



BEFORE THE LAND USE COMMISSION

STATE OF HAWAI'I

In The Matter Of The Petition Of )  
 )  
 QUEEN LILI'UOKALANI TRUST )  
 )  
 For a Declaratory Order Regarding )  
 )  
 Hawai'i Housing Finance and Development )  
 Corporation and Forest City Hawai'i Kona, LLC )  
 )  
 To Amend The Agricultural Land Use District )  
 Boundary Into The Urban Land Use District For )  
 Approximately 271.837 Acres Of Land At )  
 Keahuolu, North Kona, Island of Hawai'i, )  
 Tax Map Key(TMK) Nos.: (3) 7-4-021:020 (por.), )  
 (3) 7-4-021:024, (3) 7-4-021:025, (3) 7-4-021:026 )  
 and (3) 7-4-021:027 )  
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DOCKET NO. DR10-39

ORDER REFUSING TO  
ISSUE DECLARATORY  
ORDER; CERTIFICATE OF  
SERVICE

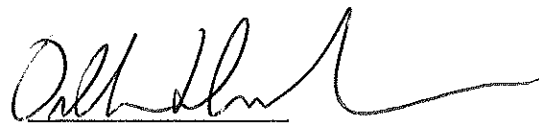
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LAND USE COMMISSION  
STATE OF HAWAII

ORDER REFUSING TO ISSUE DECLARATORY ORDER

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

January 21, 2011 by

  
 Executive Officer



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|   | ) |                       |

ORDER REFUSING TO ISSUE DECLARATORY ORDER

On October 11, 2010, Queen Lili'uokalani Trust ("QLT") filed a Petition for Declaratory Order ("Petition") requesting the Land Use Commission ("Commission") to determine the following two issues: (1) Whether a petition for a district boundary amendment can be deemed a proper filing, and therefore invoke the jurisdiction and authority of the Commission to process it under Hawai'i Revised Statutes ("HRS") Section §201H-38 and Chapter 205, and Hawai'i Administrative Rules ("HAR") Sections §15-15-50 and 15-15-97, when the petitioner's property

interest in the petition area is in question; and (2) Whether a public body and body corporate and politic of the State of Hawai`i (i.e., an agency of the State of Hawai`i), upon petitioning the Commission for a land use district boundary amendment under HRS Section §201H-38 and HAR Section §15-15-97, is required to give statewide and county-wide public notice of its intent to file the petition under HRS Section §1-28.5. As filed, the Petition referenced Docket No. A10-788 Hawai`i Finance and Development Corporation and Forest City Hawai`i Kona, LLC.

On October 13, 2010, the Commission notified QLT by letter that the docket number for QLT's Petition was DR10-39.

On October 15, 2010, the Commission received QLT's letter to the parties in Docket No. A10-788 advising them of corrections to the docket number for this Petition.

On October 18, 2010, the Commission received Respondents Hawai`i Housing Finance and Development Corporation's and Forest City Hawai`i Kona LLC's Memorandum in Opposition to the Petition ("Opposition").

On October 20, 2010, the Commission received the State Office of Planning's ("OP") State of Hawai`i's Joinder to the Opposition.

On October 21, 2010, the LUC met in Waikoloa, Hawai`i, to consider, among other matters, QLT's Petition for Declaratory Order. The LUC subsequently deferred the matter to a later date to be determined.

On October 27, 2010, the Commission received QLT's Response to the Opposition.

On November 1, 2010, the Commission received: (1) OP's Rebuttal Regarding QLT's Petition; and (2) Hawai`i Housing Finance and Development Corporation's and Forest City Hawai`i Kona LLC's Supplemental Memorandum in Opposition to the Petition.

On January 6, 2011, the Commission met in Conference Room 405, Leiopapa A Kamehameha Building, in Honolulu, Hawai`i, to consider the Petition. Yoko Funaki, Esq., and Benjamin A. Kudo, Esq., were present on behalf of QLT. Bryan Yee, Esq., and Mary Alice Evans were present on behalf of OP. Diane Tiara, Esq., was present on behalf of the Hawai`i Housing Finance and Development Corporation. Jennifer A. Benck, Esq., and Bernard Bays, Esq., were present on behalf of Forest City Hawai`i Kona, LLC.

The issues raised in this Petition for Declaratory Order were also raised by QLT orally and in writing in Docket No. A10-788. In that docket, QLT's oral and written motions on those issues were denied. QLT has filed an administrative appeal from the Commission's decision in Docket No. A10-788 that is currently pending in the State Circuit Court for the Third Circuit<sup>1</sup>. In addition, the Trustees of QLT filed a lawsuit in First Circuit Court raising the same issues.<sup>2</sup> That lawsuit is also still pending.

According to the Commission's administrative rules, HAR Section §15-15-100, within 90 days after receipt of a petition for declaratory order, the Commission shall either deny the petition, stating its reasons, issue a declaratory order, OR set the matter for hearing as provided in HAR Section §15-15-103 of the Commission rules. In addition, HAR Section §15-15-102 of the Commission rules provides that the Commission, for good cause, may refuse to issue a declaratory order by giving specific reasons. Without limitation, among the grounds for refusal to issue a declaratory order are:

- (1) the questions is speculative or purely hypothetical and does not involve existing facts, or facts that can be expected to exist in the near future;

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<sup>1</sup> That agency appeal is Civil No. 10-01-438.

<sup>2</sup> That lawsuit is Civil No. 10-1-2253-10.

- (2) the petitioner's interest is not of the type that would give the petitioner standing to maintain an action if the petitioner were to seek judicial relief;
- (3) the issuance of the declaratory order may affect the interests of the commission in a litigation that is pending or may reasonably be expected to arise; or
- (4) the matter is not within the jurisdiction of the Commission.

On behalf of QLT, Ms. Funaki argued for the granting of the Petition and incorporated arguments made and submitted on the same issues in Docket No. A10-788. She argued that under the public interest exception to the mootness doctrine, the issue regarding notice was not moot because it could arise in future dockets before the Commission.

Mr. Yee incorporated oral and written arguments of OP on the same issues in Docket No. A10-788 and noted for the Commission that its rules, namely HAR Section § 15-15-102, allowed the Commission to refuse to issue a declaratory ruling on the grounds, among others, that it could affect the Commission's interest in pending litigation or litigation that was likely to arise.

Ms. Taira concurred with Mr. Yee's argument and also incorporated by reference the Commission's orders in Docket No. A10-788 relating to the same issues involved in this Petition.

Ms. Benck argued that (1) because the issues had been considered and decided by the Commission in Docket No. A10-788, they were moot; (2) the Commission has no jurisdiction to determine contract disputes between the parties; and (3) the Commission could refuse to issue a declaratory order because it could affect the Commission's rights not only in the existing pending appeal of the Commission's decision and order in Docket No. A10-788, but also in the separate lawsuit pending in First Circuit Court.

Upon questioning by the Commission, attorneys for QLT agreed that HHFDC has legal title to the land described in the Petition<sup>3</sup>,

Following discussion, a motion was made and seconded to refuse to issue a declaratory order in this matter as it may affect the interests of the Commission in litigation that is pending. There being a vote of 7 ayes, 0 nays, and 2 excused, the motion carried.

### ORDER

The Commission, having duly considered QLT's Petition for Declaratory Order, and the written and oral arguments presented by the parties in this proceeding, and a motion having been made at a meeting conducted on January 6, 2011, in Honolulu, Hawai'i, and the motion having been seconded and received the affirmative votes required by HAR Section §15-13,, and there being good cause for the motion, this Commission ORDERS as follows:

Pursuant to HAR Section §15-15-102, the Commission HEREBY REFUSES to issue a declaratory order in this matter as it may affect the interests of the LUC in litigation that is pending.

### ADOPTION OF ORDER

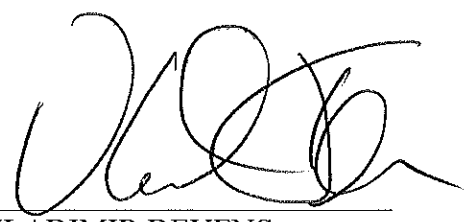
This ORDER and its ADOPTION shall take effect upon the date this ORDER is certified and filed by this Commission.

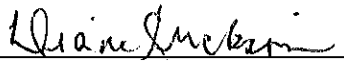
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<sup>3</sup> The land described in QLT's petition is the same as the petition area described in Docket No. A10-788.

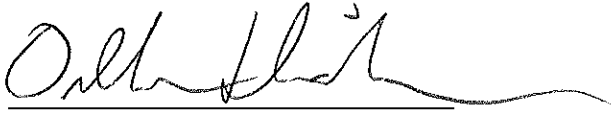
DATED: Honolulu, Hawai'i, January 21, 2011 per motion in Honolulu, Hawai'i,  
on January 6, 2011.

APPROVED AS TO FORM:

By   
VLADIMIR DEVENS  
Chairperson and Commissioner

  
Deputy Attorney General

Filed and effective on:  
January 21, 2011

Certified by:  
  
ORLANDO DAVIDSON  
Executive Officer

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CERTIFICATE OF SERVICE

I hereby certify that a certified copy of the foregoing ORDER was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail, return receipt requested, as noted:

CERT. BENJAMIN A. KUDO, Esq.  
YUKO FUNAKI, Esq.  
Imanaka Kudo & Fujimoto  
745 Fort Street, 17<sup>th</sup> Floor  
Honolulu, Hawai'i 96813

Attorneys for Queen Lili'okalani Trust



CERT. JENNIFER A. BENCK, Esq.  
Carlsmith Ball LLP  
121 Waiuanuenue Avenue  
Hilo, Hawai'i 96720

CERT. BERNARD BAYS, Esq.  
Bays Deaver Lung Rose & Baba  
Ali'i Place  
1099 Alakea Street, Floor 16  
Honolulu, Hawai'i 96813

Attorneys for Forest City Hawai'i  
Kona, LLC

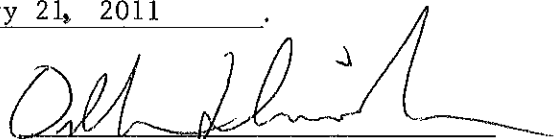
DEL. DIANE K. TAIRA, Esq.  
CRAIG Y. IHA, Esq.  
Deputy Attorney General  
425 Queen Street  
Honolulu, Hawai'i 96813

Attorneys for Hawai'i Housing Finance  
and Development Corporation

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

Attorney for State Office of Planning

Dated: Honolulu, Hawai'i, January 21, 2011.



ORLANDO DAVIDSON  
Executive Officer