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BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

To Amend the Agricultural Land Use District Boundary to Reclassify Approximately 236 Acres Located at Kahuku, Koolauloa, County of Honolulu, State of Hawai`i, to the Urban Use District	Docket No. A85-595 **DEFEND OAHU COALITION'S REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE WHY THE BOUNDARY RECLASSIFICATION SHOULD NOT BE REVOKED FOR FAILURE TO PERFORM CONDITIONS, REPRESENTATIONS AND COMMITMENTS; CERTIFICATE OF SERVICE**

DEFEND OAHU COALITION'S REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE WHY THE BOUNDARY RECLASSIFICATION SHOULD NOT BE REVOKED FOR FAILURE TO PERFORM CONDITIONS, REPRESENTATIONS AND COMMITMENTS

Movant DEFEND OAHU COALITION ("Defend Oahu Coalition") respectfully submits its Reply Memorandum in Support of its Renewed Motion for an Order To Show Cause Why the Kuilima Development Company Boundary Reclassification Should Not Be Revoked

For Failure To Perform Conditions, Representations and Commitments, responding to (1) TURTLE BAY RESORT's Memorandum in Opposition, filed August 22, 2013 ("TBR's Opposition") and (2) OFFICE OF PLANNING's Response, filed August 22, 2013 ("OP's Response").

I. No Dispute That Conditions 1, 2, 3 and 7 And Incremental Districting Schedule Have Not Been Met.

There is no dispute that Conditions 1 (full service hotels), 2 (affordable housing), 3 (highway improvements) and 7 (public parks and access), imposed by the Land Use Commission ("LUC") in 1986, have still not been met by the developer, nearly 30 years later. OP admits this: "Conditions 1, 2, 3 and 7 have not yet been met." OP Response at 7. Even TBR admits this. TBR Opposition at 13-15 ("TBR intends to comply with Condition [1, 2, 3 and 7]") (emphasis added).

Nor is there any dispute that the incremental districting schedule contained at FOF 60 has been breached. "Petitioner proposes to complete substantial portions of the infrastructure as described in Finding of Fact No. 17 as well as 315 of the proposed 1,000 resort condominium units within five years of Commission's approval [i.e. 1991] and to complete the entire Resort development by 1996." D&O at FOF 60, p. 21. This was a schedule required by the rules; it is not an unenforceable representation or aspirational goal.

TBR offers two excuses for the near 30 year failure to perform these conditions and comply with the schedule. First, TBR incorrectly asserts the D&O does not contain a performance deadline so TBR has forever to comply. Second, TBR incredibly suggests that it need not meet representations made to the LUC if the LUC didn't specifically require it. These arguments defy both logic and the law.

A. **Timing Is Imposed By Rule.**

In this case, timing and scheduling are imposed by the LUC's regulations and exist independent of the four corners of the D&O.

The LUC regulations in effect when the D&O was issued contain express time limitations:

> Performance Time. Petitioners requesting amendments to District Boundaries shall make substantial progress in the development of the area redistricted to the new use approved within a period specified by the Commission not to exceed five (5) years from the date of approval of the boundary change.

Haw. Admin. R. 6-3 (emphasis added). While the LUC could impose shorter deadlines, the rule makes clear that five years is the maximum time limit for substantial progress to be made. There was no need for the LUC to restate what the regulations already express.

Furthermore, the original D&O was based upon the incremental districting rule and contains the required schedule at FOF 60.[1] The rule states:

> INCREMENTAL DISTRICTING. (1) Petitioners submitting applications for redistricting to urban shall also submit proof that development of the premises in accordance with the demonstrated need therefor will be accomplished within 5 years from the date of Commission approval. In the event full urban development cannot reasonably be completed within such period, the petitioner shall also submit a schedule for development of the total of such project in increments, each such increment to be completed within no more than a 5-year period.

Haw. Admin. R. 6-2(1) (emphasis added). Thus, to comply with the rule, the developer committed to completing infrastructure and 315 condominium units on the premises by 1991 (five years from approval) and all of the resort development by 1996 (ten years from approval).

[1] "INCREMENTAL DISTRICTING 60. Petitioner proposes to complete substantial portions of the infrastructure as described in Finding of Fact No. 17 as well as 315 of the proposed 1,000 resort condominium units within five years of Commission's approval and to complete the entire Resort development by 1996." D&O at FOF 60, p.21.

See D&O at FOF 60, p.21. Clearly, the developer was bound by the rules and its representations to comply with the incremental districting requirements and schedule. To suggest that TBR is free from any performance deadlines is to ignore the rules that the LUC and the developer were bound by, and to ignore the developer's incremental schedule which was required under those rules.

Because the rules under which the boundary amendment was sought contain explicit deadlines and schedules, TBR's reliance on *Lanai Co., Inc. v. Land Use Comm'n* is misplaced. In the *Lanai Co.* case, there were no underlying LUC regulations pertaining to aquifers and water usage; rather those conditions were only contained in the D&O. In contrast to *Lanai Co.*, LUC Regulations 6-2 and 6-3 expressly prescribed deadlines and schedules and the required incremental districting schedule is contained at FOF 60. *Lanai Co.* is completely inapposite to the instant case.

Furthermore, TBR has already lost the argument that the absence of a specific deadline for completion creates an entitlement in perpetuity:

> [U]nder Kuilima's and the City's interpretation of the applicable rules and circumstances, because no specific deadline was established for the project's completion [by the City], the 1985 EIS would remain valid in perpetuity and no SEIS could ever be required, so long as no substantive changes to the design of the project were made.

Unite Here! Local 5 v. Honolulu, 120 Hawai'i 457, 472 (Hawai'i App. 2009) (Nakamura, J. dissenting), *reversed*, 123 Hawai'i 150, 177 (2010) ("We agree. For an EIS to meet its intended purpose, it must assess a particular project at a given location based on an explicit or implicit time frame."). Both Judge Nakamura and the Hawaii Supreme Court recognized that approvals are not valid in perpetuity and project timing and deadlines cannot be ignored.

Similarly, in *Konkel v. City of Delafield*, 229 N.W.2d 606 (Wis. 1975), the plaintiff argued that an ordinance was vague and unenforceable because "there is no 'time period at the end of which failure or satisfaction' of the specific conditions can be ascertained." *Id.* at 579. Rejecting this argument, the Wisconsin Supreme Court stated "at any time that the council concludes that a reasonable time has passed without meeting the conditions, the ordinance can be repealed. The state of limbo can be terminated at will of the legislative body." *Id.*[2]

In fact, earlier in this case, OP took the exact same position as the Wisconsin Supreme Court, urging the LUC to modify the D&O and to impose additional deadlines: "In this case, a clarification of the prior decision and order to impose a reasonable time period in which the conditions must be completed would not result in manifest injustice ... The LUC may modify ... any of the conditions imposed or modify the decision and order at any time for good cause." OP's Response To Kuilima Resort Company's Response [to DOC's original motion], filed May 23, 2008.

B. <u>A Petitioner Cannot Misrepresent To The LUC.</u>

TBR suggests that because "the 1986 D&O does not contain the condition that requires the Petitioner to substantially comply with representations to the Commission," TBR is free to ignore the representations. TBR Opposition at 11. This argument flies in the face of the LUC regulations.

The LUC regulations contain explicit authority for the LUC to enforce a petitioners' representations through reclassification:

> <u>PERFORMANCE TIME</u>. Petitioners requesting amendments to District Boundaries shall make substantial progress in the development of the area redistricted to the new use approved

[2] The doctrines of vested rights and equitable estoppel exist as a check on the government's right to change the law, but those constitutional doctrines are not applied by the LUC.

> within a period specified by the Commission not to exceed five (5) years. The Commission may act to reclassify the land to an appropriate District classification upon failure to perform within the specified period **according to representations** made to the Commission; provided that the Commission, in seeking such a boundary reclassification, complies with the requirements of Section 205-4, HRS.

Haw. Admin R. 6-3 (emphasis added). *See also* Haw. Admin R. 7-2 ("The approval granted by the Commission on a petition for boundary change may be reversed if the parties bound by the conditions attached to the approval fail to comply with said conditions."); Haw. Admin. R. 7-4 ("... upon its own motion, the Land Use Commission may act to modify or delete any of the conditions imposed.").[3] Thus, it is clear that the LUC had the authority in 1986, and today, to hold a petitioner to its representations and to reclassify the land upon the failure to perform those representations.

The fact that the applicable LUC regulations specifically authorize the LUC to reclassify upon the failure to perform representations (Regulation 6-3) or conditions (Regulation 7-2) demonstrates the fallacy of TBR's suggestion that LUC cannot reclassify or modify because the D&O doesn't contain a condition stating that the property can be reclassified. TBR Opposition at 12. There is no need for a D&O to restate the existing law and regulatory framework under which the boundary petition was sought and granted.

II. "Standing" Is A Red Herring.

Both TBR and OP question the movant's right to bring this motion. This issue, however, is a red herring because the LUC has the authority and responsibility on its own to ensure compliance with its decisions and orders.

[3] These procedures are substantially similar to the current statute and rules, which provide for an order to show cause and reclassification upon the failure to perform conditions or representations. *See* Haw. Rev. Stat. §205-4(g) and Haw. Admin. R. 15-15-93 and 15-15-94.

"Whenever the Commission shall have reason to believe there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve ... an order to show cause." Haw. Admin. R. §15-15-93(b). Similarly, "For good cause shown, the commission may act to modify or delete any of the conditions imposed or modify the commission's order." Haw. Admin. R.§15-15-94(b). Because the LUC can initiate proceedings on its own to ensure compliance, it is simply irrelevant whether DOC has "standing" to bring the instant motion. The LUC can reach the merits on its own.

Standing is also a red-herring because DOC meets the "interested person" requirement under 15-15-93 and a hearing is required on the motion pursuant to Haw. Admin. R. 15-15-70 ("If a hearing is requested, the executive officer shall set a date and time for hearing on the motion."). As indicated in the Renewed Motion and in the original Motion, and the declarations submitted therewith, DOC's members live, work, travel and play on and around the Turtle Bay property. This easily meets the relatively low standard to intervene as a "party", which the Hawaii Supreme Court has frequently held applicable to groups with environmental and aesthetic interests that are less than DOC's members, and it more than meets the lesser standard of "interested person."[4] In prior OSC cases before the LUC, similar groups have been heard. *See, e.g., Aha Hui Malama O Kanaikapupu v. Land Use Comm'n.*, 111 Hawai'i 124 (2006) (association formed to protect archeological sites on properties 200-300 feet from the petition area filed motion for order to show cause); *Lanai, Co., Inc. v. Land Use Comm'n*, 105 Hawai'i 296 (2005) (order to show cause involving organization Lanaians for Sensible Growth).

[4] Although the rules do not define "interested person", the definition of "person" as any association, individual, corporation, firm, partnership, society, etc., confirms that it is a broad and inclusive category. Haw. Admin. R. 15-15-3.

In short, DOC has filed the motion allowed by Section 93 and has requested a hearing as provided in Section 70, and DOC has stated its interests on the project site and in the area surrounding it, the LUC must conduct a hearing. And in any event, if the LUC has reason to believe that conditions or representations have not been met, then it must issue and order to show cause why the property should not be reclassified. Given the admissions by TBR and OP that conditions, representations and the incremental development schedule have not been satisfied, an order to show cause is required. Let TBR come forward to explain why it has not completed the project according to its schedule.

III. Conclusion.

Because TBR has admittedly failed to satisfy the representations it made to this Commission and the North Shore community, the conditions imposed in the D&O, and the incremental development schedule and regulations concerning timing of performance, Defend Oahu Coalition respectfully requests that this Commission issue an Order to Show Cause.

DATED: Honolulu, Hawaii, September 12, 2013.

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STATE OF HAWAII

To Amend the Agricultural Land Use District Boundary to Reclassify Approximately 236 Acres Located at Kahuku, Koolauloa, County of Honolulu, State of Hawai`i, to the Urban Use District	Docket No. A85-595 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the foregoing document was duly served upon the following parties by delivering same to their last known address as follows:

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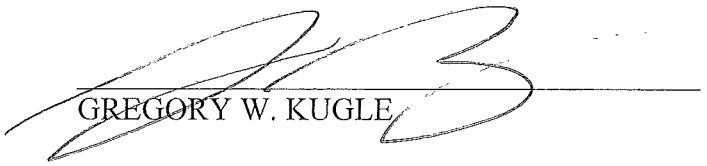

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