

DEPARTMENT OF HAWAIIAN HOME LANDS
STATE OF HAWAII

DECEMBER 9, 2022

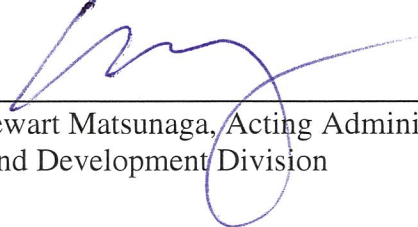
ADDENDUM NO. 2 TO
REQUEST FOR PROPOSALS
No. RFP-23-HHL-006

SEALED OFFERS
FOR
LAND ACQUISITION AND DEVELOPMENT, STATEWIDE

NOTICE TO ALL PROSPECTIVE OFFERORS

This addendum is hereby made a part of the Request for Proposals documents for LAND ACQUISITION AND DEVELOPMENT, STATEWIDE, and it shall amend the said Request for Proposals documents as detailed within this Addendum document.

APPROVED:



Stewart Matsunaga, Acting Administrator
Land Development Division

Date: December 9, 2022

Please detach, execute, and return immediately, the receipt below, by mail to the Department of Hawaiian Home Lands, P. O. Box 1879, Honolulu, HI 96805; by facsimile to 620-9299, or by e-mail to darrell.h.ing@hawaii.gov.

Receipt of Addendum No. 2 for RFP-23-HHL-006, LAND ACQUISITION AND DEVELOPMENT, STATEWIDE, is hereby acknowledged.

Signed _____

Title _____

Firm _____

Date _____

ADDENDUM NO. 2 TO RFP-23-HHL-006
SEALED OFFERS
FOR
LAND ACQUISITION AND DEVELOPMENT, STATEWIDE

AMENDMENTS TO THE RFP

(None)

ATTACHMENTS

Questions received after Amendment no. 1 and responses.

Questions received after Amendment no. 1 and responses

1. Does the Infrastructure Contractor and the House Contractor need to be named at the time of application or can it be "To Be Determined"

Unless the contractor(s) are member(s) of the development team and will commit to a guaranteed maximum cost, developer shall award the work through a competitive bid procedure, therefore a contractor would not be named in the proposal.

2. If Offeror is a partnership, will the experience of the individual partners count toward the experience requirements in the RFP?

Experience as a development team, as well as individual experiences will both be considered.

3. How much funding is available for interim/construction loans from DHHL?

The amount of the interim house construction loan is subject to negotiation, based on anticipated peak drawdown, as determined by the size of the project and schedule.

4. Can there be multiple loans for each phase of the project? Or would this be a revolving loan?

It would be a revolving loan.

5. Offer Form OF-2 suggests a 2-bedroom house type. If a 2-bedroom model is not included as one of the five model types, will we be marked down on points?

Lack of a 2-bedroom model will be considered a negative in the evaluation. The intent is to offer a house at the lowest possible price for beneficiaries on the margin of financial pre-qualification. The design should allow relatively easy expansion to meet future needs and financial resources of the homeowner.

6. Will DHHL accept the "proposal to develop the property" subject to board approval? Although the Addendum 1 describes flexibility in the final pricing, we will not be able to obtain final Board approval on the development aspect of the RFP prior to submission. Our process would require the final development agreement as described in section 5.10 (below) would require board approval.

Yes, DHHL will accept the offer to develop the property "subject to board approval".

7. How does a contractor give a guaranteed maximum cost without plans and specs?

The guaranteed maximum cost is only required if a contractor is named as part of the development team, i.e., the project will not be put out to competitive bidding.

8. How does DHHL know what they are getting for that “maximum cost” without near permit ready plans and specs and if the development proposed is “conceptual”?

We would evaluate against costs for similar projects plus assumed inflation and contingency.

9. So committing to going out to competitive bid versus naming a contractor does NOT affect point scoring?

Correct. For each offered property, the selection committee will determine: (1) whether the property is acceptable for acquisition; (2) if acceptable and the proposal includes an offer to develop, whether that offer is reasonable. Scoring of developer qualifications will not be compared to those on other proposals.

10. The cost per square foot on two bedroom homes is the highest because of lack of economies of scale. The price/construction cost difference between a 2 vs 3 bedroom is minimal unless the other larger homes sales are subsidizing the 2 bedroom sales price like we did at Princess Kahanu. Does DHHL want us to have the larger units subsidize the sales prices of the 2 bedroom homes or just sell them priced relative to their construction cost?

No subsidizing of costs between models. Price for each model should be construction cost plus soft costs and profit. Sales prices will need to be at or lower than appraisal value.

11. We would like DHHL to confirm that NAHASDA funds are NOT being used.

Acquisition of some properties may utilize NAHASDA funds. NAHASDA funding of development/renovation costs would only be used on the properties acquired with NAHASDA funds. Home buyer assistance may be provided with NAHASDA funds regardless of the source of acquisition funding. Should NAHASDA funds be utilized in the project, a HUD ER will be required, and cost and schedule should be included in the environmental compliance phase.

12. RFP section 2.3 says “applicants on the Department’s waiting list who are financially qualified to purchase a house”. Does DHHL determine at what level an individual is financially qualified or does the specific level come from a financial institution’s prequalification process.

The pre-qualification amount is determined by the beneficiary’s lender. The financial institution, lender will determine final loan approval.

13. Can DHHL Provide a Draft Development Agreement for review?

A draft development is attached to this addendum. The developer may propose its own format which would be subject to review and approval by the Department of the Attorney General.

14. RFP section 2.5 states that both sides can terminate the contract with 6 weeks advance notice. Has this happened in the past? If so, what kind of situation do they expect in the case the State terminates the contract?

DHHL has not yet had to invoke Section 2.5; however, that does not guarantee that such action will not be taken, should a contract condition arise prompting such termination for cause or convenience. That clause is from the State Procurement Office (SPO) RFP template. SPO did not provide guidance regarding the types of situations contemplated.

15. If the State terminates the Development portion of the RFP but retains the land through acquisition, will a new developer be selected through a separate RFP process? Will the original developer be allowed to participate in the new RFP?

“Yes” to both questions. However, the reasons for termination of the original development agreement will be considered when evaluating the Offerors proposal for the new RFP.

16. Please clarify if guaranties, security collateral, or any other major terms and conditions are required related to the DHHL Construction Loan program.

At minimum, (1) performance bond, (2) labor and materials payment bonds, each provided in full amount of contract, and (3) liability and builder’s risk insurance would be required.

17. Please clarify the applicable rules for adjustment of sales prices to beneficiaries should we participate in the DHHL Construction Loan program.

On proposal form OF-2, Section E. 3. Feasibility Analysis, there should be no costs under Indirect Development for Interim Loan Fees or Interim Loan Interest.

18. The current DHHL Construction Loan term is twenty-four (24) months. Please clarify if this term could be extended due to extenuating circumstances outside of the control of the developer or contractor such as DPP permit approvals, long lead material deliveries, etc.

The term of the loan would not start until all permits have been approved and construction is ready to start; i.e. first draw.

19. Please clarify the review and approval process for the developer or contractor to obtain DHHL approval of sales prices.

Tentative prices from proposal form OF-2 shall be incorporated into the development agreement. Developer/contractor shall submit final house construction budget prior to lot/house offering to determine actual prices.

20. RFP Section 2.3C, D - Please clarify if DHHL would consider reviewing and accepting an existing EIS or EA for a property in lieu of requiring new reports or documentation.

Existing documentation could be acceptable. Factors to be considered are: age of the EIS/EA; project description in the EIS/EA versus the proposed development; conformance with current EIS/EA regulations. DHHL may consult with Office of Planning and Sustainable Development to determine whether additional actions are required.

21. RFP Section 2.3E – Please clarify if DHHL would consider reviewing and accepting an existing soil investigation and analysis for the site.

As with the response to the EIS/EA question, a previously completed soil study could be acceptable, subject to review by DHHL. If conducted, Offeror shall provide any Phase 1 and Phase 2 Environmental Site Assessment studies and findings.

22. RFP Section 2.3R, S and T – Please clarify if DHHL will accept fully designed and permit approved construction plans, or if they will participate in the design process.

If subdivision and construction plans have been approved and permitted by the City, DHHL reserves the right to review and request changes to be compatible with projects in other DHHL subdivisions – on Oahu for instance: minimum lot size of 5,000 square feet.

23. RFP Section 2.4F – With regards to DHHL payment of construction costs, could you please clarify DHHL's policy on change orders and coverage of unexpected cost increases?

Please refer to Exhibit D, DHHL Construction General Conditions, Section 4.2 Changes.

24. RFP Section 2.4G – Please clarify the criteria that will be used by DHHL to determine qualification by the developer or contractor for the DHHL Construction Loan.

The same criteria for evaluating the development proposal would apply.

25. RFP Section 2.5 – Please clarify if there is any penalty of any type for terminating the contract with six (6) weeks prior notice.

As noted above, that clause is from the State Procurement Office (SPO) RFP template. SPO did not provide guidance regarding penalties for early termination.

26. Would it be possible to extend the date for the Execution of Sale Agreement from February 1, 2023 to April 1, 2023 or later?

The dates provided are estimates. Post-submittal dates are subject to change depending on number of proposals received.

27. Please clarify the entity that will possess ownership of the home units prior to sale to beneficiaries, DHHL or the Developer or Contractor?

In accordance with RFP Section 2.3 AA., developer shall "Maintain and protect each house until sale and loan closing, and turnover of the home to a lessee takes place."

28. Please clarify the general requirements for completed home features to qualify them as "Turn-Key".

A turn-key house, as opposed to a vacant lot award, would be ready for the beneficiary to move into upon execution of the homestead lease and close of the sale.

29. Please clarify if condominium statutes will be applicable.

At this time, the Department's intent is that any multi-family project will be rentals for beneficiaries, not to be sold as leasehold, and thus condominium laws would not apply. However, should this change, and units be sold leasehold, HRS 514B would apply.

30. Please clarify if the Developer or Contractor is required to construct model homes, or if "virtual" models would be acceptable.

Construction of model homes will not be required. Lot and house offerings to beneficiaries are usually made using plans and renderings.

31. Please clarify if DHHL requires the Developer or Contractor to set up an on-site Sales Office.

An on-site sales office will not be required. Buyers would be identified at the lot selection meeting (RFP Section 2.4 K. and L.), therefore there would not be a continuous marketing program needing one.

32. Please clarify if there are any limitations or restrictions to the start and overall duration of the development period.

The schedule would generally be driven by submittal to and approval of documents by the various Federal, State and County authorities, as applicable. Offerors should consider use of electronic platforms for submitting, processing and approval of required permits, and the length of time needed for approvals.

33. Please clarify if the development period can be either suspended or extended due to poor market conditions and/or slow sales. Has this ever been a situation on other DHHL development projects?

Sales would be to the Hawaiian Home Lands residential waitlist. While some projects have had to contact more beneficiaries than had been anticipated, none have been suspended or terminated for poor market conditions.

DEPARTMENT OF HAWAIIAN HOME LANDS

AND

PROJECT DEVELOPER AGREEMENT

(DATE)

PROJECT DEVELOPER AGREEMENT

A. DATE OF THIS PROJECT DEVELOPER AGREEMENT

_____, 20__

B. PARTIES; NOTICES

<u>LESSOR:</u>	Department of Hawaiian Home Lands 91-5420 Kapolei Parkway Kapolei, Hawaii 96707 <u>Mailing Address:</u> P. O. Box 1879 Honolulu, Hawaii 96805
<u>LESSEE:</u>	_____ _____ _____

All notices between the parties shall be in writing and shall be mailed or delivered at the foregoing addresses. Either party may change its address for the receipt of notices by giving written notice of such change to the other party.

C. RECITALS

1. Under HHCA, Section 220.5, LESSOR is authorized to enter into and carry out contracts to develop available lands for homestead, commercial, and multi-purpose projects.
2. LESSOR is entering into this Project Developer Agreement in furtherance of the purpose of promoting Hawaiian socio-economic development under HHCA, Section 220.5.
3. The execution of this Project Developer Agreement by LESSEE shall constitute a binding agreement on LESSEE's part to carry out the responsibilities of developing and operating the project described herein subject to the terms hereof.

D. PROJECT DEVELOPER AGREEMENT GROUND LEASE

As used in this Section D., the term "Lease" means this Project Developer Agreement.

Article 1

THAT, LESSOR, for and in consideration of the rent to be paid and of the terms, covenants and conditions herein contained, all on the part of LESSEE to be kept, observed and performed, does lease to LESSEE, and LESSEE does lease from LESSOR, the premises located at _____, Hawaii, Tax Map Key No. _____ comprising _____ square feet (_____ acres) of Hawaiian Home Lands, more particularly described as follows:

See: Exhibit 1, being the legal description of the premises and

Exhibit 2, being a map of the premises,
both of which attached hereto and made a part hereof.

TO HAVE AND TO HOLD the demised premises unto LESSEE for the term of _____ (__)
years:

Commencing:	On the date set forth above
Ending:	On the date __ years from the date set forth above

Unless sooner terminated as hereinafter provided, LESSOR reserving and LESSEE yielding and paying to LESSOR at the office of the LESSOR of Hawaiian Home Lands, Honolulu, Oahu, State of Hawaii, a net annual rental of ONE DOLLAR (\$1.00) per year, the receipt and advance payment for the full term hereof, LESSOR acknowledges.

RESERVING UNTO THE LESSOR THE FOLLOWING:

1.1. Minerals and waters.

- (a) All minerals as hereinafter defined, in, on, or under the premises, and the right, on its own behalf or through persons authorized by it, to prospect for, mine and remove such minerals and to occupy and use so much of the surface of the ground as may be required for all purposes reasonably extending to the mining and removal of such minerals by any means whatsoever, including strip mining. "Minerals," as used herein, shall mean any or all oil, gas, coal, phosphate, sodium, sulfur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, including all geothermal resources, in, on, or under any land, fast or submerged; provided, that "minerals" shall not include sand, gravel, rock or other material suitable for use and when used in road construction in furtherance of LESSEE'S permitted activities on the demised premises and not for sale to others.
- (b) All surface waters, ground waters, and water systems, appurtenant to the premises and the right on its own behalf or through persons authorized by it, to capture, divert or impound the same and to occupy and use so much of the demised premises as may be required in the exercise of this right Reserved
- (c) As a condition precedent to the exercise by LESSOR of any rights reserved in this paragraph 1, just compensation shall be paid to LESSEE for any of LESSEE'S improvements taken which amount is to be determined in the manner set forth in paragraph 3, and the rental will be reduced in proportion to the rental value of the premises of which LESSEE is deprived.

1.2. Prehistoric and historic remains. All prehistoric and historic remains found on the premises.

Article 2

THE PARTIES HEREIN COVENANT AND AGREE AS FOLLOWS:

- 2.1. Payment of rent. LESSOR acknowledges that LESSEE has paid the rent reserved hereunder in legal tender of the United States of America for the full term hereof.
- 2.2. Taxes, assessments, etc. (a) That LESSEE shall pay or cause to be paid, when due, the amount of all taxes, rates, assessments and other outgoings of every description as to which the premises or any part, or any improvements, or LESSOR or LESSEE, are now or may be assessed or become liable by authority of law during the term of this Lease provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, LESSEE shall be required to pay only those installments, together with interest, which become due and payable during the term. (b) That LESSEE shall reimburse to LESSOR, upon demand, any and all conveyance and transfer taxes payable with respect to this transaction, or with respect to any document to which LESSEE is a party, creating or transferring an interest or an estate in the premises.
- 2.3. Utility services. That LESSEE shall pay or caused to be paid all charges, duties, rates and, other outgoings of every description, including water, sewer, gas, refuse collection, relocation of utility poles and lines or any other charges, as to which the premises or any part, or any improvements, or LESSOR or LESSEE may become liable for during the term, whether assessed to or payable by LESSOR or LESSEE. Notwithstanding the foregoing, LESSOR shall be responsible for all assessments for sewer line improvements and for hook up to a sanitary sewer system when a sanitary sewer system shall become available to the premises.
- 2.4. Issuance and relocation of utility easements. (a) That LESSEE may request an easement for utility purposes or relocation of an existing utility easement and, if so approved by LESSOR, LESSEE shall pay all costs related to the issuance and installation of a new utility easement or relocation of an existing utility easement. (b) That LESSOR may issue utility easements or relocate existing utility easements without LESSEE'S approval provided the issuance or relocation thereof does not unreasonably interfere with LESSEE'S use of the premises. In such event, LESSOR shall pay for all costs related to the issuance and installation of a new utility easement or relocation of an existing easement, unless the issuance or relocation is being done at the request of a utility company, in which case the utility company shall pay all the related costs.
- 2.5. Sanitation, etc. That LESSEE shall keep the premises and improvements in a strictly clean, sanitary and orderly condition.
- 2.6. Waste and unlawful, improper or offensive use of premises. That LESSEE shall not strip or commit, suffer or permit to be committed any waste, nuisance, strip or unlawful, improper or offensive use of the premises, or any part thereof, nor, without the prior written consent of LESSOR, cut down, remove or destroy, or suffer to be cut down, removed or destroyed, any trees now growing on the premises.
- 2.7. Compliance with laws. That LESSEE shall, if applicable, comply with the requirements of any municipal, state and federal authorities and observe any municipal ordinances and state and federal statutes, applicable to the premises, now in force or which may be in force.
- 2.8. Inspection of premises. That LESSEE will permit LESSOR and its agents, at all reasonable times as to cause as little interference with LESSEE'S use of the premises as is reasonably possible during this Lease term, to enter into and upon the premises to inspect and examine the same and determine the state of repair and condition thereof, including without

limitation the right to inspect LESSEE'S records regarding compliance with all applicable rules and regulations.

- 2.9. LESSOR's approval of improvements. That LESSEE shall not at any time during the term construct, place, maintain and install on the premises any building, structure or improvement of any kind and description except with the prior written consent of LESSOR and upon those conditions LESSOR may impose, unless otherwise provided in this Lease.

LESSEE shall own in fee simple all buildings and real property improvements which are now or hereafter situated on the demised premises; provided that LESSEE, for itself and its successors and assigns, covenants that the buildings and real property improvements shall not be separated from the demised premises and can only be conveyed or encumbered with any conveyance or encumbrance of this Lease subject to Lessor's approval or consent as provided below in paragraph 2.13 "Assignment."

- 2.10. Repairs to improvements. That LESSEE shall at its own expense, keep, repair and maintain all buildings and other improvements now existing or hereafter constructed or installed on the premises in good order, condition and repair, reasonable wear and tear excepted.
- 2.11. Liens. That LESSEE will not commit or suffer any act or neglect which results in the premises, any improvement or the right, title and interest of LESSEE in the premises becoming subject to any attachment, lien, charge, or encumbrance, except as provided in this Lease, and shall indemnify, defend, and hold LESSOR harmless from and against all attachments, liens, charges, and encumbrances and all resulting expenses, including reasonable attorney's fees.
- 2.12. Character of use. That LESSEE shall develop and construct an affordable multifamily rental housing project on the demised premises in accordance with Exhibit 3 hereof. Upon completion of such project, Exhibit 3 shall be of no force and effect.

Upon completion of such project, LESSEE shall use, own, operate and manage the demised premises solely for an affordable multifamily rental housing project for elderly native Hawaiians of low and very low income and to the extent allowed by LESSOR moderate income and such other purpose as the LESSOR shall reasonably permit.

- (a) Native Hawaiian Certification. LESSOR will provide LESSEE with an extract from the Residential Waiting List maintained by the Lessor. The LESSOR will assist the LESSEE in updating the addresses of applicants and certifications of blood quantum.
- (b) Project Documents. LESSEE shall draft House Rules and/or Resident Handbook, which shall be submitted to LESSOR for approval. LESSEE shall be responsible for distributing such House Rules and/or Resident Handbook to residents and for enforcing the same.
- (c) Reports. LESSEE shall cause the following reports to be prepared and submitted to LESSOR for LESSOR'S review and acceptance, which shall not be unreasonably withheld:
- (1) On or before the fifteenth (15th) day of each month, monthly financial statement of receipts and disbursement, schedule of accounts receivable and

payable, and reconciled bank statements for project accounts for the previous month;

- (2) Annual audit prepared and certified by a Certified Public Accountant (CPA) or other person acceptable to LESSOR; and
- (3) Management reports covering occupancy, operations, physical condition of the premises and improvements.

- 2.13. Assignments, etc. LESSEE shall not assign or mortgage this Lease without the approval or consent of LESSOR. A permitted assignee shall have the same rights and obligations hereunder as the original LESSEE; provided, however, that no such assignment shall be effective to transfer any interest in this Lease unless LESSOR shall have approved or consented to the assignment or mortgage and shall have received either a true executed copy of such assignment or written notice thereof, and also, in any case other than assignment by way of mortgage or assignment to or by the Department of Hawaiian Home Lands of the State of Hawaii or upon foreclosure of mortgage or assignment in lieu of foreclosure, payment of a reasonable service charge and the written undertaking of the assignee to perform all obligations of LESSEE hereunder, which undertaking may be incorporated in such assignment. No such assignment shall release the assignor from further liability hereunder unless LESSOR shall consent in writing to such assignment, and LESSOR will not require payment of any money except said service charge for such consent nor withhold such consent unreasonably or because of the assignee's national origin, race, color or creed; provided, however, that any person acquiring the leasehold estate in consideration of the extinguishment of a debt secured by mortgage of this Lease or through foreclosure sale, judicial or otherwise, shall be liable to perform the obligations imposed on LESSOR by this Lease only during the period such person has possession of ownership of the leasehold estate.

LESSEE shall expressly be allowed to rent or sublet the whole or any portion of the premises consistent with the provisions of paragraph 2.12 above.

LESSEE may assign this Lease to a limited partnership in which LESSEE is the general partner without LESSOR's consent.

LESSEE may mortgage this Lease to the Department of Hawaiian Home Lands of the State of Hawaii or to any other State of Hawaii agency, or to any county or agency thereof of the State of Hawaii without LESSOR's consent.

- 2.14. Mortgage. That, except as provided in this Lease, LESSEE shall not mortgage, hypothecate or pledge the premises or any portion of this Lease or any interest without the prior written approval of LESSOR and any such mortgage, hypothecation or pledge without such approval shall be null and void.
- 2.15. Indemnity. That LESSEE shall indemnify, defend and hold LESSOR harmless (a) from and against any claims or demands for loss, liability or damage, including claims for property damage, bodily injury or wrongful death, arising out of or resulting from any use, occupancy, maintenance, or enjoyment of the premises, or adjacent sidewalks and roadways in LESSEE'S use or control, including any accident, fire or nuisance, or growing out of or caused by any failure on the part of LESSEE to maintain the premises in a safe condition, or by any act or omission of LESSEE; and (b) from and against all actions, suits, damages and

claims by whomsoever brought or made by reason of the non-observance or non-performance of any of the terms, covenants and conditions of this Lease or the rules, regulations, ordinances and laws of the federal, state, municipal or county governments.

- 2.16. Costs of litigation. That in case LESSOR shall, without any fault on its part, be made a party to any litigation commenced by or against LESSEE (other than condemnation proceedings), LESSEE shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on LESSOR; furthermore, LESSEE shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by LESSOR in enforcing the covenants and agreements of this Lease, in recovering possession of the premises or in the collection of delinquent rental, taxes and any and all other charges.
- 2.17. Insurance. LESSEE shall procure and maintain, at its own cost and expense and acceptable to LESSOR, in full force and effect with responsible insurance carriers the following insurance:
- a. Worker's Compensation Insurance. As required by state laws, including and without limitation, employer's liability insurance for all employees of the general contractor performing any work on any improvements being constructed on the premises.
 - b. Comprehensive General Liability. Against claims for personal injury (including bodily injury and death and property damage). Such insurance shall provide coverage for blanket contractual, explosion, collapse and underground coverage, broad form property damage and personal injury insurance as required by the lender.
 - c. Comprehensive General Liability Insurance. Against claims for personal injury (including bodily injury and death and property damage). Such insurance shall provide coverage for blanket contractual explosion, collapse and underground coverage, broad form property damage and personal injury insurance with a \$10,000,000 minimum limit per occurrence for combined bodily injury and property damage and in the aggregate where applicable, so long as such insurance is available on reasonable commercial terms. Such insurance shall include to the extent coverage is available on reasonable commercial terms, claims resulting from alleged environmental damage to the soil, water (surface, ground and sea) and air.
 - d. Fire and Extended Coverage Insurance. The LESSEE shall, at its sole cost, maintain all-risk property insurance covering the building(s) on the Premises, including but not limited to, LESSEE'S leasehold improvements, alterations, additions, trade fixtures and personal property from time to time in, on or upon the Premises and upon every reconstruction, repair and replacement therefor in an amount not less than one hundred percent (100%) of their full replacement cost. This requirement will include Builder's Risk Insurance during any period of construction which the Contractor shall be required to provide.
 - e. Business Interruption Insurance. The LESSEE shall procure and maintain, at its own cost and expense, in full force and effect throughout the entire term of this Lease, a business interruption insurance policy to assure rental payment for at least six (6) months in the event of a natural disaster or occurrence beyond the control of LESSEE. The policy shall name LESSOR as the beneficiary of the policy and a certificate so stating shall be forwarded to LESSOR upon each renewal of the policy.

All policies of insurance required to be maintained pursuant to this paragraph 2.17, "Insurance", covering loss or damage to any of LESSEE'S property shall provide that the insurer is required to provide LESSOR with at least thirty (30) days (or ten (10) days in the case of nonpayment of premiums) prior written notice to cancellation or non-renewal of any policy. The LESSEE will pay all premiums thereon when due and will from time to time deposit promptly with LESSOR current policies of such insurance or certificates thereof. All public liability and property damage policy shall be in the joint names of and for the mutual and joint benefit and protection of LESSOR, LESSEE, subtenants and mortgagees, as their interests may appear and shall contain a provision that LESSOR, although named as an additional insured, shall not be denied any recovery under the policy(s) for any loss occasioned to it, its servants, agents and employees by reasons of the acts, omissions and/or negligence of LESSEE which recovery would be possible if LESSOR were not named as an additional insured. As often as any such policy shall expire or terminate, LESSEE shall procure and maintain, renewal or additional policies in like manner and to like extent. All public liability, property damage and other casualty policies shall be written as primary policies, not contributing with and not in excess of coverage which LESSOR may carry.

That LESSEE will, at its own expense, at all times during the term of this Lease, keep insured all buildings and other improvements erected on the premises in the joint names of LESSOR, LESSEE and the Mortgagee, if any, as their interests may appear, against loss or damage by fire including perils specified in the extended coverage endorsement and in an amount equal to the maximum insurable value thereof, in an insurance company or companies approved by LESSOR, and will pay the premiums at the time and place the same are payable; that the policy or policies of insurance shall be made payable in case of loss to LESSOR, LESSEE and the Mortgagee, if any, as their interests may appear and shall be deposited with the Mortgagee; and that any proceeds derived therefrom in the event of total or partial loss shall be immediately available to, and as soon as reasonably possible, be used by LESSEE for rebuilding, repairing, or otherwise reinstating the same buildings in a good and substantial manner according to the plans and specifications approved in writing by LESSOR or its designated representative; provided, however, that with the approval of LESSOR, LESSEE may surrender this Lease and pay the balance owing on any mortgage and LESSEE shall then receive that portion of the proceeds which the unexpired term of this Lease at the time of the loss or damage bears to the whole of the term, LESSOR to retain the balance of the proceeds.

The LESSOR shall retain the right at any time to review the coverage, form, and amount of the insurance required by this Lease. If, in the opinion of LESSOR, the insurance provisions in this Lease do not provide adequate protection for LESSOR, LESSOR may require LESSEE to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The LESSOR'S requirements shall be reasonable but shall be designed to assure protection for and against the kind and extent of the risks which exist at the time a change in insurance is required. The LESSOR shall notify LESSEE in writing of changes in the insurance requirements and LESSEE shall deposit copies of acceptable insurance policies or certificates thereof, with LESSOR incorporating the changes within thirty (30) days of receipt of notice.

The procuring of the required policy(s) of insurance (i) shall not release or relieve LESSEE of its responsibility, nor be construed to release or relieve LESSEE of its responsibility, under this Lease as set forth herein or limit the amount of its liability under this Lease, and (ii) shall

not be deemed or construed to fulfill the indemnification provisions and requirements of this Lease.

- 2.18. Performance and Performance Bond. LESSEE will before commencing construction of any improvement on the demised premises deposit with LESSOR a performance and payment bond or certificate thereof provided by the Contractor and naming LESSOR and Lessee, as their respective interests appear, as an obligees, in a penal sum not less than 100% of the cost of such construction and with a responsible corporate surety authorized to do business in Hawaii, guaranteeing the completion of such construction free and clear of all mechanics' and materialmen's liens. There shall be attached to the bond an affidavit by a surety or sureties pursuant to and in accordance with the provisions contained in Section 78-20, Hawaii Revised Statutes.
- 2.19. Termination. That at the end of or earlier termination of this Lease, LESSEE shall, peaceably deliver unto LESSOR possession of the premises, together with all buildings and other improvements of whatever nature or name, now or hereafter erected or placed upon same, in good order and condition, reasonable wear and tear excepted. Furthermore, upon the expiration, termination, and/or revocation of this Lease, should LESSEE fail to remove any and all of LESSEE'S personal property from the premises, after notice thereof, LESSOR may remove any and all personal property from the premises and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of LESSEE, and LESSEE does agree to pay all costs and expenses for disposal, removal, or storage of the personal property.
- 2.20. Non-warranty. That LESSOR does not warrant the conditions of the premises, as the same is being leased as is.
- 2.21. Abandonment by LESSEE. That LESSEE agrees that should LESSEE breach this Lease and abandon the premises, this Lease shall continue in effect so long as LESSOR does not terminate this Lease or LESSEE'S right to possession; and LESSOR may enforce all of its rights and remedies under this Lease, including the right to recover the rent as it becomes due under this Lease; and further, that LESSOR need not mitigate its damages in the event LESSEE abandons the premises and LESSEE hereby expressly agrees to make LESSOR whole in accordance with the terms of this Lease.

Article 3

IT IS HEREBY UNDERSTOOD AND AGREED BY AND BETWEEN THE PARTIES AS FOLLOWS:

- 3.1. Mortgage. That upon due application and with the written consent of LESSOR, LESSEE may mortgage this Lease, or any interest, or create a security interest in this leasehold land. If the mortgage or security interest is to a recognized lending institution in either the State of Hawaii or elsewhere in the United States, the consent may extend to foreclosure and sale of LESSEE'S interest at the foreclosure to any purchaser, including the mortgagee, without regard to whether or not the purchaser is qualified to lease, own or otherwise acquire and hold the land or any interest. The interest of the mortgagee or holder shall be freely assignable. The term "holder" shall include an insurer or guarantor of the obligation or condition of the mortgage, including the Department of Housing and Urban Development through the Federal Housing Administration, the Federal National Mortgage Association, the Veterans Administration, the Small Business Administration, Farmers Home Administration, or any other federal agency and their respective successors and assigns or any lending

institution authorized to do business in the State of Hawaii or elsewhere in the United States; provided, that the consent to mortgage to a non-governmental holder shall not confer any greater rights or powers in the holder than those which would be required by any of these federal agencies.

- 3.2. Breach. That time is of the essence of this Lease and if LESSEE shall become bankrupt, or shall abandon the premises, or if this Lease and the premises shall be attached or taken by operation of law, or if any assignment is made of LESSEE'S property for the benefit of creditors, or if LESSEE shall fail to observe and perform any of the terms, covenants and conditions contained in this Lease and on its part to be observed and performed, LESSOR shall deliver a written notice of the breach or default by service, as provided by Section 634-35, or 634-36, Hawaii Revised Statutes, or by registered mail, or certified mail to LESSEE at its last known address, and to each mortgagee or holder of record having a security interest in the premises, making demand upon LESSEE to cure or remedy the breach or default within sixty (60) days from the date of receipt of the notice; provided that where the breach involves a failure to make timely rental payments pursuant to this Lease, the written notice shall include a demand upon LESSEE to cure the breach within less than sixty (60) days, but not less than five (5) business days, after receipt of the notice. Upon failure of LESSEE to cure or remedy the breach or default within the time period provided herein or within such additional period as LESSOR may allow for good cause, LESSOR may, subject to the provisions of Section 171-21, Hawaii Revised Statutes, at once re-enter the premises or any part, and upon or without such entry, at its option, terminate this Lease without prejudice to any other remedy or right of action for arrearages of rent and interest at the legal rate pursuant to Section 478, Hawaii Revised Statutes, or for any preceding or other breach of contract; and in the event of termination, all buildings and improvements shall remain and become the property of LESSOR; furthermore, LESSOR shall retain all rent paid in advance as damages.
- 3.3. Rights of holder of record of a security interest. In the event LESSOR seeks to forfeit the privilege, interest, or estate created by this Lease, each recorded holder of a security interest may, at its option, cure or remedy the default or breach, if the same can be cured or remedied by the payment of money or, if such is not the case, by performing or undertake in writing to perform all the terms, covenants and conditions contained in this Lease on LESSEE'S part to be performed, capable of performance by the holder, as determined by LESSOR, within the time period provided in Section 171-20, Hawaii Revised Statutes, or within the additional period as LESSOR may allow for good cause and add the cost to the mortgage debt and the lien of the mortgage. Upon failure of the holder to exercise its option, LESSOR may: (a) pay to the holder from any monies at its disposal the amount of the mortgage debt, together with interest and penalties, and secure an assignment of the debt and mortgage from the holder or if ownership of the privilege, interest or estate shall have vested in the holder by way of foreclosure, or action in lieu thereof, LESSOR shall be entitled to the conveyance of the privilege, interest or estate upon payment to the holder of the amount of the mortgage debt, including interest and penalties, and all reasonable expenses incurred by the holder in connection with the foreclosure and preservation of its security interest, less appropriate credits, including income received from the privilege, interest or estate subsequent to the foreclosure; or (b) if the property cannot be reasonably reassigned without loss to the State, then terminate the outstanding privilege, interest or estate without prejudice to any other right or remedy for arrearages of rent or for any preceding or other breach or default and use its best efforts to redispense of the affected land to a qualified and responsible person free and clear of the mortgage and the debt secured; provided that a reasonable delay by LESSOR in instituting or prosecuting its rights or remedies under this provision and Section

171-21 of the Hawaii Revised Statutes shall not operate as a waiver of these right or to deprive it of the remedy when it may still otherwise hope to resolve the problems created by the breach or default involved. Section 171-19, Hawaii Revised Statutes to the contrary notwithstanding, the proceeds of any disposition under the terms of this provision and Section 171-21, Hawaii Revised Statutes, shall be applied; first, to reimburse LESSOR for costs and expenses in connection with the disposition; second, to discharge in full any unpaid purchase price or other indebtedness owing LESSOR in connection with the privilege, interest or estate terminated; third, to the mortgagee to the extent of the value received by the State upon disposition which exceeds the fair market lease value of the land as previously determined by the State's appraiser; and fourth, to the owner of the privilege, interest, or estate.

- 3.4. Condemnation. That, if at any time, during the term of this Lease, any portion of the premises should be condemned, or required for public purposes by the State of Hawaii, or any county or city and county, or any other governmental agency or subdivision, the rental shall be reduced in proportion to the value of the portion of the premises condemned. The LESSEE shall be entitled to receive from the condemning authority (a) the value of growing crops, if any, which LESSEE is not permitted to harvest and (b) the proportionate value of LESSEE'S permanent improvements so taken in the proportion that it bears to the unexpired term of this Lease; provided, that LESSEE may, in the alternative, remove and relocate its improvements to the remainder of the demised premises occupied by LESSEE. The LESSEE shall not by reason of the condemnation be entitled to any claim against LESSOR for condemnation or indemnity for leasehold interest and all compensation payable or to be paid for or on account of this leasehold interest by reason of the condemnation shall be payable to and be the sole property of LESSOR. The foregoing rights of LESSEE shall not be exclusive of any other to which LESSEE may be entitled by law. Where the portion taken renders the remainder unsuitable for the use or uses for which the land was leased, LESSEE shall have the option to surrender this Lease and be discharged and relieved from any further liability therefor; provided, that LESSEE may remove the permanent improvements constructed, erected and placed by it within any reasonable period allowed by LESSOR.
- 3.5. Right to enter. That LESSOR and agents or representatives shall have the right to enter and cross any portion of the premises for the purpose of performing any public or official duties; provided, however, in the exercise of these rights, LESSOR shall not interfere unreasonably with LESSEE or LESSEE'S use and enjoyment of the premises.
- 3.6. Inspection by prospective bidders. That LESSOR shall have the right to authorize any person or persons to enter upon and inspect the premises at all reasonable times following a published notice for its proposed disposition for purposes of informing and apprising that person or persons of the condition of the premises prior to the proposed disposition; provided, however, that any entry and inspection shall be conducted during reasonable hours after notice to enter is first given to LESSEE, and shall, if LESSEE so requires, be made in the company of LESSEE or designated agents of LESSEE; provided, further, that no such authorization shall be given more than two years before the expiration or termination of this Lease.
- 3.7. Acceptance of rent not a waiver. That the acceptance of rent by LESSOR shall not be deemed a waiver of any breach by LESSEE of any term, covenant or condition of this Lease, nor of LESSOR'S right to re-entry for breach of covenant, nor of LESSOR'S right to declare and enforce a forfeiture for any such breach, and the failure of LESSOR to insist upon strict performance of any such term, covenant or condition, or to exercise any option conferred,

in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition or option.

- 3.8. Extension of time. That notwithstanding any provision contained in this Lease when applicable, LESSOR may for good cause shown, allow additional time beyond the time or times specified in this Lease for LESSEE to comply, observe and perform any of this Lease terms, covenants and conditions.
- 3.9. Justification of sureties. Any bonds required by this Lease shall be supported by the obligation of a corporate surety organized for the purpose of being a surety and qualified to do business in the State of Hawaii, or by not less than two personal sureties, corporate or individual, for which justifications shall be filed as provided in Section 78-20, Hawaii Revised Statutes; provided, however, LESSEE may furnish a bond in like amount, conditioned as aforesaid, executed by it alone as obligor, if, in lieu of any surety or sureties, it shall also furnish and at all times thereafter keep and maintain on deposit with LESSOR security in certified checks, certificates of deposit (payable on demand or after such period as LESSOR may stipulate), bonds, stocks or other negotiable securities properly endorsed, or execute and deliver to LESSOR a deed or deeds of trust of real property, all of such character as shall be satisfactory to LESSOR and valued in the aggregate at not less than the principal amount of the bond. It is agreed that the value at which any securities may be accepted and at any time thereafter held by LESSOR under the foregoing proviso shall be determined by LESSOR, and that LESSEE may, with the approval of LESSOR, exchange other securities or money for any of the deposited securities if in the judgment of LESSOR the substitute securities or money shall be at least equal in value to those withdrawn. It is further agreed that substitution of sureties or the substitution of a deposit of security for the obligation of a surety or sureties may be made by LESSEE, but only upon the written consent of LESSOR and that until such consent be granted, which shall be discretionary with LESSOR, no surety shall be released or relieved from any obligation.
- 3.10. Waiver, modification, reimposition of bond provision. Upon substantial compliance by LESSEE of the terms, covenants and conditions herein contained on its part to be observed or performed, LESSOR at its discretion may waive or suspend the performance bond and/or improvement bond requirements or may modify the same by reducing the amount; provided, however, that LESSOR reserves the right to reactivate or reimpose the bond and/or bonds in and to their original tenor and form at any time throughout the term of this Lease.
- 3.11. Quiet enjoyment. That LESSOR covenants and agrees with LESSEE that upon payment of the rent at the times and in the manner provided and the observance and performance of these terms, covenants and conditions on the part of LESSEE to be observed and performed, LESSEE shall and may have, hold, possess and enjoy the premises for the term of this Lease, without hindrance or interruption by LESSOR or any other person or persons lawfully claiming by, through or under it.
- 3.12. Costs and Fees. In case of any default by LESSEE in the performance of the terms, covenants and conditions herein contained, LESSEE shall pay to LESSOR any and all costs incurred in connection with the default, including reasonable attorneys' fees. In the event that any indebtedness arising hereunder is placed in the hands of a collector or an attorney for collection, or suit is instituted for collection, LESSEE shall pay, in addition to the indebtedness, reasonable collector's and/or attorneys' fees, together with all costs.

- 3.13. Hazardous materials. LESSEE shall not cause or permit the escape, disposal or release of any hazardous material. LESSEE shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought into the premises any such materials except to use in the ordinary course of LESSEE'S business, and then only after written notice is given to LESSOR of the identity of such materials and upon LESSOR'S sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by LESSEE, then LESSEE shall be responsible for the reasonable costs thereof. In addition, LESSEE shall execute affidavits, representations and the like from time to time at LESSOR'S request concerning LESSEE'S best knowledge and belief regarding the presence of hazardous materials on the premises placed or released by LESSEE.

LESSEE agrees to indemnify, defend, and hold LESSOR harmless, from any damages and claims resulting from the release of hazardous materials on the premises occurring while LESSEE is in possession or elsewhere if caused by LESSEE or persons acting under LESSEE. These covenants shall survive the expiration or earlier termination of this Lease.

For the purpose of this Lease, the term "hazardous material" as used herein shall include any substance, waste or material designated as hazardous or toxic or radioactive or other similar term by any present or future federal, state or local statute, regulation or ordinance, as amended from time to time, including but not limited to the following statutes and regulations promulgated pursuant to them:

- Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 et seq. ("RCRA")
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") amended by Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. 9601 et seq.
- Clean Air Act, 42 U.S.C. Sections 7401 et seq.
- Clean Water Act of 1977, 33 U.S.C. 1251 et seq.
- Pesticide Act of 1978, 7 U.S.C. 13 et seq.
- Toxic Substances Control Act ("TSCA"), 15 U.S.C. 2601 et seq.
- Safe Drinking Water Act, 42 U.S.C. 300(f) et seq.
- Hazardous Materials Transportation Act, 49 U.S.C. 1801 et seq.
- Chapter 128D, Hawaii Revised Statutes
- Chapters 342B through 342N, Hawaii Revised Statutes,

And including but not limited to petroleum, petroleum based substances, asbestos, polychlorinated-biphenyls ("PCBs"), formaldehyde, and also including any substance designated by federal, state or local regulation, now or in the future, as presenting a risk to human health or the environment.

- 3.14. Hawaii Law. This Lease shall be construed, interpreted, and governed by the laws of the State of Hawaii.
- 3.15. Exhibits – Incorporation in Lease. All exhibits referred to are attached to this Lease and hereby are deemed incorporated by reference.
- 3.16. Partial invalidity. If any term, provision, covenant or condition of this Lease should be held to be invalid, void or unenforceable, the remainder of this Lease shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.
- 3.17. Additional Definitions. As used herein, unless clearly repugnant to the context:
- (a) "Holder of record of a security interest" is a person who is the owner or possessor of a security interest in the land leased and who has filed with the Department of Hawaiian Home Lands and, if applicable, Bureau of Conveyances of the State of Hawaii a copy of this interest.
 - (b) "LESSEE" shall mean and include LESSEE herein, its heirs, executors, administrators, successors or permitted assigns.
 - (c) "Premises" shall mean the land leased and all buildings and improvements now or hereinafter constructed and installed on the land leased.
 - (d) The use of any gender shall include all genders, and if there be more than one LESSEE, then all words used in the singular shall extend to and include the plural.
 - (e) The paragraph headings throughout this Lease are for the convenience of LESSOR and LESSEE and are not intended to construe the intent or meaning of any of the provisions thereof.
- 3.18. Counterparts. This Lease may be executed by the parties in counterparts.

Executed this _____ day of _____, 20__.

[The remainder of this page is blank. The next page is a signature page.]

Developer Project Agreement
_____ **Project**

APPROVED AS TO FORM AND LEGALITY: DEPARTMENT OF HAWAIIAN HOME LANDS

Deputy Attorney General

By: _____

Its: Chairman
Hawaiian Homes Commission

a Hawaii nonprofit corporation

By: _____

Its:

EXHIBIT 1

(legal description)

EXHIBIT "2"
(Map of the Demised Premises)

EXHIBIT 3

_____**PROJECT DEVELOPER AGREEMENT**
(Development and Financing of an
Affordable Rental Multifamily Housing Project)

This Development Agreement is part of a project developer agreement covering the development and construction of the affordable rental multifamily housing project described below.

1. Parties

Department: Department of Hawaiian Home Lands

Developer: _____

2. Definitions

- (a) "Development Agreement" means this Exhibit 3.
- (b) "Chairman" means the chairman of the Hawaiian Homes Commission. The Chairman also serves as the Director of the Department of Hawaiian Home Lands and is the Chief Procurement Officer for the Department. The Chairman shall make final and conclusive decisions on all questions arising out of or in connection with the administration of this Development Agreement.

The Chairman may delegate some or all of the Chairman's responsibilities to a project manager ("Project Manager"), who shall be employed by the Department and authorized to act in behalf of the Department on all matters regarding this Development Agreement.
- (c) "County" means the City and County of Honolulu, a municipal corporation of the State of Hawaii.
- (d) "Department" means the Department of Hawaiian Home Lands, a public body responsible for administering the provisions of the HHCA.
- (e) "Developer" means _____, a Hawaii corporation, including its successors and assigns.
- (f) "HHCA" means the Hawaiian Homes Commission Act of 1920, as amended.
- (g) "Lease" means the foregoing Project Developer Agreement to which this Development Agreement is attached.

(j) "Project" means the following affordable rental multifamily housing project:

Name: _____
Location: _____, Hawaii 96____
Tax Map Key No. _____

The Project will contain no less than the following types of dwelling units:

<u>Number of Dwelling Units</u>	<u>Type of Unit</u>
—	1-bedroom/1-bath
—	2-bedroom/1-bath
—	3-bedroom/2-bath
<u> 1 </u>	<u>Resident manager's unit</u>
—	Total number of dwelling units

The name of the Project may be changed only with the Department's written consent.

(k) "State" means the State of Hawaii.

3. List of Exhibits to this Development Agreement

Except for Exhibit A, which is attached hereto and incorporated by reference, all of the following other exhibits are on file at the Department and are incorporated by reference.

<u>Exhibit</u>	<u>Description</u>
A.	Project Description
B.	Request for Proposals for _____ dated _____, as amended by approved Addenda
C.	Developer's Project Proposal dated _____, including but not limited to: (1) Feasibility Analysis (2) Financial Plan (3) Marketing Plan (4) Rental Schedules (5) Conditions

D. HHC Agenda Items Pertaining to the Developer and Project

- (1) _____
- (2) _____
- (3) _____

E. List of Approvals and Certifications

- (1) U.S. Department of Housing and Urban Development ("HUD") letter dated August 6, 1999 (re: Fair Housing Act)
- (2)
- (3)
- (4)

4. RECITALS

- A. Under HHCA, Section 220.5, the Department is authorized to enter into and carry out contracts to develop available lands for, among other purposes, multi-purpose projects, including multifamily affordable rental housing projects.
- B. On _____, the Department announced and advertised a "Request for Proposals" which was directed to private developers, who met the qualifications described therein, to submit a proposal to develop and construct the Project.
- C. The Department reviewed applications and proposals submitted by developers who responded to the "Request for Proposals" ("RFP"), including Developer's application and Developer's Project Proposal dated _____, being Exhibit C hereof.
- F. This Development Agreement establishes the terms and conditions under which Developer will develop and construct the Project with assistance from the Department and others.

5. INTERIM FINANCING

The sources of interim financing for the Project are as follows:

Source	Type/Term	Donee/Recipient/ Borrower	Amount
Total			

6. PERMANENT FINANCING

Developer shall keep the Department regularly informed of Developer's efforts to obtain commitments for permanent financing.

Based on the assistance that the Department and Developer have arranged for the Project, the proposed interim and permanent financing for the Project are illustrated as follows:

Funding Source	Interim	Permanent			
		(a) Grant	(b) Equity	(c) Balance (Loan)	Cross Ref. Below
Subtotal					
		(a)+(b)+(c)=			

- A. Private Lender First Mortgage Loan. Developer proposes to apply for a first mortgage loan permanent financing from private institutional sources. The first mortgage loan will be evidenced and secured by a note, first mortgage and other loan documents that the mortgagee shall require. The terms (principal sum, interest rate and amortization term) of such first mortgage loan financing will be tied to project feasibility and, in particular, the rent schedule, together with resulting Project income, that the Department shall approve.
- B. Rental Housing Trust Fund of the State of Hawaii ("RHTF") Second Mortgage Loan. Developer proposes to apply for secondary financing from the RHTF. Such secondary financing will be evidenced by a residual receipts note, second mortgage and such other documents that the RHTF, as mortgagee, shall require. The permanent financing is based on the assumption that the terms of the secondary financing from the RHTF shall not exceed the following terms:

Term	40 years
Interest Rate:	
Years 1 - 5	___%
Years 6 - 25	___%
Years 26 - 40	___%

For as long as the first mortgage remains outstanding, the only payments that can be made on account of such residual receipts note and second mortgage would be limited to annual residual receipts in excess of 1.15 times all costs required to own, operate and manage the Project.

As used herein the term "residual receipts" means any cash remaining at the end of each fiscal year of the Project after:

- (1) The payment of:
 - (i) All sums due or currently required to be paid under the terms of the first mortgage loan;
 - (ii) All amounts required to be deposited in all reserve funds, including reserve fund for replacements and mortgage loan debt service reserves;
 - (iii) All obligations, including operating reserves, of the Project other than the first mortgage loan;
- (2) The segregation of:
 - (i) An amount equal to the aggregate of all special funds reasonably required to be maintained by the Project; and
 - (ii) All tenant security deposits held.

- D. Low Income Housing Tax Credit ("LIHTC"). If Developer is awarded low income housing tax credits, Developer will apply such portion of the proceeds from the sale of such tax credit that shall be available to be applied to reducing the interim financing. The amount of the LIHTC equity is based on the award of a total of \$_____ annual tax credits (i.e., \$_____ federal tax credits + \$_____ Hawaii state tax credits) over a 10-year period. Based on the assumptions that the total tax credit will be \$_____ over 10 years (i.e., \$_____ x 10 years) and that such tax credits are sold at \$0.____/\$1.00, the LIHTC tax credit equity will be approximately \$_____, more or less. The foregoing LIHTC tax credit calculation is only an estimate.

7. DEPARTMENT'S RESPONSIBILITIES AND ASSISTANCE

- A. Zoning and Building Exemptions and Preemptions. The Department will process the Project for exemption and/or preemption from County zoning requirements in accordance with the Department's powers under HHC laws.
- (1) The Project land, including easements and streets serving the Project, are or will be lawfully designated and existing.
 - (2) If necessary for the development and construction of the Project in accordance with the plans and specifications of the Project and for the purposes for which the Project are being developed, the Department will take such action to exempt and/or pre-empt the Project from statutes, ordinances, charter provisions and rules of the State and of the County relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of the Project in accordance with the Department's powers under HHC laws or assist Developer in securing such exemptions and/or preemptions from other governmental agencies, including the Hawaii Housing Finance Development Corporation ("HHFDC") in exercise of HHFDC's powers under HRS Chapter 201G. Developer understands and agrees that the decision of the Department to process any of Developer's recommendations for additional exemptions or preemption under HHC laws (or other laws) is discretionary
- B. Assisting Developer with Obtaining Exemptions from General Excise Taxation and Real Property Taxation. Department will assist Developer with:
- (1) Obtaining a determination from HHFDC that the Project is a certified or approved housing project in order that Developer and the Project, together with persons or entities participating in the design, development/planning, construction, financing, marketing and rental of the Project, will be exempted from the Hawaii General Excise Tax.
 - (2) Processing claims for exemption with the County and exemption of the Project from real property taxation.

- C. Utility Lines. Department will be responsible for:
- (1) Granting all utility easements or licenses for utility lines, including water, sewer, electrical, and telephone lines and, if applicable, gas and cable television lines, necessary for the Project, whether such easements or licenses are on site or off site;
 - (2) Providing all utility lines to the Project land;
 - (3) Paying all construction and improvement utility line charges assessed to the Project and all hook-up or connection fees.
- D. Infrastructure Requirements. Department shall be responsible for constructing and/or improving access from the Project to a public road and all necessary improvements to the public road required by law.

8. **DEVELOPER'S RESPONSIBILITIES**

The Developer will have the following responsibilities

- A. Prosecution of the Work; Notice to Proceed. Immediately following the execution of the foregoing Agreement by both Department and Developer, Developer will proceed with carrying out Developer's responsibilities hereunder provided Developer has submitted the following to the Department:

- (1) Upon its execution of this Development Agreement, Developer will appoint a team captain who shall be Developer's authorized representative for the Project. Developer informs the Department that Developer has appointed the following team captain, whom the Department acknowledges is acceptable:

In the event the team captain shall be replaced, the successor team captain must at least meet the requirements stated in the Request for Proposals and shall be acceptable to the Department; and

- (2) Proof of insurance coverage. Certificate of insurance or other documentary evidence satisfactory to the Department that the Developer has in place all insurance coverage required by paragraph I below.

Until such time as the above items are processed and approved, the Developer will not be allowed to commence any operations unless authorized by the Department.

Following the issuance of the Notice to Proceed, Developer will proceed with causing the Project to be constructed in accordance with the Project documents.

- B. Disclosures. The Developer understands and accepts all risks for the following conditions:

None

- C. Encumbrances. Department represents that the Project land is free and clear of encumbrances and that title to the Project land is marketable for purposes of obtaining permanent mortgage financing.
- D. Development and Construction Schedule. The Developer shall provide its schedule to complete the development and construction of the Project.
- E. Taxes. The Developer shall be responsible for applying for exemptions from taxes, including general excise and real property taxes and assessments, available for the Project under applicable laws. Department shall cooperate with Developer in obtaining certifications of Developer and/or Project necessary to obtain such exemptions. Any taxes that are not exempted shall be paid by the Developer.
- F. Developer's Financial Status. The Developer shall not be involved in any voluntary bankruptcy, reorganization, arrangement or insolvency proceeding without prior notice to and consent of the Department.
- G. Using Licensed Contractors, Subcontractors, etc. Developer shall not retain or contract with any person or entity who does not meet all requirements of the State and particularly with respect to licenses that are required.
- H. Rental Marketing Program. Prior to completion of the development and construction of the Project, Developer shall submit to the Department for the Department's prior review and approval a written description of Developer's rental marketing program, including:
- (1) Tenant eligibility, qualification and selection plan, which shall be consistent with the guidelines established by Exhibit B, hereof, being the Request for Proposals for _____;
 - (2) Forms to be used in connection with the management and operation of the Project, including rental agreement and housing rules or resident handbook;
 - (3) Rent schedule; and
 - (4) Marketing program.
- The Department shall not unreasonably withhold its approval. The Developer's rental marketing program as approved may be amended subject to the Department's prior written approval.
- I. Insurance Requirements During Development and Construction
- (1) Obligations of Developer

- (a) The Developer shall not commence any work until it obtains, at its own expense, all required insurance. Such insurance must have the acceptance of the Department as to policy limits and form and must be maintained with an insurance company authorized to do business in the State of Hawaii.

All insurance described herein will be maintained by the Developer during the development and construction of the Project. In no event will such be terminated or otherwise allowed to lapse. After completion of the development and construction of the Project, Developer will maintain the insurance pursuant to Part II hereof.

- (b) Certificate(s) of Insurance acceptable to the Department for all insurance required shall be filed with the Department prior to commencement of the work. These certificates shall contain a provision that coverages afforded under the policies will not be canceled or changed until at least thirty (30) days written notice has been given to the Department by registered mail. The insurance policies shall name the Department as an additional insured and such coverage shall be noted on the Certificate. Should any policy be canceled before final acceptance of the work by the Department, and the Developer fails to immediately procure replacement insurance as specified, the Department, in addition to all other remedies it may have for such breach, may procure such insurance and deduct the cost thereof from any money due to the Developer.

The Developer shall, from time to time, furnish the Department, when requested, satisfactory proof of coverage of each type of insurance required or a copy of the actual policies covering the work. Failure to comply with the Department's request may result in suspension of the work, and shall be sufficient grounds to withhold future payments due the Developer and to terminate the contract for Developer's default.

- (c) Nothing contained in these insurance requirements is to be construed as limiting the extent of the Developer's responsibility for payment of damages resulting from its operations under this Development Agreement, nor shall it affect the Developer's separate and independent duty to defend, indemnify and hold the Department harmless pursuant to other provisions of this contract.
- (d) All insurance described herein shall cover the insured for all work to be performed under this Development Agreement, all work performed incidental thereto or directly or indirectly connected therewith, including traffic detour work or other work performed outside the work area and all change order work.

(2) Types of Insurance

The Developer shall purchase and maintain insurance described below which shall provide coverage against claims arising out of the Developer's operations under this Development Agreement.

- (a) Worker's Compensation. The Developer and all its designers, consultants, contractors and subcontractors shall obtain full worker's compensation insurance coverage for all persons who they employ or may employ in carrying out the work under this Agreement. This insurance shall be in strict conformity with the requirements of the most current and applicable State Worker's Compensation Insurance laws in effect on the date of the execution of this Development Agreement and as modified during the duration of this Development Agreement.
- (b) Commercial General Liability Insurance. Developer's commercial general liability insurance shall be obtained in a combined, single limit of not less than \$1,000,000 per occurrence and \$2,000,000 aggregate.
- (c) Automobile Insurance. Developer's automobile liability insurance shall provide for not less than \$1,000,000 per accident.
- (d) Developer shall require each of its designers, consultants, contractors and subcontractors to procure and to maintain during the life of its contract or subcontract, designer, contractor and subcontractor's comprehensive general liability, automobile liability and property damage liability insurance of the type and in the same amounts specified herein;
- (e) Fire and Extended Coverage Insurance. The Developer shall, at its sole cost, maintain all-risk property insurance covering the building(s) on the Premises, including but not limited to, improvements, alterations, additions, trade fixtures and personal property from time to time in, on or upon the Premises and upon every reconstruction, repair and replacement therefor in an amount not less than one hundred percent (100%) of their full replacement cost.
- (f) Any proceeds derived from the insurance required by this subparagraph (3) in the event of total or partial loss shall be immediately available to, and as soon as reasonably possible, be used by Developer for rebuilding, repairing, or otherwise reinstating the same buildings in a good and substantial manner according to the original plans, or plans and specifications approved in writing by the Department.

- J. Performance and Labor and Material Payment Bonds. The Developer will require the contractor to provide a 100% performance bond and 100% payment bond in forms acceptable to the Department.
- K. Laws to be Observed. Unless exempted or pre-empted by the Department, the Developer at all times shall observe and comply with all Federal, State and local laws or ordinances, rules and regulations which in any manner affect those engaged or employed in the work, the materials used in the work, and the conduct of the work. The Developer shall also comply with all such orders and decrees of bodies or tribunals having any jurisdiction or authority over the work. Any reference to such laws, ordinances, rules and regulations shall include any amendments thereto before and after the date of this Development Agreement.

Except with respect to matters which Department has exercised its powers of exemption or preemption, Developer shall defend, protect, hold harmless and indemnify the State and its Departments and Agencies and all their officers, representatives, employees or agents against any claim or liability arising from or based on the violation of any such laws, ordinances, rules and regulations, orders or decrees, whether such violation is committed by the Developer or its Contractor(s) and Subcontractor(s) or any employee of either or both. If Developer has actual knowledge of any violation of laws, ordinances, rules and regulations, orders or decrees arising out or in connection with the development and construction of the Project in accordance with the plans and specifications for the Project, the Developer shall forthwith report the same to the Chairman in writing.

Attention is directed to the Hawaii Employment Relations Act, Chapter 377, HRS, Hawaii Employment Security Law, Chapter 393, HRS, Wage and Hour Law, Chapter 387, HRS, Payment of Wages, Chapter 388, HRS, Industrial Safety, Chapter 376, HRS and Worker's Compensation Law, Chapter 386, HRS

- L. Responsibility for Damage Claims, Indemnity. Developer shall indemnify the State and the Department, including their employees, officers and agents, against all losses, claims, suits, liability and expense, including but not limited to attorneys' fees, arising out of injury to or death of persons and loss of or damage to the State's or County's or the Department's existing property and facilities arising out of any act or omission committed in the performance of the Developer's responsibilities under this Development Agreement not caused by the negligence of the State or the Department, their agents, officers and employees. The State or the Department may participate in the defense of any claim or suit without relieving the Developer of any obligation hereunder. The purchase of liability insurance shall not relieve the Developer of the obligations described herein.

The State, including the Department and other departments, agencies and divisions thereof, including their officers, representatives, employees or agents, shall not be liable or responsible for any losses or damages to third parties caused by forces beyond its control, including the elements and acts of God.

The Developer shall defend, indemnify and hold harmless the State, including the Department and other departments, agencies and divisions thereof, including their officers, representatives, employees or agents, from all suits, actions or claims of any character brought by Developer's employees on account of any claims or amounts arising or recovered under the Workers' Compensation Law or any other law, by-law, ordinance, order or decree.

- M. Transfer of Project and Operations upon Material Default. If Developer shall be declared in default and such default shall not be cured within a reasonable time, Department may terminate this Development Agreement pursuant to Section 11 below in addition to any other remedy that Department may have under law. All rights of the Department are Reserved

If Department shall terminate this Development Agreement, Developer agrees as follows:

- (1) Developer shall assign to the Department or the Department's designee all of Developer's right, title, and interest in and to the Project including without limitation:
 - (a) Service contracts for the benefit of the Project to which Developer is a party and that can be terminated without penalty by Developer within thirty (30) or fewer days' notice; and
 - (b) All existing agreements to the extent assignable by Developer; and
 - (c) All revenues, if any, from the Project following such termination.
- (2) Within thirty days (30) after termination, Developer shall provide Department with an accounting of for the Project and reconciliation of records in such detail that Department shall reasonably require.

Developer shall represent that the accounting is true, correct, and complete.

In addition, Developer, in accordance with all applicable rules and regulations, shall make all necessary arrangements to transfer any Project funds to a bank account designated by Department, and Department shall in writing acknowledge receipt of and expressly assume all Developer's financial and custodial obligations with respect thereto.

Notwithstanding the foregoing, Developer will indemnify and hold Department harmless from all liabilities, claims, and demands, including reasonable attorney fees, with respect to which Developer is not entitled.

9. DEPARTMENT'S RIGHTS TO MONITOR THE PROJECT

- A. The Project shall be developed and constructed in accordance with the plans and specifications, which the Department has approved.

- B. Department shall have the right to inspect the progress of development and construction.

Department may appoint or retain an Inspector who shall observe and inspect the contract performance and materials on behalf of the Department. The Inspector does not have any authority vested in the Department's Project Manager unless specifically delegated in writing. The Inspector may offer advice and recommendations to the Developer, but any such advice or recommendations are not directives from the Project Manager. The Inspector has no authority to allow deviations from this Development Agreement or the approved plans and specifications and may reject any and all work that the Inspector reasonably deems is not in conformity with the contract requirements. Failure of an Inspector at any time to reject non-conforming work shall not be considered a waiver of the Department's right to require work in strict conformity with this Development Agreement.

Department may also engage consultants for limited or full observation to supplement the inspections performed by the Department and the County. Unless otherwise specified in writing to the Developer, such consultants will have the authority of an Inspector.

All inspections and other services rendered by the Department or its agents shall be rendered solely for the protection and the benefit of the Department. Neither the Developer nor its successors in title shall be entitled to claim any loss or damage against the Department or against the Department's agents or employees for failure to properly discharge their duties to the Department. Developer, for itself, its successors and assigns, hereby agrees to indemnify and save harmless Department from and against any such claims aforesaid, including all costs, expenses and liabilities incurred in or in connection with any claim or proceeding brought thereon, and the defense thereof.

Department shall not be precluded or estopped by any measurements, estimate or certificate made either before or after the completion and acceptance of the work and payment therefor, if Developer has not, in fact, developed and constructed the Project substantially in accordance with the plans and specifications for the Project, as approved by Department.

- C. Records Maintenance, Retention and Access. The Developer and any subcontractor whose contract for services is valued at \$10,000 or more shall, in accordance with generally acceptable accounting practices, maintain fiscal records and supporting documents and related files, papers, and reports that adequately reflect all direct and indirect expenditures and management and fiscal practices related to the Developer and designer, contractor or subcontractor's performance of services under this Development Agreement.

Department and the Department of the Attorney General will have the right of access to any book, document, paper, file, or other record maintained hereunder to assure the

proper and effective expenditure of funds and to verify all costs associated with any claims made under this Development Agreement.

- D. Reports. During the development and construction of the Project, Developer will furnish monthly financial reports comparing actual and budgeted figures of receipts and disbursements and progress reports which the Department and other institutions, agencies or organizations which are providing financing or other assistance for the Project shall require.

Unless otherwise required, Developer will submit such reports to the Department within fifteen (15) days after the end of the preceding month.

Unless exempted or preempted by the Department, Developer shall apply for, obtain, and maintain in its name all other licenses, certifications, and permits, if any, required by all Federal, State and local laws or ordinances, rules and regulations in connection with the management and operation of the Project and submit copies of the same to the Department.

10. OWNERSHIP OF THE IMPROVEMENTS

Developer shall be the fee simple owner of all buildings and real property improvements which are situated on the Project land; provided that such buildings and real property improvements shall not be separated from the leasehold interest in the Project land and can only be conveyed or encumbered with any conveyance or encumbrance of the foregoing lease subject to the Department's approval or consent. [Although this is also in the lease, it is repeated to confirm to the LIHTC partnership that the improvements are owned by the developer.]

11. TERMINATION

- A. Term of this Development Agreement. Unless sooner terminated as set forth below, this Development Agreement shall be terminated and of no further force and effect upon the occurrence of the following events:

- (1) The development and construction of the Project has been substantially completed.
- (2) A Notice of Completion of the Project has been published in accordance with the provisions of HRS Sec. 507-43.
- (3) Closing of a permanent first mortgage loan covering the Project.

- B. Termination of Agreement for Cause. Time is of the essence of this Development Agreement. If Developer shall become bankrupt, or shall abandon the Project or the Project land, or if this Development Agreement and the Project land shall be attached or taken by operation of law, or if any assignment is made of Developer's property for the benefit of creditors, or if Developer shall fail to observe and perform any of the terms, covenants and conditions contained in this Development Agreement and

on its part to be observed and performed, Department shall deliver a written notice of the breach or default by service, as provided by Section 634-35, or 634-36, Hawaii Revised Statutes, or by registered mail, or certified mail to Developer at its last known address, and to each mortgagee or holder of record having a security interest in the premises, making demand upon Developer to cure or remedy the breach or default within sixty (60) days from the date of receipt of the notice. Upon failure of Developer to cure or remedy the breach or default within the time period provided herein or within such additional period as Department may allow for good cause, Department may, subject to the provisions of Section 171-21, Hawaii Revised Statutes, at once re-enter the premises or any part, and upon or without such entry, at its option, terminate this Development Agreement without prejudice to any other remedy or right of action, or for any preceding or other breach of contract; and in the event of termination, all buildings and improvements shall remain and become the property of Department.

C. Termination for Convenience.

- (1) Termination. The Chairman may, when the interests of the Department so requires, terminate this Development Agreement in whole or in part, for the convenience of the Department. The Chairman shall give written notice of the termination to the Developer specifying the part of the Agreement terminated and when termination becomes effective.
- (2) Developer's Obligations. The Developer shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the Developer will stop work to the extent specified. The Developer shall also terminate outstanding orders, contracts and subcontracts as they relate to the terminated work. The Developer shall settle the liabilities and claims arising out of the termination of contracts, subcontracts and orders connected with the terminated work subject to the Department's acceptance and the conditions herein. The Chairman may direct the Developer to assign the Developer's right, title, and interest under terminated orders, contracts or subcontracts to the Department. The Developer must still complete the work not terminated by the notice of termination provided the Department provides the funds therefor.
- (3) Right to Construction and Goods - The Chairman may require Developer to transfer title and delivery to the Department in the manner and to the extent directed by the Chairman, the following:
 - (a) Any completed work; and
 - (b) Any partially completed construction, goods, materials, tools, dies, jigs, fixtures, plans, drawings, information and contract rights (hereinafter called "construction material") that the Developer has specifically produced or specially acquired for the performance of the terminated part of this Development Agreement.

- (c) Developer shall protect and preserve all property in the possession of Developer in which the Department has an interest. If the Department does not elect to retain any such property, the Developer shall use its best efforts to sell such property and construction material for the Department's account in accordance with the standards of section 490:2-706, HRS.

(4) Compensation

- (a) The Developer shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data, submitted to the extent required by subchapter 15, chapter 3-122 and 3-123, HAR. If the Developer fails to file a termination claim within one year from the effective date of termination, the Department shall pay the Developer a reasonable amount inclusive of all consultant, professional services and other fees and costs, plus reasonable profit and overhead, determined pursuant to an account prepared in accordance with generally accepted accounting practices.
- (b) The Chairman and the Developer may agree to a settlement provided the Developer has filed a termination claim supported by cost or pricing data submitted as required.
- (c) Costs claimed, agreed to, or established by the Department shall be in accordance with chapter 3-123, HAR.

12. GENERAL TERMS

- A. Approval and Consent. Except as otherwise provided in this Development Agreement, where the consent or approval of the Department or Developer is required by any provision of this Development Agreement, such approval or consent shall not be unreasonably withheld or delayed. Except as otherwise provided in this Development Agreement, if no written objection is received by Developer or the Department within fifteen (15) calendar days after the request for approval and consent is delivered, then such approval and consent shall be deemed to have been given.

B. Assignment or Change of Name

- (1) The identity of the Developer is of material importance to the Department. The Developer shall not sublet, sell, transfer, assign or otherwise dispose of this Development Agreement or any part hereof or any right, title or interest herein or any monies due or to become due hereunder without the prior written consent of the Chairman.
- (2) If the Developer desires to assign this Development Agreement, the assignee must submit a "Developer's Application and Qualification Form", meet all

requirements imposed by the Department, and must be acceptable to the Department. If the Department shall consent to an assignment of this Development Agreement, no assignment unless specifically provided for in writing signed by the Chairman will result in the release of the Developer, any guarantor or security from the obligation undertaken in this Development Agreement.

Notwithstanding the foregoing, the Department agrees that the following assignments were contemplated in the selection of the Developer to facilitate the financing for the Project:

- (a) Developer may assign this Development Agreement to _____, a Hawaii nonprofit corporation, which is a single asset entity that Developer caused to be organized to carry out the development of the Project, with prior notice to the Department. Developer shall maintain a relationship to _____ akin to that of a "sponsor" whereby the directors of the _____ shall at all times, be limited to individuals who are either members of Developer or nonmembers who have the approval of the Board of Directors of the Developer. In the event that a director of _____ ceases to be a member of the Developer or, if the Developer's aforesaid approval is withdrawn, then, in either event, such shall constitute automatic resignation as a director of _____.
- (b) _____ may further assign this Development Agreement to a tax credit partnership or other business organization that has received an allocation of low-income housing tax credits of which _____ is the general partner with prior notice to the Department.

The Department's consent shall not be required for such assignments.

The Department understands and agrees that after the 15-year compliance period, the tax credit partnership may assign the Project.

- (3) The Developer may assign money due or to become due it under the contract and such assignment will be recognized by the Department, if given proper notice thereof, to the extent permitted by law; but any assignment of monies shall be subject to all reasonable and proper set-offs in favor of the Department and to all deductions provided in this Development Agreement. Any monies withheld or unpaid, whether assigned or not, shall be subject to use by the Department for the completion of the work in the event that the Developer should be in default therein.
- (4) If the Developer requests to change the name in which it holds this Development Agreement with the Department, the Chairman shall, upon receipt of a document indicating such change of name (for example: an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting Developer to effect such a change of name. The

agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

- (5) All change of name or novation agreements effected hereunder other than by the Chairman shall be reported to the Chairman within thirty (30) days of the date of the date that the agreement becomes effective.
- C. Attorney's Fees and Costs. Should any litigation be commenced between the parties hereto concerning this Development Agreement, the subject matter of this transaction or the rights and duties of either in relation thereto, the prevailing party in such litigation shall be entitled to (in addition to such other relief as may be granted) a reasonable sum for its attorneys' fees and costs of litigation as shall be determined by the court.
- D. Cooperation. The parties shall cooperate with one another in effecting this Development Agreement and agree to execute such further and additional mutually approved documentation required to facilitate and complete the transactions contemplated in this Development Agreement.
- E. Relationship Between the Developer and the Department. The Developer is an independent contractor. This Development Agreement does not establish any partnership, joint venture, employer and employee or other agency relationship between the Department and Developer nor is the Department in any way to be deemed the developer or renter of the housing units in the Project. The Developer, including any person acting by, through, under or for the benefit of the Developer will not represent or hold itself out as being a partner, joint venture, employee, servant or agent of the Department nor will the Developer, including any person acting by, through, under or for the benefit of the Developer, have any authority to bind, act for or represent the Department in any respect.
- F. Governing Law. The validity of this Development Agreement and any of its terms or provisions, as well as the rights and duties of the parties to this Development Agreement, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Development Agreement shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
- G. Binding Effect of Agreement. This Development Agreement shall be binding upon and inure to the benefit of the Department, its successors and assigns; and upon and to Developer, its successors and permitted assigns.
- H. Gender and Number. The use of any pronoun in reference to the Department or Developer shall be construed to mean the singular or plural, the masculine, feminine, or neuter, as the instruction and context may require.
- I. Captions. All captions used in this Development Agreement are for convenience only, and are not to be construed as limiting in any manner the context of any paragraph, section or particular provision.

- J. No Party Deemed Drafter. The parties agree that neither party shall be deemed to be the drafter of this Development Agreement, and that in the event this Development Agreement is ever construed by a court of law, such court shall not construe this Development Agreement or any provision hereof against either party as the drafter of this Development Agreement.
- K. Interpretation. This Development Agreement shall be interpreted in a manner which is consistent with all applicable laws, rules and regulations.
- L. Invalidity of Provision. If any provision of this Development Agreement as applied to any party or to any circumstances shall be adjudged by a court of competent jurisdiction to be void or unenforceable for any reason, the same shall in no way affect (to the maximum extent permissible by law) any other provision under circumstances different from those adjudicated by the court, or the validity or enforceability of this Development Agreement as a whole.
- M. Counterparts. This Development Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument, but all such counterparts together shall constitute but one Agreement.
- N. Computation of Periods. All periods of time referred to in this Development Agreement shall include all Saturdays, Sundays and state or national holidays, unless the period of time specifies business days, provided that if the date or last date to perform any act or give any notice with respect to this Development Agreement shall fall on a Saturday, Sunday or state or national holiday, such act or notice shall be timely performed or given on the next succeeding day which is not a Saturday, Sunday or state or national holiday.
- O. Recordation of Short Form Memorandum. A short form memorandum of this Development Agreement may be recorded.
- P. Nonrecourse Liability. Notwithstanding any provision contained herein to the contrary, it is agreed that Developer shall have no personal liability for the payment and performance of the Developer's obligations hereunder including any interim or permanent loans. In the event of a material default, Department shall look solely to the Project subject to any mortgage and to the rents, issue and profits thereof in satisfaction of the payment and performance of Developers obligations. Department will not seek or obtain any deficiency or personal judgment against the Developer except such judgment or decree as may be necessary to foreclose or bar Developer's interest in the Project subject to any mortgage. This paragraph shall survive termination of this Development Agreement.
- Q. Entire Agreement. This Development Agreement shall include the Request for Proposals, all addenda, wage schedule, and any change orders and amendments required to complete the Project.
- (1) All prior representations and agreements including any memorandum of understanding between the parties are merged into this Development

Exhibit 3

Agreement. The terms of this Development Agreement may not be waived, modified or in any way changed by implication, conduct, correspondence or otherwise except in writing.

- (2) Any waiver by the Department in whole or in part of any terms or conditions hereunder shall be specific and not general.
- (3) The terms and conditions of this Development Agreement including the Exhibits supersede all prior correspondence and negotiation and are subject to all laws, regulations and interpretations which now or may in the future affect the Department.
- (4) This Development Agreement may not be amended or modified in any respect except by an instrument in writing executed by the parties.