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LAND USE COMMISSION
STATE OF HAWAII

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

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|--|---|---------------------------------------|
| In the Matter of the Petition |) | DOCKET NO. DR08-36 |
| |) | |
| of |) | OFFICE OF PLANNING'S RESPONSE |
| |) | TO PETITIONER'S MOTION FOR |
| KO OLINA DEVELOPMENT, LLC |) | RECONSIDERATION OF ORDER |
| |) | GRANTING MOTION TO DEFER |
| To Amend the Agricultural Land Use District |) | ACTION OF PETITIONER'S STATUS |
| Boundary into the Urban Land Use District |) | REPORT FILED NOVEMBER 5, 2015; |
| for approximately 642 acres at Honouliuli, |) | |
| Ewa, Oahu, Tax Map Keys: 9-1-14: Portion |) | CERTIFICATE OF SERVICE |
| of Parcel 2; 9-1-15: 3, 6, 7, 10, Portion of |) | |
| Parcel 4; 9-2-03: 3, 7, Portion of 2 |) | |
| _____ |) | |

OFFICE OF PLANNING'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DEFER ACTION OF PETITIONER'S STATUS REPORT FILED NOVEMBER 5, 2015

The Office of Planning ("OP") recommends that Ko Olina Development, LLC's Motion for Reconsideration of Order Granting Motion to Defer Action of Petitioner's Status Report Filed November 5, 2015 ("Motion for Reconsideration") be DENIED.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND.

On November 7, 2008, the Land Use Commission (“Commission”) issued a Decision and Order (“Declaratory Order”) finding that compliance with the Findings of Fact, Conclusions of Law, and Decision and Order filed on September 12, 1985 required the construction of a boat ramp within the Ko Olina Marina open to the public. The Declaratory Order also required a status hearing within six months to describe the location, process, and schedule for designing and constructing the public boat ramp, and a written status report not less than thirty days before the status hearing. On April 14, 2009, Petitioner stated that it intended to construct a public boat ramp in conformance with the Declaratory Order, and described the process it would follow. See Ko Olina Development, LLC’s Status Report filed on April 14, 2009. For a variety of reasons, construction was delayed. On January 29, 2013, the Commission also required that the Petitioner submit supplemental status reports every three months. No appeals were filed from any of these decisions. Twenty-one status reports have been filed so far.

On July 23, 2015, the Petitioner reported to the Commission by letter that a boat ramp had been constructed within the Ko Olina Marina and was open to the public. On October 16, 2015, the Commission held a hearing to receive a status report from the Petitioner, and for other possible action. At the status hearing, OP agreed with Petitioner that this matter should be concluded. We acknowledged the public concerns and agreed that access to the ocean for recreational use is an important value. We argued, however, that these concerns were at a level of detail best addressed at the county level. Consequently, OP recommended that the matter be concluded and the quarterly reporting requirement be terminated.

The Commission disagreed and instead voted to ask that a list of questions be submitted to Petitioner and other relevant parties; that its staff and deputy attorney general prepare a

background summary of this matter; that the Petitioner be requested to engage in discussions with the public boaters; and that further action on the case be deferred. A written order was filed on November 5, 2015 (the November 5, 2015 Order).

On November 12, 2015, the Petitioner filed its Motion for Reconsideration, making two arguments: (1) The Commission has no jurisdiction to enter further orders in this docket; and (2) the County is the proper agency to enforce LUC conditions in this case.

II. ARGUMENT.

OP believes the Motion for Reconsideration is incorrect as the LUC acted within its jurisdiction. The Motion for Reconsideration may also be anticipating enforcement action from the LUC which has not yet occurred, and Petitioner has suffered no prejudice from the November 5, 2015 Order.¹

A. The November 5, 2015 Order was Within the Commission's Jurisdiction to Issue.

Petitioner notes that any declaratory order must be issued within 120 days after the hearing on a declaratory petition. Section 15-15-100(b), Hawaii Administrative Rules ("HAR"). Because the November 5, 2015 Order was issued more than 120 days after the close of the declaratory hearings on August 8, 2008, Petitioner argues that the LUC has no jurisdiction to take any further action within this docket.

OP notes that the November 5, 2015 Order merely deferred action on Petitioner's status report and set forth a process by which the Commission could receive additional information. The Executive Director is ordered to prepare a list of questions for the parties and a historical summary on this case. The Petitioner is requested but not required to meet with boaters, and the Commission deferred any further action (such as terminating the status report requirement). All

¹Although OP recommends that the Motion for Reconsideration be denied, it has not changed its position expressed at the October 16, 2015 status hearing.

of these items are consistent with the Commission's efforts to be kept informed dating back to 2008.

The Commission's jurisdiction is not limited by HAR § 15-15-100(b) which sets a deadline by which the declaratory order must be issued, but does not limit the jurisdiction of the Commission over the Petitioner. The Commission has not issued a new declaratory order. It has simply required its staff to ask for more information and deferred action on the Petitioner's status report requirement.

Furthermore, HAR § 15-15-100(b) does not inhibit the LUC's jurisdiction over this case through the underlying district boundary amendment proceeding. The LUC's long-standing practice has included status conferences and status reports long after the initial district boundary amendment proceeding was concluded. Whether required under Docket No. A83-562 or DR08-36, the LUC has jurisdiction to request information from Petitioners as they relate to compliance with LUC orders.

In fact, OP notes that the LUC on January 29, 2013 issued an Order Requiring Supplementary Written Status Report and Follow-up Oral Status Report. Petitioner did not object or file a motion for reconsideration at the time. To the contrary, Petitioner has not only appeared at multiple status hearings, it has also filed at least twenty-one status reports in Docket No. DR08-36.

B. The November 5, 2015 Order is Not an Enforcement Action.

The Motion for Reconsideration also argues that the Commission is not the proper enforcing agency. As discussed above, however, the Motion for Reconsideration merely asks for information and is not a new declaratory order. Contrary to Petitioner's assertions, the Commission has not, at this time, sought to enforce any part of the LUC conditions.

Consequently, Petitioner's argument that the LUC lacks jurisdiction to take enforcement actions against it are irrelevant to the November 5, 2015 Order.

C. Petitioner is not Prejudiced by the November 5, 2015 Order.

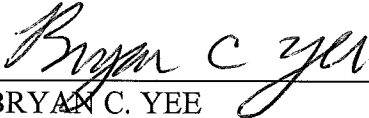
The Petitioner is not prejudiced if the Executive Director submits a list of questions to answer. The Commission has not specifically required that the Petitioner answer the questions. The Petitioner is not prejudiced if the Executive Director and the Commission's attorney prepares a background summary of the case. The Petitioner is not prejudiced by a request to meet with the public boaters given the fact that such a meeting is not required. But even if required, it would be difficult to understand what substantial prejudice could occur by having a meeting. Finally, Petitioner is not prejudiced by the order to defer action. If the Commission simply didn't issue a decision, action in this case would still have been deferred. An order doing the same thing is not prejudicial to Petitioner.

III. CONCLUSION.

For all the aforementioned reasons, OP recommends that the Motion for Reconsideration be denied.

DATED: Honolulu, Hawai'i, November 19, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that due service of a copy of the **OFFICE OF PLANNING'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DEFER ACTION OF PETITIONER'S STATUS REPORT FILED NOVEMBER 5, 2015**, was made by depositing the same with the U. S. mail, postage prepaid, on November 19, 2015, addressed to:

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DATED: Honolulu, Hawai'i, November 19, 2015.



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