

OF COUNSEL:  
MATSUBARA – KOTAKE  
A Law Corporation

BENJAMIN M. MATSUBARA, #993-0  
CURTIS T. TABATA, #5607-0  
WYETH M. MATSUBARA, #6935-0  
888 Mililani Street, Eighth Floor  
Hónolulu, Hawai`i 96813  
Telephone: 526-9566

Attorneys for Respondent  
TURTLE BAY RESORT COMPANY, LLC

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

LAND USE COMMISSION  
STATE OF HAWAII  
2013 AUG 22 P 2:19

To Amend the Agricultural Land Use	)	Docket No. A85-595
District Boundary to Reclassify	)	
Approximately 236 Acres Located at	)	RESPONDENT TURTLE BAY RESORT
Kahuku, Koolauloa, County of Honolulu,	)	COMPANY, LLC'S MEMORANDUM IN
Honolulu, State of Hawai`i, to the	)	OPPOSITION TO DEFEND OAHU
Urban Use District	)	COALITION'S 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 FILED HEREIN
	)	ON JUNE 18, 2013; AFFIDAVIT OF
	)	SCOTT McCORMACK AND
	)	CERTIFICATE OF SERVICE
	)	

**RESPONDENT TURTLE BAY RESORT COMPANY, LLC'S  
MEMORANDUM IN OPPOSITION TO DEFEND OAHU COALITION'S  
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 FILED HEREIN ON JUNE 18, 2013**

Comes now, Respondent TURTLE BAY RESORT COMPANY, LLC ("TBR"), as the successor in interest of Kuilima Development Company ("KDC") by and through its attorneys, MATSUBARA – KOTAKE, and hereby submits its Memorandum in Opposition to Defend

Oahu Coalition's Renewed Motion for Issuance of an Order to Show Cause Why Boundary Reclassification Should Not Be Revoked for Failure to Perform Conditions, Representations and Commitments filed herein on June 18, 2013.

**I. INTRODUCTION**

On June 18, 2013, Defend Oahu Coalition ("Coalition") filed its 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 ("Order to Show Cause") with the Land Use Commission ("Commission"). At controversy in this matter is whether Petitioner TBR is in compliance with the Commission's March 27, 1986 Findings of Fact, Conclusions of Law and Decision and Order ("1986 D&O") granting a reclassification of 236 acres of agricultural land to urban. A comparison of the 1986 D&O and more modern district boundary amendment decision and orders reflect how Commission decision and orders have evolved over the last 26 years. Whereas, the Commission's current decision and orders normally include over 20 conditions, the 1986 D&O has only nine conditions.

The Coalition's Motion must be decided on the express language of the 1986 D&O and the specific conditions contained therein.

**II. BACKGROUND**

KDC, filed a Petition for Land Use District Boundary Amendment on June 14, 1985 (the Petition as so amended is referred to as "Petition"), to amend the land use district boundary of approximately 236 acres of land situated at Kahuku, Koolauloa, County of Honolulu, State of Hawai'i Oahu, Tax Map Key Nos.: 5-6-03:37, 43, portion of 40, portion of 41, portion of 42 and portion of 44, 5-7-01: portion of 33, ("Petition Area") from the Agricultural District to the Urban District for resort and golf course uses. In the district boundary reclassification proceedings before the Commission the Petitioner, the Department of Planning and Economic Development for the State of Hawai'i and the Department of General Planning, City and County of Honolulu participated as parties to the Petition. The Commission received no petitions to intervene in the district boundary reclassification proceedings before the Commission. The Coalition was not a party or witness to the district boundary reclassification proceedings before the Commission.

On January 15, 1986 the Commission conducted its Deliberation and Action meeting on Docket No. A85-595 KDC to amend the Agricultural Land Use District Boundary into the Urban

District for approximately 236 acres of land. The Commission, at the Deliberation and Action meeting discussed and deliberated various matters, including but not limited to affordable housing, hotels, incremental development, timing, roadway improvements, water resources, archaeological resources, affordable housing, public access, parks and a sewage treatment plant before Commission vice-chair Frederick Whittemore made a motion recommending approval of the KDC Petition which would be subject to nine (9) conditions which motion to approve was seconded and open to discussion. The Commission's nine conditions, based upon the various matters discussed above, were made clear and were adequately expressed to KDC at the Deliberation and Action meeting.

On March 27, 1986, the Commission filed its Findings of Fact, Conclusions of Law and Decision and Order ("D&O") in Docket No. A85-595 approving reclassification of the Petition area subject to the nine (9) conditions and that the Commission's nine (9) conditions imposed in the D&O clearly expressed and were intended as fair notice and warning to KDC regarding the obligations tied to the Petition Area.

Within the first five (5) years after the D&O was granted the Petitioner's predecessor made substantial progress and expended substantial capital in the entitlement process and actual development of the Petition Area and its required infrastructure, including but not limited to:

1. Drafted, finalized, submitted and received zone change approval from the City Council, City and County of Honolulu;
2. Drafted, finalized, submitted and received approval of the revised Kuilima Resort Urban Design Plan from the Department of Land Utilization, City and County of Honolulu ("DLU");
3. Drafted, finalized, submitted and received approvals for three (3) different Revised Proposed Consolidation and re-subdivision application approvals from the DLU for various areas of the Property;
4. Drafted, finalized, submitted and received tentative approval of a proposed consolidation and re-subdivision application;
5. Design, permitting, construction and completion of a Wastewater Treatment Plant that included capacity to serve the 1,000 resort condominium units, 2,500 hotel units, commercial development, golf course, parks and other miscellaneous development planned for the Property;

6. Design, construction, completion and acceptance by the Board of Water Supply of a 12" water transmission main along Kamehameha Highway from Kuilima Drive to Marconi Road, intended to provide water flow to the Property;

7. Completion of Phase I of the Opana Well Facility (Pump No. 1 and Pump No. 2) and water storage tanks that serves as the initial phase of water source for improvements on the Property and the Kuilima Resort;

8. Secured a Well Construction Permit for Opana Well No. 3 which has been approved by the Department of Land and Natural Resources, State of Hawai'i (DLNR) that is intended to provide for additional water source to service the Property;

9. Addressed D&O condition No. 5 by making improvements to Punaho'olapa Marsh after meeting with the U.S. Fish and Wildlife Service by constructing a water moat adjacent to the Palmer Golf Course to prevent feral animals from entering the marsh and killing native birds as part of the adjacent golf course construction, provides regular maintenance work on the marsh moat to ensure its depth is maintained and vegetation is cleared as well as provides annual maintenance is estimated at 1,200 to 1,300 hours;

10. Completed a Traffic Impact Assessment Report (TIAR) that was accepted by the Department of Transportation Services, City and County of Honolulu (DTS);

11. Completed the design and construction of the 192 acre 18-hole Palmer Golf Course;

12. Completed certain drainage Improvements;

13. Completed certain portions of internal roadway; and

14. Completed certain electrical/telephone line improvements.

After the initial five (5) year period, Petitioner reasonably moved forward with the project with the completion of the expansion of the Fazio Golf Course, major renovations to the existing Turtle Bay Hotel, roadway improvements to main access road (Kuilima Drive) that services the Property which was widened and improved and construction of the Ocean Villas in anticipation of the expansion project, as well as a substantial amount of capital that had been invested and expended for planning, design and permitting. In all more than \$100 million has been spent by the owner in reliance of the land use approvals.

On or about October 15, 2009 the Supreme Court of the State of Hawai'i ("Court") issued its notice that it would hear oral arguments regarding Kuilima's environmental impact statement

("EIS") for the Turtle Bay project. On April 8, 2010 the Court issued its decision in *Unite HERE Local 5 et. al. v City and County of Honolulu and Kuilima Resort Company*, Civil No. 06-1-0265 (2010), remanding the case to the circuit court with instructions to enter judgment in favor of plaintiffs. The result of this ruling was to mandate that the City and County of Honolulu, Department of Planning and Permitting ("DPP") require that a Supplemental Environmental Impact Statement ("SEIS") be completed in accordance with Hawai'i Revised Statutes, Chapter 343, and to prohibit "any further ground work or construction by [TBR] relating to the Project until [an SEIS] is completed" The Court's decision in *Unite HERE Local 5* required, in effect, a cease in further development of the undeveloped lands of the Property until an updated SEIS was completed. TBR has again invested an enormous amount of time and capital into the Project since the Court's 2010 decision.

In the Spring of 2011, TBR retained Lee Sichter LLC to prepare a full SEIS. The SEIS has been prepared pursuant to and in accordance with the requirements of Hawai'i Revised Statutes, Chapter 343; Hawai'i Administrative Rules, Chapter 11-200; and the ruling of the Hawai'i Supreme Court in *Unite HERE Local 5 et. al. v City and County of Honolulu and Kuilima Resort Company*, Civil No. 06-1-0265 (2010). TBR's SEIS is intended to supplement the 1985 Kuilima Revised Final EIS. On August 8, 2011, TBR filed its Environmental Assessment and SEIS Preparation Notice ("EISPN") which is TBR's official announcement of its intent to prepare an SEIS for the proposed project. The SEIS has been completed and submitted for review to the Department of Planning and Permitting, City and County of Honolulu ("DPP") who is the accepting authority on August 19, 2013.

As an integral part of preparing the SEIS, the owners of the Property specifically sought to establish a meaningful community relationship with the general public and particularly with all of the stakeholders involved with the lands at TBR. TBR made it a point to address the Coalition's request to the Commission in 2009 that the developer "bring all sides together" by working with the community to change the size and scope of the current expansion project proposed for Turtle Bay resort." To achieve this goal, a multi-faceted consultation process was undertaken. A deliberate attempt was made by the TBR Project Team to initiate requests with various stakeholders to listen to them in settings or forums of their choosing. TBR established various approaches to engage and reach out to the community, such as establish: 1. individual and small talk story sessions (for many Hawaiians who previously dissociated themselves from

community dialogues, requests were made to meet them in informal, one-on one small talk story sessions. Elected officials and government agencies were given individualized briefings.); 2. Group meetings (TBR project team attended regular public meetings of the Ko'olauloa Neighborhood Board and Kahuku Community Association. Presentations were made to various organizations including the Ko'olauloa and Ko'olaupoko Hawaiian Civic Clubs to provide them a briefing of the Revised Master Plan and to get their mana`o on cultural practices or issues and concerns they may have about the project.); 3. Traditional Public Meetings (In an effort to reach out to the broader community, TBR held a large public forum hosted at Turtle Bay Resort on September 15, 2011. The TBR project team convened a public open house and informational meeting. The event was well attended with over 100 people); 4. Cultural Advisory Council (The TBR Project Team convened a Cultural Advisory Council composed of Hawaiian cultural practitioners, educators, cultural experts, and individuals who could provide cultural guidance to TBR as it began to revise its Master Plan and prepare the SEIS); 5. Kahuku Burial Committee; (Several years ago, TBR convened a group of individuals who have lineal and cultural connections to these lands who accepted the kuleana to mālama (care for) any iwi kūpuna that may be discovered on the project site as well as within the Ahupua`a of Kahuku. Over the past two and a half years TBR has engaged and invested in over 225 separate meetings with the public, totaling approximately 1,000 hours of meetings with the public which compromised about 100 separate groups and hundreds of individuals, to receive community input regarding the Project. The SEIS evaluation considered four (4) proposed project alternatives and reasonable development plans for the Property including an assessment of the original full build out alternative and TBR's preferred alternative, referred to in the SEIS as the "Proposed Action", which envisions the development of a resort build out but is based upon and incorporates the traditional Hawaiian cultural resource management principles and values that sustained the ahupua`a as well as seeks to reduce the density and area of the resort expansion based upon the extensive community outreach programs, public and community feedback and application of Tomorrow's Ahupua`a guidelines.

Although TBR's preferred alternative the Proposed Action may provide for reductions in density and development area, on an overall basis, this more balanced and responsible Project remains fundamentally the same as there are plans for the development, which includes but not limited to, multiple hotels, golf courses, equestrian center, mixed use residential housing,

affordable housing, commercial areas, public access and parks among other things being provided for.

### **III. DISCUSSION**

The Coalition requests that the Commission issue an Order to Show Cause on that basis that; 1. Petitioner has breached its representations, commitments and conditions; 2. The Commission has recently issued two orders to show cause on other dockets and should do the same here; and, 3. That Petitioner is proposing a completely different project.

The Coalition's basis for the Commission to issue an Order to Show Cause fails as Petitioner has not breached any of 1986 D&O conditions, the recent Commission matters that involve Orders to Show Cause involve Decision and Order's, unlike our matter, with specific conditions that would allow for the order to show cause being issued and the project has not changed. Furthermore, this matter should be dismissed as the Coalition has no standing. As there is no standing by the movant and no express conditions as to deadlines or for the performance of conditions in the 1986 D&O the Commission should either dismiss or deny the motion for the issuance of an Order to Show Cause on the following grounds:

- A. The Coalition does not have standing to seek an Order to Show in this matter under Hawai'i Administrative Rules ("HAR") § 15-15-93;
- B. The Commission May Not Enforce a Condition that is Not Expressly Stated;
- C. Statutory Provision for an Order to Show Cause is Not Applicable to The 1986 D&O;
- D. Petitioner is in Compliance with All Conditions in the 1986 D&O and the Applicable Law; and
- E. The Project Remains the Same.

### **IV. ARGUMENT**

#### **A. The Coalition Lacks Standing to Pursue the Motion.**

The Coalition is neither a "party" to the original Petition filed by KDC in 1985, nor an "interested person" under HAR § 15-15-52, and therefore has no ability under the HAR to pursue this Motion. Further, the Coalition does not meet the traditional requirements of "standing" and has made no allegation that it has suffered "an actual or threatened injury" as a result of the alleged failure to fulfill conditions as alleged in the Motion.

If the Coalition is permitted to pursue the Motion, the Commission would essentially be setting a new precedent, allowing third parties -- who were neither parties to the proceeding, nor proper intervenors therein -- to interject themselves in the Commission's decision-making process. Almost anyone would be able to challenge the Commission's land use decisions, making the land use planning process intractable. As such, the Motion should be dismissed.

1. **Only a "Party" or "Interested Person" Can Bring the Motion.**

The Coalition does not meet the requirements to bring their Motion in this matter, as it does not meet the requirements mandated by HAR Chapter 15 ("LUC Rules"). HAR § 15-15-93 under subchapter 11 of the LUC Rules entitled "Conditions: Filing, Enforcement, Modification, and Deletion" provides:

- (a) Any **party** or **interested person** may file a motion with the commission requesting an issuance of an order to show cause upon a showing that there has been a failure to perform a condition, representation, or commitment on the part of the petitioner.

"Party" is defined in § 15-15-03 as "a person named or admitted as a party or entitled as of right to be admitted as a party in any contested case proceeding before the commission." Accordingly, the Coalition is not a "party" under § 15-15-93. Nor is the Coalition an "interested person" entitled to pursue such a motion.

The definition section of the LUC Rules, § 15-15-03, does not define "interested person." The commission, however, should look to HAR § 15-15-52 entitled "Intervention in proceeding for district boundary amendments" to determine whether the Coalition is an "interested" person in the proceeding. *See Town v. Land Use Comm'n*, 55 Haw. 538, 543, 524 P.2d 84, 88 (1974) (An adjoining property owner is an interested party to a proceeding for a boundary change). Section 15-15-52(c)(2) provides that "all persons who have a property interest in the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public" may intervene upon timely application. (Emphases added).

Here, the Coalition is not an interested person because it cannot: (1) establish that it has a "property interest in the land"; or (2) "demonstrate that it will be directly and immediately affected" such that its "interest in the proceeding is clearly distinguishable from that of the general public"; and (3) establish that it has made a "timely application." The Coalition merely



stated in its Motion that it “is a non-profit Hawaii corporation organized on August 23, 2006” whose members “include resident of the North Shore and Kahuku, who live, work travel and play on and around the Property.” “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it.” *Keahole Def. Coalition, Inc v. Bd. of Land and Natural Res.*, 110 Hawai‘i 419, 432, 134 P.3d 585, 598 (Hawai‘i 2006) (citations omitted). While several individuals or entities active in the Coalition may live or work in the area, that is not enough to confer standing pursuant to HAR § 15-15-52(c). Furthermore, it is without contention that no individual from the Coalition lives on the Property. Therefore, the Coalition cannot be an interested party. HAR § 15-15-34 provides that “no rule relating to jurisdictional matters shall be waived or suspended by the commission.” It is therefore improper for the Commission to entertain a Motion from the Coalition in this matter, because the Coalition is an entity who was neither a party nor an interested person.

## **2. The Coalition Lacks Traditional Standing to Bring this Motion.**

Further, under the traditional concepts of “standing,” the Coalition is not an “interested person.” A crucial inquiry regarding standing is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court’s jurisdiction and to justify exercise of the court’s remedial powers on his or her behalf. *Sierra Club v. Dep’t of Transp.*, 115 Hawai‘i 299, 319, 167 P.3d 292, 312 (Haw. 2007).

To determine standing, the Supreme Court employs a three-part test: (1) has the plaintiff suffered an actual or threatened injury as a result of the defendant’s wrongful conduct; (2) is the injury fairly traceable to the defendant’s actions; and (3) would a favorable decision likely provide relief for plaintiffs injury. *County of Kauai ex rel. Nakazawa v. Baptiste*, 115 Hawai‘i 15, 27, 165 P.3d 916, 928 (2007). The Coalition bears the burden of establishing standing. *Hawaii Med. Ass’n v. Hawaii Med. Serv. Ass’n, Inc.*, 113 Hawai‘i 77, 95, 148 P.3d 1179, 1197 (2006). Plaintiff’s alleged injury must be distinct and palpable, as opposed to abstract, conjectural, or merely hypothetical. *Id.* at 87, 148 P.3d at 1189. The injury prong of the standing inquiry requires a judicially-cognizable injury; that is, harm to some legally-protected interest. *Sierra Club* at 321, 167 P.3d at 314 *citing Bremner v. City & Count)) of Honolulu*, 96 Hawai‘i 134, 140, 28 P.3d 350, 356 (Haw. Ct. App. 2001).

The Coalition has failed to show an “actual or threatened injury,” a “property interest,” or “an interest in the proceeding that is clearly distinguishable from that of the general public.” It was therefore improper for the Coalition to file the Motion. The Coalition has clearly failed to meet this jurisdictional requirement of standing. As stated above, HAR § 15-15-34 provides “[n]o rule relating to jurisdictional matters shall be waived or suspended by the commission.” The Coalition has never provided any applicable legal authority to demonstrate that it has standing. Standing to bring this Motion is a prerequisite, such that if it cannot be established it is grounds for immediate dismissal of the Motion. *Hawai`i Medical Ass’n, Inc.*, 113 Hawai`i 77, 94, 148 P.3d 1179, 1196 (2006) (citations omitted) (stating “[i]t is well-settled that courts must determine as a threshold matter whether they have jurisdiction to decide the issue presented. If a party is found to lack standing, the court is without subject matter jurisdiction to determine the action. The Commission should dismiss this action as the Coalition lacks standing.

**B. Commission May Not Enforce a Condition That is Not Expressly Stated.**

Assuming *arguendo* that the Commission finds that the Coalition has standing, the Motion should be dismissed as Petitioner is not in violation of any condition. As discussed in prior pleadings the D&O does not require or specify schedules or deadlines by which the conditions are required to be met. The plain reading of the D&O does not require TBR to complete the conditions within a specific time period. The Commission needs to expressly state a condition and may not enforce an implied deadline upon the conditions at this time. *See Lanai Co., Inc. v. Land Use Com’n*, 105 Hawai`i 296, 314, 97 P.3d 372, 390 (2004). In *Lanai Co.*, the Supreme Court of the State of Hawai`i reversed the LUC’s decision as clearly erroneous when the LUC found that the petitioner had violated a condition amending its land use district boundary despite the plain language of the condition. *Id.* at 308, 97 P.3d at 384. The Court stated:

Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies. *See e.g., Gates & Fox v. Occupational Safety & Health Review Comm’n*, 790 F.2<sup>nd</sup> 154, 156 (D.C. Cir. 1986) (reasoning that an “employer is entitled to fair notice in dealing with his government, “and thus the agency’s regulations “must give an employer fair warning of the conduct it prohibits or requires”). **In this light, the 1991 Order cannot be construed to mean what the LUC may have intended but did not express.** *CF. id.* (Explaining that “a regulation cannot be construed to mean what an agency intended but did not adequately express”). An

administrative agency, such as **the LUC, has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed.** *CF. Id.* (Reasoning that the “enforcer of the act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated”).

*Id.* at 314, 97 P.3d at 390. (emphasis added).

The Court clearly stated that “[t]he LUC cannot now enforce a construction of [a condition] that was not expressly adopted. *Id.* In this matter, the 1986 D&O does not contain any condition that requires TBR to comply with any completion dates or deadlines. Furthermore, the 1986 D&O does not contain the condition that requires that the Petitioner substantially comply with its representations to the Commission. The plain language of the conditions contained in the 1986 D&O do not give fair notice, or adequately express any intent on the Commission’s part that TBR be required to comply with any completion dates or deadlines which is what the law requires.<sup>1</sup> The Commission, under Hawai`i law, clearly may not enforce a condition that was not expressly adopted and therefore the Commission does not need to issue an order to show cause.

**C. Statutory Provision for an Order to Show Cause is Not Applicable to the D&O**

The 1986 D&O does not contain the condition provided by the Commission in its decision and orders that grants the statutory authority to the Commission to issue and serve an order to show cause. The Commission's policy of issuing orders to show cause why a particular property should not revert to its former land use classification or be changed to a more appropriate classification is based upon the premise that there has been a failure to perform according to the conditions imposed, or the representations made by the petitioner based upon a statutory grant of authority, and any rule promulgated to facilitate the issuance of an Order to Show Cause must not exceed the scope of the enabling statute. *See Capua v. Weyerhaeuser Company*, 117 Hawai`i 439, 184 P.3d 191, 198 (S.Ct. 2008) (administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down).

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<sup>1</sup> The Coalition’s position in its Order to Show Cause motion regarding the Supreme Court holding in the *Unite Here! Local 5* case is clearly inapplicable in this matter as the rules governing an EIS under HRS Chapter 343 and HAR Chapter 11-200 are clearly different and distinguishable from the rules that apply to the Commission found under HRS Chapter 205 and HAR Chapter 15-15.

Section 205-4(g) of the Hawai'i Revised Statutes ("HRS") provides the statutory authority of the Commission to issue an Order to Show Cause, and any administrative rule promulgated to facilitate an Order to Show Cause would be limited by the statutory grant of authority contained in HRS § 205-4(g).

HRS § 205-4(g) provides the following in relevant part:

The commission **may provide by condition** that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification. **Such conditions, if any,** shall run with the land and be recorded in the bureau of conveyances. (Emphasis added).

The unambiguous language of HRS § 205-4(g) clearly states that an Order to Show Cause can only be issued when the Commission provides a condition that could trigger a possible order to show cause why the property should not revert to its former land use classification. The Coalition's arguments regarding the Commission's recently issued orders to show cause in Docket No. A87-617 Bridge Aina Lea and in Docket No. A94-706 Ka'ono'ulu Ranch are clearly distinguishable from this matter. In both the Bridge and Ka'ono'ulu Ranch matters their respective D&O's contained clear conditions that gave fair warning and express notice that they needed to develop their respective properties "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." It was clearly within the Commission's discretion to provide a condition in the 1986 D&O that would have provided this fair warning and expressly state that the Commission could issue an order to show cause, however, this was not the case and the Commission clearly chose not to provide this within the 1986 D&O. As stated above, it is clear that the 1986 D&O does not contain a condition by the Commission that would allow for an Order to Show Cause to be issued against Petitioner TBR.

**D. Petitioner is in Compliance with All Conditions in the 1986 D&O and Applicable Law**

**i. Petitioner is in Compliance with All Conditions in the 1986 D&O and Applicable Law**

Regardless of the Coalition's positions, Petitioner TBR is in compliance with the 1986 D&O and no order to show cause should be issued by the Commission. Petitioner TBR is in compliance and intends to complete all the conditions in the 1986 D&O. The following is a brief summary of the nine (9) conditions contained in the 1986 D&O in relevant part in which TBR intends to comply.

1. The Petitioner shall develop full-service hotels on lands outside of the Property. . . to ensure employment opportunities for North Shore Residents.

Status: Petitioner TBR intends to comply with this Condition. Originally three (3) new hotels with a total of 1,400 units were to be developed. TBR is proposing to develop two (2) new hotels with a total of 625 units.

2. Petitioner shall provide housing opportunities for low and moderate income Hawai'i residents and employees employed at the Kuilima Resort . . . a number of residential units, not less than ten percent of the number of resort condominium residential units to be developed on the Property to residents of Hawai'i and employees. . ."

Status: Petitioner TBR intends to comply with this Condition. The original proposal called for 10% affordable and community housing. TBR is proposing 160 units (Approximately 27% affordable to market housing) that will be constructed within the Petition Area for affordable and community housing. Community housing is housing that will meet the needs of the regional community. The new residential homes will target 30 percent of these 160 homes for community use. The phasing plan indicates that about 44 units would be built the first year and 25 units in the second year, and about 19 each year for the next 3 years. That equals to 126 homes built in the first 5 years. The remainder of the units (34) would be built over the years until project completion in 2022.

3. Petitioner shall fund the design and construction of improvements to Kamehameha Highway for the Kuilima Resort Expansion as required by the State Department of Transportation, including fully channelized intersections at Marconi Road, Kuilima Drive and West Kuilima Drive. Petitioner shall also assist the State Department of Transportation in its

attempt to acquire a 50-foot right-of-way for widening Kamehameha Highway parallel to the boundary of the Kuilima Resort Expansion.

Status: Petitioner TBR intends to comply with this Condition. A roadway improvement plan was already prepared and approved by DPP in 2006. TBR is continuing to address this condition and the SEIS includes traffic a TIAR currently under review by the Department of Transportation, State of Hawai'i.

4. Petitioner shall develop additional water sources and related infrastructure to accommodate the water demand of the Kuilima Resort Expansion.

Status: Petitioner TBR intends to comply with this Condition. Petitioner has already completed design, construction, completion and acceptance by the Board of Water Supply of a 12" water transmission main along Kamehameha Highway from Kuilima Drive to Marconi Road, which intended to provide water flow to the Property. Furthermore, Petitioner has completed Phase I of the Opana Well Facility (Pump No. 1 and Pump No. 2) that serves as the initial phase of water source for improvements on the Property and the Kuilima Resort. In addition, TBR and the City and County of Honolulu, Board of Water Supply have entered into and consummated the transaction contemplated by that certain Opana Wells Pump Station Water Agreement, dated as of October 2, 2012. Among other things, this agreement assures TBR that it is entitled to receive a reserved water allocation from the Board of Water Supply for future use by TBR in perpetuity.

TBR Proposed Action includes improvements to the existing system and the dedication of new wells to meet future water demand.

5. Petitioner shall assist the U.S. Fish and Wildlife Service and the Department of Land and Natural Resources in their activities to improve Punaho'olapa Marsh.

Status: Petitioner TBR intends to comply with this Condition. Petitioner has already completed improvements to Punaho'olapa Marsh after meeting with the U.S. Fish and Wildlife Service by constructing a water moat adjacent to the Palmer Golf Course to prevent feral animals from entering the marsh and killing native birds as part of the adjacent golf course construction, provides regular maintenance work on the marsh moat to ensure its depth is maintained and vegetation is cleared as well as provides annual maintenance is estimated at 1,200 to 1,300 hours.

TBR proposes to provide further improvements and restoration to the marsh to enhance the marsh wetlands habitat in coordination with the U.S. Fish and Wildlife Service. Future improvements to the marsh may include viewing areas and walking paths.

6. Petitioner shall take such measures as required by the State Historic Preservation Office to protect archaeological sites F4-14 and T-1 from further disturbance and to monitor construction activities. Should any archaeological resources be discovered during the project's development, the Petitioner shall comply with directives of the State Historic Preservation Office.

Status: Petitioner TBR intends to comply with this Condition. TBR has already prepared a Cultural Impact Assessment (CIA) and Supplemental Archaeological Inventory Study (SAIS) as part of the SEIS process. The site number T-1 was changed to site number 641-I, and this site is proposed for preservation. Site F4-1 4 is another site number for site T-1.

7. The Petitioner shall insure free public access and parking for parks and rights-of-way . . . purposes.

Status: Petitioner TBR intends to comply with this Condition. Petitioner has already created Park P-1, two easements, and a portion of a continuous shoreline easement have been subdivided and created under Subdivision 1989 (203). Currently, TBR allows public access through existing shoreline accesses via the Turtle Bay Hotel parking lot which then connects to trail systems that allow the public to access all the shoreline areas. The creation of parks P-2, P-3 and P-4, along with three remaining pedestrian way easements and the remainder of the continuous shoreline easements are pending with DPP.

TBR's proposals includes the addition of five (5) new parks, 12 public shoreline access ways, bike trails and pedestrian paths, comfort stations, and public parking to mitigate the impacts upon regional recreational facilities. TBR will provide public parking and shoreline access ways free of charge to the public.

8. The Petitioner shall develop a sewage treatment plant and related infrastructure to County standards to accommodate the sewage demand of the Kuilima Resort Expansion. (as amended)

Status: Petitioner TBR intends to comply with this Condition. Petitioner has already designed, constructed and completed a Wastewater Treatment Plant that included capacity to serve entitlements for 1,000 resort residential units, golf courses, commercial space, parks and other miscellaneous improvements planned for the Property. TBR is proposing further improvements which include the installation of new wastewater collection and transmission lines.

9. The Petitioner shall establish a monitoring program of the coastal resource conditions at the East and West drains and their effects upon offshore waters and marine ecosystems in conjunction with and under the direction of the Department of Land and Natural Resources.

Status: Petitioner TBR intends to comply with this Condition. A monitoring program has been conducted along the Resort coastline since the late 1980s and will be continued with the implementation of the Proposed Action.

ii. **Petitioner is in Compliance with the Law**

**Petitioner made substantial progress in the development of the area redistricted.**

Petitioner TBR is in compliance with the Commission Regulations that were in effect when the 1986 D&O<sup>2</sup> was issued. Specifically, it has been stated that the Commission's State Land Use District Regulations § 6-3 Performance Times (1975) applies to Kuilima which states:

§ 6-3 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. 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. (Emphasis added).

The relevant § 6-3 "Performance Time" rule that was in effect at the time the D&O was issued only relates to the area that was redistricted. All development outside the area redistricted is clearly not subject to the performance time period of five (5) years. In 1986 the Commission clearly understood that it could not impose any time requirements or incremental conditions for the development outside the petition area. Furthermore, as noted above there has already been substantial progress in the development of the area redistricted. Petitioner, soon after the D&O was approved in 1986 commenced forward with the related infrastructure improvements including permit applications for and the eventual construction of the wastewater plant and wells to service the petition area. Within the relevant five year period more than substantial progress of the area redistricted was achieved by completing the following: various zone change submittals were approved by the City, an Urban Design Plan submitted and approved by DPP,

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<sup>2</sup> The legal standard that the Coalition relies upon is not applicable to this current D&O. HAR § 15-15-93(a) was not in effect or applicable when the D&O was filed and became effective on March 11, 1986.



subdivision applications were approved by DPP, the wastewater treatment plant was completed, water transmission main completed, Opana Well facility Phase I completed, improvements to Punaho`olapa Marsh after meeting with the U.S. Fish and Wildlife Service were completed, TIAR completed, the 192 acre 18-hole Palmer Golf Course completed and other items as stated above were completed within the relevant five year time period. Substantial time, manpower and capital was invested into the development of the Petition Area. The 113 acre, 18 hole Palmer golf course and related golf course infrastructure and comfort station alone were in excess of \$20 million dollars.

After the initial five (5) year period, Petitioner reasonably moved forward with the project by expanding the Fazio Golf Course, renovating the existing hotel, completing costly roadway improvements to main access road (Kuilima Drive) that services the Property by being widened and improved and completing construction of the Ocean Villas condominium project, all in anticipation of the expansion project. In addition to the hard costs associated with construction, a substantial amount of capital has been expended in soft costs, such as planning, design and permitting. Well more than \$100 million has been spent by the owner of the Property in reliance on the land use approvals. Furthermore, TBR has continued to proceed in good faith by investing its time and capital in engaging the North Shore community in numerous and meaningful discussions about the future of the Property, and incorporating the input it received as part of completing a thorough SEIS for the entire Project.

As there has already been substantial progress in the development of the area redistricted there is no basis for the Commission to reclassify the Petition Area.

**E. The Project Remains the Same.**

The Project and character of the project is the same. The Coalition's assertion that the SEIS proves that a "completely different" project is being planned is simply incorrect. TBR is still planning on developing the Property for resort and golf course use as originally planned. As noted above, the Final SEIS has been completed and submitted to the accepting authority DPP for acceptance. However, the SEIS does evaluate various alternatives which include the "full" project build out as well as an alternative version of the project that provides for less density. The SEIS evaluation considered four (4) proposed project alternatives and reasonable development plans for the Property including an assessment of the original full build out alternative and TBR's preferred alternative, the Proposed Action, which envisions the

development of a resort build out but is based upon and incorporates the traditional Hawaiian cultural resource management principles and values that sustained the ahupua`a as well as seeks to reduce the density and area of the resort expansion based upon the extensive community outreach programs, public and community feedback and application of Tomorrow's Ahupua`a guidelines.

As this Commission is well aware, our case is distinguishable from the Ka`ono`ulu Ranch, Docket No. A94-706 matter where the change of use in Ka`ono`ulu Ranch went from light industrial to big box retail which triggered issues relating to violating specific conditions as to representations contained in their decision and order and to an increase in impacts. The issuance of the order to show cause in Ka`ono`ulu Ranch is consistent with Hawai'i Revised Statutes Chapter 205 and the *Kauai Springs v. Planning Commission*, 2013 WL 1829587 (Haw.App. 2013) case where the overarching purpose of the LUC is conservation and the protection of natural resources and to have orderly development. TBR, on the other hand, has maintained and is still proposing the same uses in the Petition Area and has even decreased density to respond to the community's call for conservation and orderly development. To accuse TBR of reducing jobs as a result of lessening impacts is to ignore the Commission's overarching purpose and to ignore the health and well being of community.

TBR is still planning the same project that will be for resort and golf uses. Although TBR's preferred alternative Proposed Action may provide for reductions in density and development area, the overall Project remains the same and true to the original character of what was planned as there continues to be plans for the development of multiple hotels, golf courses, equestrian center, mixed use residential housing, affordable housing, commercial areas, public access and parks among other things being provided for.

IV. CONCLUSION

Based upon the above, it is respectfully requested that the Land Use Commission not issue an order to show cause in this matter.

Dated: Honolulu, Hawai'i August 22, 2013.

OF COUNSEL:  
MATSUBARA – KOTAKE  
A Law Corporation



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BENJAMIN M. MATSUBARA  
CURTIS T. TABATA  
WYETH M. MATSUBARA  
Attorneys for Respondent  
TURTLE BAY RESORT COMPANY, LLC

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

To Amend the Agricultural Land Use ) Docket No. A85-595  
District Boundary to Reclassify )  
Approximately 236 Acres Located at ) AFFIDAVIT OF SCOTT McCORMACK  
Kahuku Koolauloa, County of Honolulu, )  
Honolulu, State of Hawai'i, to the )  
Urban Use District )  
\_\_\_\_\_ )

**AFFIDAVIT OF SCOTT McCORMACK**

STATE OF HAWAII )  
CITY AND COUNTY OF HONOLULU ) ss.:

SCOTT McCORMACK, being first duly sworn on oath, deposes and says:

1. I am the Vice President of Real Estate with Turtle Bay, Replay Resorts, Inc. and in this capacity I am familiar with matters relating to the land which is the subject of Docket No. A85-595 and knowledgeable to testify on behalf of the Respondent.

2. I have personal knowledge of the matters set forth in the foregoing Response to Defend Oahu Coalition's 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 in Docket No. A85-595 ("Response") and am qualified and competent to make this Affidavit.

3. I hereby verify and certify that the relevant facts and information in the Background portion of the Response quoted below to be true and correct as set forth in the Response:

"In the Spring of 2011, TBR retained Lee Sichter LLC to prepare a full SEIS. The SEIS has been prepared pursuant to and in accordance with the requirements of Hawai'i Revised Statutes, Chapter 343; Hawai'i Administrative Rules, Chapter 11-200; and the ruling of the Hawai'i Supreme Court in *Unite HERE Local 5 et. al. v City and County of Honolulu and Kuilima Resort Company*, Civil No. 06-1-0265 (2010). TBR's SEIS is intended to supplement the 1985 Kuilima Revised Final EIS. On August 8, 2011, TBR filed its Environmental Assessment and SEIS Preparation Notice ("EISPN") which is TBR's official announcement of its intent to prepare an SEIS for the proposed project.

The SEIS has been completed and submitted for review to the Department of Planning and Permitting, City and County of Honolulu (“DPP”) who is the accepting authority on August 19, 2013.

As an integral part of preparing the SEIS, the owners of the Property specifically sought to establish a meaningful community relationship with the general public and particularly with all of the stakeholders involved with the lands at TBR. TBR made it a point to address the Coalition’s request to the Commission in 2009 that the developer “bring all sides together” by working with the community to change the size and scope of the current expansion project proposed for Turtle Bay resort.” To achieve this goal, a multi-faceted consultation process was undertaken. A deliberate attempt was made by the TBR Project Team to initiate requests with various stakeholders to listen to them in settings or forums of their choosing. TBR established various approaches to engage and reach out to the community, such as establish: 1. individual and small talk story sessions (for many Hawaiians who previously dissociated themselves from community dialogues, requests were made to meet them in informal, one-on one small talk story sessions. Elected officials and government agencies were given individualized briefings.); 2. Group meetings (TBR project team attended regular public meetings of the Ko’olauloa Neighborhood Board and Kahuku Community Association. Presentations were made to various organizations including the Ko’olauloa and Ko’olaupoko Hawaiian Civic Clubs to provide them a briefing of the Revised Master Plan and to get their mana’o on cultural practices or issues and concerns they may have about the project.); 3. Traditional Public Meetings (In an effort to reach out to the broader community, TBR held a large public forum hosted at Turtle Bay Resort on September 15, 2011. The TBR project team convened a public open house and informational meeting. The event was well attended with over 100 people); 4. Cultural Advisory Council (The TBR Project Team convened a Cultural Advisory Council composed of Hawaiian cultural practitioners, educators, cultural experts, and individuals who could provide cultural guidance to TBR as it began to revise its Master Plan and prepare the SEIS); 5. Kahuku Burial Committee; (Several years ago, TBR convened a group of individuals who have lineal and cultural connections to these lands who accepted the kuleana to mālama (care for) any iwi kūpuna that may be discovered on the project site as well as within the Ahupua’a of Kahuku. Over the past two and a half years TBR has engaged and invested in over 225 separate meetings with the public, totaling approximately 1,000 hours of meetings with the public which compromised about 100 separate groups and hundreds of individuals, to receive community input regarding the Project. The SEIS evaluation considered four (4) proposed project alternatives and reasonable development plans for the Property including an assessment of the original full build out alternative and TBR’s preferred alternative, referred to in the SEIS as the “Proposed Action”, which envisions the development of a

resort build out but is based upon and incorporates the traditional Hawaiian cultural resource management principles and values that sustained the ahupua`a as well as seeks to reduce the density and area of the resort expansion based upon the extensive community outreach programs, public and community feedback and application of Tomorrow's Ahupua`a guidelines.

Although TBR's preferred alternative the Proposed Action may provide for reductions in density and development area, on an overall basis, this more balanced and responsible Project remains fundamentally the same as there are plans for the development, which includes but not limited to, multiple hotels, golf courses, equestrian center, mixed use residential housing, affordable housing, commercial areas, public access and parks among other things being provided for."

4. I further hereby verify and certify that the facts and information related to the 1986 D&O Conditions quoted below to be true and correct as set forth in the Response:

"Regardless of the Coalition's positions, Petitioner TBR is in compliance with the 1986 D&O and no order to show cause should be issued by the Commission. Petitioner TBR is in compliance and intends to complete all the conditions in the 1986 D&O. The following is a brief summary of the nine (9) conditions contained in the 1986 D&O in relevant part in which TBR intends to comply.

1. The Petitioner shall develop full-service hotels on lands outside of the Property. . . to ensure employment opportunities for North Shore Residents.

Status: Petitioner TBR intends to comply with this Condition. Originally three (3) new hotels with a total of 1,400 units were to be developed. TBR is proposing to develop two (2) new hotels with a total of 625 units.

2. Petitioner shall provide housing opportunities for low and moderate income Hawai'i residents and employees employed at the Kuilima Resort . . . a number of residential units, not less than ten percent of the number of resort condominium residential units to be developed on the Property to residents of Hawai'i and employees. . ."

Status: Petitioner TBR intends to comply with this Condition. The original proposal called for 10% affordable and community housing. TBR is proposing 160 units (Approximately 27% affordable to market housing) that will be constructed within the Petition Area for affordable and community housing. Community housing is housing that will meet the needs of the regional community. The new residential homes will target 30 percent of these 160 homes for community use. The phasing plan indicates that about 44 units would be built the first year and 25 units in the second

year, and about 19 each year for the next 3 years. That equals to 126 homes built in the first 5 years. The remainder of the units (34) would be built over the years until project completion in 2022.

3. Petitioner shall fund the design and construction of improvements to Kamehameha Highway for the Kuilima Resort Expansion as required by the State Department of Transportation, including fully channelized intersections at Marconi Road, Kuilima Drive and West Kuilima Drive. Petitioner shall also assist the State Department of Transportation in its attempt to acquire a 50-foot right-of-way for widening Kamehameha Highway parallel to the boundary of the Kuilima Resort Expansion.

Status: Petitioner TBR intends to comply with this Condition. A roadway improvement plan was already prepared and approved by DPP in 2006. TBR is continuing to address this condition and the SEIS includes traffic a TIAR currently under review by the Department of Transportation, State of Hawai'i.

4. Petitioner shall develop additional water sources and related infrastructure to accommodate the water demand of the Kuilima Resort Expansion.

Status: Petitioner TBR intends to comply with this Condition. Petitioner has already completed design, construction, completion and acceptance by the Board of Water Supply of a 12" water transmission main along Kamehameha Highway from Kuilima Drive to Marconi Road, which intended to provide water flow to the Property. Furthermore, Petitioner has completed Phase I of the Opana Well Facility (Pump No. 1 and Pump No. 2) that serves as the initial phase of water source for improvements on the Property and the Kuilima Resort. In addition, TBR and the City and County of Honolulu, Board of Water Supply have entered into and consummated the transaction contemplated by that certain Opana Wells Pump Station Water Agreement, dated as of October 2, 2012. Among other things, this agreement assures TBR that it is entitled to receive a reserved water allocation from the Board of Water Supply for future use by TBR in perpetuity.

TBR Proposed Action includes improvements to the existing system and the dedication of new wells to meet future water demand.

5. Petitioner shall assist the U.S. Fish and Wildlife Service and the Department of Land and Natural Resources in their activities to improve Punaho'olapa Marsh.

Status: Petitioner TBR intends to comply with this Condition. Petitioner has already completed improvements to Punahoolapa Marsh after meeting with the U.S. Fish and Wildlife Service by constructing a water moat adjacent to the Palmer Golf Course to prevent feral animals from entering the marsh and killing native birds as part of the adjacent golf course construction, provides regular maintenance work on the marsh moat to ensure its depth is maintained and vegetation is cleared as well as provides annual maintenance is estimated at 1,200 to 1,300 hours.

TBR proposes to provide further improvements and restoration to the marsh to enhance the marsh wetlands habitat in coordination with the U.S. Fish and Wildlife Service. Future improvements to the marsh may include viewing areas and walking paths.

6. Petitioner shall take such measures as required by the State Historic Preservation Office to protect archaeological sites F4-14 and T-1 from further disturbance and to monitor construction activities. Should any archaeological resources be discovered during the project's development, the Petitioner shall comply with directives of the State Historic Preservation Office.

Status: Petitioner TBR intends to comply with this Condition. TBR has already prepared a Cultural Impact Assessment (CIA) and Supplemental Archaeological Inventory Study (SAIS) as part of the SEIS process. The site number T-1 was changed to site number 641-I, and this site is proposed for preservation. Site F4-1 4 is another site number for site T-1.

7. The Petitioner shall insure free public access and parking for parks and rights-of-way . . . purposes.

Status: Petitioner TBR intends to comply with this Condition. Petitioner has already created Park P-1, two easements, and a portion of a continuous shoreline easement have been subdivided and created under Subdivision 1989 (203). Currently, TBR allows public access through existing shoreline accesses via the Turtle Bay Hotel parking lot which then connects to trail systems that allow the public to access all the shoreline areas. The creation of parks P-2, P-3 and P-4, along with three remaining pedestrian way easements and the remainder of the continuous shoreline easements are pending with DPP.

TBR's proposals includes the addition of five (5) new parks, 12 public shoreline access ways, bike trails and pedestrian paths, comfort stations, and public parking to



mitigate the impacts upon regional recreational facilities. TBR will provide public parking and shoreline access ways free of charge to the public.

8. The Petitioner shall develop a sewage treatment plant and related infrastructure to County standards to accommodate the sewage demand of the Kuilima Resort Expansion. (as amended)

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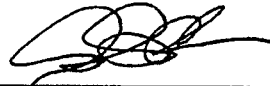
9. The Petitioner shall establish a monitoring program of the coastal resource conditions at the East and West drains and their effects upon offshore waters and marine ecosystems in conjunction with and under the direction of the Department of Land and Natural Resources.

Status: Petitioner TBR intends to comply with this Condition. A monitoring program has been conducted along the Resort coastline since the late 1980s and will be continued with the implementation of the Proposed Action.”

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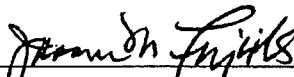
5. I have read the foregoing document and the contents therefore are true and correct to the best of my knowledge and belief.

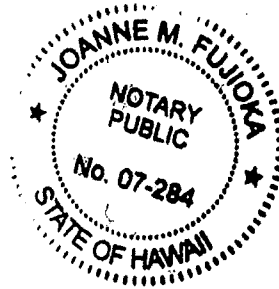
That further Affiant sayeth naught.

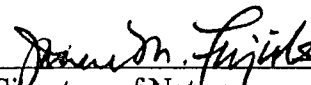


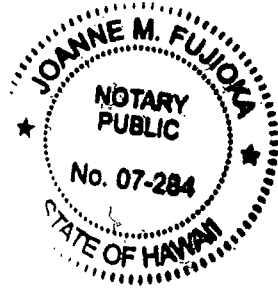
SCOTT McCORMACK

Subscribed and sworn to me  
this 21st day of August 2013

  
Name: Joanne M. Fujioka  
Notary Public, State of Hawai'i  
My Commission expires: 6-17-2015



NOTARY CERTIFICATE (Hawaii Administrative Rules §5-11-8)	
Document Identification or Description: Affidavit of Scott McCormack	
Doc. Date: <u>August 21, 2013</u>	No. of Pages: <u>7</u>
Jurisdiction: <u>First</u> Circuit (in which notarial act is performed)	
 Signature of Notary	<u>8-21-13</u> Date of Certificate
<u>Joanne M. Fujioka</u> Printed Name of Notary	(Official Stamp or Seal)



BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

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

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 August 22, 2013:

GREGORY W. KUGLE, ESQ.  
Damon Key Leong Kupchak Hastert  
1003 Bishop Street  
Suite 1600, Pauahi Tower  
Honolulu, Hawai'i 96813

Attorneys for Movant  
DEFEND OAHU COALITION

JESSE SOUKI, Director  
Office of Planning, State of Hawai'i  
235 South Beretania Street, 6<sup>th</sup> Floor  
Honolulu, Hawai'i 96813

BRYAN C. YEE, ESQ.  
Deputy Attorney Generals  
Department of the Attorney General  
425 Queen Street  
Honolulu, Hawai'i 96813

Attorney for THE OFFICE OF PLANNING

GEORGE I. ATTA, Director  
Department of Planning and Permitting  
City and County of Honolulu  
650 South King Street, 7<sup>th</sup> Floor  
Honolulu, Hawai'i 96813

DON S. KITAOKA, ESQ.  
Deputy Corporation Counsel  
Department of the Corporation Counsel  
530 South King Street  
Room 110, Honolulu Hale  
Honolulu, Hawai'i 96813

Dated: Honolulu, Hawai'i August 22, 2013.

OF COUNSEL:  
MATSUBARA – KOTAKE  
A Law Corporation

  
BENJAMIN M. MATSUBARA  
CURTIS T. TABATA  
WYETH M. MATSUBARA  
Attorneys for Respondent  
TURTLE BAY RESORT COMPANY, LLC