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LLC

LAND USE COMMISSION  
STATE OF HAWAII  
2015 NOV 12 A 10: 14

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In The Matter Of The Petition Of	)	Docket No. DR08-36
	)	
KO OLINA DEVELOPMENT, LLC	)	<b>KO OLINA DEVELOPMENT, LLC'S</b>
	)	<b>MOTION FOR RECONSIDERATION</b>
To Amend The Agricultural Land Use	)	<b>OF ORDER GRANTING MOTION TO</b>
District Boundary into the Urban Land	)	<b>DEFER ACTION OF PETITIONER'S</b>
Use District for approximately 642 acres	)	<b>STATUS REPORT FILED NOVEMBER</b>
At Honouliuli, Ewa, Oahu, Tax Map	)	<b>5, 2015; MEMORANDUM IN</b>
Keys: 9-1-14: Portion of Parcel 2; 9-1-15:	)	<b>SUPPORT OF MOTION;</b>
3, 6, 7, 10, Portion of Parcel 4; 9-2-03: 3,	)	<b>CERTIFICATE OF SERVICE</b>
7, Portion of 2	)	
_____	)	

**KO OLINA DEVELOPMENT, LLC'S MOTION FOR  
RECONSIDERATION OF ORDER GRANTING MOTION TO DEFER  
ACTION OF PETITIONER'S STATUS REPORT FILED NOVEMBER 5, 2015**

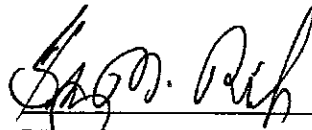
Comes now, KO OLINA DEVELOPMENT, LLC, by and through its attorneys,  
MATSUBARA – KOTAKE, and hereby submits its Motion for Reconsideration of Order  
Granting Motion to Defer Action of Petitioner's Status Report filed November 5, 2015 for

an order to vacating the Order Granting Motion to Defer Action of Petitioner's Status Report filed November 5, 2015.

This motion is made pursuant to Rules § 15-15-70 and § 15-15-84 of the *Hawai'i Administrative Rules*, and is supported by the attached memorandum in support of motion, and the materials and files herein.

Dated: Honolulu, Hawai'i November 12, 2015.

OF COUNSEL:  
MATSUBARA – KOTAKE  
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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Petition Of ) Docket No. DR08-36  
)  
KO OLINA DEVELOPMENT, LLC ) **MEMORANDUM IN SUPPORT OF**  
) **MOTION**  
To Amend The Agricultural Land Use )  
District Boundary into the Urban Land )  
Use District for approximately 642 acres )  
At Honouliuli, Ewa, Oahu, Tax Map )  
Keys: 9-1-14: Portion of Parcel 2; 9-1-15: )  
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7, Portion of 2 )  
\_\_\_\_\_)

**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION**

KO OLINA DEVELOPMENT, LLC ("Petitioner") seeks reconsideration of the Order Granting Motion to Defer Action of Petitioner's Status Report ("Order Granting Motion to Defer Action") filed on November 5, 2015 and requests an order vacating the Order Granting Motion to Defer Action based on the following grounds:

1. The rules of the Land Use Commission, State of Hawaii ("Commission") provides a specific timeline for the Commission's processing of petitions for declaratory order. In this docket, the Commission decided to set the Petition for Declaratory Order in DR08-36 ("Petition") for hearing. As a result, the Commission was required to issue its decision within 120 days after the close of the hearing. The Order Granting Motion to

Defer Action falls outside of the 120 day period and was therefore issued without jurisdiction.

2. HRS § 205-12 grants the power to enforce the land use districts to the counties, and therefore the Department of Planning and Permitting, City and County of Honolulu (“DPP”) is the appropriate enforcement agency with respect to the Commission’s orders relating to Oahu and not the Commission.

## II. BACKGROUND

On March 24, 2008, KO OLINA DEVELOPMENT, LLC (“Petitioner”) filed its Petition for Declaratory Order in DR08-36 (“Petition”) 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 dated September 12, 1985.

On June 10, 2008, the Commission filed its order setting the Petition for contested case hearing.

A contested case hearing was held on the Petition on July 10, 2008, August 7, 2008, and August 8, 2008. The evidentiary hearing was closed on August 8, 2008.

On November 7, 2008, the Commission filed its Findings of Fact, Conclusions of Law, and Decision and Order in DR08-36 (“November 7, 2008 D&O”), and declared, *inter*

*alia*, that Petitioner must construct a boat launch ramp inside the Ko Olina Marina that is open to the public.

On October 16, 2015, the Commission held a status report meeting on the completion and opening of the boat launching ramp for public use at the Ko Olina Marina. At the meeting, Petitioner confirmed that it satisfied the November 7, 2008 D&O by: 1) completion of construction of a new boat launch ramp inside the Ko Olina Marina; and 2) that the new boat launch ramp is open to the public.

Petitioner's Status Report was submitted to inform the Commission that what had been ordered had been completed. There is no Commission action required for the Status Report. The Status Report is merely informational as to the compliance thereunder.

On November 5, 2015, the Commission filed its Order Granting Motion to Defer Action of Petitioner's Status Report ("Order Granting Motion to Defer Action"). The Order Granting Motion to Defer Action provides the following order:

"Action on Petitioner's status report on this matter is DEFERRED for three months. During the interim, (1) the Commission's Executive Officer shall receive questions from the Commissioners that could be addressed in writing by Petitioner and other relevant parties, including DPP, prior to the next scheduled meeting on the matter; (2) the Commission's staff and the Commission's deputy attorney general shall provide a summary on the historical background on this matter to this Commission; and (3) Petitioner and the fishermen and public boaters in the community are requested to engage in further discussion to determine what greater understanding could be reached among the parties in regard to the use of the Ko Olina Boat Ramp."

### III. DISCUSSION

#### A. The Commission is Without Jurisdiction to Enter Further Orders in this Docket

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The Commission's authority to issue declaratory orders is found at § 91-8 of the *Hawai'i Revised Statutes* ("HRS"), and Subchapter 14 of the Commission's rules at § 15-15-98, *et seq.* of the *Hawai'i Administrative Rules* ("HAR"), where the Commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the Commission to a specific factual situation.

Here, the Petition requested the Commission's determination as to 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 in Docket No. A83-562.

The procedural framework for petitions for declaratory order before the Commission is that once a petition for declaratory order is filed, the Commission, within ninety days after submission of the petition for declaratory order, shall either deny the petition, issue a declaratory order, or set the petition for hearing. HAR § 15-15-100(a).

In this docket, the Commission acted, within 90 days of the submission of the Petition for declaratory order, to set the Petition for hearing as set forth in the Commission's order filed on June 10, 2015.

HAR § 15-15-100(b) provides that “[i]f the matter is set for hearing, the commission shall render its findings of fact and decision within one hundred and twenty days after the close of the hearing...”

The Commission’s November 7, 2008 D&O was filed within 120 days after the close of the hearing on August 8, 2008, which decided the applicability of the Decision and Order in Docket No. A83-562 to a specific factual situation. *See* HAR § 15-15-98(a).

The November 7, 2008 D&O, therefore, concluded the Commission’s duties in connection with the Petition. The rules do not provide the Commission with authority to take any action on a petition for declaratory order beyond the 120 day period following the close of the hearing.

Because the Order Granting Motion to Defer Action was issued after the 120 day period following the close of the hearing on August 8, 2008, the Order Granting Motion to Defer Action was made without jurisdiction in this docket and should be vacated.

**B. The County is the Proper Enforcement Agency under HRS § 205-12 and not the Commission**

The Commission is granted the authority to issue declaratory orders under chapter 91 of the *Hawai`i Revised Statutes* and under the Commission’s rules. The Commission, however, is not expressly authorized to issue cease and desist orders and is without enforcement powers. *See Lanai Co., Inc. v. Land Use Commission*, 105 Hawai`i 296, 318, 97 P.2d 372, 394 (2004).

HRS § 205-12 provides the following:

**“Enforcement.** The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.”

In *DW Aina Lea Development, LLC v. Bridge Aina Lea, LLC*, 134 Hawai‘i 187, 211, 339 P.3d 685, 709 (2014), the Court, while citing to *Lanai Co., Inc.*, stated “looking to the express language of HRS § 205-12, it is clear and unambiguous that enforcement power resides with the appropriate officer or agency charged with the administration or county zoning laws, name the counties, and not the LUC.”

Order Granting Motion to Defer Action is an order that seeks to enforce the Commission’s November 7, 2008 D&O, and is inconsistent with chapter 205 and the applicable case law. The Department of Planning and Permitting, City and County of Honolulu (“DPP”) is the appropriate enforcement agency pursuant to HRS § 205-12.

Furthermore, the division of responsibilities provided for in HRS § 205-12 makes practical sense.

The DPP is a planning and permitting agency. They are staffed with inspectors, planners, support staff and administrators. They have access to the Department of Corporation Counsel and its investigators. The DPP has practices and procedures for issuing notices of violations and for issuing monetary fines. The DPP is an enforcement agency.



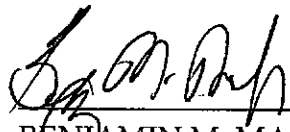
The Order Granting Motion to Defer Action should be vacated because it is an act of enforcement that is beyond the Commission's statutory powers.

**IV. CONCLUSION**

Petitioner respectfully requests that its motion for reconsideration be granted for the following reasons: 1) the Commission's rules do not allow for any orders beyond the 120 day period following the close of the hearing; and 2) the County is the appropriate enforcement agency and not the Commission under HRS § 205-12.

Dated: Honolulu, Hawai'i November 12, 2015.

OF COUNSEL:  
MATSUBARA – KOTAKE  
A Law Corporation

  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a file-marked copy of the foregoing document was duly served upon the parties listed below **VIA HAND DELIVERY** on November 12, 2015:

LEO R. ASUNCION, JR., AICP, Acting Director  
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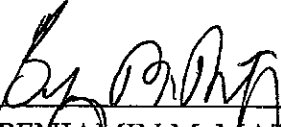
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Dated: Honolulu, Hawai'i November 12, 2015.

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