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STATE OF HAWAII
LAND USE COMMISSION

ORIGINAL

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of

U of N BENCORP

To Amend the Agricultural Land Use District to the Urban Land Use District for Approximately 62 Acres, Tax Map Key Nos.: (3) 7-5-010:085 and 7-5-017:006 situated at Wai'aha, North Kona, County and State of Hawaii'i

DOCKET NO. A02-737

UNIVERSITY OF THE NATIONS, KONA, INC.'S MOTION TO AMEND THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF MARIA F. FAGERSTROEM-RYDER, PETITIONER'S EXHIBITS "1" - "20"; VERIFICATION OF JULIE B. ANJO; CERTIFICATE OF SERVICE

**UNIVERSITY OF THE NATIONS, KONA, INC.'S
MOTION TO AMEND FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER**

I. RELIEF SOUGHT.

University of the Nations, Kona, Inc., a Hawaii'i nonprofit corporation ("UNK"), as successor-in-interest to Petitioner U of N Bencorp ("UNB") to those certain parcels of land consisting of approximately 62 acres and currently identified by Tax Map Key ("TMK") Nos. (3) 7-5-010:085 and (3) 7-5-017:006, by and through its legal counsel, Carlsmith Ball LLP, hereby respectfully requests that the Land Use Commission of the State of Hawaii'i

("Commission") issue an order modifying its *Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment*, dated August 8, 2003, to reflect UNK's revised project which expands on the educational facility component of the prior project and deletes the for-profit development, and approve its thirty (30) year full build-out time table.

II. GROUNDS FOR THIS MOTION.

This Motion is made pursuant to Chapter 205, Hawai'i Revised Statutes, and Title 15, Subtitle 3, Chapter 15 of the Hawai'i Administrative Rules ("**HAR**"), §§ 15-15-70, 15-15-79, and 15-15-94, the other authorities and arguments stated in the attached Memorandum in Support of Motion, and the pleadings and files herein.

DATED: Honolulu, Hawai'i, March 23, 2020.



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UNIVERSITY OF THE NATIONS, KONA,
INC.

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MEMORANDUM IN SUPPORT OF
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MEMORANDUM IN SUPPORT OF
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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION/RELIEF SOUGHT.

By *Findings of Fact* ("**FOF**"), *Conclusions of Law* ("**COL**"), and *Decision and Order for a State Land Use District Boundary Amendment*, dated August 8, 2003 (the "**D&O**"), the State of Hawai'i Land Use Commission (the "**Commission**") reclassified approximately 62 acres of land currently identified by Tax Map Key Nos. (3) 7-5-010:085 ("**Parcel 85**") and (3) 7-5-017:006 ("**Parcel 06**;"¹ together with Parcel 85, the "**Petition Area**") from the State Land Use ("**SLU**") Agricultural District to the SLU Urban District, subject to 19 conditions of approval ("**D&O Conditions**"), attached as **Petitioner's Exhibit 1**. The original petitioner in this Docket was U of N Bencorp ("**UNB**"), who sought reclassification of the Petition Area to allow for the development of the "Hualalai Village" condominiums, a multi-function Cultural Center, and a five-acre Educational Facility (the "**Original Project**"). University of the Nations, Kona, Inc., a

¹ At the time of the D&O, Parcel 06 was already within the SLU Urban District and split-zoned RD-3.75 and R-7.5 by the County of Hawai'i. See D&O at FOF ¶70.

Hawai'i nonprofit corporation ("UNK"), took title to the Petition Area from an affiliated entity in 2018.²

The Original Project, described in more detail *infra*, was primarily intended to generate income that would be reinvested in the University. However, in the time since the reclassification of the Petition Area, UNK (and its predecessors) determined that the market-based model that the Original Project was based upon was not consistent with UNK's mission and goals. Through this motion, UNK now seeks to amend the D&O to allow for the development of UNK's master-planned expansion of the University (the "**Revised Project**"). As explained in greater detail *infra*, the Revised Project focuses on expanding educational and housing opportunities for the University's faculty and students, and preserving the significant archaeological resources within the Petition Area.

Additionally, in order to proceed with the Revised Project, UNK requests the modification and deletion of certain conditions to better address the Revised Project. Specifically, UNK requests modifications to D&O Conditions Nos. 6 (Archaeology), 7 (Cultural, Historical, Customary and Traditional Rights and Resources) and 15 (Compliance with Representations to the Commission) as detailed herein, and UNK requests the deletion of D&O Conditions Nos. 11 (Cultural Center) and 12 (Ka Haka 'Ula O Ke'elikelani, College of Hawaiian Language at University of Hawaii-Hilo).

UNK commissioned G70 to prepare the 2020 Master Plan Update for the Revised Project and an Environmental Planning Report in support of this Motion to Amend, which are attached hereto as **Petitioner's Exhibits 2 and 3**, respectively.³ The Archaeological Inventory Study, Archaeological Data Recovery Plan, Preservations Plan, and Dismantling/Restoration Plan for a Portion of the Kuakini Wall, and technical studies and investigations included in the Environmental Planning Report in support of this Motion to Amend include the following: (a) a flora fauna study; (b) a traffic study; (c) a preliminary infrastructure assessment; (d) a water supply study; (e) a cultural impact assessment; and (f) Ka Pa'aakai O Ka'Aina analysis.

² UNK took title to the Petition Area pursuant to two (2) Warranty Deeds recorded in the State of Hawai'i Bureau of Conveyances (the "**Bureau**") on June 14, 2018 as Regular System Doc. Nos. A-67390372 and A-67390373. UNK provided notice of this transfer in ownership of the Petition Area to the Commission in its 2019 Annual Report and again by way of letter dated May 1, 2019.

³ The various technical studies prepared for this Motion to Amend are attached as appendices to G70's Environmental Planning Report.

II. PETITIONER BACKGROUND

UNK operates a mission-based educational facility founded in Kona in 1978 (the "**University**"), which is immediately adjacent to and shares a common boundary with the Petition Area. Through the University, UNK fulfills its commitment to Christ by equipping men and women with spiritual, cultural, intellectual and professional training and inspiring them to continually grow in their personal relationship to God, while also seeking to make God known among all people in all nations. In short, the UNK trains missionaries. UNK is affiliated with the University of the Nations, which has campuses in 650 locations throughout 160 countries.⁴

The University serves as the training center for Youth with a Mission ("**YWAM**"). YWAM, founded in 1960, is a global movement of Christians from many cultures dedicated to serving Jesus throughout the world. YWAM functions as a family of ministries rather than a centralized agency, and has about 40,000 missionaries world-wide. Thus, the UNK's and YWAM's reach and the people they serve are world-wide.

Students come to the University to learn how to share their faith in Jesus Christ throughout the world, and to serve the poor and needy in Kona and abroad. The core program UNK offers is the Discipleship Training School ("**DTS**"), which is mandatory for all other UNK courses. The DTS is a full-time program that lasts five to six months. It consists of two parts: a lecture phase and an outreach phase. In the outreach phase, students focus on applying what they learned in the classroom (during the lecture phase) through an intense, cross-cultural experience which includes sending their missionaries to foreign countries to assist with a variety of missions such as assisting in building housing, digging wells, and providing medical support.

III. PETITION AREA BACKGROUND AND PROCEDURAL HISTORY.

1. THE PETITION AREA.

The Petition Area consists of approximately 62 acres of land. The Petition Area is located approximately one mile south of the town center of Kailua-Kona, on the lower western slopes of Hualalai at an elevation ranging from approximately 100 to 325 - 360 feet. D&O at FOF ¶26, Petitioner's Exhibit 3 at §1.2. The Petition Area is bounded by Kuakini Highway on the west, Queen Ka'ahumanu Highway and Hualalai Road on the east, the UNK's existing

⁴ Each campus is an independent 501(c)(3) corporation.

campus on the North (TMK No. (3) 7-5-010:003) ("**Existing Campus**"), and the Kona Hillcrest subdivision on the south. D&O at FOF ¶27, Petitioner's Exhibit 3 at §1.2.

The potential for agricultural activity for Petition Area is very limited, and the Revised Project will not reduce the inventory of agriculturally significant land. D&O at FOF ¶¶32-33, Petitioner's Exhibit 3 at §3.3 and Figure 3-2. The soil in the Petition Area is classified with an "E" rating by the Land Study Bureau's ("**LSB**") land classification system, which means that it is very poorly suited for agricultural activity and the entire Petition Area is unclassified under the Agricultural Lands of Importance to the State of Hawai'i ("**ALISH**") classification system. D&O at FOF 33, 34, Petitioner's Exhibit 3 at §3.3. Soils without any ALISH classification are not considered agriculturally important lands. The Petition Area is located on the leeward side of the Island of Hawai'i, at a low elevation, and thus receives relatively little precipitation. D&O at FOF 35, Petitioner's Exhibit 3 at 3.1.

Parcel 85 is zoned A-1a (agricultural with a one-acre minimum lot size) and Parcel 06⁵ is zoned RS-7.5 (single-family residential with a minimum lot size of 7,500 square feet) and RD-3.75 (double-family residential with a minimum building site of 3,750 square feet) by the County of Hawai'i. D&O at FOF ¶70; Petitioner's Exhibit 3 at Figure 1-5. The Petition Area is designated as Medium Density Urban (mdu) in the County's General Plan Land Use Pattern Allocation Guide ("**LUPAG**") map, D&O at FOF ¶71 and Petitioner's Exhibit 3 at Figure 1-6, and is within the Kona Urban Area in the Kona Community Development Plan ("**Kona CDP**"). Petitioner's Exhibit 3 at Figure 4. The Petition Area is not located within the Special Management Area. D&O at FOF ¶72.

2. PROCEDURAL HISTORY.

In 2003, the Commission issued the D&O reclassifying the Petition Area from the SLU Agricultural District to the SLU Urban District and authorized the development of the Original Project. On December 21, 2006, UNK's predecessor-in-interest, Aero Hawaii, a Hawai'i nonprofit corporation ("**Aero**"),⁶ filed a *Motion to Amend Findings of Fact, Conclusions of Law and Decision and Order* (the "**2006 Motion to Amend**") seeking approval of a modification to the Original Project in order to eliminate the Cultural Center (due to it being profit-driven) and

⁵ The reference in D&O FOF ¶70 to "a narrow parcel owned by Petitioner is in the Urban District and split-zoned RD-3.75 and R-7.5" appears to be to Parcel 06, which is included in the 62 acres making up the Petition Area.

⁶ As noted in UNK's 2019 Annual Report and its May 1, 2019 letter to the Commission's Executive Officer, on May 18, 2005, UNB formally changed its name to Aeko Hawaii.

instead expand the University's academic and recreational facilities, and also to replace the market-rate phases of Hualalai Village on the Petition Area with much needed staff and student housing (the "**2006 Updated Project**"). The Commission held a hearing on the 2006 Motion to Amend on March 1, 2007, but ultimately no action was taken. UNK is concurrently withdrawing the 2006 Motion to Amend with the filing of this Motion to Amend.

On March 28, 2019, at the request of UNK, the Commission held a status hearing on this Docket. At the conclusion of UNK's status report, the Commission voted to issue an Order to Show Cause (the "**OSC**"). One day later, on March 29, 2019, the Commission filed the OSC and set the OSC Hearing for May 22, 2019.

On May 9, 2019, UNK filed its *Motion to Rescind Order to Show Cause or to Continue Hearing on Order to Show Cause* ("**Motion to Continue**"). The hearing on the Motion to Continue was held on May 22, 2019 (the "**May 22nd Hearing**"). At the May 22nd Hearing, the Commission granted Petitioner's Motion to Continue subject to certain stipulations and conditions. Thereafter, on October 7, 2019, the Commission issued its *Order to [sic] Granting United Nation of Kona's [sic] Motion to Continue Hearing on Order to Show Cause* ("**Order on Motion to Continue**"), which continued the OSC proceedings by a time period not to exceed one year, to allow Petitioner an opportunity to file an amendment to the 2006 Motion to Amend, or to withdraw their 2006 Motion to Amend and file a new motion to amend the conditions of the D&O.

On October 14, 2019, UNK filed a Motion for Reconsideration of Order to [sic] Granting United Nation [sic] of Kona's Motion to Continue Hearing on Order to Show Cause ("**Motion for Reconsideration**"). The Commission orally granted in part and denied in part the Motion for Reconsideration at its January 8, 2020 hearing. This Motion to Amend is made in compliance with the conditions and stipulations of the Order on Motion to Continue.

IV. EVOLUTION OF DEVELOPMENT PLANS FOR PETITION AREA.

1. THE ORIGINAL PROJECT.

The Original Project was to be composed of the Hualalai Village condominiums, the Cultural Center, and the Education Facility. D&O at FOF ¶39. A copy of the Master Plan for the Original Project is attached hereto as **Petitioner's Exhibit 4.**

Three of the four phases of Hualalai Village were planned within the Petition Area. Phase I, containing 103 residential units, was under construction and located outside of the

Petition Area. Phases II - IV, with a total of 297 residential units were to be constructed within 31 acres of the Petition Area and would include a recreation center, exercise facilities, and a pool. D&O at FOF ¶39. The condominiums were to be sold to two different market segments: University affiliates and the general public. D&O at FOF ¶45.

The Cultural Center was planned as a first-class tourist attraction, intended to present the authentic story of the native Hawaiian culture, its historical relationship with the introduction of Christianity, and its impact upon the monarchy and the people of Hawai'i, including the Kona region. D&O at FOF ¶50. The Cultural Center would also include an outdoor water feature, an educational living museum complex, a restaurant, and shops. *Id.*

At the time of the D&O, it was projected that between 500 to 1100 visitors per day were to visit the Cultural Center. D&O at FOF ¶57. The Cultural Center included parking for up to 15 buses and 840 cars. D&O at FOF ¶54. It was planned that profits from the Cultural Center were to flow back to UNK to support its educational activities. D&O at FOF ¶53.

The Educational Facility Component of the Original Project was modest. It was planned to use an approximately 5-acre portion of the Petition Area to allow for the expansion of the University's Existing Campus. D&O at FOF ¶63. The exact site plan and configuration had not been determined at the time of the D&O. *Id.*

2. 2006 MOTION TO AMEND.

Aero filed the 2006 Motion to Amend to get Commission approval of revisions to the Original Project that Aero believed would more closely align with its institutional and faith-based values. The 2006 Updated Project consisted of three elements: (1) a Staff Housing Community (up to 400 units, ranging from studios to three-bedroom units, along with six single-family residences); (2) three Student Villages consisting of 300 low cost residential units, classrooms, offices, and a library; and (3) expanded Academic and Recreational Facilities consisting of: (a) the College of Arts and Communications; (b) the College of Education; (c) a commons with multi-purpose gymnasium; and (d) additional sports facilities. A copy of the Master Plan for the 2006 Updated Project is attached hereto as **Petitioner's Exhibit 5.**

On March 1, 2007, the Commission held a hearing on the 2006 Motion to Amend, but no action was taken. UNK and its predecessors were not able to return to the Commission to pursue further action on the 2006 Motion to Amend due to an internal reorganization and a series of

unfortunate and largely unforeseeable events. Now that those hurdles have been cleared, UNK is ready, willing and able to proceed with developing the Revised Project.

3. THE REVISED PROJECT

The Revised Project is more modest in scope than the Original Project and more focused on the students than the changes that were proposed in the 2006 Updated Project. The Revised Project does not contain any for sale housing. The Revised Project expands the educational facilities that were originally planned on 5 acres of the Petition Area, and no longer includes the Hualalai Village condominiums or the Cultural Center. The Revised Project is proposed to generally be composed of the following elements:

- Dormitories for students and staff
- Elementary, middle and high schools
- Instructional buildings, student resource center
- Athletic Complex and training areas
- Storage and maintenance facilities
- Discovery Center (science, technology, linguistics)
- Chapel
- Agricultural area
- Preservation and integration of archeological sites
- Supportive facilities

See Petitioner's Exhibit 2 for a copy of the 2020 Master Plan and the more detailed Project Description in Petitioner's Exhibit 3 at §2.0.

The Revised Project is envisioned as a sustainable campus environment that provides a mission-based setting for its faculty and student population, incorporating the unique historical and cultural legacy specific to the Petition Area and the greater Kona Region. Preservation and restoration of significant cultural resources within the Petition Area are highlighted and interpreted as focal features in the design. A historical walk is planned, connecting the idea of "gathering water" to a landscape feature envisioned as a dry-stream bed. The proposed dry-stream bed is planned to begin at the Existing Campus site, meander through the site and connect to the principal gathering area proposed for the Petition Area, the Chapel. The central gathering area at the Chapel is envisioned as the "Piko" of the campus.

The development of the Revised Project is projected to take 30 years. Development is planned in three phases of ten years each. However, the roadway/utility corridor (i.e. "Spine" Road) for the Revised Project will be completed within the first ten years, and will connect the

Existing Campus to the Revised Project. See Petitioner's Exhibit 3 at §2.7. For Phase 1, additional infrastructure and roadway connections from the Center "Spine" Road will be constructed. The Center "Spine" Road will be the main access/circulation drive improvement corridor, involving grading for roadway widening, paving, curbs and sidewalks, drainage and underground utility infrastructure, including water, sewer and communications. This approach will allow for the planned extension of the existing infrastructure from the Existing Campus to the Petition Area in Phase 1 for more holistic circulation and operations onsite.

For a full discussion of the proposed improvements and phasing, see Petitioner's Exhibit 3 §§2.4, 2.5.

V. APPLICABLE RULES AND STATUTES

HAR § 15-15-94(c) provides: "[f]or good cause shown, the commission may act to modify or delete any of the conditions imposed or modify the commission's order." "The term 'good cause' has been defined to mean 'a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.'" *Miller v. Tanaka*, 80 Hawai'i 358, 363, 910 P.2d 129, 134 (Ct. App. 1995) (citation omitted). "'Good cause' also 'depends upon [the] circumstances of [the] individual case, and [a] finding of its existence lies largely in [the] discretion of [the] officer or court to which [the] decision is committed'" *Id.* at 363-64, 910 P.2d at 134-35 (citation omitted). "As a general rule, 'good cause' means a substantial reason; one that affords a legal excuse." *State v. Estencion*, 63 Haw. 264, 267, 625 P.2d 1040, 1042 (1981) (citations omitted).

HRS § 205-16 provides: "[n]o amendment to any land use district boundary nor any other action by the land use commission shall be adopted unless such amendment or other action conforms to the Hawai'i state plan." In addition, HAR § 15-15-94 instructs that motions to modify conditions must be served on all parties to the original boundary amendment proceeding, and any person with a property interest in the Petition Area, as recorded in the respective County's real property tax records at the time the Motion is filed.

VI. JUSTIFICATION FOR THIS MOTION.

For the following reasons, good cause exists to amend the D&O to allow for the development of the Revised Project.

1. GOOD CAUSE SHOWN FOR AMENDING THE D&O

a. The Revised Project is a Downsizing of the Original Project.

The Commission previously approved the Original Project. The Revised Project is a downsizing of the Original Project. The Original Project anticipated tour buses carrying 500-1100 visitors a day just to the Cultural Center, and included a parking area for 15 tour buses and up to 840 cars. D&O FOF ¶¶54 and 57. In addition to the Cultural Center, 297 high quality condominium units in approximately 21 two- and three-story structures were distributed over 31 acres. D&O FOF ¶42.

In contrast, the Revised Project is an extension of the existing campus. Rather than for-sale housing, the Revised Project will have dormitories for the University's students and staff. The vision is that students live together in dormitories, study together in the classrooms, and work together on the UNK campus. The community learning concept embodies the New Testament model of Christians who live and learn together and work toward common objectives. This family-style approach implies a sharing of meals, resources, ideas and talents in the spirit of love and unity. Generally, the buildings and facilities are spread over the 62-acre Petition Area. The Revised Project incorporates green building design using water and energy saving features and utilizes the space between the buildings as "outdoor rooms." See Petitioner's Exhibit 3 at §2.3.

A detailed description of the proposed improvements in the Revised Project are set forth in Petitioner's Exhibit 3 at §2.5. Generally, seventeen new student dormitory buildings are planned for housing students and some staff. Six new instructional buildings are planned for the University in addition to the lower, middle and high schools. A Discovery Center, which is to function as a library, research and administration area will also be incorporated into the Revised Project.

With the Revised Project, the projection over the 30-year build-out will increase the student population from 840 students per quarter to approximately 3,000 students per quarter and 900 staff for the entire University. Only approximately 1,950 of these students and staff will be commuting to the Existing Campus as well as to the Revised Project, which is a significant decrease in the traffic impact from the Original Project. See Petitioner's Exhibit 3 at §2.6.

b. No Land Speculation – Even when Confronted with Significant Financial Hardship, UNK did not Sell or Attempt to Sell the Petition Area.

In *DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC*, 134 Hawai'i 187, 214, 339 P.3d 685, 712 (2014), the Hawai'i Supreme Court explained that the legislative intent behind HRS § 205-4(g) was, in part, to "deter speculators who obtained favorable land-use rulings and then sat on the land for speculative purposes." Turning a financial profit on land speculation is not, and has never been UNK's mission which is to equip men and women with spiritual, cultural, intellectual and professional training to inspire them to grow in their personal relationship to God. Neither UNK nor any of its predecessors have attempted to sell the Petition Area since it was reclassified by the Commission, notwithstanding the significant financial challenges experienced in the past. All conveyances of the Petition Area since the reclassification have been amongst UNK-affiliated entities, and were done for valid and necessary business and legal reasons.

The Petition Area is immediately adjacent to the UNK's Existing Campus [TMK No.: (3) 7-5-010:003] and is an integral part of UNK's 2020 Master Plan to have a fully integrated Kona campus. There are no plans to sell any portion of the Petition Area, and the granting of this Motion to Amend and allowing the UNK to move forward with the Revised Project, which is unique to UNK, would not encourage land speculation.

c. Through the University, UNK Provides Educational Operations that are Part of a World-Wide Network and Supports the Kona Community.

UNK is a mission-based educational institution. UNK employs a modular system with 12 weeks of classroom coursework. Some courses also require field internships or field assignments in their respective areas of study. UNK's training modules include the prerequisite DTS, upper level schools, and seminars. The upper level schools offer certificate and degree programs such as Digital Filmmaking, Biblical Studies, Event Management, Primary Health Care, Early Childhood Education, and many others.

UNK has served the Kailua-Kona community and the Island of Hawai'i in many ways:

- **Island Breeze.** UNK faculty, staff and students participate with Island Breeze, a dance group which presents Pacific Island dances glorifying God and encouraging indigenous peoples and others through their message. Island Breeze has performed for: the Royal Family of Tongatapu; the King of Tonga; millions of people on TV and

in person; the nation of China; India; nations in Europe; and many other nations. As they spread Aloha throughout the world, they have promoted Hawai'i and its culture. Locally, Island Breeze gives youth an introduction to the tourist entertainment world, and an opportunity for a profession and employment to those interested in this industry. They also operate a dance and cultural studio for youth. Island Breeze also performs for-profit at Kailua-Kona hotels and other venues.

- **Aloha Theatre:** The UNK family has engaged with local musical companies in presenting their productions at the Aloha Theater.
- **Symphony of Hope:** A UNK ministry provides music training on stringed instruments to local children.
- **Feeding the Homeless (Meet & Greet):** UNK's kitchen personnel and staff/students feed approximately 200 homeless people on a weekly basis, and build relationships with them.
- **Deep and Beyond:** Staff and students organize activities in snorkeling and scuba, swimming, boating, surfing, and aquatic exercise/therapy for people with disabilities in the Kona area.
- **Marshallese Community:** YWAM/UNK serves the Marshallese community in conjunction with Kona Kids Outreach by offering afterschool reading and tutoring programs, sports, games, and Bible memorization to approximately 75-100 kids per week.
- **Kama'aina Hale:** UNK staff volunteers renovated the facility and provides services to the Kama'aina Hale affordable housing community.
- **The Pregnancy Center:** UNK volunteers provide emotional support to pregnant women with wanted and unwanted pregnancies, and provide education on their various options.
- **Chapel Service:** UNK staff volunteers serve as church/chapel speakers around Hawai'i Island
- **Sunday School:** UNK staff volunteers are actively involved in serving the local churches with programs such as nursery, Sunday schools, and worship music.
- **Parks & Recreation:** UNK staff and students volunteer at Parks & Recreation facilities.

- **Endangered Animals:** UNK staff volunteers support the preservation of endangered monk seals through weekly feeding and cleaning.
- **Uniskript:** Developed by the University of the Nations, Uniskript is a simplified pictorial and phonetically written language that has been used to convey the complex meaning of thought into an easy-to-learn written form. This language has been used to teach the Hawaiian language easily to native Hawaiians and to others who know the language orally and who want to learn how to read. Uniskript has also been used to teach other languages that have hundreds or thousands of characters, such as Mandarin Chinese.
- **Seminars:** UNK offers seminars on various topics such as marriage and family, business conferences, community technology, and summer youth camps to name a few.
- **Preschool:** A top-rated preschool that is open to the public.
- **Local High School:** UNK staff are actively involved with local high schools by offering mentoring and tutoring programs.
- **High School Athletes:** YWAM/UNK has provided free weekly meals for local high school coaches and athletes through the HoloHolo sports programs.
- **Skateboarding:** UNK hosts skateboarding events for 20-40 community youths.
- **Ironman and Other Athletic Events:** Between 200-400 YWAM/UNK staff and students volunteer for the Ironman event each year. Additionally, 50-60 volunteers staff the Lava Man and the Honu Triathlon.
- **Soccer:** UNK staff members have served as volunteer coaches for AYSO soccer.
- **Emergency Relief and Evacuation:** The Existing Campus serves as a Red Cross, First Aid and Disaster training location. Additionally, the Aloha Cafeteria building meets the highest standards for earthquakes and hurricane-force winds to provide shelter in an emergency.
- **Volunteer Community Emergency Response Team:** UNK operates a Community Emergency Response Team ("**UNK CERT Team**") in conjunction with County Fire and Civil Defense that serves the campus and surrounding Kona community. In addition, more than 50 UNK community members have been trained in basic fire suppression, emergency medical operations, and light search and rescue.

- **CERT Training:** The UNK CERT Team gives CERT Training and Incident Command System Leadership Training. UNK CERT instructors, working with the Hawai'i County Civil Defense, have trained approximately 360 community members now serving on CERT teams in 22 communities around Hawai'i County.
- **\$15 Million Contribution to Local Economy Per Year:** It has been estimated that the combined purchases of UNK and its staff, students and volunteers totals approximately \$15 million per year. Annually, UNK purchases approximately \$7 million in goods and services directly, while its staff, students, and volunteers purchase approximately another \$8 million. These purchases include items such as food (more than 750,000 meals served at UNK per year), hosting international YWAM events and committee meetings, car rentals, hotels, island tours, building construction, off-campus housing, household items, entertainment, transportation, utilities, health care, and many others.
- **YWAM Ships:** A new ministry was started in 2013 to provide medical, community development, education, and other services to the estimated 1,600 populated and remote islands of the Pacific Ocean. The staff and students have an economic impact on downtown businesses where they make purchases.
- **Payment of Taxes:** UNK volunteer staff members who live off campus in owner-occupied homes pay real property taxes. Also, General Excise Tax is paid on approximately \$8 million of purchases by staff, students, and volunteers who purchase items in the community. UNK educates many K-12 students, who are children of staff and students, causing a deferment of costs that would otherwise have to be paid by the State of Hawai'i for their education.

d. Keeping the Petition Area in the SLU Urban District is Consistent with County Plans and Surrounding Land Uses and Designations.

The properties surrounding the Petition Area are primarily classified within the SLU Urban District. *See* Petitioner's Exhibit 3 at Figure 1-4.

Although Parcel 85 is presently zoned A-1a and a change of zone will have to be sought for the Revised Project, the County of Hawai'i zoning for the surrounding lands is primarily designated as Residential and Commercial Village Districts. *See* Petitioner's Exhibit 6, attached hereto.

The County of Hawai'i's LUPAG Map designation is Medium Density Urban (*mdu*). See Petitioner's Exhibit 3 at Figure 1-6. *Mdu* uses are described as "village and neighborhood commercial and single family and multiple family residential and related functions (multiple family residential - up to 35 units per acre)." See **Petitioner's Exhibit 7** (page 14-7 of the 2005 Hawai'i County General Plan), attached hereto. The County of Hawai'i is presently undergoing its comprehensive review of its General Plan. The Draft General Plan 2040's LUPAG Map for the North Kona District maintains the *mdu* designation for the Petition Area. See **Petitioner's Exhibit 8**, attached hereto. The Kona CDP designates the Petition Area as being within the Kona Urban Area. See Petitioner's Exhibit 3 at Figure 4-3, and discussion of conformance with the Kona CDP at Petitioner's Exhibit 3 §4.8 at p. 4-24.

Development of the Petition Area for the Revised Project is consistent with the land use and zoning designations.

e. The Petition Area is Poorly Suited for Agricultural Uses.

As discussed *infra*, and in Petitioner's Exhibit 3 §3.3, the potential for agricultural activity for Petition Area is very limited. See D&O at FOF ¶¶32-33. The soil in the Petition Area is very poorly suited for agricultural activity.

f. Financial Capability.

The UNK has the financial capability to develop the Revised Project by utilizing traditional financing, increased revenue from tuition from an increase in the student body, general donations, project specific CIP fundraising, drawing down on cash reserves, and fundraising. As noted in **Petitioner's Exhibit 9**, and in Petitioner's Exhibit 3 §2.8, the total estimated cost of the Project over the 30-year development time table is \$162,743,031. See also, Petitioner's Exhibit 3 §2.8. UNK will finance the development of the Revised Project with a combination of the following four capital sources.

i. Traditional Financing.

Attached hereto as **Petitioner's Exhibit 10** is a letter dated February 18, 2020 from Central Pacific Bank indicating that UNK has been a highly valued customer of Central Pacific Bank for the past nineteen (19) years. UNK has maintained an average balance of \$4,259,376 over the last twelve-months. UNK also has a \$1 million line of credit with Central Pacific Bank. Although UNK would prefer not to resort to conventional financing, as indicated in the letter

from Central Pacific Bank, UNK has maintained loans from the bank since 2001. If necessary for the development of the Petition Area, UNK is willing and able to obtain conventional financing in the amount of \$10 million.

The UNKS's 2018 IRS Form 990 and 2018/2019 Financials are attached as **Petitioner's Exhibit 11** and **Petitioner's Exhibit 12**, respectively. According to the financial statements, UNK has net assets of approximately \$34 million.

UNK presently only has long term debt in the amount of \$4,426,774. Thus, their borrowing capacity is quite solid, and their land assets could be used as security, although as stated above, their preference is to avoid conventional financing.

ii. Increase in Tuition.

At full build-out of the Master Plan,⁷ it is anticipated that UNK will have a total of 3,000 students: 1,000 in kindergarten through high school, and 2,000 university students. It is further anticipated that the tuition, per student, that can be set aside for development of the Petition Area is approximately \$2,000 a year. Over the 30-year Revised Project build-out period, the total amount that can be set aside for the Revised Project will be approximately \$181,624,000. *See **Petitioner's Exhibit 13***. These funds will be earmarked for development of the Revised Project on the Petition Area. As shown in Petitioner's Exhibit 13, student population will increase incrementally over the 30-year development period allowing increasing amounts of tuition to be allocated to the Revised Project. A comparison of the projected costs by phase and the increase in tuition is as follows:

PHASES	TOTAL STUDENTS	TUITION AVAILABLE TO REVISED PROJECT IMPROVEMENTS	IMPROVEMENT COSTS BY PHASE
Phase 1	1,500	\$19,768,000.00	\$18,771,983
Phase 2	2,250	\$60,760,000.00	\$59,288,366
Phase 3	3,000	\$101,096,000.00	\$84,682,681
TOTAL	3,000	\$181,624,000.00	\$162,74,031

Based on these projections, UNK will have sufficient funds to develop the Revised Project through the tuition collected from students as the University's campus is expanded.

⁷ The 2020 Master Plan is composed of the development of both the Revised Project on the Petition Area and improvements to the University's Existing Campus.

iii. Fundraising

UNK will also continue to fundraise funds for the construction of the Revised Project, through general donations, as well as project specific CIP fundraising. Attached hereto as **Petitioner's Exhibit 14** is UNK's Faith-Based Model that is utilized for fundraising purposes. In general, the UNK has chosen to fund their campus development through faith/donations and not through conventional financing. In the last 35 years, UNK has used the faith-based model to construct more than \$78 million in buildings and improvements to the University's existing campus. With those buildings and improvements, the University's existing campus is valued at close to \$100 million.

While the fundamental theory is that "God will provide," that does not mean that UNK administrators, staff and volunteers sit back and wait for a miracle to happen. The Faith-Based Model is an organized and coordinated fundraising effort. Because of the many students who attended the University and the staff that have taught at University throughout the years, UNK's global family of ministries is held together by shared foundational covenants, purpose, vision, values, and relationships. It is through these relationships that other missionaries can assist with the funding, donations, and volunteering to make this project happen. UNK's development of the Petition Area will be broken down into three phases in order to raise the funds and manage the Project in a timely and orderly manner.

iv. Volunteers

UNK is also uniquely equipped to internalize a significant amount of its development costs. UNK has used skilled volunteers to complete projects in the past and will use them to assist with the build-out of the Petition Area. UNK has an organized network of professionals who donate their skills to the Kona Campus. First, UNK has many skilled, specialized volunteers presently on staff. These specialized volunteers include a civil engineer, architect, developer, and journeymen. Additionally, UNK will use its Kokua Crew and Mission Builder programs for most of the labor. This is estimated to cover approximately 40% of the construction costs.

The Mission Builders are skilled professional volunteers such as engineers, contractors, electricians, lawyers, welders, equipment operators, mechanics, who volunteer their time and skills and are provided accommodation and meals. These professionals have the background,

experience, and certification (insurance, licenses, etc.) necessary to carry out the task they are volunteering to do at no or minimum cost.

For example, UNK has a relationship with a missionary group, Pennsylvania Mission Builders, in Pennsylvania, who will send, mostly in the winter, Mission Builders to assist with a project. UNK will rent whatever equipment is necessary, and Mission Builders will supply the labor. When UNK was building its recently-completed \$9 million Aloha Cafeteria, this group organized a group of crane operators who donated their time and the steel needed to complete UNK's cafeteria.

The Kokua Crew are invaluable to the overall operation of the UNK. The crewmembers volunteer in positions around the campus such as grounds keeping, housekeeping, kitchen work, maintenance, security, the library, mailroom, administrative office positions, IT department, and as teacher's assistants for preschool through grade 12. There is a minimum commitment of 6 weeks or 3 months, and their room and board is provided if requested (some Kokua Crew members are from the local community and do not require housing accommodations). It is difficult to adequately convey the true capacity of the volunteer crews the UNK can tap into. To view a video of a typical volunteer staff day please view the short clips accessible at the following link: <https://ywamkona.org/news/j-building/>.

All of UNK's staff are volunteers. The staff missionaries do not receive a salary. Each staff member must raise their own finances for their support through friends, families, and/or churches. UNK promotes the servant leadership as a lifestyle – a servant leader is one who honors the gifts and callings of those under his/her care and guards their rights and privileges.

- g. UNK Has Put Together an Experienced and Seasoned Team to Ensure that the Revised Project is Successfully Developed.

UNK has assembled the team necessary to see through the successful development of Revised Project. Petitioner's efforts to develop the Revised Project are now headed by its Development Advisory Committee, which is composed of Loren Cunningham (UNK President), Martin Rediger (UNK Chief Financial Officer), Warren Israelson (developer with KJ Walk), Luke Israelson (civil engineer), Ken Van Bergen (commercial developer), Paul Childers (UNK's Chief Operating Officer), Bruce Logan (architect), Julie Anjo (UNK General Counsel), Allen Anjo (UNK General Counsel), David Matsuura (business advisor), Craig Mosley (UNK

construction), Sheila Mosley (UNK construction), Jay King (Pennsylvania Mission Builders), and Chong-ho Won (UNK Chief Information Officer).

UNK has also hired Tom Waddle as a full-time Construction Management Advisor. Mr. Waddle has managed over 200 projects, with a combined value exceeding \$250 million, over the course of his 45-year career in construction and construction-management. Tasked as UNK's Construction Superintendent, Mr. Waddle supervises and oversees projects to ensure all deadlines and budgets are met. Mr. Waddle is also in charge of coordinating and scheduling, reviewing constructability, cost estimating, allocating of construction activities among contractors, and overseeing contractors and subcontractors to ensure performance and work quality. UNK's primary development firm/general contractor is KJ Walk, a real estate development firm with over 20 years' experience and a Class A contractor license. KJ Walk has successfully completed projects for UNK in the past, including Hualalai Village Phase I and the University's Aloha Cafeteria, a \$9 million project.

UNK's outside development consultants include the G70 planning firm, archaeologist Robert B. Rechtman, Ph.D. of ASM Affiliates, architect Walter Fullerton (of Walter Stewart Fullerton), and civil engineer David Ross. With this robust development team in place, UNK is well equipped to complete the Revised Project.

2. AMENDING THE D&O IS IN COMPLIANCE WITH THE STATE PLAN.

HRS §205-16 provides that no action by the Commission shall be adopted unless the action conforms to the Hawai'i State Planning Act, codified at Chapter 226, HRS (the "**State Plan**"). The State Plan is a comprehensive guide for the future long-range development of the State of Hawai'i. The Commission already determined that the reclassification of the Petition Area to the SLU Urban District conformed to the State Plan. *See* D&O at 38-40. Section 4.1 of G70's Environmental Planning Report sets forth an in-depth discussion of the Revised Project's conformance to the State Plan. *See* Petitioner's Exhibit 3 at §4-1. For the sake of brevity and readability, that discussion is not reproduced here.

Additionally, the Revised Project is consistent with the County of Hawai'i General Plan, Kona CDP, Kailua-Kona Master Plan, and Hawai'i County Water Use and Development Plan, as discussed in Petitioner's Exhibit 3 §§4.7, 4.8, 4.9 and 4.11.

3. OTHER CONSIDERATIONS FOR FINDING GOOD CAUSE.

a. Updated Flora Fauna.

A flora and fauna study and biological survey of the Petition Area was completed in July 2002. See D&O at FOF 105. In 2019, UNK engaged AECOS Incorporated ("AECOS"), an environmental consulting firm headquartered in the State of Hawai'i, to provide an updated flora and fauna study. Attached as Appendix A to G70's Environmental Planning Report is AECOS' *Natural Resources Surveys for University of Nations Kona Expansion Property (TMK: (3) 7-5-010:085), North Kona District, Hawai'i*, dated January, 2020 ("**2019 AECOS Survey**"). See Appendix A of Petitioner's Exhibit 3 and detailed discussion in Petitioner's Exhibit 3 §3.8.

The entire Petition Area was re-surveyed by AECOS. In summary, with respect to protected species, with one exception as to the Hawaiian Hawk seen circling in the thermals over the site (the Hawaiian Hawk was delisted as an endangered species effective February 2, 2020 by the U.S. Fish and Wildlife Service, but remains listed by the State of Hawai'i⁸) no plant or animal species protected or proposed for protection under either the federal or State of Hawai'i endangered species programs were detected on the Petition Area during the course of the survey. See Petitioner's Exhibit 3, Appendix A at p.15. Additionally, no federally delineated Critical Habitat for any species is included in or is located close to the Petition Area. Thus, modifications of habitats on the site will not result in impacts to federally designated Critical Habitat.⁹ *Id.* at 16.

The 2019 AECOS Survey study made the following recommendations:

- If nighttime construction activity or equipment maintenance is proposed during the construction phases of the project, all associated lights should be shielded, and when large flood/work lights are used, they should be placed on poles that are high enough to allow the lights to be pointed directly at the ground.
- If street lights or exterior facility lighting is installed in conjunction with the project, it is recommended that the lights be shielded to reduce the potential or interactions of nocturnally flying seabirds with external lights and man-made structures.

Id. at 15. UNK will comply with these recommendations in developing the Revised Project.

⁸ Although likely to also be delisted by the State, the process could take several years. Consequently, the Hawaiian Hawk remains as a state listed species. 2019 AECOS Survey 2019, page 15.

⁹ There is no equivalent statute under state law.

b. Traffic Impact Assessment.

Fehr and Peers prepared a Mobility Analysis Report, dated February 18, 2020, for UNK's Revised Project. See **Appendix B of Petitioner's Exhibit 3**, and discussion in Petitioner's Exhibit 3 §3.12. The potential impacts of the Revised Project were evaluated following guidelines established by the County of Hawai'i Department of Public Works-Engineering Division and the State of Hawai'i Department of Transportation ("HDOT").

In summary, in Phase 1, the Revised Project is expected to cause an impact at the intersection of Kuakini Highway and the Existing Campus driveway as intersection operations would degrade to undesirable Levels of Service ("LOS"), and signal warrants would be met. However, the impact at this intersection can be mitigated by adding a refuge lane along Kuakini Highway to receive westbound left-turn movements from the Existing Campus driveway.

The addition of a refuge lane could likely be accomplished within the existing highway right-of way with re-striping minor pavement modifications, though additional design analysis and County approval would be needed to determine construction needs for this improvement. With a refuge lane, intersection operations would improve to LOS C¹⁰ in both AM and PM peak hours. The intersections of Queen Kaahumanu Highway and Hualalai Road, and Queen Kaahumanu Highway and Kuakini Highway intersections would operate at an unacceptable LOS (LOS E¹¹ or F¹²) during both peak hours under Phase 1 with the Revised Project. However, neither intersection met any of the signal warrants in this scenario, therefore no impacts are anticipated at these locations.

The assessment determined that the following intersections could either have project-related impacts during Phase 2 or may require additional attention:

- **Queen Kaahumanu Highway/Hualalai Road and Queen Kaahumanu Highway/Kuakini Highway:** warrants are not expected to be met, but HDOT may express concern that the project would add traffic to the northbound left-turn movements at both intersections, which would contribute to increased delays for minor street approaches.

¹⁰ "Average traffic delays. See Appendix B of Petitioner's Exhibit 3, p. 16.

¹¹ This level is considered by many agencies to be the limit of desirable delay. See Appendix B of Petitioner's Exhibit 3, p. 15.

¹² This level is considered undesirable with oversaturation, which is when arrival flow rates exceed the capacity of the intersection. See Appendix B of Petitioner's Exhibit 3, p. 15.

- **Kuakini Highway and the University of the Nations Kona Driveway:** a sensitivity test found that the intersection would operate at LOS E in the AM peak and LOS C in the PM peak. Further, it was determined that the intersection would also meet both 4-hour and 8-hour signal warrants with the addition of Phase 2 project trips. As such, it is likely that a signal would be required with Phase 2 of the project to enhance intersection operations, site access, and safety.
- **Queen Kaahumanu Highway and Nani Kailua Drive:** The intersection is projected to operate at acceptable levels of service under Phase 1 conditions, however the intersection would likely operate worse than what is shown because congestion along Queen Kaahumanu Highway limits the number of vehicles that are able to pass through the intersection during the peak hour. Intersection conditions would likely continue to degrade with the addition of ambient and project-related traffic in Phase 2. If it is determined that Phase 2 of the project would create a significant impact, the project may be required to contribute funding for anticipated roadway improvements (e.g. widening of Queen Kaahumanu Highway) or signal modifications.
- **Kuakini Highway Widening:** The secondary access into the project site (TMK No. (3) 7-5-010:085) off of Kuakini Highway is scheduled to be a part of Phase 2. In general, the secondary access on Kuakini Highway would help to distribute traffic on that highway; however, with increased through and project traffic after 2030, Kuakini Highway may need to be widened to accommodate a left-turn lane in and a refuge lane for left-turn traffic out of the site. The County of Hawai`i has already planned the widening of Kuakini Highway fronting the project site in Federal Aid Project No. STP 01102 (Kuakini Highway Improvements, Phase II, Hualalai Road to the Proposed Alii Highway). If the roadway widening occurs by 2040, the UNK could be required to contribute funding for select improvements within the widened corridor or if it is determined future on-campus growth would significantly impact intersections along the highway.

In Phase 3 (Beyond 2040), the potential operational issues noted above would continue to persist and operations would likely degrade further without additional improvements. However, the Kuakini Highway Improvements, Phase 2 will likely change the LOS on Kuakini Highway and redistribute traffic in the subregion. With planned regional improvements such as the

widening of Queen Kaahumanu Highway and Kuakini Highway, the UNK could be required to contribute funding or select improvements within the widened corridor.

c. Archaeology.

An Archaeological Inventory Survey ("AIS") was completed and approved by the State of Hawai'i Historic Preservation Division ("SHPD") in 2003. *See **Appendix E of Petitioner's Exhibit 3*** (2003 AIS) and ***Appendix F of Petitioner's Exhibit 3*** (11/17/03 SHPD Approval Letter).

The Archaeological Data Recovery at Ten Sites on Parcel 85 and Parcel 06 was originally submitted in October 2007, and resubmitted to SHPD on August 30, 2019, and received by their office on September 5, 2019. *See **Appendix I of Petitioner's Exhibit 3***.

The Preservation Plan was completed in October 2013 for SIHP Site 632 and SIHP Site 23681, and approved by SHPD by letter dated June 19, 2014. *See **Appendix J of Petitioner's Exhibit 3*** (Preservation Plan) and ***Appendix K of Petitioner's Exhibit 3*** (6/19/2014 SHPD Approval Letter).

The Burial Treatment Plan for three sites within the Petition Area was completed in September 2003 and approved by the Hawai'i Island Burial Council on November 20, 2003. *See **Appendix G of Petitioner's Exhibit 3*** (11/03 Burial Treatment Plan). Final Acceptance of the Burial Treatment Plan was obtained from SHPD by letter dated August 20, 2019 *See **Appendix H of Petitioner's Exhibit 3***.

ASM Affiliates has prepared a Dismantling/Restoration Plan for a Portion of the Kuakini Wall (SIHP 50-10-28-6302). *See **Appendix L of Petitioner's Exhibit 3***. The Dismantling/Restoration Plan has been submitted to SHPD for review and acceptance. The Archaeological Preservation Plan stipulated, among other measures, that the collapsed portions of Site 6032 will be restored and stabilized, and that the missing southern portion of the wall will be reconstructed to the extent possible given availability of appropriate stones. In their acceptance letter for the Archeological Preservation Plan, SHPD required that a separate dismantling/restoration plan be submitted. This plan was prepared in response to that requirement.

Although based on the 2006 Motion to Amend, the Dismantling/Restoration Plan also discusses the construction of the access roadway into the Petition Area which would require the creation of a new 40-foot wide gap in the Kuakini Wall (SIHP Site 6302) to accommodate vehicles, curb and gutter, sidewalks, and landscaping.

UNK is also hiring rock masons to build the rock walls around the permanent preservation buffers of the burial and preservation sites, which once verified in writing to SHPD, will complete the implementation of the Burial Treatment Plan and Archaeological Preservation Plan.

d. Development of the Revised Project Will Not Affect Traditional and Customary Cultural Practices or Resources.

In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the Commission, in its review of a petition for reclassification of district boundaries, must – at a minimum – make specific findings and conclusions as to the following: (1) the identity and scope of “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist. *See Ka Pa'akai O Ka'Aina v. Land Use Comm'n, State of Hawai'i*, 94 Hawai'i 31, 47, 7 P.3d 1068, 1084 (2000), as amended (Jan. 18, 2001).

In February of 2020, ASM Affiliates completed the *Ka Pa'akai O Ka'Aina* analysis for the Revised Project. The full report is attached as Appendix N to G70's Environmental Planning Report and is discussed in §3.16. *See **Appendix N of Petitioner's Exhibit 3*** and Petitioner's Exhibit 3, §3.16. In summary, the previously archeological studies conducted within the Petition Area have identified significant, valued cultural resources, including sites traditionally used for ceremonial, habitation, agricultural, burial, and transportation purposes. Although a Cultural Impact Assessment conducted in 2003 did not identify any specific past or ongoing traditional or customary practices occurring within the project area, concerns were expressed by the consulted parties regarding the presence of burials on the property; the possibility of encountering additional *iwi kupua* during development activities; and the potential effects that the proposed development would have on the ability of the descendant community to care for those ancestral remains.

Several measures have already been undertaken by UNK to reasonably mitigate and protect the cultural resources located on the Petition Area and to ensure that the rights of the

descendant community to access and care for their *iwi kupuna* are not impinged. These mitigation measures include archaeological data recovery and the establishment of permanent preservation easements with associated access rights for any identified lineal and cultural descendants to the three known burial sites, a heiau, and the Kuakini wall. Also, at the recommendation of OHA, UNK has agreed to preserve a portion of a historic trail across the Petition Area. If all of the conditions and mitigation measures (both interim and permanent) set forth in the Burial Treatment Plan and Preservation Plan are adhered to and implemented as part of the Revised Project, there will be no anticipated adverse impacts to the three burial sites (SIHP Sites 23683, 23684, and 23685) and the two preservation sites (SIHP Sites 6302 and 23681), to allow the exercise of cultural practices associated with those sites.

ASM Affiliates also noted that to further avoid potential impacts to valued cultural resources, the Commission could condition any approvals to include the recommended archaeological/cultural precautionary monitoring measures as additional mitigation during all ground disturbing development activities. This condition is already included on the D&O as D&O Condition No. 6.

e. Water

G70 prepared a Preliminary Infrastructure Assessment which identified impacts to existing infrastructure systems due to the Revised Project and described new infrastructure proposed to support the Revised Project. See **Appendix C Petitioner's Exhibit 3**. The estimated water demand for the Project on the Petition Area is 641 County of Hawai'i Water Units (400 gpd per water unit). Water is intended to be supplied by the Hawai'i County Department of Water Supply ("**DWS**"), who has indicated that a new source will need to be developed in order to supply the planned expansion of the University on the Petition Area.

Three potential new source alternatives have been identified and studied by Tom Nance Water Resource Engineering (TNWRE). See **Appendix D Petitioner's Exhibit 3**.

UNK has been in discussions with the owner of TMK No. (3) 7-5-003:023, the site of one of the source alternatives, to contribute to the source development for an allocation of water sufficient to serve the Petition Area. See **Petitioner's Exhibit 15** (E-mail from owner of TMK No. (3) 7-5-003:023). With modest infrastructure improvements, well water from this site could be delivered directly downslope to an existing DWS transmission main in Queen Kaahumanu Highway and the required electrical power would be about half of the requirements of DWS'

high-level wells above Mamalahoa Highway. Because the system would be dedicated to the DWS, DWS has indicated that water would then be available from the existing DWS System from the North.

The Wheelock well would also have no impact on the flowrate and salinity of the brackish basal lens in the nearshore area because: (a) the well would draw fresh water from 400 to 600 feet below sea level. This body of water is hydrologically isolated from the overlying saline groundwater and brackish basal groundwater. Based on the piezometric head level and measured tidal response, water drawn by the well would otherwise discharge at great depth and distance offshore without ever coming in contact with the basal groundwater; and (b) monitoring of inland wells for the past 26 year have shown no impact on the basal groundwater. *See **Appendix D Petitioner's Exhibit 3.***

Another alternative is for well development on TMK No. (3) 8-1-002:058 which is owned by a UNK affiliated company, Ahualani, a non-profit corporation. Based upon the extremely fresh high-level groundwater from surrounding wells, it is anticipated that well development on this parcel would also produce very fresh high-level groundwater. Development of this site would be more expensive than the Wheelock well, and thus the Wheelock well is UNK's preferred option.

As a third alternative, UNK could develop a private stand-alone water system on the Petition Area. However, due to the salinity of the water, it would have to be treated by reverse osmosis filtration for drinking water use. In order to have no impact on the basal groundwater and its discharge into the marine environment, the system would need to consist of a variety of elements which cost would be substantially greater than the Wheelock Well, and the operating cost would be greater than the price of water of the DWS system. *See **Appendix D Petitioner's Exhibit 3.***

f. Wastewater

As noted in the Preliminary Infrastructure Assessment, as with the Original Project, the onsite wastewater system will continue to be connected to the existing County wastewater system. *See Appendix C of Petitioner's Exhibit 3, page 10.* Wastewater will be collected from a predominantly gravity-fed system, which will be collected and then connected to an interceptor along Kuakini Highway. The Petition Area is within the service area of the Kealakehe Wastewater Treatment Plant ("**Kealakehe WWTP**"). The Kealakehe WWTP treats and disposes

of sewage collected from the North Kona Sewerage system, which extends across the greater Kailua-Kona region from just south of Kealakehe Parkway at its northern edge to Ali'i Heights at the southern edge.

Current flows to the Kealakehe WWTP are approximately 1.8 million gallons per day ("mgd"). The Hawai'i County Department of Environmental Management currently has set aside 2.0 mgd for two specific projects. Therefore, the committed capacity is 3.8 mgd. The Kealakehe WWTP has a rated capacity of 5.3 mgd, leaving 1.5 mgd of remaining uncommitted capacity. The County of Hawai'i usually commits unused capacity on a first come basis. *See **Petitioner's Exhibit 16*** (letter from County of Hawai'i Department of Environmental Management).

g. Affordable Housing.

Attached as **Petitioner's Exhibit 17** is a letter from the County of Hawai'i Office of Housing and Community Development ("OHCD") confirming that the Revised Project does not contain any residential or industrial uses. Therefore, if the property is rezoned to one of the following districts, the Revised Project would not be subject to an affordable housing requirement under the Housing Code: RS (single-family residential), RD (double family residential), RM (multiple-family residential), RCX (residential-commercial mixed-use), RA (residential & agricultural), FA (family agricultural), APD (agricultural project district), CG (general commercial), CV (village commercial), CN (neighborhood commercial) or PD (Project District) Districts. It is UNK's intent to apply to re-zone the Petition Area to PD, RM, RCX, or CV after these proceedings before the Commission have concluded. OHCD recommends, and UNK agrees, that the present affordable housing condition in the D&O¹³ should remain.

Notwithstanding that developing the Petition Area for the Revised Project does not trigger affordable housing requirements under the County Code, UNK has undertaken significant projects that have contributed to providing affordable housing for the Kona community.

i. Kama'aina Hale Apartments

UNK has contributed to the Kona community's inventory of affordable housing. The Kama'aina Hale Apartments, a 128-unit rental housing complex, are located at 75-5837 Kuakini

¹³ "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."

Highway in Kailua-Kona (TMK No.: (3) 7-5-009:057), immediately adjacent to the existing University campus. The Kama'aina Hale Apartments are owned by Kamehameha Schools/Bishop Estate and leased to the Hawai'i Housing Finance and Development Corporation ("HHFDC"). In 2011, HHFDC issued a request for proposals to sell its leasehold interest in the Kama'aina Hale Apartments. See Petitioner's Exhibit 18 (HHFDC press release), attached hereto. While HHFDC's existing lease does not require the property to be maintained as rental housing, UNK established Kama'aina Hale Apartments ("KHA"), a non-profit organization, in 2013 to bid on the sublease for the property. UNK was the only bidder on the property, and in early 2014, a sublease to the UNK was approved. See Petitioner's Exhibit 19 (4/10/14 HHFDC minutes), attached hereto.

At that time, 68 of the 128 units were abandoned and totally uninhabitable. Through funds infused by UNK and volunteer assistance from UNK, KHA was able to rehabilitate the 68 abandoned units. As of 2019, KHA's policy requires 42 of the 128 units to be rented to applicants who make 50% below the area median income ("AMI"), and the remaining 84 units are available to those applicants making 80% below the AMI. Two units are reserved for managers. There is currently a 98% occupancy rate. Due to the fact that UNK/KHA rehabilitated the Kama'aina Hale complex, as opposed to constructing the project from the ground up, UNK's initial discussion with the OHCD indicate that affordable housing credits were not strictly available under the County Code. However, clearly UNK has contributed to the inventory of affordable housing in the Kona community.

ii. Hualalai Villages

UNK's predecessor originally completed buildings A, B & E of Hualalai Villages on a portion of TMK No.: (3) 7-5-010:086. Those condominium units were sold at market value. Although facing financial difficulties, buildings C, D, F, G, and H were completed by 2016 and together with Building A, B & E, comprise the buildings of Hualalai Village Phase I. UNK's predecessor-in-interest created Ka 'Ohana Waiaha (f.k.a. University Community Land Trust) whose purpose is to arrange for the acquisition and provision of affordable housing for faculty and staff of the University of the Nations, Inc., amongst other purposes. Ka 'Ohana Waiaha currently enters into ground leases for units within buildings C, D, F, G and H on a priority basis to staff and persons affiliated with the UNK. See Petitioner's Exhibit 20. In this way, affordable housing is provided for UNK personnel.

4. CHAPTER 343 REVIEW IS NOT REQUIRED FOR THE REVISED PROJECT.

Chapter 343 environmental review is required only "if three conditions are satisfied: (1) the proposed activity is an 'action' under HRS § 343-2 (2010); (2) the action proposes one or more of the nine categories of land uses or administrative acts enumerated in HRS § 343-5(a) (2010); and (3) the action is not declared exempt pursuant to HRS § 343-6(a)(2) (2010)." *Umberger v. Dep't of Land & Nat. Res.*, 140 Hawai'i 500, 512, 403 P.3d 277, 289 (2017) (citation omitted). For the following reasons, the Revised Project does not trigger Chapter 343 environmental review, and, even if triggered, it is nevertheless exempt.

a. The Revised Project Does Not Trigger Chapter 343 Review.

The Revised Project does not trigger Chapter 343 environmental review. The only potential Chapter 343 trigger is the use of State or County lands under HRS § 343-5(a)(1) to the extent necessary to provide the traffic improvements and funding recommended in the MAR. See Appendix B of Petitioner's Exhibit 3. As discussed *supra*, those improvements and funding obligations may consist of:

- Phase I:
 - Addition of a refuge lane along Kuakini Highway to receive traffic turning left (or south) out of the University's existing driveway, which can likely be accomplished within the existing right-of-way with restriping minor pavement modifications;
- Phase II:
 - Addition of a secondary access point and refuge lane off of Kuakini Highway;
 - Possible addition of a signal at Kuakini Highway and the existing access point; and
 - Possible widening of Kuakini Highway, which has already been planned by the County.
- Phase III:
 - Possible contribution of funding or select improvements related to the widening of Kuakini Highway.

The Hawai'i Supreme Court has made clear that not every request for the use of State or County land triggers HRS § 343-5(a)(1). While "use" is not defined by Chapter 343, the court has addressed in detail how the word "use" is to be interpreted in HRS § 343-5(a). In *Nuuanu Valley Ass'n v. City & County of Honolulu*, 119 Hawai'i 90, 103, 194 P.3d 531, 544 (2008), the court noted that the "'ordinary meaning' of the word 'use' is 'to employ for some purpose; put into

service; make use of[,]" but expressly rejected that interpretation because "use," so interpreted, "could be construed to apply to **any** 'use' of state or county land, **no matter what or how benign that 'use' may be**" (emphasis added). The court also rejected the argument that Chapter 343 is triggered "[s]o long as there is a 'use' of city or state lands, **without regard to 'the size of the use' and comparisons to the scope and size of the overall project.**" *Id.* at 101, 194 P.3d at 542 (emphasis added). In doing so, the court noted that it has long-recognized "that the boundaries of the meaning of the word 'use,' as contemplated by HRS § 343-5(a)(1), is not unlimited in possibilities." *Id.*, 194 P.3d at 544.

As recently summarized in *Umberger*:

What can be readily gleaned from *Nuuanu Valley* is that whether a proposed activity constitutes a "use of state or county lands" **depends on the nature of the activity and the extent of the involvement of state or county lands.** *Id.* at 103, 194 P.3d at 544. When the proposed activity utilizes state or county lands **in a decidedly inconsequential or negligible manner,** like the mere connection to state or county lands in *Nuuanu Valley*, or when the use is hypothetical, like the "potential use" of a public highway in *Citizens*, **then the activity does not rise to the level of "use" contemplated by [Chapter 343].**

Umberger, 140 Hawai'i at 522, 403 P.3d at 299 (emphases added).

For example, the Hawai'i Supreme Court has held that the construction of two underpasses below a State highway for golf cart passage was a "use" of State land. *See Citizens for Prot. of N. Kohala Coastline v. County of Hawai'i*, 91 Hawai'i 94, 103, 979 P.2d 1120, 1129 (1999). Similarly, in *Kahana Sunset Owners Ass'n v. County of Maui*, 86 Hawai'i 66, 70-71, 947 P.2d 378, 382-83 (1997), the construction and installation of a new, thirty-six-inch drainage line beneath a public street was a "use" for the purposes of HRS § 343-5(a). And in *Sierra Club v. Office of Planning, State of Haw.*, 109 Hawai'i 411, 415-16, 126 P.3d 1098, 1102-1103 (2006), the triggering "use" was "the construction of the sewage and water transmission lines [that] will require tunneling beneath state highways." What the triggering "uses" in *Citizens*, *Kahana* and *Sierra Club* all have in common is that the "use" involved intensive development, construction and/or land-altering activities.

By contrast, the potential traffic improvements recommended by the MAR use the County-owned Kuakini Highway in a decidedly inconsequential and negligible manner. *See Umberger*, 140 Hawai'i at 522, 403 P.3d at 299. The improvements do not require tunneling under Kuakini Highway, or the installation of underpasses and large-scale drainage and sewer

lines. See *Umberger*, 140 Hawai'i at 522, 403 P.3d at 299 (noting that the court "concluded in *Nuuanu Valley* that merely connecting to an existing drainage system and county lines without any construction or tunneling beneath state or county lands was not a 'use' within the meaning of that term in HRS § 343-5(a)(1).") (citing *Nuuanu Valley Ass'n*, 119 Hawai'i at 103-04, 194 P.3d at 544-45). As discussed *supra*, the improvements recommended by the MAR involve the addition of one or more refuge lane, which can likely be accomplished within the existing right-of-way with restriping minor pavement modifications, the addition of a second access point, and the potential installation of a traffic signal. These improvements do not rise to the level of "use of . . . county land" as contemplated in HRS § 343-5(a)(1).

b. Even if the Revised Project Triggers HRS Chapter 343, the Traffic Improvements Recommended by the MAR are Exempt.

At the January 8, 2020 status hearing, the issue of whether an environmental impact statement was required for the Revised Project was raised by the Commissioners. Even assuming *arguendo* that the traffic improvements required for the Revised Project trigger Chapter 343, those improvements are nevertheless exempt actions. Kuakini Highway is a County-owned highway. The County of Hawai'i Department of Public Works ("DPW") has published its Comprehensive Exemption List, dated September 1, 2015, which received concurrence from the State of Hawai'i Department of Health, Environmental on May 10, 2016 ("**County Exemption List**"). The County Exemption List includes a number of exemption applicable to the improvements recommended by the MAR, including:

- Exemption Class #1, Category B (Facilities), Exemption No. 11 for "[p]avements **(and striping, as needed)**, including but not limited to, roadways, driveways, parking lots, walkways, bikeways, jogging paths, or multi-use pathways."
- Exemption Class #3, Exemption No. 14 for "[f]encing, **curbing**, walls, and gates."
- Exemption Class #3, Exemption No. 16 for "[m]inor street widening and **improvements** within existing or future County street right-of-ways."
- Exemption Class #3, Exemption No. 17 for "[p]avements **(and striping, as needed)**, including but not limited to, roadways, driveways, parking lots, walkways, bikeways, jogging paths, or multi-use pathways."
- Exemption Class #3, Exemption No. 19 to "**install traffic control devices, i.e. traffic signals**, street lights, **traffic signs, striping and pavement markings**."
- Exemption Class #3, Exemption No. 20 for the "[i]nstallation of manholes, waterlines, sewage, electrical, gas, telephone, street light and appurtenances and other essential public utility service extensions within the County road right-of-way."

- Exemption Class #3, Exemption No. 21 for "[t]raffic calming devices."
- Exemption Class #3, Exemption No. 29 for "[s]idewalks, pathways, trails, bike paths not greater than 10,000 lineal feet."
- Exemption Class #3, Exemption No. 33 for the "[i]nstallation of traffic and pedestrian safety measures – guardrails, escape ramps, sidewalk."

(Emphasis added). The addition of one or more refuge lanes, a secondary access point, and a traffic signal, as well as any related improvements required by DPW, fall squarely within a number of these exemptions. In addition, the County has already planned for the widening of the portion of Kuakini Highway fronting the Petition Area, and a draft Environmental Assessment has been published: http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2013-03-23-HA-DEA-Kuakini-Highway-Improvements-Phase-2.pdf#search=%22Kuakini%20Highway%22

5. INCREMENTAL REDISTRICTING IS NOT APPLICABLE TO MOTIONS TO AMEND AND WOULD BE IMPROPER FOR THE REVISED PROJECT.

At the January 8, 2020 status hearing, the issue of incremental districting for the Revised Project was raised by the Commissioners. The Commission's authority to order incremental districting is derived from HAR § 15-15-78(a), which provides, in pertinent part, that:

(a) **If it appears to the commission that full development of the subject property cannot substantially be completed within ten years after the date of the commission's approval** and that the incremental development plan submitted by the petitioner can be substantially completed, and if the commission is satisfied that all other pertinent criteria for amending the land use boundary for the subject property or part thereof are present, then the commission may:

(1) **Grant the petitioner's request to amend the land use boundary for the entire subject property; or**

(2) **Amend the land use boundary for only that portion of the subject property which the petitioner plans to develop first** and upon which it appears that substantial development can be completed within ten years after the date of the commission's approval. At the same time, the commission shall indicate its approval of the future land use boundary amendment of the total subject property requested by the petitioner, or so much thereof as shall be justified as appropriate therefor by the petitioner, such approval to indicate a schedule of incremental land use boundary amendments over successive periods not to exceed ten years each. The commission may amend the land use boundary of the subject property, if it finds such an amendment is justified.

(Emphasis added). Therefore, when a petitioner requests a **district boundary amendment** for a project that cannot be completed within ten (10) years, the Commission has the discretion to

grant the petition in one of two ways. The Commission can either: (a) grant the district boundary amendment as to the entire petition area, notwithstanding that the proposed development timeframe exceeds ten (10) years; or (b) grant the district boundary amendment as to only a specific geographic portion or increment of the petition area that can be developed within ten (10) years, and reclassify subsequent portions upon completion of development of the preceding portions. For the following reasons, incremental districting is not applicable to this Motion to Amend and is inappropriate for the Revised Project.

First, incremental districting only applies to petitions for **district boundary amendments** and the Petition Area is already within the SLU Urban District. A motion to amend is **not** a petition for a district boundary amendment; it asks for modifications to a prior decision and order granting a district boundary amendment. HAR § 15-15-78 is contained within Subchapter 8 of the Commission's rules, entitled "Decision-Making Criteria for **Boundary Amendments**." (Emphasis added). The decision-making criteria for motions requesting an amendment to a decision and order of the Commission is contained in HAR § 15-15-94(c), which provides that "[f]or **good cause shown**, the commission may act to modify or delete any of the conditions imposed or modify the commission's order." (Emphasis added). As discussed throughout this Motion to Amend, there is good cause to amend the D&O to allow for the development of the Revised Project.

Second, even if this Motion to Amend is treated as a petition for district boundary, or the Commission otherwise determines that HAR § 15-15-78 is applicable, incremental districting is not **required** under HAR § 15-15-78. As noted above, the Commission has discretion to reclassify an entire petition area for projects with development timeframes exceeding ten (10) years. *See* HAR § 15-15-78(a) ("If it appears to the commission that full development of the subject property cannot substantially be completed within ten years after the date of the commission's approval . . . , then the commission may . . . [g]rant the petitioner's request to amend the land use boundary for the entire subject property[.]"). As discussed *infra*, there are compelling reasons for the Commission to not order incremental districting.

Third, a significant amount of the spine infrastructure for the Revised Project will be constructed in Phase I. UNK's proposed early investment in infrastructure demonstrates its commitment to fully developing the Revised Project.

Fourth, incremental districting is inappropriate for and would frustrate the deliberate planning of the Revised Project. As shown in Petitioner's Exhibit 3, Phase I of the Revised Project is not geographically confined to a discrete portion of the Petition Area. In order to make the most efficient¹⁴ and beneficial use of the Petition Area, Phase I involves improvements spanning across the vast majority of the Petition Area utilizing the existing slopes to accommodate buildings, walkways, and parking lots without requiring any significant re-shaping. UNK would not be able to develop the Revised Project, or any other project appropriately planned and designed for the Petition Area, if it was required to develop the Petition Area in small, isolated pieces.

Finally, UNK needs flexibility in developing the Revised Project that would **not** be afforded with incremental districting. UNK intends to seek a rezoning of the Petition Area to the County's Project District zoning, which allows for flexibility in moving around project elements and refinement as the project development process moves forward. UNK would not be able to take advantage of the Project District zoning if it was constrained to developing the Petition Area in geographically isolated increments.

Similarly, UNK needs flexibility in developing the Revised Project in order to take advantage of earmarked donations that it may receive for specific project elements (*i.e.*, if it receives an earmarked donation during Phase I for elements not planned to be implemented until Phase 2 or Phase 3). For example, a UNK alumni recently visited the existing campus and realized that it did not have a dedicated cafeteria for the students, faculty and staff. That alumni subsequently made a significant donation earmarked for the specific purpose of developing a new cafeteria. The result of that donation is the completion of the Aloha Cafeteria, a \$9 million project. If UNK is limited to only being able to develop specific portions of the Petition Area and, by extension, the project elements planned for those portions, UNK would risk losing opportunities to take advantage of similar donations for improvements planned for future phases or increments.

6. REVISED CONDITIONS.

In order to proceed with the Revised Project, UNK requests the modification and deletion of certain conditions to better address the Revised Project.

¹⁴ Considerations include minimizing on-site grading with the existing slopes accommodating buildings, walkways, and parking lots without requiring any significant re-shaping of the land.

a. Amendment to D&O Condition No. 6.

UNK requests that D&O Condition No. 6 (Archaeology) be amended¹⁵ as follows:

6. Archaeology.

~~a. Petitioner shall submit a compete 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 State Historic Preservation Division of the Department of Land and Natural Resources ("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. Mitigation commitments shall be monitored by the "Waia`ha Community Advisory Committee" ("WCAC") as described below.~~

b. ~~Should any previously unidentified human burials, archaeological or historic sites such as artifacts, marine shell concentrations, charcoal deposits, stone platforms, paving 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 WCAC 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 y 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").~~

c.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 The Archaeological Data Recovery 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.

¹⁵ Language that UNK is requesting be deleted from the conditions is shown as stricken through, while the new language to be added to the conditions is shown as underlined.

~~e. For all sites approved for preservation by the DLNR-SHPD, to include without limitation the Great Wall of Kuakini (Site 6302), the papamu 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 DNR-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.~~

d.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 Petitioner shall reestablish a minimum of one of the two trail segment, 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.

Good Cause for Amendment: Petitioner has fully complied with the deleted portions of Condition 6. See Section V.3.c *infra*.

b. Amendment to D&O Condition No. 7.

UNK requests that D&O Condition No. 7 (Cultural, Historical, Customary and Traditional Rights and Resources) be amended as follows:

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

a. Petitioner shall initially establish the Waia`ha Community Advisory Committee ("WCAC") and annually provide reasonable operating and capital expenditure costs or facilities through revenues from the Project, the KWC composed of but not limited to: (1) a person of Native Hawaiian ancestry ~~who is a lineal descendant~~ 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 WCAC ~~KWC~~ shall operate on an equal vote basis.

b. The WCAC ~~KWC~~ shall be established by Petitioner no later than six months from the issuance of this Amended Decision and Order. Upon establishment of the WCAC ~~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,

and structure, ~~operating costs and compensation for members and staff, procedures, and plan of action.~~

c. The WCAC ~~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~~ WCAC ~~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 WCAC ~~KWC~~ shall be filed with the Commission.

d. The WCAC ~~KWS~~ 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 WCAC ~~KWC~~ shall provide recommendations consistent with this Amended 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 WCAC ~~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 Amended 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 WCAC ~~KWC~~.

Good Cause for Amendment: The Kahu Wai'aha Committee ("KWC") was proposed by the petitioner and imposed as a condition on the Original Project because of the proposed Hualalai Village, and the Cultural Center¹⁶, which are not being pursued as a part of the Revised Project. However, UNK has worked closely with people with familial ties to the Petition Area and sought their input on numerous occasions, as well as other Hawaiians such as Kupuna Mary Kamahale Boyd. UNK established the WCAC, which is comprised of Leinā'ala Fruean and UNK Chief Operating Officer Paul Childers, Tom Waddle, Kahu Kealoha Kaopua, Paoakalani Patu, Rollins Rabara, Tammie Rabara, Kahu Bobby Laioha Macomber, Kumu Namahana, and

¹⁶ D&O at FOF ¶119.

Brooke Anderson, to give advice on programs and the development of the Petition Area, including integrating its archaeological resources.

c. Deletion of D&O Condition No. 11.

UNK requests that D&O Condition No. 11 (Cultural Center) be deleted in its entirety. D&O Condition No. 11 provides:

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.

Good Cause for Deletion: The Revised Project does not include a Cultural Center. D&O Condition No. 11 is, therefore, no longer applicable to the development of the Petition Area.

d. Deletion of D&O Condition No. 12.

UNK request that D&O Condition No. 12 (Ka Haka 'Ula O Ke'elikolani, College of Hawaiian Language at University of Hawai'i-Hilo) be deleted in its entirety. D&O Condition No. 12 provides:

12. Ka Haka 'Ula O Ke'elikolani, 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 naïve Hawaiian language, as well as cooperating in activities that promote Hawaiian cultural authenticity.

Good Cause for Deletion: In 2004, the University of Hawai'i-Hilo ("UHH") came to Kona to discuss a possible partnership related to the College of Hawaiian Language. At that time, it became apparent that UHH was interested primarily in the development of the Cultural Center and resulting funding. There was discussion regarding creating a distance learning opportunity for teaching the native Hawaiian language, but UHH's interest appeared minimal.

UNK has since established the Haleo Hawaiian language program, which has trained approximately 400 students. UNK charges no tuition for native Hawaiians ages 14 and up to enroll in the Haleo Hawaiian Language program. UNK's Haleo Hawaiian language program fulfills the purpose and intent of D&O Condition No. 12.

e. Amendment to D&O Condition No. 15.

UNK requests that D&O Condition No. 15 (Compliance with Representations to the Commission) be amended as follows:

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, as amended, 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.

Good Cause for Deletion: Through this Motion to Amend, UNK is seeking amendments to the D&O to allow for the development of the Revised Project. This amendment is intended to clarify that UNK will develop the Petition Area in substantial compliance with its (and its predecessors') representations to the Commission as amended by its representations made through this Motion to Amend related to the Revised Project.

7. THE MOTION WAS PROPERLY SERVED.

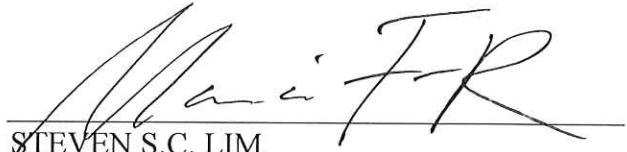
Under HAR §15-15-94, a petitioner filing a motion to amend or delete conditions under HAR §15-15-70 must serve a copy of the motion on all parties to the original boundary amendment proceeding in which the condition was imposed or the order was issued, and to any person who may have a property interest in the subject property as recorded in the County's real property tax records at the time that the motion is filed.

The Petition Area is presently owned in fee simple by UNK. Pursuant to HAR §15-15-48, a copy of this motion was also served on the State Office of Planning and the County of Hawai'i Planning Department. As determined based on a review of the title reports for the Petition Area, all persons with a recorded interest in the Petition Area have also been served with a copy of this Motion.

VII. CONCLUSION.

For the foregoing reasons, UNK respectfully requests that the Commission issue an order amending the D&O as requested herein.

DATED: Honolulu, Hawai'i, March 23, 2020.

A handwritten signature in black ink, appearing to read "Maria FR", is written over a horizontal line.

STEVEN S.C. LIM
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MARIA F. FAGERSTROEM-RYDER

Attorneys for
UNIVERSITY OF THE NATIONS, KONA,
INC.

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of
U of N BENCORP

To Amend the Agricultural Land Use District
to the Urban Land Use District for
Approximately 62 Acres, Tax Map Key Nos.:
(3) 7-5-010:085 and 7-5-017:006 situated at
Wai'aha, North Kona, County and State of
Hawaii

DOCKET NO. A02-737

DECLARATION OF MARIA F.
FAGERSTROEM-RYDER

DECLARATION OF MARIA F. FAGERSTROEM-RYDER

I, MARIA F. FAGERSTROEM-RYDER, declare and state as follows:

1. I am an attorney with Carlsmith Ball LLP, attorneys for University of the Nations, Kona, Inc. ("**Petitioner**"), successor-in-interest to U of N Bencorp, the original Petitioner in Docket No. A02-737.
2. Attached hereto as **Petitioner's Exhibit 1** is a true and correct copy of the Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment; Exhibit A filed on August 8, 2003.
3. Attached hereto as **Petitioner's Exhibit 2** is a true and correct copy of the 2020 Master Plan Update for the Revised Project prepared by G70.
4. Attached hereto as **Petitioner's Exhibit 3** is a true and correct copy of the Environmental Planning Report prepared by G70.
5. Attached hereto as **Petitioner's Exhibit 4** is a true and correct copy of the Master Plan from the 2003 State Land Use District Boundary Amendment in this docket.
6. Attached hereto as **Petitioner's Exhibit 5** is a true and correct copy of the Master Plan from the 2006 Motion to Amend.
7. Attached hereto as **Petitioner's Exhibit 6** is a true and correct copy of a Zoning Map compiled using the County of Hawaii's Planning Department's GIS system (with notations added).

8. Attached hereto as **Petitioner's Exhibit 7** is a true and correct copy of excerpts from the 2005 Hawai'i County General Plan.
9. Attached hereto as **Petitioner's Exhibit 8** is a true and correct copy of the Hawai'i County 2040 Draft General Plan Future Land Use Map for the North Kona District (with notation added).
10. Attached hereto as **Petitioner's Exhibit 9** is a true and correct copy of the construction costs estimates for the Revised Project prepared by the UNK.
11. Attached hereto as **Petitioner's Exhibit 10** is a true and correct copy of a letter dated February 18, 2020 from Central Pacific Bank.
12. Attached hereto as **Petitioner's Exhibit 11** is a true and correct copy of the UNK's 2018 IRS Form 990 provided by the UNK.
13. Attached hereto as **Petitioner's Exhibit 12** is a true and correct copy of the UNK's Consolidated Audited Financial Statements with Independent Auditor's Report for the Years Ended June 30, 2019 and 2018.
14. Attached hereto as **Petitioner's Exhibit 13** is a true and correct copy of a worksheet prepared by the UNK showing additional tuition to be applied to the Revised Project.
15. Attached hereto as **Petitioner's Exhibit 14** is a true and correct copy of UNK's Faith-Based Financing Model provided by UNK.
16. Attached hereto as **Petitioner's Exhibit 15** is a true and correct copy of an e-mail dated March 11, 2020 from Richard Wheelock to Ken Van Bergen regarding the potential for the UNK to obtain water units.
17. Attached hereto as **Petitioner's Exhibit 16** is a true and correct copy of a letter from the County of Hawai'i, Department of Environmental Management's Wastewater Deputy Chief.
18. Attached hereto as **Petitioner's Exhibit 17** is a true and correct copy of a letter from the County of Hawai'i, Office of Housing and Community Development Housing Administrator.
19. Attached hereto as **Petitioner's Exhibit 18** is a true and correct copy of a press release dated September 23, 2011 issued by the Hawai'i Housing Finance and Development Corporation entitled "Hawai'i Housing Finance and Development Corporation Seeks Public Private Partnership for Affordable Rental in Kona".

20. Attached hereto as **Petitioner's Exhibit 19** is a true and correct copy of the Minutes of the Regular Meeting of the Hawai'i Housing Finance and Development Corporation from April 10, 2014.

21. Attached hereto as **Petitioner's Exhibit 20** is a true and correct copy of Exhibit C to a Ground Lease with Lessor Ka `Ohana Waiaha entitled "Eligibility and Priority System and Offering Procedures for Homeowner Resales to Eligible Successor Homeowners".

DATED: Honolulu, Hawai'i, March 23, 2020.


MARIA F. FAGERSTROEM-RYDER