

DEPARTMENT OF TRANSPORTATION SERVICES
CITY AND COUNTY OF HONOLULU

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MAYOR



J. ROGER MORTON
DIRECTOR

JON Y. NOUCHI
DEPUTY DIRECTOR

July 8, 2021

The Honorable Tommy Waters
Chair and Presiding Officer
and Members
Honolulu City Council
530 South King Street, Room 202
Honolulu, Hawaii 96813

Dear Chair Waters and Councilmembers:

SUBJECT: Draft Council Resolution; Authorizing the Mayor's Designee to Enter into a Master Use and Occupancy Agreement with the Honolulu Authority for Rapid Transportation and the University of Hawai'i for Exclusive Rights to Use and Occupy University Property at the University of Hawai'i – West O'ahu, Leeward Community College, and Honolulu Community College for the Honolulu Rail Project

Submitted for your favorable consideration is a draft resolution requesting the Council's approval to enter into a Master Use and Occupancy Agreement (MUOA) between the University of Hawai'i and the City and HART for use of University Property at three campuses.

Portions of the Honolulu Rail Project have been constructed on University Property including a rail station touchdown and fare gate plaza and temporary park and ride facility at the University of Hawai'i – West 'Oahu, and a rail station, pedestrian underpass, and portions of the guideway at Leeward Community College. The current designs for the City Center segment include a station touchdown at Honolulu Community College.

Section 1-8.6, Revised Ordinances of Honolulu, requires Council approval of any agreements concerning the Honolulu High-Capacity Transit Corridor Projects that place an obligation on the City. This MUOA contains the overall terms that will apply to the City's and HART's use of the University Property generally described above, identifies campus site specific conditions, defines the City and HART use areas at each of the three campuses, and sets forth the responsibilities of the parties for these use areas.

DEPT. COM. 539

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The Honorable Tommy Waters
Chair and Presiding Officer
and Members
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The proposed version of the MUOA agreed to by the parties is also attached for your review.

Should you have any questions, please contact me at 768-8303.

Very truly yours,



J. Roger Morton, Director
Department of Transportation Services

Attachment

APPROVED:



Michael D. Formby
Managing Director



RESOLUTION

AUTHORIZING THE MAYOR OR THE MAYOR'S DESIGNEE TO ENTER INTO A MASTER USE AND OCCUPANCY AGREEMENT WITH THE HONOLULU AUTHORITY FOR RAPID TRANSPORTATION AND THE UNIVERSITY OF HAWAII FOR EXCLUSIVE RIGHTS TO USE AND OCCUPY UNIVERSITY PROPERTY AT UNIVERSITY OF HAWAII – WEST O'AHU, LEEWARD COMMUNITY COLLEGE, AND HONOLULU COMMUNITY COLLEGE FOR THE HONOLULU RAIL PROJECT

WHEREAS, the Honolulu Rail Project includes project improvements sited on or planned to be constructed on University of Hawai'i property, on portions of the University of Hawai'i – West O'ahu, Leeward Community College, and the Honolulu Community College campuses; and

WHEREAS, a proposed Master Use and Occupancy Agreement ("MUOA") between the University of Hawai'i ("University"), the City and County of Honolulu (for the benefit of its Department of Transportation Services) ("City"), and the Honolulu Authority for Rapid Transportation ("HART"), which is attached hereto as Exhibit A, defines the areas that will be committed to City and HART use at each of the three campuses (collectively the "University Property"), contains the overall terms that will apply to the City's and HART's use of the University Property, provides additional campus site specific conditions, and sets forth the responsibilities of the parties for the University Property; and

WHEREAS, under the MUOA, the University grants City and HART the exclusive right to use and occupy the University Property for purposes related to the Honolulu Rail Project; and

WHEREAS, the initial term of the MUOA is eighty years from the date of execution with the opportunity to extend the term for up to two additional twenty-year periods upon mutual agreement of the parties; and

WHEREAS, this MUOA is separate from the construction right of entry agreements executed between HART and the University that allow HART and its contractors to construct the Honolulu Rail Project on the University Property; and

WHEREAS, the MUOA is necessary for the operation and maintenance of those portions of the Honolulu Rail Project situated on University Property; and

WHEREAS, at its meeting on November 19, 2020, the University Board of Regents approved the major term sheet for the MUOA; and



CITY COUNCIL

CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII

No. _____

RESOLUTION

WHEREAS, ROH, Section 1-8.6 requires City Council ("Council") approval of Honolulu High-Capacity Transit Corridor Project agreements as follows:

- 1) Any agreements or amendments to agreements concerning the Honolulu High-Capacity Transit Corridor Project that place an obligation on the City (other than HART or the Board of Water Supply) will require prior Council consent and approval; and
- 2) The final or draft version of the agreement or amendment must be provided to the Council for review prior to the Council's approval. In the event a draft agreement or draft amendment to an agreement is provided, if a material change is made to the draft agreement or draft amendment to the agreement after Council approval, such change will require additional Council review and approval;

now, therefore,

BE IT RESOLVED by the Council of the City and County of Honolulu that the Council hereby authorizes the Mayor or the Mayor's designee to:

- a. Execute the MUOA in substantially the form attached hereto as Exhibit A; and
- b. Execute any incidental or related agreements, amendments, or other documents in furtherance of the purposes of the MUOA, so long as such incidental or related documents do not increase the financial obligation of the City; and



CITY COUNCIL

CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII

No. _____

RESOLUTION

BE IT FINALLY RESOLVED that copies of this Resolution be transmitted to the Managing Director, the DTS Director, the Executive Director of the Honolulu Authority for Rapid Transportation, and the University of Hawai'i Vice President for Budget and Finance and Vice President for Legal Affairs.

INTRODUCED BY:

DATE OF INTRODUCTION:

Honolulu, Hawaii

Councilmembers

EXHIBIT A

MASTER USE AND OCCUPANCY AGREEMENT

BETWEEN

THE UNIVERSITY OF HAWAII
(for the benefit of the University of Hawai'i – West O'ahu,
Leeward Community College,
and Honolulu Community College)

and

THE CITY AND COUNTY OF HONOLULU
(for the benefit of its Department of Transportation Services)

and

THE HONOLULU AUTHORITY FOR RAPID TRANSPORTATION

THIS MASTER USE AND OCCUPANCY AGREEMENT ("**Agreement**"), is made and entered on _____ ("**Execution Date**"), by and between the UNIVERSITY OF HAWAII, the state university and a body corporate of the State of Hawai'i, whose business address is 2444 Dole Street, Bachman Hall, Honolulu, Hawai'i 96822, for the benefit of its University of Hawai'i – West O'ahu ("**UHWO**"), Leeward Community College ("**LCC**"), and Honolulu Community College ("**HonCC**") campuses (collectively the "**University**" or "**UH**"), the CITY AND COUNTY OF HONOLULU, a Hawai'i municipal corporation, whose business address is Honolulu Hale, 530 South King Street, Honolulu, Hawai'i 96813 ("**CCH**" or "**City**"), for the benefit of its Department of Transportation Services ("**DTS**"), and the HONOLULU AUTHORITY FOR RAPID TRANSPORTATION, a semi-autonomous public transit authority under the CCH, whose business address is Ali'i Place Suite 1700, 1099 Alakea Street, Honolulu, Hawai'i 96813 ("**HART**"). "**City/HART**" means City, or HART, or both, as applicable. The UNIVERSITY, City, and HART are individually a "**Party**" and collectively the "**Parties**."

1. Honolulu Rail Project. HART is responsible for developing the Honolulu Rail Project fixed guideway system. Under Section 17-102 of the Revised Charter of the City and County of Honolulu 1973 (2017 Edition) ("**CCH Charter**"), "develop" means "plan, design, develop and construct." The fixed guideway system is defined under Section 17-102 of the CCH Charter as "the minimum operable segment approved by the city council and any extensions to the minimum operable segment approved by the mayor and the city council." Pursuant to the City and HART's December 19, 2012, Full Funding Grant Agreement with the U.S. Department of Transportation, Federal Transit Administration, the minimum operable segment under construction is a 20-mile, 21-station guideway route extending from East Kapolei to Ala Moana Center. In addition to guideway and

station improvements, the project includes fare gates, parking facilities, utility facilities, and drainage facilities, as well as related monitoring and support facilities (collectively, to the extent located on University Property (as defined below), the "**Project Improvements**"). The project includes the elements described in this paragraph, including the construction, development, operation, and maintenance of the Project Improvements on University properties (collectively the "**Honolulu Rail Project**").

2. Master Use and Occupancy Agreement. This Agreement is intended to allow the City and HART exclusive rights to use and occupy various University properties located on three (3) separate campuses on a long term basis in connection with the Honolulu Rail Project (collectively the "**University Property**"), subject to the University Reservations defined in Subparagraph 4.c., below.
 - a. Overall use terms. This Agreement contains the overall terms that will apply to the City's and HART's use of all University Property.
 - b. Prior agreements. According to the Board of Regent's regular meeting minutes of August 22, 2013, the Board delegated "Authority to the President to Execute Construction Rights of Entry with the Honolulu Authority for Rapid Transportation and the City and County of Honolulu Regarding Various University Properties with a vote of 11-0 [one member recused himself due to a conflict of interest]." Since that time, the University has issued several preconstruction right of entry agreements to the City and HART to enable them to complete assessments, investigative studies, and testing of the University Property in connection with the planning and design of the Honolulu Rail Project. The University has also issued a number of construction right of entry ("**CROE**") agreements to HART and HART's contractors to allow HART and its contractors to proceed with the construction of the Honolulu Rail Project.
 - c. Pending UH/HART HonCC CROE. The University and HART are working to finalize a CROE to allow HART and its contractors to complete construction of the Honolulu Rail Project and particular Project Improvements upon the HonCC campus.
 - d. CROEs survive Agreement. All CROE agreements between the University and HART and all CROE agreements between the University and any of HART's contractors shall continue and survive after this Agreement is fully executed by the University, HART, and the City until each CROE agreement expires or is terminated according to its terms. This Agreement shall not supersede or replace any CROE agreement between the University and HART and/or HART's contractors for so long as the CROE agreement is in effect. This Agreement is not intended to apply to the development, construction and installation activities covered by the CROEs. As used in this Agreement, the terms "develop,"

"construct" and "install" shall refer to such activities that occur after the initial installation of the Honolulu Rail Project covered by the CROEs.

- e. City and HART Responsibilities for the Honolulu Rail Project. The University originally dealt exclusively with HART concerning the Honolulu Rail Project. However, due to CCH Charter amendments in 2016, under Section 6-1703 of the CCH Charter DTS is now responsible for the operation and maintenance of the CCH's multimodal municipal transportation system, which includes the Honolulu Rail Project. HART is now responsible only for the design, development, and construction of the Honolulu Rail Project.
 - f. Campus Site Specific Conditions. The Parties have identified and described the site specific conditions that apply to each of the University campuses involved in this Agreement, namely the UHWO, LCC, and HonCC campuses (collectively the "***UH Campuses***") in Exhibit B (Campus Site Specific Conditions), attached hereto and incorporated herein by reference (collectively the "***Campus Site Specific Conditions***"). City/HART shall comply with and fully and timely perform all of their obligations under the Campus Site Specific Conditions.
3. Term. The term of this Agreement ("***Term***") will commence upon the Execution Date and expire on that date which is eighty (80) years after the Execution Date ("***Expiration Date***"), provided that the University and City/HART may mutually agree to extend the Term for up to two (2) additional twenty (20) year periods, subject to such terms and conditions as may be agreed upon.
4. Exclusive Access and Use.
- a. Location. The portion of the University Property to be used on each of the UH Campuses shall each be known as the "***Use Area***." All of the Use Areas collectively comprise the University Property. City/HART shall, at no cost to the University, retain a State of Hawai'i licensed surveyor to prepare property descriptions and maps accurately showing the location and boundaries of each of the Use Areas, which maps and property descriptions will be attached hereto as Exhibit A and incorporated herein by reference. The Parties agree that City/HART has prepared maps that will be attached as the initial Exhibit A to this Agreement, with the understanding that once the Hawai'i licensed surveyor prepared maps and descriptions are completed, they will replace the initial Exhibit A and be incorporated into this Agreement by reference.
 - b. Grant of exclusive access and use. Pursuant to this Agreement, the University grants the City and HART exclusive rights to access and use the University Property to develop, construct, install, operate, maintain, repair, alter, improve, upgrade, expand, renovate, rehabilitate, replace,

reconstruct, and/or remove all or portions of the Honolulu Rail Project and/or the Project Improvements and such other permitted uses more fully described later in this Agreement (collectively the "**City Work**"). The University also grants to HART's and the City's respective contractors, consultants, agents, representatives, subcontractors, and any person acting on behalf of the City or HART (including Hawaiian Electric Company, Inc. ("**Hawaiian Electric**") (collectively the "**City/HART Agents**") access to the University Property for purposes of performing the City Work.

- c. City/HART's exclusive use subject to University Reservations. City/HART's exclusive use of the University Property (including use by the City/HART Agents) is subject to the following reservations with respect to the University Property (collectively the "**University Reservations**"):
- (1) Existing real property interests. All existing real property interests recorded against the Use Areas, such as easements, rights of entry, rights of way, and access or use agreements, and other real property interests or encumbrances pursuant to instruments or other written evidence that are provided by the University to City/HART, as included in Exhibit C, to be attached hereto and incorporated herein by reference within ninety (90) days of the Execution Date. To help confirm the existing real property interests recorded against the Use Areas, City/HART shall, at no cost to the University and within one hundred twenty (120) days of the completion of Exhibit C, obtain title status reports covering each of the Use Areas from a recognized and experienced title company in the State of Hawai'i. Should the recorded real property interests identified in the title status reports be inconsistent with the information in Exhibit C, the Parties will meet to resolve the inconsistencies and Exhibit C will be modified as appropriate. In the event the Parties are unable to resolve the inconsistencies, the matter shall be submitted to the Committee for resolution.
 - (2) Future access and use rights for University purposes. All future easement, access or use rights that the University deems reasonably necessary for University operations (such as for electricity, or other utility services), provided that any such rights shall not materially interfere with City/HART's use and enjoyment of or activities and operations within the University Property.
 - (3) Future access and use rights for Honolulu Rail Project purposes. Future easement, access or use rights that the University and City/HART agree are required for the Honolulu Rail Project, such as University easements to Hawaiian Electric to furnish electricity to City/HART for the operation of the Project Improvements, with the

understanding that the University shall not have a legal obligation to grant any such easement, access or use rights to third parties in support of the Honolulu Rail Project.

- (4) Existing and future utility systems. Existing and future utility systems on, within, under or over the University Property, including the right to construct, install, maintain, adjust, alter, upgrade, expand, repair, renovate, rehabilitate, reconstruct, replace, and/or remove utility systems or infrastructure running through the University Property that the University deems reasonably necessary to support UH operations. The University will furnish to City/HART maps and other information in the University's possession showing the location of any existing utility systems on, within, under or over the University Property. With respect to such existing utility systems, the University will ensure that interference with City/HART's use and enjoyment of and activities and operations within the University Property is minimized. With respect to future new, relocated, or reconstructed utility systems, the University agrees that such utility systems will not materially interfere with City/HART's use and enjoyment of or activities and operations within the University Property. The utility systems will include utility infrastructure for the following purposes: electricity, water, sewer, gas, alternate energy production, communications, telecommunications, data transmission, drainage, waste disposal, ventilation, air conditioning, heating, chilled water, plumbing, boiler and steam production, security, and backup and emergency alert and response systems.
- (5) Development rights. Subject to Paragraph 6.c., the University expressly reserves all development rights above or under each Use Area, including all air rights above each Use Area, provided that the University will obtain City/HART's prior written approval before the University exercises any such development rights, which City/HART approval shall not be unreasonably withheld, conditioned or delayed.
- d. City and HART to maintain University Property. The City and HART will be responsible, at no cost to the University, for the safety, maintenance, repair, and upkeep (collectively the "**Maintenance**") of all of the University Property, to a standard at least as stringent as the standard exhibited at other comparable facilities along the fixed guideway system, except that City/HART shall not be responsible for any hazards, conditions, damage or injury caused solely by any party that is permitted access to the University Property under any of the University Reservations.

- e. City/HART accepting each Use Area "as is". Pursuant to the CROEs, HART accepted the use of the CROE areas "as is" and is presumed to have knowledge of the condition of each Use Area.
 - (1) Existing condition. City/HART agree to accept each Use Area on an "as is with all faults" basis, in its existing form, content, state of condition, and subject to the University Reservations identified pursuant to Subparagraph 4.c.(1) and existing utilities identified pursuant to Subparagraph 4.c.(4), including the obligation to comply with any covenants and conditions contained in deeds and other conveyance documents under which the University acquired ownership and/or control of each Use Area.
 - (2) Not relying on University representations. City/HART agree that they are not relying on any University representation or warranty concerning any Use Area, including: (a) physical condition and terrain, (b) adequacy and condition of soils, (c) sufficiency of utilities, (d) development potential, (e) zoning or legal status, (f) compliance with applicable laws, (g) presence of Hazardous Materials (as defined herein), (h) quality of improvements, if any, and (i) title, except that the University represents that it has the authority and the rights in each Use Area to enter into this Agreement.

5. City/HART responsibility.

- a. Responsible for City/HART Agents acts/omissions. City/HART will be responsible for the acts/omissions of the City/HART Agents, including all general contractors retained by City/HART in connection with the City Work (collectively "**City/HART Contractors**"), as though such acts/omissions were committed by City/HART.
- b. Responsible for ensuring City/HART Agents perform/comply with Agreement terms. HART and the City shall each ensure that their respective City/HART Agents perform and complete obligations under and comply with all of the terms and conditions of this Agreement when using the University Property and/or performing any of the City Work. If the City/HART Agents fail to perform and complete such obligations and/or fail to comply with such terms and conditions, the City or HART, respectively, will perform and complete such obligations and cause or achieve full compliance with such terms and conditions. The failure of the City/HART Agents to so perform and complete such obligations shall constitute a City/HART Default, as defined in Paragraph 13.a. of this Agreement, subject to City/HART's opportunity to cure such City/HART Default and the University's right to exercise its remedies for such City/HART Default.

- c. Responsible for safety, compliance and Adverse Impacts in each Use Area. With respect to each Use Area, HART and the City shall be responsible for:
- (1) the safety and operation of the Honolulu Rail Project,
 - (2) ensuring compliance (and enforcing compliance to the extent of the City's and HART's authority) with all applicable laws, and
 - (3) managing and operating each Use Area, including using reasonable efforts to prevent, mitigate or resolve any Adverse Impacts described in clauses (1) through (5) of Subparagraph 5.g. below, and implementing reasonably necessary measures to prevent, mitigate or resolve any Adverse Impacts described in clauses (6) through (10) of Subparagraph 5.g. below,
- to a standard at least as stringent as the standard exhibited at other comparable facilities along the fixed guideway system.
- d. NPDES Permit. City/HART shall ensure that City/HART and the City/HART Agents comply with the University's National Pollutant Discharge Elimination System ("**NPDES**") Municipal Separate Storm Sewer System ("**MS4**") Permit and the terms and conditions of any written permission to discharge granted by the University for any of the UH Campuses if the Honolulu Rail Project connects to or discharges into the University's MS4.
- e. Responsible for governmental approvals and permits. City/HART shall ensure that City/HART and the City/HART Agents secure and comply with, at no cost to the University, all required governmental approvals and permits for the City Work, including any Maintenance, Subsequent Construction, and the City/HART Covenants (as those terms are defined herein). To the extent that the University must apply for any governmental approvals or permits, including any amendment, alteration, update or change to any of the University's existing governmental approvals or permits due to City/HART's use of or operations and activities within the University Property, City/HART shall fully cooperate with the University in applying for and obtaining any such governmental approvals or permits. City/HART's obligation to fully cooperate shall include the obligation to pay for or share in the costs incurred by the University to obtain such governmental approvals or permits, as determined by the Parties.
- f. Responsible for City/HART Utility infrastructure. City/HART are responsible, at no cost to the University, for providing all utility infrastructure, utility connections, and utility services to each Use Area and the Project Improvements that City/HART may need in support of

City's/HART's use and occupancy of each Use Area and City's/HART's operations within each Use Area, including, sewer, water, electricity, gas, alternative energy production, ventilation, air conditioning, heating, chilled water, plumbing, boiler and steam production, waste disposal, drainage, communications, telecommunications, telephone, data transmission, security, and backup and emergency alert and response systems. City/HART shall promptly repair, at no cost to the University, any damage to such utility infrastructure, utility connections and utility services to the extent that such damage is adversely impacting the University and/or the University's operations, except any damage caused by the acts or omissions of the University or its contractors or agents. City/HART shall promptly repair, at no cost to the University, any damage that City/HART or the City/HART Agents may cause to the University's utility infrastructure, utility systems, utility connections and utility services.

- g. Adverse Impacts definition. The term "**Adverse Impacts**" is defined to mean detrimental impacts to the University and the University Property resulting from the City's/HART's use of the University Property beyond that which would reasonably be expected in the normal course of activities permitted by this Agreement including (1) excessive noise, dust, vibration, lighting, heat or emissions of any kind; (2) traffic disruption or interference with access to the UH Campuses; (3) vandalism or criminal activity; (4) overcrowding beyond the loading capacity of the Project Improvements; (5) major repairs to the Project Improvements that detrimentally impact the University; (6) soil movement; (7) any discharge of wastewater or sewage; (8) any discharge, release, escape, generation, or disposal of Hazardous Materials; (9) damage to or reduction in capacity of any University utility systems (such as electrical, water, wastewater, and drainage systems); and (10) damage to any University facilities or improvements.
- 6. Permitted use. City/HART use of the Use Area shall be limited to performing and completing the City Work.
 - a. No Concession Activity without University approval. City/HART will not engage in or conduct any Concession Activity in any portion of any Use Area, including any of the rail stations located within any Use Area, without the University's prior written approval. The term "**Concession Activity**" shall include all revenue generating activities taking place at least partially on or within the University Property. The term "Concession Activity" shall not include activities such as advertising in or on rail cars or the collection of passenger fares and charges, provided that the revenues generated from such excluded activities are used to fund, and do not exceed what is necessary to fund, the operations and maintenance of the rail system.

- b. University approval may be conditioned. City/HART shall submit for University approval all agreements covering any Concession Activity in any portion of any Use Area, including any of the rail stations located within a Use Area. Such University approval will not be unreasonably withheld and may be conditioned upon City/HART paying the University a certain percentage of the revenues generated from such Concession Activity, not to exceed five percent (5%) of gross revenues reasonably allocable to the revenue generating activity within the Use Area, and compliance with other reasonable conditions.
- c. Joint Development.
 - (1) By HART or the City. Should HART or the City desire to undertake significant, structural development on, within, under, or over the Use Area for commercial or retail purposes, HART or the City shall notify the University of this joint development opportunity.
 - (a) Initial UH response to HART or City joint development notice. If, within thirty (30) business days of such notice, the University notifies HART or the City that it desires to participate in the joint development, the Parties shall negotiate in good faith to reach a mutually acceptable joint development agreement that satisfies all legal requirements, including any applicable Federal Transit Administration requirements for joint development.
 - (b) Joint development agreement deadline or submission of development plans for UH approval. If the University does not respond within thirty (30) business days, or notifies HART or the City that it does not desire to participate in the joint development, or if the Parties have not reached agreement on all material terms of a joint development agreement within one hundred eighty (180) days after the University notifies HART or the City that it desires to participate in the joint development, then the City/HART may submit their plans and agreements covering the proposed development activity to the University for approval. Such approval shall not be unreasonably withheld or delayed, but may be conditioned upon City/HART paying to the University a certain percentage of the gross revenues generated from such proposed City/HART development or such other amount and/or type of compensation as may be required by the University.

- (2) By the University. Should the University desire to undertake significant, structural development on, within, under, or over the Use Area for commercial or retail purposes, the University shall notify HART and the City of this joint development opportunity.
 - (a) Initial City/HART response to UH joint development notice. If, within thirty (30) business days of such notice from the University, HART or the City or both of them notify the University that either or both desire to participate in the joint development, the interested Parties shall negotiate in good faith to reach a mutually acceptable joint development agreement that satisfies all legal requirements, including any applicable Federal Transit Administration requirements for joint development.
 - (b) Joint development agreement deadline or submission of plans for City/HART approval. If, within thirty (30) business days of such notice from the University, neither HART nor the City notify the University of a desire to participate in the joint development, or both HART and the City notify the University that they do not desire to participate in the joint development, or the interested Parties have not reached agreement on material terms of a joint development agreement within one hundred eighty (180) days after HART or the City or both notify the University that it or they desire to participate in the joint development, then the University may submit its plans and agreements covering the proposed University development activity to the City/HART for approval, which approval shall not be unreasonably withheld, delayed or conditioned. In the absence of participating in a joint development agreement, neither the City nor HART shall be entitled to share in any revenue generated from or attributable to the proposed University development activity.

7. Rent and Other Charges.

- a. Rent. Except as a remedy for a City/HART Default pursuant to Paragraph 13, the University will not charge City/HART any rent for the use of the University Property during the initial Term of eighty (80) years. The University's sharing in the gross revenues generated or the consideration received by City/HART from the following shall not be treated or considered as the payment of rent by City/HART: (1) Concession Activity, (2) City/HART development activity, (3) joint development, (4) assignment, sublicensing or other transfer of interest under this Agreement by City/HART, and/or (5) any other source relating to the use of the University Property.

- b. Taxes. City/HART will be responsible for paying all federal, state, and county taxes assessed against City/HART or the University by reason of City's/HART's conduct of activities within or related to the University Property, or any of City's/HART's personal property placed or stored within the University Property. City/HART are also responsible for paying all real property taxes, penalties, and interest applicable to the University Property, the Project Improvements, and/or portions of the Honolulu Rail Project situated thereon, except to the extent attributable to University uses or activities.
 - c. Utility charges. City/HART shall pay for all utility charges including electricity, water, sewer, alternative energy production, communications, telecommunications, waste disposal, ventilation, air conditioning, heating, chilled water, boiler and steam production, telephone, data transmission, gas or any other similar charges, applicable to HART's or the City's activities in each Use Area, the Project Improvements, and/or the City Work during the Term of this Agreement.
 - d. Student Fares. The City will give due consideration to the establishment of special student fare rates in accordance with applicable law.
- 8. Observance of Laws, Rules. City/HART shall, and shall ensure that the City/HART Agents observe and comply with all applicable laws relating to the possession, occupancy, or use of the University Property or the conduct of business thereon. City/HART shall comply with such rules and policies as the University may have in effect or adopt or amend with respect to the operation or use of the University Property.
- 9. City/HART Covenants. At no cost to the University, City/HART shall, and shall ensure that the City/HART Agents, perform and comply with all City/HART covenants, such as:
 - a. Submitting any requested information with respect to HART's and the City's planned operations and activities within the University Property, except for information that must be kept confidential for national, regional, state or county facility security reasons;
 - b. Addressing University concerns with respect to such information;
 - c. Agreeing that the University does not incur any liability for review of such information;
 - d. Agreeing that University review does not excuse City/HART from performing obligations, including indemnity, defense, hold harmless, and insurance obligations as stated herein;

- e. Performing all Campus Site Specific Conditions;
- f. Using reasonable efforts and/or implementing measures reasonably necessary, as provided herein, to prevent, mitigate or resolve Adverse Impacts to the University and the University's operations;
- g. Obtaining and complying with all requirements and conditions contained in all necessary governmental approvals for the City Work, including any required modifications to any existing governmental approvals or permits already obtained by the University but which are affected by the City/HART construction and operation of the Project Improvements; and
- h. Ensuring performance by the City/HART Agents

(collectively, the "***City/HART Covenants***").

10. UH Rail Management Committee.

a. Membership.

(1) Initial Composition. There shall be a committee called the "UH Rail Management Committee" ("***Committee***") composed of the following representatives of the Parties:

- (a) HART. Three (3) HART Representatives, including:
 - Deputy Executive Director.
 - Project Director.
 - One other representative to be determined.
- (b) City. Three (3) City Representatives, including:
 - Director or Deputy Director of DTS.
 - Director of Rapid Transit or designee.
 - One other representative to be determined.
- (c) University. Six (6) University Representatives, including:
 - Vice President for Budget and Finance/Chief Financial Officer or designee.
 - Vice President for Community Colleges or designee.
 - Vice President for Administration or designee.
 - Chancellors for UHWO, LCC and HonCC or their designees.
- (d) Such other persons as the Parties may agree.

- (2) Modify composition. The Parties may revise the composition of the Committee by agreement, provided that at least one (1) representative from each Party shall be a senior executive within their organization.
 - (3) Expiration of HART membership. Once HART's obligations under this Agreement expire, due to HART's fulfillment of its duties under the CCH Charter, HART's membership on the Committee shall also expire and its representation eliminated. Upon the expiration of HART's membership, the City may appoint three (3) additional representatives as members to the Committee.
- b. Delegates/Designees. The persons referred to above, or their successors, may appoint delegates or designees to attend in their absence. Each of the Parties may note concerns or objections to the delegates and/or designees selected to attend. Each Party shall notify the other Parties in writing at least forty-eight (48) hours prior to a scheduled Committee meeting of any delegates/designees who will be attending the Committee meeting.
- c. Objectives. The objectives of the Committee are to:
 - (1) Facilitate collaboration. Facilitate the development of a long term, collaborative working relationship between the Parties;
 - (2) Monitor operations. Monitor rail operations and other rail-related activities as they pertain to services to, and impacts to, the UH Campuses;
 - (3) Oversee concessions/joint development. Oversee City/HART/University concession and joint development arrangements, and help facilitate agreements between the Parties with respect to transit oriented development ("**TOD**") opportunities when appropriate;
 - (4) Monitor other uses. Monitor other uses of the University Property for rail-related facilities, equipment, and infrastructure;
 - (5) Assist with other matters. Assist with the resolution of any matters referred to the Committee by a Party, including issues arising out of this Agreement or any conflicts in the uses or needs of the Parties with respect to the University Property; and
 - (6) Facilitate work coordination. Facilitate the coordination of work impacting another Party.

- d. Frequency of meetings.
 - (1) Initial meeting. An initial meeting of the Committee must be convened by HART no later than three (3) months prior to the scheduled Interim Opening, which shall be the commencement of revenue service from East Kapolei to Aloha Stadium.
 - (2) Monthly/Quarterly meetings. The Committee will meet monthly thereafter through the first full year of revenue service, and then quarterly thereafter. Monthly meetings will recommence three (3) months prior to the scheduled Full Opening, which shall be the commencement of revenue service along the full alignment from East Kapolei to Ala Moana Center. The Committee will continue to meet monthly through the first full year after Full Opening and quarterly thereafter.
 - (3) Alter meeting frequency. The Parties may agree to alter the frequency of meetings.
 - (4) Meetings upon request. During any period where meetings are being held less frequently than monthly, any Party may convene a meeting of the Committee upon thirty (30) days' notice.
- e. Administration. With the exception of the first meeting, the University will convene the regular meetings of the Committee. The meetings will be chaired by the most senior attendee of the University.
- f. Specific Functions. Without limiting the purview of the Committee, the functions of the Committee shall include:
 - (1) Reports and Information.
 - (a) University may require City/HART reports/information. The University may reasonably require information, reports, presentations, and briefings by HART and the City, including:
 - i. regular reporting of certain information at each meeting;
 - ii. presentations on specific topics; and
 - iii. planned activities on or near University Property.
 - (b) City/HART may require UH updates. HART and the City may reasonably require updates on the status of reviews, approvals, and other feedback or input on plans or proposals put forth by HART or the City.

(2) Adverse Impacts, Interference and Consents.

- (a) Adverse Impacts by City/HART. The Committee shall work to resolve claims involving Adverse Impacts from the Honolulu Rail Project to the University, including Adverse Impacts resulting from HART or City rail-related activities outside of the University Property, after such claims have not been resolved at the staff level with diligent effort. The Committee will evaluate the claimed Adverse Impacts and work toward agreement on whether and the extent to which Adverse Impacts must be addressed and, if so, the measures reasonably necessary to address them.
 - (b) Interference by UH. The Committee shall work to resolve claims that the University, its contractors, representatives, or agents, or those occupying or using the University Property with the University's permission, are materially interfering with HART's or the City's use of the University Property, after such claims have not been resolved at the staff level with diligent effort. The Committee will evaluate the claimed material interference and work toward agreement on whether and the extent to which such interference must be addressed and, if so, the measures reasonably necessary to address such interference.
 - (c) Consents. The Committee shall work to resolve claims that under Paragraph 29, a Party's consent is being unreasonably withheld.
- (3) Traffic Flow. The Parties will monitor and evaluate traffic flow, and the City and HART will take appropriate measures to direct or control the flow of rail-related traffic to ensure that it does not unduly interfere with access to the UH Campuses for University operations. The Committee will address traffic management conflicts raised by any Party, after such conflicts have not been resolved at the staff level with diligent effort.
- (4) Emergency Procedures. The Parties will share information pertaining to emergency response procedures to ensure that in the event of an emergency the Parties can be in immediate and direct contact, and to ensure that each Party has critical information required to respond to potential emergencies. The Committee will facilitate the sharing of information to ensure coordinated emergency response, such as considering the establishment of an emergency response planning group with representatives of City/HART and the UH Campuses.

- (5) Consider modifications to the Agreement. At least once every ten (10) years during the Term of the Agreement, the Committee will conduct a review of the arrangements and relationship between City/HART and the University, and the use and occupancy of the University Property, and recommend modifications to the Agreement, including adjustments to revenue sharing provisions.
- (6) Hazardous Materials Investigation and Remediation. Upon the request of any Party after the Parties have been unable to reach agreement at the staff level with diligent effort, the Committee will:
 - (a) oversee and coordinate environmental investigation, analysis, and response actions;
 - (b) facilitate agreement on appropriate environmental investigation, analysis, and response actions;
 - (c) facilitate agreement on a fair allocation between the Parties of the responsibilities and costs for environmental investigation, analysis, and response actions where there are overlapping responsibilities pursuant to Paragraph 17, or for Preexisting Contamination discovered during City Work in accordance with Paragraph 17.e.(2)(b);
 - (d) address any claims involving a Party's failure to cooperate as required by Paragraph 17; and
 - (e) oversee and direct the pursuit of relief from third parties responsible for any Hazardous Materials discharge or release impacting the University Property.
- g. University may require certain representatives to attend. At the University's request, the City and HART must ensure the attendance of representatives of any City or HART contractor, consultant, representative, or agent, including the DTS Chief Safety & Security Officer. At the University's request, the City or HART shall also endeavor to arrange for the attendance of representatives of any governmental entity involved in the Honolulu Rail Project, including the State Safety Oversight Program Manager. Any Party may also have representatives of any of the foregoing attend meetings.

- h. City/HART Defaults and Corrective Actions. In the event there is a City/HART Default that has not been cured pursuant to Paragraph 13, the Committee may take the following steps:
- (1) Designate the Appointee. The Committee shall appoint a neutral third person or panel (the "**Appointee**") to consider the City/HART Default and determine appropriate corrective actions. The Committee shall select one (1) of the following methods, considering the nature of the claimed City/HART Default:
 - (a) Appoint single neutral third party. One (1) University member and one (1) City or HART member shall agree on a neutral third party (which could include a professional neutral); or
 - (b) Appoint neutral panel. The University members shall appoint one (1) person to a neutral panel; the City and HART members together shall appoint one (1) person to a neutral panel, and the two (2) appointees together shall appoint a third person to the neutral panel by mutual agreement.
 - (2) Appointee to make findings. The Appointee shall consider information presented by the University, the City, and HART, and in consultation with the Parties, shall make findings:
 - (a) Confirm City/HART Default exists. Confirming that a City/HART Default exists;
 - (b) Identify harm/damages. Identifying and quantifying the specific harm, damages, and losses to the University caused by the City/HART Default; and
 - (c) Evaluate measures to cure City/HART Default. Evaluating potential measures to mitigate or cure the City/HART Default, including a consideration of alternatives; the costs of all such measures; the impacts of such measures on the costs and operations of the rail system; the impacts to the University of not implementing measures to mitigate or cure the City/HART Default; the impacts of such measures on regulatory compliance; and the impacts of such measures on passengers and the general public.

- (3) Appointee to determine corrective actions/schedule. Based upon the findings under Subparagraph 10.h.(2), the Appointee shall, in consultation with the Parties, decide:
- (a) Specific corrective actions. Specific corrective actions that the City or HART must take to protect the University's interests while also considering the public's interest in an operational, efficient, compliant, and affordable public transit system;
 - (b) Corrective action schedule. A schedule by which such corrective actions must be completed; and
 - (c) Liquidated damages. A liquidated damages amount to be paid per day to the University, considering the specific damages and losses being incurred by the University due to the delay in correcting the City/HART Default, not exceeding \$500 per day, that the City or HART must pay for each day after a corrective action deadline that the required corrective action is not completed.
- (4) Liquidated damages parameters. The Parties agree that, with respect to the liquidated damage amounts paid under Subparagraph 10.h.(3)(c) (Liquidated damages):
- (a) Payment when actual damages difficult to determine. Assessment and payment of liquidated damages are appropriate when the actual amount of damages suffered or incurred by the University as a result the City's or HART's failure to timely cure an ongoing City/HART Default are difficult or impossible to determine with precision;
 - (b) Liquidated damages are not a penalty. These amounts are in the nature of liquidated damages (and not a penalty) and are, as determined by the Appointee, fair and reasonable to compensate the University for the City's or HART's uncorrected City/HART Default of this Agreement;
 - (c) Not appropriate if actual damages are reasonably ascertainable. If actual damages suffered or incurred by the University are reasonably ascertainable, the payment of liquidated damages may not be appropriate; and
 - (d) Liquidated damages not exclusive remedy. UH recovery of such liquidated damages shall not limit the University's recourse to other remedies under this Agreement, except

that any liquidated damages amounts recovered under Subparagraph 10.h.(3)(c) shall be deducted from any additional amounts recovered under any provision of this Agreement that allows for the recovery of losses, damages, costs, or expenses incurred, or the costs of corrective actions taken, or the assessment of fair market rent, by the University, arising from the same City/HART Default.

11. Project Improvements.

- a. University to evaluate City Work Plans. Before starting construction, installation, upgrade, expansion, repair, renovation, rehabilitation, replacement, reconstruction and/or the removal of capital improvements subsequent to the initial construction and installation covered by the CROEs (collectively the "***Subsequent Construction***"), where the value of such work exceeds \$100,000, City/HART shall allow the University an opportunity to review and evaluate all City Work plans, specifications, drawings, and schedules (collectively the "***City Work Plans***") for the Subsequent Construction and identify any concerns noted by the University, which if not resolved by the staffs of UH and City/HART, may be brought to the Committee, particularly with respect to: (1) any Adverse Impacts (2) landscaping and areas of transition between the Use Areas and the University campus areas, and (3) compliance with land use and/or entitlement conditions applicable to the University Property, such as compliance with the UHWO urban design plan (which initially is the *University of Hawaii Non-Campus Lands Urban Design Plan (2011)*), the implementation of which was a condition of the City's approval rezoning the lands known as the UH West Oahu makai lands.
- b. City/HART construction related obligations. In connection with City Work that involves Subsequent Construction, City/HART shall also satisfy the following obligations before starting:
 - (1) Responsible for all costs. The City Work will be completed by City/HART at no cost to the University.
 - (2) Keep University informed. City/HART will keep the University informed of City Work activities that may impact the University, including maintaining a project website, holding regularly scheduled meetings, and addressing and resolving complaints regarding the City Work and its impacts.
 - (3) Implement mitigation measures. City/HART shall use reasonable efforts and/or implement measures reasonably necessary, as provided herein, to mitigate or resolve any Adverse Impacts resulting from the City Work, including traffic mitigation measures.

City/HART shall provide, and will ensure that the City/HART Agents provide, in connection with any Subsequent Construction, adequate worker accommodations (including parking, restrooms, food facilities and trash disposal) to minimize any Adverse Impacts to any UH Campus operations.

- (4) No additional runoff. City/HART shall not allow any additional runoff into any Use Area in a quantity that would increase the risk of flooding, resulting from the City Work, the Project Improvements, and/or the Honolulu Rail Project and provide written certification to the University.
 - (5) Historic preservation obligations. City/HART shall, and shall cause the City/HART Agents to, comply with applicable historic preservation laws, and if historic properties or burial sites are discovered, they will: (a) immediately stop work in and around the discovery area; (b) notify the State Historic Preservation Division ("**SHPD**"); (c) implement measures to protect the discovery area; and (d) not resume any work until SHPD allows work to continue.
- c. Damage/destruction of Project Improvements. If the Project Improvements are severely damaged or destroyed by fire or casualty, and City/HART elects not to rebuild, either City/HART or the University may terminate this Agreement. If City/HART elects to terminate this Agreement, City/HART shall demolish and remove the Project Improvements or the University may do so at City's/HART's cost if City/HART fails to do so, all in accordance with Paragraph 19. City/HART could instead elect to repair, rebuild and/or replace the Project Improvements (which shall be at City's/HART's cost). To the extent the plans to repair, rebuild and/or replace the Project Improvements differ from the plans for the Project Improvements that were in place at the time of the fire or casualty, such plans shall be considered City Work Plans for Subsequent Construction. City/HART must obtain University prior written approval for the City Work Plans covering such Subsequent Construction and meet all City/HART construction related obligations (if the value of such Subsequent Construction is \$100,000 or more). If requested by the University, City/HART shall furnish to the University the City Work Plans covering such Subsequent Construction together with the as-built plans for the prior Project Improvements.
- d. Disposition of Improvements. At the expiration or sooner termination of this Agreement, except for specific Project Improvements that the University informs City/HART in writing that the University desires to remain, City/HART shall demolish and remove the Project Improvements, at no cost to the University, in accordance with City Work Plans and schedule covering such demolition and removal approved by the

University, with City/HART being obligated to promptly demolish and remove the Project Improvements after expiration or sooner termination of this Agreement. For any specific Project Improvements that the University desires to retain, the Parties will negotiate mutually acceptable terms for such retention, provided that if the Parties are unable to negotiate such mutually agreeable terms within one (1) year after expiration or sooner termination of this Agreement, then City/HART shall proceed with demolition of all Project Improvements in accordance with this subparagraph.

12. **Maintenance and Repairs.** City/HART shall, at no cost to the University during the Term, maintain and keep the Use Areas and the Project Improvements in a good and safe condition and repair.
 - a. **Failure to comply.** If City/HART fails to so maintain and keep in good repair and condition, after providing City/HART with notice and an opportunity to cure in accordance with Paragraph 13, the University may but is not obligated to, repair, replace, and rebuild any portion of each Use Area or the Project Improvements, as may be included in the University's notice to City/HART, and the cost thereof, including the cost of such consultants and contractors as the University deems necessary and the University personnel involved in the effort to cure or correct the failure of City/HART to perform, plus ten percent (10%) of all such amounts for the University's administrative overhead, shall be payable immediately by City/HART to the University upon the University's request.
 - b. **Damage Repair.** City/HART shall repair, replace, and rebuild all or any parts of the Use Area and the Project Improvements, or any portion thereof, as the same may have been damaged or destroyed by the acts/omissions of City/HART, the City/HART Agents, and/or the City/HART Contractors.
 - c. **Inspection.** The University may, at reasonable times, with reasonable notice, and subject to reasonable safety and security requirements (but only to the extent that City/HART provides such safety and security requirements in writing to the University at least twenty-four (24) hours prior to the University's entry), enter upon portions of the Use Areas and the Project Improvements that are not accessible by the public for the purpose of: (1) inspecting the same and examining the condition and state of repair, (2) observing City/HART performance of their obligations under this Agreement, (3) making any repairs the University deems reasonably necessary, such as situations where City/HART fails to effect required repairs, and (4) performing any obligation of the University.

- d. Address emergencies. The University reserves the right, in cases of emergencies, as determined by the University, in its sole discretion, to enter the Use Areas and the Project Improvements and effect such repairs and implement such measures as the University deems necessary to address the emergency, mitigate the adverse conditions, or reduce the possibility of a larger casualty, all without the need to obtain a court order or other authorization. Before entering to address emergencies in the Use Areas or the Project Improvements, the University will attempt to notify or contact City/HART at emergency contact numbers to be provided, which can be called on a 24-hour a day/7-day a week basis. If the University tries to contact City/HART at the designated emergency contact numbers and City/HART fails to answer or respond, the University may enter the Use Areas and the Project Improvements to address such emergency situation, all without liability to City/HART, as long as the University acts reasonably. However, should the University enter the Use Areas and/or the Project Improvements without trying to contact City/HART at the designated emergency contact numbers, it does so solely at its own risk and neither HART nor the City shall have any responsibility or liability therefor, or for any personal injury or property damage arising therefrom, except when such entry is a necessary and reasonable response to an emergency situation caused by HART, the City, or any of their respective contractors or agents.

13. University Remedies for Default.

- a. City/HART Default. A failure by City/HART to timely or fully perform obligations that City/HART are required to perform under this Agreement shall constitute a default under this Agreement. A "**City/HART Default**" is a default that is not timely cured or corrected, or for which cure or correction is not timely commenced and pursued, as follows:
 - (1) If City/HART is in default for failure to timely:
 - (a) respond to requests for information;
 - (b) respond to requests for City Work Plans; and/or
 - (c) use reasonable efforts and/or implement measures that are reasonably necessary, as provided herein, to mitigate or resolve Adverse Impacts;the cure period shall be sixty (60) days from receipt of the University's written notice of default to City/HART;
 - (2) For any other defaults, the cure period shall be one hundred eighty (180) days from receipt of the University's written notice of default to City/HART; or

- (3) If the default cannot be cured within said 60-day period or 180-day period, as applicable, City/HART shall start such cure within said applicable 60-day or 180-day period and diligently prosecute the same until completion.

If City/HART commit a City/HART Default, the University shall be entitled to all remedies available under this Agreement and by law, which remedies shall be cumulative and not exclusive.

- b. Remedies. Upon the occurrence of any City/HART Default, the University may, but shall not be obligated to:

- (1) Recover losses and damages against City/HART. Recover against City/HART all losses, damages, costs, and expenses incurred or imposed upon the University in connection with the City/HART Default, plus an additional ten percent (10%) of all such amounts for the University's administrative overhead;
- (2) Cure/remedy City/HART Default and obtain reimbursement. Cure or remedy any City/HART Default and charge to City/HART, as applicable, any costs and expenses incurred by the University in performing said cure or remedy, including such costs as the cost of consultants and contractors that the University reasonably deems necessary and the cost of University personnel involved in the work to cure or correct any City/HART Default, which costs and expenses City/HART shall immediately pay to the University upon receiving notice from the University, plus ten percent (10%) of all such costs for the University's administrative overhead; and
- (3) Charge and receive fair market rent from City/HART. Charge and receive from City/HART, immediately after written notice from the University to City/HART, fair market rent for the use of the Use Area involved with the City/HART Default for the period of the City/HART Default, which shall be established by an appraisal: (a) obtained by the University by an appraiser reasonably approved by City/HART, acting pursuant to agreed instructions, and (b) for which the Parties will equally share the cost.

- c. Referral to UH Rail Management Committee. If the staffs of the Parties are unable to resolve any disputes relating to the existence of a City/HART Default and the remedies that City/HART should perform and/or pay to the University, either Party may submit the dispute to the Committee to facilitate a non-binding resolution, and failing a mutually agreeable resolution, either Party may invoke the dispute resolution procedure provided in Paragraph 24 below.

- d. No double recovery. Despite any other provisions of this Agreement to the contrary, the University shall not be entitled to recover compensation or make a claim under this Agreement with respect to any loss or default to the extent that it has already been compensated with respect to that loss or default pursuant to this Agreement or otherwise. Any amounts that the University may be recover for any loss or default under this Agreement shall be reduced by all amounts previously recovered by the University with respect to the same loss or default, including amounts recovered pursuant to Paragraph 10.h.(3)(c).
- 14. Abandonment. If there is no City Work in a Use Area for a continuous period of five (5) years, either Party may require that the Agreement be amended to delete that Use Area. If the Honolulu Rail Project is modified to no longer require development at the HonCC campus, either Party may require that the Agreement be amended to delete the Use Area at the HonCC campus.
- 15. Indemnity. City/HART shall indemnify, defend and hold harmless the University and the University's officers, employees and agents against any claims, actions, judgments, orders, liens, liabilities, losses, damages, costs, and expenses (including reasonable Attorneys' Fees and Costs (as defined herein)) including claims for property damage, personal injury, bodily injury, death, or environmental damage, arising from or connected with:
 - a. Exercise of rights. City's/HART's exercise of any of rights under this Agreement;
 - b. Act or omission. Any act/omission by City/HART and/or the City/HART Agents;
 - c. Accident or other casualty. Any accident, fire, or other casualty if caused or otherwise attributable to City/HART, the City/HART Agents, the City Work, and/or the Project Improvements;
 - d. Violation of applicable laws. Any violation or alleged violation of any applicable laws, including any Environmental Laws (as defined herein), by City/HART and/or the City/HART Agents;
 - e. Hazardous Materials. Any liability, claim, cost, and/or expense relating to the release, discharge, disposal, escape, presence, treatment, handling, generation, transport, accumulation, collection, or storage of any Hazardous Materials by or attributable to City/HART and/or the City/HART Agents, or arising from City's/HART's failure to perform any required remediation, clean up, and restoration;

- f. Liens. Any act/omission by City/HART and/or the City/HART Agents resulting in any liens, attachments, charges and/or encumbrances (collectively the "***Liens***") filed against or affecting the Use Areas, the University Property and/or the Project Improvements and the failure to promptly discharge and release such Liens; and
- g. Failure to perform. Any failure of City/HART and/or any of the City/HART Agents to fully perform any of the terms and conditions in this Agreement,

except to the extent caused by or arising from the negligent, grossly negligent, intentional, or willful acts or omissions of the University or its officers, employees, agents, or contractors.

16. Insurance.

- a. Required insurance coverage. City/HART shall, during the term of this Agreement or as otherwise described below, and at no cost to the University, procure and maintain the following insurance coverage, issued by a Hawai'i licensed insurer acceptable to the University:
 - (1) Commercial general liability insurance (\$5 million for property damage, personal injury, or death per occurrence).
 - (2) Umbrella liability insurance sufficient to meet liability insurance requirements.
 - (3) Automobile liability insurance (\$1 million per person per accident personal injury and property damage).
 - (4) Commercial property damage broad form insurance, including underground, explosion, and collapse hazard liability insurance and insuring against fire and other perils (such as wind and hurricane).
 - (5) Builder's all risk insurance coverage on a full replacement value basis, in amounts reasonably satisfactory to the University during any construction, including any Subsequent Construction, covered by this Agreement.
 - (6) Workers' Compensation and Employer's liability insurance with limits of not less than \$100,000.00 or as otherwise required by applicable laws.

- b. General requirements. Each insurance policy that City/HART and/or any of the City/HART Agents are obligated to obtain under this Agreement shall be subject to the following:
- (1) Notice of change. All insurance policies required under this Agreement shall contain a clause to the effect that should any of the insurance policies be limited in scope, changed, or cancelled before the expiration date thereof, the insurer shall provide City/HART and the University with notice in accordance with the policy provisions or, if sooner, as required by law. City/HART shall, and shall ensure that the City/HART Agents shall, provide the University notice of (a) any act or omission by City/HART or any of the City/HART Agents that would allow the insurer to terminate or modify any of the insurance coverage within two (2) business days of such act or omission (including failure to renew an insurance policy or pay a required premium therefor) and (b) notice of cancellation, limitation in scope, material change, or non-renewal by the insurer within two (2) business days of receipt.
 - (2) Insurance obtained by the University shall apply in excess of City/HART insurance. Any insurance maintained by the University will apply in excess of, and not contribute with, insurance provided by City/HART and/or any of the City/HART Agents under this Agreement.
 - (3) University as additional insured. City/HART shall, and shall ensure that the City/HART Agents shall, name the University and those persons or entities identified in writing from time to time by the University to City/HART as additional insured on the insurance policies for all insurance coverage City/HART and/or the City/HART Agents are obligated to obtain under this Agreement, except for Workers' Compensation and Employer's liability insurance.
 - (4) Waiver of subrogation endorsement. All insurance required under this Agreement will contain a waiver of subrogation endorsement in favor of the University.
 - (5) University not required to pay premiums. City/HART and/or the City/HART Agents shall be solely responsible for the costs of procuring and maintaining the insurance coverage described in this Agreement and shall not charge the University or expect the University to pay any portion of the premiums or charges to obtain the insurance coverage required under this Agreement.

- (6) Acceptable deductibles. The terms and amounts of any deductibles for the insurance policies required under this Agreement must be reasonable and acceptable to the University based upon the type of insurance involved and the nature of the activities on or within the University Property by City/HART and/or the City/HART Agents.
 - (7) Deposit insurance certificates. City/HART shall, and shall ensure that the City/HART Agents shall, (a) deposit with the University, on or before the Execution Date of this Agreement, certificates of insurance necessary to satisfy the University that the insurance provisions of this Agreement have been fully complied with and (b) keep such insurance in effect and the certificates therefore on deposit with the University during the entire term of this Agreement.
 - (8) Lapse in insurance constitutes a breach. Any lapse in, or failure by City/HART or any of the City/HART Agents to procure, maintain, and keep in full force and effect such insurance coverage as is required under this Agreement, at any time during and throughout the term of this Agreement, shall be a breach of this Agreement and the University may exercise the remedies set forth in Paragraph 13.b.
 - (9) University may adjust insurance requirements. The University may, upon reasonable notice and reasonable grounds, increase or change the form, type, coverage, or coverage limits of the insurance required hereunder, in which event City/HART shall cause City/HART and the City/HART Agents to obtain such required insurance. The University's requirements shall be reasonable and shall be designed to provide protection from and against the kind and extent of risks that exist at the time a change in insurance is required.
 - (10) The foregoing general insurance requirements are subject to the University's written notice and an opportunity to cure pursuant to Paragraph 13.
- c. Insurance not a limit on liability. Provision of insurance by City/HART shall not be construed to limit City/HART liability or to fully satisfy City/HART indemnification, defense, hold harmless, and liability obligations under this Agreement.
- d. Failure to obtain. If City/HART fail to provide and maintain the required insurance coverage after the University's written notice and an opportunity to cure pursuant to Paragraph 13, the University may procure such insurance at City's/HART's sole cost and City/HART will immediately reimburse the University for the cost thereof plus 10% of all such costs for the University's administrative overhead. Any lapse in, or failure by City/HART to procure or maintain the insurance shall be a breach/default

under this Agreement, subject to the University's written notice and an opportunity to cure pursuant to Paragraph 13.

- e. City's right to self-insure. City may provide the required insurance coverage through self-insurance, provided that such self-insurance covers the cost of defending the University as required under Paragraph 15 (Indemnity).

17. Hazardous Materials.

- a. Environmental Laws compliance. City/HART agree to comply, at no cost to the University, with all Environmental Laws that apply to each Use Area and the Project Improvements and to City/HART occupancy or use of and/or activities within each Use Area. City/HART failure to comply with any Environmental Laws shall constitute a breach/default under this Agreement, subject to the University's written notice and an opportunity to cure pursuant to Paragraph 13.
- b. No use without University approval. City/HART shall not use, store, treat, dispose of, discharge, release, generate, or otherwise handle any Hazardous Materials within any Use Area and/or the Project Improvements without first obtaining the University's written consent and complying with all Environmental Laws, except in the normal course of activities permitted by this Agreement and in strict compliance with all Environmental Laws.
- c. Notice to University. City/HART shall give the University immediate notice of any investigation, enforcement action, remediation or other regulatory action, or any legal action initiated, or any indication of an intent to do so, communicated to City/HART by any government authority which relates to City/HART, any Use Area, and/or the Project Improvements.
- d. Environmental assessments. If the University reasonably believes that City/HART has caused the release of Hazardous Materials, City/HART shall, at the University's request and at no cost to the University, cause to be conducted such investigations and assessments of the Use Area involved and/or the Project Improvements, to determine the presence of any Hazardous Materials.
- e. Remediation/Restoration.
 - (1) City/HART Hazardous Materials. If any Hazardous Materials are used, stored, treated, disposed, or handled by City/HART on, or are discharged or released by City/HART from, any Use Area or the Project Improvements ("**City/HART Hazardous Materials**"), City/HART shall, at no cost to the University: (a) clean up and

remediate any such Use Area and/or the Project Improvements of any City/HART Hazardous Materials, (b) dispose/remove City/HART Hazardous Materials in accordance with the Environmental Laws, and (c) remediate and restore each Use Area and the Project Improvements to the same condition as existed immediately prior to the introduction, discharge, or release of the City/HART Hazardous Materials to, on, or upon any Use Area or the Project Improvements. With respect to City/HART Hazardous Materials, City/HART shall be responsible for all required reporting to the State of Hawai'i Department of Health ("**HDOH**") as required by applicable laws, including all rules, regulations and directives of HDOH and the Environmental Protection Agency, and shall at no cost to the University, complete any clean up, remediation, and removal of Hazardous Materials that may be required by HDOH.

(2) Preexisting contamination.

- (a) City/HART Preexisting Contamination Obligation.
City/HART will be solely responsible for any legally required clean up and remediation, at no cost to the University, of any Hazardous Materials that were present on, within, at, or under the Use Area on or before the Execution Date ("**Preexisting Contamination**"), that are physically excavated, moved, removed, or replaced, by City/HART during City Work ("**City/HART's Preexisting Contamination Obligation**"). City/HART may not require the University to clean up or remediate or contribute to the cost of cleanup or remediation of Hazardous Materials that are within City/HART's Preexisting Contamination Obligation.
- (b) Preexisting Contamination Discovered During City Work. If, in the course of City Work, City/HART discovers Preexisting Contamination present in concentrations that trigger a duty to investigate or respond beyond the City's Preexisting Contamination Obligation, the Parties shall evaluate the contamination according to the post-construction Environmental Hazard Evaluation-Environmental Hazard Management Plan ("**EHE-EHMP**") to be prepared pursuant to the Programmatic Environmental Hazard Evaluation and Environmental Hazard Management Plan for the Honolulu Rail Transit Project, dated July 2014. If further site investigation is required, the Parties shall jointly conduct and share in the costs of a site investigation and new or updated EHE-EHMP, as appropriate, provided that City/HART's share of the costs shall be limited to one-half of the costs

allocable to the Use Area. Based upon the post-construction EHE-EHMP, any new or updated EHE-EHMP, and the appropriate response action that is determined in consultation with HDOH, the Parties shall agree on a fair allocation of the responsibilities and costs of any further investigation, analysis, and response actions allocable to Preexisting Contamination. In arriving at a fair allocation, the University shall be responsible for costs and actions to the extent they are necessitated by the threat to public health or the environment posed by the hazardous conditions of the property irrespective of the City Work, while City/HART shall be responsible for any costs and actions to the extent they are necessitated by or attributable to the City Work, including costs that would otherwise be attributable to City/HART's Preexisting Contamination Obligation but are addressed through the response action. If, after diligent effort, the Parties are unable to reach agreement on a fair allocation, the matter may be referred to the Committee to facilitate a resolution.

- (c) Hazardous Materials Introduced or Discovered By Others. Neither HART nor the City shall be responsible for any investigation, clean up or remediation of: (i) Hazardous Materials used, stored, treated, disposed, handled, discharged, or released during the term of this Agreement by the University, its officers, employees, agents, representatives, contractors, or anyone acting upon the University's behalf or who is present upon the Use Area or adjacent property with the University's permission, (ii) Preexisting Contamination that is neither within City/HART's Preexisting Contamination Obligation, nor encountered during City Work; or (iii) Hazardous Materials which intrude or migrate into the Use Areas from activities unrelated to the City Work. Except for the foregoing, as part of their Maintenance responsibilities City/HART shall be responsible for the investigation, clean up or remediation of releases, discharges or spills of Hazardous Materials within the University Property that occur during the Term of the Agreement.
- (3) Duty to Cooperate. Notwithstanding the allocation of responsibilities under this paragraph, the Parties acknowledge that they have a common interest in addressing Hazardous Materials within the Use Areas to allow for beneficial uses of the Use Areas while protecting public health and the environment. The Parties therefore agree to make every reasonable effort to cooperate in

properly addressing any Hazardous Materials within the Use Areas as cost-effectively and efficiently as possible.

- f. University's Right to Act. If City/HART fail to timely comply with any of their obligations under this Agreement or under any Environmental Laws, the University may, in its sole discretion, after providing City/HART with notice and an opportunity to cure pursuant to Paragraph 13, cause them to be performed, all at City's/HART's cost, which shall include the cost of such consultants and contractors as the University deems necessary and any University personnel involved in the University's performance of such obligations plus 10% of all such costs for the University's administrative overhead, which total amount City/HART shall immediately pay the University upon the University's written demand.
 - g. Hazardous Materials/Environmental Laws definitions. "**Hazardous Materials**" means any substance, element, compound, mixture or solution: (1) the presence of which requires investigation or remediation under any federal, state or county statute, regulation, ordinance, order, action, and/or policy (collectively the "**Environmental Laws**"); or (2) which is now or at any time hereafter in effect becomes defined as a "hazardous waste," "hazardous substance," pollutant or contaminant under any Environmental Laws, including petroleum, fuel oil, oil sludge, crude oil or residual oil, and trichloropropane; or (3) which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, or mutagenic and is or becomes regulated by any governmental authority.
18. University Limitations. The following provisions limit the University's liability under this Agreement and shall apply to all of the University's obligations, duties, responsibilities, and liabilities under this Agreement (collectively the "**UH Limitations**"):
- a. University not authorized to be responsible for others. The University maintains that as a State of Hawai'i agency, the University is not authorized to be responsible for the acts or omissions of other persons or entities (other than the University's own officers and employees). In all University agreements with contractors or other third parties (collectively the "**UH Contractors**") that may involve the use of any Use Area or the University Property or adversely impact City/HART or their use of University Property, the University will require the UH Contractors to accept liability for, and indemnify, defend and hold harmless City/HART against, any claims, actions, judgments, orders, liens, liabilities, losses, damages, costs and expenses (including reasonable Attorneys' Fees and Costs) including claims for property damage, personal injury, bodily injury, death, or environmental damage, arising from or connected with any act or omission by the UH Contractors. The University/UH Contractor agreements shall expressly provide that City/HART are third party

beneficiaries of such University/UH Contractor agreements, only to the extent that City/HART are being granted herein the right to enforce such liability, indemnity, defense, and hold harmless obligations directly. If the University complies with this requirement, then notwithstanding anything to the contrary contained in this Agreement, where the University is or may be obligated to be responsible for the acts or omissions of other persons or entities, such obligations shall be deemed null and void and such contrary responsibility obligations and provisions shall be deemed to be superseded by this provision, and of no force or effect.

- b. University obligations subject to funding. To the extent the University is obligated to perform, make any payments, or satisfy a liability under this Agreement, the University's ability to satisfy such obligations or liabilities, particularly any obligations to pay monies, is limited to that which is permitted by law and is subject to the condition that funds are properly appropriated, allotted, or otherwise properly made available for the purpose of satisfying such obligations or liabilities.
19. Surrender. Subject to the provisions of Paragraph 11.d., at the expiration or sooner termination of this Agreement, City/HART shall, at no cost to the University, demolish and remove all of the Project Improvements and City's/HART's equipment, vehicles, trailers, tents, signs, temporary structures, devices, tools, and other personal property (collectively the "**Personal Property**") and restore the University Property to a condition reasonably approximating the condition it was in prior to the initial construction of the Project Improvements, and reasonably satisfactory to the University.
- a. City/HART obligations in removing the Project Improvements. In demolishing and removing the Project Improvements, City/HART shall, at no cost to the University, complete such demolition and removal of the Project Improvements in accordance with: (1) applicable laws; (2) requirements under this Agreement applicable to demolition and removal activities, such as securing insurance, obtaining governmental approvals, repairing any damage caused by such demolition and removal, and restoring any Use Area (including removing and disposing of any Hazardous Materials in accordance with the Environmental Laws) to a reasonable approximation of their condition prior to the initial construction of the Project Improvements; and (3) City/HART demolition and removal plans approved by the University prior to start of the demolition/removal work.
 - b. Removal subject to legal requirements. City's/HART's obligations hereunder to demolish and remove the Project Improvements shall be expressly subject to and conditioned upon any restrictions that may be imposed by law, including legal requirements for the disposition of federally-assisted property or City property, or other authorities that may

govern the disposition of the Project Improvements, provided that the Parties acknowledge and agree that the University would not have entered into this Agreement but for City/HART's covenant and commitment to promptly demolish and remove all Project Improvements not specifically agreed by the Parties to be retained, upon expiration or termination of this Agreement, at City's/HART's cost, under the applicable laws in effect at the time that this Agreement is fully executed.

- c. City/HART failure to remove/restore. Subject to the preceding subparagraph, if City/HART fails to comply with their demolition, removal and restoration obligations, particularly demolishing and removing the Project Improvements, removing their Personal Property, and restoring each Use Area, after affording the City/HART notice and an opportunity to cure pursuant to Paragraph 13, the University may, in its sole discretion, cause such obligations to be performed, all at City's/HART's cost, including the cost of such consultants and contractors as the University deems necessary and all University personnel involved in the University's performance of such obligations plus 10% of all such costs for the University's administrative overhead, which total amount City/HART shall immediately pay the University upon the University's written demand.
20. Litigation. If the University is made a party to litigation by or against City/HART without any fault on the part of the University, whether relating to City/HART use and occupancy of the Use Areas or attributable to the City Work, the Project Improvements, and/or the Honolulu Rail Project, or the handling of the Personal Property of City/HART, the City/HART Agents, and/or the City/HART Contractors, City/HART shall indemnify, defend, and hold harmless the University against claims, actions, liabilities, losses, and damages arising from such litigation, including paying the University's reasonable Attorneys' Fees and Costs. "**Attorneys' Fees and Costs**" as used in this Agreement means and includes all reasonable attorneys' fees, expert witness fees and costs, discovery and pretrial costs, and costs incurred in the investigation, prosecution, or defense of any action.
21. Liens. City/HART shall not commit, and shall ensure that the City/HART Agents do not commit, any act or neglect whereby any Use Area, and/or the Project Improvements, or City's/HART's interest in the same, shall become subject to any Liens. City/HART shall take immediate action to discharge, release, and remove the Liens and indemnify, defend and hold harmless the University against any and all Liens, and any and all actions, suits, judgments, and orders relating thereto, and reasonable Attorneys' Fees and Costs arising from the challenge, discharge, satisfaction, or release of any such Liens.
22. Assignment and sublicensing. City/HART shall not assign this Agreement, or otherwise assign, transfer, or sublicense any Use Area and/or the Project Improvements (or any portion or any interest therein) without the University's

prior written consent, which consent will be at the University's sole discretion (except for sublicensing consent requests which will not be unreasonably withheld and may be conditioned in a manner consistent with Paragraph 6.b.) and may be subject to such conditions as the University may reasonably require, including no release of City/HART and the payment to the University of a portion or percentage of the consideration received by City/HART and/or revenue/rent generated in connection with such assignment, transfer or sublicensing.

Notwithstanding the foregoing, the University acknowledges that it is essential for the Honolulu Rail Project that Hawaiian Electric be allowed to occupy the Use Area at the LCC Campus for purposes of the Ka'aahi substation and for storage of specialized vehicles required by the Honolulu Rail Project. City/HART acknowledge and agree that the University and HART entered into an amendment to the UH HART LCC CROE under which HART is permitted, with the University's approval, to enter into a separate agreement with Hawaiian Electric under which Hawaiian Electric would be allowed to begin construction of the Ka'aahi substation. Under this Agreement, and as more specifically provided for in Exhibit B to this Agreement, the Ka'aahi substation site will be part of the Use Area that City/HART will be authorized to use for the City Work, the Honolulu Rail Project, and the Project Improvements and City/HART will be permitted by the University to enter into a sublicense agreement with Hawaiian Electric to allow the operation, maintenance, repair, replacement, and removal of the Ka'aahi substation and the storage of specialized Hawaiian Electric vehicles required by the City Work and the Honolulu Rail Project, subject to City's/HART's compliance with the terms of this Agreement, including ensuring that the City/HART Agents, such as Hawaiian Electric, comply with all applicable terms and conditions of this Agreement.

23. Survival of obligations. Any termination or cancellation of this Agreement shall not relieve City/HART of any of their obligations contained in this Agreement that are intended to survive the expiration or termination of this Agreement, including the following:
- a. City/HART surviving overall obligations. City/HART obligations related to compliance with applicable laws, including the Environmental Laws, removal and remediation of City/HART Hazardous Materials, the removal and discharge of any Liens, surrender, restoration of the Use Areas, City/HART Defaults and University remedies, UH Limitations, litigation, demolition and removal of Project Improvements, City/HART representations, covenant against discrimination, and compliance with the Americans with Disabilities Act.
 - b. City/HART surviving indemnity, insurance, assignment and sublicensing obligations. City's/HART's obligations, as required under this Agreement with respect to incidents or events arising and/or time periods occurring prior to the expiration or termination of this Agreement, to: (1) obtain the

University's prior written consent (such as for Concession Activity, development, assignment and/or sublicensing), (2) maintain the required insurance, and/or (3) indemnify, defend and hold harmless the University.

24. Dispute resolution. If a dispute arises, the Parties agree to negotiate face-to-face. If the matter is not resolved by negotiation within thirty (30) days of this initial negotiation meeting, the Parties shall engage a mediator and attempt to mediate the dispute. The Parties agree to try in good faith to resolve the dispute by mediation under the mediation rules of an alternative dispute resolution firm acceptable to both Parties, before resorting to litigation. If the dispute is not resolved by mediation within sixty (60) days of the initial mediation meeting or such further time as the Parties may agree to or that the mediator deems is needed, any Party may commence legal action in the State Circuit Court in the City and County of Honolulu. The Parties will equally share the cost of the mediator services and the mediation sessions but each Party will bear the cost and expense of making its presentation to the mediator.
25. Representations. City/HART and University signatories each represent that City/HART and the University, respectively, have full right and authority to enter into this Agreement, and that each of the signatories are authorized to sign on behalf of City/HART and the University, respectively. City/HART represent that there is no litigation, action, proceeding, or investigation pending or, to the best of City's/HART's knowledge, threatened before any court or other government authority by, against, affecting or involving any of City's/HART's business or assets that would affect City/HART's ability to carry out the City/HART obligations under this Agreement except the following: Ongoing Federal and State investigation(s). While HART is not aware of any direct implications of the investigation(s) for performance of duties under this Agreement, uncertainty about the scope prompts this disclosure.
26. Historic Preservation. In the construction, operation, alteration, repair, reconstruction, replacement, and/or removal of the Project Improvements, and City/HART use and occupancy of the Use Areas, City/HART shall comply with all applicable historic preservation laws, such as the National Historic Preservation Act of 1966, as amended; Chapter 6E, Hawai'i Revised Statutes; and all other federal or State laws, particularly those pertaining to the protection of archaeological, historical, and cultural resources.
27. Americans with Disabilities Act compliance. City/HART shall, and will cause the City/HART Agents to, comply with the mandates of the Americans with Disabilities Act of 1990, including any amendments and implementing regulations, particularly with respect to the City Work and the Project Improvements.

28. Covenant Against Discrimination. The use and enjoyment of the University Property shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age, veteran status, or HIV (human immunodeficiency virus) infection.
29. Consents. Where this Agreement requires the consent of a Party for a proposed activity and provides that such consent shall not be unreasonably withheld, without limiting the effect of such provision and without limiting the effect of other provisions in this Agreement that allow the University to condition its consent upon the receipt of revenue or consideration:
- a. Contrary to University mission, vision or purpose. It shall not be unreasonable for the University to withhold consent to a proposed activity if the University determines that the proposed activity will be contrary to the mission, vision, or purpose of the University, will be detrimental to University operations or activities, or will impede compliance with the legal obligations of the University.
 - b. No sharing of revenue or consideration with the University. It shall not be unreasonable for the University to withhold consent to a City/HART request for consent if, under circumstances where the University has the right to condition its consent upon the receipt of revenue, City/HART informs or advises the University that City/HART are not willing to or may not share any revenue generated or consideration received by City/HART in connection with such activity.
 - c. Material interference with rail operations. It shall not be unreasonable for the City or HART to withhold consent to a proposed activity if the City or HART determines that the proposed activity will materially interfere with operations of the rail system, threaten public safety, pose a risk of property damage that, considering the likelihood and the magnitude of the potential damage collectively, is significant, or impede compliance with the legal obligations of the City or HART.
30. Amendment. This Agreement shall not be amended except in writing signed by the Parties.
31. Counterparts; facsimile signatures. This Agreement may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the Parties hereto, notwithstanding all of the Parties are not signatory to the original or the same counterparts. For all purposes, including recordation, filing, and delivery of this instrument, duplicate unexecuted pages of the counterparts may be discarded and the remaining pages assembled as one document. The submission of a signature page transmitted by email, facsimile (or similar electronic transmission

facility) shall be considered as an "original" signature page for purposes of this Agreement.

32. Interpretation of Agreement.

- a. Headings. The headings and captions used herein are for convenience of reference only and are not to be used to construe, interpret, define, or limit the paragraphs to which they may pertain.
- b. Not against drafter. This Agreement has been negotiated at arm's length and shall be interpreted to achieve the intents and purposes of the Parties, without any presumption against the Party responsible for drafting any part of this Agreement. The language hereof, and in all parts of this Agreement shall, in all cases, be construed simply according to its fair meaning, and not strictly for or against any Party hereto.
- c. Fair Meaning. Provisions in this Agreement relating to number of days shall be calendar days. Use of the word "including" shall mean "including, but not limited to." References to statutes, sections, ordinances, or regulations are to be construed as including all statutory, ordinance, or regulatory provisions consolidating, amending, replacing, succeeding or supplementing the statute, section, ordinance or regulation.
- d. Gender and number. Whenever the singular number is used in this Agreement and when required by the context, the same includes the plural, the plural includes the singular, and the masculine gender includes the feminine and neuter genders, and the word "person" shall include corporation, partnership, firm, limited liability company, trust, and association. The use of any pronoun herein shall include any and all pronouns.

33. Severability. If any provision of this Agreement or the application thereof to any person, entity, or circumstance shall, to any extent, be deemed invalid, void, or unenforceable by a court of competent jurisdiction, the remainder of this Agreement, or the application of such provision to persons, entities, or circumstances other than those as to which it is invalid, void, or unenforceable, shall not be affected thereby, and each other provision of this Agreement shall be valid and be enforceable to the full extent permitted by law.

34. Governing Law; Jurisdiction. This Agreement shall be governed by, interpreted, construed, and enforced in accordance the laws of the State of Hawai'i. The Parties agree that the Circuit Court of the First Circuit shall have jurisdiction over this matter to enforce the terms of this Agreement.

35. Waiver. Any waiver of the terms, conditions, or provisions of this Agreement or a Party's rights or remedies under this Agreement must be in writing to be effective. Failure, neglect, or delay by a Party to enforce the terms, conditions, or provisions of this Agreement or such Party's rights or remedies at any time, will not be construed as a waiver of such Party's rights under this Agreement and will not in any way affect the validity of the whole or any part of this Agreement or prejudice such Party's right to take any subsequent action. No exercise or enforcement by any Party of that Party's rights or remedies under this Agreement will preclude the enforcement by such Party of any of its other rights or remedies that are available under this Agreement or by law.
36. Entire Agreement. The Parties intend that this Agreement (including all of the exhibits which are made a part of the Agreement) shall be the final expression of their entire agreement with respect to the subject matter hereof and may not be contradicted by evidence of any prior or contemporaneous written or oral agreements or understandings. The Parties further intend that this Agreement shall constitute the complete and exclusive statement of its terms and that no extrinsic evidence whatsoever (including prior drafts hereof and changes therefrom) may be introduced in any judicial, administrative, or other legal proceeding.

[THE REMAINDER OF THIS PAGE IS BLANK.
SIGNATURES APPEAR ON THE NEXT PAGE.]

IN WITNESS, WHEREOF, the University, CCH and HART have, by their duly authorized officers, duly executed and entered into this Agreement on the day and year first above written.

UNIVERSITY OF HAWAII ("University")

APPROVED AS TO FORM

By: David Lassner
Title: President

By: Carrie K.S. Okinaga
Title: Vice President for Legal Affairs
and University General Counsel

By: Kalbert K. Young
Title: Vice President for Budget and
Finance/Chief Financial Officer

CITY AND COUNTY OF HONOLULU
("City")

APPROVED AS TO FORM AND
LEGALITY (for City)

By: J. Roger Morton
Title: Director, Department of
Transportation Services

By: Kathleen A. Kelly
Title: Deputy Corporation Counsel

HONOLULU AUTHORITY FOR RAPID
TRANSPORTATION ("HART")

APPROVED AS TO FORM AND
LEGALITY (for HART)

By: Lori M. K. Kahikina, P.E.
Title: Interim Executive Director and
CEO

By: Lisa S. Hirahara
Title: Deputy Corporation Counsel

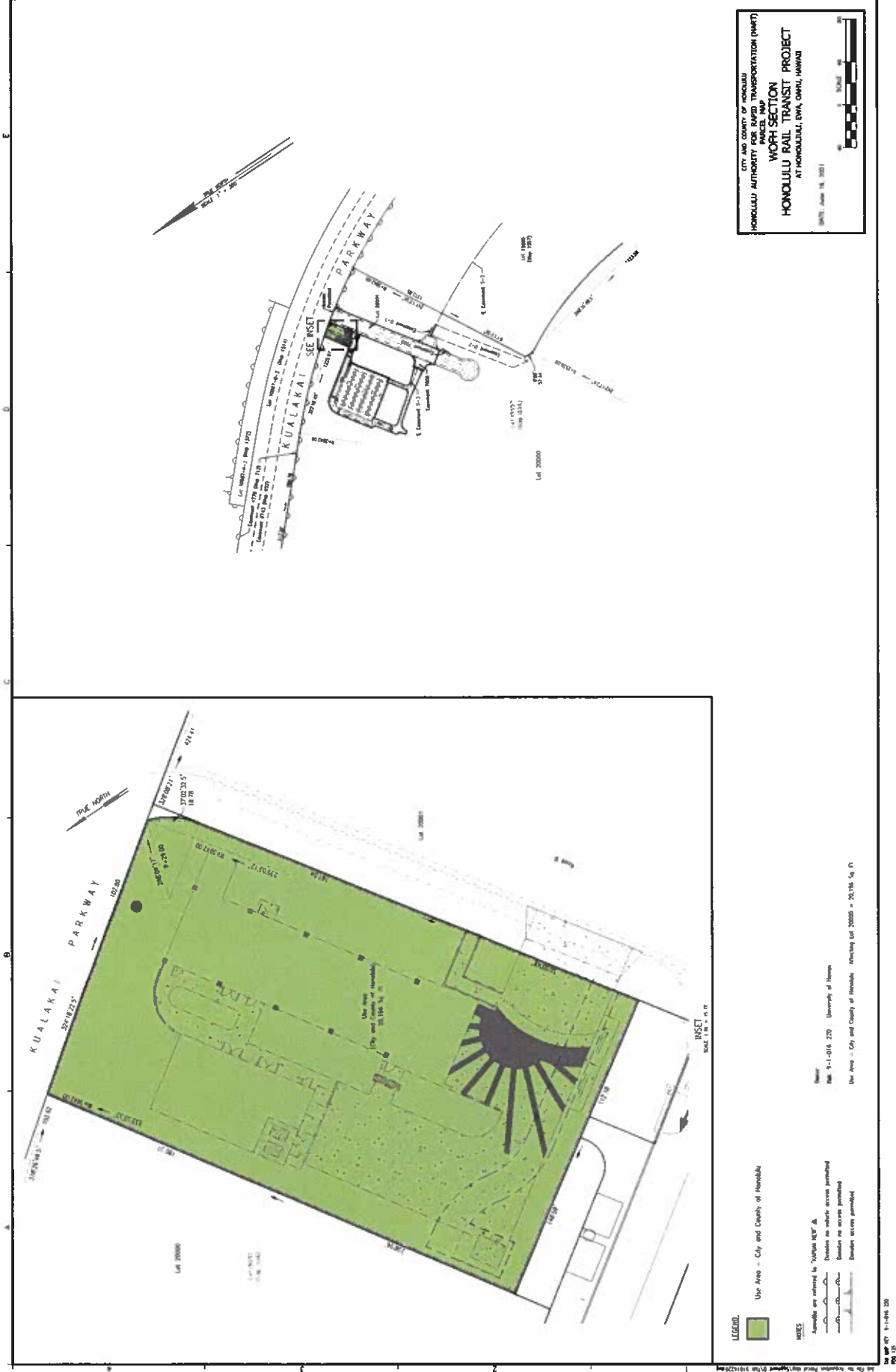
Exhibit List:

- A Use Areas at UHWO, LCC and HonCC
- B Campus Site Specific Conditions
- C Recorded and Unrecorded Property Interests, to be attached after execution
- D HonCC Preliminary Survey Maps for Easements for Underground Transmission Improvements and Typical Duct Section Drawing
- E HonCC Buffer Area for Maintenance
- F Middle Loch Connector Phase 1
- G UHWO Temporary Use Area

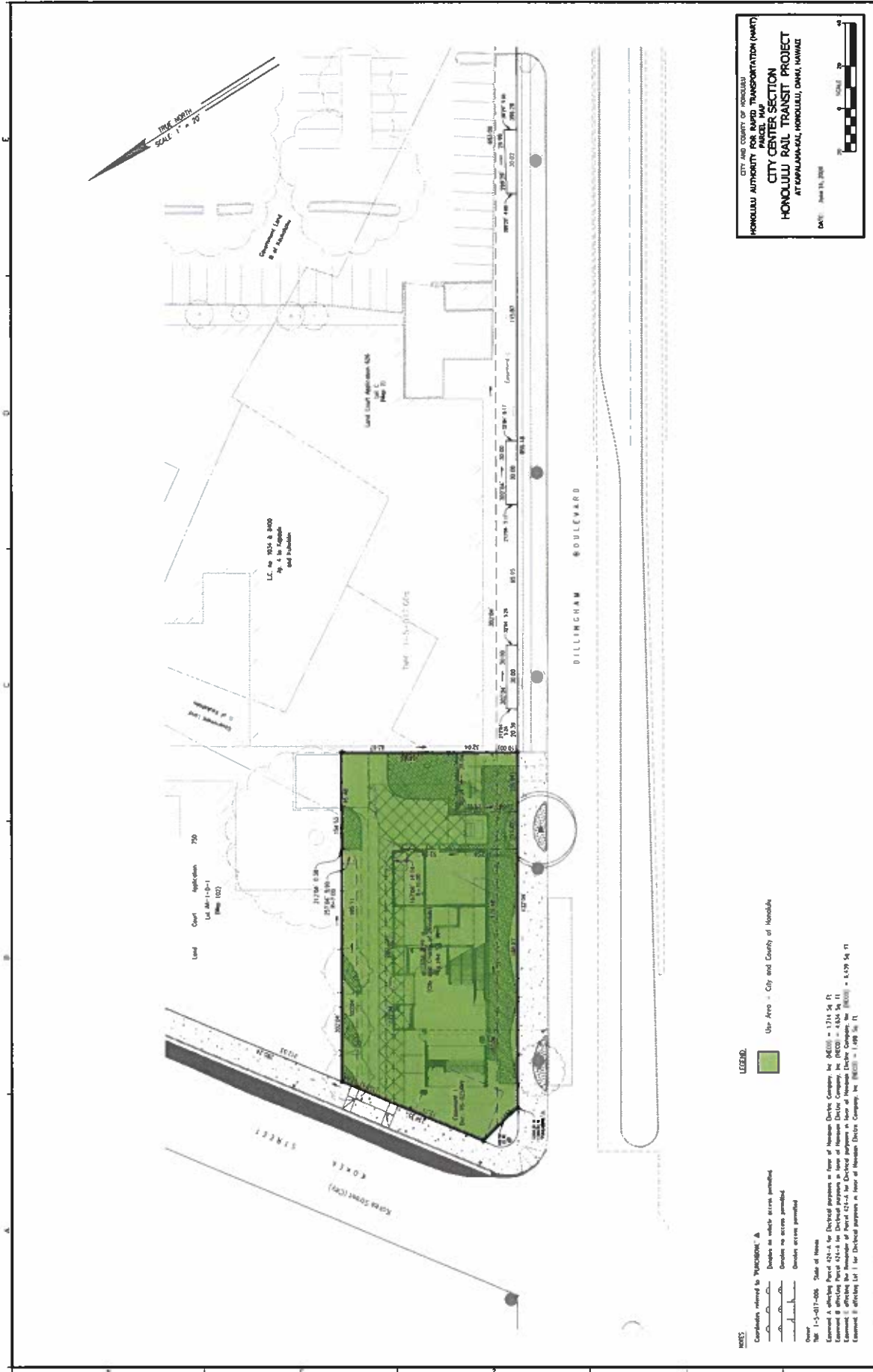
EXHIBIT A

Use Areas at UHWO, LCC and HonCC

EXHIBIT A



Use Area at UHWO



Use Area at HonCC

EXHIBIT B

Campus Site Specific Conditions

EXHIBIT B

Campus Site Specific Conditions

Capitalized terms used in this Exhibit B and not otherwise defined herein shall have the meanings assigned to such terms in the Master Use and Occupancy Agreement ("**Agreement**") to which this Exhibit B is attached.

City/HART shall comply with, and shall ensure that all City/HART Agents comply with, the following site specific conditions that apply to the UH Campuses (collectively the "**Campus Site Specific Conditions**"), which campuses are the University of Hawai'i – West Oahu (that portion consisting of the 500 acres owned by the University makai of Farrington Highway) ("**UHWO**"), Leeward Community College ("**LCC**") and Honolulu Community College ("**HonCC**"), all as specified below:

A. Honolulu Community College.

1. Hawaiian Electric Underground Transmission Line Easement. HART has advised the University that HART is working with Hawaiian Electric to move high voltage transmission lines underground along Dillingham Boulevard, and install a 138 kV underground electrical line, access vault(s) with manhole entries, and other such equipment necessary to facilitate below ground electrical transmission that will replace current above ground electrical transmission lines along Dillingham Boulevard (the "**Underground Transmission Improvements**") partially within the Use Area at the HonCC campus and partially within the HonCC campus. Preliminary survey maps describing the easement boundaries for the Underground Transmission Improvements and other electrical easements and a typical duct section drawing are attached hereto as Exhibit D and incorporated herein by reference. The preliminary survey maps may change as the design is finalized. The University will grant easements to Hawaiian Electric, with HART responsible to facilitate the finalization of such easements for the construction, installation, operation, maintenance, repair and removal of the Underground Transmission Improvements and other electrical easements.
2. Advanced Technology & Training Center ("ATTC") improvements. The University anticipates constructing the ATTC improvements on the HonCC campus in an area located immediately mauka of the Use Area on which the HonCC rail station will be constructed, along with additional parking and other improvements. With the oversight of the UH Rail Management Committee as needed, City/HART and the City/HART Agents will work

closely with the University and its contractors to facilitate the safe and efficient completion of the planned ATTC improvements.

3. Buffer areas for maintenance. City/HART requires buffer areas for maintenance of the guideway columns, in order to maintain and operate the Honolulu Rail Project. Such maintenance will occur occasionally and consist of cleaning, prescheduled and emergency inspections, repairs and other preventive maintenance activities. The dimensions of such buffer areas have a typical offset of 10 feet clearance from face of each column pier on all sides. On the map of HonCC attached hereto and incorporated herein as Exhibit E, there are three such areas designated as the "Buffer Area for Maintenance." During maintenance, buffer areas will be cordoned off to the public and pedestrian traffic, pursuant to appropriate safety standards. Any equipment required for the performance of any maintenance or repair activities shall be within buffer areas and cordoned off accordingly. City/HART shall coordinate its planned maintenance schedule with the University and, except for emergency circumstances, provide the University with at least fourteen (14) days' notice before the start of any proposed maintenance activities in the buffer areas. During times when City/HART is using the buffer areas for maintenance activities, City/HART shall be solely responsible for the buffer areas, and such use shall be subject to all terms, conditions, obligations and reservations of the Agreement applying to City/HART use of any Use Area, including restoration of the buffer areas after the maintenance work is completed.
4. Changes to Rail Project Design. Should changes in the design of the Honolulu Rail Project alignment in the vicinity of the HonCC campus change the Use Area at the HonCC campus, the location of the Underground Transmission Improvements and associated easements, or the location of the buffer areas for maintenance, or require that the University provide City/HART with any additional property rights, City/HART shall propose updated exhibits, as applicable, for review and approval by the University. The University and City/HART agree that the Agreement shall be amended to address such design changes.

B. Leeward Community College.

1. Hawaiian Electric Ka'aahi substation and vehicle storage area. The University recognizes that HART is obligated to provide Hawaiian Electric with a site upon the LCC Campus to construct and operate the Hawaiian Electric Ka'aahi substation ("**Substation Area**"). The University also provided an additional site within the LCC Campus ("**Storage Area**") to store Hawaiian Electric's specialized vehicles required by the Honolulu Rail Project that are made specifically to work on the overhead utility lines that are in close proximity to the fixed guideway and other Honolulu Rail

Project improvements (collectively the "**Specialized Vehicles**"). The construction of the Storage Area has been completed. The University and City/HART have agreed that City/HART are permitted, with University's prior written approval, to enter into a separate sublicense agreement with Hawaiian Electric ("**Hawaiian Electric Sublicense Agreement**") under which Hawaiian Electric would be allowed to operate, maintain, repair, replace and remove the Ka'aahi substation improvements within or from the Substation Area and the parking areas for the Specialized Vehicles within the Storage Area. Under the Hawaiian Electric Sublicense Agreement, the Substation Area and the Storage Area will be part of the Use Area that City/HART will be authorized to use for the City Work, the Honolulu Rail Project, and the Project Improvements. Under the Hawaiian Electric Sublicense Agreement, City/HART will be required to ensure that any City/HART Agents, such as Hawaiian Electric, comply with all of the applicable terms and conditions of the Agreement.

2. Access to and within LCC Campus and Service Roads. Other than within the Use Area, City/HART and the City/HART Agents may not prohibit access to any areas within the LCC campus without the University's prior written consent. This paragraph does not limit City/HART's rights or ability to close or restrict access over any roadways, access routes, or other areas owned by the City/HART; or to seek permission to impose closures or access restrictions from the applicable owner. However, any closures or restrictions of access that will limit access to the LCC Campus via the Ala 'Ike roadway or to the Ewa Service Road, will not be implemented by City/HART without providing LCC with reasonable prior notice and an opportunity to comment, in order to minimize disruptions to normal campus activities.
3. Emergency Access. HART is intending to develop a multi-use access route, part of which will run along the edge of the neighboring Maintenance and Storage Facility/Rail Operations Center site ("**MSF Site**") called the Middle Loch Connector Phase 1 which is shown and depicted on the map attached hereto as Exhibit F and incorporated herein by reference (the "**Middle Loch Connector Phase 1**"). Once the Middle Loch Connector Phase 1 is completed, during times of emergencies or tests/exercises of emergency response, City/HART shall allow access from the LCC Campus over City/HART-controlled portions of the Middle Loch Connector Phase 1 pursuant to a separate agreement between City/HART, University and other landowners. Procedural details to include gate access, notifications of emergency declarations, maintenance of the emergency access way in a condition suitable for safe passage in an emergency situation, and/or tests/exercises of campus evacuations are to be documented in the separate agreement. City/HART shall cooperate with University's efforts to complete the separate agreement. Permission

to access property over which City/HART have no ownership or right to use cannot be granted by City/HART, and will need to be agreed to by the applicable landowners in the separate agreement.

4. Possible Future Secondary Access. In addition to emergency access, City/HART shall preserve the Middle Loch Connector Phase 1 alignment along the edge of the MSF Site in order to accommodate a possible future general-purpose secondary access facility that would be wide enough to meet City standards, if such access is determined to be required in accordance with applicable laws to serve the LCC Campus. The foregoing does not constitute City/HART's commitment to build access improvements through the MSF Site or along the Middle Loch Connector Phase 1, or to obtain the permission of other landowners whose properties will be needed for the secondary access, but City/HART shall not construct improvements within the alignment of the Middle Loch Connector Phase 1 that would prevent or unduly hinder the construction of such an access along the edge of the MSF Site, subject to compliance with Hawai'i Revised Statutes Chapter 343, to the extent applicable.
5. Modified and Extended Ala 'Ike roadway. City/HART constructed the Ala 'Ike roadway within the University Property ("***Ala 'Ike Improvements***") to provide a new vehicular and pedestrian access to the MSF Site. To the extent that such Ala 'Ike Improvements continue to be used to access the MSF Site, the Honolulu Rail Project and the Project Improvements, City/HART shall be responsible at all times for maintaining, repairing, replacing, and ensuring the safe operation of the Ala 'Ike Improvements at no cost to the University. City/HART's obligations hereunder shall cease upon the written acceptance of responsibility by the State of Hawai'i Department of Transportation ("***HDOT***") or the City for all of the Ala 'Ike Improvements. City/HART and the University will cooperate in effectuating such transfer. City/HART will pay for costs of surveying and other professional services and necessary costs to enable University to subdivide out any new Ala 'Ike roadway lot for acceptance by HDOT or the City. So long as such written acceptance by HDOT or the City has not occurred, City/HART indemnity, defense, and hold harmless obligations to the University under the Agreement shall include and cover the construction, use or presence of the Ala 'Ike Improvements, as the UH HART LCC CROE specifically provides that such indemnity, defense and hold harmless obligations relating to the Ala 'Ike Improvements shall survive the expiration or termination of the UH HART LCC CROE. Notwithstanding the foregoing, the City's obligations under this Paragraph shall not apply to the extent any maintenance, repair, or replacement is necessitated by, or any hazards, claims, liabilities, losses, damages, or costs are due to, any condition of the Ala 'Ike Improvements caused by

the University or the University's officers, employees, agents, or contractors, resulting from other than normal travel.

6. Backflow preventer access. The University has reserved the right to access, maintain, and repair all University utility systems and in connection therewith, the University may specifically access the backflow preventer located in the Use Area at the LCC Campus, as may be necessary to inspect, maintain, repair, replace and/or remove the backflow preventer. The location of the backflow preventer will be indicated in the materials furnished by the University pursuant to Paragraph 4.c.(4) of the Agreement.
7. LCC Diamond Head Parking Lot. In conjunction with development of the Hālaulani (Leeward Community College) rail station, HART constructed the LCC Diamond Head Parking Lot, which has experienced certain settling issues. HART and University agree to continue discussing this matter in order to reach a mutually satisfactory resolution.
8. Hawaiian Electric Easements. The Parties understand and agree that upon request by Hawaiian Electric, the University may grant easements to Hawaiian Electric to accommodate additional electrical lines and equipment to serve the Use Area at the LCC Campus, the MSF Site, and related improvements.

C. University of Hawai'i – West Oahu.

1. Temporary park and ride. In support of the Honolulu Rail Project, City/HART may use for parking the area located adjacent to the rail line and the Keone'ae (UH West O'ahu) rail station, as surveyed by City/HART, at no cost to the University, and accepted by the University and as shown on the map attached to and incorporated herein as Exhibit G to this Campus Site Specific Conditions ("**Temporary Use Area**"). City/HART's use and occupancy of the Temporary Use Area will be subject to the same conditions, obligations and reservations as apply to any Use Area or portion of the University Property under the Agreement.
 - a. Right to use Temporary Use Area expires after 5 years. After five (5) years from the Execution Date of the Agreement, unless otherwise mutually extended by the Parties, City/HART shall peaceably surrender the Temporary Use Area to the University in good order and condition, reasonable wear and tear excepted, and without any warranties. To the extent that there are any improvements remaining on or within the Temporary Use Area at the time the University assumes operational control and exclusive use of the Temporary Use Area, City/HART shall convey ownership

of said improvements to the University, at no cost to the University, free and clear of all Liens, and shall indemnify, defend and hold harmless the University from and against any claims, actions, liabilities, losses, costs and expenses related to the condition of or title to said improvements that accrued or arose prior to the date that City/HART convey ownership of the improvements to the University.

- b. Extended use of Temporary Use Area. City/HART may request that the five (5) year use and occupancy period for the Temporary Use Area be extended. The Parties understand and agree that the University in its sole discretion shall determine whether or not to agree to an additional period of use and occupancy, and that the University is under no obligation to agree to any extension of the original five (5) year use and occupancy period for the Temporary Use Area. The Parties also understand and agree that any extension of the original use and occupancy period may be subject to the payment of rent and other charges by City/HART. If the Parties agree to extend the period of time City/HART may use the Temporary Use Area in support of the Honolulu Rail Project, any such extension will be subject to joint development or University proposed development opportunities involving the Temporary Use Area. If the University desires to utilize the Temporary Use Area for development opportunities, particularly TOD development opportunities, and City/HART decline to participate or the Parties are unable to agree upon a joint development agreement, the University may give City/HART ninety (90) days prior written notice to vacate the Temporary Use Area and City/HART will vacate and surrender the Temporary Use Area and any and all improvements thereon to the University.

2. Bus Transit Center. The Parties acknowledge and agree that City/HART plan to operate a bus transit center within the Temporary Use Area where passengers may be dropped off to embark on the rail line or disembark from the rail line and board buses scheduled for a variety of routes ("**Bus Transit Center**"). The planned route for the buses is to enter the Temporary Use Area from the Road B entry and exit the Temporary Use Area at the Road D exit and use Road D to travel to Road B, and then Road B to access Kualakai Parkway (all as marked on the Temporary Use Area map attached hereto as Exhibit G). City/HART shall maintain the Temporary Use Area in a way that supports and allows the safe operation of the Bus Transit Center. City/HART may operate the Bus Transit Center only during the period that City/HART has the right to use the Temporary Use Area.

3. Road B and Road D use and maintenance. HART and the HART Contractors constructed a roadway which was designed by the University that will provide the primary access to and from the Temporary Use Area to Kualakai Parkway ("**Road B**"). HART and HART Contractors also constructed a roadway that is along the western edge of the Temporary Use Area and connects to Road B ("**Road D**"). The Parties agree that City/HART will be allowing buses and other vehicles transporting passengers to and from the Keone'ae (UH West O'ahu) rail station to use both Road D and that portion of Road B from Kualakai Parkway up to and including where Road D meets Road B ("**Road B Portion**") for access to and from Kualakai Parkway. During the time that City/HART may use the Temporary Use Area for parking and a Bus Transit Center in support of the Honolulu Rail Project, City/HART shall be responsible, at no cost to the University, to maintain, operate, repair, reconstruct and replace the Road B Portion and Road D. Road B includes the roadway past Road D up to the and including the turnaround area and the Parties agree that City/HART will not be responsible for maintaining the portion of Road B that is beyond Road D, as that is not part of the Road B Portion.
4. Hawaiian Electric Easements. The University has granted to Hawaiian Electric an easement over University Property to extend the existing Hawaiian Electric electrical lines to the Honolulu Rail Project to furnish power to the Keone'ae (UH West O'ahu) rail station and related operations. The Parties understand and agree that upon request by Hawaiian Electric, the University may grant further easements to Hawaiian Electric to accommodate additional electrical lines to serve the Keone'ae (UH West O'ahu) rail station and related improvements, provided that City/HART have no present intention that such electrical lines will furnish power to operate the Honolulu Rail Project rail line itself.

EXHIBIT C

Recorded and Unrecorded Property Interests

EXHIBIT C
(To Be Attached)

EXHIBIT D

**HonCC Preliminary Survey Maps for Easements for
Underground Transmission Improvements and Typical Duct
Section Drawing**



Robert M. A. ...
Licensed Professional Land Surveyor
Certificate Number LS-10059
Expiration Date of License: 4/30/22

[illegible]

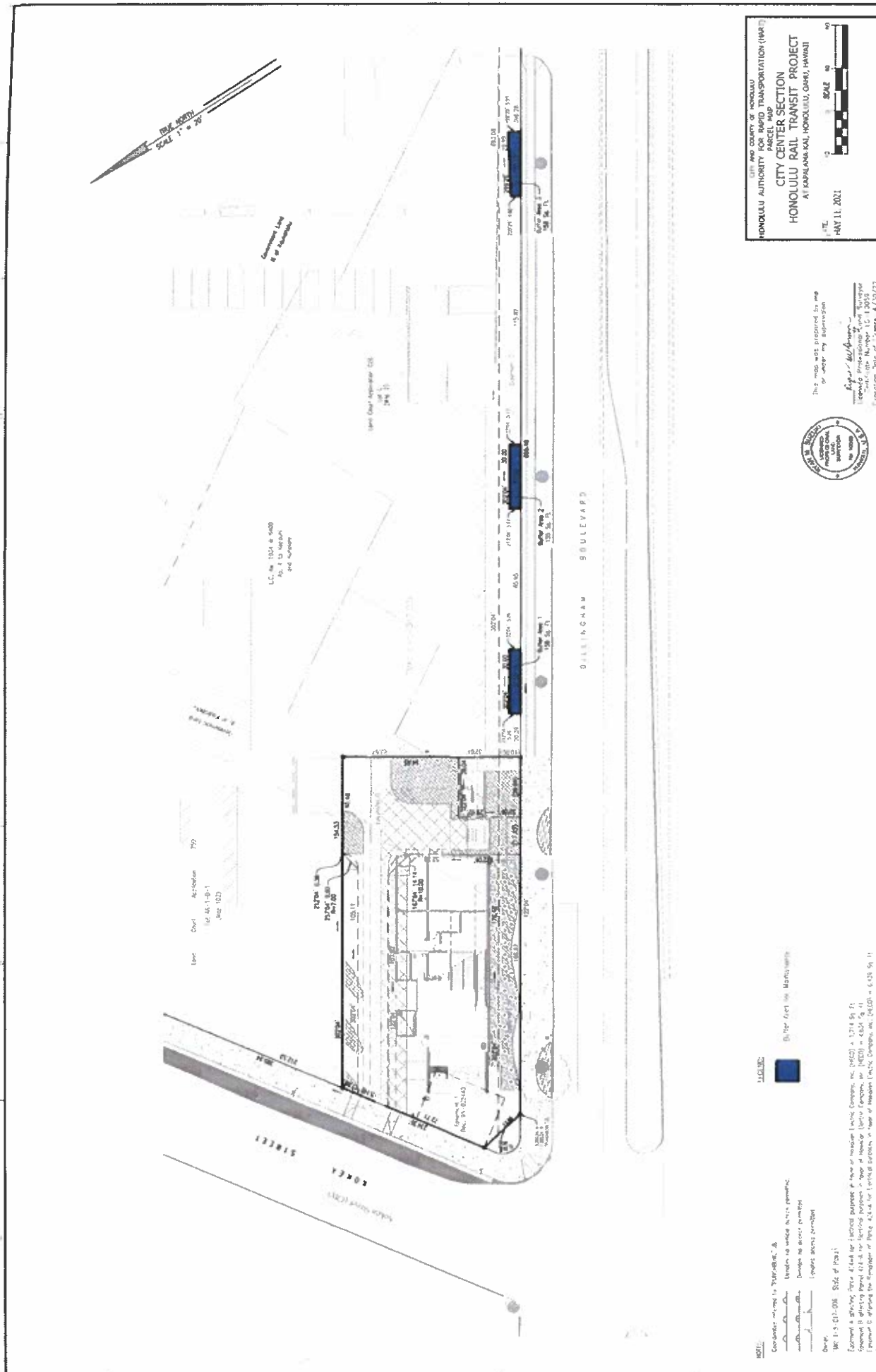
HonCC Preliminary Survey Maps for Easements for Underground Transmission Improvements, Page 1



EXHIBIT E

HonCC Buffer Area for Maintenance

EXHIBIT E

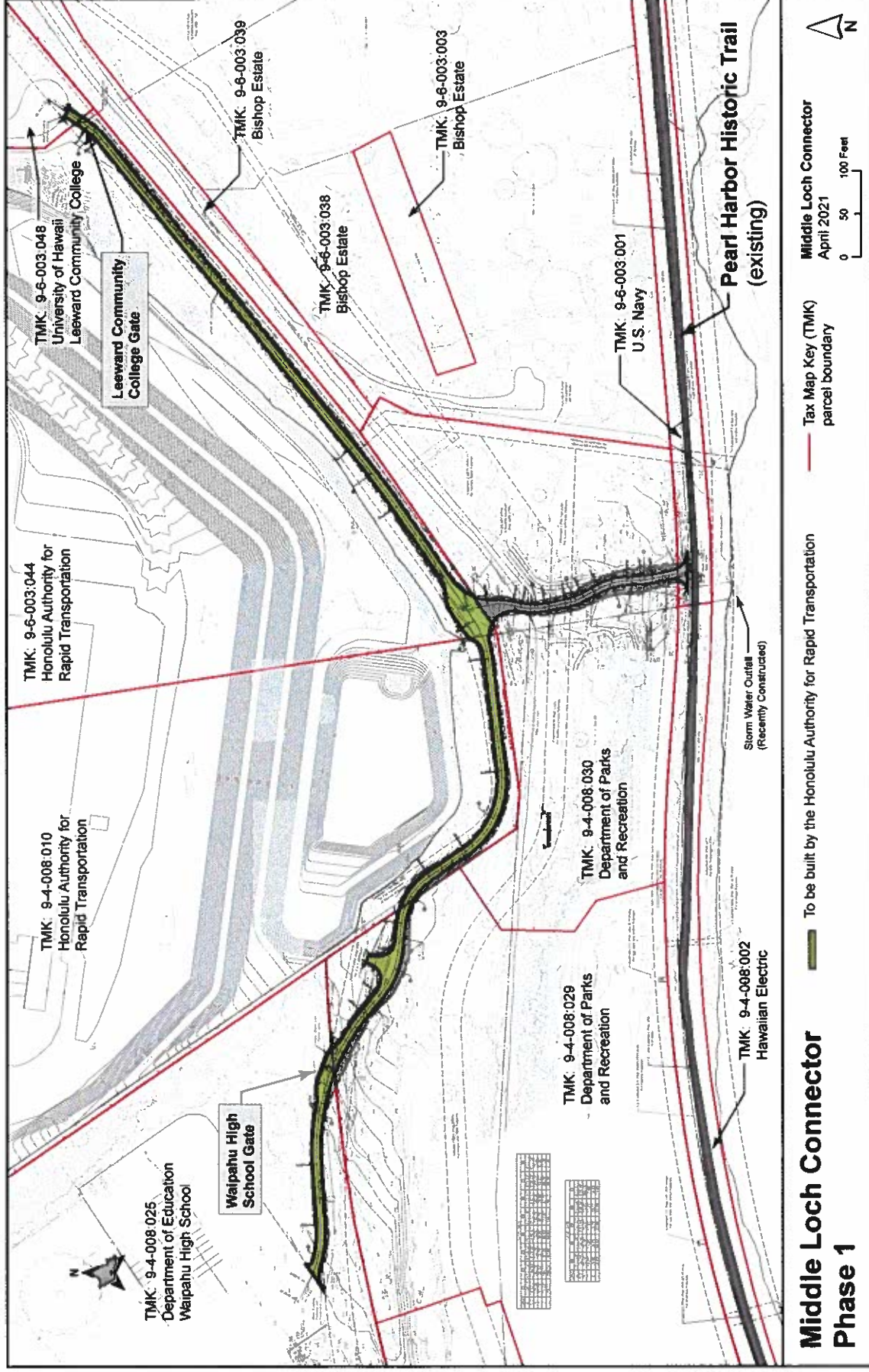


HonCC Buffer Area for Maintenance

EXHIBIT F

Middle Loch Connector Phase 1

EXHIBIT F



Middle Loch Connector Phase 1

EXHIBIT G

UHWO Temporary Use Area

VENERY MAP
Scale 1" = 200' ft

LEGEND

Temporary Use Area - Park and Ride and Portions of Road B and Road D

NOTES

Asmetries are referred to "light blue"

Double access permitted

Double access permitted

Double access permitted

Scale

North Arrow

HONOLULU AUTHORITY FOR RAIL TRANSPORTATION (HART)
WORK SECTION
HONOLULU RAIL TRANSIT PROJECT
AT HONOLULU, OAHU, HAWAII

June 14, 2001

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