MEMORANDUM OF AGREEMENT
BETWEEN NA DULLES REAL ESTATE INVESTOR, LLC, THE VIRGINIA STATE HISTORIC PRESERVATION OFFICE, AND THE NORFOLK DISTRICT, CORPS OF ENGINEERS RELATIVE TO THE KINCORA PROJECT
IN LOUDOUN COUNTY, VIRGINIA
June 4, 2008

WHEREAS, NA Dulles Real Estate Investor, LLC (Permittee) proposes to construct a circa 424 acre mixed use development, known as Kincora, located in Loudoun County, Virginia; and

WHEREAS, pursuant to Section 404 of the Clean Water Act, permits from the Norfolk District of the U.S. Army Corps of Engineers (Corps) will be required for fill in 2.55 acres and 6,005 linear feet of jurisdictional wetlands and other waters of the United States; and

WHEREAS, pursuant to regulations at 36 CFR Part 800, regulations implementing Section 106 of the National Historic Preservation Act of 1966 (NHPA), as amended, 16 U.S.C. 470f, and 33 CFR Part 325, Appendix C, Processing of Department of the Army Permits: Procedures for Protection of Historic Places, the Corps is required to take into account the effects of federally permitted undertakings on properties included in or eligible for inclusion in the National Register prior to the issuance of permits for the undertaking and to consult with the State Historic Preservation Officer (SHPO); and

WHEREAS, the Corps, in consultation with the SHPO, has determined that the permit action constitutes an undertaking within the meaning of the NHPA; and

WHEREAS the Corps, in consultation with the SHPO, has determined that the area of potential effect (APE) for the undertaking consists of the entire property within the Project boundary; and

WHEREAS, the Corps, in consultation with the SHPO, has completed a Phase I survey entitled *A Phase I Investigation of the Circa 420 Acre A. S. Ray Property Along Broad Run, Loudoun County, Virginia.*, dated 2001, and a Phase II evaluation entitled *Phase II Archaeological Investigation of Site 44LD0729, Loudoun County, Virginia*, dated January 2008, and

WHEREAS, the Corps, in consultation with the SHPO, has determined that sites 44LD0103, 44LD0104, 44LD0105, 44LD0107, 44LD0109, 44LD0151, 44LD0371, 44LD0372, 44LD0421, 44LD0495, 44LD0727, 44LD0728, 44LD0730, 44LD0731 and 44LD0732 are <u>not eligible</u> for the National Register of Historic Places (NRHP); and

WHEREAS, the Corps, in consultation with the SHPO, has determined that site 44LD0729 is <u>eligible</u> for inclusion in the NRHP; and

WHEREAS, the Corps, in consultation with the SHPO, has determined that issuance of permits to the Permittee for undertakings in jurisdictional wetlands or waters of the United States will have an adverse effect on site 44LD0729; and

WHEREAS, the Corps has invited the participation of the Advisory Council on Historic Preservation (Council) to participate in consultation, and the Council has declined to participate; and

WHEREAS, the Corps invited Loudoun County (County) to participate in consultation and the County has agreed to participate; and

NOW THEREFORE, the Corps and the SHPO agree that the undertaking shall be implemented in accordance with the following stipulations in order to satisfy the Corps' Section 106 responsibilities to take into account the effects of permitted activities on historic properties.

STIPULATIONS

The Corps will insure that the following stipulations are carried out:

I. TREATMENT OF ARCHAEOLOGICAL SITES

a. The Permittee shall develop a data recovery plan for site 44LD0729. The data recovery plan shall be consistent with the Secretary of the Interior's *Standards and Guidelines for Archaeological Documentation* (48 FR 44734-37, September 29, 1983); the SHPO's *Guidelines for Conducting Cultural Resource Survey in Virginia: Additional Guidance for the Implementation of the Federal Standards Entitled Archaeology and Historic Preservation: Secretary of Interior's Standards and Guidelines* (48 FR 44742, September 29, 1983) 1999, rev. 2003, and shall take into account the ACHP's publications, *Recommended Approach for Consultation of Recovery of Significant Information from Archaeological Sites* (2002) and *Section 106 Archaeology Guidance* (June 2007) or subsequent revisions or replacements to these documents. The plan shall specify at a minimum, the following:

1. the property, properties, or portions of properties where site specific data recovery plans shall be carried out;

2. the portion(s) of the site(s) to be preserved in place, if any, as well as the measures to be taken to ensure continued preservation;

2. any property, properties, or portions of properties that will be destroyed or altered without data recovery;

3. the research questions to be addressed through data recovery, with an explanation of their relevance and importance;

4. the methods to be used with an explanation of their relevance to the research questions;

5. the methods to be used in analysis, data management, and dissemination of data, including a schedule;

6. the proposed disposition of recovered materials and records;

7. proposed methods of disseminating the results of the work to the interested public and/or organizations who have expressed an interest in the data recovery; subject to revision based on the results of the data recovery proceeds;

8. a schedule for the implementation of the treatment plan and the submission of progress reports to the Corps, the SHPO and other consulting parties.

b. The Permittee shall submit the treatment plan to the Corps, the SHPO for review and approval. The Permittee shall provide one (1) copy to the consulting parties for review and comment. Following approval, the Permittee shall implement the treatment plan.

II. PROFESSIONAL QUALIFICATIONS

a. All archaeological work carried out pursuant to this Agreement shall be conducted by or under the direct supervision of an individual or individuals who meets, at a minimum, the Secretary of the Interior's Professional Qualifications Standards (48 FR 44738-9, September 29, 1983) in the appropriate discipline.

III. PREPARATION AND REVIEW OF DOCUMENTS

a. A draft of all final technical reports shall be submitted to the Corps and the SHPO and other consulting parties for review and comment. The Corps shall ensure that all comments received within thirty (30) days of report receipt shall be addressed in the final technical reports. Two copies of all final reports, bound and on acid-free paper, and one in an electronic format on CD shall be provided to the SHPO and one copy to the Corps and other consulting parties.

b. All technical reports resulting from this agreement shall be consistent with the federal standards entitled *Archaeology and Historic Preservation: Secretary of Interior's Standards and Guidelines* (48 FR 44716-44742, September 29, 1983) and SHPO's *Guidelines for Conducting Cultural Resource Survey in Virginia* (rev. 2003) or subsequent revisions or replacements to these documents.

c. The SHPO and other consulting parties agree to provide comments on all technical reports, treatment plans and other documentation arising from this Agreement within thirty (30) days of receipt. If no comments are received from the SHPO or other consulting parties, the Corps may assume the non-responding party's concurrence with its findings.

IV. CURATION

All archaeological materials and appropriate field and research notes, maps, drawing and photographic records collected as part of this project (with the exception of human skeletal remains) shall be cared for in the Loudoun County repository and in accordance with the requirements in 36 CFR 79, *Curation of Federally Owned and*

Administered Archaeological Collections. All such items will be made available to educational institutions and individual scholars for appropriate exhibit and/or research under the operating policies of Loudoun County.

POST-REVIEW DISCOVERIES

The Permittee shall ensure that all contracts for activities involving ground disturbance and/or construction contain the following provisions for treatment of post-review discoveries:

a. In the event that previously unidentified archaeological resources are discovered during ground disturbing activities within the area of potential effect, the Permittee shall immediately halt all construction work involving subsurface disturbance in the area of the resource and in the surrounding area where further subsurface resources can reasonably be expected to occur and immediately notify the Corps and the SHPO of the discovery.

b. The Corps and the SHPO, or an archaeologist approved by them, shall immediately inspect the work site and determine the area and nature of the affected archaeological resource. Construction work may then continue in the area outside the archaeological resource and any designated protective buffers as defined by the Corps and the SHPO, or their designated representative.

c. Within five (5) working days of the original notification of discovery, the Corps, in consultation with the SHPO, shall determine the National Register eligibility of the resource.

d. If the resource is determined eligible for the National Register, the Permittee shall prepare a plan for its avoidance, protection, or recovery of information. The Corps and SHPO shall approve such plan, prior to implementation.

e. Work in the affected area shall not proceed until either:

    1. the development and implementation of appropriate data recovery or other recommended mitigation procedures, or

    2. the determination is made that the located resources are not eligible for inclusion on the National Register.

f. Any disputes over the evaluation or treatment of previously unidentified resources shall be resolved as provided in the section of this Agreement entitled Dispute Resolution.

VI. HUMAN REMAINS

The Permittee shall make all reasonable efforts to avoid disturbing gravesites, including those containing Native American human remains and associated funerary artifacts. The Permittee shall treat all human remains in a manner consistent with the ACHP "Policy

Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects" (February 23, 2007; http://www.achp.gov/docs/hrpolicy0207.pdf).

The Permittee shall ensure that human skeletal remains and associated funerary objects encountered during the course of actions taken as a result of this Agreement shall be treated in accordance with the Regulations Governing Permits for the Archaeological Removal of Human Remains (Virginia Register 390-01-02) found in the *Code of Virginia* (10.1-2305, et seq., Virginia Antiquities Act). The Permittee will obtain a permit from the SHPO for the removal of human remains in accordance with the regulations stated above.

The Permittee shall make a good faith effort to ensure that the general public is excluded from viewing any American Indian burial site or associated funerary artifacts. The consulting parties to this agreement shall release no photographs of any American Indian burial site or associated funerary artifacts to the press or general public. The Corps shall notify the Virginia Council on Indians (VCI) when burials, human skeletal remains, or funerary artifacts are encountered on the project, prior to any analysis or recovery. The Corps shall deliver any American Indian human skeletal remains and associated funerary artifacts recovered pursuant to this agreement to the appropriate tribe to be reinterred. The disposition of any other human skeletal remains and associated funerary artifacts shall be governed as specified in any permit issued by the SHPO or any order of the local court authorizing their removal.

VI. DISPUTE RESOLUTION

a. Should any party to this Agreement object in writing to the Corps regarding any action carried out or proposed with respect to any undertakings covered by this Agreement or to implementation of this Agreement, the Corps shall consult with the objecting party to resolve the objection.

b. If after initiating such consultation, the Corps determines that the objection cannot be resolved through consultation, the Corps shall forward all documentation relevant to the objection to the ACHP, including the proposed response to the objection.

c. Within thirty (30) days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:

    1. Advise the Corps that the ACHP concurs with the Corps' proposed response to the objection, whereupon the Corps shall respond to the objection accordingly; or

    2. Provide the Corps with recommendations, which the Corps shall take into account in reaching a final decision regarding its response to the objection; or

    3. Notify the Corps that the objection will be referred for comment pursuant to 36 CFR 800.7(a)(4), and proceed to refer the objection and comment. The Corps shall take the resulting comment into account in accordance with 36 CFR 800.7(c)(4) and Section 110(l) of the NHPA.

c. Should the ACHP not exercise one of the above options within thirty (30) days after receipt of all pertinent documentation, the Corps may assume the ACHP's concurrence in its proposed response to the objection.

d. The Corps shall take into account any ACHP recommendation or comment provided in accordance with this stipulation with reference only to the subject of the objection; the Corps' responsibility to carry out all the actions under this Agreement that are not the subjects of the objections shall remain unchanged.

e. At any time during implementation of the measures stipulated in this Agreement, should an objection pertaining to this Agreement be raised by a member of the public, the Corps shall notify the parties to this Agreement and take the objection into account, consulting with the objector and, should the objector so request, with any of the parties to this Agreement to resolve the objection.

VII. AMENDMENTS AND TERMINATION

a. Any party to this Agreement may propose to the Corps that the Agreement be amended, whereupon the Corps will consult with the other parties to this Agreement to consider such an amendment. All signatories to the Agreement must agree to the proposed amendment in accordance with 36 CFR 800.6(c)(7).

b. If the Permittee decides it will not proceed with the undertaking, it shall so notify the Corps and the SHPO, and this Agreement shall become null and void.

c. If the Permittee determines that it cannot implement the terms of this Agreement, or if the Corps or SHPO determines that the Agreement is not being properly implemented, the Permittee, the Corps, or the SHPO may propose to the other parties to this Agreement that it be amended or terminated.

d. This Agreement may be terminated by any signatory to the Agreement in accordance with the procedures described in 36 CFR 800.6(c)(8). Termination shall include the submission of a technical report by the Permittee on any work done up to and including the date of termination. If the Corps is unable to execute another Memorandum following termination, the Corps may choose to modify, suspend, or revoke the Department of the Army permit as provided by 33 CFR 325.7.

VIII. DURATION OF AGREEMENT

This Agreement will continue in full force and effect until five (5) years after the date of the last signature. At any time in the six-month period prior to such date, the Corps may request the signatory parties to consider an extension or modification of this Agreement. No extension or modification will be effective unless all parties to the Agreement have agreed with it in writing.

IX. FAILURE TO CARRY OUT THE TERMS OF THE MEMORANDUM

In the event that the terms of this Memorandum are not carried out, the Corps shall comply with 36 C.F.R. 800 with regard to actions covered by this Memorandum.

Execution of this Memorandum of Agreement by the Corps and the SHPO and its submission to the ACHP in accordance with 36 CFR 800.6(b)(1)(iv), shall, pursuant to 36 CFR 800.6(c), be considered to be an agreement with the ACHP for the purposes of Section 110(l) of NHPA. Execution and submission of this Agreement, and implementation of its terms, evidence that the Corps has afforded the ACHP an opportunity to comment on the proposed undertaking and its effect on historic properties, and that the Corps has taken into account the effect of the undertaking on historic properties.

VIRGINIA STATE HISTORIC PRESERVATION OFFICER

By: _____ Date: 10/16/08

Kathleen S. Kilpatrick
Director, Virginia Department of
Historic Resources

NA DULLES REAL ESTATE INVESTOR, LLC

By: _____ Date: 10/6/2008

Michael W. Scott

Managing Member of Nokes Partners LLC, Managing Member

NORFOLK DISTRICT, U. S. ARMY CORPS OF ENGINEERS

By:_____ Date: 10/8/08

J. Robert Hume, III
Chief, Regulatory Office