

**DEPARTMENT OF THE CORPORATION COUNSEL**

COUNTY OF MAUI  
200 SOUTH HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
TELEPHONE: (808) 270-7740  
FAX: (808) 270-7152

July 8, 2004

MEMO TO: Michael J. Molina, Chair  
Public Works and Traffic Committee

F R O M: Cindy Y. Young, Deputy Corporation Counsel  
*Cindy Y. Young*

SUBJECT: **EXCHANGE OF A PORTION OF MAKANOE PLACE PROPERTY, MAKAWAO,  
MAUI, HAWAII (PWT-20)**

This responds to your memorandum, dated February 23, 2004, requesting (1) a determination of Council's authority, in adopting a resolution approving an exchange of land, to impose a condition requiring that the property the County is disposing of be maintained as an access road, and (2) a recommendation for the most appropriate method for establishing such a condition and guaranteeing that the requirement run with the land.

**I. Background**

The Department of Public Works and Environmental Management ("DPWEM") has requested that a portion of Makanoë Place ("Lot D"), a County road, be exchanged for a parcel owned by Katja Oberwelland Holmes ("Lot A-3-B"). (See subdivision plat attached as Exhibit "1".) DPWEM will use Lot A-3-B as a cul-de-sac. Lot D would be conveyed to the owners of private property abutting Makanoë Place, Tara Kuhaneck, Katja Oberwelland Holmes, Michael J. Fergus and Janice Lau, and the France Family Limited Partnership (collectively "Grantees"), as tenants in common. Lot D comprises 35,991 square feet or 0.826 acres, and Lot A-3-B comprises 2,284 square feet or 0.052 acres.

It is our understanding that, although the County owns Makanoë Place, the Grantees have maintained Makanoë Place (including Lot D) for a period of time. DPWEM has represented that this real property exchange is intended to relieve the County of the responsibility of maintaining Lot D and to relieve the County of potential liability associated with Lot D.

## **II. Relevant Ordinances**

Maui County Code ("MCC") section 3.44.020 provides:

- A. Except as otherwise provided by law and subject to other provisions of this chapter, the County council may, by resolution, approved by a majority of its members, dispose of real property in fee simple or easements.
- B. The County council may hold a public hearing prior to the passage of any resolutions authorizing the disposition of real property in fee simple under this chapter.

MCC section 3.44.060 provides:

- A. No exchanges of real property for private property shall be made except upon a finding by the council that the purpose of the exchange is in the public interest and the passage of a resolution to that effect is approved by two-thirds of its members. Such purposes may include, but not by way of limitation:
  - 1. Consolidation of holdings of real property;
  - 2. Realigning boundaries of real property; or
  - 3. Acquisition of adequate access for landlocked real property.
- B. Exchanges shall be effective without public auction. Public notice of any proposed exchange shall be published at least once in each of three successive weeks in a newspaper of general circulation in the County. The notice shall contain a general description of the real property proposed to be disposed, including the size, location, address and tax map key.

## **III. Discussion**

### **A. Council's Authority To Impose A Condition Requiring That Lot D Be Used For Roadway Purposes Only**

#### **1. Council Authority**

MCC section 3.44.020 authorizes the Council to dispose of real property by adoption of a resolution by a simple majority of its members. MCC section 3.44.020(A) provides that "[e]xcept as otherwise provided by law and subject to other provisions of this chapter, the County council may, by resolution, approved by a

majority of its members, dispose of real property in fee simple or easements." Additionally, MCC section 3.44.060 authorizes the Council to approve exchanges of County real property for private property upon a finding by the Council that the purpose of the exchange is in the public interest and the passage of a resolution to that effect by two-thirds of its members.

## 2. Enforceability of Use Restriction

Generally, a fee owner may convey real property with covenants or restrictions on said property, including use restrictions. See e.g., 20 Am. Jur. 2d *Covenants, Etc.* § 12; Fong v. Hashimoto, 92 Hawaii 568, 576, 994 P.2d 500, 508 (2000) ("Certainly, a vendor, who specifically inserts restrictions in a deed, with the intent to preserve remaining land still held by the vendor in the neighborhood, has every right to demand enforcement of the restrictions.").

A covenant or restriction contained in a deed runs with the land (i.e., will be enforceable against subsequent owners of the property) so long as the party seeking to enforce the covenant holds sufficient interest in a property, typically a neighboring parcel, which is benefitted by the restriction on the burdened parcel and the deed conveying the burdened parcel contains a reference to the dominant or benefitted parcel. Fong, 92 Hawaii at 574, 994 P.2d at 506 ("A restrictive covenant is a contract dependent upon reciprocal or mutual burdens and benefits. Thus, although the Hashimotos had notice that their lot was restricted, their deed did not contain any reference to the dominant parcel or parcels, a required element of a real covenant."); Storey v. Brush, 152 N.E. 225, 226 (Mass. 1926) ("As trustees, although no longer owners of any part of said original tract, [plaintiffs] still had such an interest in the subject matter of this suit that they have a right to enforce the restrictions for the benefit of their grantees.").

In this instance the parcels to be benefitted by the restriction on use would be the parcel being acquired by the County of Maui, Lot A-3-B and Lot C. Therefore, in the event that the exchange is executed, the County, as owner of Lot A-3-B and Lot C would be able to enforce the covenant in the event Lot D is used for other than roadway purposes.

Michael J. Molina, Chair  
Public Works and Traffic Committee  
July 8, 2004  
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**B. The Most Appropriate Method For Establishing A  
Condition Requiring That County Property Be  
Maintained For Access Purposes Only**

The most appropriate method for establishing a condition requiring that the roadway parcel be maintained for roadway purposes only is to include the requirement in the deed. The requirement would then run with the land and bind future successors or assigns in interest to the County property. Fong, 92 Hawaii at 576, 994 P.2d at 508. By ensuring that Lot D remains in roadway use, County will, as the owner of adjacent roadway lots constituting Makano Place and its cul-de-sac, benefit by avoiding possible parking, safety, and vehicular congestion problems on its Makano Place roadway lots.

The draft deed submitted to the Committee for conveyance of Lot D did not contain a reference to the benefitted parcels. We have, therefore, revised the deed. The revised deed is attached to this memorandum as Exhibit "2".

A condition restricting use of Lot D is also included in the subdivision plat. See Exhibit "1".

Should you have any further questions, please do not hesitate to contact this office.

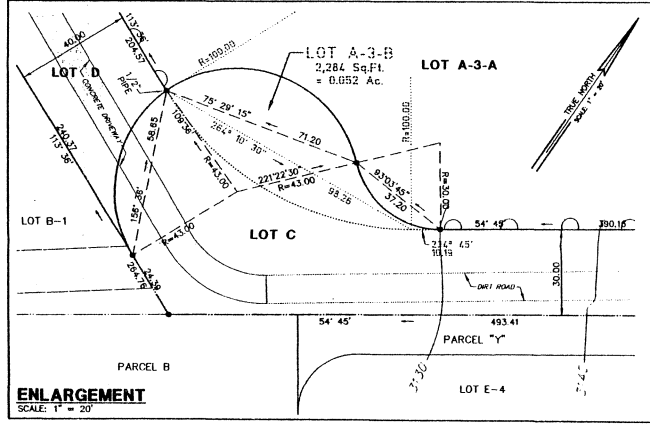
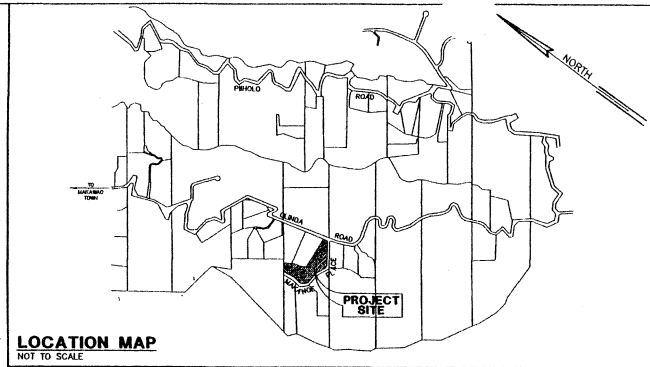
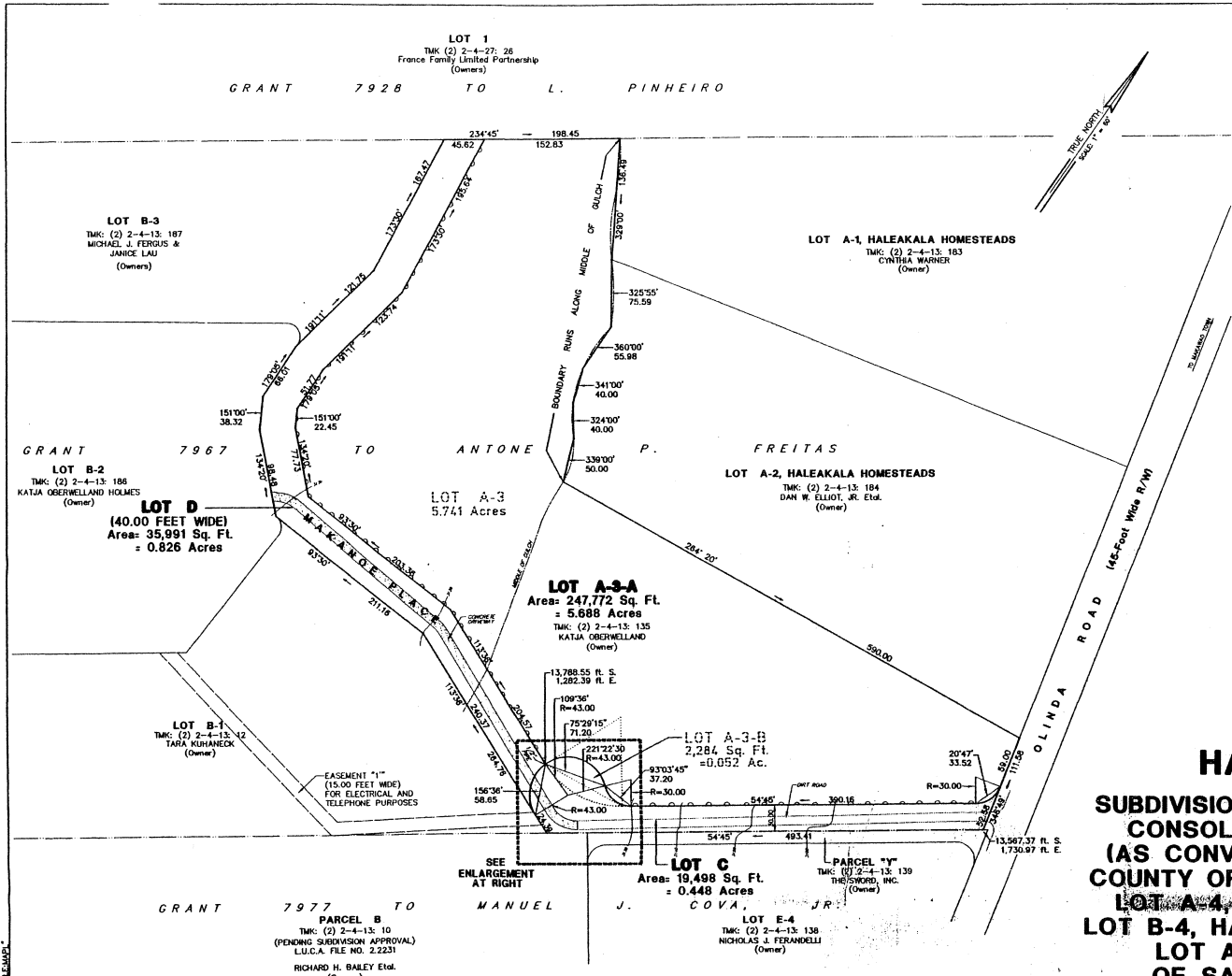
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Enclosures

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APPROVED FOR TRANSMITTAL:

  
BRIAN T. MOTO  
Corporation Counsel

EXHIBIT " 1 "



## HALEAKALA HOMESTEADS

**SUBDIVISION OF LOT A-3 INTO LOTS A-3-A AND A-3-B, CONSOLIDATION OF MAKANOE PLACE (0.67 ACRE) (AS CONVEYED FROM THE STATE OF HAWAII TO THE COUNTY OF MAUI RECORDED IN LIBER 17719, PAGE 180), LOT A-4, HALEAKALA HOMESTEADS (LUCA #2.1790), LOT B-4, HALEAKALA HOMESTEADS (LUCA #2.2064) AND LOT A-3-B INTO ONE LOT, AND RESUBDIVISION OF SAID CONSOLIDATION INTO LOTS C AND D**

Being a Portion of Grant 7967 to Antone P. Freitas  
**AT MAKAWAO, MAUI, HAWAII**

|          |   |
|----------|---|
| OWNER:   | LOT A-3 [TK (2) 2-4-13: 135]<br>KATJA OBERWELLAND |
| ADDRESS: | 1135 Makawao Avenue<br>Makawao, Maui, HI 96768    |
| OWNER:   | (MAKANOE PLACE)<br>COUNTY OF MAUI                 |
| ADDRESS: | 250 S. High Street<br>Wailuku, Maui, HI 96793     |

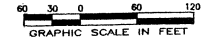


THIS WORK WAS PREPARED BY ME OR UNDER MY SUPERVISION  
*Kirk T. Tanaka*  
 KIRK T. TANAKA  
 Licensed Professional Land Surveyor  
 Certificate No. 7231  
 License Expires: APRIL 30, 2009  
 DATE: 07/01/04

REVISED: JULY 01, 2004  
 REVISED: MAY 5, 2004  
 REVISED: JULY 31, 2000  
 REVISED: APRIL 10, 2000  
 REVISED: MARCH 8, 2000  
 REVISED: NOVEMBER 17, 1999  
 MAY 20, 1999

**R. T. TANAKA ENGINEERS, INC.**  
 LAND SURVEYORS - CIVIL & STRUCTURAL ENGINEERS

- NOTES:**
- ADJOINING OWNERS AS SHOWN TAKEN FROM TAX MAP.
  - ALL WATER SERVICE FROM COUNTY SYSTEM.
  - ALL BOUNDARY CORNERS MARKED WITH 1/2-INCH PIPE UNLESS OTHERWISE NOTED.
  - ALL ADMITTIS AND RECORD COORDINATES AS SHOWN REFERRED TO GOVERNMENT SURVEY TRIANGULATION STATION "PIHOLO" A.
  - LOT "D" (40.00 FEET WIDE) IS A PRIVATE ROADWAY LOT. THIS PORTION OF MAKANOE PLACE WILL BE ABANDONED BY THE COUNTY OF MAUI. LOT "D" TO BE OWNED JOINTLY BY LOTS A-3-A, B-1, B-2, B-3 AND PARCEL 26 OF TK (2) 2-4-27. ROADWAY LOT D IS LIMITED TO ROADWAY PURPOSES ONLY.
  - LOT C TO BE OWNED BY THE COUNTY OF MAUI.
  - DENOTES NO VEHICULAR ACCESS PERMITTED.
  - PURSUANT TO MAUI COUNTY CODE SECTION 3.44.015(C), THE COUNTY OF MAUI IS NOT RESPONSIBLE FOR ANY PARK, ROADWAY, EASEMENT (INCLUDING BUT NOT LIMITED TO DRAINAGE, SEWER, ACCESS, RECLAIMED WATER, OR AVIGATION EASEMENT), OR ANY OTHER INTEREST IN REAL PROPERTY SHOWN ON THIS MAP OR SHOWN ON THESE PLANS, UNLESS THE MAUI COUNTY COUNCIL HAS ACCEPTED ITS DEEDATION BY A RESOLUTION APPROVED BY A MAJORITY OF COUNCIL'S MEMBERS AT A REGULAR OR SPECIAL MEETING OF THE MAUI COUNTY COUNCIL.



Tax Map Key (2) 2-4-13: 135  
 871 KOLU STREET, SUITE 201  
 WAILUKU, MAUI, HAWAII 96793

LUCA FILE NO. 2.2557  
 JOB NO. 99-27

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LAND COURT REGULAR SYSTEM  
**AFTER RECORDATION, RETURN BY: MAIL ( ) PICK-UP ( )**  
COUNTY OF MAUI  
DEPARTMENT OF FINANCE  
200 South High Street  
Wailuku, Maui, Hawaii 96793

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Affecting TMK: (2)2-4-013:Roadway (portion)

**QUITCLAIM DEED**

**KNOW ALL MEN BY THESE PRESENTS:**

That the COUNTY OF MAUI, a political subdivision of the State of Hawaii, whose principal place of business is 200 South High Street, Wailuku, Maui, Hawaii 96793 (hereinafter referred to as "Grantor"), for and in consideration of the sum of ONE DOLLAR (\$1.00) to the County paid by Tara Kuhaneck (owner of Tax Map Key (2) 2-4-013:012), wife of Russell Karaviotis, whose mailing address is P.O. Box 1298, Makawao, Hawaii 96768, Katja Oberwelland Holmes (owner of Tax Map Keys (2) 2-4-013:135 and (2) 2-4-013:186), wife of David Zink, whose mailing address is 1135 Makawao, Hawaii, Makawao, Hawaii 96768, Michael J. Fergus and Janice Lau (owners of Tax Map Key (2) 2-4-013:187), husband and wife, whose mailing address is 4211 Waiialae Avenue, Suite 303, Honolulu, Hawaii 96816,

and France Family Limited Partnership (owner of Tax Map Key (2) 2-4-027:026), a Wyoming limited partnership, whose mailing address is P.O. Box 656, Rawlins, Wyoming 82301, (hereinafter collectively referred to as "Grantees"), receipt whereof is hereby acknowledged, does hereby release, remise and quitclaim all that certain property situated at Makawao, Maui, Hawaii, more particularly described in Exhibit "A" attached hereto and incorporated herein by reference, unto the Grantees, as Tenants in Common, their respective successors and assigns.

AND all of the estate, right, title and interest of the Grantor, both at law and in equity, therein and thereto;

TO HAVE AND TO HOLD the same, together with all buildings, improvements, tenements, rights, easements, hereditaments, privileges and appurtenances thereto, belonging appertaining, or held and enjoyed in connection therewith unto the Grantees, according to the tenancy hereinabove set forth, forever.

Grantees expressly understand and agree that the property shall never be used for any purpose other than as a roadway, for the benefit of Tax Map Key Numbers (2) 2-4-013:135 and (2) 2-4-013:Roadway (portion) (Lot A-3-B and Lot C). The foregoing restriction on use shall be deemed a covenant running with the land and binding upon the respective successors and assigns of Grantees.

It is understood and agreed that the term "property" shall be deemed to mean and include the property specifically described in Exhibit "A", all improvements thereon (including any

personal property described in Exhibit "A") and all rights, easements, privileges and appurtenances in connection therewith, that the terms "Grantor" and "Grantees", as and when used herein, or any pronouns used in place thereof, shall mean and include the masculine and/or feminine, the singular or plural number, individuals, firms or corporations, that the rights and obligations of the Grantor and Grantees shall be binding upon and inure to the benefit of their respective estates, heirs, personal representatives, successors in trust and assigns and that where there is more than one Grantor or Grantee, any covenants of the respective party shall be and for all purposes deemed to be joint and several.

IN WITNESS WHEREOF, the undersigned have executed this instrument on the day and year first above written.

GRANTOR:

COUNTY OF MAUI

By \_\_\_\_\_  
ALAN M. ARAKAWA  
Its Mayor

GRANTEES:

\_\_\_\_\_  
TARA KUHANECK

\_\_\_\_\_  
KATJA OBERWELLAND HOLMES



\_\_\_\_\_  
MICHAEL J. FERGUS

\_\_\_\_\_  
JANICE LAU

FRANCE FAMILY LIMITED PARTNERSHIP

By \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print Name)

Its \_\_\_\_\_  
(Title)

By \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print Name)

Its \_\_\_\_\_  
(Title)

APPROVED AS TO FORM  
AND LEGALITY:

\_\_\_\_\_  
CINDY Y. YOUNG  
Deputy Corporation Counsel  
County of Maui

S:\ALL\Cyy\Agreement\Hakone lot D deed.wpd

STATE OF HAWAII        )  
                              :     SS.  
COUNTY OF MAUI        )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared ALAN M. ARAKAWA, to me personally known, who, being by me duly sworn, did say that he is the Mayor of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to the foregoing instrument is the lawful seal of the said County of Maui, and that the said instrument was signed and sealed on behalf of said County of Maui pursuant to Section 7-5.11 and Section 9-18 of the Charter of the County of Maui; and the said ALAN M. ARAKAWA, acknowledged the said instrument to be the free act and deed of said County of Maui.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public, State of Hawaii  
  
Print Name \_\_\_\_\_  
My commission expires: \_\_\_\_\_

STATE OF HAWAII)  
                              )     SS.  
COUNTY OF MAUI )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public, State of Hawaii  
Print Name \_\_\_\_\_  
My commission expires: \_\_\_\_\_

STATE OF HAWAII)  
  )  SS.  
COUNTY OF MAUI  )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public, State of Hawaii  
Print Name\_\_\_\_\_

My commission expires:\_\_\_\_\_

STATE OF HAWAII)  
  )  SS.  
COUNTY OF MAUI  )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public, State of Hawaii  
Print Name\_\_\_\_\_

My commission expires:\_\_\_\_\_

STATE OF HAWAII)
) SS.
COUNTY OF MAUI )

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Notary Public, State of Hawaii
Print Name\_\_\_\_\_
My commission expires:\_\_\_\_\_

STATE OF HAWAII )
: SS.
COUNTY OF MAUI )

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me appeared \_\_\_\_\_ and \_\_\_\_\_, to me personally known, who, being by me duly sworn, did say that they are the \_\_\_\_\_ and \_\_\_\_\_ of FRANCE FAMILY LIMITED PARTNERSHIP, that the instrument was signed on behalf of said agency by authority of its Board of Directors; and said officers acknowledged said instrument to be the free act and deed of said agency.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Notary Public, State of Hawaii
Print Name\_\_\_\_\_
My commission expires:\_\_\_\_\_

HALEAKALA HOMESTEADS

LOT "D"

SITUATED AT MAKAWAO, MAUI, HAWAII

BEING A PORTION OF GRANT 7967 TO ANTONE P. FREITAS

BEING ALSO A PORTION OF MAKANOE PLACE

Beginning at the Southeast corner of this Lot, being also the West corner of Lot A-3-B, Haleakala Homesteads, the coordinates of said point of beginning referred to Government Survey Triangulation Station "PIIHOLO" being 13,788.55 feet South and 1,282.39 feet East and running by azimuths measured clockwise from True South:

1. Along Lot C, Haleakala Homesteads on a curve to the left with a radius of 43.00 feet the chord azimuth and distance being:  
336° 36' 58.65 feet;
2. 113° 36' 240.37 feet along Lot B-1, Haleakala Homesteads;
3. 93° 30' 211.16 feet along Lot B-1, Haleakala Homesteads;
4. 134° 20' 98.48 feet along Lot B-2, Haleakala Homesteads;
5. 151° 00' 38.32 feet along Lot B-2, Haleakala Homesteads;
6. 179° 05' 66.01 feet along Lot B-2, Haleakala Homesteads;
7. 191° 11' 121.75 feet along Lot B-3, Haleakala Homesteads;
8. 173° 30' 167.47 feet along Lot B-3, Haleakala Homesteads;
9. 234° 45' 45.62 feet along Grant 7928 to L. Pinheiro;
10. 353° 30' 195.64 feet along Lot A-3-A, Haleakala Homesteads;
11. 11° 11' 123.74 feet along Lot A-3-A, Haleakala Homesteads;
12. 359° 05' 51.77 feet along Lot A-3-A, Haleakala Homesteads;
13. 331° 00' 22.45 feet along Lot A-3-A, Haleakala Homesteads;
14. 314° 20' 77.73 feet along Lot A-3-A, Haleakala Homesteads;
15. 273° 30' 203.36 feet along Lot A-3-A, Haleakala Homesteads;

EXHIBIT " A "

16. 293° 36'

204.57 feet along Lot A-3-A, Haleakala Homesteads to the point of beginning and containing an area of 35,991 Square Feet or 0.826 Acre.



R. T. TANAKA ENGINEERS, INC.

*Kirk T. Tanaka*

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Kirk T. Tanaka  
Licensed Professional Land Surveyor  
Certificate No. 7223-LS

871 Kolu Street, Suite 201  
Wailuku, Hawaii - 96793

July 24, 2000  
Revised: June 9, 2004