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LAND USE COMMISSION
STATE OF HAWAII
2020 AUG 10 A 11:55

Attorneys for Petitioner HANO HANO LLC

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition Of

DOCKET NO. A03-745

HANO HANO LLC, a Hawaii Limited
Liability Company

HANO HANO LLC'S MOTION TO RELEASE
AND MODIFY CONDITIONS;
MEMORANDUM IN SUPPORT OF
MOTION; VERIFICATION; CERTIFICATE
OF SERVICE

To Amend the State Land Use Agricultural
District to the State Land Use Urban District
for approximately 28.695 acres of land at
Keahua, Kula, Island and County of Maui,
State of Hawaii, bearing Tax Map Key
Numbers 2-3-11:1 and 2-3-11:2 (Second
Taxation Division)

HANO HANO LLC'S MOTION TO RELEASE AND MODIFY CONDITIONS

I. RELIEF SOUGHT

HANO HANO LLC, a Hawai'i Limited Liability Company ("**Petitioner**"), by and through its legal counsel, CARLSMITH BALL LLP, hereby respectfully requests that the STATE OF HAWAII LAND USE COMMISSION (the "**Commission**") issue an order releasing certain conditions imposed under the Commission's *Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment*, filed May 17, 2005 ("**D&O**") in Docket No. A03-745 because development of the Petition Area under the subject Docket has been completed in accordance with the D&O and the conditions have been satisfied.

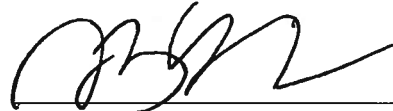
Specifically, Petitioner requests the release of Conditions Nos. 1, 3, 5 through 23, and 25, all as fully satisfied. Petitioner does not seek release of Condition Nos. 2 or 24, and requests limited modifications to Condition Nos. 4 and 26.

Pursuant to § 15-15-70(c) of Title 15, Subtitle 3, Chapter 15 of the Hawai'i Administrative Rules ("**HAR**"), Petitioner requests a hearing on this Motion.

II. **GROUNDS FOR MOTION**

This Motion is made pursuant to Chapter 205, Hawai'i Revised Statutes and HAR §§ 15-15-70 and 15-15-94, the other authorities and arguments stated in the attached Memorandum in Support of Motion, and the pleadings and files to be submitted.

Dated: Honolulu, Hawai'i, August 10, 2020.



JENNIFER A. LIM
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Attorneys for HANOHANO LLC

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MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On May 17, 2005, the State of Hawaii's Land Use Commission (the "**Commission**") reclassified approximately 28.695 acres of land situate at Keahua, Kula, Island and County of Maui, State of Hawaii, then-identified by Tax Map Key ("**TMK**") Nos. (2) 2-3-011:001 and 002 (together, the "**Petition Area**"),¹ from the State "A" Agricultural District into the State "U" Urban District and issued its *Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment* (the "**D&O**"). Petitioner Hanohano LLC, a Hawaii's Limited Liability Company ("**Petitioner**"), sought the reclassification in order to develop the Petition Area as the Kualono subdivision ("**Project**" or "**Kualono**"). The D&O was issued subject to 26 conditions ("**Conditions**").

Petitioner has fully completed the Project. Throughout the development of the Project, Petitioner has complied with and satisfied the Conditions. As part of Petitioner's turnover of the Project to the Kualono Homeowners' Association (the "**Kualono HOA**"), Petitioner wishes to get formal confirmation from the Commission of satisfaction of the Conditions through this Motion to Release and Modify Conditions ("**Motion**") so as to not burden the Kualono HOA

¹ The current TMK Nos. for the Petition Area are (2) 2-3-11: 001, 002 and 076 through 130.

with uncertainty as to the status of the Conditions. Petitioner also wishes to avoid imposing upon the Kualono HOA the obligation to prepare annual reports in perpetuity for a project that is completed. Because the Project has been completed consistent with Petitioner's representations to the Commission and the Conditions have been satisfied, Petitioner seeks a formal release of 22 of the 26 Conditions, and a modification to two Conditions (Condition Nos. 4 and 26), and does not seek a release of or modification to Condition Nos. 2 and 24.

Petitioner is not requesting the release of Condition No. 2, which prohibits the construction of accessory dwelling units on the lots, or Condition No. 24, which provides a right to seek full or partial release of conditions from the Commission. Petitioner has completed all of its obligations under Condition No. 2. However, based upon an assumption that the Commission may view Condition No. 2 as imposing a continuing obligation upon the Petition Area, Petitioner does not seek a release of Condition No. 2. Nevertheless, it is possible that Project lot owners or the Kualono HOA may at some point in the future wish to seek release of Condition No. 2 and for that reason Petitioner is not seeking release of Condition No. 24.

Petitioner's requested modifications to Condition No. 4 are to address what has proven to be impracticable in implementation, but retains fully the intent of Condition No. 4 and, where applicable, the language.

Petitioner's requested technical modification to Condition No. 26 is merely to reflect the fact that any conditions to be recorded after the Commission's decision on this Motion would be documented in an amended and restated declaration (whereby the existing Certificate of Conditions that was recorded in the Bureau of Conveyances of the State of Hawai'i (the "**Bureau**") would be amended and restated to reflect the outcome of the Commission's decision on this Motion).

II. BACKGROUND

The Petition Area is located in Keahua, Kula, Island and County of Maui, directly south of Pukalani, near Makawao. D&O finding of fact ("**FOF**") 24. The Petition Area abuts Old Haleakala Highway, near its intersection with Haleakala Highway and Kula Highway, which is also known as "Five Trees." *Id.* at FOF ¶25. King Kekaulike High School is located to the

southeast of the Petition Area, across Kula Highway. *Id.* The Kulamalu Town Center and Kamehameha School are located south of the Petition Area. *Id.*

The Petition Area is within the Urban Growth Boundary of the Maui Island Plan, adopted December 28, 2012, as shown on the Maui Island Plan Directed Growth Boundaries, Map M-12. The Petition Area is designated as "single family residential" on the Makawao-Pukalani-Kula Community Plan. FOF ¶45. The Petition Area is zoned R-3 Residential by the County. The Petition Area is outside of the Special Management Area. FOF ¶48.

Petitioner sought reclassification from the Commission in order to develop the Petition Area with 49 residential lots (the "**Residential Lots**"), one heiau/retention basin lot ("**Heiau/Retention Basin Lot**") and associated additional roadway lots. *See* FOF 37. As fully developed, the Project consists of: (a) 49 Residential Lots, all of which have been sold, and approximately half of which now have single-family residences;² (b) the 2.383-acre Heiau/Retention Basin Lot (Lot 50); (c) five roadway lots (Lots 51 through 55) ("**Roadway Lots**"); and (d) two pedestrian access, utility reserve and/or emergency access lots (Lots 56 and 57) ("**Pedestrian Lots**"), as depicted on File Plan No. 2488.

Under the Kualono Declaration of Covenants, Conditions, Easements and Restrictions dated July 27, 2016, and recorded in the Bureau against the Petition Area on July 28, 2016 as Document No. A-60530533 (the "**Kualono CC&Rs**"), Lots 50 through 57 are designated as "Common Area." Petitioner conveyed Lots 50 through 57 (the "**Common Areas**") to the Kualono HOA by Limited Warranty Deed with Covenants and Reservations, recorded in the Bureau on July 25, 2019, as Document No. A-71450713 (the "**HOA Deed**").³

Consistent with the Conditions, Petitioner conveyed a road widening lot (Lot 58, comprised of 7,117 square feet) to the County by way of Warranty Deed dated June 20, 2019, and recorded in said Bureau on July 11, 2019 as Document No. A-71310109. Petitioner is in the process of completing the dedication of another road widening lot (Lot 59, comprised of 1,702

² The Residential Lots consist of Lots 1 through 49 and range in size from 18,102 square feet to 35,465 square feet.

³ The HOA Deed conveyed Lot 50 (the 2.383-acre Heiau/Retention Basin Lot), five Roadway Lots (Lots 51-55), and Lots 56 and 57 (two pedestrian access, utility reserve and/or emergency access lots) to the Kualono HOA.

square feet) to the State Department of Transportation ("SDOT"), who has already approved Petitioner's tentative dedication map. Upon completion of the conveyance of the road widening lot to the SDOT, Petitioner will have no remaining interest in the Petition Area.

III. LEGAL STANDARD

HAR § 15-15-94(c) 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." "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). As discussed further herein, Petitioner has satisfied the Conditions, thereby providing the Commission with good cause to release the Conditions, as requested. Relatedly, Condition No. 24 provides that:

Petitioner shall have the right to seek from the Commission full or partial release of any of the Conditions as to all or any portion of the [Petition Area] **upon assurance acceptable to the Commission of satisfaction of such Condition.**

D&O at 48 (emphasis added). Through its annual reporting to the Commission, Petitioner has submitted documentation assuring the Commission that the Conditions have been satisfied. This Motion and any related submissions and argument will provide the Commission any additional assurance it may seek to confirm Petitioner's satisfaction of the Conditions.

Regarding service of this Motion, HAR § 15-15-94 instructs that motions to modify conditions, such as the instant Motion, 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. The only parties to the original boundary amendment proceeding were Petitioner, the Office of Planning ("OP"), and the County of Maui Planning Department ("**Planning Department**"). Parties with a property interest in the Petition Area are those who own the 49 Residential Lots, the Kualono HOA and the County of Maui (as to Lot 58) (collectively the "**Owners**").

For the purposes of providing notice, Petitioner will serve the Owners with a copy of this Motion. However, unless otherwise instructed by the Commission, Petitioner will not serve subsequent filings (*e.g.*, exhibits, briefs, etc.) on the Owners; subsequent filings will be served only upon OP and the Planning Department. Similarly, Petitioner anticipates that any filings

made by OP or the Planning Department will only be served upon Petitioner and not on all of the owners of the Residential Lots. Within one week of the filing of this Motion, Petitioner intends to file exhibits documenting the various representations made in this Motion (many of which have already been provided to the Commission in conjunction with Petitioner's annual reports).

IV. DISCUSSION

Petitioner has been timely with its submission of annual reports, as required under Condition No. 23. Petitioner's last annual report was submitted on May 6, 2019, and provides a summary of Petitioner's satisfaction of the Conditions. This section provides a brief summary of the Conditions, a description of Petitioner's satisfaction of the Conditions, and Petitioner's request for release of the noted Conditions and modifications to Condition Nos. 4 and 26.

A. 22 CONDITIONS FULLY SATISFIED AND REQUESTED FOR RELEASE.

1. Condition No. 1 – Affordable Housing.

Prior to approval of the "final plat" (as this term is defined in §18.04;190, Maui County Code) for the Project (the "Final Subdivision Approval"), Petitioner shall enter into an agreement with the [County of Maui Department of Housing and Human Concerns], whereby, among other things, Petitioner shall pay Habitat for Humanity Maui, Inc., on or before Final Subdivision Approval, the amount of ONE HUNDRED TWENTY-FIVE THOUSAND and 00/100 DOLLARS \$125,000.00), in full satisfaction of the County of Maui's affordable housing requirements for the Project.

D&O at 37-38.

Condition No. 1 has been fully satisfied as reported in Petitioner's Sixth Annual Report, filed with the Commission on April 27, 2011 (with copies to OP and the Planning Department) and incorporated herein by reference. On October 25, 2006, Petitioner and Habitat for Humanity Maui, Inc. entered into an Agreement for Affordable Housing Contribution, which required Petitioner to pay Habitat for Humanity Maui, Inc. \$125,000 to satisfy Petitioner's affordable housing obligations for the Project. Petitioner paid \$125,000 on April 19, 2011, the receipt of which was confirmed by Habitat for Humanity Maui, Inc. through a letter dated April 25, 2011. Petitioner requests the release of

Condition No. 1.

2. Condition No. 3 – Park Dedication Requirements.

Prior to Final Subdivision Approval, Petitioner shall comply with the park dedication requirements under §18.16.320, Maui County Code, for the Project, as approved by the Parks Department. An executed agreement between the Petitioner and the Parks Department shall be delivered to the Commission, OP and the Planning Department.

D&O at 38.

Condition No. 3 has been fully satisfied. A 9.232-acre parcel, together with certain improvements, was conveyed to the County by Deed recorded on March 10, 2011 in the Bureau as Document No. 2011-041387. A copy of the Deed for the park parcel was submitted to the Commission through Petitioner's Fourth Annual Report that was filed with the Commission on April 22, 2011, and is incorporated herein by reference. Petitioner requests the release of Condition No. 3.

3. Condition No. 5 - Unidentified Archaeological Finds.

If any previously unidentified human burial, or archaeological or historic sites, such as artifacts, marine shell concentrations, charcoal deposits/ stone platforms, pavings, or loi walls (collectively the "Historic Sites") are found during construction on the Property or any Residential Lot, work shall immediately stop and SHPD shall be notified of such Historic Sites. The requirements of Chapter 6E, HAW. REV. STAT., and the rules promulgated thereunder, applicable to the Historic Sites shall be satisfied before construction resumes. SHPD shall determine and approve the significance of the Historical Sites, and construction work shall re-commence at the Property only after both approval by an authorized archaeologist has been obtained and appropriate mitigative measures for the Historic Sites have been implemented.

D&O at 42-43.

Condition No. 5 has been satisfied. No unidentified human burials or archaeological or historic sites were encountered during the construction of the Project. Requirements for notice to the State Historic Preservation Division ("SHPD") are embodied in the Kualono CC&Rs and apply to the Project on an ongoing basis. For example, Section 17 of the Kualono CC&Rs

contains the following provision requiring Residential Lot owners to stop all work and contact SHPD should any evidence of human burial, archaeological or historic sites be found:

17. ARCHAEOLOGICAL. Each Owner agrees to assume all risks of impairment of Owner's use and enjoyment of a Lot, loss in market value and property damage and personal injury arising from the existence of and/or access to an archaeological site. Should any evidence of burial, archaeological or historic sites such as artifacts, bones, stone platforms, pavings or walls be found, Owner shall stop work in the immediate vicinity and the State Department of Land and Natural Resources, Historic Preservation Division ("SHPD") shall be promptly notified. Subsequent work shall proceed after the SHPD authorization has been received and applicable mitigation measures have been implemented.

Moreover, the requirements under HRS Chapter 6E apply to the Petition Area and the property owners irrespective of any of the Conditions. Petitioner requests the release of Condition No. 5.

4. Condition No. 6 – Traffic Impact Mitigation.

On or before the completion of all improvements required by the Director of the DPW as a condition to Final Subdivision Approval, Petitioner shall cause, at its sole cost and expense, the construction of the following:

6a. Separate lanes for left-turns and right turns on the northbound approach of the Project Entrance to Old Haleakala Highway;

6b. A left-turn pocket on the westbound approach on Old Haleakala Highway to the Project Entrance;

6c. A taper at the intersection of Old Haleakala Highway and the Project Entrance to facilitate eastbound traffic turning right into the Project;

6d. An extended shared through/left turn lane and an extended separated right turn lane approximately 200 feet long on the Old Haleakala Highway approach to the signalized intersection of Haleakala Highway, Kula Highway and Old Haleakala Highway, which improvements shall include full curbs, gutters and sidewalk frontage improvements along the entire Project frontage on Old Haleakala Highway up to Kula Highway; and

6e. An extended separate right turn lane, approximately 150 feet long, on the makai bound approach of Haleakala Highway within

the available right-of-way and within the constraints of the existing drainage ditch.

Petitioner shall also dedicate a sufficient right-of-way and setback, at no cost to the State of Hawaii, along portions of lots 19 and 20 of the Project fronting Old Haleakala Highway, and along a portion of the pedestrian and utility right-of-way between such lots, as shown on the Petitioner's Conceptual Development Plan (Petitioner's Exhibit 8), for the purpose of accommodating the storage lanes, turn lanes and sidewalk improvements described in Condition 6(d) above.

D&O at 43-44.

Condition No. 6 has been satisfied. The County issued final subdivision approval for the Project in June 2009 (subdivision project 2.2896), after review by all applicable agencies to confirm necessary improvements were provided. Moreover, the certified as-built drawings for the Project were approved by the SDOT and several County agencies, including the County of Maui Department of Public Works ("DPW") and Department of Water Supply ("DWS"), confirming that required improvements were in place, as shown on Sheet 14.02 (Old Haleakala Highway Striping Plan).

With respect to Petitioner's obligation to dedicate a right-of-way to the State, as previously mentioned, Petitioner has been working closely with SDOT to dedicate Lot 59 (1,702 square feet) of File Plan No. 2488, which fronts Lot 19 and a portion of Lot 20. A tentative dedication map for Lot 59, along with the metes and bounds description, have been approved by SDOT. Conveyance documents are underway.⁴ As also noted previously, Petitioner dedicated a right-of-way parcel (Lot 58) to the County by way of Warranty Deed dated June 20, 2019, and recorded with in the Bureau on July 11, 2019 as Document No. A-71310109. Petitioner requests the release of Condition No. 6.

5. Condition No. 7 – Hazard Mitigation.

Within six months of issuance of this Decision and Order, the Petitioner shall properly test for the presence of any hazardous materials, and thereafter properly dispose of, the three (3) fifty-five

⁴ It is Petitioner's understanding that it must convey Lot 59 to the State of Hawai'i, Department of Land and Natural Resources, Board of Land and Natural Resources and not directly to SDOT.

(55) gallon drums currently on the Property. If such testing evidences the presence of hazardous materials, Petitioner shall conduct additional soil sampling at and in close proximity to the location of the drums on the Property to ascertain any potential impacts resulting therefrom and shall mitigate/cure any potential impacts resulting therefrom.

D&O at 44.

Condition No. 7 has been satisfied. Petitioner understands that it reported its compliance with this Condition by letter to the Commission dated November 16, 2005. On May 9, 2005, Vuich Environmental Consultants, Inc. conducted a site inspection on the Petition Area.⁵ Vuich inspected the three 55-gallon drums identified in the D&O, and determined that there was no remaining product, residue or odors related to the drums. The drums were subsequently removed from the Petition Area and disposed of in accordance with State and County regulations. Soil samples were also taken from the location of each drum and analyzed for contaminants, with a determination that no further work was necessary. The required investigations have been made, the three drums were properly removed, and no further work was required, as reported by Vuich Environmental Consultants, Inc. on June 6, 2005. Petitioner requests the release of Condition No. 7.

6. Condition No. 8 - Responsibility of the Homeowner's Association to Maintain the Property.

All landscaping in the Project but outside of the Residential Lots, and all easements, cul-de-sac turnarounds, and emergency vehicle, pedestrian and utility rights of way established by Petitioner as a part of the Project shall be maintained in good repair as long as the Project exists.

D&O at 44-45.

Condition No. 8 has been fully satisfied and the maintenance obligations for the Common Areas have been turned over to the HOA. All lots other than Residential Lots have been conveyed to the Kualono HOA under the HOA Deed. The HOA Deed requires the Kualono

⁵ Vuich Environmental Consultants, Inc. previously prepared a Phase I Environmental Site Assessment for the Petition Area, which was submitted to the Commission during the district boundary proceedings in this Docket. See D&O at FOF ¶72.

HOA, as the grantee thereunder, to observe, abide by and comply with all of the terms, conditions, covenants and restrictions contained in the Kualono CC&Rs, which contains provisions regarding the Kualono HOA's obligations to maintain the Common Areas (*i.e.*, the Heiau/Retention Basin Lot, five Roadway Lots, and two Pedestrian Lots). Petitioner requests the release of Condition No. 8.

7. Condition No. 9 – Water Service.

Prior to Final Subdivision Approval, Petitioner shall provide evidence, in the form of a fully executed agreement with DWS, whereby, among other things, the DWS shall allocate to and reserve for the Project any excess source and storage credits arising from the Kulamalu development. Petitioner shall provide adequate potable water transmission improvements for the Project as may be approved by the appropriate State agencies and the DWS.

D&O at 45.

Condition No. 9 has been fully satisfied. The County of Maui DWS, by letter dated September 22, 2017 to the County of Maui DPW Development Services Administration, confirmed that the water system improvements for the Project were completed, passed final inspection, and were accepted, and that all other requirements of the DWS were satisfied. Petitioner requests the release of Condition No. 9.

8. Condition No. 10 – Wastewater.

Petitioner or the owner of each Residential Lot shall provide adequate individual wastewater systems for such Residential Lot as determined by the DOH and the DPW.

D&O at 45.

Condition No. 10 has been satisfied. Wastewater within the Project is treated by individual wastewater systems ("IWS"), which are installed by the owner of each Residential Lot prior to occupancy. Under the Kualono CC&Rs, all purchasers of Residential Lots were informed that the Residential Lots were not served by the County wastewater system and that an IWS would be required. In addition, County law mandates that all buildings must be connected to an IWS (or other private system) where public wastewater service is not available, and the County will not issue building permits for the construction of the single-family residences on the

Residential Lots until an IWS has been constructed. *See* Maui County Code § 14-27.010. Appropriate requirements and safeguards are in place to ensure that all Residential Lots, when fully developed, will be serviced by an IWS. Petitioner requests the release of Condition No. 10.

9. Condition No. 11 – Civil Defense.

Petitioner shall fund and construct adequate solar-powered civil defense measures for the Project, as determined by the Department of Defense and the Office of Civil Defense of the State of Hawaii and the Civil Defense Agency of the County of Maui.

D&O at 45.

Condition No. 11 has been satisfied. Through its work with the State of Hawai'i Department of Defense, Hawai'i Emergency Management Agency ("**HEMA**"), Petitioner learned that SDOT had launched a State-wide program to install civil defense sirens on State-owned land. Petitioner subsequently secured an agreement with SDOT to participate in that program and allow Petitioner to install a civil defense siren on State-owned land in the vicinity of the Petition Area. By way of letter dated May 9, 2019, HEMA approved Petitioner's proposed siren location within a State-owned right-of-way near the Petition Area, which has been designated as siren MA155. The siren has been ordered and is expected to ship in the second quarter of 2020. Petitioner is also under contract with a contractor for the installation of the siren. Petitioner requests the release of Condition No. 11.

10. Condition No. 12 – Drainage Improvements.

Petitioner shall design and construct, at its sole cost and expense, drainage improvements required on the Property as a result of the Project to the satisfaction of the appropriate State agencies and the DPW.

D&O at 45.

Condition No. 12 has been satisfied. As previously discussed, Petitioner's as-built plans for the Project were approved by a number of State and County agencies, including DPW. Sheet 2.01 of the as-built plans (Site Plan) shows the location of all of the completed drainage improvements that were required by DPW and constructed for the Project. Petitioner requests the release of Condition No. 12.

11. Condition No. 13 – Solid Waste.

Petitioner shall cooperate with the DOH and the County of Maui to conform the Project with the program goals and objectives of Chapter 342G, HAW. REV. STAT., and the County of Maui's approved integrated solid waste management plan in accordance with a schedule and timeframe satisfactory to the DOH.

D&O at 45-46.

Condition No. 13 has been satisfied. The Construction Notes that were part of Petitioner's approved as-built plans (Sheets 20.01 and 20.02) contain sections addressing Water Pollution and Erosion Control Notes and the Waste Disposal Plan for the Project. The Waste Disposal Plan addressed the disposal of solid waste, hazardous waste, and sanitary waste for the Project. The requirements of the Waste Disposal Plan were implemented and followed throughout construction of the Project.

In addition, Section 5.08 of the Kualono CC&Rs provides that "[t]rash, garbage and domestic waste shall not be kept on any Lot except in containers, stored inside the dwelling, enclosed garage, or properly screened and not visible from any street or other Lot." The Kualono CC&Rs further prohibit the storage of new or used building materials on the Residential Lots except during times of active construction and require that all construction waste be promptly removed when the construction is complete. Petitioner requests the release of Condition No. 13.

12. Condition No. 14 – Best Management Practices.

Petitioner shall implement at the Property applicable best management practices to reduce or eliminate soil erosion and ground water pollution and effect dust control measures during and after the construction of the Project in accordance with the DOH's guidelines and shall assure best management practices are followed by individual lot owners through appropriate deed restrictions.

D&O at 46.

Condition No. 14 has been satisfied. The Construction Notes from Petitioner's approved as-built plans detail Best Management Practices ("BMPs") for the Project. These BMPs are described in the Water Pollution and Erosion Control Notes (Sheet 20.02), and further detailed in

the following sub-sections: General Notes; Erosion and Sediment Control Inspection and Maintenance Practices; Good Housekeeping Best Management Practices; and Site Specific Spill Prevention Plan. The Erosion Control Plan from the as-built plans (Sheet 15.01) depicts the location of the dust and silt fencing that was implemented for the Project, as well as the tire cleaning pad and staging and stockpile area.

BMPs are also required under the Kualono CC&Rs. Exhibit B to the Kualono CC&Rs provides the "Kualono Design and Construction Standards" and sets forth construction standards that each Residential Lot owner must comply with, including daily time limitations, guidelines for the storage of debris and other construction materials, and the requirement for sanitary facilities to be provided for construction workers. Moreover, the Kualono CC&Rs also: (a) prohibit Residential Lot owners from carrying out activities that may become an annoyance or nuisance, including, but not limited to, activities that cause dust, noise, or odors; (b) require each Residential Lot owner to keep their property in good order and repair, and to maintain irrigation and drainage free and clear of debris; and (c) require each Residential Lot owner to store waste in a tidy fashion. Petitioner requests the release of Condition No. 14.

13. Condition No. 15 – Water Conservation Measures.

Petitioner shall implement water conservation measures and best management practices for the Project such as use of indigenous and drought tolerant plants and turf, and shall incorporate such measures into common area landscape planting.

D&O at 46.

Condition No. 15 has been satisfied. Native plants appropriate for the upcountry Maui climate were planted, including koa, ohia, and akia. Additionally, drip irrigation, where appropriate, and rain sensors were installed as water conservation measures. Petitioner requests the release of Condition No. 15.

14. Condition No. 16 – Energy Conservation Measures.

Petitioner shall implement into the Project energy conservation measures such as use of solar energy and solar heating.

D&O at 46.

Condition No. 16 has been satisfied. Petitioner has encouraged energy conservation measures in the Kualono CC&Rs by approving the use of alternative energy in the form of roof-top solar heating and photovoltaic panels on the Residential Lots. In addition, solar water heaters are required by law for each of the single-family residences to be developed on the Residential Lots. *See* HRS § 196-6.5(a) ("On or after January 1, 2010, no building permit shall be issued for a new single-family dwelling that does not include a solar water heater system that meets the standards established pursuant to section 269-44, unless the chief energy officer of the Hawaii state energy office approves a variance."). Petitioner requests the release of Condition No. 16.

15. Condition No. 17 – Air Quality Monitoring.

Petitioner shall participate in an air quality monitoring program during the construction of the Project as specified by the DOH.

D&O at 46.

Condition No. 17 has been satisfied in that the State of Hawai'i Department of Health did not require an air quality monitoring program for the construction of the Project. The Project is now fully constructed. Petitioner requests the release of Condition No. 17.

16. Condition No. 18 – Notification of Potential Nuisances.

Petitioner shall notify all prospective buyers and/or lessees of the Residential Lots of potential odor, noise and dust pollution resulting from adjacent agricultural uses.

D&O at 47.

Condition No. 18 has been satisfied. All prospective purchasers of Residential Lots were informed of the potential for nuisances relating to adjacent agricultural uses. Petitioner's Public Offering Statement for the Residential Lots notified potential purchasers that their lots may be subject to nuisances from agricultural activities surrounding the Petition Area, including odor, smoke, dust, noise, heat, and agricultural chemicals. In addition, the Limited Warranty Deed with Reservations and Covenants for each Residential Lot contained a clause notifying the purchaser that the Petition Area is located in the vicinity of lands that are used for farming, ranching, and/or other agricultural uses that generate noise, dust, odors, or other impacts.

Moreover, Section 18 of the Kualono CC&Rs notified purchasers that the Project is in close proximity to lands that are either in active agricultural use or that may be put to such use in the future, and that those agricultural uses may result in odors, smoke, dust, noises, heat, agricultural chemicals, particulates and similar substances, and other similar nuisances. The Kualono HOA and/or owners of Residential Lots have provided and will continue to provide all lessees with copies of the Kualono CC&Rs. The Kualono HOA has been notified to ensure a process is in place for Residential Lot owners to notify any of their lessees. Petitioner requests the release of Condition No. 18.

17. Condition No. 19 – Hawai'i Right to Farm Act.

Petitioner shall notify all prospective buyers and/or lessees of the Residential Lots that the Hawaii Right to Farm Act, Chapter 165, HAW. REV. STAT., limits the circumstances under which pre-existing farm activities may be deemed a nuisance.

D&O at 47.

Condition No. 19 has been satisfied. All potential purchasers and lessees of the Residential Lots are informed of the Hawai'i Right to Farm Act, found at Chapter 165, HRS. The Limited Warranty Deed with Reservations and Covenants for each Residential Lot notified potential purchasers that the Project is located near lands zoned or designated "Agricultural," that such lands may be used for farming, ranching, and/or other agricultural uses, and that the Right to Farm Act limits the circumstances under which such pre-existing agricultural uses may be deemed a nuisance. The Kualono HOA has been notified to ensure a process is in place for Residential Lot owners to notify any of their lessees. Petitioner requests the release of Condition No. 19.

18. Condition No. 20 - Preservation of Access.

The access rights of native Hawaiians who customarily and traditionally have used the Property for access on site or to other areas for subsistence, cultural, and religious practices shall be preserved.

D&O at 47.

Condition No. 20 has been satisfied. Petitioner reports that no access for traditional and

customary practices has been requested, and no access has been denied. Furthermore, the Heiau/Retention Basin Lot was established to "protect the native Hawaiian practitioner's exercise of customary and traditional practices in the subject area; to ensure appropriate public access to the Heiau located within the Property; to ensure the availability of natural and cultural resources for present and future generations; to promote the practice of ohana and conservation values with respect to the physical and cultural landscape." See Condition No. 4. The Kualono HOA is obligated to maintain the Heiau/Retention Basin Lot in perpetuity. Therefore, appropriate access to the Property shall be ongoing. Petitioner requests the release of Condition No. 20.

19. Condition No. 21 – Compliance with Representations to the Commission.

Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. Failure to so develop the Property may result in reversion of the Property to its former classification, or a change to a more appropriate classification.

D&O at 47.

Condition No. 21 has been satisfied. As discussed *supra*, all of the Residential Lots have been sold to individual purchasers and all subdivision improvements have been completed. The Project, as described in the D&O, has been fully developed in substantial compliance with the D&O and Petitioner's representations to the Commission. Petitioner requests the release of Condition No. 21.

20. Condition No. 22 – Notice of Change to Ownership Interests.

Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership of the Property, prior to the development of the Property. This Condition shall be satisfied by giving notice only, and shall not require approval by the Commission. This Condition does not apply to the sale of any Residential Lot after Final Subdivision approval.

D&O at 47.

The Project has been fully developed as represented by Petitioner to the Commission. Therefore, by its terms, Condition No. 22 no longer applies. Petitioner requests the release of

Condition No. 22.

21. Condition No. 23 – Annual Reports.

Petitioner shall timely provide without any prior notice, annual reports to the Commission, OP and the Planning Department in connection with the status of the Project, administration for the maintenance of the Heiau and its preservation program, and Petitioner's progress in complying with the Conditions. The annual report shall be submitted in a form prescribed by the executive officer of the Commission. The annual report shall be due prior to or on the anniversary date of the Commission's approval and entry of this Decision And Order.

23a. Upon the sale of all of the Residential Lots and establishment of the Homeowner's Association, the Petitioner will transfer to the Homeowner's Association the responsibility of providing annual reports to the Commission.

D&O at 48.

Petitioner has complied with Condition No. 23. The Project, as described and defined in the D&O, has been fully developed in substantial compliance with the D&O and Petitioner's representations to the Commission. All of the Project improvements have been completed and all Residential Lots have been sold. Petitioner has been compliant with the Commission's annual reporting requirement under Condition No. 23, but now that the Project is completed, Petitioner seeks a formal release of Condition No. 23 so as not to burden the Commission and its staff with the obligation to review annual reports that are mere redundancies at this time. Petitioner also wants to avoid transferring the burden of redundant annual reporting to the Kualono HOA. Petitioner requests the release of Condition No. 23.

22. Condition No. 25 – Notice of Imposition of Conditions.

Within seven (7) days of the delivery to Petitioner of these Findings of Fact, Conclusions of Law, and Decision and Order for the subject reclassification, Petitioner (a) shall record in the Bureau of Conveyances of the State of Hawaii a statement that the Property is subject to the Conditions; and (b) shall file a copy of such recorded statement with the Commission.

D&O at 48.

Condition No. 25 has been fully satisfied. Petitioner recorded a Certificate of Conditions in the Bureau on May 26, 2005, as Document No. 2005-105309, which document contained a notice of the D&O, a property description of the Petition Area, and a list of all of the Conditions. Petitioner requests the release of Condition No. 25.

B. TWO CONDITIONS NOT REQUESTED FOR RELEASE.

1. Condition No. 2 - Ohana Units.

Not more than forty-nine (49) "dwelling units" (as this term is defined in §19.04.040, Maui County Code) shall be constructed or maintained on the Property, and not more than one (1) dwelling unit shall be constructed or maintained on each Residential Lot. No "accessory dwellings" (as this term is defined in §19.04.040, Maui County Code) or ohana units shall be permitted in the Project.

D&O at 38.

Petitioner has satisfied Condition No. 2. However, to the extent Condition No. 2 has ongoing obligations, those obligations would fall to the owners of the Residential Lots and the Kualono HOA. In terms of Petitioner's efforts toward satisfaction, the Kualono CC&Rs contain an express provision prohibiting more than one dwelling unit on each Residential Lot.⁶ The Kualono CC&Rs also contain a provision prohibiting "Accessory Dwelling Units."⁷ However, to

⁶ Each deed from Petitioner to a Residential Lot owner includes a distinct covenant under which the purchaser explicitly agreed to observe and comply with the Kualono CC&Rs.

⁷ Sections 5.02 and 5.03 of the Kualono CC&Rs provide as follows:

5.02 One Dwelling Per Lot. As set forth in the LUC Conditions, Kualono is limited to a maximum of forty-nine (49) dwellings. Accordingly, except as set forth in Section 5.03 below, only one dwelling may be constructed, placed or maintained on each Lot. If two Lots are consolidated into a single Lot, two dwellings may be constructed on the consolidated Lot if permitted by applicable Law. No dwellings may be constructed on the Common Areas.

5.03 Accessory Dwellings. "Accessory Dwellings" as defined in Maui County Code Chapter 19.35 are not permitted due to the limit on dwellings in the LUC Conditions. However a Lot Owner may construct an Accessory Dwelling if the Owner first secures (a) a waiver or modification of the LUC Condition that allows an accessory dwelling without impairing the ability of all other Owners to build at least one dwelling per Lot, (b) the approval of the Design Review Committee, and (c) the approval of the Declarant, so long as it owns any Lots.

the extent that the Commission intended Condition No. 2 to impose an ongoing obligation, Petitioner is not seeking release of Condition No. 2 based upon the understanding that such a release could be sought by those with an ownership interest in the Petition Area in the future.

2. Condition No. 24 - Release of Conditions.

Petitioner shall have the right to seek from the Commission full or partial release of any of the Conditions as to all or any portion of the Property upon assurance acceptable to the Commission of satisfaction of such Conditions.

D&O at 48.

Because Petitioner has not requested the release of Condition No. 2, and because those with an ownership interest in the Petition Area may wish to seek a release of Condition No. 2 in the future, Petitioner is not seeking a release of Condition No. 24.

C. TWO CONDITIONS REQUESTED FOR MODIFICATION.

1. Condition No. 4 - Archaeological.

Petitioner has satisfied the intent and purpose of Condition No. 4 and also satisfied several of the technical requirements under Condition No. 4. However, certain other highly technical requirements under Condition No. 4 have proven impracticable, as further described herein, and for that reason Petitioner seeks the Commission's approval of some modifications to the language so that it can be implemented in full.

Condition No. 4 is provided in subparts (a) through (i) and spans D&O pages 38 through 42. In an effort to make Petitioner's proposed amendments easy to follow, a table showing the original condition, Petitioner's proposal with respect to that condition, and a brief rationale, is provide in the table below, followed by a more detailed discussion of the proposed revisions.

<u>D&O Language</u>	<u>Petitioner's Proposal</u>	<u>Rationale</u>
To protect the native Hawaiian practitioner's exercise of customary and traditional practices in the subject area; to ensure appropriate public access to the Heiau located	Retain as is.	

<p>within the Property; to ensure the availability of natural and cultural resources for present and future generations; to promote the practice of ohana and conservation values with respect to the physical and cultural landscape:</p>		
<p>4a. Petitioner shall establish on the Heiau/Retention Basin Lot, permanent 60 foot wide and 100 foot wide buffer zones around the Heiau, with a rock wall of not less than four (4) feet high demarcating the perimeter of the 60 foot buffer zone. Within 6 months of the filing of this Decision and Order, Petitioner shall use reasonable efforts to request, but shall not be required to obtain, the consent and cooperation of the owner of the parcel of land immediately adjacent to the Heiau/Retention Basin Lot to extend the permanent 100 foot wide buffer zone on such adjoining lot. Within six months of Petitioner receiving notice that the adjacent property has changed ownership, Petitioner shall use reasonable efforts to request the consent and cooperation to extend the 100 foot wide buffer on that adjoining lot and shall continue to use such reasonable efforts with each successive owner of the adjacent parcel until such request is agreed to.</p>	<p>4a. Petitioner shall establish on the Heiau/Retention Basin Lot, permanent 60 foot wide and 100 foot wide buffer zones around the Heiau, with a rock wall of not less than four (4) feet high demarcating the perimeter of the 60 foot buffer zone. Within 6 months of the filing of this Decision and Order, Petitioner shall use reasonable efforts to request, but shall not be required to obtain, the consent and cooperation of the owner of the parcel of land immediately adjacent to the Heiau/Retention Basin Lot to extend the permanent 100 foot wide buffer zone on such adjoining lot. Within six months of Petitioner receiving notice that the adjacent property has changed ownership, Petitioner shall use reasonable efforts to request the consent and cooperation to extend the 100 foot wide buffer on that adjoining lot and shall continue to use such reasonable efforts with each successive owner of the adjacent parcel until such request is agreed to.</p>	<p>This condition has been satisfied. To the extent this condition was intended to impose ongoing obligations, Petitioner requests only a deletion of the portion of the condition that was required to be satisfied by November 2005 (i.e., within 6 months from the issuance of the D&O), as the required actions have been taken.</p> <p>Most recently, Petitioner again conferred with the adjacent property owners in 2018, and they confirmed that they were not willing to extend the buffer zone onto their properties.</p>
<p>4b. Petitioner shall include in the CC&Rs provisions which prohibit public access, through</p>	<p>4b. Petitioner shall include in the CC&Rs provisions which prohibit public access, through</p>	<p>This condition has been satisfied. To the extent this condition was intended to</p>

<p>the use of appropriate signage, to the 60 foot wide buffer zone, and, with the exception of the wall around the 60 foot buffer zone and irrigation lines in the area between the perimeters of the 60 foot wide buffer zones, shall further prohibit the construction of any structures within the entire 100 foot wide buffer zones. Petitioner shall also install appropriate informational signage at the perimeters of the 100 foot wide buffer zone and the Heiau to aid in its preservation.</p>	<p>the use of appropriate signage, to the 60 foot wide buffer zone, and, with the exception of the wall around the 60 foot buffer zone and irrigation lines in the area between the perimeters of the 60 foot wide buffer zones, shall further prohibit the construction of any structures within the entire 100 foot wide buffer zones. Petitioner shall also install appropriate informational signage at the perimeters of the 100 foot wide buffer zone and the Heiau to aid in its preservation.</p>	<p>impose ongoing obligations, Petitioner requests only a deletion of the portion of the condition that required the installation of signage because that requirement has been fulfilled consistent with the SHPD-approved Preservation Plan.</p>
<p>4c. Petitioner shall cause the formation of a three (3) person committee, composed of a representative of the Homeowners' Association pursuant to a provision in the CC&Rs, a representative from OHA, and a representative from the Kupuna Council of Maui (the "Curator Selection Committee"), to select the Curator, who shall (a) oversee the maintenance of the Heiau by the Homeowners' Association; and (b) direct and coordinate the initial installation by the Petitioner and the perpetual maintenance by the Homeowners' Association of the native plantings in the 60 foot wide buffer zone.</p>	<p>4c. Petitioner shall cause the formation of a three (3) person committee, composed of a <u>representative two representatives</u> of the Homeowners' Association pursuant to a provision in the CC&Rs, a representative from OHA, and a <u>and one representative from of the Kupuna the Hawaiian Civic Club, Aha Moku Council, or similar Hawaiian entity</u> of Maui (the "Curator Selection Committee"), to select the Curator, who shall (a) oversee the maintenance of the Heiau by the Homeowners' Association; and (b) direct and coordinate the initial installation by the Petitioner and the perpetual maintenance by the Homeowners' Association of the native plantings in the 60 foot wide buffer zone. 4d. Petitioner shall establish the Curator Selection Committee and its</p>	<p>Project documents and corporate bylaws were prepared for the Curator Selection Committee ("CSC") in the formulation required under this condition. However, implementation of the specific required composition of the CSC has proven impossible. Petitioner proposes a modification to the composition of the CSC together with requiring input from the Office of Hawaiian Affairs.</p>

	<p>governing laws including succession plans no later than six months from the issuance of this Decision and Order. Upon establishment of the Curator Selection Committee, the Petitioner and Curator Selection Committee shall provide a written report to the Commission, OP and the Planning Department, with details as to the Curator Selection Committee composition and structure, procedures and plan of action to be approved by the Commission. <u>The Curator Selection Committee shall seek input from Office of Hawaiian Affairs on its proposed selection of a Curator prior to retaining such Curator.</u></p>	
<p>4d. Petitioner shall establish the Curator Selection Committee and its governing laws including succession plans no later than six months from the issuance of this Decision and Order. Upon establishment of the Curator Selection Committee, the Petitioner and Curator Selection Committee shall provide a written report to the Commission, OP and the Planning Department, with details as to the Curator Selection Committee composition and structure, procedures and plan of action to be approved by the Commission.</p>	<p>Delete.</p>	<p>Petitioner satisfied its obligations under 4d, as described in Petitioner's September 28, 2018 letter to the Executive Officer of the Commission.</p>
<p>4e. The Curator shall monitor the preservation and</p>	<p>4e. The Curator shall monitor the preservation and</p>	<p>Amendment in recognition that the obligations under the</p>

<p>maintenance of the Heiau and the effectiveness of the Petitioner's actions to limit access to and/or preserve and maintain the Heiau. The Curator shall provide recommendations consistent with this Decision and Order to the Commission with respect to the maintenance and/or preservation of the Heiau and any other traditional and customary native Hawaiian practices and cultural resources on the Property.</p> <p>The Curator shall provide reports on an annual basis describing items and issues relating to the preservation and maintenance of the Heiau and other traditional and customary native Hawaiian practices and cultural resources on the Property and discussions with the adjoining landowner with respect to the buffer on the adjoining landowner's property.</p>	<p>maintenance of the Heiau and the effectiveness of the Petitioner's actions to limit access to and/or preserve and maintain the Heiau. to <u>maintain consistency with the requirements under the Preservation Plan.</u> The Curator, <u>or the Curator Selection Committee based upon information provided by the Curator,</u> shall, upon request, provide recommendations consistent with this Decision and Order to the Commission with respect to the maintenance and/or preservation of the Heiau and any other traditional and customary native Hawaiian practices and cultural resources on the Property. The Curator shall provide reports <u>provide a report to the Commission on an annual basis describing items and issues relating to the</u> <u>on the maintenance and</u> preservation and maintenance of the Heiau and any other traditional and customary native Hawaiian practices and cultural resources on the Property and discussions with the adjoining landowner with respect to the buffer on the adjoining landowner's property.</p>	<p>SHPD-approved Preservation Plan are consistent with, but more specific than, the conditions imposed under the D&O. Further amendment requested to requirement to report to the Commission.</p>
<p>4f. Petitioner shall initially landscape with grass and install the necessary irrigation lines in the area between the 60 foot wide buffer zone and the perimeter of the 100 foot wide buffer zone. Petitioner shall, in consultation with the</p>	<p>Delete.</p>	<p>Condition has been satisfied.</p>

<p>Curator, initially install appropriate native plantings, without any irrigation lines, in 60 foot wide buffer zone.</p>		
<p>4g. Upon the establishment of the Homeowners' Association, said Homeowners' Association shall maintain in perpetuity the Heiau/Retention Basin Lot. The CC&R's will include a condition to the effect that the Homeowners' Association shall bear the cost including reasonable out of pocket costs, if any, of the Curator, such that the Curator may perform the duties prescribed in this Decision and Order.</p>	<p>4g. Upon the establishment of the Homeowners' Association, said <u>The</u> Homeowners' Association shall maintain in perpetuity the Heiau/Retention Basin Lot. The CC&R's will include a condition to the effect that the Homeowners' Association shall bear the cost including reasonable out of pocket costs, if any, of the Curator, such that the Curator may perform the duties prescribed in this Decision and Order.</p>	<p>Minor technical amendment to reflect the fact that the HOA has been established.</p>
<p>4h. The view planes from the Heiau will be preserved by prohibiting (a) the construction of any "structure" (as this term is defined in §19.04.040, Maui County Code), with the exception of the Retention Basin, the 4 foot high walls around the 60 foot wide buffer zone and the Retention Basin, and irrigation line on that portion of the Property north of the Heiau; and (b) the construction on the Property of any structure or landscaping that blocks the view plane from the Heiau to the summit of Haleakala (but structures that do not block such view plane may be constructed on the Property). This condition will also be included in the CC&R's and in appropriate deed restrictions.</p>	<p>Delete.</p>	<p>Condition has been satisfied.</p>

<p>4i. Petitioner shall comply with any and all conditions proposed by SHPD for the Heiau. Within one month of notification from SHPD, Petitioner shall inform the Commission that SHPD has approved Petitioner's commitments, if any, for the preservation and maintenance of the Heiau, and has determined that any historic preservation mitigation plan and archaeological data recovery sub-plan have been successfully implemented.</p>	<p>Delete.</p>	<p>Condition has been satisfied.</p>
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Petitioner imposed all appropriate requirements related to the maintenance of the Heiau/Retention Basin Lot, the establishment of the Curator Section Committee ("CSC"), and the role of the Curator, through the Kualono CC&Rs, relevant portions of which are provided below:

16.02 Buffer Zones. The Heiau/Retention Lot contains two (2) concentric buffer zones surrounding the heiau, as more particularly shown on the Plan: (a) the "60-Foot Buffer Zone" extends out from the perimeter of the heiau by sixty (60) feet (in the general location shown on the Plan), and (b) the "100-Foot Buffer Zone" extends out from the perimeter of the heiau by one hundred (100) feet, in the general location shown on the Plan. No public access is permitted within the 60-Foot Buffer Zone. The installation or construction of any structures or other improvements within the 100-Foot Boundary Zone is strictly prohibited (except for any boundary wall around the 60-Foot Buffer Zone and irrigation lines that may be installed between the 60-Foot Buffer Zone and the 100-Foot Buffer Zone perimeters). Neither zone may be disturbed or moved. The Association shall protect, maintain, monitor, and preserve these zones as a common expense of the Association, which obligations include the installation and maintenance of appropriate informational signage required to be installed to aid in the preservation of the buffer zones and the heiau.

16.03 Curator Selection Committee. The Declarant will cause the formation of a Curator Selection Committee, which committee is

charged with the duties and empowered with the rights set forth in its Bylaws. The Curator Selection Committee shall be comprised of three (3) persons: (i) a representative of the Association, (ii) a representative from the Office of Hawaiian Affairs, and (iii) a representative from the Kupuna Council of Maui. These representatives shall be selected pursuant to the Curator Selection Committee's Bylaws.

16.04 Curator. The Curator Selection Committee shall select a Curator to oversee the maintenance and preservation of the heiau by the Association, and direct and coordinate the installation and maintenance of native plantings within the 60-Foot Buffer Zone, as set forth in the Curator Selection Committee's Bylaws. The Association shall also bear the reasonable out of pocket costs, if any, incurred by the Curator, in connection with the performance of the Curator's duties.

Petitioner's additional measures of compliance with Condition No. 4 are described below with specific reference to the applicable subpart of Condition No. 4. The obligations of the CSC are documented in the Bylaws of the Kualono Heiau Curator Selection Committee ("**CSC Bylaws**"), also discussed in more detail below.

Condition No. 4a. Condition No. 4a has been satisfied. Petitioner established permanent 60-foot and 100-foot buffer zones around the Heiau/Retention Basin Lot. These buffers are depicted on the Project's File Plan 2488, which was recorded in the Bureau. A 4-foot high rock wall has been constructed to demarcate the boundary of the 60-foot buffer zone.

After issuance of the D&O, Petitioner contacted the owners of the parcels immediately adjacent to the Heiau/Retention Basin Lot (TMK Nos. (2) 2-3-009:031, 032). The owners, however, were not willing to extend the 100-foot buffer zone onto their parcels. Therefore, Petitioner proceeded to establish the Heiau/Retention Basin Lot with the required buffers only within the Petition Area. Most recently, Petitioner again conferred with the adjacent property owners in 2018, and they confirmed that they were not willing to extend the buffer zone onto their properties. As proposed for modification, Condition No. 4a continues the requirements for the buffers (which are incorporated into the Project documents), and the obligation to seek consent from the neighboring property under the stated circumstances, but eliminates the language that has been fully satisfied and is not of an ongoing nature.

Condition No. 4b. Condition No. 4b has been satisfied. Petitioner has incorporated the necessary provisions into the Kualono CC&Rs. See Kualono CC&Rs Sections 16.02 through 16.04, recited above. Nevertheless, in recognition of the likely intent of the Commission to make these requirements ongoing, Petitioner is not seeking a release of Condition No. 4b. That said, Petitioner has completed the specific action item of installing informational signage. Appropriate informational signage has been installed at the perimeters of the 100-foot-wide buffer zone, in accordance with the SHPD-approved Preservation Plan (discussed below), which called for the following: "bronze plaque, which measures 18 inches by 10 inches, should be posted at two locations around the 100 ft. perimeter. The plaque will be inscribed, 'Access is permitted to this open space which surrounds a Native Hawaiian Religious Structure-SIHP 50-50-05-2701. Please Respect This Area.'" Because the signage has been installed, Petitioner seeks the deletion of that portion of the language in Condition No. 4b.

Condition No. 4c. Petitioner has satisfied the intent of Condition No. 4c, but due to impracticability, satisfaction entailed some minor deviation from the precise requirements of Condition No. 4c. Petitioner established the CSC and the CSC Bylaws. Condition No. 4c required that the three members of the CSC be: a representative from the Kualono HOA, a representative from the Office of Hawaiian Affairs ("OHA"), and a representative of the Kupuna Council of Maui. However, Petitioner was not able to get a member from the Kupuna Council of Maui, as the Kupuna Council of Maui appears to be defunct, and OHA does not appear to have a system to serve as a member of the CSC.

As described in Petitioner's September 28, 2018 letter to the Executive Officer of the Commission ("**2018 CSC Letter**"), incorporated herein by reference, the HOA representative on the CSC is Residential Lot owner Leahi Hall. Petitioner sought input as to the selection of the Curator from OHA in 2017 and 2018. Thelma Shimaoka of OHA agreed to attend a CSC meeting and relay any information or questions to OHA's Compliance and/or Advocacy Division, as appropriate. As reported in the 2018 CSC Letter, after consultation with Commission staff, Petitioner reached out to Na Kupuna O Maui to request a representative to sit on the CSC (due to the inability to get a representative from the Kupuna Council). In response, Patty Nishiyama volunteered to take over the seat that was supposed to be held by a member of

the Kupuna Council of Maui.⁸

In order to meet the intent of the CSC, and in recognition that the implementation of the Condition as currently drafted is not possible, Petitioner requests an amendment that would call for the CSC to include one representative from the Hawaiian Civic Club, Aha Moku Council, or similar Hawaiian entity and two members from the Kualono HOA, and for the CSC to seek input from OHA on its proposed selection of a Curator prior to retaining such Curator.

The CSC selected Mr. Sam Kaai to be the Curator. He is from the area in the vicinity of the Project and is knowledgeable about the archaeological and cultural aspects of the area. The selection of Mr. Kaai was described in Petitioner's 2018 CSC Letter. However, Mr. Kaai recently left Maui and the CSC is working to identify another Curator that resides on Maui and is knowledgeable about the area, however these efforts are complicated by the impossibility of complying with the strict requirements of the CSC composition under Condition No. 4. The Kualono CC&Rs (excerpts of which are provided above) place the responsibility for the maintenance of the Heiau/Retention Basin Lot in accordance with approved plans on the Kualono HOA.

Condition 4d. Petitioner satisfied its obligations under Condition No. 4d. Petitioner provided the Commission with a copy of the CSC Bylaws with Petitioner's transmittal of the 2018 CSC Letter. The purpose of the CSC is to select, and, if necessary, replace the Curator, and also to ensure that the Curator carries out its responsibilities as required under the CSC Bylaws. The responsibilities of the Curator are provided in Article II, Section B of the CSC Bylaws.

Condition No. 4d requires the CSC's "composition and structure, procedures and plan of action to be approved by the Commission." Petitioner has satisfied its obligations under this condition. Through the 2018 CSC Letter, and consistent with the requirements of Condition No. 4d, Petitioner sought the Commission's approval of the CSC and CSC Bylaws. To date, no response from the Commission has been provided. Through this Motion the Commission has another opportunity to examine the CSC and Petitioner therefore requests the deletion of

⁸ The current composition of the CSC is Leahy Hall, a member of the Kualono HOA, and Patty Nishiyama of Na Kupuna O Maui.

Condition No. 4d.

Condition No. 4e. Petitioner has satisfied its obligations under Condition 4e by imposing all appropriate requirements of the Curator within the CSC Bylaws. The CSC Bylaws set forth the following responsibilities for the Curator: (a) oversee the maintenance of the Heiau by the Kualono HOA; (b) oversee the initial installation (by Petitioner) and perpetual maintenance (by the Kualono HOA) of the native landscaping within the 60-foot buffer zone; (c) monitor the effectiveness of Petitioner's efforts to limit access to and preserve and maintain the Heiau; (d) provide annual reports to the CSC; and (e) carry out the responsibilities of the Curator required under the D&O. The CSC Bylaws, therefore, satisfy the requirements of Condition No. 4e. However, the concepts underlying Condition No. 4e are to some extent intended to be ongoing obligations, and those obligations have been more fully presented in the SHPD-approved Preservation Plan.

On or about August 27, 2008, Petitioner submitted its *Final Preservation Plan for Heiau Site 50-50-05-2701 Located in Makaeha Ahupua'a, Makawao District, Island of Maui, TMK: 2-3-11:01 and 02 ("Preservation Plan")* to SHPD, and SHPD approved the Preservation Plan by way of letter dated September 19, 2008. The short-term measures, *i.e.* during Project construction, were put into place consistent with the requirements of the Preservation Plan, and all long-term measures have been established. Namely, the establishment of the buffers, signage, and measures for access and landscaping as follows:

BUFFER ZONE OF 100 FT. Demarcation-The 100 ft. buffer zone shall not be demarcated by a surface structure along its perimeter.

Landscaping-The area between the 100 ft. and 60 ft. buffer zone is designated as a 40 ft. swath. This 40 ft. area can be irrigated and planted with a grass lawn, trees and shrubs. An irrigation system may also be installed within this zone. Mechanical clearing is also permitted within the 40 ft. swath/zone.

Access-Access is permitted within this 40 ft. zone.

Signage-A bronze plaque, which measures 18 inches by 10 inches, should be posted at two locations around the 100 ft. perimeter. The plaque will be inscribed, "Access is permitted to this open space which surrounds a Native Hawaiian Religious Structure-SIHP 50-50-05-2701. Please Respect This Area. "

Usage-This area is envisioned to be utilized as open space by the residents of Kualono, however this open space is not intended to fulfill any County park requirements. This buffer area is a no building zone (except for the rock wall along the 60 ft. boundary line). The no-build requirement shall aide in preserving the view planes towards the summit of Haleakala (mauka) and toward the sea (makai).

THE BUFFER ZONE OF 60 FT. Demarcation-The perimeter of the 60 ft. buffer zone shall be demarcated by a 4.0 ft. high rock wall.

Landscaping-Only Native plantings and irrigation shall be permitted within the 60 ft. buffer zone. A detailed landscaping plan might not be established until a Native Hawaiian group "Curator" accepts stewardship over the site. The organization can orchestrate the installation and maintenance of the native plantings. Consultation with persons knowledgeable about pre-Contact environments, and traditional types of landscaping around a heiau should be consulted prior to developing and implementing a landscaping plan. Mechanical construction equipment may grub and grade the existing grasses and fallow pineapple within the 60 ft. buffer zone. No deep excavations should occur within this 60 ft. zone.

Access-Access within the 60 ft. buffer zone will be restricted and controlled by the Native Hawaiian Group-"Curator" selected to maintain and preserve this significant historic property. Access will be through an entrance in the rock wall located near the vehicular turn-around depicted on Figure 4.

Signage- Bronze plaques measuring 18 inches by 10 inches shall be affixed at two locations (entrance and southwestern boundary) along the rock wall. The plaques may be inscribed with "Native Hawaiian Religious Site 50-50-05-2701, Please Respect This Area-KAPU-Do Not Enter-Access is Controlled Call the Caretaker for Permission."

Usage-The 60 ft. swath and the heiau structure shall be utilized for traditional religious practices deemed appropriate by the Curator.

Restoration-The selected Native Hawaiian Group-"Curator", knowledgeable researchers and archaeologists may restore this site in the future. Funding for restoration will not be imposed on the residents of Kualono.

The obligations under the Preservation Plan are consistent with, but more specific than,

the conditions originally imposed by the Commission, but the current language could raise ambiguities as to which obligations are to be followed. As such, Petitioner proposes to modify Condition No. 4e to make it clear that the Curator's obligations are as set forth under the Preservation Plan. Additionally, in keeping with the desire to lessen administrative burdens upon the Kualono HOA and CSC in light of the fact that the Project is fully completed, Petitioner seeks a minor change to require reports to the Commission upon request, and to make it clear that either the Curator or the CSC, based upon information provided by the Curator, can submit such reports to the Commission.

Condition No. 4f. Condition No. 4f has been satisfied. Petitioner installed grass and irrigation within the area between the 100-foot buffer and 60-foot buffer zones. Petitioner also installed appropriate native plants within the 60-foot wide buffer zone. Temporary irrigation lines have been installed within the 60-foot buffer area in order to establish the plants and will be removed at the appropriate time. As with all other landscaping within the Common Areas, the Kualono HOA is responsible for maintaining the landscaping within and around the Heiau. Because the requirements under Condition No. 4f have been completed, Petitioner requests deletion of this condition.

Condition No. 4g. Condition No. 4g appears to be intended as an ongoing obligation. The Heiau/Retention Basin Lot has been turned over to the Kualono HOA, which has the obligation to protect, maintain, monitor, and preserve the area under the Kualono CC&Rs. The Kualono CC&Rs also obligate the Kualono HOA to bear the reasonable out-of-pocket costs, if any, incurred by the Curator in connection with the performance of the Curator's duties. For these reasons Petitioner seeks a minor modification to Condition No. 4g in recognition that the Kualono HOA has been established.

Condition No. 4h. Condition No. 4h has been fully satisfied. Section 16.02 of the Kualono CC&Rs prohibits the installation or construction of any structures or other improvements within the 100-foot buffer zone. To protect the views of Halekala from the Heiau, Petitioner recorded a view corridor easement ("**Easement V-1**") over Lot 31 of File Plan 2488, which is immediately adjacent to the Heiau/Retention Basin Lot. The Kualono CC&Rs provide that "Any building, structure, or landscaping located within Easement V-1 [described in metes

and bounds in Exhibit D of the CC&Rs] on Lot 31 shall not exceed a Height of four (4) feet." As such, Petitioner requests the deletion of Condition No. 4h as fully satisfied.

Condition No. 4i. Condition No. 4i has been fully satisfied. As noted above, SHPD approved the Preservation Plan and all requirements for the Heiau/Retention Basin Lot under the Preservation Plan have been implemented and are considered ongoing obligations (see proposed revision to Condition No. 4c). As such, Petitioner requests the deletion of Condition No. 4i.

2. Condition No. 26 - Recordation of Conditions.

Petitioner shall record the Conditions with the Bureau of Conveyances of the State of Hawaii pursuant to Section 15-15-92, Hawaii Administrative Rules.

D&O at 49.

Condition No. 26 has been fully satisfied. Petitioner recorded a Certificate of Conditions in the Bureau on May 26, 2005, as Document No. 2005-105309, which document contained a notice of the D&O, a property description of the Petition Area, and a list of all of the Conditions. Pending the Commission's decision on this Motion, Petitioner will have the Certificate of Conditions removed as an encumbrance on title to the Petition Area. Upon disposition of this Motion by the Commission, Petitioner will record the remaining Conditions consistent with the requirements of Condition No. 26. Petitioner anticipates that the remaining and/or modified Conditions would be recorded through an amended and restated Certificate of Conditions.

V. PROPER SERVICE OF MOTION

Pursuant to HAR § 15-15-94, Petitioner must serve a copy of this Motion "on all parties to the boundary amendment proceeding in which the condition was imposed or in which the order was issued, and to any person that 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." This Motion was properly served.

The Petition Area is now owned by the Kualono HOA (as to the Common Areas (Lots 50

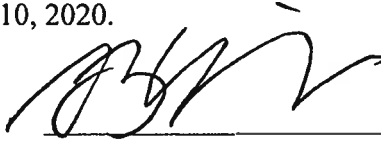
through 57)), the Residential Lot owners, and the County (right-of-way Lot 58).⁹ The Kualono HOA, the Residential Lot owners, and the County have been served with a copy of this Motion. OP and the Planning Department, as original parties to the boundary amendment proceeding, are parties to this proceeding, and each have been served with a copy of this Motion. Petitioner's subsequent filings in this proceedings (i.e., exhibits, responsive briefings, stipulations, etc.), will not be served on the Owners. Petitioner's subsequent filings will be served only upon OP and the Planning Department. Within one week of the filing of this Motion, Petitioner intends to file exhibits documenting the various representations made in this Motion (many of which have already been provided to the Commission in conjunction with Petitioner's annual reports). Petitioner's expectation is that its later filings will be posted to the Commission's website and therefore available for public review.

VI. CONCLUSION

For the foregoing reasons, Conditions Nos. 1, 3, 5 through 23, and 25 should be released as fully satisfied. Condition No. 4 should be released in part and modified in part, to reflect current circumstances and the completion of several of the requirements imposed under the condition. Condition No. 26 should be modified to reflect the requirement for Petitioner to record an amended and restated Certificate of Conditions against the Petition Area upon the Commission's disposition of this Motion. Petitioner is not seeking release of Condition No. 2 (which prohibits accessory dwelling units/ohana units within the Residential Lots), or Condition No. 24, which allows a petitioner to seek full or partial release of the Conditions from the Commission. It is Petitioner's understanding that the owners of the Residential Lots and/or the Kualono HOA may wish to pursue a release of or modification to Condition No. 2 in the future, and therefore Condition No. 24 retains a path for them to do so through this Commission.

⁹ As noted above, the State will own a portion of the Petition Area once the dedication of right-of-way Lot 59 has been completed.

DATED: Honolulu, Hawai'i, August 10, 2020.

A handwritten signature in black ink, appearing to be 'JAL', written over a horizontal line.

JENNIFER A. LIM
DEREK B. SIMON

Attorneys for HANOHANO LLC

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition Of

HANOHANO LLC, a Hawaii Limited
Liability Company

To Amend the State Land Use Agricultural
District to the State Land Use Urban District
for approximately 28.695 acres of land at
Keahua, Kula, Island and County of Maui,
State of Hawaii, bearing Tax Map Key
Numbers 2-3-11:1 and 2-3-11:2 (Second
Taxation Division)

DOCKET NO. A03-745

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy filed on August 10, 2020 of the foregoing document was served on the following parties by U.S. Mail, postage prepaid at their last known addresses below:

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Bruce Hiwahiwa U'u Cathy Marie U'u 249 Kupaa Street Paia, HI 96779	Bryan McQuin Hannah McQuin 23 Pualei Drive, Unit 1 Lahaina, HI 96761

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<p>Keoni Kellen Wong Nicole Chiemi Wong 58 Leiohu Circle Makawao, HI 96768</p>	<p>Kyle D. Neihaus Deborah Mathias Neihaus 1630 Piihola Road Makawao, HI 96768</p>
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<p>Roger S. Manuel 176 Kapuahi Street Makawao, HI 96768</p>	<p>Sherelle Lehua Lum Corey Kalanialohaokulamanu Lum 10 Leiohu Circle Makawao, HI 96768</p>

<p>Stephen Pawlak, Trustee Judi Pawlak, Trustee Stephen and Judi Family Trust 143 Leiohu Circle Makawao, HI 96768</p>	<p>Stephen Todd Leis Sheralyn Leis 1137 Kupulau Drive Kihei, HI 96753</p>
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DATED: Honolulu, Hawai'i, August 10, 2020.



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