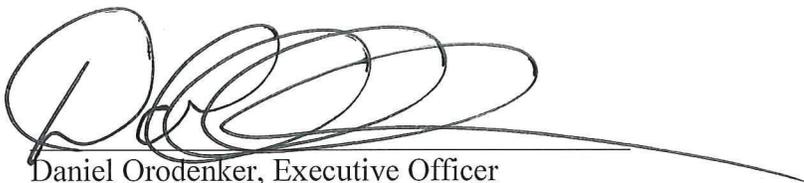


**LUC Docket No. A06-771  
D.R. Horton-Schuler Homes, LLC**

**Intervenor Friends Of Makakilo's Motion For An  
Order To Show Cause Why The Property Should  
Not Revert To Its Former Land Use Classification;  
Affidavit By Dr. Kioni Dudley; Exhibits 1 To 61,  
And Certificate Of Service**

***Staff Report***

Action Hearing  
October 23, 2015



Daniel Orodener, Executive Officer

Submitted: October 21, 2015

# TABLE OF CONTENTS

<u>Sections.</u>	<u>Page No.</u>
1. Motion History .....	3
2. Motion Background.....	4
3. Process and Nature of the Proceedings.....	4
4. Preliminary Issues.....	4
5. Possible Determinations .....	5
6. Staff Analysis and Recommendation .....	6
7. Proposed Language for a Motion .....	9
8. Deputy Attorney General Memorandum to Commission.....	10

## **1. Motion History**

On July 24, 2015, Intervener Friends of Makakilo (“FOM”) filed a Motion for an Order to Show Cause Why the Property Should Not Revert to its Former Land Use Classification (“Motion”); Affidavit by Dr. Kioni Dudley; Exhibits 1 to 61; and Certificate of Service.

On July 28, 2015, FOM filed an Amendment to the Motion Adding Page 67 and additional parties to the Certificate of Service (“Amended Motion”).

On July 29, 2015, the State Office of Planning (“OP”) filed a Request for an Extension to File Responses to FOM’s Motion until August 24, 2015.

On August 17, 2015, the State Department of Transportation (“DOT”) filed a copy of a comment letter to OP.

On August 18, 2015, Intervener Clayton Hee filed a Substantive Joinder to Intervener FOM’s Motion.

On August 20, 2015, Michele Lincoln provided public comments.

On August 20, 2015, D.R. Horton-Schuler Homes filed a Notice of Intent to Sell or Donate Property within the Petition Area.

On August 24, 2015, D.R. Horton-Schuler Homes filed its Memorandum in Opposition to Intervenor Friends of Makakilo’s Motion for an Order to Show Cause Why the Property Should Not Revert to its Former Land Use Classification filed July 23, 2015; Affidavit of Cameron Nekota; Exhibits A to B; Affidavit of Matt Nakamoto; Exhibits C to D; Certificate of Service.

On August 24, 2015, OP filed its Opposition to Intervenor Friends of Makakilo’s Motion for an Order to Show Cause Why the Property Should Not Revert to the Agricultural District; Exhibits 1 & 2; Certificate of Service.

On August 27, 2015, the Sierra Club filed its Substantive Joinder to Intervenor FOM’s Motion to Show Cause.

On September 29, 2015, the Neighborhood Board No. 34 filed a comment letter.

On October 13, 2015, the LUC mailed the Meeting Agenda and Notice for the October 22-23, 2015 meeting to the Parties, the Statewide and O`ahu mailing lists.

On October 20, 2015, FOM filed an Amended Exhibit List and Exhibits 63 to 72, and Certificate of Service.

## 2. Motion Background

On June 21, 2012, the LUC approved Petitioner D.R. Horton-Schuler Homes request for reclassification of approximately 1,525 acres of land from the State Agricultural District to the State Urban District in `Ewa, O`ahu identified by Tax Map Key (TMK) Nos. (1) 9-1-017:004 (por.), 059 and 072; (1) 9-1-018:001 and 004. The reclassification was made subject to 26 conditions of approval<sup>1</sup>.

The Friends of Makakilo (FOM) filed to intervene in the Petition on December 3, 2008. On January 8, 2009, the LUC granted FOM's Petition to Intervene with its participation specifically limited to traffic, education, open space, agricultural lands, and sociological issues.

On July 24, 2015, FOM filed its Motion for Order to Show Cause, alleging the Petitioner has failed to comply with conditions of its approval. Specifically Condition 10 (Transportation); Condition 11(Stormwater); Condition 22 (Notice of Change of Ownership); and representations made regarding substitute agricultural lands for existing farming tenants.

A party to the original petition (Intervener Friends of Makakilo) has filed its Motion with the LUC requesting them to review information they have provided which they believe shows that Petitioner (D.R. Horton-Schuler Homes) is not in compliance with conditions of approval, or representations or commitments made. Under LUC rules Section 15-15-93(b), HAR, the Commission is only looking at the submitted information in order to make a determination whether or not it gives them "reason to believe" that there may have been a failure to perform by Petitioner.

## 3. Process and the Nature of the Proceedings

It must be emphasized that this proceeding is a "*Motion for Order to Show Cause*". At this stage the commission is hearing argument on whether or not there is enough evidence, taking into consideration all of the pleadings filed for and against the Motion, to believe that there may have been a violation of a condition contained in the Commission's original decision and order.

If the Commission believes that there is enough evidence to reasonably believe there may have been a violation of a condition, it can move on to stage two and schedule a contested case hearing to determine whether the property should be reverted to its original land use classification. At that subsequent hearing (if the commission decides to take the next step) the parties will be given the chance to present evidence on whether or not a breach of the condition did in fact take place and present any defenses it may have. The current motion is therefore not an evidentiary proceeding.

It is not appropriate at this time for the parties to re-argue the merits of the original case. Even if the proceedings go to the next stage, the investigation of the Commission will be limited to the facts concerning the violation of the condition. Motions for Order to Show Cause are not paramount to a re-opening of the case.

## 4. Preliminary Issues

a) Does the person/organization submitting the Motion have legal standing as a party or "interested person" under Section 15-15-93, HAR, to request an Order to Show Cause?

---

<sup>1</sup> See Decision and Order (pages 168-178) at < [http://files.hawaii.gov/luc/dockets/a06771drhorton/a06771\\_dando\\_06212012.pdf](http://files.hawaii.gov/luc/dockets/a06771drhorton/a06771_dando_06212012.pdf)>

The Friends of Makakilo (FOM) was granted intervener status as a party to the original docket. Therefore, they have standing to bring this motion.

b) Does the LUC have jurisdiction?

The LUC's administrative rules Section 15-15-90 allows the Commission to impose conditions on petitions and to assure substantial compliance with representations made by a petitioner in seeking boundary amendment. Section 15-15-93, HAR, provides the Order to Show Cause process for examining questions of compliance with conditions and representations.

The LUC's decision rendered in June 2012 has been appealed to court. Currently, the issue is before the State Supreme Court. The Court has completed hearing oral arguments of the parties.

Therefore, until the State Supreme Court has rendered its decision; the matter is not properly within the LUC's jurisdiction. Based on this, the Commission could decide to hear the Motion and then continue the matter until the State Supreme Court renders a decision and returns jurisdiction to the Commission to take action.

*NOTE: If it is determined, based on advice from the Attorney General, that the LUC does not have jurisdiction, the Commission may not take up the matter and dismiss the Motion.*

c) What is "reason to believe" that there has been a failure to perform according to conditions imposed, or the representations or commitments made by the petitioner<sup>2</sup>.

## 5. Possible Determinations

There are three specific courses of action the Commission can take.

### Potential Action One:

If the LUC determines that it does not have jurisdiction over this matter it may dismiss the Motion on those grounds.

### Potential Action Two:

If the LUC finds no reason to believe there was a failure to perform then the Motion by Intervener FOM could be denied. FOM would then have 30 days to appeal the decision to circuit court or, if applicable, the environmental court.

---

<sup>2</sup> Neither the administrative rules nor Chapter 205 provide guidance on what would constitute a "reason to believe" there has been a failure to perform according to the conditions. Case law from other jurisdictions indicates that a "reason to believe" standard may be analogous to the "probable cause" standard used in criminal statutes; i.e. the same standard of reasonableness inherent in probable cause. *United States v. Gorman*, 314 F.3d 1105 (9th Cir. 2002).

In turn, "probable cause" is established by a "state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." *State v. Chung*, 75 Haw. 398,409-10, 862 P.2d 1063, 1070 (1993).

### Potential Action Three:

If the LUC finds a reason to believe there may be a failure to perform then they can grant the Motion and serve an Order to Show Cause on the Petitioner. This will trigger a future evidentiary hearing (“stage two”) where the Petitioner would need to present a case providing evidence to refute any failure to perform. All parties to the original docket would be included.

## **6. Staff Analysis of Motion and Recommendation**

FOM’s Motion for Order to Show Cause is quite voluminous and contains a lot of extraneous or irrelevant arguments and information. Facts and arguments concerning the propriety of prior LUC or County decisions are not relevant in this proceeding. While allegations of false statements and undue influence in County proceedings may have merit in another jurisdiction, they are not arguable here.

Arguments concerning false representations and new information presented at the original LUC proceedings are also irrelevant. The Motion does not present an opportunity to re-open findings of fact from the original proceedings. The issues have been argued and the LUC, in its role as fact finder, made determinations based on the evidence presented and the qualifications and veracity of the witnesses as well as pleadings and documentary evidence. These issues are in fact the subject of the appeal and most certainly not within the LUC’s current jurisdiction.

The Motion does allege violation of three conditions. Specifically Condition 10 (Transportation); Condition 11(Stormwater); and Condition 22 (Notice of Change of Ownership).

### Condition 10 (Transportation)

The Motion alleges that Petitioner has failed to meet provision (b) of condition 10.

*“b. Petitioner shall submit an updated Traffic Impact Analysis Report (“TIAR”) for review and acceptance by the DOT, the City and County of Honolulu Department of Planning and Permitting (“DPP”), and the City and County of Honolulu Department of Transportation Services (“DTS”). The updated TIAR shall include the most current updated traffic data, and shall provide and validate all recommended mitigations measure for potential project-related traffic impacts on State and City facilities to the satisfaction of the DOT, the DPP and the DTS. The updated TIAR shall include the construction status and timeline for the City’s rail transit project, and shall specifically address the potential effects on traffic if the rail project does not proceed as anticipated. Petitioner shall obtain acceptance of the updated TIAR from the DOT, the DPP, and the DTS, prior to submittal of a change in zoning application with the City and County of Honolulu.”*

Movant specifically alleges a violation of Condition 10(b) by failing to obtain approval of the revised Traffic Impact Analysis Report (“TIAR”) by the City and County of Honolulu’s Department of Transportation Services (“DTS”) prior to zoning application.

Movant’s Exhibit 4 is a letter dated February 4, 2014 from DTS stating they had reviewed the revised TIAR and had no further comments. The County in their response to the Motion (“County Memorandum in Opposition”) on page 2, indicates that they believe this constituted DTS’ acceptance

of the revised TIAR. Movant's Exhibit 40 is a transcript of the December 3, 2014 public hearing before the City and County of Honolulu Planning Commission, where the Director of DTS, Michael Formby, testified that DTS had in fact accepted the updated TIAR.

While there may be some dispute whether the February 2014 letter from DTS constituted an "acceptance" of the TIAR; DTS did state on the record before the Planning Commission that it did indeed "accept" the revised TIAR.

Movant has gone into great detail to provide substantive objections to the TIAR itself, however the LUC has already considered the adequacy of the TIAR and determined that the Petition Area should be reclassified subject to the submission of a revised TIAR acceptable to the State DOT, the County Department of Planning and Permitting ("DPP"), and DTS. The LUC has no further role in any substantive disagreements on the TIAR. Movant can't attempt to relitigate its traffic concerns through a Motion for Order to Show Cause.

It should also be noted that the Motion is essentially asking the LUC to re-review the evidence presented before the planning commission. The pleadings all agree on what occurred. The Movant is taking issue with the final determination by the Planning Commission that the condition had been satisfied. As such, the issue has been argued and a determination made by the planning commission. It is generally held that the County is responsible for enforcing conditions in an LUC Decision and Order; it is questionable whether the LUC can second guess a county determination that a condition has been satisfied.

Staff does not believe that the evidence presented warrants a conclusion that the condition has been violated.

#### Condition 11 (Stormwater)

*"Petitioner shall construct stormwater and drainage system improvements as designed in compliance with applicable federal, State and County laws and rules.*

*a. Prior to any subdivision approval, for lands that may drain onto adjacent Navy lands, the Petitioner shall provide a master drainage plan for review by the State Department of Health ("DOH"), the State Office of Planning ("OP"), and DPP, that either includes a letter of consent from the Navy allowing drainage onto its properties or a specific explanation of strategies to be employed so that drainage onto Navy lands is not necessary.*

*b. To the extent feasible, Petitioner shall mitigate non-point source pollution by incorporating low impact development practices for onsite stormwater capture and reuse into the Petition Area's site design and landscaping, provided that such low impact development practices do not prevent dedication of drainage facilities to the counties, to prevent runoff onto affected State highway facilities, downstream properties and receiving gulches, streams, and estuaries that connect with coastal waters."*

Movant specifically alleges a violation of Condition 11(a) because Petitioner has not received a letter of consent from the Navy and its stormwater would have to cross Navy property. Movant also argues that a violation of Condition 11(a) will affect Native Hawaiian gathering rights for limu at the beach in violation of another Condition – Condition 14.

OP argues that the LUC imposed a stormwater drainage plan prior to subdivision approval. The Petitioner has not yet obtained subdivision approval. Therefore, it has not violated Condition 11(a). Further, since it has not violated Condition 11(a) it has also not impacted Native Hawaiian gathering rights. Substantive arguments regarding stormwater drainage should properly be addressed through the City's subdivision process.

Staff agrees with OP's analysis. The evidence regarding condition 11(a) does not give rise to a conclusion that there has been a violation of the condition.

Condition 22 (Notice of Change of Ownership)

*“Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Petition Area, any time prior to completion of the development of the Petition Area.”*

Movant alleges that Petitioner has failed to notify the LUC of its intention to sell or alter the ownership interests in the Petition Area. Movant references articles in Pacific Business News indicating that the Petitioner is in negotiation with various groups to sell or give away certain lands within the Petition Area.

OP argues that there is no evidence that any actual land transfers or sales have occurred; and that newspaper articles may not be reliable. OP points out that the City has the authority to determine if a violation has occurred, require a correction to be made, and assess a monetary penalty if correction is not made. OP does not believe there is a reasonable basis to believe Condition 22 has been violated.

D.R. Horton-Schuler Homes filed with the Commission a Notice of Intent to Sell or Donate Property within the Petition Area on August 20, 2015. This complies with Condition 22.

Staff does not believe that there has been a violation of Condition 22.

## 7. Proposed Language for a Motion

The following are three options for Motions. The deputy AG (see attached memorandum) and staff recommend the first option.

Note!: Consistent with the first option below the deputy AG recommends that in order to support a Motion to Deny for Lack of Jurisdiction - that the Commission establish the following on the record through questioning of the parties.

- (a) The parties should be asked to acknowledge that there is a pending appeal of the Commission's Decision and Order; and,
- (b) The parties should be asked to acknowledge that if the Supreme Court were to reverse the Commission's Decision and Order, and that this Motion would be moot and/or conflict with the exercise of the Supreme Court's appellate authority in this case.

### Option 1: Motion to Deny for Lack of Jurisdiction

“Move to Deny the Motion because the Commission does not presently have jurisdiction of the Motion due to the pending appeal of its Decision and Order before the Hawai`i Supreme Court.”

### Option 2 Motion to Deny Due to No Reason to Believe there has not been a Violation of Conditions

“Move to Deny the Motion because the Commission does not have a reason to believe that there has been a failure to perform according to conditions imposed.”

### Option 3: Motion to Grant Motion Due to Reason to Believe there may have been a Violation of Conditions; Issue and Order to Show Cause; and set a Show Cause hearing

“Move to Grant the Motion because the Commission has reason to believe that there has been a failure to perform according to the conditions imposed; issue an Order to Show Cause; and set the matter for a Show Cause hearing.”

**PRIVILEGED AND CONFIDENTIAL  
ATTORNEY/CLIENT COMMUNICATION**

**CAUTION This memorandum contains confidential information  
And attorney/client communications and should not be released to  
The public or other third parties. Nor should they be discussed or  
Referred to in public or with third parties.**

October 20, 2015

**MEMORANDUM**

TO: Land Use Commission

FROM: Diane Erickson  
Deputy Attorney General  
Administration Division

RE: Docket No. A06-771, Intervenor Friends of Makakilo's Motion  
for Order to Show Cause Why the Property Should Not Revert  
to Its Former Land Use Classification, filed on July 23, 2015

**I. Background and Discussion**

The Land Use Commission (Commission) is scheduled to hear the above-referenced Motion at his hearing October 22 and 23, 2015. The Motion requests the Commission to revert the property comprising the Ho'opili project from the Urban land use district to the Agricultural land use district for failure to comply with conditions contained in the Decision and Order approving the petition for land use district reclassification, which was issued by the Commission on June 21, 2012, as corrected June 27, 2012. The Commission's Decision and Order was appealed to the Circuit Court and then to the Hawaii Supreme Court and is still pending with the Hawaii Supreme Court.

Both D.R. Horton and the Office of Planning have filed oppositions to the Motion for Order to Show Cause on substantive grounds.

As the Commission is aware, the validity of the Commission's Decision and Order is currently pending at the Hawaii Supreme Court. The Supreme Court heard oral argument in the case in June of this year. If the Supreme Court were to rule that the Commission's Decision and Order were wrong and the land should not have been reclassified, the Friends of Makakilo's Motion would be moot.

Petitions for district boundary amendments are quasi-judicial proceedings, which can be appealed pursuant to Hawaii Revised Statutes (HRS) section 91-14 and Hawaii Rules of Civil Procedure Rule 72. By analogy, in a quasi-judicial proceeding, the Commission acts as a trial court, and the reasoning of cases relating to the jurisdiction of the trial court when a case is appealed would apply to proceedings before the Commission.

The Commission has several options:

1. It could, based on the pleadings, decide that there is reason to believe that there has been a failure to perform according to the conditions imposed, GRANT the Motion, issue an order to show cause, and set the show cause hearing.
2. It could, based on the pleadings, decide that it does NOT have reason to believe that there has been a failure to perform according to conditions imposed and DENY the Motion.
3. It could decide that it does not presently have jurisdiction of the Motion because of the pending appeal of its Decision and Order.

## II. RECOMMENDATION

**Based on the discussion below, it is recommended that the Commission DENY the motion because it does not presently have jurisdiction of the Motion due to the pending appeal of its Decision and Order.**

**In order to support this action, the Commission needs to establish the following on the record through questioning of the parties.**

1. **The parties need to acknowledge that there is a pending appeal of the Commission's Decision and Order.**
2. **The parties need to acknowledge that if the Supreme Court were to reverse the Commission's Decision and Order, the Motion would be moot and/or conflict with the exercise the Supreme Court's appellate authority in this case.**

Generally, the filing of a notice of appeal divests the trial court of jurisdiction over the appealed case. TSA Intern., Ltd. v. Shimizu Corp., 990 P.2d 713, 92 Hawai'i 243 (1999); Kamaole v. Two Hui v. Aziz Enterprises, Inc., 9 Haw. App. 566, 854 P.2d 232 (1993). **The principle governing the transfer of jurisdiction from the trial court to the appellate court when the notice of appeal is filed is designed to avoid the confusion and inefficiency that might flow from placing the same issue before two courts at the same time.** Id. Although there are a few matters over which the trial court retains jurisdiction even after the notice of appeal is filed – for example, enforcement of the judgment where a supersedeas bond is not filed. MDG Supply, Inc. v. Diversified Investments, Inc., 51 Haw. 375, 463 P.2d 525 (1969). In this case, Friends of Makakilo might argue that it is merely requesting the Commission to enforce its Decision and Order, but the effect of granting the Motion and setting the matter for a show cause hearing goes to the very basic issue on appeal – whether or not the subject property should be designated Urban or Agricultural.

Other jurisdictions agree, and have explicitly applied the principle to appeals of decisions of administrative agencies.

Where a party institutes proceedings to review a decision or order of an administrative agency, the agency is deprived of its jurisdiction over

the matter during the pendency of the appeal. The Supreme Court of Nevada states, "**It is generally accepted that where an order of an administrative agency is appealed to a court, that agency may not act further on that matter until all questions raised by the appeal are finally resolved.**" *Westside Charter Serv., Inc. v. Gray Line Tours of Southern Nevada*, 99 Nev. 456, 664 P.2d 351, 353 (1982); *see also Fishback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965), *overruled on other grounds by City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 n. 6 (Alaska 1979); *American Smelting & Refining Co. v. Arizona Air Pollution Control Hearing Bd.*, 113 Ariz. 243, 550 P.2d 621, 622 (1976); *O'Bryant v. Public Utils. Comm'n*, 778 P.2d 648, 655-56 (Colo. 1989); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 143 Colo. 590, 355 P.2d 83, 86 (1960)

*Career Service Review Bd. v. Utah Dept. of Corrections*, 322 Utah Adv. Rep. 8, 942 P.2d 933, 943 (1997). [Emphasis added.]

As noted above, operation of the rule divesting agencies of jurisdiction while an appeal is pending applies to situations where the exercise of administrative jurisdiction would conflict with the proper exercise of the court's jurisdiction. If there is no conflict, there would be no obstacle to the administrative agency exercising a continuing jurisdiction that may be conferred upon it by law. *Westside Charter Serv.*, 664 P.2d at 353, quote *Fishback & Moore*, 407 P.2d at 176.

This rule is based on common sense. If a court has appellate jurisdiction over a decision of an administrative body, it would not be consistent with the full exercise of that jurisdiction to permit the administrative body also to exercise jurisdiction. . . . The court's jurisdiction over the subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.

*Fishback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965).

Further, courts have held that when a notice of appeal is filed, an administrative agency loses jurisdiction to reconsider or modify its former decision. *Lorain Educ. Ass'n. v. Lorain City School Dist. Bd. of Educ.*, 46 Ohio St.3d 12, 544 N.E.2d 687 (1969). In the Ho'opili case, Friends of Makakilo is providing information not previously before the Commission and is asking the Commission, in effect, to change its decision.

The Motion at paragraph 169 states that the remedy sought is for the Commission to issue an order to show cause why the subject property should not revert to the agricultural district for failure to comply with the following conditions:

a. 10b requiring submission of an updated Traffic Impact Analysis Report (TIAR) and acceptance of same by DOT, DTS and DPP before petitioner applies for a zoning change. The Motion's basis for asserting this condition was violated is that petitioner filed a "bogus" letter of acceptance by the

City and County DTS and thus the revised TIAR required by the condition was not timely accepted and petitioner applied for zoning before receiving acceptance of the TIAR. The Motion also asserts that the revised TIAR is "bogus" because it contained falsified traffic data. LUC does not have authority to resolve the County issue of whether DTS did or did not accept the TIAR or whether DPP can accept the TIAR on behalf of DTS.

b. 11, if stormwater drainage will impact Navy lands, requiring the petitioner to provide a master drainage plan for acceptance by the DOH and OP and DPP that either includes a letter of consent from the Navy allowing the drainage onto its properties or a specific explanation of strategies to be employed so that drainage onto Navy lands is not necessary. There is no reason to believe that this condition has not been complied with. Since no plan has been presented, the violation is speculative. It is unclear where in the process this is. Petitioner claims a drainage plan is pending before the County; OP indicates no plan has been presented.

c. 14 access to the property for native gathering rights, etc. This is asserted to be violated in case the drainage flows into the ocean and negatively impacts the limu that may be growing where the drainage enters the ocean. This is speculative at this time.

d. 18 notice of intent to sell or transfer all or part of the petition area. Motion contends Horton in negotiations to sell. Subsequent to the Motion, Horton filed a notice with Commission stating however, that negotiations were ongoing and transfers had not been complete.

e. 22 notice of change of ownership. See above.

f. 27 representations. Horton represented that farmland at higher levels of elevation that was available to farmers could produce the same varieties of crops produced on Hoopili lands. Testimony at hearing contradicted this.

Generally the power to enforce LUC conditions and orders lies with the counties. HRS § 205-12, except for violations of conditions, for which LUC has the power to revert the property HRS §205-4.