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LAND USE COMMISSION  
STATE OF HAWAII  
2007 JUN 15 A 10:57

(F)

Attorneys for Intervenor  
KAPOLEI PROPERTY DEVELOPMENT LLC

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

MARK J. BENNETT, as ATTORNEY  
GENERAL, STATE OF HAWAII,

Petitioner,

vs.

RICHARD W. GUSHMAN, II, CLINTON  
R. CHURCHILL, DAVID A. HEENAN,  
and R.J. ZLATOPER, Trustees under the  
Will and of the Estate of James Campbell,

Respondents.

DOCKET NO. DR06-32

KAPOLEI PROPERTY  
DEVELOPMENT LLC'S PETITION  
TO INTERVENE; VERIFICATION;  
EXHIBIT 1; CERTIFICATE OF  
SERVICE

**KAPOLEI PROPERTY DEVELOPMENT LLC'S PETITION TO INTERVENE**

TO THE HONORABLE LAND USE COMMISSION OF THE STATE OF HAWAII:

Kapolei Property Development LLC, a Hawaii limited liability company  
("KPD"), petitions the Land Use Commission of the State of Hawaii (the  
"Commission") for an order allowing KPD to intervene as a party in this proceeding  
under Haw. Rev. Stat. chs. 91 and 205 and under HAR § 15-15-53. KPD is the owner of

the property that is the subject of this proceeding and therefore should be allowed to intervene. Haw. Rev. Stat. § 205-4(e) (3).

## I. INTRODUCTION.

17 years of inaction by the State of Hawaii (“**State**”) have caused it to forfeit its *conditional* right to receive about 16 acres of land in Kapolei, which was initially documented in an April 1989 agreement executed by the Campbell Estate<sup>1</sup> and *three State agencies*, and approved by the *Attorney General's office*. In a desperate attempt to avoid that forfeiture, on December 26, 2006, Mark J. Bennett, Attorney General of the State of Hawaii (the “**Attorney General**”), filed a petition purportedly seeking a declaratory order under HAR § 15-15-98 (the “**AG Petition**”). Hawaii law allows an interested person to seek a declaratory order from an agency “as to the *applicability* of any statutory provision or of any rule or order of the agency.” Haw. Rev. Stat. § 91-8 (emphasis added); HAR 15-15-98 (same). The AG Petition actually seeks something far different from a ruling on the *applicability* of a Commission order: it asks the Commission to *reconsider* a June 1989 order to which the State did not object, and from which the State did not appeal. The AG Petition is 17 years too late, with no legal or factual basis.

Indeed, the Attorney General completely disregards the rulings of the Commission (and explicit agreements executed by the State) and its 17 years of unexplained inaction,

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<sup>1</sup> “Campbell Estate” means and refers to Richard W. Gushman, II, Clinton R. Churchill, David A. Heenan, and R.J. Zlatoper, Trustees under the Will and of the Estate of James Campbell, acting in their capacity as the trustees of the Estate of James Campbell and not their individual capacities, and, to the extent relevant to these proceedings, also means and refers to their predecessor trustees.

to seek surreptitiously to impose new conditions onto *other* Commission orders, also entered over 17 years ago. In 1989, the State agreed to certain *mutual* rights and *obligations* concerning the subject land, including a 10-year deadline (*i.e.*, before April 11, 1999) to fulfill its voluntarily-assumed obligations under the April 1989 agreement. Campbell Estate even extended that 10-year deadline another 7 years, from April 11, 1989 until December 31, 2006.

The Commission has no jurisdiction to reconsider unappealed orders entered over 17 years ago or to set aside valid and enforceable agreements entered into by the State. *See, e.g., Tanaka v. Department of Hawaiian Home Lands*, 106 Hawai'i 246, 103 P.2d 406 (App. 2004) (holding (1) *a party's failure to timely request agency review bars the agency from reconsidering prior order because the agency has no jurisdiction to hear an untimely request* and (2) *an agency may not enlarge or extend mandatory time limits*); *see also* HAR § 15-15-84 (requiring motion for reconsideration to be filed within seven calendar days). For these and other reasons, the Commission simply should refuse to issue a declaratory order, and it should dismiss or deny the AG Petition forthwith. HAR §§ 15-15-100 and 15-15-102(4).

That said, KPD is the successor to the Campbell Estate's interest in the subject property. As such, KPD would bear the full brunt of the Attorney General's attack on (a) the order in question, (b) the other orders implicitly attacked, and (c) the many agreements between the State and the Campbell Estate that are the real target of the AG Petition. As the owner of the subject land, KPD petitions to intervene to protect its ownership interests.

## II. RELEVANT FACTS

On September 23, 1988, the Commission entered Findings of Fact, Conclusions of Law and Decision and Order (“**September 1988 Order**”). The Commission conditionally granted Campbell Estate’s petition to reclassify about 890 acres of land from the agricultural district to the urban district to develop Kapolei. Paragraph 9 of the September 1988 Order contained a *pre-condition* requiring the *execution of an agreement* as follows:

**b. The execution of an agreement** or document evidencing the Petitioner’s commitment to provide forty acres to the State of Hawaii at no cost for governmental offices or other uses in the Kapolei Town Center with all off-site costs to be borne by the Petitioner.

...

The agreement referenced in subparagraphs **9.a., b., and c.** is the **oral agreement entered into between the State of Hawaii and Petitioner involving *mutual rights and obligations.***

The only pre-conditions to reclassification (as opposed to conditions upon approval of reclassification) are those listed in these subparagraphs 9.a.b. and c.

September 1988 Decision and Order, at 57-58 ¶ 9 (emphases added).

On March 29, 1989, the Commission entered the First Amended Findings of Fact, Conclusions of Law and Decision and Order (“**March 1989 Order**”), amending the September 1988 Order. Paragraph 9 of the March 1989 Order (at pages 58-59) restated the identical language quoted above.

In April 1989, Campbell Estate filed a Motion for Order Approving Executed Agreements Satisfying Petitioner’s Pre-Conditions to Reclassification and Department of Health in Decision and Order. That motion’s primary exhibit was the “Document

Evidencing Petitioner's Commitments" dated April 11, 1989 ("April 1989 Agreement").

*Three* State agencies executed the April 1989 Agreement: Office of State Planning, Department of Transportation, and Department of Land and Natural Resources. The Attorney General's Office approved it. *Id.* at 14.

The April 1989 Agreement referred to the pre-conditions in Paragraph 9 in the September 1988 Order and the March 1989 Order:

b. **The execution of an agreement** or document evidencing the Petitioner's commitment to provide forty acres to the State of Hawaii at no cost for governmental offices or other uses in the Kapolei Town Center with all off-site costs to be borne by the Petitioner.

...

The agreement referenced in subparagraphs 9.a., b., and c. is the **oral agreement entered into between the State of Hawaii and Petitioner involving mutual rights and obligations.**

Document Evidencing Petitioner's Commitments, at 2 ¶ 3 (emphases added).

The State also agreed to the following:

The Estate wishes to formally commit to the pre-conditions contained in subparagraphs 9.b. and c. in satisfaction of the Decision and Order, **subject, however, to fulfillment by the State of the consideration for which the commitments are made.**

*Id.* at 3 ¶ 4 (emphasis added). The State thereby recognized it would have to fulfill certain obligations (*i.e.*, "consideration") to obtain the land. The State explicitly acknowledged and agreed the purpose of the April 1989 Agreement was to comply with and satisfy Paragraph 9.b.:

**NOW, THEREFORE, in compliance with and in satisfaction of subparagraphs 9.b., and c. of the LUC's Decision and Order and in consideration of the mutual promises contained herein, the parties**

to this Document Evidencing Petitioner's Commitments hereby agree . . .

*Id.* at 3 (emphases added).

In the April 1989 Agreement, the State specifically agreed:

B. KAPOLEI TOWN CENTER

1. Estate shall provide 40 acres to the State of Hawaii ("State") in mutually agreed upon locations, at no cost, **upon execution of building construction contracts for governmental offices or other public facilities** in Kapolei Town Center with all off-site costs to be borne by the Estate. The property will be conveyed incrementally as reasonably required for the Planned Improvements based on execution of building construction contracts for governmental offices or other facilities ("Planned Improvements"), as more specifically described in paragraph B.2. below.

2. **Estate's obligation to make any conveyances of any portion of the foregoing 40 acres will terminate on the tenth anniversary of this Document Evidencing Petitioner's Commitments ("Document"), unless by that date the State has executed building construction contracts for governmental offices or other public facilities on such portion(s) of the subject property.** Within such ten year period, the Estate's obligation shall be to convey portions of the property in increments, as reasonably required for the Planned Improvements. By way of example, if the State's Planned Improvements require a land area of 5 acres, the Estate's obligation shall be to convey 5 acres. As a further example, **if on the tenth anniversary of execution of this Document, the State will have required 30 acres for its Planned Improvements, the Estate will have no further obligation to convey the remaining 10 acres.**

*Id.* at 4-5 (emphases added).

The initial deadline for the State to perform its obligations was **April 11, 1999.**

The State *agreed* it could accept only acres for which it had obtained executed building construction contracts for governmental offices or other public facilities before the

deadline. *Id.* In the April 1989 Agreement, the State *agreed* that: **“Time is of the essence in this Document.”** *Id.* at 12 ¶ 2 (emphasis added).

On May 30, 1989, the Commission entered Second Amended Findings of Fact, Conclusions of Law and Decision and Order (“**May 1989 Order**”). Paragraph 9 of the May 1989 Order provided the identical pre-conditions as the September 1988 Order and March 1989 Order, quoted above.

On June 6, 1989, the Commission entered an Order Approving Executed Agreements Satisfying Petitioner’s Pre-Conditions to Reclassification (the “**June 1989 Order**”). The Commission prefaced its ruling: “there being *no objections from the Office of State Planning, State of Hawaii.* . .” June 1989 Order, at 2 (emphasis added). The Commission accepted the April 1989 Agreement as the “execution of an agreement” specified in Paragraph 9.b.:

**THE COMMISSION FURTHER ORDERS that Exhibits A and B attached to said Supplement Memorandum filed on April 12, 1989, and identified as “Kapolei Village Condemnation Agreement” and “Document Evidencing Petitioner Commitments”, respectively, are approved and that they satisfy Pre-Conditions 9.a., 9.b., and 9.c. of the Commission’s Second Amended Decision and Order dated May 30, 1989, and that the district boundaries are hereby amended accordingly.**

June 1989 Order, at 2-3 (emphasis added). It was the June 1989 Order approving the satisfaction of the Commission’s pre-conditions that granted Campbell Estate the requested district boundary amendments.

Campbell Estate and the State later executed a series of letter agreements acknowledging, relying on, and supplementing the 1989 Agreement. For example, in a

September 14, 1994 Letter Agreement, concerning, in part, the conveyance of a 7-acre parcel for the State Office Building, the State acknowledged:

The [May 1989] Decision and Order contained a **number of pre-conditions which were more particularly described in that certain Document Evidencing Petitioner's Commitments dated April 11, 1989 [i.e., the April 1989 Agreement].**

...

[T]he purpose of this letter is to set forth the additional agreements we have reached regarding the transfer, development and use of these lands[.]

*Id.* at 1 (various emphases and bracketed information added). The State agreed:

The Estate shall provide forty acres of land to the State designated as parcels 1, 2, 3, 4, 5, and 6 ... **on the terms and conditions** more particularly set forth below.

*Id.* at 2 ¶ 1 (emphasis added). The State agreed:

“Land will be conveyed **incrementally as reasonably required** by the State for governmental offices or other public facilities[.]”

*Id.* at 2 ¶ 2 (emphases added).

**The Estate's obligation** to make any conveyances of any portion of Land *shall terminate on April 11, 1999 as to any portion of Land for which the State has not satisfied the requirements of* subparagraphs 2(a) or 2(b) above.

*Id.* at 3 ¶ 2 (emphases added).

The September 1994 Letter Agreement was the first of several agreements entered into by the State, subsequent to the 1989 Agreement, explicitly acknowledging the State's obligation to comply with the agreed upon deadline. For example, the State and Campbell Estate entered into a letter agreement dated March 31, 1997, in which, *inter alia*, the deadline was *extended* from April 11, 1999 until December 31, 2006. Pursuant



to the April 1989 Agreement and these subsequent letter agreements, land was conveyed for the State Office Building in Kapolei and for the Kapolei Library Complex. Campbell Estate and State performed under these agreements. As recently as October 31, 2006, KPD, Campbell Estate and the State entered into a letter agreement regarding the conveyance of land for the Kapolei Judiciary Complex, including an extended deadline for satisfaction of the conditions to this particular conveyance. KPD, Campbell Estate and the State currently are performing under the October 2006 Letter Agreement.

Condition 11 of the May 1989 Decision and Order required Campbell Estate to file annual reports with the Commission concerning its compliance with the conditions in the May 1989 Decision and Order. *See* May 1989 Decision and Order, at 61 ¶ 11. On September 26, 1989, the Estate filed its First Annual Report with the Commission, served on the State Office of Planning (Harold S. Masumoto, Director). It stated in Paragraph 9.b.:

On June 6, 1989, by an “Order Approving Executed Agreements Satisfying Petitioner’s Preconditions to Reclassification” and pursuant to Petitioner’s motion and memoranda filed on April 4 and April 12, 1989, the Commission approved certain agreements executed by the Petitioner. The Commission concluded that these agreements satisfied preconditions 9.a, 9.b., and 9.c. of the Commission’s Second Amended Decision and Order dated May 30, 1989.”

First Annual Report, § I.E., at 4-5 (called “Satisfaction of Preconditions”). It explained:

With respect to the preconditions listed in paragraph 9, the Petitioner has entered into various agreements with the State of Hawaii. These agreements have been documented and approved by the Commission as satisfying the preconditions imposed by paragraph 9. *See* discussion at Section I.E. above.

*Id.* § II.9, at 8.

The State did not object to that annual report. The annual reports filed after it all refer to Paragraph 9.b. as having been satisfied by the “various agreements with the State,” embodied in the April 1989 Agreement and accepted by the June 1989 Order as complying with and satisfying Paragraph 9.b. For over 16 years, the State received annual reports including a statement substantially identical to the one quoted above. The State never objected. Only *after* it became clear that the State had failed to fulfill its obligations under the April 1989 Agreement for about 16 acres did the State raise any issue over the April 1989 Agreement or the June 1989 Order, by filing the incredibly-belated AG Petition. The AG Petition asks the Commission to reconsider and declare “null and void” the June 1989 Order that, among other things, approved the satisfaction of the pre-conditions for the boundary amendments that allowed the development of the City of Kapolei.

### **III. STANDARD FOR INTERVENTION**

Haw. Rev. Stat. § 205-4(e)(3) provides that persons may intervene in Land Use Commission proceedings in accordance with that statute:

All persons who have some property interest in the land, who lawfully reside on the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application for intervention.

KPD petitions for intervention under HAR § 15-15-53. That rule applies to proceedings other than a district boundary amendment proceeding and special permit

proceedings. HAR § 15-15-53 requires petitions to intervene to conform to subchapter 5 of the Commission's Rules, and HAR §§15-15-52(e) and (f). In addition to filing copies and service requirements, HAR § 15-15-52(e) provides a deadline for filing, which deadline is triggered by the publication of a notice of hearing. This petition meets the applicable requirements of subchapter 5 and HAR §15-15-52(e). As no notice of hearing has been published; this petition is timely. HAR § 15-15-52(f)<sup>2</sup> requires petitions for intervention to refer to the following:

- (1) Nature of the intervenor's statutory or other right;
- (2) Nature and extent of the intervenor's interest, and if an abutting property owner, the tax map description of the property; and
- (3) Effect of any decision in the proceeding on the intervenor's interest.

#### **IV. INTERVENTION SHOULD BE GRANTED**

As noted above, Haw. Rev. Stat. § 205-4(e)(3) provides that "[a]ll persons who have some property interest in the land . . . shall be admitted as parties upon timely application for intervention." HAR 15-15-52(c)(2) also provides: "[p]ersons who may intervene upon timely application include: ... (2) All persons who have a property interest in the land[.]"

KPD owns the land that is the subject of the State's petition. Exhibit 1 attached hereto is a deed showing the conveyance of the subject land from the Estate to KPD. KPD has a "property interest" in the land, and consequently, a right to intervene provided

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<sup>2</sup> HAR § 15-15-53(b) provides that "[c]ontents of the petition shall conform to sections 15-15-52(e) and 15-15-52(f)."

by Haw. Rev. Stat. § 205-4(e)(3) and HAR 15-15-52(c)(2). The Commission should allow KPD to intervene.

The Commission's decision on the AG's Petition directly and immediately will affect KPD. If the AG's Petition is granted, arguably, a perpetual and unconditional obligation to convey about 16 acres of property to the State would be imposed on KPD. Other potential consequences of the Attorney General's request are beyond the scope of this petition. However, as the owner of other land in Kapolei, KPD would be directly impacted by the cloud that might result from such a ruling.

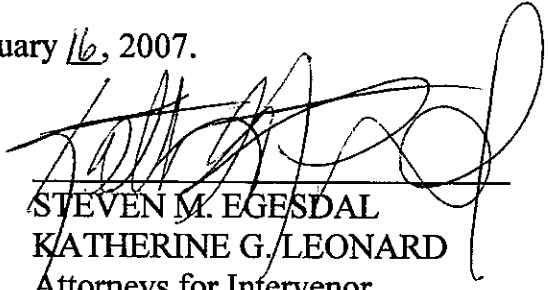
KPD has unique interests as the fee owner of the subject property. No other party to this proceeding represents those interests. Because of KPD's particular perspective as the owner of the property, KPD's intervention will help to develop a sound record. KPD's intervention will not broaden the issues or otherwise delay the proceeding. Indeed, once KPD corrects the glaring errors and misleading argument in the State's petition, KPD expects that the Commission will dismiss this proceeding summarily for lack of jurisdiction, other compelling procedural and substantive grounds, or both. *See* HAR §§ 15-15-100, 101 & 102(4); *see also* Tanaka v. Department of Hawaiian Home Lands, 106 Hawai'i 246, 103 P.2d 406 (App. 2004).

#### V. CONCLUSION

The AG Petition should be dismissed forthwith because the Commission does not have jurisdiction to reconsider the June 1989 Order. However, if this matter is not immediately dismissed, the Commission should grant this petition and allow KPD to

intervene in this proceeding so that KPD may seek to protect its property interests.

DATED: Honolulu, Hawaii, January 16, 2007.



STEVEN M. EGESDAL  
KATHERINE G. LEONARD  
Attorneys for Intervenor  
KAPOLEI PROPERTY DEVELOPMENT  
LLC

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

MARK J. BENNETT, as ATTORNEY  
GENERAL, STATE OF HAWAII,

Petitioner,

vs.

RICHARD W. GUSHMAN, II, CLINTON  
R. CHURCHILL, DAVID A. HEENAN,  
and R.J. ZLATOPER, Trustees under the  
Will and of the Estate of James Campbell,

Respondents.

DOCKET NO. DR06-32

VERIFICATION

VERIFICATION

STATE OF HAWAII

)

CITY AND COUNTY OF HONOLULU

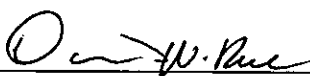
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SS:

)

DAVID W. RAE, the undersigned, being first duly sworn, does hereby verify under oath that: (a) he is the Senior Vice President, Development, of Kapolei Property Development LLC; and (b) he has read the Petition and that the contents thereof are true and correct to the best of his knowledge.

KAPOLEI PROPERTY DEVELOPMENT LLC

By   
DAVID W. RAE  
Senior Vice President, Development

Subscribed and sworn to before me  
this 15<sup>th</sup> day of January, 2007.

Jody L. Thomas

57 JODY L. THOMAS

Notary Public, State of Hawaii

My Commission Expires: 2/17/2010

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MARK J. BENNETT vs. RICHARD W. GUSHMAN, II, et al; Docket No. DR06-32; *Verification*



L-68 STATE OF HAWAII  
OFFICE OF ASSISTANT REGISTRAR  
RECORDED

OCT 31, 2006 08:01 AM

Doc No(s) 3505984

on Cert(s) 754,864

Issuance of Cert(s) 830,890

/s/ CARL T. WATANABE  
ASSISTANT REGISTRAR  
CTax (30): \$10238.60



20 177 Z7

LAND COURT

REGULAR SYSTEM

Return By Mail  Pick-Up  To:

CARLSMITH BALL LLP  
Kapolei Building, Suite 318  
1001 Kamokila Boulevard  
Kapolei, Hawaii 96707  
Attention: Mark K. Murakami  
Telephone: 808.523.2581  
Escrow No. A6-101-1230

TGOH 2006609117-S  
TGES A6-101-1230  
BARBARA PAULO

TITLE OF DOCUMENT:

TRUSTEES LIMITED WARRANTY DEED WITH RESTRICTIONS, COVENANTS AND AGREEMENTS

PARTIES TO DOCUMENT:

**GRANTORS:** C.R. CHURCHILL, D.A. HEENAN, RICHARD W. GUSHMAN, II and RONALD J. ZLATOPER, the duly appointed, qualified and acting TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, acting in their fiduciary and not in their individual capacities

**GRANTEE:** KAPOLEI PROPERTY DEVELOPMENT LLC, a Hawaii limited liability company  
James Campbell Building, Suite 250, 1001 Kamokila Boulevard, Kapolei, Hawaii 96707

TAX MAP KEY(S): (Oahu) 9-1-016-001(por.)  
Certificate of Title No. 754,864

(This document consists of 10 pages.)



**TRUSTEES LIMITED WARRANTY DEED WITH RESTRICTIONS, COVENANTS AND AGREEMENTS**

**KNOW ALL MEN BY THESE PRESENTS:**

That as of November 1, 2006, **C.R. CHURCHILL, D.A. HEENAN, RICHARD W. GUSHMAN, II and RONALD J. ZLATOPER**, the duly appointed, qualified and acting **TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED**, acting in their fiduciary and not in their individual capacities (the "Grantors"), whose address is the James Campbell Building, 1001 Kamokila Boulevard, Kapolei, Hawaii 96707, in consideration of the sum of **TEN AND NO/100 DOLLARS (\$10.00)** and other valuable consideration previously paid to Grantors by **KAPOLEI PROPERTY DEVELOPMENT LLC**, a Hawaii limited liability company (the "Grantee"), whose address is the James Campbell Building, Suite 250, Kapolei, Hawaii 96707, the receipt and sufficiency of which is hereby acknowledged by the Grantors, and upon and subject to the covenants and conditions herein set forth, **DO HEREBY GRANT, BARGAIN, SELL, and CONVEY** unto Grantee, its successors and assigns, forever, that certain parcel of real estate (the "Property") situated at Honouliuli, City and County of Honolulu, Island of Oahu, State of Hawaii, and more particularly described in **Exhibit A** attached hereto and incorporated herein by this reference, subject to the reservations and encumbrances herein and in **Exhibit A** attached hereto, **AND SUBJECT ALSO TO THE FOLLOWING RESTRICTIONS, COVENANTS AND AGREEMENTS:**

1. Permitted Use of the Property. To the extent that the Property is now or may become subject to that certain City of Kapolei Declaration of Protective Covenants, Conditions and Restrictions dated November 30, 1993, made by the Trustees under the Will and of the Estate of James Campbell, Deceased, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 2103428, as it has been and may be amended or supplemented from time to time (collectively the "City of Kapolei Declaration"), the Property shall be used solely for one or more of the permitted uses described in the applicable provisions of the City of Kapolei Declaration, and as may from time to time be permitted by applicable laws, and for no other uses or purposes.

2. Property in "As Is, Where Is" Condition.

a. No Warranties. It is expressly understood and agreed that Grantors have not made any representation or warranty, express or implied, regarding any aspect of the Property including, but not limited to, the implied warranties of merchantability, fitness for a particular purpose, suitability, habitability, quality, physical condition and value, and Grantors hereby disclaim any and all liability for any and all such representations and warranties. Grantee agrees that it has examined and investigated the Property prior to the execution of this instrument and that Grantee has relied solely upon such examinations and investigations in acquiring the Property. Without limiting the generality of the foregoing, Grantee acknowledges that (i) it has made all inspections, investigations and analyses deemed necessary or appropriate to determine compliance by the Property with all environmental or other applicable laws that may apply to the Property, and (ii) Grantors have made no representation or warranty, express or implied, concerning the Property's compliance with environmental or other applicable laws.

b. "As Is" Condition. Grantee acknowledges and agrees that it is acquiring the Property in its "as is, where is" condition, with all faults, if any, and that Grantee has assumed all risks regarding all aspects of the Property, and the condition thereof, including, without limitation: (i) the risk of any physical condition affecting the Property including, without limitation, the existence of any soils conditions, or the existence of archeological or historical conditions on the Property; (ii) the risk of any damage or loss to the Property caused by any means including, without limitation, flood or earthquake; and (iii) the risk of use, zoning, habitability, merchantability or quality of the Property or the suitability of the Property for its present use or future development; and (iv) the activities of Grantors and others on adjacent or other nearby lands.

c. Adjacent Land Use. Grantee acknowledges and agrees for itself, its permitted assigns, transferees, and any other party claiming by, through or under it that: (i) Grantors have entered and may further enter into agreements with others for development and use of other lands owned by or formerly owned by Grantors located adjacent to or near the Property; (ii) such agricultural, developmental, commercial and other activities may involve by way of example and not in limitation thereof, noise, smoke, soot, dust, lights, noxious vapors, odors, and other nuisances of every description arising from or incidental to the activities conducted from time to time on adjacent or other nearby lands, subject only to zoning and other legal restrictions on use; and (iii) Grantee is acquiring the Property subject to all risks associated with the location of the Property. The foregoing shall not prevent Grantee from pursuing all remedies legally available to Grantee in the event of any violation of zoning or other legal restrictions on use.

3. Attorneys' Fees. In the event of a dispute under this instrument, the prevailing party shall be entitled to recover from the losing party all costs including reasonable attorneys' fees.

4. Governing Law. This instrument shall be governed by laws of the State of Hawaii.

5. Perpetuities. If any of the terms, covenants or conditions set forth herein shall be unlawful, void, or voidable for violation of the rule against perpetuities, then such provisions shall continue only until twenty-one (21) years after the death of the last survivor of the now living descendants of Elizabeth II, Queen of England.

6. Effect of Invalidity. The terms, covenants and conditions set forth herein shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof, of any such terms, covenants or conditions shall not affect the validity or enforceability of any other provisions hereof.

7. Joint and Several Liability. Wherever the term "Grantee" or the term "Grantees" refers to more than one person, the terms, covenants, conditions and agreements of this instrument shall be jointly and severally binding upon each such person. Any notice given to any such person shall be deemed to be notice upon all such persons.

**TOGETHER WITH** the reversions, remainders, rents, issues and profits thereof, together with all buildings, improvements, tenements, rights, easements, privileges, and

appurtenances to the same belonging or appertaining or held and enjoyed therewith, and all of the estate, right, title and interest of Grantors both at law and in equity therein and thereto.

**TO HAVE AND TO HOLD** the same unto Grantee, its successors and assigns, forever.

**AND** Grantors, for themselves and their successors in trust and assigns, do hereby covenant and agree with Grantee, its successors and assigns, that Grantors have done or suffered no act or thing whereby the Property described in **Exhibit A** is encumbered, except as aforesaid and set forth hereinafter; that the Property described in **Exhibit A** is free and clear of liens and encumbrances made or suffered by Grantors except for the encumbrances contained herein and as set forth in **Exhibit A**, and real property taxes not yet due and payable; and that Grantors will and their successors in trust and assigns shall **WARRANT AND DEFEND** the same unto Grantee, its successors and assigns, forever, against the loss or claims and demands of all persons claiming by, through or under Grantors except as aforesaid.

**AND** Grantee does hereby covenant to and with Grantors for the benefit of Grantors, and affiliates of the Estate of James Campbell, each as owners of lands adjacent or near to the Property, and for the benefit of the Declarant under the City of Kapolei Declaration, that Grantee will observe and perform all of the terms, covenants and conditions and restrictions set forth in the City of Kapolei Declaration, any other declaration of covenants or deed of record with respect to the Property, as the same exist or may hereafter be amended from time to time in accordance with law and the terms of such declaration(s) of covenants or deed(s), on the part of Grantee to be observed and performed, as and when required to do so, and will Indemnify Grantors, and the Declarant under the City of Kapolei Declaration from and against any and all liability or claims arising out of the failure to observe and comply with any such terms, covenants, conditions and restrictions.

The terms "Grantors" and "Grantee" wherever herein used shall be held to mean and include Grantors, their successors in trust and assigns, and Grantee, its successors and assigns, and this instrument shall be binding upon and shall inure to the benefit of the parties hereto and their said respective successors, successors in trust and assigns.

Any liability which may arise as a consequence of the execution of this instrument by or on behalf of the Trustees under the Will and of the Estate of James Campbell, Deceased, shall be a liability of the Estate of James Campbell and not the personal liability of any trustee or employee of the Estate of James Campbell.


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IN WITNESS WHEREOF, the parties have executed this instrument as of the date first above written.

**Grantee:**

**KAPOLEI PROPERTY DEVELOPMENT LLC**, a Hawaii limited liability company

By Aina Nui Corporation, a Hawaii corporation, its member manager


By   
Name: Bradford J. Myers  
Its: Senior Vice President/Treasurer

By   
Name: D. Charles Hill  
Its: Vice President

**Grantors:**

**TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED**, acting in their fiduciary and not in their individual capacities

  
C.R. CHURCHILL

D.A. HEENAN  
  
RICHARD W. GUSHMAN, II

  
RONALD J. ZLATOPER

STATE OF HAWAII  
CITY AND COUNTY OF HONOLULU

}  
} SS.  
}

On this 27th day of October, 2006, before me personally appeared C. R. Churchill, ~~D. A. Heenan,~~ Richard W. Gushman, II, and Ronald J. Zlatoper, Trustees Under the Will and of The Estate of James Campbell, Deceased, to me known to be the persons described in and who severally executed the foregoing instrument, and severally acknowledged that they executed the same as their free act and deed as such Trustees.

*LS*  
N.P.

LS

*Lydia L. Hannemann*  
Printed Name: Lydia L. Hannemann  
Notary Public, State of Hawaii  
My commission expires: Feb. 11, 2008

STATE OF HAWAII )  
 ) ss.  
CITY AND COUNTY OF HONOLULU )

On this 25th day of October, 2006, before me personally appeared Bradford J. Myers and D. Charles Hill, to me personally known, who, being by me duly sworn or affirmed, did say that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable in the capacities shown, having been duly authorized to execute such instrument in such capacities.

LS

Lydia L. Hannemann  
Notary Public, State of Hawaii  
Name: Lydia L. Hannemann  
My commission expires: Feb. 11, 2008

## EXHIBIT A

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

**LOT 16014** (area 73.141 acres), as shown on Map 1239, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

**BEING** all of the land described in and covered by **Certificate of Title No. 754,864** issued to the Trustees under the Will and of the Estate of James Campbell, Deceased.

### **SUBJECT, HOWEVER TO THE FOLLOWING:**

1. Easement "182" (15 feet wide), as shown on Map 21, as set forth by Land Court Order No. 16009, filed February 12, 1958.

2. Grant of Easement dated March 13, 1958, in favor of Standard Oil Company of California, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 213791, as assigned to Chevron, U.S.A., Inc., by instrument filed in said Office of the Assistant Registrar as Document No. 891877, affecting Easement "182".

3. Easement "199" (15 feet wide), as shown on Map 95, as set forth by Land Court Order No. 17311, filed July 14, 1959. Said Easement "199" was relocated as shown on Map 106, as set forth by Land Court Order No. 17854, filed February 11, 1960.

4. Grant of Easement dated June 23, 1959, in favor of Standard Oil Company of California, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 240190, as assigned to Chevron, U.S.A., Inc., by instrument filed in said Office of the Assistant Registrar as Document No. 891877.

5. Grant of Easement dated April 5, 1982, in favor of Hawaiian Electric Company, Inc., filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 1124864.

6. Easement "1442" (15 feet wide) for sanitary sewer purposes, as shown on Map 407, as set forth by Land Court Order No. 83457, filed April 3, 1987.

7. Building setback (40 feet wide) for building purposes, as shown on Map 407, as set forth by Land Court Order No. 83457, filed April 3, 1987.

8. Amended Document Listing Conditions and Preconditions to Reclassification dated November 14, 1989, made by the Trustees under the Will and of the Estate of James Campbell, Deceased, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 1684751.

9. Grant of Easement dated May 31, 1991, in favor of Hawaiian Electric Company, Inc., filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 1824808.

10. Unilateral Agreement and Declaration for Conditional Zoning dated September 9, 1991, made by the Trustees under the Will and of the Estate of James Campbell, Deceased, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 1849708, as amended by instrument filed in said Office of the Assistant Registrar as Document No. 1850615.

11. Easement "3185" (0.132 acre) for sanitary sewer purposes, as shown on Map 593, as set forth by Land Court Order No. 107256, filed June 3, 1992.

12. Easement "3810" (area 209 square feet) for electrical purposes, as shown on Map 653, as set forth by Land Court Order No. 113611, filed September 28, 1993.

13. Easement "3819" (area 33,193 square feet) for drainage purposes, as shown on Map 653, as set forth by Land Court Order No. 113611, filed September 28, 1993.

14. Restriction of vehicular access rights as shown on Map 653, as set forth by Land Court Order No. 113611, filed September 28, 1993.

15. Grant of Easement dated June 7, 1995, in favor of GTE Hawaiian Telephone Company Incorporated, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 2244634.

16. Amended and Restated Document Listing Conditions to Reclassification dated September 11, 1995, made by the Trustees under the Will and of the Estate of James Campbell, Deceased, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 2260754.

17. Document Listing Conditions of Order Modifying Conditions dated September 11, 1995, made by the Trustees under the Will and of the Estate of James Campbell, Deceased, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 2260756.

18. Easement "5750" (total area 70,200 square feet) for access and utility purposes, as shown on Map 820, as set forth by Land Court Order No. 123327, filed February 6, 1996.

19. Grant of Sewer Easement dated August 5, 1996, in favor of the City and County of Honolulu, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 2493647, affecting Easement "1442".

20. Easement "6169" (area 38,395 square feet) for utility purposes, as shown on Map 898, as set forth by Land Court Order No. 128141, filed June 26, 1997.



21. Easement "6170" (area 25,063 square feet) for waterline purposes, as shown on Map 898, as set forth by Land Court Order No. 128141, filed June 26, 1997.

22. Easement "6171" (area 22,800 square feet) for access purposes, as shown on Map 898, as set forth by Land Court Order No. 128141, filed June 26, 1997.

23. Grant of Easement dated March 8, 1999, in favor of Hawaiian Electric Company, Inc. and GTE Hawaiian Telephone Company Incorporated, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 2535142, affecting Easement "3810".

24. Access rights over Easement "6171" in favor of Lot 11000, as set forth by Land Court Order No. 139546, filed September 13, 2000.

25. Easement "7076" (total area 834 square feet) for pedestrian purposes, as shown on Map 1024, as set forth by Land Court Order No. 139546, filed September 13, 2000.

26. Easement "7077" (total area 4,340 square feet) for flowage purposes, as shown on Map 1024, as set forth by Land Court Order No. 139546, filed September 13, 2000.

27. Easement "7078" (area 40,373 square feet) for flowage purposes, as shown on Map 1024, as set forth by Land Court Order No. 139546, filed September 13, 2000.

28. Easement "7114" (2 feet wide, total area 1,510 square feet) for pedestrian purposes, as shown on Map 1028, as set forth by Land Court Order No. 139733, filed October 4, 2000.

29. Grant of Drainage Easement dated December 19, 1997, in favor of the City and County of Honolulu, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 2671382, affecting Easement "3819".

30. Unilateral Agreement and Declaration for Conditional Zoning dated November 17, 2004, made by Kapolei Property Development LLC and the Trustees under the Will and of the Estate of James Campbell, Deceased, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 3195672.

31. Grant of Non-Exclusive Easements dated December 30, 2004, in favor of the City and County of Honolulu and the Board of Water Supply, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 3228386, affecting Easement "6169" and Easement "6170".

32. Easement "8502" (area 11,347 square feet) for landscaping and utility purposes, in favor of Campbell Hawaii Investor LLC, a Hawaii limited liability company, as shown on Map 1239, as set forth by Land Court Order No. 161918, filed June 23, 2005.

33. Easement "8670" (area 300 square feet) for reuse water purposes, as shown on Map 1271, as set forth by Land Court Order No. 162934, filed August 31, 2005.

**END OF EXHIBIT A**

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

MARK J. BENNETT, as ATTORNEY  
GENERAL, STATE OF HAWAII,

Petitioner,

vs.

RICHARD W. GUSHMAN, II, CLINTON  
R. CHURCHILL, DAVID A. HEENAN,  
and R.J. ZLATOPER, Trustees under the  
Will and of the Estate of James Campbell,

Respondents.

DOCKET NO. DR06-32

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

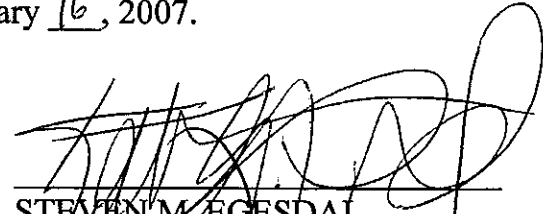
I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was  
duly served upon the follow party by hand-delivering a copy of same on January 16,  
2007:

Mark J. Bennett  
Attorney General, State of Hawaii  
Brian Aburano  
Deputy Attorney General  
425 Queen Street  
Honolulu, Hawaii 96813

Laura H. Thielen, Director  
State of Hawaii, Office of Planning  
238 S. Beretania St.; 6th Floor  
Honolulu, HI 96813

Henry Eng, Director  
City & County of Honolulu, Department of Planning and Permitting  
650 S. King St.  
Honolulu, HI 96813

DATED: Honolulu, Hawaii, January 16, 2007.



STEVEN M. EGESDAL  
KATHERINE G. LEONARD  
Attorneys for Intervenor  
KAPOLEI PROPERTY DEVELOPMENT  
LLC