BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI`I

In The Matter Of The Petition Of	)	DOCKET NO. DR08-36
	)	
KO OLINA DEVELOPMENT, LLC	)	FINDINGS OF FACT, CONCLUSIONS OF
	)	LAW, AND DECISION AND ORDER
For A Declaratory Order To Determine	)	
Whether Petitioner's Location Of The	)	
Public Boat Launch Ramp At Kalaeloa	)	
With The Installation Of The Proposed	)	
Improvements Constitute Substantial	)	
Compliance With Representations	)	
Made To The Land Use Commission	)	
_____	)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER

This is to certify that this is a true and correct copy of the document on file in the office of the State Land Use Commission, Honolulu, Hawaii.

11/3/08 by _____
Executive Officer

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI`I

In The Matter Of The Petition Of	)	DOCKET NO. DR08-36
	)	
KO OLINA DEVELOPMENT, LLC	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
	)	
For A Declaratory Order To Determine Whether Petitioner's Location Of The Public Boat Launch Ramp At Kalaeloa With The Installation Of The Proposed Improvements Constitute Substantial Compliance With Representations Made To The Land Use Commission	)	
	)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER

On March 24, 2008, Ko Olina Development, LLC ("Petitioner"), filed a Petition For Declaratory Order ("Petition") in Docket No. DR08-36, pursuant to Hawai`i Revised Statues ("HRS") §91-8 and Hawai`i Administrative Rules ("HAR") §15-15-98. On May 20, 2008, Petitioner filed its Supplement to the Petition.

Petitioner requested a declaratory order from the Land Use Commission ("Commission") to determine "whether Petitioner's location of the public boat launch ramp at Kalaeloa with the installation of the proposed improvements constitute

substantial compliance with representations made to the Commission" with respect to the Findings Of Fact, Conclusions Of Law, And Decision And Order in Docket No. A83-562.

This Commission, having heard and examined the testimony, evidence, and arguments of counsel presented during the hearing and the proposed findings of fact, conclusions of law and decision and orders filed by Petitioner and the State Office of Planning ("OP") and their respective responses filed thereto, hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

PROCEDURAL MATTERS

1. On March 24, 2008, Petitioner filed the Petition.

2. On April 17, 2008, OP filed its Motion To Intervene and Memorandum In Support Of Motion.

3. On April 23, 2008, Petitioner filed its Statement Of No Opposition to OP's Motion To Intervene.

4. On April 23, 2008, the City and County of Honolulu ("City and County") Department of Planning and Permitting ("DPP") submitted, via fax, its position of "no opposition" to the Petition and took "no position" to OP's Motion To Intervene.

5. On May 20, 2008, Petitioner filed its Supplement To Petitioner's

Petition.

6. On June 10, 2008, the Commission filed its Order Setting Petition For Declaratory Order For Contested Case Hearing And Granting Motion Of State Office Of Planning To Intervene.

7. On June 10, 2008, the Executive Officer of the Commission conducted a prehearing conference on the contested case hearing matter which, among other things, established deadlines for filing and exchanging exhibits and witness lists and exhibits.

8. On June 19, 2008, the Commission filed its Prehearing Order.

9. On June 23, 2008, OP filed Exhibit No. 1, List of Exhibits, and List of Witnesses.

10. On June 23, 2008, Petitioner filed its List of Witnesses, List of Exhibits, and Exhibits 1 through 34.

11. On June 24, 2008, OP filed its First Amended List of Witnesses, First Amended List of Exhibits, and Exhibits 1A and 2 through 14.

12. On June 30, 2008, Petitioner filed its Stipulated Facts.

13. On July 8, 2008, DPP submitted via email its notice to the Commission that they would not be in attendance and had no position to the Petition.

14. On July 9, 2008, OP submitted its Second Amended List of Witnesses, Second Amended List of Exhibits, and Exhibits 15 through 19.

15. On July 9, 2008, DPP submitted a letter to the Commission which stated that it took "no opposition" to Petitioner's Stipulated Facts as said facts were consistent with the facts, correspondence, and other documentation contained in DPP's files and records.

16. On July 10, 2008, Petitioner filed its First Amended List of Witnesses, First Amended List of Exhibits, and Exhibits 32A, 33A, and 35.

17. On July 10, 2008, the Commission considered the Petition at its meeting in Honolulu, Hawai`i. Entering appearances were Benjamin M. Matsubara, Esq.; Curtis T. Tabata, Esq.; and Wyeth M. Matsubara, Esq., on behalf of Petitioner and Bryan C. Yee, Esq., Deputy Attorney General; Abbey Mayer; Abe Mitsuda; and Scott Derrickson on behalf of OP.

18. At the meeting on July 10, 2008, the Commission took official notice of the record in Docket No. A83-562/Ko Olina Development, LLC, et al. (formerly West Beach Estates).

19. At the meeting on July 10, 2008, the following individuals appeared as public witnesses and provided oral testimony:

CHARLES KRAUSE
RONALD TAM
ED WATAMURA
RODNEY AJIFU
AL FARM
WARREN VON ARNSWALDT
RICHARD YAMASAKI

DOUG EWALT
REGGIE PUANA
HONOLULU FIRE DEPARTMENT CHIEF KEN SILVA
BRIAN HALSEY
TODD PICKERING
WILLIAM CHANG
EIJI TANAKA

20. At the meeting, the Commission entered the following into evidence:

a. Petitioner's Exhibits 1 through 35;

b. OP's Exhibits 1, 1A, 2 through 14, and 15 through 20;

c. Petitioner's experts were submitted as experts in their respective fields after no objections by the Commission or OP: 1) Gordon Fulton as an expert in the layout, planning, construction management, and operation of boat ramps; 2) Joanne Hiramatsu as an expert in the field of land use and environmental planning and permitting; 3) Patrick Ross as an expert in the field of construction of boat ramps and marina construction; and 4) Keith Kurahashi as an expert in the County permitting process.

d. OP's experts were submitted as experts in their respective fields after no objections by the Commission or Petitioner: 1) Fred Nunes in the area of engineering and 2) Eric Yuasa as an expert in the area of engineering.

21. The Commission continued the meeting to August 7 and 8, 2008.

22. On August 6, 2008, Petitioner filed its Second Amended List of Witnesses, Second Amended List of Exhibits, and Exhibits 36 and 37.

23. On August 6, 2008, OP filed its Third Amended List of Witnesses, Third Amended List of Exhibits, and Exhibits 1B, 18A, and 19A.

24. At the meeting on August 7, 2008, the following individuals appeared as public witnesses and provided oral testimony:

MAEDA TIMSON
WARREN VON ARNSWALDT
RICHARD YAMASAKI
DR. KIONI DUDLEY

25. At the meeting, the Commission entered the following into evidence:

a. Petitioner's Exhibits 36 and 37; and

b. OP's Exhibits 1B, 18A, 19A, and 20A.

26. At the conclusion of the August 8, 2008, hearing, the Commission closed the evidentiary portion of the hearing.

HISTORICAL BACKGROUND OF KALAELOA RAMP

27. On December 21, 1983, Petitioner's predecessor-in-interest, West Beach Estates ("WBE"), filed the Petition For District Boundary Amendment to reclassify approximately 642 acres of land located at Honouliuli, `Ewa, O`ahu, Hawai`i, from the State Land Use Agricultural District ("Property") to the State Land Use Urban District to develop a resort, commercial area, and a planned residential community.

28. WBE proposed to develop a resort, commercial, and residential community on the Property that would include 4,000 hotel rooms and/or resort

condominium units; 5,200 residential units; a championship golf course, four new lagoons with swimming beaches; a marina, commercial areas, including one shopping center, four new parks, two transit stations, a Hawaiian Cultural Center, beach and yacht clubs, and tennis facilities (collectively "Project," "Ko Olina," or "Ko Olina Resort").

29. WBE made various representations to this Commission regarding the provision of a boat launch ramp in the Project that is open to the public. These representations include:

(a) *The marina, with its launching ramp, will provide a convenient place for the new residents of West Beach, as well as those presently living in surrounding communities, to launch their boats.*

(b) *One of the most significant benefits that West Beach will provide to the community at large is the reasonable proximity of recreational and social facilities for the Central Plains and Leeward Oahu residents....Also, there will be public designated areas for boat launching at the proposed marina....*

(c) *The next major amenity [of the Project], of course, is the marina. The marina is set up as a combination of slips for residents of West Beach and slips for charter fishing boats that will occur up in this area, tour boats, charter boats related to the commercial area, public launch ramp and public parking area for that launch ramp and a boat repair haul-out facility here as well as probably a public field dock at this location at the entrance.*

(d) *The slips [for the marina] that we call private will probably be generally available for either leasing or purchasing by residents of West Beach. We will be supplying a boat launch ramp facility that will be open to the public for boats that can be launched at West Beach for entry into the water. At this time we have no specific plan for public slips.*

(e) *This is showing what we call our preferred entrance [to the marina]. This drawing shows what we call our preferred entrance option. We will talk about that a little later. Basically, the marina is 2,900 feet long in the basin here, about 900 feet wide, proposed to be an average of 15 feet at mean low or low water throughout the marina, and the intent is for use as a private marina for pleasure craft, power boats, sailboats, for commercial craft such as charter boats, charter cruises, dinner cruises, fishing, things like that; intent to provide a moderate amount of boat repair, fuel dock and pump out facilities and a public boat launch ramp and then the associated facilities with parking concessions, those kinds of things in this site area.*

(f) *We intend that the harbor is going to be a very safe harbor and in times of storms and what not it would be a harbor of refuge for ships that have problems, and we are going to be having a public boat launching ramp there.*

(g) *As I indicated earlier, we would have – for the slips themselves we would offer it to the people who live at West Beach first and to the extent that they are not taken we would offer it to the general public. What we would also have there is a public boat launching facilities, you know, where they go park their trailer and launch it and then come back later on the evening.*

30. On September 12, 1985, the Commission filed its Findings Of Fact, Conclusions Of Law, And Decision And Order in Docket No. A83-562 reclassifying the Property from the State Land Use Agricultural District to the State Land Use Urban District ("Decision and Order").

31. Within the Decision and Order are three findings of facts and one condition that are relevant to this instant motion: Finding of Facts Nos. 33, 52, and 87 and Condition No. 4.

1. Finding of Fact No. 33 provides the following:

> Petitioner proposes to develop a 36 acre recreational and commercial marina with a public boat launch ramp, and to

develop pump out facilities, a fueling and drydock facility, other public conveniences and parking adjacent to the Deep Draft Harbor. Commercial use of the marina facilities will include sightseeing, charter fishing, dinner cruises and other excursions.

2. Finding of Fact No. 52 provides the following:

Portions of the Property are within the County Special Management Area. Petitioner will need to obtain the appropriate permits prior to developing any portions of the Property in the Special Management Area.

3. Finding of Fact No. 87 provides, in pertinent part, the following:

Petitioner will also open to public use parks and open areas . . . Petitioner will provide boating and other marina-related recreational facilities and beach rights-of-way in coordination with the County Department of Parks and Recreation requirements.

4. Condition No. 4 provides, in pertinent part, the following:

Petitioner shall dedicate to the City and County public easements for shoreline access to the beach and lagoon areas to be developed on the Property from all internal roadways, and easements for recreational purposes for the use of such beach and lagoon areas. . . . The City and County of Honolulu Department of Land Utilization shall determine the location of the easements and number of parking stalls.

32. By submittal dated November 7, 1986, the Board of Land and Natural Resources ("BLNR") approved a Construction Right-of-Entry and Grant of Easement for WBE to access Kalaeloa Harbor. The submittal, among other things, contained the representation that WBE would "construct a public boat launching ramp

within the WBE marina which shall be opened to the tenants of the marina and the boating public."

33. Among the conditions in the Construction Right-of-Entry and Grant of Easement for WBE was a requirement to provide instructions to users of the public boat ramp regarding the small boat restrictions for use of the entrance channel.

34. On or around 1988, WBE constructed a public boat launch ramp in the marina area, which was not then opened to the public. At that time, the other areas of the future marina were not yet developed.

35. On May 3, 1994, the Commission filed its Order Granting Petitioner's Motion To Amend Findings Of Fact, Conclusions Of Law And Decision And Order dated September 12, 1985 ("Amended Decision and Order").

36. The Amended Decision and Order deleted Condition No. 10 of the Decision and Order to release the partial building restriction of residential portions of the Project and added three new conditions numbered 13, 14, and 15.

1. Condition No. 13 imposed by the Amended Decision and Order provides the following:

> Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. Failure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification.

37. On June 5, 1995, WBE entered into Amended Lease No. H-89-1

with the Department of Transportation ("DOT"). The Lease allowed for, among other things, marina access and joint use of the Kalaeloa Harbor entrance channel. Paragraph 9 of the Lease required, among other things, that Petitioner provide "instructions to users of the public boat ramp regarding the small boat restrictions for use of the entrance channel."

38. On August 20, 1998, Petitioner and affiliated entities succeeded to the interest of WBE in the Property.

39. In April 1999, Petitioner began maintenance dredging of the marina, and construction of the marina commenced in July 1999.

40. On May 27, 1999, Petitioner, pursuant to its obligations to follow the Commission's FOF Nos. 52 and 87 and Condition No. 4, submitted its request with the City and County to revise the approved site plan for the Ko Olina Marina Dock Master Facility.

41. On August 26, 1999, Petitioner provided the City and County with the Preliminary Access Plan, Hours of Operation, and Rules for the Ko Olina Boat Ramp.

42. Petitioner's proposed preliminary plan provided, inter alia, that "[t]he boat launch ramp and boat trailer parking lot will be open from sunrise to sunset to allow boaters to launch and retrieve their boats."

43. On September 20, 1999, the City and County approved Petitioner's

May 27, 1999, request to revise the approved site plan for the Ko Olina Marina Dock Master Facility as a Minor Modification to the previously approved Conditional Use Permit ("CUP"), Type 1, File Number 95/CUP1-82, as modified subject to conditions.

44. Condition 1 of the CUP provides that "[p]rior to the submittal of applications for building or grading permits for the Ko Olina Ocean Club facility, the [Petitioner] shall submit a Public Access Master Plan ("PAMP") for the review and approval of the [DPP]."

45. DPP's explanation for condition 1 of the CUP stated as follows:

> "Explanation: Public access to the Ko Olina community's coastal recreation resources should be facilitated, as well as ensured. Although Ko Olina community encompasses a wider land area than covered by this permit, it is appropriate to address and resolve issues related to community-wide public access at this time, since public use of the Ko Olina marina is an integral element of the public access plan."

46. One of the elements of the required PAMP was "[a]n operations plan for the boat launch ramp that includes appropriate measures to ensure access to the ramp for the general public, including recreational deep sea fishing users."

47. On September 23, 1999, Petitioner requested to amend the conditions of the Minor Modification to CUP, and that request was approved on November 5, 1999, by DPP.

48. On October 22, 1999, Petitioner provided to Harbors Division, DOT, State of Hawai`i ("Harbors Division"), a draft of Ko Olina Marina's Boat Launch

Ramp and Parking Policies.

49. Petitioner's draft policy stated, *inter alia,* that "[t]he boat ramp and trailer parking will be open from sunrise to sundown."

50. On or around November 10, 1999, Harbors Division provided its response to the draft of Ko Olina Marina's Boat Launch Ramp and Parking Policies.

51. In March 2000, construction of Phase I of the marina was completed and opened for public use.

52. On April 12, 2000, Petitioner transmitted its final PAMP for the Project to DPP pursuant to condition 1 of the CUP. As the PAMP was required by DPP, its purpose was "to implement the conditions of the Unilateral Agreement attached by reference to the zoned change ordinance (Ordinance No. 86-09) and the Special Management Area Use Permit and Shoreline Setback Variance (Resolution No. 86-61, adopted March 12, 1986)."

53. The proposed final PAMP included the following concerning the Marina Ramp operating hours:

> Marina boat launch ramp and parking: These areas will be open to the public from sunrise to sunset. Vehicles with boat trailers and decals remaining in the marina parking lot after sunset will be allowed to remain overnight. However, vehicles with trailers remaining in the lot for a second night will be subject to towing.

54. Petitioner and certain members of the public disagreed about the terms of access to the public boat launching ramp within the Marina,

including the hours of operation. Pursuant to the Special Management Area Permit process and acceptances of the final PAMP for the Ko Olina Resort, the City and County encouraged Petitioner to resolve the terms of access.

55. On May 5, 2000, DPP partially approved Petitioner's final PAMP submitted on April 12, 2000. DPP's partial approval stated the following in pertinent part:

> The Plan proposes to allow public access to the boat launch ramp and trailer parking from sunrise to sunset, in addition to other special requirements. However, we understand that the applicant is negotiating with the State Department of Land and Natural Resources and other interested parties to revise the boat launch access plan. Accordingly, our review excludes that portion of the Plan referring to the boat launch ramp and trailer parking access plan.
>
> The Plan, with the exception of the section described above, is accepted as the Public Access Master Plan for the Ko Olina Resort. Please note that until the access plan for the boat launch ramp and trailer parking is finalized, building permits will not be issued for the Ko Olina Clubhouse.

56. On June 1, 2000, Petitioner responded to DPP's May 5, 2000, letter agreeing to modify the boat ramp access plan as follows:

1) For a period of one year ("interim period") Ko Olina Companies will work diligently with the State Department of Land and Natural Resources and Marisco Shipyard to construct a public boat launch ramp in Kalaeloa Harbor. Ko Olina Companies will contribute to the cost of said boat ramp;

2) Within 6 months of the approval of this boat ramp

access plan, Ko Olina Companies will provide a status report to DPP regarding the Kalaeloa Harbor boat ramp;

3) For the interim period, the Ko Olina boat ramp will be open to the public from sunrise to sunset;

4) For the interim period, boaters without insurance will be required to execute an indemnity and waiver of liability;

5) For the interim period, there will be no $25 annual fee for licensing;

6) At such time that the substitute boat launch ramp is constructed and opened to the public, Ko Olina Companies shall have the right to permanently close its boat ramp or limit its use to resort guests.

57. On June 15, 2000, DPP responded to Petitioner's June 1, 2000, letter and accepted the six modifications stated in Petitioner's June 1, 2000, letter as the remaining portion of the Ko Olina PAMP, and indicated that Petitioner may submit building permit plans for the Ko Olina Clubhouse.

58. Having received approval from the DPP for the Ko Olina PAMP, Petitioner began formal discussions with The Phoenician, LLC ("Phoenician"), in constructing a public boat launch ramp at Kalaeloa Harbor. Kalaeloa Harbor is not part of Ko Olina.

59. By letter dated September 18, 2002, the DOT stated that it had no objections to allow the general public to use the boat ramp, subject to conditions that would be incorporated into Phoenician's lease for the area designated for the proposed

boat ramp and haul-out slip and to the DOT's review and approval of the proposed construction plans of the boat ramp and haul-out slip.

60. On September 30, 2004, Phoenician and Petitioner and West Honolulu Attractions, LLC (collectively "KOD"), entered into that certain Agreement for Use of Facility whereby Phoenician granted to KOD the non-exclusive privilege of using the parking (not less than 12 stalls) and boat launch ramp facilities of Phoenician located within Phoenician's small boat repair yard at the Kalaeloa Deep Draft Harbor ("Facility").

61. The non-exclusive privilege granted by Phoenician to KOD extends to the Ko Olina Resort & Marina association members, residents, and to those members of the public granted the right and/or privilege of access and use of Ko Olina's small boat marina, parking, and boat launch ramp facility located at the resort, which was operated in accordance with the PAMP for Ko Olina, dated April 12, 2000, which was attached to the Agreement for Use of Facility.

62. Phoenician acknowledges in the Agreement for Use of Facility that the Facility shall be a public boat ramp, open 24 hours a day, seven days a week, and agrees to operate the Facility in such a manner.

63. KOD agreed to pay to Phoenician the sum of $455,150 in exchange for the installation of the boat ramp at Phoenician's site and the privilege granted to KOD and the public by Phoenician to use the ramp.

64. On September 30, 2004, KOD's affiliate paid to Phoenician the sum of $227,575.

65. In February 2005, construction of the Kalaeloa Harbor public boat launch ramp was completed and opened to the public.

66. The Kalaeloa Ramp is not part of Ko Olina.

67. Between Wai`anae Harbor and Sand Island, a distance of approximately 25 miles, the Kalaeloa Ramp (and previously the Marina Ramp) is the only boat launch ramp available to the public.

68. Currently, the public must pay $125 per year to use the Kalaeloa Ramp.

69. The Agreement for Use of Facility between Petitioner and Phoenician, which lasts for 25 years, allows Phoenician to charge and collect fees from the public for the use of the Kalaeloa Ramp. There is no limit on the amount that may be charged.

70. The Agreement for Use of Facility places no limitation on Phoenician's ability to preempt the use of the Kalaeloa Ramp for haul-out activities.

71. In or around March 2005, the Ko Olina Marina Ramp and boat parking facility were closed to the general public.

72. In or around March 2005, the Ko Olina Marina Ramp was rendered inoperable through the partial demolition of the boat ramp approach. At this time, the

Ko Olina Marina does not have a boat launch ramp that is open to the public.

73. On April 7, 2005, Petitioner transmitted the installment payment of $115,000 to Phoenician with the understanding that final payment would be made upon the satisfaction of three conditions: 1) the ramp shall remain open in accordance with the Agreement for Use of Facility; 2) Phoenician will complete construction of the boat ramp; and 3) Phoenician shall provide Petitioner with an executed lease with the State that allows use of the ramp by the public as outlined in the Agreement for Use of Facility.

74. On June 7, 2005, Harbors Division confirmed with DPP that due to mitigating circumstances there is a delay of the completion of the lease for easement to permit Phoenician to operate a boat ramp from private lands adjoining the Kalaeloa Harbor.

75. Harbors Division further confirmed that Phoenician has since undertaken and completed construction of the facility and established operational procedures for the use of the ramp that are acceptable to the DOT, and that in recognition of these circumstances and knowing that the delay in completion of the lease was not solely due to the applicant, the DOT granted their use of the easement.

76. Petitioner at no time during the relocation of the marina boat ramp process informed the Commission of that fact.

PRESENT STATE OF KALAELOA RAMP

77. Boaters face several problems with the existing Kalaeloa Ramp, including: water surges of approximately eight inches; high walls unlike most ramps; unprotected concrete walls without adequate bumpers; lack of proper railing; a ramp that is not properly sloped; signage indicating "private boat launch ramp"; excessive limu (algae) growth on the ramp; and poor construction and/or design with holes, depressions, and broken and patched concrete.

78. Petitioner has proposed a number of improvements to the Kalaeloa Ramp to address safety and access concerns, including a) adjusting the boat ramp slope to 15 percent; b) meeting ADA requirements relative to the boarding dock and the path to the dock; c) angling the seaward end of the boarding dock to 45 degrees; d) raising the boarding dock; e) installing "bull rails" on the boarding dock; f) including a "rough broom" or non-skid walking surface on the boarding dock; and g) including sharp herring-bone grooves on the ramp.

79. The construction costs for the ramp are estimated to be $250,000.

80. The construction costs for the loading dock are estimated to be $75,000.

81. The construction timeframe from notice to proceed to completion is estimated to take approximately four months and the actual construction could be done in 12 consecutive days.

82. The boarding dock could be constructed first and independent of the ramp.

83. The timeframe to obtain the required permits to construct the proposed improvements is estimated to range from eight months to approximately a year and a half.

84. An interim or quicker solution of just constructing the boarding dock within the canal could be accomplished within five days.

85. The Army Corps of Engineers would not require all the other relevant permits such as the Section 10 Rivers and Harbors Act Permit and the Clean Water Act Permit for the boarding dock as the temporary solution, but the other permits would be required for the permanent solution of constructing the ramp.

86. Petitioner's proposed improvements to the Kalaeloa Ramp were reviewed by the Harbors Division, DOT, and the Division of Boating and Ocean Recreation, Department of Land and Natural Resources. There are several revisions that would improve the usability, durability, and the safety of the Kalaeloa Ramp, including changes to the ramp slope, toe elevation, plastic fender, rip rap, grouting, bull rails, lighting, materials used, and loading dock ramp elevation.

87. If necessary to do so, Petitioner would take approximately six months to select a location for the ramp inside the Marina and would be willing to appear before the Commission to report on its progress.

88. Although there have been objections and concerns raised by the public regarding the location and condition of the alternative boat launch ramp site at Kalaeloa, Petitioner has made good faith attempts to address those concerns and to act in compliance with the Decision and Order and its amendments.

RULING ON PROPOSED FINDINGS OF FACT

Any of the proposed findings of fact submitted by Petitioner or the other parties to this proceeding not already ruled upon by the Commission by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

Any conclusion of law improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction to consider and issue Declaratory Orders pursuant to HRS §91-8 and HAR §§15-15-98 through 104, which authorize the Commission to issue declaratory rulings. HAR §15-15-98 states in relevant part:

> "(a) ...the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission.
>
> (b) Notwithstanding the other provision of this subchapter, the commission, on its own motion or upon request but without notice of hearing, may issue a declaratory order to terminate a controversy or to remove uncertainty."

2. The representations and conditions in the Decision and Order and the Amended Decision and Order run with the land pursuant to HRS §205-4(g).

3. As the current owner of the Property, Petitioner is bound by the representations and conditions in the Decision and Order and Amended Decision and Order.

4. The Commission did not amend the Decision and Order and Amended Decision and Order so as to release Petitioner from the representations of its predecessor-in-interest, WBE, that there will be a boat launch ramp in the Ko Olina Marina that is open to the public.

5. Condition Number 13 of the Amended Decision and Order requires Petitioner to develop the Property in substantial compliance with the representations made to the Commission. Failure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification.

6. The conditions of CUP, Type 1, File Number 95/CUP1-82 are independent of the conditions imposed by this Commission in its Decision and Order and Amended Decision and Order.

7. Any decisions by the City and County of Honolulu on CUP, Type 1, File Number 95/CUP1-82 are independent of and not binding upon this Commission regarding the Decision and Order and Amended Decision and Order.

DECISION AND ORDER

1. This Commission finds and declares that Petitioner is not in substantial compliance with the representations in the Decision and Order and the Amended Decision and Order because there is no boat launch ramp in the Ko Olina Resort Marina. The installation of the proposed improvements to the existing Kalaeloa Ramp does not constitute substantial compliance with the representations made to this Commission because the ramp is not in the marina.

2. Petitioner must construct a boat launch ramp inside the Ko Olina Marina that is open to the public to be in substantial compliance with the representations in the Decision and Order and Amended Decision and Order.

3. Petitioner shall appear before this Commission within six months from the date of this Findings Of Fact, Conclusions Of Law, And Decision And Order providing (i) a schedule and timeline describing any public outreach efforts it has made or will make in regard to the boat launch ramp in the marina; (ii) the proposed location of the ramp inside the marina; (iii) the regulatory permitting and construction requirements for the ramp; and (iv) a schedule and timeline for the opening of the ramp to the public.

4. Petitioner shall file a written report describing the items listed in paragraph 3 above not less than 30 days before the Commission hearing.

ABSENT

THOMAS CONTRADES
Commissioner

LISA M. JUDGE
Commissioner

NORMAND LEZY
Commissioner

NICHOLAS W. TEVES, JR.
Commissioner

ABSENT

REUBEN S.F. WONG
Commissioner

Filed and effective on: November 7, 2008

Certified by:

ORLANDO DAVIDSON
Executive Officer

ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 6th day of November, 2008. This ORDER and its ADOPTION shall take effect upon the date this ORDER is certified and filed by this Commission.

Done at Honolulu, Hawai'i, this 6th day of November, 2008, per motion on Nov. 8, 2008.

APPROVED AS TO FORM

Deputy Attorney General

LAND USE COMMISSION
STATE OF HAWAI'I

DUANE KANUHA
Chairperson and Commissioner

ABSENT
RANSOM PILTZ
Vice-Chairperson and Commissioner

VLADIMIR PAUL DEVENS
Vice-Chairperson and Commissioner

ABSENT
KYLE CHOCK
Commissioner

BEFORE THE LAND USE COMMISSION

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_____	)	

CERTIFICATE OF SERVICE

I hereby certify that a certified copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

DEL. ABBEY MAYER, Director
Office of Planning
P. O. Box 2359
Honolulu, Hawai'i 96804-2359

BRYAN C. YEE, Esq.
Deputy Attorney General
425 Queen Street
Honolulu, Hawai'i 96813

Attorney for State Office of Planning

WYETH M. MATSUBARA ESQ.
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DATED: Honolulu, Hawai`i, Nov. 7, 2008

ORLANDO DAVIDSON
Executive Officer