



LAND USE COMMISSION
STATE OF HAWAII

2011 APR 25 A 10: 22

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of)	DOCKET NO. A87-617
)	
BRIDGE `ĀINA LE`A, LLC, Successor)	ORDER ADOPTING PROPOSED
Petitioner to PUAKŌ HAWAII)	FINDINGS OF FACT, CONCLUSIONS OF
PROPERTIES and D.W. `ĀINA LE`A)	LAW, AND DECISION AND ORDER
DEVELOPMENT, LLC)	REVERTING THE PETITION AREA, AS
)	AMENDED AS COMMISSION'S FINAL
To Amend the Agricultural Land Use District)	DECISION; CERTIFICATE OF SERVICE
Boundary into the Urban Land Use District)	
for Approximately 1,060 Acres of Land)	
Situated at Waikoloa, South Kohala, Island of)	
Hawaii`i, State of Hawaii`i, Tax Map Key)	
Nos.: 6-8-01: 25 (por.), 36 (por.), 37 (por.),)	
38 (por.), 39 (por.), and 40 (por.).)	

ORIGINAL

**ORDER ADOPTING PROPOSED FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA,
AS AMENDED AS COMMISSION'S FINAL DECISION;
CERTIFICATE OF SERVICE**



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AMENDED AS COMMISSION`S FINAL DECISION**

FINDINGS OF FACT

A. Background

1. On January 17, 1989, the Land Use Commission ("Commission") issued its Findings of Fact, Conclusions of Law, and Decision and Order ("1989 Order") in this docket reclassifying approximately 1,060 acres of land, from the State Agricultural to the State Urban district, to develop a residential community consisting of 1,924 dwelling units along with support facilities and recreational amenities including a commercial center, golf course, club house, parks and community facilities.

2. On July 9, 1991, the 1989 Order was amended (“1991 Order”). The Petitioner Puakō Hawai`i Properties (“Puakō”), successor to original Petitioner Signal Puakō Corporation, provided a revised development plan that included a low density residential development consisting of approximately 1,550 residential single- and multi-family units containing its own small village commercial center, two world class golf courses, and two parks.

3. Petitioner Puakō represented that it would take approximately one year, or until 1992 to obtain necessary government approvals and that single-family lots would be completed and multi-family home construction would begin in 1995. Petitioner Puakō further represented that it would take six years to complete construction within the Property.

4. Condition 1 of the 1991 Order required Petitioner Puakō to provide thirty percent (30%) of the units priced for families with an income range of up to 120% of the median income for the County of Hawai`i, and an additional thirty percent (30%) of the units for families with an income range of one hundred twenty to one hundred forty percent (120% to 140%) of the County of Hawai`i median income. The gross number of affordable units could not be less than 1,000 units.

5. Condition 13 also required the Petitioner Puakō to develop the Petition Area in substantial compliance with the representations made to the LUC, and informed the Petitioner Puakō that failure to develop the Petition Area in substantial compliance with representations may result in reversion of the Petition Area to its original classification.

B. 2005 Order

6. On September 1, 2005, Petitioner Bridge `Āina Le`a, LLC (“Bridge”), successor to Puakō, asked to amend the 1991 Order to reduce the number and percentage of affordable

units. Hearings were held on September 30, 2005, October 7, 2005, October 19, 2005, and November 4, 2005.

7. At these hearings and on behalf of Petitioner Bridge, Mr. Ho`olae Paoa represented that the homes would be built within three years. “We use a three years as, perhaps, a worse case scenario.” “The certificates of occupancy could be issued within five years.”

8. Mr. Paoa also represented that the zoning was completed. Furthermore, Mr. Paoa represented that Petitioner Bridge would have executed all contracts within thirty days of Commission approval, mobilization within the next thirty days, and that permits would be pulled and clearing, grubbing and grading would begin within the next thirty days.

9. Petitioner Bridge emphasized that development with a 60% affordable housing requirement was not economically feasible; but development with a 20% affordable housing requirement was.

10. On November 25, 2005, the Commission issued the second amended Decision and Order to allow a reduction in the amount of affordable housing required (the “2005 Order”).

11. Finding of Fact 4 of the 2005 Order found that Petitioner Bridge had represented that the Project could not be constructed with a 60% affordable housing requirement because of the costs.

12. Finding of Fact 6 of the 2005 Order found that the Project would become economically feasible if the affordable housing requirement was reduced to 20%.

13. Finding of Fact 12 of the 2005 Order specifically found that Petitioner Bridge represented that it was possible to obtain certificates of occupancy for all 385 affordable housing units within three years, and that it was reasonable to obtain certificates of occupancy within five

years of the date of the 2005 Order, “taking into account possible delays for permitting and other contingencies.”

14. Finding of Fact 11 of the 2005 Order found that Petitioner Bridge had represented that its construction plan would enable the market units and the affordable units to be constructed concurrently and that the affordable units would be spread throughout the Project.

15. Finding of Fact 26 of the 2005 Order found that Petitioner Bridge had represented that there were no additional discretionary governmental approvals outstanding, except for the highway access approval by the State Department of Transportation.

16. Petitioner Bridge’s representations that the project would be completed soon were a significant factor in the Commission’s decision to grant the Petitioner Bridge’s request to reduce the required number and percentage of affordable units.

17. The 2005 Order reduced the number and percentage of affordable units from sixty percent (60%) to twenty percent (20%).

18. As a condition of the 2005 Order, Condition 1 was amended to require Petitioner Bridge to submit to the Commission copies of the certificates of occupancy for at least 385 affordable units within the Petition Area by November 17, 2010. Condition 1 is an essential component of the 2005 Order. Condition 13 of the 1989 Order was unchanged by the 2005 Order and remained in effect.

19. Bridge represented to the Commission that the 385 affordable units would be built on the Petition Area, and that it would not claim credit against the 385 units for the 107 affordable units its predecessor had built off-site.

20. The Commission’s 2005 Decision and Order was never appealed.

C. Post-2005 Proceedings

21. At various status meetings during 2006 and 2007, Bridge continued to represent that it would meet the requirements of Condition 1.

22. On July 24 and September 18, 2008, Petitioner Bridge was requested to provide status reports to the Commission regarding compliance with conditions and development of the Petition Area. In both instances, Petitioner Bridge failed to do so.

23. On September 18, 2008, Petitioner Bridge informed the Commission that it would be filing a motion to amend Condition 1 of the 2005 Order

24. On December 9, 2008 and pursuant to a vote taken on September 18, 2008, the Commission issued its written Order to Show Cause. The Order to Show Cause stated that the Commission had reason to believe that Petitioner Bridge had either violated or not met at least six specific conditions or representations, including Condition 1 of the 2005 Order.

25. On January 5, 2009, Petitioner Bridge filed a Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order, Filed November 25, 2005.

26. On January 6, 2009, Petitioner Bridge filed its List of Witnesses and List of Exhibits on the Order to Show Cause.

27. On March 20, 2009, Petitioner Bridge notified the Commission of its intent to assign its interests in the Petition Area to D.W. `Āina Le`a Development, LLC.

28. On April 30, 2009, the Commission continued its hearing and action meeting on the Order to Show Cause. During this hearing, Petitioner Bridge requested that its motion to amend the conditions with respect to the affordable housing requirements be withdrawn and represented that DW `Aina Le`a was prepared to go forward with its purchase/sale agreement

and did not need to set aside the conditions. Petitioner Bridge verbally withdrew its Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order filed November 25, 2005.

29. On April 30, 2009, the Commission adopted a motion which determined that the Petitioner Bridge was in non-compliance with certain conditions for reclassification and voted to revert the Petition Area to its original agricultural classification (“reversion decision”).

30. On May 21, 2009, DW `Āina Le`a Development, LLC (“DW `Āina Le`a”) moved to be made a co-petitioner with Petitioner Bridge (collectively referred to as “Petitioners”). On September 28, 2009, the request was granted.

31. On June 5, 2009, at the request of the Petitioners, the Commission delayed the issuance of a written reversion order, and allowed Petitioners another opportunity to provide additional evidence and to present argument on the issue.

32. On July 10, 2009, the LUC, by letter, requested information from Petitioner Bridge and DW `Āina Le`a, specifically a verification of their current master plan, a detailed plan for Project implementation, and a status report on compliance with the conditions of the 2005 Decision and Order.

33. On July 30, 2009, the Commission received Petitioner Bridge’s status report regarding compliance with conditions of the 2005 Decision and Order. Petitioner Bridge represented that it was in compliance with all conditions set forth in the 2005 Order and the representations made to the Commission.

34. On July 31, 2009, the Commission received DW `Āina Le`a’s status report on compliance with conditions of the 2005 Decision and Order. DW `Āina Le`a represented that Conditions 1, 3-4, 6, 9-12, 14, and 15 would be complied with.

35. On August 19, 2009, the Commission received Petitioner Bridge's Motion to Rescind Order to Show Cause dated December 9, 2008.

36. On August 27, 2009, the Commission held a hearing in Waikoloa, Hawai'i, to hear further argument and evidence that was not available or presented to the Commission at the April 30, 2009 hearing on the pending Order to Show Cause. Petitioner designated D.W. 'Aina Le'a as its agent for purposes of presenting evidence of the progress of the Project and compliance with the Decision and Orders of the Commission.

37. On September 24, 2009, the LUC rescinded the reversion decision, "provided that as a condition precedent, the Petitioner completes 16 affordable units by March 31, 2010."

38. On July 26, 2010, the Commission found that the Petitioners had failed to comply with the condition precedent, kept the Order to Show Cause pending, scheduled a further hearing after September 17, 2010, and affirmed that the November 17, 2010 date in Condition 1 of the 2005 Order was a deadline, not a goal.

39. On November 18, 2010, the Commission held a hearing in Kailua-Kona, Hawai'i, to hear further argument and evidence regarding the pending Order to Show Cause.

40. On January 20, 2011, the Commission held a hearing in Waikoloa, Hawai'i, to hear further argument and evidence regarding the pending Order to Show Cause. At the conclusion of the hearing, the Commission voted to revert the Petition Area to the former Agricultural District classification.

D. Financing

41. In 2005, Mr. Paoa testified that Petitioner Bridge had entered into an agreement with Westwood Heritage Development Group to provide additional capital and development

expertise. Westwood Heritage Development Group's involvement was subject only to the condition that the LUC amend the affordable housing provision. The arrangement was to be finalized within two weeks. An agreement with Westwood Heritage Development Group was never executed.

42. In 2006 and 2007, Petitioner Bridge represented that Bridge Capital Inc. had pledged to provide sufficient financing for the entire project; but that Bridge was in negotiations with Stonington Realty Partners as its development partner. Bridge never executed an agreement with Stonington Realty Partners.

43. In 2009, after the Commission issued its Order to Show Cause, Petitioner Bridge represented that it had negotiated an agreement with DW `Āina Le`a, LLC. DW `Āina Le`a, LLC represented that it had construction financing through Redwood Capital and Capital Asia.

44. On July 1, 2010, Mr. Robert Wessels, on behalf of Co-Petitioner DW `Āina Le`a, testified that the rate of money being raised by Capital Asia was slower than anticipated, and that Co-Petitioner DW `Āina Le`a had found a lender, Exim Corporation, to provide the additional financing.

45. Mr. Wessels represented that Exim Corporation had made a firm commitment to provide a 98 million dollar loan, that there was an executed commitment, but the documents were not finalized and the loan was not funded. He further represented that Exim Corporation was aware of the order to show cause proceeding and was still willing to work with Co-Petitioner DW `Āina Le`a.

46. On November 18, 2010, Mr. Wessels admitted that Exim Corporation had not put the money in an escrow account, and the only money that he could absolutely count on was from Capital Asia. On January 7, 2011, by affidavit attached to Co-Petitioner DW `Āina Le`a's

Supplemental Memorandum in Support of Motion to Amend Conditions 1, 5 and 7, Mr. Wessels stated that Exim Corporation had not funded the loan, and that he was in discussions with other prospective lenders.

E. Procedural Due Process

47. The Petitioners have had a full and fair opportunity to present their case.

48. On April 30, 2009, Petitioners had an opportunity to question witnesses, submit exhibits, and present oral argument. Petitioners' case was limited only after they were asked to submit an offer of proof as to the information Petitioners intended to elicit. The Commission determined that the evidence, even if true, was insufficient to show cause why the Petition Area should not be reverted.

49. On August 27, 2009, Petitioners had a second opportunity to call and question witnesses, submit exhibits, and present oral argument. Petitioners did so.

50. On November 18, 2010, Petitioners had a third opportunity to call and question witnesses, submit exhibits, and present oral argument. Petitioners did so.

51. On January 20, 2011, Petitioners had a final opportunity to call and question witnesses, submit exhibits, and present oral argument. In response to questions by the Commission, all parties admitted that they had attended all hearings, had an opportunity to present any additional evidence and call any witnesses in response to the Order to Show Cause, and that there was nothing additional to present.

52. Petitioners were informed of all of the hearings, were aware of the matters at issue, were present at all of the hearings, and fully participated at all of the hearings.

53. Petitioners have alleged procedural violations, but have made no showing of prejudice as a result of any alleged procedural violations.

54. Throughout this case, the Commission has provided adequate notices and followed the appropriate procedures for an Order to Show Cause.

F. Equal Protection

55. Co-Petitioner Bridge has asserted that it is being treated differently from other cases in the area.

56. None of the cases cited by Co-Petitioner Bridge involve facts and circumstances similar to this case.

G. Violations

57. As of November 17, 2010, Petitioners had failed to provide certificates of occupancy for at least 385 affordable dwelling units, and violated Condition 1 of the 2005 Order.

58. As of January 20, 2011, over 22 years since the reclassification was first granted, Petitioners had failed to obtain a certificate of occupancy for even one affordable dwelling unit within the Petition Area.

59. Of the 385 affordable dwelling units, Petitioners have approximately 40 dwelling units in various stages of vertical construction all in the same area.

60. There is no infrastructure connection to any of the affordable dwelling units, including electrical lines, sewage lines, water lines, and finished roads. Current construction and preliminary infrastructure development has been limited to a 62-acre portion of the 1,060 acre Petition Area, including temporary access roads.

61. As of July 1, 2010, Petitioners owed approximately 5.5 million dollars to the General Contractor, Goodfellow Brothers for work previously done.

62. Petitioners continue to be in violation of Condition 1 of the 2005 Order, and are unlikely to complete 385 affordable units in the near future.

63. Petitioners have not substantially commenced use of the Petition Area in conformance with the representations made in 2005 or in conformance with the applicable representations and conditions as of January 20, 2011. Furthermore, Petitioners have failed to substantially comply with representations made to the Commission.

64. Through multiple status hearings and the issuance of the December 9, 2008 Order to Show Cause, the Commission has clearly informed Petitioners of the importance of complying with their representations and all conditions of approval, including but not limited to Conditions 1 and 13.

65. It is important to the integrity of the State land use process that Petitioners comply with the conditions imposed by the Commission and with the representations made by the Petitioners.

66. Under the facts and circumstances of this case, Petitioners have failed to show cause why the Petition Area should not be reverted to its original classification. Petitioners have continually violated Condition 13, which requires them to substantially comply with representations made to the Commission, including but not limited to the following:

- On September 30, 2005, Mr. Paoa represented that Petitioner Bridge would build 385 affordable housing units on-site within the Petition Area (2005 Order, FOF 9); that the homes would be built and certificates of occupancy obtained within three years (2005 Order, FOF 12); that no additional discretionary governmental approvals were

needed, with the sole exception of the highway access approval (2005 Order FOF 26); and that all Petitioner Bridge's contracts with contractors and consultants have been negotiated and would be executed and construction site work started within 30 days of the Commission's decision (2005 Order, FOF 24 and 25).

- On April 30, 2009, Petitioner Bridge represented the capabilities, particularly the experience and financial capability of DW `Āina Le`a to step into Bridge's shoes and meet all the conditions the Commission had set down. Further, Mr. Paoa represented that Petitioner Bridge had the capabilities to meet the timeline for construction of the affordable housing.
- On June 5, 2009, in response to a question by the Commission prior to being accepted as a co-petitioner, a representative of DW `Āina Le`a represented that they had reviewed the conditions imposed by the Commission and that they were prepared to comply with the conditions. The representative of DW `Āina Le`a also represented that they had no intent to seek to amend conditions in the 2005 Order.
- On August 27, 2009, Mr. Wessels, a representative of DW `Āina Le`a, represented that DW `Āina Le`a was familiar with the Commission's July 10, 2009 letter to Petitioner Bridge requesting information on compliance with conditions, the subsequent response letter by Petitioner Bridge on July 30, 2009, DW `Āina Le`a's response letter on July 31, 2009, and that DW `Āina Le`a was prepared to comply with the conditions imposed by the Commission in their 2005 Decision and Order.
- On December 16, 2009, Co-Petitioner DW `Āina Le`a submitted an annual report that represented that all necessary permits, including vertical construction permits for the affordable housing site had been prepared and recently submitted; that they planned

to construct the wastewater treatment plant in the Agricultural District which would require a State Special Permit and amendments to the conditions; that they intend to provide 32 acres in the Agricultural District to the Department of Education which would require amendments to the conditions; that they would comply with DOH conditions; and that they will provide the Commission with notice of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interest of the Property.

- On November 18, 2010, Co-Petitioner DW `Aina Le`a admitted not meeting a deadline by a “very major amount” in reference to the requirement to provide certificates of occupancy for 385 affordable units by November 17, 2010; and further admitted that they could not provide a firm date by which the 16 units that had been constructed could be occupied.
- On November 18, 2010, in response to questioning by the Commission, Co-Petitioner DW `Aina Le`a represented that condominium documents had not been submitted, the package wastewater treatment plant had not been delivered and plans not submitted to the State Department of Health for review and approval, no application had been made to the Public Utilities Commission for approval of wastewater or water utilities, no plans for landscaping had been submitted for review and approval by the County, and Co-Petitioner DW `Aina Le`a had not authorized anything to facilitate the construction of the intersection to provide access to the Property.

CONCLUSIONS OF LAW

1. Any conclusions of law herein improperly designated as a finding of fact should be deemed and construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed and construed as a finding of fact.

2. The Commission has the authority to revert a Petition Area to its original land use classification for failure to comply with the conditions imposed by the Commission. Lana`i Co. Inc. v. Land Use Commission, 105 Hawai`i 296, 318 (Haw. 2004), and HRS Section 205-4(g).

3. Under the facts and circumstances of this case, Petitioners have failed to satisfy Condition 1 and have failed to substantially comply with representations made to the Commission, in violation of Condition 13.

4. Under the facts and circumstances of this case, reversion of the Petition Area to its original agricultural classification does not violate any applicable rule or statutory provisions, including Hawai`i Administrative Rules (HAR) subchapter 7 of Chapter 15-15, and HRS Chapters 91, 92, and 205.

5. The Commission does not rule upon questions of constitutional law.

6. Under the facts and circumstances of this case, reversion of the Petition Area to its original agricultural classification for violation of conditions, including Condition 1 and Condition 13, is not precluded by the doctrine of estoppel.

ORDER

This Commission, having duly considered the written reports, pleadings, and oral and written statements and testimony, and oral arguments of the parties, and a motion having been made and seconded at a hearing on January 20, 2011, in Waikoloa, Hawai`i, and the motion having received the affirmative votes required by HAR §15-15-13, and there being good cause for the motion,

HEREBY ORDERS:

1. The Petitioner has failed to show cause why the Petition Area should not revert to its prior land use classification.
2. The Petition Area of approximately 1,060 acres of land consisting of Tax Map Key Nos.: 6-8-01:025 (portion); 036 (portion); 037(portion); 038 (portion); 039 (portion); and 040 (portion), is therefore reverted to the Agricultural District.
3. In compliance with Hawai`i Administrative Rules § 15-15-93(e), the 1989 Order, as amended, is further amended to incorporate the order to show cause and to include the reversion of the Petition Area to its former land use classification.
4. Any and all proposed findings of fact submitted by the parties which are not expressly adopted by the Commission, or rejected by clearly contrary findings of fact, are hereby denied and rejected.

ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 21st day of April, 2011. This ORDER may be executed in counterparts. This Order is a final decision and order in a contested case for purposes of section 91-14, Hawaii Revised Statutes.


Done at Honolulu, Hawai'i, this 25th day of April, 2011, per motion on April 21, 2011.


LAND USE COMMISSION

APPROVED AS TO FORM

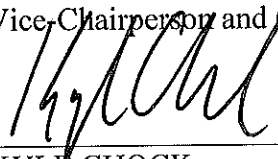
STATE OF HAWAI'I

Diana Luckson
Deputy Attorney General

By 
VLADIMIR PAUL DEVENS
Chairperson and Commissioner

By 
THOMAS CONTRADES
Vice-Chairperson and Commissioner

By (excused)
LISA M. JUDGE
Vice-Chairperson and Commissioner

By 
KYLE CHOCK
Commissioner

By 
RONALD HELLER

Commissioner

By voted no
DUANE KANUHA
Commissioner

By: voted no
CHARLES JENCKS
Commissioner

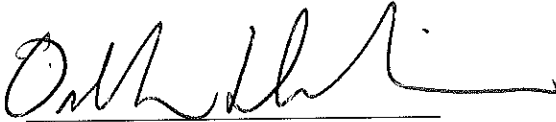
By
NORMAND LEZY
Commissioner

By
NICHOLAS W. TEVES, JR.
Commissioner

Filed and effective on:

4/25/2011

Certified by:



ORLANDO DAVIDSON
Executive Officer



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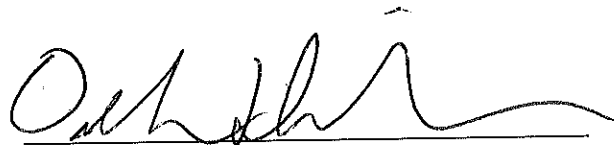
CERTIFICATE OF SERVICE

I hereby certify that a copy of the ORDER ADOPTING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA, AS AMENDED AS COMMISSION'S FINAL DECISION was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

	HAND DELIVERED	REGULAR MAIL	CERTIFIED MAIL
JESSE SOUKI, DIRECTOR Office of Planning 235 S. Beretania Street Rm. 600 Honolulu, Hawai`i 96813	X		
BRYAN YEE, ESQ. Deputy Attorney General Hale `Auhau, Third Floor 425 Queen Street Honolulu, Hawai`i 96813		X	

	HAND DELIVERED	REGULAR MAIL	CERTIFIED MAIL
BOBBY JEAN LEITHEAD-TODD County of Hawai'i Planning Director Aupuni Center 101 Pauahi Street, Suite 3 Hilo, Hawai'i 96720		X	
LINCOLN ASHIDA, Esq. County of Hawai'i Office of the Corporation Counsel Hilo Lagoon Center 101 Aupuni Street, Suite 325 Hilo, Hawai'i 96720		X	
Alan M. Okamoto, Esq. Nakamoto, Okamoto & Yamamoto 187 Kapiolani Street Hilo, Hawaii 96720			X
Bruce D. Voss, Esq. Bays Deaver Lung Rose & Holma Alii Place, 16 th Floor 1099 Alakea Street Honolulu, Hawaii 96813			X

Dated Honolulu, Hawai'i, April 25, 2011.



ORLANDO DAVIDSON