

**JOINT USE AND OCCUPANCY AGREEMENT  
FOR  
KAMEHAMEHA HIGHWAY GUIDEWAY SECTION**

THIS AGREEMENT is effective this October 11, 2013 (the “Joint Use and Occupancy Agreement”), by and between the STATE OF HAWAII, by its Director of Transportation, whose principal place of business and mailing address is 869 Punchbowl Street, Honolulu, Hawaii, 96813, hereinafter referred to as the “STATE,” and the CITY AND COUNTY OF HONOLULU, a municipal corporation of the State of Hawaii, whose principal place of business and mailing address is Honolulu Hale, 530 South King Street, Honolulu, Hawaii 96813, hereinafter referred to as the “CITY.” The STATE and the CITY collectively, are the “Parties,” and individually a “Party,” all as governed by the context in which such words are used.

WITNESSETH THAT:

WHEREAS, Ordinance No. 07-001 authorized the implementation of the Locally Preferred Alternative (the “LPA”), which is a fixed guideway system between Kapolei and the University of Hawaii (“UH”) at Manoa, provided that a Minimum Operable Segment (the “MOS”) of the LPA is constructed within financial constraints;

WHEREAS, Resolution No. 08-261 approved the MOS beginning at UH-West O`ahu (near the Kroc Center), via Farrington Highway and Kamehameha Highway (adjacent to Pearl Harbor), to Aolele Street serving the Airport, to Dillingham Boulevard, to Nimitz Highway, to Halekauwila Street, and ending at Ala Moana Center;

WHEREAS, the CITY, by the Honolulu Authority for Rapid Transportation (“HART”), a semi-autonomous agency of the CITY, is constructing a mass transit system known as the Honolulu Rail Transit Project (“H RTP”) within the MOS which includes the limits of the Kamehameha Highway Guideway Section, the Airport Guideway Section, and the City Center Guideway Section, as described in Article I and Exhibit “A” of the Master Agreement hereinafter referred to as the “PROJECT”;

WHEREAS, the PROJECT is proposed to be situated within STATE Highway rights-of-way which are under the jurisdiction, authority, and control of the STATE;

WHEREAS, the CITY and the STATE entered into the Master Agreement between the City and County of Honolulu and the State of Hawaii for the Honolulu Rail Transit Project, dated October 11, 2013 (the “Master Agreement”);

WHEREAS, in accordance with the terms of the Master Agreement, the CITY has identified certain properties within the STATE's rights-of-ways necessary for the CITY to complete the PROJECT;

WHEREAS, in accordance with the terms of the Master Agreement, the CITY and the STATE desire to enter into this Joint Use and Occupancy Agreement for the certain properties more specifically identified herein;

WHEREAS, it is in the public interest for the STATE to permit the construction, operation and maintenance of the PROJECT and transit facilities (hereinafter referred to as "GUIDEWAY FACILITY") within the STATE Highway rights-of-way subject to the conditions herein; and

WHEREAS, the STATE does not object to granting the CITY's joint use and occupancy rights over the certain properties provided the CITY complies with the terms and conditions set forth below;

NOW, THEREFORE, the Parties, in and for the consideration of the mutual promises hereinafter set forth, the sufficiency and adequacy of which are hereby acknowledged, and intending to be legally bound thereby, hereby mutually agree as follows:

1. Premises. The STATE is the owner of and has jurisdiction, authority, control and possession of those certain parcels of land described in Exhibit "E", Page 1 of the Master Agreement (hereinafter referred to as the "Premises").
  
2. Grant of Use and Occupancy Rights.
  - a. The STATE hereby grants the CITY the joint right to use and occupy, on a non-exclusive basis, including surface, subsurface, and air space property, such portion of the Premises as shall be necessary to allow the construction, operation, and maintenance of the PROJECT for the life of the Honolulu Rail Transit Project or for seventy-five (75) years or sooner termination, whichever occurs first.
  
  - b. The location and extent of the Premises which may be utilized for PROJECT facilities, and the scope and nature of such use, shall be governed by the as-built drawings.
  
3. Right to Construct the PROJECT. The STATE grants to the CITY and its Contractors the right to construct and maintain the PROJECT on, within, under, over, and across the Premises. The CITY shall be solely responsible for all costs and expenses incurred in connection with the PROJECT and the maintenance of the PROJECT on the Premises, including,

but not limited to, all design, planning, engineering, construction, alteration, and maintenance costs and expenses. The CITY's operation and maintenance responsibilities during PROJECT construction are set forth in Article III of the Master Agreement.

4. Consideration. In consideration for the CITY's right to use and occupy the Premises granted by the STATE to the CITY by this Joint Use and Occupancy Agreement, the CITY agrees as follows:

- a. The CITY agrees to construct, operate, and maintain the GUIDEWAY FACILITY as set forth in this Joint Use and Occupancy Agreement;
- b. The CITY agrees to provide regular service to the general public in the area served by the PROJECT; and
- c. The CITY shall be solely responsible for all costs and expenses incurred in connection with the PROJECT and the operation and maintenance of the PROJECT on the Premises as set forth herein, including, but not limited to, all design, planning, engineering, construction, alteration, and maintenance costs and expenses, including the costs to mitigate relocation of highway facilities, occupants or utilities due to the existence of the PROJECT.

5. Work Permit. The CITY shall request and the STATE shall promptly grant within twenty-one (21) calendar days or a mutually agreed upon time frame a permit for any construction, installation, maintenance, repair, removal, replacement, reconstruction, and upkeep work that affects the safety and/or operations of the STATE Highway within the Premises prior to commencing such work. In the case of an emergency, the STATE may grant the permit after the work remedying the emergency need has been performed.

6. Work Completion. Upon completion of any work performed on, within, under, over, or across the Premises by the CITY and its Contractors, the CITY and its Contractors shall remove all unused or surplus materials, if any, and shall restore the Premises and any other affected areas to a condition reasonably satisfactory and acceptable to the STATE. In addition, the CITY shall provide a warranty for the restoration work for a period of not less than twenty-four (24) months from the date of final inspection and acceptance by the STATE. Such warranty shall be identical to the warranty required by the CITY of the CITY's Contractors for the PROJECT work, a copy of which is attached to the Master Agreement as Exhibit "I" and incorporated by reference, the STATE acknowledges that it has reviewed and by signing this Joint Use and Occupancy Agreement accepts the terms of such warranty, and the warranty shall insure that the CITY shall be responsible for any failure of the restoration work.

7. Ownership of Improvements. Upon satisfactory completion of the fixed guideway improvements constructed pursuant to the PROJECT, the CITY shall accept such fixed guideway improvements as part of the fixed guideway transit system. Upon satisfactory completion of the roadway and related improvements to STATE Highways constructed pursuant to the PROJECT, the STATE shall accept such improvements as the STATE's public improvements.

8. Maintenance of CITY Improvements. The CITY shall, at its sole cost and expense, keep the PROJECT in a safe, clean, sanitary, and orderly condition, including, but not limited to, making all necessary repairs to the PROJECT, and shall not make, permit, or suffer, any waste, strip, spoil, nuisance, or unlawful, improper, or offensive use of the PROJECT.

9. Repair. The CITY shall not damage, undermine, or otherwise destroy any portion of STATE property, including, without limitation, any STATE Highway facilities or improvements situated on or near the Premises or any equipment or appurtenances relating thereto, including, but not limited to, sidewalks, storm drains, drainage systems, and underground utility systems. The CITY shall, at the written direction of the STATE, promptly, at its sole cost and expense, repair, restore, and reconstruct that portion of said STATE property so damaged, undermined, or destroyed, including any and all affected facilities, improvements, equipment, and appurtenances. Repair work shall be designed and constructed in accordance with all applicable STATE and federal standards and requirements.

10. No Obstruction. The CITY shall not construct, replace, repair, or maintain any landscaping or any portion of the PROJECT on, within, under, over, or across the Premises in such a manner as to (a) unreasonably obstruct traffic, (b) obstruct, in any way whatsoever, the sight lines and distances and view corridors along the STATE Highway, except as agreed to by the parties, or (c) otherwise constitute a hazard to users of the STATE Highway, as determined by the STATE.

11. STATE Work Within or Affecting the fixed guideway transit system. If the STATE performs work of any kind on, within, under, over, across, near, or affecting the fixed guideway transit system, the STATE will coordinate such work with the CITY. The CITY shall not prevent the STATE from performing such work, provided, however, that the STATE will take the necessary protective measures to assure that such work does not unreasonably interfere with the CITY's use of the fixed guideway transit system. The STATE must secure approval from the CITY if the proposed STATE work interferes with the operation and/or safety of the fixed guideway transit system.

12. Future Highway Mitigation. The CITY acknowledges that the construction of the GUIDEWAY FACILITY may reduce roadway capacity and potentially affect operations of the

STATE corridor along Kamehameha Highway and Nimitz Highway including but not limited to, highway widening, installation of shared lanes, and intersection modifications within its existing right-of-way. The CITY therefore agrees to participate with the STATE in areas that were directly impacted by the PROJECT in the acquisition of land required to accommodate highway improvements at the time when the STATE determines that the improvement work will proceed. The CITY will participate in sharing in the cost and expenses with the STATE in instances where land acquisition is demonstrated to be in excess of the land necessary had the GUIDEWAY FACILITY not been constructed and shall be solely responsible for all costs and expenses in instances where land acquisition is solely due to the construction of the GUIDEWAY FACILITY, including but not limited to, fees associated with the land acquisition and all design, planning, engineering, construction and alteration costs. The CITY also agrees to be solely responsible for any post construction operational traffic mitigations that were a direct result of the PROJECT.

13. Indemnity. Notwithstanding any agreements to the contrary between the Parties, the CITY shall hold harmless, defend, and indemnify the STATE from and against all claims, demands, liabilities, suits, actions, judgments, costs, and expenses for loss, injury, death, or damage under tort, contract or otherwise, including, but not limited to, claims of property damage, personal injury, or death of persons, and economic loss, whenever such loss, injury, death, or damage arises out of, is connected with, or related to the CITY's acts, omissions, rights and responsibilities under this Joint Use and Occupancy Agreement, provided, however, that the CITY shall not be responsible for indemnifying the STATE from and against any claims or damages arising out of the negligence or intentional misconduct of the STATE.

14. No Obligation to Third Parties. There are no intended third party beneficiaries to this Joint Use and Occupancy Agreement. It is expressly understood that the enforcement of the terms and conditions of this Joint Use and Occupancy Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the CITY and the STATE, and nothing contained in this Joint Use and Occupancy Agreement shall give or allow any legal or equitable remedy, claim, or right of action by any third person under this Joint Use and Occupancy Agreement. It is the express intention of the parties that any third person who receives benefits under this Joint Use and Occupancy Agreement shall be deemed an incidental beneficiary only.

15. Insurance. The CITY shall procure or cause to be procured and maintained during the term of the Joint Use and Occupancy Agreement, comprehensive general liability insurance, and if necessary, excess liability insurance, with combined single limits of not less than \$5,000,000 for bodily injury and property damage per occurrence, which shall cover all the claims arising out of, connected with, or related to rights and responsibilities under this Joint Use and Occupancy Agreement. Such policy(ies) shall name the STATE as an additional insured. The policies of insurance for the CITY's Contractors working on the PROJECT and GUIDEWAY FACILITY shall name the STATE as an additional insured.

The CITY shall furnish the STATE with evidence that such policy or policies have been issued and are in force, and without notice or demand, furnish like certificate(s) upon each renewal thereof. The CITY shall provide the STATE with thirty (30) days prior written notice of any termination or cancellation of the coverage provided by said policy or policies. The minimum limits of insurance recited herein may be increased by the STATE as the STATE deems necessary in the exercise of sound business judgment. All insurance required herein shall apply as primary insurance with respect to any other insurance or self-insurance programs afforded to the STATE. This paragraph shall not relieve or release the CITY from its responsibilities under this Joint Use and Occupancy Agreement or limit the amount or degree of the CITY's liability.

The CITY may, at its sole discretion, elect to self-insure any and all insurance it is required to provide hereinabove.

16. Assignment. The CITY's rights under this Joint Use and Occupancy Agreement, in whole or in part, shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of, directly or by operation of law, except to an agency of government that may assume the rights and obligations of the CITY with respect to the Joint Use and Occupancy Agreement provided that the CITY making such assignment shall continue to be obligated under the terms of the Joint Use and Occupancy Agreement; otherwise the CITY may not assign its interest without the prior written consent of the STATE. In giving any such consent, the STATE will not release the CITY from any liabilities or obligations hereunder.

17. Default.

- a. Notice of default. If the CITY defaults on or otherwise fails to perform the CITY's obligations under this Joint Use and Occupancy Agreement, the STATE will issue a written notice of default to the CITY by receipted hand-delivery or certified mail, return receipt requested.
- b. The CITY to Cure Defaults. Any and all defaults or failures to perform contained in such notice of default must be resolved and remedied to the STATE's reasonable satisfaction within one hundred eighty (180) calendar days of the date of the STATE's written notice to the CITY or such further time as may be authorized by the STATE in writing. The CITY's failure to construct the PROJECT in substantial accordance with the plans and specifications accepted by the STATE shall be deemed a default of this Joint Use and Occupancy Agreement.
- c. STATE Remedies for Failure to Cure. If the CITY fails to cure said defaults or failures to perform within the required time period, the STATE itself may, but shall not be obligated to, cure or remedy said defaults or failures to perform and charge any costs and expenses incurred in

performing said cure or remedy to the CITY, who shall promptly pay said costs and expenses to the STATE upon receiving notice from the STATE. If the CITY defaults or fails to perform as required under this Joint Use and Occupancy Agreement, the State shall be entitled to all remedies available under this Joint Use and Occupancy Agreement and by law, which remedies shall be cumulative and not exclusive.

18. Abandonment. This Joint Use and Occupancy Agreement and all of the CITY's rights hereunder shall terminate, without any action on the part of the STATE, in the event of non-use or abandonment by the CITY of the Premises, or any portion thereof, for a continuous period of five (5) years.

19. Termination. This Joint Use and Occupancy Agreement shall not be terminated or cancelled in whole or in part until the expiration of the life of the PROJECT or seventy-five (75) years, whichever occurs first, except as provided in paragraph 18 (Abandonment). Any termination or cancellation of this Joint Use and Occupancy Agreement, in whole or in part, shall not relieve the CITY of its obligations to indemnify, defend and/or hold harmless the STATE pursuant to paragraphs 13 (Indemnity) and 20 (Hazardous Materials) herein with respect to any obligations arising prior to such termination or cancellation of all or a portion of this Joint Use and Occupancy Agreement.

20. Hazardous Materials.

- a. STATE pre-approval required. The CITY shall not, without the written prior approval of the STATE, the exercise of which approval is in the sole and absolute discretion of the STATE, cause or permit the escape, disposal, discharge, or release of any hazardous materials except as permitted by law. The CITY shall not allow the storage or use of such materials in any manner not sanctioned by law or by the standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto and/or into the Premises any such materials except to use in the ordinary course of the CITY's business, and then only after written request is made to the STATE identifying such materials and upon the STATE's written consent, which consent may not be unreasonably withheld. As used in this paragraph 20, the "presence, escape, disposal, discharge, or release of hazardous materials" includes, but is not limited to, oil, fuel, and polychlorinated biphenyl (PCB) spillage or leakage, improper waste oil disposal, or pollution of any water attributable to the CITY's (a) operations and activities on or connected with the Premises or (b) use and occupancy of the Premises.

- b. The CITY's best knowledge and belief. If any lender or governmental agency shall ever require testing to ascertain whether or not the CITY has caused or permitted the escape, disposal, discharge, or release of hazardous materials, then the CITY shall be responsible for the reasonable costs thereof. Hazardous materials pre-existing on the CITY MAINTAINED STATE HIGHWAYS shall be administered in accordance with Article III of the Master Agreement (the CITY MAINTAINED STATE HIGHWAYS are defined in the Master Agreement and more specifically delineated in Exhibit "C" of the Master Agreement). The CITY shall execute affidavits, representations and the like from time to time concerning the CITY's best knowledge and belief regarding the presence of hazardous materials on, within, or under the CITY MAINTAINED STATE HIGHWAYS and/or the escape, disposal, discharge, or release of hazardous materials therefrom.
- c. Indemnity. Notwithstanding any agreements to the contrary between the Parties, the CITY shall hold harmless, defend, indemnify and insure the STATE as an Additionally Named Insured where appropriate, including, but not limited to, under any CITY excess policies of insurance and when the CITY is named as an Additionally Named Insured under policies of insurance provided by its Contractors, from and against all claims, demands, liabilities, suits, actions, judgments, costs, and expenses for loss, injury, death, or damage under tort, contract or otherwise, including, but not limited to, claims of property damage, personal injury, or death of persons, and economic loss, whenever such loss, injury, death, or damage arises out of, is connected with, or related to Hazardous Materials as a result of the PROJECT located on CITY MAINTAINED STATE HIGHWAYS.
- d. "Hazardous materials" definition. For the purposes of this Joint Use and Occupancy Agreement, "hazardous materials" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Federal Clean Water Act, all as amended, or any other federal, State, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.
- e. The CITY's clean-up obligation. Upon termination of this Joint Use and Occupancy Agreement, the CITY shall, at the CITY's sole cost and expense, clean up and decontaminate the Premises and remove all hazardous materials therefrom, including, without limitation, clean-up of surface and ground waters to the extent practicable, making the soil free and clear of all contaminants and hazardous materials. The CITY shall not

be responsible for any hazardous materials pre-existing on the Premises prior to the execution of the Joint Use and Occupancy Agreement or which intrudes into the Premises from activities unrelated to the CITY or the PROJECT.

- f. Protection of waters. The CITY shall maintain and employ debris, pollution, and contamination control measures, safeguards, and techniques to prevent debris, pollution, or contamination to ocean waters, streams, or waterways resulting from the activities or operations of the CITY, and the CITY's invitees and agents on, within, under, over, across, through, or connected with the Premises, and shall take prompt corrective action upon actual notice of the event of such pollution or contamination to promptly remove the cause of such pollution or contamination, and shall immediately clean the Premises and affected areas and surrounding waters of such pollutant or contaminant and restore to the STATE's reasonable satisfaction the areas affected by such pollution or contamination, all at the CITY's own cost and expense.

21. End of the Joint Use and Occupancy Agreement. Prior to the expiration of the life of the PROJECT or seventy-five (75) years, whichever occurs first, the Parties agree to negotiate a new Joint Use and Occupancy Agreement to allow the continued operation and maintenance of the PROJECT on the Premises.

22. Removal of the PROJECT. Upon the expiration of the life of the PROJECT or seventy-five (75) years, whichever occurs first, and if a new Joint Use and Occupancy Agreement has not been agreed to by the Parties as provided under paragraph 21 (End of the Joint Use and Occupancy Agreement), or upon abandonment as provided in paragraph 18 (Abandonment), the CITY shall, at the CITY's sole cost and expense:

- a. Remove and Restore. Remove any and all portions of the PROJECT installed or constructed on, within, under, over, or across the Premises and any improvements, equipment, facilities, components, and appurtenances relating thereto and restore the Premises to the reasonable satisfaction of the STATE to a condition equal to current standards or as it existed prior to the commencement of this Joint Use and Occupancy Agreement. If the CITY fails to restore the Premises to a condition reasonably satisfactory to the STATE, the STATE shall have the right to charge the CITY, and the CITY shall be solely responsible for, any and all reasonable costs and expenses incurred by the STATE in completing and accomplishing such restoration, including, but not limited to, any costs the STATE incurs in removing and disposing of the CITY's property; or

- b. STATE's Option. At the STATE's option, abandon in place the PROJECT and any improvements, equipment, facilities, components, and appurtenances relating thereto; provided, however, that such termination or cancellation shall not relieve the CITY of its obligations to indemnify, defend, and/or hold harmless the STATE pursuant to paragraphs 13 (Indemnity) and 20 (Hazardous Materials) herein with respect to any such obligations arising prior to such termination or cancellation of all or a portion of this Joint Use and Occupancy Agreement.

23. Compliance with Laws. The CITY, at all times during the term of this Joint Use and Occupancy Agreement, shall comply with and observe all of the requirements of all Federal, STATE, and CITY laws, statutes, ordinances, rules, and regulations now in force or which may hereafter be in force, including, but not limited to, all laws and regulations applicable to the use of areas within the highway right-of-way and/or Federal-aid Highways.

24. Binding Effect. All provisions contained in this Joint Use and Occupancy Agreement shall be binding upon and inure to the benefit of the respective parties, their successors and permitted assigns, and officers, agents, and employees or any person acting for and on their behalf.

25. Singular, Plural, Gender. All words used herein in the singular number shall extend to and include the plural. All words used in a gender shall extend to and include all genders.

26. Severability. The portions of this Joint Use and Occupancy Agreement shall be severable, and any invalidity, unenforceability, or illegality of any provision or provisions of this Joint Use and Occupancy Agreement shall not affect any other provision or provisions of this Joint Use and Occupancy Agreement, and each term or provision of this Joint Use and Occupancy Agreement shall be construed to be valid and enforceable to the full extent permitted by law.

27. Headings. The headings and captions herein are for convenience or reference only and are not intended to fully describe, define, or limit the provisions of this Joint Use and Occupancy Agreement to which they may pertain.

28. Drafting of Agreement. The parties expressly acknowledge that this Joint Use and Occupancy Agreement is the product of mutual negotiations; that each has had ample opportunity to read the Joint Use and Occupancy Agreement; that each has had any questions or concerns completely explained by independent counsel and is satisfied that this Joint Use and

Occupancy Agreement accurately conveys the meanings and intents it chooses to be bound by; and, it is expressly agreed that neither party shall be construed to be the primary drafter thereof.

29. Survivability. All obligations arising prior to termination of this Joint Use and Occupancy Agreement, all obligations of the parties to be completed following termination of the Joint Use and Occupancy Agreement, and all paragraphs of this Joint Use and Occupancy Agreement allocating responsibility or liability between the parties shall survive the termination of this Joint Use and Occupancy Agreement.

30. Entire Agreement; Amendment. This writing embodies the whole agreement and understanding of the Parties. There are no promises, terms, conditions, or obligations other than those contained herein, and this Joint Use and Occupancy Agreement shall supersede all previous communications, representations, or agreements either verbal or written, between the parties hereto. This Joint Use and Occupancy Agreement cannot be modified except by an instrument, in writing, signed by each of the Parties.

IN WITNESS WHEREOF, the Parties have caused these presents to be executed the day and year first above written:

CITY AND COUNTY OF  
HONOLULU

STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION

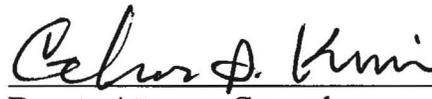
  
By: Michael D. Formby, Director  
Department of Transportation Services  
City and County of Honolulu

  
By: Glenn M. Okimoto, Ph.D.  
Director, Department of Transportation  
State of Hawaii

APPROVED AS TO CONTENT:

APPROVED AS TO FORM:

  
By: Nelson H. Koyanagi, Jr., Director  
Department of Budget and Fiscal Services

  
Deputy Attorney General

APPROVED AS TO FORM  
AND LEGALITY:

APPROVED AS TO FORM  
AND LEGALITY:

  
Deputy Corporation Counsel (For HART)  
**GARY Y. TAKEUCHI**

  
Deputy Corporation Counsel (For City)  
**KRISHNA F. JAYARAM**