

KUKUI‘ULA BUILDER AGREEMENT

THIS BUILDER AGREEMENT (this “**Agreement**”) is made as of the Effective Date (defined below), by and between the undersigned Builder (“**Builder**”) and the undersigned Owner (as defined below), and is for the benefit of KUKUI‘ULA DEVELOPMENT COMPANY (HAWAII), LLC, a Hawaii limited liability company (“**Developer**”).

BACKGROUND STATEMENT

Developer is the developer of the planned resort community located in the County of Kaua‘i, Hawaii, and known as Kukui‘ula (the “**Community**”). Builder is engaged in the business of constructing homes for sale to others. Builder desires to build a home (the “**Home**”) on Lot _____ at Kukui‘ula Parcel _____ (the “**Lot**”), the street address of which is _____, and which Lot is owned by _____ (“**Owner**”).

STATEMENT OF AGREEMENT

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Builder and Owner, intending to be legally bound, hereby agree as follows:

1. **PLANNED COMMUNITY AND ASSOCIATION MEMBERSHIP.** By signing below, Builder acknowledges that Builder has received and has had an adequate opportunity to read and understand the following materials: (a) the Community Charter for Kukui‘ula and the Supplemental Conditions and Restrictions applicable to the Lot, attached as “Exhibit E” thereto (collectively, the “**Charter**”), the Articles of Incorporation and By-Laws of the Kukui‘ula Community Association (the “**Association**”), the then current Community Standards for Kukui‘ula as adopted by the Association and the then current Kukui‘ula Design Guidelines (collectively, the “**Association Documents**”). Builder acknowledges that the nature and extent of the rights and obligations of Builder in the Community in general, and with respect to the Lot in particular, will be controlled by and subject to the Association Documents and this Agreement, together with all Construction Rules imposed by Developer as defined below (and provided that additional obligations exist if Builder is also an owner of Kukui‘ula property). For the avoidance of doubt, notwithstanding the use of the term “Builder” in this Agreement, neither Owner nor Builder is a “Builder” or “Speculative Builder” (as applicable) under the Charter or under the other Association Documents. The use of the defined term “Builder” refers to the general contractor retained by Owner to construct improvements on the Lot.

2. **COVENANTS OF OWNER AND BUILDER.**

(a) **Compliance with Construction Rules.** By signing below, Builder acknowledges that Builder has received and has had an adequate opportunity to read and understand the Construction Rules attached to this Agreement. Builder shall be responsible for the conduct of its employees, agents, subcontractors and suppliers and for ensuring their compliance with the terms and conditions of this Agreement, the Association Documents and the Construction Rules. Owner and Builder acknowledge that if any subcontractor, supplier, employee or agent of Builder, in its capacity as such, violates any of the terms or conditions of this Agreement, the Governing Documents (as defined in the Charter), or the Construction Rules, and such violation is not cured within five (5) business days after Builder’s receipt of notice of the violation, such event shall be a default of Builder under this Agreement, and, in addition to pursuing any other remedies available to Developer at law or in equity, Developer may, without liability to

Developer, prohibit the violator from performing any further services for Builder or any other builder or contractor in the Community. Furthermore, Owner and Builder acknowledge that Developer reserves the right to seek the removal of and prohibit any subcontractor, employee, agent or supplier of Builder from entering or engaging in activities in the Community if Developer deems, in its sole discretion, that such person (i) has violated any material term or condition of this Agreement, the Governing Documents, or the Construction Rules; (ii) has violated applicable laws within or outside the Community; (iii) has committed negligent acts or omissions causing damage to subdivision improvements or other improvements within or adjacent to the Community; or (iv) has violated any rules of conduct within the Community, including site requirements and personal behavior standards.

(b) **Failure to Comply.** If Owner or Builder fail to comply with their obligations under this Agreement, the Governing Documents, or the Construction Rules, and such failure is not cured within five (5) business days of receipt of notice of such failure from Developer, then Developer may enter the Lot to cure such failure, at Owner's expense, and Owner shall reimburse Developer for all actual and reasonable costs so incurred by Developer within thirty (30) business days following receipt of an invoice relating to all such costs so incurred by Developer. If such sums are not paid within such thirty (30) business day period, Owner shall pay interest on such sums which shall accrue at the rate of twelve percent (12%) per annum from the date of its receipt of the invoice from Developer until all such sums and all accrued interest thereon has been paid.

(c) **AB Sites.** Areas that are occupied by endangered plant and animal life, lava tubes, evidence of past cultures or other historically and archaeologically significant sites (called "**Archaeological/Biological Preserve Sites**" or "**AB Sites**") exist within the Community and have been set aside for preservation. Identified AB Sites have been depicted on Developer's Resort Plan for the Community. Under no circumstances may any person: deposit construction waste, refuse or any other material on or in any AB Site; damage, disrupt or destroy an AB Site; or remove material of any kind from an AB Site. Builder shall be held responsible for any such damage, disturbance or destruction of AB Sites resulting from Builder's activities within the Community.

(d) **Insurance Coverage.** Builder shall procure, pay the premiums for, and maintain in full force and effect, during its construction activities with respect to the Lot, insurance per the builder minimum insurance requirements exhibit, and such other insurance which Developer may, from time to time, reasonably request with such companies and under such policies as are approved by Developer in its reasonable discretion, which policies shall insure Developer, the Association and The Club and their affiliated parties, against the acts and omissions of Builder, its subcontractors, and their respective employees, agents, subcontractors and suppliers, and all other persons involved in such construction activities.

(e) **Compliance with Laws.** Builder shall comply (and shall be responsible for ensuring that its employees, agents, contractors and subcontractors comply) with all applicable federal, state and local laws, rules, regulations, permit conditions and requirements, and court orders, pertaining to all activities of Builder, or on behalf of Builder, with respect to the Community. In the event of a violation, significant civil and criminal penalties may be imposed, and enforcement action by Developer, the Association or The Club may apply.

(f) **Notice of Litigation.** Builder shall promptly inform Developer of any litigation, or of any claim or controversy that might become the subject of litigation, against Builder or affecting the Lot, the Home or any property owned by Builder in the Community, if such litigation or potential litigation might, in the event of an unfavorable outcome, have a material adverse effect on Builder's capability to perform its obligations hereunder.

(g) **Licenses.** Builder shall obtain and maintain in good standing all licenses, privileges, franchises, certificates and the like necessary for the operation of Builder's business in Hawaii.

(h) **Good Construction; Soils Condition.** All improvements to be built by Builder in the Community shall be constructed in accordance with standard industry practices and in a timely manner consistent with all building codes, covenants, conditions and restrictions applicable thereto. Owner and Builder each acknowledge that Developer is not in any way representing or warranting the soils condition upon the Lot as of the commencement of construction by Builder. Prior to commencement of construction on the Lot, Builder, at its expense, shall conduct all such investigations and obtain such certifications or re-certifications of the grading and compaction of the Lot as may be reasonably required in connection with quality construction standards and generally accepted practice to confirm that no additional grading, compaction or other improvement to the Lot is required prior to commencement of construction of any building pad on the Lot, or that no particular type of concrete slab is recommended to be installed in connection with any construction on the Lot, to minimize or eliminate all risk of subsidence and any other settlement, expansion, swell or movement of the soils. Owner and Builder accept the Lot in its current condition, subject to any post-Closing grading that may be described in the Addendum to Purchase Contract. The Owner and Builder shall be responsible for determining all approved soils engineering specifications, and obtaining all pad certifications as may be necessary or appropriate, to confirm compaction of the Lot and to determine appropriate soils engineering specifications and specific foundation recommendations prior to construction of the Home. Moreover, the Reviewer (as defined in the Charter) may require that it be provided with confirmation of the existence of a current soils report having been prepared with respect to the Lot and a copy of the certification of compaction from Builder's engineer as a condition to granting Owner and Builder the right to commence construction on the Lot.

(i) **Exclusive Rights to Use "Kukui'ula" Name.** The "Kukui'ula®" name, mark and logo are federally trademarked, with all rights reserved to Developer. Therefore, neither the name "Kukui'ula" nor any derivative of such name shall be used or included by Builder (including such parties for example as architects, landscapers, subcontractors) in any logo or depiction, or in any printed or promotional material, domain name, e-mail address, business name or entity name, without Developer's prior written consent in its sole discretion, even if such entity is created for the sole purpose of constructing a home on a Kukui'ula lot or leasing, and/or marketing, or owning or selling any other lot within the Community.

3. **CONSTRUCTION DEPOSIT.** To ensure compliance with the provisions of this Agreement, Builder shall deposit with Developer a deposit (the "**Construction Deposit**") prior to commencement of construction of the Home, in the amount of \$10,000 to cover the cost of repairing any damage caused by Builder or its subcontractors. The Construction Deposit shall be held by Developer until completion of construction of the Home. Upon completion of all construction of the Home and receipt of Certificate of Occupancy, provided Builder is not then in default hereunder or under any other agreement with Developer, Developer shall release to Builder the Construction Deposit, less any funds expended by Developer pursuant to this Agreement and not restored by Builder. Developer may draw upon the Construction Deposit as necessary to cover, among other things, the cost of repairing damage to property and subdivision improvements caused by Builder or its subcontractors, employees or agents, and the cost of trash removal and maintenance, if not performed by Builder as required by this Agreement. If any part of the Construction Deposit is applied by Developer pursuant to this Agreement, Builder or Owner shall, immediately upon demand, deposit with Developer a sum equal to the amount so applied to restore the Construction Deposit to its original sum. Nothing in this Section or this Agreement shall be construed as limiting Developer's rights to seek reimbursement from Builder for the total amount expended on Builder's behalf if the amount expended exceeds the amount of the Construction Deposit. Any provision in this Agreement granting Developer the right to draw on or charge the Construction Deposit shall be deemed to provide that Developer shall have a right to reimbursement for any amount in excess of the Construction

Deposit. Nothing in this Section is intended to limit any of the rights or remedies granted to the Association by the Charter to enforce the Charter, or granted to The Club by the Covenant to enforce the Covenant and additional conditions that may be imposed by the Reviewer as a part of the approval process.

4. **REPRESENTATIONS AND WARRANTIES OF BUILDER.** Builder hereby represents and warrants to Developer that:

(a) **Organization and Good Standing.** Builder is duly organized, validly existing and in good standing under the laws of the State of Hawaii, and has all requisite power and authority to own and operate its properties, to carry on its business as now conducted and as proposed to be conducted, and to enter into and perform its obligations under this Agreement, which is a legal, valid and binding obligation of Builder, enforceable against Builder in accordance with its terms. Builder is validly and duly licensed under Hawaii law to act as a general contractor and has the full right, power and authority to carry out its obligations hereunder and in connection with the construction of the Home.

(b) **No Legal Bar.** The execution, delivery and performance of this Agreement are not and shall not be in violation of or conflict with any contract, law or governmental ruling or regulation, or any order applicable to Builder.

(c) **Disclosure.** Neither this Agreement nor any other document, certificate or statement furnished to Developer by or on behalf of Builder pursuant to this Agreement or in connection with the matters described herein contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained herein and therein not misleading.

Each of the foregoing representations and warranties shall be true as of the execution of this Agreement and for so long as any provision of this Agreement remains enforceable against Builder.

5. **INDEMNIFICATION; RELEASE.** To the fullest extent permitted by law, in addition to and not in limitation of all other covenants of Builder and Owner under this Agreement, Builder and Owner, jointly and severally do and shall indemnify, defend and hold harmless, Developer, the Association and The Club, and their directors, officers, members, partners, agents, employees, managers, trustees, trust beneficiaries, and any successors or assigns of any of the foregoing (collectively, the “**Developer-Related Parties**”) for, from and against all injuries, losses, liens, claims, demands, judgments, liabilities, damages, costs and expenses (including but not limited to court costs and reasonable attorneys’ fees and expenses) sustained by or made or threatened against any or all Developer-Related Parties, which result from or arise out of or in connection with (a) any work, occurrence, conduct, act, error or omission (whether or not negligent or in violation of any applicable law, rule, regulation or order) maintained, performed, permitted or suffered by Builder, Owner or any representative, subcontractor or supplier of Builder or Owner, or any of their respective employees, agents, invitees or licensees of any of the foregoing, on or about or pertaining to the Community or any portion thereof, (b) any design defect or construction defect in the Home or any improvement, fixture or other property constructed, installed or otherwise provided by Builder in, at or on the Home or the Lot (including the grading and compaction of the Lot), or (c) any covenant, representation or warranty made by Builder to any third party pertaining to the Community or any portion thereof. Notwithstanding the foregoing, nothing in this Section shall require either Builder or Owner to indemnify, defend or hold harmless Developer-Related Parties for, from or against any such injury, loss, lien, claim, demand, judgment, liability, damage, cost or expense resulting from any negligent or willful act of Developer or any of the Developer-Related Parties. Owner acquired the Lot in its “AS-IS” condition. Developer shall not be responsible or liable to Owner or Builder, nor their respective successors in interest or assigns, for any conditions affecting the Lot, and Owner and Builder, on their own behalf and on behalf of all future owners of the Lot, hereby fully release Developer and all Developer-Related Parties, from any and all claims that it may now have or hereafter acquire against Developer or any Developer-Related

Parties, for any cost, loss, liability, damage, expense, demand, action or cause of action arising from or related to any construction defects, errors or omissions or other conditions affecting the Lot. Buyer further acknowledges and agrees that this release shall be given full force and effect according to each of its expressed terms and provisions, including, but not limited to, those relating to unknown and unsuspected claims, damages and causes of action.

6. DEFAULT BY BUILDER.

(a) Upon the failure of Owner, Builder or any of its employees, agents, suppliers or subcontractors to perform or observe any term, provision, covenant, agreement or condition contained herein or in any other agreement executed by Builder and Owner with or in favor of Developer, either directly or through its agents, employees, or subcontractors, Developer shall be entitled to any or all of the following: (i) to cure the default and apply the Construction Deposit toward the cost of correcting any such default or breach and, if the Construction Deposit is insufficient, to file a lien against the Lot to secure the amounts expended in excess of the Construction Deposit; (ii) to bring a lawsuit to foreclose such lien, if any, and to recover all damages; (iii) to avail itself of the equitable remedy of specific performance as to any obligations not compensable by monetary damages; and (iv) to avail itself of any other remedies set forth in this Agreement or available to Developer at law or in equity.

(b) In any action at law or in equity by Developer occasioned by a default hereunder, Developer, if the prevailing party, shall be entitled to collect its reasonable attorneys' fees and costs actually incurred in the action. As used herein, the term "prevailing party" shall mean the party who receives substantially the relief sought.

(c) Notwithstanding anything in this Agreement to the contrary, Developer may not declare a default hereunder until Developer has delivered to Builder and Owner written notice of the alleged default and such default remains uncured five (5) days thereafter.

7. NOTICE. Any and all notices required or permitted hereunder shall be given in writing and sent by personal delivery or registered or certified mail, return receipt requested, postage prepaid, addressed as follows:

To Developer: Kukui'ula Development Company (Hawaii), LLC
Attn: Thad Bond, Vice President
2700 Ke Alaula Street, Suite B
Koloa, Hawaii 96756

To Owner: _____

To Builder: _____

8. SUCCESSORS AND ASSIGNS. This Agreement shall be binding upon the respective heirs, representatives, successors and permitted assigns of Builder and Owner. Builder shall not assign this Agreement or any interest hereunder, in whole or in part, without the prior written consent of Developer,

which consent may be withheld for any reason or for no reason. Any attempted assignment that is not approved in writing by Developer shall be null and void. Developer may assign its rights and obligations hereunder without the approval or consent of Builder.

9. **ENTIRE AGREEMENT.** This Agreement (including the Governing Documents and the Construction Rules), together with any written agreement between Builder and Developer or between Developer and Owner relating in any way to the Lot, embodies the entire agreement concerning the subject matter hereof. The provisions of this Agreement cannot be waived or amended except by written instrument executed by Builder, Owner and Developer. Neither Builder nor Owner have relied upon or been induced by any information, representation, warranties or statements, whether oral or written, express or implied, made by Developer or any other person representing or purporting to represent Developer except as expressly set forth in this Agreement.

10. **APPLICABLE LAW.** This Agreement shall be construed and interpreted under the laws of the State of Hawaii.

11. **SURVIVAL.** All provisions of this Agreement shall survive the expiration of this Agreement.

12. **NO WAIVER.** Failure of either party to insist upon compliance with any provision hereof shall not constitute a waiver of the rights of such party to subsequently insist upon compliance with that provision or any other provision of this Agreement.

13. **SEVERABILITY.** The provisions of this Agreement are intended to be independent, and in the event any provision of this Agreement is declared by a court of competent jurisdiction to be invalid, illegal, or unenforceable for any reason whatsoever, such illegality, unenforceability, or invalidity shall not affect the remainder of this Agreement.

14. **CONSTRUCTION OF AGREEMENT.** Owner and Builder acknowledge that they have read, understood and had the opportunity to be advised by legal counsel as to each and every one of the terms, conditions, and restrictions, and as to the effect of all the provisions, of this Agreement. Should any provision of this Agreement require judicial interpretation, it is agreed that the court interpreting or construing the provision shall not apply a presumption that the terms hereof shall be more strictly construed against any person by reason of the rule of construction that a document is to be construed more strictly against the person who itself or through its agent prepared the document. Titles or captions of Sections contained in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.

15. **TIME OF ESSENCE.** Time is of the essence for this Agreement.

16. **TERM.** The term of this Agreement shall commence on the Effective Date and shall continue until construction of the Home is complete, a certificate of occupancy has been issued therefore by the County of Kaua'i, and Builder and Owner have fulfilled all of their obligations hereunder.

17. **NO JOINT VENTURE.** Builder and Owner acknowledge that their respective relationships with Developer are not intended to be and shall not in any way be construed to be that of a partnership, joint venture, or principal and agent unless otherwise acknowledged by separate agreement. Any control exercised by Developer with respect to any property within the Community or any document or matter related thereto is solely for the purpose of protecting Developer's business reputation and the quality of Kukui'ula. Any approval granted by Developer pursuant to this Agreement is solely for Developer's benefit and no person or entity may rely upon Developer's approval for any other purpose.

18. **NO THIRD PARTY RIGHTS.** This Agreement shall be for the sole benefit of the Developer, and no mutual covenants or agreements herein shall be for the benefit of or create any rights in favor of any third parties.

IN WITNESS WHEREOF, the undersigned have executed the foregoing instrument as of the day and year indicated under their respective signatures, with the Effective Date being the date below the signature of Builder.

BUILDER: _____

By: _____

Name: _____

Title: _____

Hawaii License No.: _____

Dated Signed: _____

OWNER: _____

By: _____

Name: _____

Dated Signed: _____