

## ADDENDUM TO SETTLEMENT AGREEMENT

This Addendum to Settlement Agreement (the “Addendum”) is made by and among 1250 Oceanside Partners (“Oceanside”), the County of Hawaii (“County”), the Hawaii State Department of Land and Natural Resources (“DLNR”), the Hawaii State Department of Health (“DOH”), Protect Keopuka Ohana (“PKO”), and Walter John Kelly (“Kelly”), Charles Ross Flaherty, Jr., (“Flaherty”) Patrick M. Cunningham (“Cunningham”) and Michele Constans Wilkins (“Wilkins”) (Kelly, Flaherty, Cunningham and Wilkins are collectively referred to herein as the “Individual Plaintiffs”). Oceanside, County, DLNR, DOH, PKO and the Individual Plaintiffs are referred to collectively herein as the “Parties” and each individually as a “Party.”

### RECITAL

The Parties have each signed or are signing a Settlement Agreement, in the form attached hereto as Exhibit “A,” relating to the project commonly known as Hokuli’a located in Kona, Hawaii (the “Settlement Agreement”), on the understanding that this Addendum amends and supplements, and for all purposes will be treated as part of, such Settlement Agreement (the Settlement Agreement, as amended and supplemented by this Addendum, is referred to hereinafter as the “Final Settlement Agreement”).

**NOW, THEREFORE**, in consideration of the foregoing recital and in consideration of the mutual terms, covenants, conditions, promises and benefits contained in the Settlement Agreement and herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

**1. DEFINITIONS.** For the purposes of this Addendum, capitalized terms shall have the meanings set forth in the Settlement Agreement.

**2. EFFECTIVE DATE.** The Final Settlement Agreement shall be effective as of the date (“Effective Date”) when all of the following conditions have occurred: (a) all Parties have signed the Settlement Agreement and the Addendum; and (b) the Court in the Litigation has entered an Amended Decision.

**3. AMENDED DECISION.** The following new Section 7.2 is hereby added to the Settlement Agreement:

7.2 The Parties expressly state that no agreement has been reached for all Parties jointly to submit a single form of proposed Amended Decision to be presented to the Court. Each Party is free to stipulate or present such Party’s own proposed language for the Amended Decision at the appropriate time as requested by the Court, if applicable.

**4. BYPASS HIGHWAY.** The transportation section of the County General Plan states “Construct a scenic corridor from Keauhou above the Kealakekua cliffs to Napo’opo’o as both North and South Kona Courses of Action.” Therefore, the County Administration, at the request of Plaintiffs, shall work with the Plaintiffs to draft, introduce, and support legislation before the County Council that would (1) allow for the designation of the scenic corridors in the County, and (2) specifically designate the Bypass Highway as a scenic corridor, except that portion of the bypass right-of-way passing through Hokuli’a. Oceanside has not requested that

the County take the actions described in this Section and does not waive any rights it may have with respect to such actions.

## **5. HOKULI'A FOUNDATION.**

**5.1 Preamble.** Oceanside and the Plaintiffs believe that the community benefits to the public shall be the cornerstone of any settlement of the Litigation. To this end, in addition to the public benefits presented in the Settlement Agreement, Flaherty, Cunningham and Wilkins have further negotiated and obtained Directed Accounts to be directed by them, in which funds will be disbursed to charities and non-profit organizations of their choosing within the community. None of the funds in these directed accounts will be used to benefit the Plaintiffs, but will be disbursed at the direction of the named individuals. In this way, Flaherty, Cunningham and Wilkins may direct contributions to causes in our community at the grass-roots level. For example, Cunningham as an environmental plaintiff believes that funds should assist ocean/marine education, activities and protection of the offshore water resources. To this end, he intends to support such non-profit entities as the Keauhou Bay Association. Flaherty and Wilkins will also be directing funds to various charities and non-profit organizations that benefit our local community at the grass-roots level.

**5.2 Operative Provisions.** New Sections 8.7 and 8.8, containing the following terms, are hereby added to Section 8 of the Settlement Agreement:

**8.7 Additional Uses of Hokuli'a Foundation Funds, as Directed by Flaherty, Cunningham and Wilkins.** The Hokuli'a Foundation shall establish, on its books and records, three separate accounts, referred to hereinafter as the "Flaherty Directed Account," the "Cunningham Directed Account" and the "Wilkins Directed Account." Until such time as a total of \$400,000 has been credited to each such account, the Hokuli'a Foundation shall credit 5% of any contributions received by the Hokuli'a Foundation (other than contributions received pursuant to Section 8.4.3, which are to be used by the Hokuli'a Foundation solely to support affordable housing) to each such account. For example, if \$50,000 is received by the Hokuli'a Foundation as the result of the sale of Hokuli'a lots, the Hokuli'a Foundation shall credit \$2,500 to each of the three accounts, until a total of \$400,000 has been credited to each of the three accounts. Flaherty, Cunningham and Wilkins shall not receive any personal benefit from monies donated from these Directed Accounts. Monies credited to the Flaherty Directed Account shall be donated by the Hokuli'a Foundation to a qualified non-profit organization(s), at the direction of Flaherty, with each donation to be accompanied by a letter stating that the funds are being so donated at the request of Mr. Flaherty. Monies credited to the Cunningham Directed Account shall be donated by the Hokuli'a Foundation to a qualified non-profit organization(s), at the direction of Cunningham, with each donation to be accompanied by a letter stating that the funds are being so donated at the request of Mr. Cunningham. Monies credited to the Wilkins Directed Account shall be donated by the Hokuli'a Foundation to a qualified non-profit organization, at the direction of Wilkins, with each donation to be accompanied by a letter stating that the funds are being so donated at the request of Ms. Wilkins. The foregoing notwithstanding, the individual with authority to direct the donation of funds from any of the three accounts may, in such individual's sole discretion, advise the Hokuli'a Foundation in

writing that such individual wishes to relinquish the right to direct any additional donations from such account, in which event no further funds shall be credited to such account and any credits then in such account shall be transferred to the general account of the Hokuli'a Foundation (after making such donations as may have been directed before the power of direction was relinquished). The existence of the accounts described in this Section 8.7 shall not disqualify Flaherty, Cunningham or Wilkins from serving on the Board of Directors of the Hokuli'a Foundation. After the Hokuli'a Foundation has credited \$400,000 to a Directed Account, the Hokuli'a Foundation shall have no further obligation to credit additional amounts to such Directed Account. Any funds credited to a Directed Account shall be invested, until they are disbursed in accordance with this Section 8.7, in an interest-bearing investment account, with all interest earned to be credited to such Directed Account. Any interest thus credited to a Directed Account shall not be treated as part of the \$400,000 which the Hokuli'a Foundation is to credit to such account.

8.8 Further Assurances Relating to Directed Accounts. Oceanside agrees (1) that the Hokuli'a Foundation shall credit not less than \$100,000 to each of the three Directed Accounts within 60 days after the Effective Date (not including any interest earned on any amounts previously credited) and (2) that the Hokuli'a Foundation shall credit not less than the following amounts to each of the three Directed Accounts by the following dates (again not including any interest earned on amounts previously credited):

\$200,000, as of the second anniversary of the Effective Date;

\$300,000, as of the third anniversary of the Effective Date; and

\$400,000, as of fourth anniversary of the Effective Date.

Oceanside shall make such donations to the Hokuli'a Foundation, for crediting to the Directed Accounts, as may be needed to insure such levels of funding. In the event that Oceanside makes such contributions, Oceanside shall be entitled to an offset against future donations to be made by Oceanside to the Hokuli'a Foundation pursuant to the Section 8.4.1 of the Settlement Agreement, to the extent that such donations would be credited to the Directed Accounts.

6. **INDEMNITY.** Oceanside shall indemnify and provide a legal defense for Kelly, Flaherty, Cunningham, Wilkins and PKO from any and all actions filed by third parties and entities that arise from the Litigation or the Final Settlement Agreement.

7. **RIGHT TO ENFORCE WATER INJUNCTION.** Notwithstanding any other provision in the Settlement Agreement, PKO and the Individual Plaintiffs do not waive any right they may have to enforce the stipulated permanent injunction referred to in Section 16.1 of the Settlement Agreement, as such permanent water injunction may be modified. As contemplated by such Section 16.1, the Parties intend to ask the Court to amend the existing stipulated permanent injunction to eliminate the provisions establishing a court-supervised water monitoring program, based on the water monitoring provisions set forth in the Settlement

Agreement. A copy of the proposed form of revised stipulated permanent injunction, which the Parties agree to submit to the Court for its consideration, is attached hereto as Exhibit "B."

**8. RIGHT TO OBSERVE WORK DONE IN PERFORMING BASE LINE WATER QUALITY STUDY AND MODIFIED WATER MONITORING PROGRAM.**

The Individual Plaintiffs shall have the right to observe the data collection work done for the Modified Water Monitoring Program pursuant to Section 16.2 and the Baseline Study pursuant to Section 16.3 of the Settlement Agreement, to the extent practical. Oceanside shall ask the third parties performing this work to give Oceanside and the Plaintiffs notice of their work schedules, to the extent practical.

**9. PUBLIC SHORELINE ACCESS.** Oceanside confirms that the Haleki'i Street Extension is to be dedicated to the County, and Oceanside agrees to grant a public access easement over that portion of F Road which connects the Haleki'i Street Extension to the Shoreline Park. The dedication and easement described in the preceding sentence shall each be made or granted not later than 30 days after the Bypass Highway is opened. Oceanside agrees that there will be no gate on the Haleki'i Street Extension or on the portion of F Road that is subject to the public access easement. Oceanside also confirms that Oceanside intends to comply with the provisions of the CDUA for the Shoreline Park, including paragraph 26 of such CDUA which provides as follows:

"The applicant shall provide for public access to the park at no charge, provided that reasonable restrictions may be imposed on such access to protect the park from overuse and activities prohibited by law. Public access to the park shall be available from dawn to dusk; provided that, after dusk and before dawn, access shall be available on a controlled basis and allowed by permit unless otherwise provided for in this approval."

**10. AMENDMENTS TO SECTION 17 OF SETTLEMENT AGREEMENT.**

**10.1** Section 17.1 of the Settlement Agreement is hereby amended and restated to read as follows:

**17.1** Legislation to Amend County Grading and Grubbing Ordinance to Increase Protection for Cultural Resources and Marine Environment. In an effort to minimize flooding and provide greater protection for cultural, historical and burial sites, and the marine environment, and at the request of the Plaintiffs, the County Administration shall work with Plaintiffs to draft, introduce (within six months after the Effective Date) and support before the County Council legislation that would amend Chapter 10 and Chapter 27 of the Hawaii County Code, consistent with the public interest. The focus of these cooperative efforts shall be to amend Chapter 10 and Chapter 27 of the Hawaii County Code in a manner that would increase the level of education and enforcement regarding minimization of flooding and protection of cultural, historical and burial sites and the marine environment. Such amendments could include:

**17.1.1** Modifying "Section 10-1 Purpose" to read as follows: "The purpose of this chapter is to provide minimum standards to prevent flooding, soil erosion, and sedimentation, thereby protecting public health, safety and welfare, public and

private property, historic and cultural sites, state nearshore water quality standards, rivers, streams, forests, watersheds, water aquifers, and all other land and natural resources through the regulation of grubbing and grading associated with construction, agriculture and other earthmoving activities.”

17.1.2 Requiring the County Department of Public Works (“DPW”) to independently verify the natural watercourses and drainage patterns represented in permit application plans and map through inspection and inquiry, such as reference to past permits granted to adjacent TMKs.

17.1.3 Preventing DPW from allowing the alteration of natural watercourses insofar as those alterations affect neighboring properties and requiring mitigation by the permit applicant of any redirection of water flows into existing natural watercourses.

17.1.4 Requiring DPW to prepare flooding potential assessment reports, and attaching such reports to all approved permits.

17.1.5 Requiring DPW to map all grubbing and grading permits issued by TMK. Any flooding observations made by the public and/or DPW employees or flooding complaints made by the public would be documented and filed by TMK. The DPW would be required to accumulate this and other information to make an annual assessment of the specific and cumulative impacts of grubbing/grading permits on natural watercourses and drainage patterns throughout the County. The DPW would be required to investigate any significant changes noted in the annual grubbing/grading impact assessment map and supporting documentation to the County Council, together with a plan of action to resolve changes which resulted in additional flooding.

17.1.6 Requiring permit applications to identify the licensed heavy equipment operator(s) that will perform grubbing/grading activities.

17.1.7 Requiring DPW to track permit violations by applicant, TMK, and licensed operator, and requiring DPW to present an annual report to the County Council of permit violations by applicant, TMK, and licensed heavy-equipment operator.

17.1.8 The implementation of educational processes as a part of the permitting process;

17.1.9 Adding to Chapter 10 detailed definitions of activities falling under the categories of grubbing, removal of surface vegetation, and grading, to provide better notice to the permit holder of permitted activities;

**10.2** The following new Section 17.6 is hereby added to the Settlement Agreement:

17.6 In an effort to provide greater protection for cultural, historical and burial sites, and at the request of the Plaintiffs, the County Administration shall work with Plaintiffs to draft, introduce (within six months after the Effective Date) and support

before the County Council legislation that would amend Chapter 23 of the Hawaii County Code, consistent with the public interest. The focus of these cooperative efforts shall be to amend Chapter 23 of the Hawaii County Code to require comparisons of SHPD Archaeological Site Maps or any other SHPD documentation of historic and cultural site location, size, and/or significance associated with an applicant's property to all original and revised subdivision plat maps filed with the County after the Effective Date. The legislation could require any differences between boundaries and/or location of historic preservation easements to be resolved to the benefit of the cultural site being protected.

11. **AUTHORITY.** The persons signing below represent that they have the authority to bind their respective Party and that all necessary board of supervisors', board of directors', shareholders' or other approvals have been obtained.

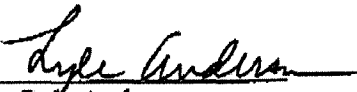
12. **SIGNATURES ON BEHALF OF PKO.** This Addendum is being signed on behalf of PKO by two duly authorized officers. By signing this Addendum, such officers ratify and affirm the Settlement Agreement, as amended and supplemented by this Addendum, on behalf of PKO.

13. **COUNTERPARTS.** This Addendum may be executed in one or more counterparts, and all the counterparts shall constitute but one and the same Addendum, notwithstanding that all Parties are not signatories to the same or original counterpart.


14. **CONFLICTS BETWEEN SETTLEMENT AGREEMENT AND ADDENDUM.** In the event of any conflict between the Settlement Agreement and this Addendum, this Addendum shall prevail

IN WITNESS WHEREOF, the Parties have executed one or more copies of this Addendum as of the Effective Date.

1250 OCEANSIDE PARTNERS  
By Red Hill 1250, Inc., General Partner

  
By: Lyle Anderson  
Title: Chairman

COUNTY OF HAWAII

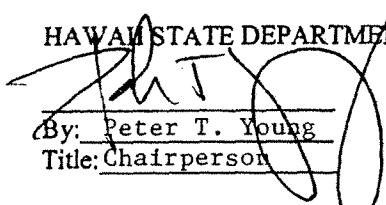
  
By: Harry Kim  
Title: Mayor

APPROVED AS TO  
FORM AND LEGALITY:

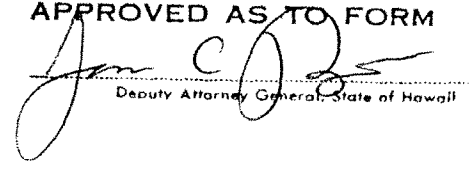
  
DEPUTY CORPORATION COUNSEL  
COUNTY OF HAWAII

Date March 2, 2006

HAWAII STATE DEPARTMENT OF LAND AND NATURAL RESOURCES

  
By: Peter T. Young  
Title: Chairperson


APPROVED AS TO FORM

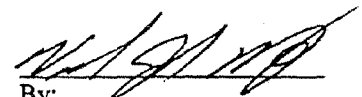
  
Deputy Attorney General, State of Hawaii

HAWAII STATE DEPARTMENT OF HEALTH

By: \_\_\_\_\_  
Title: \_\_\_\_\_


PROTECT KEOPUKA OHANA

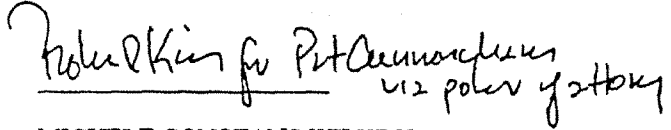
  
By: \_\_\_\_\_  
Title: CEO

  
By: \_\_\_\_\_  
Title: Vice-President

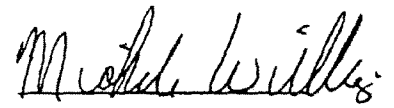
WALTER JOHN KELLY

  
CHARLES ROSS FLAHERTY, JR.

  
PATRICK M. CUNNINGHAM

  
Michele Constans Wilkins  
via power of attorney

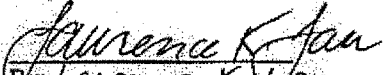
MICHELE CONSTANS WILKINS




HAWAII STATE DEPARTMENT OF LAND AND NATURAL RESOURCES

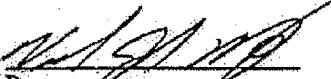
By: \_\_\_\_\_  
Title: \_\_\_\_\_

HAWAII STATE DEPARTMENT OF HEALTH

  
By: Laurence K. Lau  
Title: Deputy Director for Environmental Health, DHH

PROTECT KEOPUKA OHANA

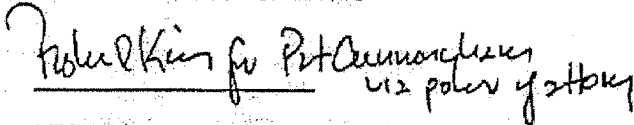
  
By: \_\_\_\_\_  
Title: CEO

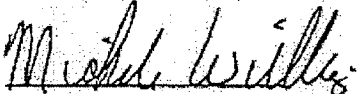
  
By: \_\_\_\_\_  
Title: Vice-President

WALTER JOHN KELLY

  
CHARLES ROSS FLAHERTY, JR.

  
PATRICK M. CUNNINGHAM

  
MICHELE CONSTANS WILKINS  
*via power of attorney*



APPROVED AS TO  
FORM AND LEGALITY:

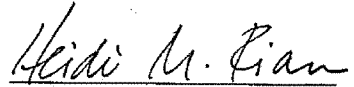
  
HEIDI M. RIAN  
DEPARTMENT OF THE  
ATTORNEY GENERAL



EXHIBIT "A" TO ADDENDUM TO SETTLEMENT AGREEMENT

**SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is made by and among 1250 Oceanside Partners ("Oceanside"), the County of Hawaii ("County"), the Hawaii State Department of Land and Natural Resources ("DLNR"), the Hawaii State Department of Health ("DOH"), Protect Keopuka Ohana ("PKO"), and Walter John Kelly, Charles Ross Flaherty, Jr., Patrick M. Cunningham and Michele Constans Wilkins (collectively referred to herein as the "Individual Plaintiffs"). Oceanside, County, DLNR, DOH, PKO and the Individual Plaintiffs are referred to collectively herein as the "Parties" and each individually as a "Party."

**RECITALS**

A. WHEREAS, Oceanside is the developer of the project commonly known as Hokuli'a located in Kona, Hawaii (hereinafter referred to as the "Project" or "Hokuli'a"); Hokuli'a's development plan envisions the construction of 730 agricultural lots, each at least one-acre in size; a twenty-seven hole golf course, golf clubhouse and related amenities; an eighty-unit members' lodge (the "Members Lodge"); and a 140-acre public shoreline park.

B. WHEREAS, the County issued a variety of approvals and entitlements permitting development of the Project and entered into an April 20, 1998, Development Agreement with Oceanside.

C. WHEREAS, the Individual Plaintiffs and PKO commenced a lawsuit encaptioned *Kelly, et al. v. 1250 Oceanside Partners*, Civ. No. 00-1-0192K (the "Litigation") in the Third Circuit Court of the State of Hawaii (the "Court") alleging, *inter alia*, certain claims regarding the Project.

D. WHEREAS, the Court entered a Third Amended Final Judgment in the Litigation (the "Final Judgment") which contained a permanent injunction that barred further development of Hokuli'a, other than the golf course and shoreline park.

E. WHEREAS, each of the Parties has appealed certain aspects of the Final Judgment to the Hawaii Supreme Court (the "Appeal").

F. WHEREAS the Parties desire to resolve the disputes embodied in the Litigation, the Appeal and certain related legal proceedings, on the terms and conditions set forth herein.

**NOW, THEREFORE**, in consideration of the foregoing recitals and in consideration of the mutual terms, covenants, conditions, promises and benefits contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **DEFINITIONS.** For the purposes of this Agreement, the following terms shall have the meanings set forth below:

1.1 Amended Decision. The term “Amended Decision” shall have the meaning set forth in Section 7.1.

1.2 Bench Area. The term “Bench Area” shall have the meaning set forth in Section 9.1.

1.3 Burial Treatment Plan. The term “Burial Treatment Plan” shall mean that certain Burial Treatment and Preservation Plan for Historical Sites at Hokuli’a dated March 2000.

1.4 Bypass Highway. The term “Bypass Highway” shall mean that bypass highway between approximately Keauhou and Captain Cook, consisting of two (2) lanes with a sufficient right-of-way for a total of four (4) lanes required in part to satisfy the conditions of approvals granted to Oceanside and to alleviate traffic congestion on the Mamalahoa Highway. The Bypass Highway is also referred to as the "Mamalahoa Highway Bypass" under Ordinance Nos. 96-7, 96-8 and 97-36.

1.5 CC&Rs. The term “CC&Rs” shall mean the covenants, conditions and restrictions applicable to the Hokuli’a Project.

1.6 County. The term “County” shall refer to the County of Hawaii.

1.7 County Administration. The term “County Administration” shall mean the Mayor of the County and the Mayor’s cabinet.

1.8 Cultural Preserve. The term “Cultural Preserve” shall have the meaning set forth in Section 14.3.1.

1.9 Development Agreement. The term “Development Agreement” shall mean that certain Development Agreement between the County and Oceanside dated April 20, 1998, and recorded on April 30, 1998, in the Office of the State Bureau of Conveyances.

1.10 Dispute Party. The term “Dispute Party” shall have the meaning set forth in Section 21.2.

1.11 DLNR. The term “DLNR” shall refer to the Department of Land and Natural Resources of the State of Hawaii and all the divisions within said Department.

1.12 DOH. The term “DOH” shall refer to the Department of Health of the State of Hawaii and all the divisions within said Department.

1.13 Effective Date. The term “Effective Date” shall have the meaning set forth in Section 2.

**1.14** Hokuli'a Cultural Area. The term "Hokuli'a Cultural Area" shall have the meaning set forth in Section 14.3.2.

**1.15** Hokuli'a Foundation. The term "Hokuli'a Foundation" shall have the meaning set forth in Section 8.1.

**1.16** Hokuli'a Project. The term "Hokuli'a Project" shall mean that master-planned project approved in and contemplated by the Hokuli'a Project Approvals.

**1.17** Hokuli'a Project Approvals. The term "Hokuli'a Project Approvals" shall mean the project approvals that approve, permit and entitle the development, use and operation of the Hokuli'a Project, including without limitation:

**1.17.1** SMA Permit No. 345 and Use Permit No. 115 approved on October 27, 1993, and issued on November 5, 1993, for the development of a golf course, clubhouse, driving range, golf maintenance facility, beach club, and related improvements.

**1.17.2** Ordinance No. 94-73 which became effective on June 28, 1994, and which changed the zone for approximately 637 acres of land from the Agricultural-5 acres (A-5a) and Unplanned (U) district to the Agriculture-1 acre (A-1a) district.

**1.17.3** SMA Permit No. 356 issued on September 28, 1995, for the development of portions of a proposed 400-lot agricultural subdivision and related improvements.

**1.17.4** Ordinance No 96-7, which became effective on January 15, 1996, and which changed the zone for approximately 756 acres of land from the Unplanned (U) district to the Agriculture-1 acre (A-1a) district.

**1.17.5** Ordinance No. 96-8 which also became effective on January 15, 1996, and which amended certain conditions contained in Ordinance 94-73.

**1.17.6** Ordinance No. 97-34 which became effective on March 13, 1997, and which amended the Hawaii County General Plan Land Use Pattern Allocation Guide Map by re-designating an approximately 25 acre parcel of land from "Orchards" to "Resort."

**1.17.7** Ordinance No. 97-35 which became effective on March 13, 1997, and which amended the State Land Use Boundaries Map (H-8) for the County of Hawaii by changing the district classification of the lodge parcel from Agriculture to Urban.

**1.17.8** Ordinance No. 97-36 which became effective on March 13, 1997, and which changed the zone for the lodge parcel from Agricultural (A-1a) to Resort (V-6.0).

**1.17.9** SMA Permit Nos. 401, 402, 403 and 404 and Special Permit No. 1056 issued on May 5, 2000, for the development of the shoreline park, bypass highway, lodge, wastewater treatment facility and related improvements.

- 1.17.10** Development Agreement.
- 1.17.11** SUB 91-124, the subdivision approvals for Phases I and II of Hokuli'a.
- 1.17.12** Any future subdivision approvals for any phase of the Hokuli'a Project.
- 1.17.13** Conservation District Use Application No. HA-2977, approved by DLNR on November 17, 2000.
- 1.17.14** Any approval, determination, right, entitlement, permit or use granted by any agency or department of the State of Hawaii including but not limited to DLNR, DOH and/or LUC.
- 1.17.15** Any approval, determination, right, entitlement, use or permit granted by the County or any other local, state or federal agency, whether discretionary or ministerial, that implements or furthers the development and improvements contemplated by any of the foregoing items listed in this Section 1.16; and
- 1.17.16** Any renewals, extensions, amendments or modifications to any of the foregoing items listed or described in this Section 1.16 that implement or further the development and improvements contemplated by the foregoing items listed or described in this Section 1.16.
- 1.18** Individual Plaintiffs. The term "Individual Plaintiffs" refers to Walter John Kelly, Charles Ross Flaherty, Patrick M. Cunningham, and Michele Constans Wilkins, plaintiffs in the Litigation.
- 1.19** Kona Scenic Park. The term "Kona Scenic Park" shall mean that parcel consisting of 5.0 acres identified as Tax Map Key (TMK) 3-8-1-25-and situated at Haleki'i and Keekee 1st, South Kona, Island of Hawaii, and owned by the County.
- 1.20** Litigation. The term "Litigation" refers to that case encaptioned *Walter John Kelly, et al. v. 1250 Oceanside Partners, a Hawai'i limited partnership, et al.*, Civil Action No. 00-1-0192K, filed in Hawai'i's Third Circuit Court.
- 1.21** LUC. The term "LUC" shall mean Land Use Commission of the State of Hawaii.
- 1.22** Members' Lodge. The term "Members' Lodge" shall mean the eighty-unit lodge contemplated by the Development Agreement.
- 1.23** Oceanside. The term "Oceanside" shall mean 1250 Oceanside Partners, a Hawaii limited partnership.

**1.24** Park Addition. The term “Park Addition” shall have the meaning set forth in Section 5.1.

**1.25** Party. The term “Party” refers individually to Oceanside, County, DLNR, DOH, PKO and the Individual Plaintiffs as the case may be.

**1.26** Parties. The term “Parties” refers collectively to Oceanside, County, DLNR, DOH, PKO and the Individual Plaintiffs.

**1.27** PKO. The term “PKO” refers to the incorporated nonprofit association denominated Protect Keopuka Ohana, plaintiff in the Litigation.

**1.28** Plaintiffs. The term “Plaintiffs” shall mean the Individual Plaintiffs and PKO.

**1.29** Project Preservation Plan. The term “Project Preservation Plan” shall mean the plan being prepared by Oceanside to satisfy the requirements of Hawaii Administrative Rule Section 13-277-3.

**1.30** Pu’u Ohau Cultural Area. The term “Pu’u Ohau Cultural Area” shall have the meaning set forth in Section 9.2.

**1.31** Shoreline Park. The term “Shoreline Park” shall mean the coastline park required by the County to be established under Conditions 8 and 10 of SMA Permit No. 345, Condition H of Ordinance No. 96-8, and Condition K of Ordinance No. 96-7, and subject to the terms and conditions as set forth in the Development Agreement.

**1.32** Shoreline Public Access Plan. The term “Shoreline Public Access Plan” shall mean shall mean that certain Shoreline Park Management and Public Access Plan for The Villages at Hokukano dated November 1998.

**2. EFFECTIVE DATE.** This Agreement shall be effective as of the date (“Effective Date”) when all of the following conditions have occurred: (a) all Parties (or signatories for all Parties as set forth below) have signed the Agreement; and (b) the Court in the Litigation has entered an Amended Decision.

### **3. HOKULI’A PROJECT**

**3.1** Completion of Bypass Highway. Subject to obtaining all of the necessary right-of-way and governmental agency approvals, Oceanside shall complete the Bypass Highway promptly, by a date to be established pursuant to Section 3.8. The County and DLNR shall cooperate in expediting their review and determination of any permit, approval or other decision required for completion of the Bypass Highway.

**3.2** Construction of Temporary Connector Road. Subject to obtaining all of the necessary right-of-way and governmental agency approvals needed to complete the Bypass Highway as well as a temporary connector road between the existing Mamalahoa Highway and

the Bypass Highway, Oceanside shall promptly construct such a temporary connector road at approximately the location shown on Exhibit 1 attached hereto. The temporary connector road shall be available, until the Bypass Highway is completed, for public use during peak traffic hours.

**3.3** Elimination of Members' Lodge. Oceanside shall forego development of the Members' Lodge within Hokuli`a.

**3.4** Limitation on Density. Oceanside shall not develop more than 665 homes or home sites at Hokuli`a.

**3.5** Rehiring of Former Hokuli`a Employees. Oceanside shall use reasonable efforts to rehire as many of its prior employees as possible to fill positions reestablished at Hokuli`a.

**3.6** Application to LUC. Oceanside shall submit to the LUC, on or before September 1, 2007, an application for a boundary amendment.

**3.6.1** Application Contents. The application shall contain the following elements:

**3.6.1.1.1** The application shall request that the portion of the Hokuli`a site currently in the Agricultural District, with the exception of the Bench Area and the Pu`u Ohau Cultural Area, be moved into the Rural District.

**3.6.1.1.2** The application shall request that the Bench Area and Pu`u Ohau Cultural Area be moved into the Conservation District.

**3.6.1.1.3** The application shall not request uses of, or density at, the Hokuli`a Project, that are inconsistent with this Agreement.

**3.6.2** Conditions Imposed by the LUC. The Parties acknowledge that the LUC may impose certain conditions upon the boundary amendments that Oceanside shall seek pursuant to the provisions of this Section 3.6.

**3.6.2.1** In the event the LUC approves Oceanside's boundary amendment application on the condition that Oceanside agrees to make the contribution to local education needs typically required as of the date of this Agreement (approximately \$4,000 per unit), Oceanside shall accept the additional condition.

**3.6.2.2** Oceanside may withdraw its boundary amendment application if the LUC proposes any other material condition or if LUC approval would (i) result in any other material condition under applicable law, including any density restriction (limiting the number of market value dwelling units to less than 665, for example), condition, or exaction, that is not authorized by or consistent with this Agreement, (ii) result in any additional financial obligations or requirements (beyond those contemplated by this Agreement) that Oceanside would have to undertake or satisfy in order to complete the Hokuli`a Project (other than the

Members' Lodge), or (iii) result in any other material limitation on Oceanside's flexibility in completing the Hokuli'a Project (other than the Members' Lodge). The withdrawal of its boundary amendment application pursuant to the preceding sentence shall not, in any form or fashion, impair or impede Oceanside's ability to develop the Hokuli'a Project (other than the Members' Lodge) in the Agricultural District, nor impair the rights and obligations of any Parties under other provisions of this Agreement.

**3.6.3** County Support. The County shall support Oceanside's application. If the LUC grants Oceanside's boundary amendment application on terms and conditions accepted by Oceanside, the County Administration shall take such actions as may be required to allow the Hawaii County Council to vote upon ordinance amendments and/or such other appropriate documents, including but not limited to amendments to the Hokuli'a Project Approvals, as may be required to remove the agricultural requirements from any ordinances and other approvals relating to Hokuli'a, including without limitation Hawaii County Ordinance 96-8.

**3.7** Implementation of Agricultural Plan. Oceanside shall implement the Hokuli'a agricultural plan, for so long as Hokuli'a remains within the Agricultural District, in the following manner:

**3.7.1** The CC&Rs shall require that agricultural activities be conducted on certain Hokuli'a common areas and on each Hokuli'a lot, and Oceanside shall enforce such provisions, as long as Oceanside controls the association of Hokuli'a lot owners.

**3.7.2** Oceanside shall continue to install the improvements needed to provide non-potable irrigation water to each Hokuli'a lot for agricultural use.

**3.7.3** In creating any new subdivisions at the Hokuli'a Project, Oceanside shall cause the aggregate area designated for agriculture use within such subdivision to be at least twenty percent (20%) of total lot area in such subdivision.

**3.7.4** For so long as Oceanside controls the association of Hokuli'a lot owners, Oceanside shall cause agriculture to be planted on each Hokuli'a lot prior to occupancy of any home on such lot.

**3.7.5** Oceanside shall, when it applies to the County for approval of any future Hokuli'a subdivision, submit to the County a specific plan identifying the areas to be cultivated in such subdivision and the plant materials to be grown in such areas.

**3.7.6** Notwithstanding anything in this Section 3.7, the obligations described in this Section 3.7 shall terminate if (i) the LUC grants and Oceanside accepts the land use boundary amendments contemplated by Section 3.6 above or (ii) if Hawaii State law is amended (or interpreted by the State Supreme Court) to state that homes on lands like those present at the Hokuli'a Project need not be "farm dwellings" or otherwise associated with agricultural activity in order to be lawful under HRS Chapter 205.

**3.8** Extension of Time For Performance of Oceanside's Commitments to the County. As a result of the delay created by the Litigation, the County Administration shall grant to Oceanside, as permitted by the Zoning Code and other applicable law, such reasonable extensions of time as may be required to complete and satisfy Oceanside's obligations under the Hokuli'a Project Approvals, including but not limited to the construction of the Bypass Highway, and to satisfy pertinent conditions under the Hokuli'a Project Approvals. To the extent permitted by applicable law, the County shall also renew any permits and approvals previously granted to Oceanside, which permits and approvals may have expired during the term of the Litigation, and the County shall grant reasonable extensions of any existing permits and approvals, in order to offset the effect of the Litigation on Oceanside's ability to do the things authorized by such permits and approvals.

#### **4. AFFORDABLE HOUSING**

**4.1.1** Construction of Affordable Housing Units. Oceanside shall cause 100 units of affordable housing to be constructed within the Kona area within five years of the Effective Date of this Agreement in accordance with County ordinances and regulations in effect at the time of construction.

**4.1.2** Construction of Additional Affordable Housing Units. Within five years after Oceanside obtains final subdivision approval for additional homesites at the Hokuli'a Project, Oceanside shall cause additional affordable housing units to be constructed within the Kona area, in accordance with County ordinances and regulations in effect at the time of construction, so that the total number of affordable housing units that Oceanside has caused to be constructed pursuant to this Section 4 is equal to twenty percent (20%) of the total number of homesites created by Oceanside at Hokuli'a and at affordable housing sites.

#### **5. KONA SCENIC PARK**

**5.1** Land Dedication. Subject to obtaining the necessary governmental permits and approvals, Oceanside shall dedicate approximately three acres to the Kona Scenic Park (the "Park Addition"), in addition to the two acres committed during the 1990's. Oceanside shall make the dedication of the Park Addition within ninety days after receiving all the necessary permits and approvals for such donation. The County shall cooperate in expediting its review and determination of any permit or approval necessary for the Park Addition. The County shall accept dedication of the Park Addition.

**5.2** Additional Facilities. Subject to obtaining the necessary permits and approvals, Oceanside shall construct, within the Park Addition, a pavilion approximately 1,000 square feet in size, a pavilion roughly 500 square feet in size, public restrooms and additional parking. Oceanside shall begin construction of these facilities within one hundred eighty days after receiving all the necessary permits and approvals. Once built, these facilities will be dedicated to the County for public use. The County shall cooperate in expediting its review and determination of any permit or approval necessary for any improvement to be built in the Park Addition.



## 6. CULTURAL RESOURCES

**6.1 Park and Cultural Sites Entity.** Within ninety days after the Effective Date, Oceanside shall form a new non-profit entity (the "Park and Cultural Sites Entity"). The organizational documents for this entity shall include articles of association or incorporation, as well as bylaws.

**6.2 Purpose.** The permitted purposes of the Park and Cultural Sites Entity shall include the following:

**6.2.1** Preservation, operation, and maintenance of the Shoreline Park and cultural, historical and burial sites located elsewhere within Hokuli`a, in a manner consistent with the provisions of the Shoreline Public Access Plan and the Project Preservation Plan;

**6.2.2** Development of educational materials and programs designed to encourage a deep understanding of and appreciation for the importance of the cultural resources at the Hokuli`a Project and developing standards for the proper maintenance of and care for such resources. In particular, these efforts shall include the development of an educational package and acculturation program for the benefit of people new to Hawaii or to Kona. Oceanside shall include such materials in the information provided by Oceanside to persons and entities that buy homes or home sites from Oceanside;

**6.2.3** Appointment of a Cultural Liaison to work with the Hokuli`a descendants pursuant to Section 13.8 of this Agreement; and

**6.2.4** Preservation, operation and maintenance of: (a) the Trail pursuant to Section 10.6 of this Agreement; (b) Old Cart Road pursuant to Section 10.10 of this Agreement; and (c) the Canoe Landing pursuant to Section 16.4 of this Agreement.

**6.3 Delegation.** The Park and Cultural Sites Entity shall have the authority to delegate some or all of its responsibilities to others. The Park and Cultural Sites Entity may enter into agreements with a third-party, including The Kuleana Foundation (discussed in Section 6.8 below), pursuant to which the third-party will have the authority (i) to manage the preservation, operation and/or maintenance of some or all of the Shoreline Park and the cultural, historical and burial sites located elsewhere within the Hokuli`a Project and (ii) to perform any or all of the responsibilities of the Park and Cultural Sites Entity under other provisions of this Agreement.

**6.4 Membership.** Consistent with the existing agreements with the County, Oceanside and Hokuli`a Lot owners will be the members of the Park and Cultural Sites Entity and will appoint its board of directors.

**6.5 Organizational Documents.** The Park and Cultural Sites Entity's organizational documents shall release from liability all individuals serving as directors, officers or Cultural Liaison, and provide indemnities for all such persons, in each case to the fullest extent permitted by law. Such organizational documents shall also expressly provide that in the

event of any claim against directors, officers or the Cultural Liaison, or against the Park and Cultural Sites Entity, the claims shall be submitted to binding arbitration.

**6.6** Advisory Board. Oceanside shall cause the Park and Cultural Sites Entity to establish, promptly after its formation, an advisory board (“Advisory Board”) whose purpose will be to provide advice and guidance to the Park and Cultural Sites Entity regarding the preservation, operation, and maintenance of the Shoreline Park and cultural, historical and burial sites within Hokuli`a. The Advisory Board shall have approximately twenty members and shall be comprised of representatives designated by Oceanside, Hokuli`a lot owners, PKO (which shall be allowed to designate individuals to hold two seats), other descendants, the County, kuleana owners and other appropriate groups.

**6.6.1** Information Provided to the Advisory Board. The organizational documents of the Park and Cultural Sites Entity shall require it to provide to the Advisory Board, on at least a quarterly basis, information relating to the status, operation, maintenance and preservation of the Shoreline Park and cultural, historical and burial sites within Hokuli`a.

**6.6.2** Consultation. Oceanside, the Board of Directors of the Park and Cultural Sites Entity, and any entity to which the Park and Cultural Sites Entity may delegate any of its authority to manage the Shoreline Park and/or cultural, historical and burial sites within the Hokuli`a Project, shall consult with the Advisory Board with respect to the following matters:

**6.6.2.1** All plans, policies and practices of the consulting group or entity relating to the improvement, operation or use of any part or all of the Shoreline Park. In the case of plans, policies and practices to be adopted in the future, and any changes to existing plans, policies and practices, this consultation shall occur before such plans, policies, practices or modifications are submitted to any County or State agencies or otherwise finally adopted.

**6.6.2.2** All plans, policies and practices of the consulting group or entity regarding the treatment of cultural, historical and burial sites at Hokuli`a. In the case of plans, policies and practices to be adopted in the future, and any changes to existing plans, policies and practices, this consultation shall occur before such plans, policies, practices or modifications are submitted to any County or State agencies or otherwise finally adopted.

**6.6.2.3** The choice of any firm or individual retained by Oceanside to conduct archaeological work, or to monitor construction work, at the Hokuli`a Project in the future.

**6.6.2.4** The roles of, and the resources being devoted by, the State and County in the management of cultural, historical and burial sites at the Hokuli`a Project. Oceanside shall have no duty to consult under this Section 6.6.2.4, after Oceanside no longer owns any land on which such cultural, historical or burial sites are located.

**6.7** Funding. The Park and Cultural Sites Entity shall be funded as follows:

**6.7.1**      Sales by Oceanside or Front Nine of Hokuli`a Lots. Oceanside and Front Nine LLC, a limited liability company affiliated with Oceanside, shall contribute to the Park and Cultural Sites Entity one-fourth of one percent of the actual gross sale price in any sales by Oceanside or Front Nine LLC of Hokuli`a homes and/or lots to an independent buyer after the Effective Date.

**6.7.2**      Resales of Hokuli`a Lots. Within three months after the Effective Date, Oceanside shall cause the CC&Rs to be amended to provide that, upon each future resale (in perpetuity) of any home and/or lot at Hokuli`a, the seller shall contribute to the Park and Cultural Sites Entity one-fourth of one percent of the actual gross sales price in such resale, except that no contribution shall be required pursuant to this Section 6.7.2 with respect to the sale by any person or entity of a lot and/or home owned by such person or entity as of the date on which such amendment is recorded. Oceanside shall, however, give persons and entities who own homes and/or lots upon recordation of such amendment the option, at their election, to agree to be subject to this provision.

**6.8**      The Kuleana Foundation. Oceanside has reached an understanding with a descendant of the lands within Hokuli`a, Mr. John De Fries, who, with the guidance of others, including particularly many other descendants of the lands within Hokuli`a and Hokuli`a residents, will carefully coordinate the planning for a new community and culturally based non-profit foundation – “The Kuleana Foundation” – which will seek a long-term agreement, with the Park and Cultural Sites Entity, to manage and care for many if not all of the public, cultural, historical and burial resources at the Hokuli`a Project. Oceanside shall cause Mr. De Fries to consult with PKO as he moves forward with the formation of this new foundation.

## **7.      AMENDED DECISION**

**7.1**      Entry of Amended Decision. The Parties agree to ask the Court for a Court-assisted settlement conference, in which the Parties will discuss whether the Final Judgment provisions dealing with Count IV of the Fifth Amended Complaint may be revised, based on this Agreement and other factors, (i) to allow Oceanside to proceed with the development of Hokuli`a (modified as provided herein), (ii) to leave all other provisions of the Final Judgment in tact and (iii) to protect all Parties from further litigation asserting claims against Hokuli`a like those advanced in such Count IV or asserting claims against the Plaintiffs based on the claims they asserted in such Count IV. Alternative approaches to a revised Final Judgment may be presented to the Court for consideration, including the approach embodied in the proposed stipulation of facts, order and amended final judgment prepared by Oceanside and provided to the other Parties prior to execution of this Agreement. The Plaintiffs acknowledge that, if an approach other than the one reflected in those documents is proposed for consideration, Oceanside will need protection against claims described in subsection (iii) above equivalent to the protection provided by the documents prepared by Oceanside. In the event that the Final Judgment is modified as a result of this process to contain terms and conditions acceptable to the Parties, the approved modified Final Judgment shall constitute an “Amended Decision” for purposes of this Agreement. Exhibits 2 and 3 to this Agreement have been left intentionally blank.

## **8. HOKULI`A FOUNDATION**

**8.1 Formation of Foundation.** Within ninety days after the Effective Date, Oceanside shall establish a foundation (the "Hokuli`a Foundation") which shall seek tax exempt status. The purposes of the Hokuli`a Foundation will include, but not be limited to, advancement within the Kona community of affordable housing, health care, education and Native Hawaiian culture. The organizational documents for this entity shall include articles of association or incorporation, as well as bylaws.

**8.2 Board of Directors.** The Board of Directors of the Hokuli`a Foundation shall consist of a diverse group of approximately twenty community-minded individuals, including individuals designated by Hokuli`a Lot owners and the County Administration. For so long as they wish to do so, the following individuals may serve on this Board of Directors: Jimmy Medeiros, Jack Kelly, Charles Flaherty, Patrick Cunningham and Michele Wilkins.

**8.3 Organizational Documents.** The Hokuli`a Foundation's organizational documents shall release from liability all individuals serving as directors or officers of such entity and provide indemnities for all such directors and officers, in each case to the fullest extent permitted by law. Such documents shall also expressly provide that in the event of any claims against directors or officers of the Hokuli`a Foundation, or against the Hokuli`a Foundation, the claims shall be submitted to arbitration.

**8.4 Funding.** Oceanside shall provide the following funding to the Hokuli`a Foundation.

**8.4.1 Sales by Oceanside or Front Nine LLC of Hokuli`a Lots.** Oceanside and Front Nine LLC shall donate to the Hokuli`a Foundation one and three-quarter percent of the actual gross sales price in any sale by Oceanside or Front Nine LLC of any Hokuli`a home and/or lot to an independent buyer after the Effective Date.

**8.4.2 Resales of Hokuli`a Lots.** Within three months after the Effective Date, Oceanside shall cause the CC&Rs to be amended to provide that, upon each future resale (in perpetuity) of any home and/or lot at Hokuli`a, the seller shall contribute to the Hokuli`a Foundation one-fourth of one percent of the actual gross sales price in such resale, except that no contribution shall be required pursuant to this Section 8.4.2 upon the resale by any person or entity of a home and/or lot owned by such person or entity on the date on which such amendment is recorded. Oceanside shall, however, give persons and entities who own homes and/or lots upon recordation of such amendment the option, at their election, to agree to be subject to this provision.

**8.4.3 Assignment of Reimbursements Pursuant to Development Agreement.** Oceanside shall contribute to the Hokuli`a Foundation any reimbursements that Oceanside may receive in connection with the Bypass Highway pursuant to Section 15 of the Development Agreement.

**8.5** Use of Hokuli'a Foundation Funds. The Hokuli'a Foundation's organizational documents shall allow the Hokuli'a Foundation to use its funds for particular purposes, including those specifically identified in Section 8.1, subject to the following:

**8.5.1** Affordable Housing. Any funds contributed to the Hokuli'a Foundation pursuant to Section 8.4.3 shall be used to support the development and use of affordable housing in the Kona area.

**8.5.2** Scholarships. During the first five years of its existence, the Hokuli'a Foundation shall contribute or dedicate not less than \$500,000 to the funding or retirement of student loans, with an emphasis on encouraging Kona residents to seek higher education and/or to return to Kona upon completion of that higher education.

**8.5.3** Drug Education and Treatment. During the first five years of its existence, the Hokuli'a Foundation shall contribute or dedicate not less than \$500,000 to programs intended to provide education relating to drug use and/or treatment and rehabilitation for drug use and/or dependency.

**8.5.4** Public School Teacher Salaries. During the first five years of its existence, the Hokuli'a Foundation shall contribute or dedicate not less than \$500,000 to programs intended to supplement the salaries of public school teachers in Kona.

**8.5.5** Kona Community Hospital. During the first five years of its existence, the Hokuli'a Foundation shall contribute or dedicate not less than \$500,000 to the Kona Community Hospital, for use by the hospital to enhance its ability to serve the Kona community.

In the event that the Hokuli'a Foundation does not receive sufficient funds from other sources in sufficient time to fulfill the obligations described in this Section 8.5, Oceanside shall contribute (or cause to be contributed) funds to the Hokuli'a Foundation to offset the funding deficit.

**8.6** Solicitation of Additional Donations. Oceanside shall send a letter to the owner of each Hokuli'a lot or home once each year, for at least ten years after the Effective Date, asking such home or lot owner to consider making a donation to the Hokuli'a Foundation, which would be authorized to use any funds donated in response to such requests for the purposes stated in Section 8.1.

## **9. PU'U OHAU**

**9.1** Abandonment of Development. Oceanside shall not develop lots in the area (the "Bench Area") included within Lots 26-30, as depicted on Oceanside's recorded Phase 2 lot plat.

**9.2** Additional Acreage. Oceanside also shall not develop an area comprised of approximately 6 acres, contiguous to, and on the mauka side of, the Pu'u Ohau Preserve (the "Pu'u Ohau Cultural Area"). The Pu'u Ohau Cultural Area is generally depicted on Exhibit 4 attached hereto.

**9.3** Conservation Easement on Bench Area and Pu'u Ohau Cultural Area.

Within one year after the Effective Date, Oceanside shall record a conservation easement over the Bench Area and the Pu'u Ohau Cultural Area, allowing improvements to be installed in the affected areas only as may be agreed by Oceanside and PKO.

**9.4** Oceanside Will not be Required to Modify the Golf Course.

The Parties agree that the golf course, including particularly the second hole and the related cart paths and sand traps, may remain intact, as it exists as of the Effective Date of this Agreement.

**9.5** Oceanside Commits to Build the Pu'u Wall, Unless Agreement is Reached to do Otherwise. Oceanside agrees with PKO that Oceanside will erect a six-foot high wall on a new alignment, shown on Exhibit 5 attached hereto, which will include approximately 22.8 more acres in the area enclosed by the wall as compared to the wall location previously approved by DLNR. Oceanside and PKO also agree, however, that before such wall is constructed, Oceanside and PKO shall work constructively together to seek the consents and approvals required, as a matter of cultural protocol and legal requirement, in order to substitute a hedge, consisting of native vegetation, for the wall, in order to void the extensive disturbance of the natural terrain that would be required in order to establish solid footings for a wall. If the necessary consents and approvals are obtained, Oceanside shall install the hedge, in consultation with descendants, including members of PKO.

**9.6** Use of Conservation Areas.

Activities within the Bench Area, the Pu'u Ohau Cultural Area and Hokuli'a Project areas in the Conservation District shall be consistent with all applicable laws, including but not limited to, the requirements of Hawaii Revised Statute Chapter 183C.

**9.7** Maintenance of Vegetation Affecting Burial Site of Kamaeo'kalani.

Within one hundred eighty days after the Effective Date, Oceanside shall apply to DLNR for any amendment to the Conservation District Use Agreement for the Shoreline Park which may be needed to permit the owner of such lands and such owner's designees to trim or remove from time to time any vegetation overhanging, or preventing appropriate access to, Kamaeo'kalani's burial site. Oceanside shall develop, in consultation with Hokuli'a descendants, a culturally appropriate protocol for trimming or removing from time to time vegetation overhanging, or preventing appropriate access to, such burial site.

**9.8** Removal of Non-Indigenous Plants.

Within one hundred eighty days after the Effective Date, Oceanside shall begin to consult with certified Hokuli'a descendants about removing the non-indigenous plants located on Pu'u Ohau and replacing them with native plants. In the event there is a consensus among the descendants in favor of such a plan, and any required permits and approvals can be obtained, Oceanside shall implement the plan.

**10. STEPPING STONE TRAIL**

**10.1** Conveyance of Stepping Stone Trail.

Within one year after the Effective Date, Oceanside shall convey to the State title to the trail that is the subject of a pending appeal (the "Stepping Stone Trail") based on the alignment previously submitted to the Court by DLNR.

The area to be conveyed to the State is depicted on Exhibit 6 attached hereto (the “Stepping Stone Trail Area”).

**10.2** Designation by DLNR. DLNR shall designate the Stepping Stone Trail Area as a preservation site on terms permitting only pedestrian use of the Stepping Stone Trail Area, except for any crossings of the types contemplated by Section 10.8 below.

**10.3** Restoration of Stepping Stone Trail Segment. Within one year after the Effective Date, Oceanside shall apply to DLNR for authority to place new rounded stones, shaped to resemble the remnant stones located elsewhere in the Stepping Stone Trail Area, in the areas depicted on Exhibit 7, in order to create a continuous trail segment, varying in width from three to five feet, through the area depicted on Exhibit 7, which runs generally from a tee box on the second hole of the Hokuli`a golf course to the southern end of the Hokuli`a site. As part of its application, Oceanside shall submit to DLNR a set of proposed plans for such work, a copy of which proposed plans Oceanside also shall provide to PKO. Before DLNR takes any action with respect to such plans, PKO shall be allowed a period of at least thirty days to comment upon such plans. Upon completion of the restoration work, Oceanside shall cooperate with PKO to organize and host a community-oriented event to celebrate the trail restoration.

**10.4** Stepping Stone Trail Buffer. Oceanside shall establish as a buffer zone an area five feet in width on each side of the Stepping Stone Trail Area centerline. Except as provided in this Section 10.4, no improvements shall be placed within the buffer zone, other than: (a) the Stepping Stone Trail segments to be created by Oceanside pursuant to Section 10.3; (b) any Stepping Stone Trail crossings approved by DLNR; and (c) landscaping which does not interfere with use of the Stepping Stone Trail. In the event that any existing tee boxes or other golf course improvements are located within the buffer zone, those improvements shall be allowed to remain to stay in place.

**10.5** Interpretive Sites. Oceanside shall establish, and shall maintain in perpetuity, two interpretive areas alongside existing remnant trail segments located in the southern third of the Stepping Stone Trail Area. These interpretive areas shall be available for public access from the Shoreline Park. The proposed locations of these interpretive areas are depicted on Exhibit 7 attached hereto. Oceanside shall prepare a set of proposed plans for the interpretive areas. Before Oceanside begins construction of the interpretive sites, Oceanside shall provide a set of such plans to PKO, which shall have a thirty-day period in which to comment on such plans.

**10.6** Maintenance of the Stepping Stone Trail and Stepping Stone Trail Area. As contemplated by Section 6.2, the Park and Cultural Sites Entity shall seek to enter into an agreement with DLNR, pursuant to which the Park and Cultural Sites Entity would be responsible for the maintenance and preservation of the Stepping Stone Trail and of the Stepping Stone Trail Area under the supervision of DNLR.

**10.7** Warning Signs. Oceanside shall install signs on the Hokuli`a golf course advising golfers that others may be present in the area in connection with the Stepping Stone Trail, that their presence is to be respected and that care should be taken not to put such people at risk by virtue of golf play. Oceanside shall also post signs along the Stepping Stone Trail Area,

and in the adjoining interpretative areas, advising persons in those areas that golf is being played in the vicinity and that they should be aware of the associated risks.

## **10.8 Trail Crossings.**

**10.8.1 Reasonable Crossings.** Plaintiffs agree that Oceanside shall be permitted easements for at-grade ingress and egress over, and easements for underground utilities beneath, specified portions of the Stepping Stone Trail Area and specified portions of any other roads or trails at Hokuli`a, on terms consistent with standard practices evidenced by similar crossings at other locations along the west coast of the Island of Hawaii.

**10.8.2 Crossing Applications.** DLNR shall process expeditiously, and in accordance with applicable law, Oceanside's application for access and utility easements in the locations specified in Exhibit 8 attached hereto and at such other locations as may reasonably be required in the future.

**10.8.3 Review and Comment on Oceanside Applications.** Oceanside shall provide PKO with all current and future applications for easements pertaining to the Stepping Stone Trail Area and shall allow PKO a thirty day period to comment on such applications. To the extent feasible and reasonable, Oceanside shall modify Oceanside's applications to incorporate any comments and recommendations submitted by PKO. PKO may submit its comments and recommendations to DLNR.

**10.8.4 Challenges.** Plaintiffs shall not initiate, request, file, fund, support or participate in any challenge (including but not limited to judicial and administrative challenges) to Oceanside's applications for access and utility easements pursuant hereto or DLNR's determinations with respect to such applications.

**10.9 Stepping Stone Trail Appeal.** Within ninety days after the Effective Date, Oceanside shall dismiss with prejudice its appeal of the Court's Stepping Stone Trail decision.

**10.10 Old Cart Road.** Oceanside and DLNR agree that the State owns the Old Cart Road and that the Old Cart Road alignment at Hokuli`a runs from the southern boundary of the Hokuli`a Project site to Pu`u Ohau along the alignment identified as Site No. 17189, as depicted on Exhibit 6 attached hereto. As contemplated by Section 6.2, the Park and Cultural Sites Entity shall seek to enter into an agreement with DLNR, pursuant to which the Park and Cultural Sites Entity would be responsible for maintenance and preservation of the Old Cart Road within Hokuli`a as a public pedestrian access trail, under supervision by DLNR. Oceanside shall grant an easement to DLNR for a pedestrian connector between the Old Cart Road and the Old Government Road in the vicinity of Pu`u Ohau/Road J-3.

## **11. NATIVE HAWAIIAN BURIAL SITES**

**11.1 Unfinished Block Reports and Lava Tube Surveys.** Oceanside shall consult with the Advisory Board of the Park and Cultural Sites Entity on the selection of one or more archaeologists and/or cultural specialists to review any unfinished block reports and lava tube resurveys. After this consultation, Oceanside shall retain an archaeologist and/or cultural



specialist to review and comment upon the unfinished block reports and lava tube resurveys. Before such reports are submitted to DLNR for review, Oceanside shall cause the individuals preparing the block reports or lava tube resurveys to address any concerns or criticisms made in such reviews. In addition, Oceanside shall cause any unfinished block reports and lava tube resurveys to be completed by an individual or firm with cultural expertise or with the assistance of a person with cultural expertise.

**11.2** Treatment of Burial Sites Discovered in the Future.

**11.2.1** Unfinished Block Reports and Lava Tube Surveys. All burial sites identified in the block reports and lava tube resurveys described in Section 11.1 shall be treated as previously identified.

**11.2.2** Others Burial Sites. With the exception of those burials identified in the block reports and lava tube resurveys described in Section 11.1, all burial sites identified after the Effective Date on the Hokuli`a site, and all burial sites located in the existing alignment for the Bypass Highway, shall constitute inadvertent discoveries within the meaning of HRS § 6E-43.6 and Haw. Admin. R. § 13-300-2 and shall be treated in accordance with HRS § 6E-43.6 and Haw. Admin. R. § 13-300-2.

**11.3** Extension of Time for DLNR Determinations. In the case of any inadvertent discovery of a burial on any portion of the Hokuli`a site owned by Oceanside, or in the current alignment for the Bypass Highway, Oceanside shall automatically grant DLNR a 60 day extension of time in which to gather sufficient information, including oral tradition, to document the nature of the burial context and to determine appropriate treatment of the burial remains.

**11.4** DLNR Staff Positions.

**11.4.1** Funding. Oceanside shall continue to fund two full-time DLNR staff positions: one burial staff position and one position for reviewing archeological reports and performing various compliance oversight tasks. The persons assigned by DLNR to these positions shall focus primarily on the Hokuli`a Project, but may work on other matters and projects as time and circumstances permit. Funds for each position shall be paid on a quarterly basis. Funding of the burial staff position shall terminate upon Oceanside's completion of the Bypass Highway and construction of substantially all Hokuli`a infrastructure. Funding of the archeological staff position shall terminate on December 31, 2008.

**11.5** Pending Applications With Respect to Particular Sites.

**11.5.1** Site No. 21833. Site No. 21833 shall be treated as an inadvertent burial site. DLNR has the authority to approve or disapprove Oceanside's pending application to relocate such burial to an area immediately makai of the existing Bypass Highway alignment. In the event that DLNR approves Oceanside's application, Plaintiffs shall not contest such decision.

**11.5.2** Site No. 16478. The Parties agree that DLNR has the jurisdiction and authority to modify the buffer for and permit Oceanside to traverse Site No. 16478 for infrastructure purposes, in accordance with the written request previously filed by Oceanside. The Individual Plaintiffs and PKO agree not to contest any decision that DLNR might make in response to Oceanside's written request.

## **12. BURIAL LAVA TUBES**

**12.1** Burial Lava Tubes Correctly Mapped. Oceanside shall not submit any additional applications to DLNR for variances that would allow Oceanside to cross or breach any portion of any burial lava tube known to contain burials as of March 2000, when the Burial Treatment Plan was approved, as such lava tube was mapped at the time. Attached hereto as Exhibit 9 is a map showing the location of the lava tubes known in March 2000 to contain burials, and the extent of such tubes as then mapped.

**12.2** Variances With Respect to Burial Lava Tubes First Discovered After Early 2000 or Incorrectly Mapped as of Early 2000. With respect to burial lava tubes discovered after March of 2000, and portions of burial lava tubes missed or incorrectly mapped before March of 2000, Oceanside shall use all practical efforts to avoid applying for any further variances from the Burial Treatment Plan. In the event that Oceanside applies for any variances from the Burial Treatment Plan in the future, Oceanside shall provide a copy of the application to PKO, at the same time that the application is filed with DLNR. Plaintiffs shall not initiate, request, file, fund, support or participate in any administrative appeal, litigation or legal action relating to any application which Oceanside has filed, or may file, seeking waiver or amendment of the provisions of the Burial Treatment Plan relating to the protection of the entirety of previously known lava tubes containing burial sites, provided that Oceanside's proposed treatment of any lava tube that is subject to the application or amendment is consistent with the statutory definition of "burial site" in HRS § 6E-2, as interpreted in the Attorney General's opinion dated May 9, 2001 regarding the protection of lava tube burial sites.

## **13. DESCENDANT ACCESS PLAN**

**13.1** With respect to burial sites located within a subdivision and within 100 feet of a finished home, descendants shall have access on any day, from sunrise to sunset, for the purposes of caring for and worshiping the burial remains.

**13.2** With respect to burial sites located within a subdivision but not within 100 feet of a finished home, descendants shall have access at all times, for the purposes of caring for and worshiping the burial remains.

**13.3** With respect to burial sites located outside of the subdivisions, descendants shall have access at all times, for the purposes of caring for and worshiping the burial remains, subject to any limitations on access set forth in the Shoreline Public Access Plan and the Project Preservation Plan.

**13.4** Descendants shall have access to the Hokuli`a Cultural Area and the Agricultural Preserves from sunrise to sunset, but descendants shall not be entitled to engage in

any agricultural activities within the Agricultural Preserves unless expressly authorized to do so by the Park and Cultural Sites Entity.

**13.5** Descendants shall have access to the Shoreline Park, the Pu'u Oahu Cultural Area and the Bench Area on the terms stated in the Shoreline Public Access Plan and the Project Preservation Plan.

**13.6** Visits to any authorized site, including a burial site located outside the Shoreline Park (which has capacity and use limitations, as set forth in the Shoreline Park and Management Access Plan), involving ten or more individuals, shall require a special permit issued by the Park and Cultural Sites Entity.

**13.7** Cultural activities, including caring for and worshipping burial remains, to be performed at night at any location within one 100 feet of a completed home, including midnight ceremonies, and cultural activities to be conducted at any location which involve significant noise, artificial light or other conditions which may disturb or (absent warning) alarm others in the area, shall require a special permit, issued by the Park and Cultural Sites Entity. In considering applications for such permits, and for permits required pursuant to Section 13.6, the Park and Cultural Sites Entity shall seek to insure that reasonable accommodations are made with respect to the interests of the applicants and any homeowners who might be affected by the proposed activity, in an effort to achieve an environment of respect and understanding. Upon request by PKO, the Park and Cultural Sites Entity shall enter into a Memorandum of Understanding that would identify the dates, terms and/or conditions for particular events or activities, so that those events and activities would be pre-approved.

**13.8** In the event that any gate needs to be opened in order for descendants to gain access to any area to which access is authorized, the Park and Cultural Sites Entity shall be required to provide a Cultural Liaison, available during normal business hours generally at a location within the Hokuli'a site, to provide the descendants an access pass which will open the pertinent gate. Descendant families who wish to plan ahead may reserve use of an access pass for a particular use. If the access pass is not returned within a designated period, it will be deactivated.

**13.9** Upon request, the Park and Cultural Sites Entity shall be required to provide a general access pass to any requesting descendant, in order to allow such descendant to enter any gates at the Hokuli'a Project in accordance with the provisions of this Section 13. If any such pass is used to gain access in violation of the rules described above, the Park and Cultural Sites Entity may revoke the pass.

#### **14. AGRICULTURAL PRESERVES AND CULTURAL PRACTICE AND PRESERVATION SITES**

**14.1** Agricultural Preserves. Oceanside shall include in the Project Preservation Plan at least three specified areas, to be set aside and maintained as agricultural preserves ("Agricultural Preserves"). The three Agricultural Preserves and their minimum acreage shall be (a) Ke'eke'e Agricultural Preserve (approximately 2.50 acres); (b) Kanaeue Agricultural Preserve (approximately 3.50 acres); and (c) Hokukano Agricultural Preserve

(approximately 3.50 acres). These Agricultural Preserves are generally depicted in Exhibit 10 attached hereto. After consultation with DLNR, Oceanside may expand the identified preserves and may set aside additional areas for similar purposes, provided, however, that such additional areas shall not be subject to the provisions of this Agreement.

**14.2 Use of Agricultural Preserves.** The Agricultural Preserves shall provide areas where traditional Native Hawaiian agricultural crops could be cultivated by Hokuli`a residents and by others authorized by the Park and Cultural Sites Entity to engage in such activities. The Ke`eke`e Agricultural Preserve shall be an active agricultural preserve, with crops planted and cultivated. The Kanaeue Agricultural Preserve shall be a non-active preserve designed primarily for the preservation of remnants of the Kona Field System located therein. The Hokukano Agricultural Preserve shall be an active area, except as needed to protect and preserve remnants of the Kona Field System located there. The Park and Cultural Sites Entity and DLNR shall consult with PKO before determining the types of traditional agricultural activities that will be permitted within the Agricultural Preserves.

**14.3 Cultural Practice and Preservation Sites.**

**14.3.1 Establishment.** Oceanside shall also establish two cultural practice and preservation sites (“Cultural Preserves”). The Cultural Preserves shall provide areas where lineal and cultural descendants may engage in traditional cultural practices, The Cultural Preserves are generally depicted on Exhibit 4 attached hereto and consist of the following:

**14.3.2 Hokuli`a Cultural Area.** An area near site 21833 consisting of approximately 6 acres (the “Hokuli`a Cultural Area”).

**14.3.3 Pu`u Ohau Cultural Area.** The Pu`u Ohau Cultural Area, which as noted above consists of approximately 6 acres contiguous to the current Conservation District area.

**14.4 Access.** Lineal and cultural descendants shall have access to the Agricultural Preserves and the Cultural Preserves in accordance with Section 13.

**14.5 Provision of Water.** Oceanside shall provide non-potable water to the Agricultural Preserves and Cultural Preserves in which crops and/or plants may be grown.

**14.6 Proposed Re-interment Site for 21833.** A portion of the Hokuli`a Cultural Area, to be given a name in consultation with the descendants of the Hokuli`a lands, shall be improved by Oceanside in the manner illustrated conceptually on Exhibit 11 attached hereto. If allowed by DLNR, the burial located at Site No. 21833 shall be reinterred in this location. Oceanside also commits to make this area available as a re-interment site for other burials located within the Hokuli`a site, if such relocation of such other burials to this area is approved by the entities or agencies with authority to approve any such burial relocations.

## **15. ARTIFACTS AND RELICS**

**15.1 Artifact Inventory Database.** Oceanside shall create and maintain a comprehensive inventory of the Native Hawaiian artifacts and relics discovered by Oceanside or its agents on the Hokuli`a site or in connection with Hokuli`a. This inventory shall include a description of the artifact or relic, the location where it was found (specific burial site or area on property), its present location, the date of removal, if it has been removed, and the identity of the person or entity believed to have removed it. Oceanside shall create and maintain a computerized database containing the data set forth in the inventory. The Parties shall have access to the database. To the extent feasible, the database shall be adapted to include certain data recovery material, field notes, documented oral histories, and maps.

**15.2 Management of Artifacts.** The Park and Cultural Sites Entity shall take possession of and store all such artifacts and relics now under the control of Oceanside. In consultation with descendants, the Park and Cultural Sites Entity shall develop a protocol providing for the care and disposition of such artifacts and relics. The protocol may include returning artifacts and/or relics to the site where found, particularly if the artifacts or relics were found in the vicinity of a burial or possible burial site. If requested by a majority of the descendants, the protocol shall include transferring possession, ownership and management of some or all such artifacts and/or relics to an entity owned by, and under the control of, the descendants or designated by the descendants.

## **16. WATER RESOURCES**

**16.1 Stipulated Permanent Injunction.** The stipulated permanent injunction entered by the Third Circuit Court shall continue, insofar as it enjoins Oceanside from polluting the ocean waters.

**16.2 Modified Monitoring Program.** The existing water monitoring program required by the County shall be continued, on terms which require that the water monitor be approved by the County, DOH, Plaintiffs (for 20 years after the Effective Date) and Oceanside, and that the water monitoring be conducted quarterly, in accordance with State ocean water monitoring protocols of general application.

**16.3 Baseline Study.** Oceanside shall retain a qualified consultant, acceptable to PKO, the Individual Plaintiffs, and DOH, to undertake a comprehensive baseline study of the near shore waters for the area from Hookena Beach Park to Kahalu`u Bay. To insure the creation of an appropriate baseline study, Oceanside shall require the consultant to seek the advice of DOH with respect to the protocols and elements of the study. Oceanside shall also require the consultant to conduct the study within a budget, in an amount reasonably established by Oceanside. The study shall begin within six months after the Effective Date. All data and reports resulting from the study shall be provided promptly to all Parties.

**16.4 Canoe Landing.** Oceanside shall redesign the silt containment measures at Nawaawaa Bay so that, if and to the extent possible, the canoe landing may be reopened. Oceanside shall seek DOH and DLNR approval of said redesign and to undertake the work. If the approval is granted, Oceanside will cooperate with PKO to organize and host a community-

oriented event at the canoe landing to celebrate its reopening. Maintenance of the canoe landing shall be the responsibility of the Park and Cultural Sites Entity.

**16.5** Administrative Penalty. DOH shall continue to pursue the November 2000 Notice of Violation regarding violations of the Clean Water Act by Oceanside and shall assess a fine deemed appropriate by DOH. In its proposal to DOH as to the manner in which any fine may be used, Oceanside shall ask that seventy five percent (75%) or more of the fine be used on special environmental projects in, or of particular relevance to, Kona.

**16.6** Best Management Practices. Oceanside shall work with the Plaintiffs, the County and DOH to prepare proposed best management practices for golf courses and landscape maintenance.

## **17. COUNTY CULTURAL RESOURCE PROTECTION AND PRESERVATION POLICIES**

**17.1** Legislation to Amend County Grading and Grubbing Ordinance to Increase Protection for Cultural Resources. In an effort to provide greater protection for cultural, historical and burial sites, the County Administration shall work with Plaintiffs to draft, introduce and support before the County Council legislation that would amend Chapter 10 of the Hawaii County Code, consistent with the public interest. The focus of these cooperative efforts shall be to amend Chapter 10 in a manner that would increase the level of education and enforcement regarding protection of cultural, historical and burial sites. Such amendments could include:

**17.1.1** The implementation of educational processes as a part of the permitting process; and

**17.1.2** Adding to Chapter 10 detailed definitions of activities falling under the categories of grubbing, removal of surface vegetation, and grading, to provide better notice to the permit holder of permitted activities.

**17.2** Codification of County Practice of Cooperating with DLNR on Grading and Grubbing Activities. The County Administration shall codify its current practices of cooperation with DLNR for implementing Chapter 6E-42, HRS, by adopting written internal work rules or procedures. In connection with these codification efforts, union consultation might be required. Should any such work rules or procedures require HRS Chapter 91 rulemaking, the County Administration shall pursue such rulemaking. At a minimum, the new work rules or procedures shall embrace the following principles:

**17.2.1** An applicant shall secure recommendations from DLNR before the County Administration would accept a grading or grubbing permit application;

**17.2.2** An application shall include, by attachment, any conditions recommended by DLNR;

**17.2.3** The County Department of Public Works shall suspend any grading or grubbing permit as may be requested or required by DLNR; and

**17.2.4** The County shall be required to report immediately, telephonically or by facsimile, any evidence of historical/burial sites to DLNR's State Historic Preservation Division should such evidence become known to County personnel in the course of granting, monitoring or closing grading/grubbing permits.

**17.3** Adoption of Related County Administrative Policies to Enhance Knowledge of Potential Impact of Grading and Grubbing on Cultural Resources. The County Administration shall adopt an administrative policy requiring persons or entities seeking grading or grubbing permits with respect to lands known to contain cultural, historical or burial sites to review the educational materials described in Section 18 prior to the issuance of any such permit. The County Administration shall adopt an administrative policy requiring the grantee of a grading or grubbing permit to affirm that he/she/it has read, reviewed and understands the applicable State and County laws and regulations regarding the protection of cultural, historical and burial sites. Should any such administrative policies require HRS Chapter 91 rulemaking, the County Administration shall pursue such rulemaking.

**17.4** Support for State and County Legislation Strengthening and Extending Laws Intended to Protect Cultural Resources. The County Administration shall work with the Plaintiffs and Oceanside to draft, introduce and support legislation in the State Legislature that would provide additional protection for documented and undocumented cultural, historical and burial sites together with appropriate funding to implement the new requirements. Such legislative efforts shall include, but not be limited to, seeking additional staff and funding for the Burial Sites Program of DLNR's State Historic Preservation Division. Nothing in this Agreement shall require DLNR to endorse such legislation or prevent DLNR from expressing its independent view as to any such proposed legislation. In the event that the State Legislature does not to pass such legislation within two years of the Effective Date, the County Administration shall work with Plaintiffs and Oceanside to draft, introduce and support before the County Council a new ordinance which would give greater protection to cultural, historic and burial sites, to the extent the County is authorized to adopt such an ordinance under HRS Chapter 6E. Among other things, such an ordinance might provide for the creation of a County Historic Preservation Commission established under the Certified Local Government program of the National Park Service and procedures for identifying and preserving cultural, historical and burial sites.

**17.5** Support for Rulemaking by DLNR. The County Administration shall work with Plaintiffs and Oceanside to urge DLNR to establish appropriate standards and inclusive procedures relating to the consideration of any requests for variances from, or amendments to, approved burial treatment plans.

## **18. EDUCATIONAL MATERIALS REGARDING CULTURAL RESOURCES**

**18.1** Educational Materials. Oceanside shall produce, at Oceanside's expense and in consultation with Plaintiffs, the County and DLNR, a videotape and a brochure, each of which shall be available for viewing by developers on the Island of Hawaii, purchasers of

undeveloped lots, and machinery operators, outlining the legal, practical and community considerations relating to the protection of cultural and historic resources.

## **19. ATTORNEYS' FEES AND COSTS**

**19.1** Payment by Oceanside of Individual Plaintiffs' Attorneys' Fees. Oceanside shall pay \$1,002,435.01 as attorneys' fees and costs to Robert D.S. Kim.

**19.2** Payment by Oceanside of PKO Attorneys' Fees. Oceanside shall pay \$2,037,732.74 as attorneys' fees and costs to Native Hawaiian Legal Corporation.

## **20. FUTURE PROJECT CHALLENGES**

**20.1** Restricted Activity Relating to Hokuli'a. The Individual Plaintiffs and PKO, including its officers and directors, agree and covenant that they shall not themselves, nor counsel others to, directly or indirectly, initiate, aid, request, file, fund or participate in (i) any publicity adverse to Oceanside or the Hokuli'a Project, (ii) any administrative hearing, litigation or other legal action adverse to Oceanside or the Hokuli'a Project and specifically directed to any aspect of the approval, permitting, entitlement, development, construction or operation of the Hokuli'a Project, except as (A) may be required to enforce the rights, obligation and covenants set forth in this Agreement or (B) to raise any concerns as to Oceanside's compliance after the Effective Date with the law regarding the treatment of burials or (iii) any effort to bring about any legislation, initiative, referendum or moratorium that would undermine or materially impair or impede the approval, permitting, entitlement, development, construction or operation of the Hokuli'a Project or of any of the Hokuli'a Project Approvals.

**20.2** Release Relating to Hokuli'a. Except for the obligations set forth in this Agreement, PKO and Individual Plaintiffs hereby unconditionally release, remise, acquit and forever discharge Oceanside, County, DOH and DLNR and each of their respective representatives, attorneys, employees, agents, heirs, officers, directors, successors and assigns, members, affiliates, partners, joint venturers, subsidiaries, parents, receivers, trustees and shareholders (collectively, "Released Parties") from claims or causes of action, including any and all administrative or judicial hearings or appeals, or any other litigation in a court of law, either at law or in equity, of any kind, nature and description, presently known or unknown, that exist as of the Effective Date, relating in any way to the Hokuli'a Project or the Hokuli'a Project Approvals.

**20.3** Waiver of Unknown Claims. PKO and Individual Plaintiffs agree that the release contained in the above section extends to all claims of any kind or nature with respect to the Project, whether known or unknown, suspected or unsuspected, and in that regard PKO and Individual Plaintiffs acknowledge that they have read, been advised by counsel concerning, and considered and understand the full nature, extent and import of this provision. PKO and Individual Plaintiffs, upon the advice of counsel, waive and relinquish, now and forever, any and all rights that they now have to the fullest extent allowed by law.

**20.4** Release Relating to Hokuli'a. Except for the obligations set forth in this Agreement, Oceanside, the County, DOH and DLNR hereby unconditionally release, remise,



acquit and forever discharge the Individual Plaintiffs and PKO, and each of their respective representatives, attorneys, employees, agents, heirs, officers, directors, successors and assigns, members, affiliates, partners, joint venturers, subsidiaries, parents, receivers, trustees and shareholders (collectively, "Released Parties") from claims or causes of action, including any and all administrative or judicial hearings or appeals, or any other litigation in a court of law, either at law or in equity, of any kind, nature and description, presently known or unknown, that exist as of the Effective Date, relating in any way to the Hokuli'a Project or the Hokuli'a Project Approvals.

**20.5 Waiver of Unknown Claims.** Oceanside, the County, DOH and DLNR agree that the release contained in the above section extends to all claims of any kind or nature with respect to the Hokuli'a Project, whether known or unknown, suspected or unsuspected, and in that regard Oceanside, the County, DOH and DLNR acknowledge that they have read, been advised by counsel concerning, and considered and understand the full nature, extent and import of this provision. Oceanside, the County, DOH and DLNR, upon the advice of counsel, waive and relinquish, now and forever, any and all rights that they now have to the fullest extent allowed by law.

**20.6 Effect on Pending Appeals.** Promptly upon entry of an Amended Decision, the Parties shall file such pleadings and/or other papers as may be necessary to dismiss all appeals pending in relation to Hokuli'a, other than the appeals filed by County and DOH relating to the existence or extent of any public trust obligations relating to coastal water quality, whether such duties as may exist in these areas were violated in this case, and related matters (which appeals County and DOH may continue at their discretion, notwithstanding any other provision of this Agreement). Notwithstanding any other provision of this Agreement, PKO and the Individual Plaintiffs do not release, remise, acquit or discharge County, DOH or DLNR from any obligation County, DOH or DLNR may have in the future to comply with the law as applied in an Amended Decision. PKO, the Individual Plaintiffs and Oceanside agree, other than such rights as PKO or the Individual Plaintiffs may have pursuant to Section 16.1 of this Agreement, that the rights and obligations set forth in this Agreement replace and terminate any rights or obligations such Parties may have in relation to one another under the Amended Decision or any orders referred to therein.

**20.7 Dismissal of Pending Trial Court Matter.** Within ninety days after the Effective Date, Plaintiffs Kelly and PKO shall dismiss with prejudice all of their claims in *Protect Keopuka Ohana, Walter John Kelly v. State of Hawaii, et al.*, Civil No. 03-1-0117K.

## **21. REMEDIES**

**21.1 Available Remedies in the Event of Breach of Agreement.** The Parties agree that, in the event of a default under this Agreement by any Party, the sole and exclusive remedy available to the other Parties shall be to enforce by specific performance the obligations hereunder of the defaulting Party. No Party shall be required or compelled as the result of any proceeding to take any action, or refrain from taking any action, other than those actions expressly identified in this Agreement. In connection with any demand or cause of action related

to a matter released, this Agreement may be pleaded as a defense by the Parties and shall operate to effect a dismissal of such demand or cause of action.

**21.2 Enforcement Procedure.** Any disputes between or among the County, Plaintiffs and/or Oceanside (hereinafter referred to in the singular as a “Dispute Party” or in the plural as “Dispute Parties”) as to the enforcement or interpretation of this Agreement shall be presented to a neutral third party selected by the Dispute Parties. The Dispute Parties shall resolve any dispute regarding the enforcement or interpretation of this Agreement shall be resolved pursuant to the following procedure:

**21.2.1 Notice of Breach.** Within ten business days of its determination that another Dispute Party has breached the provisions of this Agreement, a Dispute Party shall notify all other Dispute Parties and their counsel of this determination in writing and provide a written explanation of the basis of its determination.

**21.2.2 Response to Notice of Breach.** Within ten business days of their receipt of the notice described in Section 21.2.1, above, the Dispute Parties receiving said notice shall provide a written response to the notifying Dispute Party indicating its concurrence with, or rejection of, the determination of breach, or indicating that the alleged breach has no bearing on that party’s rights or obligations under this Agreement, as the case may be.

**21.2.3 Meet and Confer Obligation.** Should the Dispute Parties disagree with respect to the determination of breach of this Agreement, or the remedy necessary to cure any alleged breach, then within fifteen business days of the receipt by the Dispute Party claiming the breach of all responses by the other Dispute Parties, or other mutually agreeable date, the Dispute Parties who claim an interest in the subject matter shall meet and confer in good faith in an attempt to resolve any differences.

**21.2.4 Resolution of Breaches.** In the event that the dispute is not resolved within fifteen business days of the meeting described in Section 21.2.3 above, then the Dispute Party claiming the breach shall be entitled immediately to seek relief exclusively from an arbitrator selected by the Dispute Parties who claim an interest in the subject matter. Within five business days after the meeting described in Section 21.2.3, each Dispute Party who claims an interest in the matter shall be entitled to nominate three proposed arbitrators. The Dispute Parties who claim an interest in the matter will then meet and confer to select an arbitrator. In the event such Dispute Parties cannot agree upon an arbitrator with ten days of the meeting described in Section 21.2.3, then such Dispute Parties shall ask the presiding judge of the Third Circuit Court to appoint an individual to act as the arbitrator. Any action taken to resolve a dispute between the Dispute Parties with respect to the enforcement or interpretation of this Agreement shall be determined through binding and final arbitration (with no right of appeal). The arbitration shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association then in effect. All proper costs of the arbitration including, without limitation, witness fees, attorneys’ fees, and fees of the arbitrator, shall be charged to the Dispute Parties who claim an interest in the matter in such amounts as might be determined by the arbitrator. Any such award shall be subject to the provisions of Chapter 658A, Hawaii Revised Statutes, as the same may be amended from time to time.

**21.3** Resolution of Claims Involving Non-Dispute Parties. To the extent the resolution of any disputes as to the enforcement or interpretation of this Agreement involves parties other than the Dispute Parties, the resolution of the dispute shall not be in accordance with this Section 21, but shall be as permitted by law, subject to Section 20.1 above.

**21.4** Court Approval. This Agreement shall be of no further force or effect in the event that the Court declines to enter the Amended Decision.

## **22. MISCELLANEOUS PROVISIONS**

**22.1** Good Faith Consultation. In each instance in which this Agreement provides for consultation with, or review by, another person, group or entity, all parties involved in the process shall exercise reasonableness and good faith in considering the views of others. In the case of any advisory board provided for herein, the organizational documents of the entity which the advisory board is to serve shall provide that the board of directors and officers of such entity shall exercise good faith in considering the views expressed by the advisory board and its members.

**22.2** PKO Access to Project Site and Oceanside Management. The Parties acknowledge that PKO has had extensive involvement with the Hokuli'a lands, in particular through Mr. James Medeiros, its current or former President. Consequently, Oceanside agrees with PKO that Mr. Medeiros, on behalf of PKO, shall have reasonable, non-exclusive access (i) to observe development by Oceanside at Hokuli'a, including without limitation archaeological fieldwork and work on or in the vicinity of the Stepping Stone Trail, other cultural sites and the Shoreline Park, (ii) to the archaeologists retained by Oceanside to do work described in the preceding subsection or other work at Hokuli'a, and to any construction monitors hired by Oceanside or its contractors or consultants, in order to provide them information on cultural sites at Hokuli'a and on local burial and cultural practices, and (iii) to Oceanside management in a consultative capacity. PKO agrees, however, that these privileges are not intended to elevate, and will not result in elevating, PKO or Mr. Medeiros to a preferred role in comparison to others who may have similar concerns, including without limitation other descendants of the lands within Hokuli'a.

**22.3** No Prior Assignments. The Parties represent and warrant that they have not heretofore assigned or transferred or purported to assign or transfer, to any other person, entity, firm or corporation whatsoever, any claim, debt, liability, demand, obligation, expense, action or causes of action herein released.

**22.4** Binding on Successors. This Agreement and its terms shall inure to the benefit of and be binding upon each of the Parties hereto and each and all of their respective successors, assignees, buyers, grantees, vendees, or transferees, and their past or present, direct or indirect, affiliates, partners, joint venturers, subsidiaries, parents, representatives, receivers, trustees, officers, directors, employees, agents, shareholders, members and elected and appointed officials and each of them, as though they were Parties hereto, wherever located.

**22.5 Settlement of Disputed Claims.** The Parties hereto understand and agree that this settlement is a compromise of disputed claims, and that no Party's actions under this Agreement shall be construed as an admission of liability.

**22.6 Entire Agreement.** This writing constitutes the entire agreement among the Parties, and no modification of this Agreement shall be valid unless executed in writing by the Parties hereto. Further, none of the Parties to this Agreement shall be bound by any representations, warranties, promises, statements, or information unless expressly set forth herein.

**22.7 Factual Investigation.** Each Party has conducted its own factual investigation, is not relying on any other Party, and assumes the risk that there are material unknown facts or that facts are other than as is presumed. The Parties further acknowledge that they are aware that they may hereafter discover material facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of this Agreement, and further acknowledge that there may be future events, circumstances, or occurrences materially different from those they know or believe likely to occur, but that it is their intention to enter into and be bound by this Agreement.

**22.8 Agreement May Be Pleaded as a Defense.** In connection with any demand or cause of action related to a matter released in Section 20, this Agreement may be pleaded as a defense by the Parties hereto and shall operate to effect a dismissal of such demand or cause of action.

**22.9 Captions.** The captions of the various sections in this Agreement are for convenience and organization only, and are not intended to be any part of the body of this Agreement, nor are they intended to be referred to in construing the provisions of this Agreement.

**22.10 Exhibits.** All exhibits referenced in this Agreement are made a part of and incorporated herein.

**22.11 Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Hawaii.

**22.12 Notices, Demands and Communications Between the Parties.** Formal written notices, demands, correspondence and communications between the Parties shall be sufficiently given if delivered personally (including delivery by private courier), dispatched by certified mail, postage prepaid and return receipt requested, or delivered by nationally recognized overnight courier service, or by electronic facsimile transmission followed by delivery of a "hard" copy to the addresses of the Parties indicated below.

Such written notices, demands, correspondence and communications may be sent in the same manner to such persons and addresses as any Party may from time-to-time designate in writing at least fifteen days prior to the name or address change and as provided in this Section 22.12.

Notices personally delivered shall be deemed to have been received upon delivery. Notices delivered by certified mail, as provided above, shall be deemed to have been given and received on the first to occur of: (a) actual receipt by any of the addressees designated above as the Party to whom notices are to be sent; or (b) within five days after a certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail. Notices delivered by nationally recognized overnight courier service (such as Federal Express) as provided above shall be deemed to have been received twenty-four hours after the date of deposit. Notices delivered by electronic facsimile transmission shall be deemed received upon receipt of sender of electronic confirmation of delivery, provided that a "hard" copy is delivered by overnight courier as provided above.

**22.13 Counterparts.** This Agreement may be executed in one or more counterparts, and all the counterparts shall constitute but one and the same Agreement, notwithstanding that all Parties are not signatories to the same or original counterpart.

**22.14 Nonwaiver.** Unless otherwise expressly provided in this Agreement, no waiver by a Party of any provision hereof shall be deemed to have been made unless expressed in writing and signed by such Party. No delay or omission in the exercise of any right or remedy accruing to any Party upon any breach under this Agreement shall impair such right or remedy or be construed as a waiver of any such breach theretofore or thereafter occurring. The waiver by a Party of any breach of any term, covenant or condition herein stated shall not be deemed to be a waiver of any other term, covenant or condition.

**22.15 Authority.** The persons signing below represent that they have the authority to bind their respective Party and that all necessary board of supervisors', board of directors', shareholders' or other approvals have been obtained.

**22.16 Understanding of Terms.** The Parties each hereby affirm and acknowledge that they have read this Agreement, that they know and understand its terms, and have signed it voluntarily and after having been advised by counsel. The Parties have had a full and unhindered opportunity to consult with their attorneys, accountants, financial advisors and such other consultants, as they may have desired prior to executing this Agreement.

**22.17 Construction.** The Parties acknowledge that each Party and its counsel have reviewed this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendment or exhibits hereto.

**22.18 No Third Party Beneficiaries.** The Parties agree that no third party beneficiary to this Agreement exists and that nothing contained herein shall be construed as giving any other person or entity third party beneficiary status.

**22.19 Force Majeure.** In the event that any Party shall be delayed or hindered in or prevented from the performance of any duties, obligations or conditions provided for and required under this Agreement by reason of strikes or other disturbances, lockouts, labor troubles, riots, insurrection, war or civil disturbance, fire or earthquake, tidal wave, acts of God, the elements, government legislations, regulation or controls, or economic controls, making it

impossible to complete any duties, obligations, or conditions provided for or required under this Agreement, then performance of such duty, obligation, or condition shall be excused for the period of the delay and the period for the performance of any such duty, obligation, or condition shall be extended for a period equivalent to the period of such delay.

**22.20 Further Assurances.** The Parties shall promptly perform, execute and deliver or cause to be performed, executed and delivered any and all acts, deeds and assurances, including the delivery of any documents, as any Party may reasonably require in order to carry out the intent and purpose of this Agreement.

**IN WITNESS WHEREOF**, the Parties have executed one or more copies of this Agreement as of the Effective Date.

1250 OCEANSIDE PARTNERS  
By Red Hill 1250, Inc., General Partner

\_\_\_\_\_  
By: Lyle Anderson  
Title: Chairman  
Address: 76-6831 Ali'i Drive  
Suite K15  
Kailua-Kona, HA 96740

COUNTY OF HAWAII

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

HAWAII STATE DEPARTMENT OF LAND AND NATURAL RESOURCES

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

HAWAII STATE DEPARTMENT OF HEALTH

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PROTECT KEOPUKA OHANA

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

WALTER JOHN KELLY

\_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

CHARLES ROSS FLAHERTY, JR.

\_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PATRICK M. CUNNINGHAM

\_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

MICHELE CONSTANS WILKINS

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



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EXHIBIT "B" TO ADDENDUM TO SETTLEMENT AGREEMENT

AMENDED STIPULATION FOR PERMANENT  
INJUNCTION ON WATER POLLUTION CLAIMS AND ISSUES

COME NOW Plaintiffs WALTER JOHN KELLY, CHARLES ROSS FLAHERTY, JR., PATRICK M. CUNNINGHAM, AND MICHELE CONSTANS WILKINS, by and through their counsel, Robert D.S. Kim, Esq., and Plaintiff PROTECT KEOPUKA OHANA, a Hawaii non-profit corporation, by and through its counsel Alan Murakami of the Native Hawaiian Legal Corporation, (collectively, "Plaintiffs"), Defendant 1250 OCEANSIDE PARTNERS, by and through its Chief Executive Officer, John De Fries, Defendant DEPARTMENT OF HEALTH, STATE OF HAWAII, and Defendant STATE OF HAWAII, by the through their counsel, Adina Cunningham, Deputy Attorney General, and Defendant COUNTY OF HAWAII, by and through its undersigned Deputy Corporation Counsel, Ivan M. Torigoe, appear and hereby stipulate to a modified permanent injunction as follows:

1. A Stipulated Permanent Injunction is hereby issued against Defendant OCEANSIDE 1250 PARTNERS, effective upon the signature and approval of the Court hereinbelow, and the express provisions of which are as follows:

A. Defendant 1250 OCEANSIDE PARTNERS is permanently enjoined from polluting, generating runoff, discharge and/or from causing sediment runoff into the Class AA waters off of the Hokuli'a Property (more specifically described and identified on the tax maps of the Third Taxation Division of the State of Hawaii as Tax Map Key Nos. (3-) 7-9-012:004, (3) 7-9-012:011, (3) 8-1-004:003 and (3) 8-1-004:056) in violation of the water quality standards contained in Title 11, Chapters 54 and 55, Hawaii Administrative Rules, as amended, from time to time, Chapter 342D, Hawaii Revised Statutes, as amended, and the Notice of General Permit Coverage No. HI R10B008 ("NGPC") issued to 1250 Oceanside Partners as it has been or may be modified, and as applicable to construction activities on the Hokuli'a Property; and

B. In the event that any party to this Stipulation determines that there may have been a violation of this Stipulated Permanent Injunction, the party shall immediately notify the Court and the other parties of their determination and the reasons therefore and the

Court may immediately set an Order To Show Cause hearing as to whether Defendant 1250 OCEANSIDE PARTNERS has violated this Stipulated Permanent Injunction and if so, the sanctions or other relief to be ordered by the Court.

C. The Chief Executive Officer of 1250 OCEANSIDE PARTNERS (or if in the future there is no individual designated as such, the employee or officer of 1250 OCEANSIDE PARTNERS responsible for the day-to-day operations of 1250 OCEANSIDE PARTNERS) shall be subject to the in personam jurisdiction of the Court with respect to the enforcement of this Stipulated Permanent Injunction. The person identified above shall sign the Stipulated Permanent Injunction and should that person be replaced, his successor(s) shall execute a written agreement to be bound by the terms of this Stipulated Permanent Injunction, which agreement shall be filed with the Court and served on the parties to this Stipulation; and,

D. Except as may be provided in any further order of the Court, the parties specifically stipulate that this Stipulated Permanent Injunction shall continue in effect and shall be binding upon 1250 OCEANSIDE PARTNERS and its successor(s) in interest as developer of Hokuli'a, until completion of its construction of all of the phases of the Hokuli'a Property. 1250 OCEANSIDE PARTNERS shall notify the Court and all parties to this Stipulation of the identity of any such successor in interest; and,

E. This Stipulated Permanent Injunction is not meant to constitute an encumbrance and/or cloud on the title of the Hokuli'a Property; and,

F. This Stipulated Permanent Injunction as provided herein, does not in any way preclude and/or affect the right(s), power(s) and/or remedies of the State of Hawaii, County of Hawaii and their departments and/or agencies to take any and all action and/or seek any and all relief for any past, present and/or future violations of any water pollution or erosion or sediment control laws; and,

G. G. This Stipulated Permanent Injunction shall constitute a settlement of Plaintiffs' claims for injunction and/or revocation of permits in this action against Defendant 1250 OCEANSIDE PARTNERS with respect to water quality, except for Plaintiffs' claims for any attorneys fees from and after the effective date of this Stipulated Permanent Injunction. This Stipulated Permanent Injunction shall not constitute a waiver of any other



claims, rights or remedies of Defendant DEPARTMENT OF HEALTH and/or Defendant COUNTY OF HAWAII and/or Defendant STATE OF HAWAII, with respect to Defendant 1250 OCEANSIDE PARTNERS; and

H. This Stipulated Permanent Injunction shall be effective upon the signature below of all Parties by their representatives as described above and upon the signature and approval of the Court. This Stipulation may be signed in counterparts and submitted by facsimile. Duplicate unsigned pages may be discarded to produce a single document.

I. Judge Ronald Ibarra shall determine all issues relating to whether claims, or causes of action, have been settled by this Stipulated Permanent Injunction, and such decision will be final and not subject to appeal. The parties hereby waive their rights to appeal Judge Ibarra's decision on this matter.

J. This Stipulation and any Order entered pursuant hereto shall replace and supersede that certain stipulation dated December 20, 2006 (other than paragraph 1 thereof) and the Order entered pursuant thereto (except insofar as such Order implemented paragraph 1 of such stipulation).

DATED: Kealakekua, Hawaii, February \_\_, 2006.