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September 14, 2018

Jonathan Likeke Scheuer, Chairperson
Commissioners, State Land Use Commission
State of Hawai'i Land Use Commission
235 South Beretania Street, Room 406
Honolulu, Hawai'i 96804-2359

RE: Docket A06-767 - In the Matter of the Petition of Waikoloa Mauka, LLC

Dear Chair Scheuer and Commissioners of the State Land Use Commission:

This firm represents Waikoloa Highlands, Inc. ("WHI"). We are writing to express WHI's strong objection to the State of Hawai'i Land Use Commission's (the "**Commission**") proposed amendments to Title 15, Subtitle 3, Chapter 15 of the Hawai'i Administrative Rules ("**HAR**"), and more specifically the proposed amendment to HAR § 15-15-93 (the "**Proposed Amendment**"). As explained below, WHI strongly objects to the Proposed Amendment on the grounds that it: (a) exceeds the Commission's authority under Hawai'i Revised Statutes ("**HRS**") Chapter 205; (b) is contrary to Hawai'i Supreme Court precedent; and (c) is the product of a rule-making process that has not meaningfully attempted to obtain and consider input from the stakeholders who will be most significantly affected by the Proposed Amendment, including present petitioners, the development and planning communities, and County planning agencies.¹

WHI is the successor-in-interest to the land that is the subject of Commission Docket No. A06-767. On July 3, 2018, the Commission filed an Order to Show Cause ("**OSC**") pursuant to HRS § 205-4(g) and HAR § 15-15-93. The OSC is presently set to be heard by the Commission on October 24-25, 2018. As a consequence, WHI has significant due process concerns about the expedited scheduling of the OSC hearing in Docket No. A06-767, the Commission's powers and process for reverting lands, and the potentially devastating effects of such a reversion.

¹ WHI's objections to both the substance of the Proposed Amendment, and process by which it is being made, are shared by other stakeholders, including the Land Use Research Foundation of Hawai'i ("**LURF**"). A copy of LURF's comment letter, dated September 11, 2018, objecting to the Proposed Amendment is enclosed herein as Enclosure 1. While WHI is not in complete agreement with all aspects of LURF's letter, in general, it echoes WHI's belief that the Proposed Amendment is improper.

As proposed by the Commission, HAR § 15-15-93 would be amended to include the following provision:

(e) Absent substantial commencement of *construction*, the commission may revert the property to its former land use classification or a more appropriate classification. For the purposes of this subsection (e) substantial commencement shall be determined based on the circumstances or facts presented in the order to show cause regardless of dollar amount expended or percentage of work completed.

(Emphasis added). WHI strongly believes that the Proposed Amendment is legally defective for at least two reasons.

First, the Proposed Amendment exceeds the authority granted to the Commission by the Legislature. The Commission's authority to revert previously reclassified land into its prior State Land Use ("SLU") district is derived solely from HRS § 205-4. *See Asato v. Procurement Policy Bd.*, 132 Hawai'i 333, 346, 322 P.3d 228, 241 (2014) ("[A] public administrative agency possesses only such rulemaking authority as is delegated to it by a state legislature and may only exercise this power within the framework of the statute under which it is conferred."). However, the phrase "substantial commencement of *construction*" appears nowhere in HRS § 205-4.

Instead, HRS § 205-4 provides that:

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.

(Emphasis added). "Use" and "construction" are not synonymous, and the practical effect of the Proposed Amendment is clear: It would radically and impermissibly expand the Commission's power to revert land to its prior SLU district without complying with the requirements of HRS § 205-4. *See Asato*, 132 Hawai'i at 346, 322 P.3d at 241 ("Administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down.").

The distinction between "use" and "construction" is significant. There are numerous examples of ways in which a petitioner can commence use of its land without undertaking any "construction." These examples include preparation of the very costly technical studies and plans that often must be prepared subsequent to the reclassification of land by the Commission. Under the Proposed Amendment, the time and expense in commissioning these studies and plans

would be wholly irrelevant to whether the land can be reverted because some would argue² that neither can be fairly characterized as “construction.” See CONSTRUCTION, Black’s Law Dictionary (10th ed. 2014) (defining “construction” as “[t]he act of building by combining or arranging parts or elements; the thing so built.”).

Moreover, the Proposed Amendment ignores the fact that the Commission itself often provides that the condition limiting the time for completing projects (such as subdivisions) can be satisfied through the posting of a bond -- *i.e.*, without any actual construction.³ Under a strict interpretation of the Proposed Amendment, a petitioner could do everything short of posting a bond within the timeframe set by the Commission, but nevertheless have its land reverted to its prior SLU district because it has not substantially commenced “construction.”

Second, the Proposed Amendment is in direct conflict with Hawai‘i Supreme Court’s decision in *DW Aina Le ‘a Dev., LLC v. Bridge Aina Le ‘a, LLC*, 134 Hawai‘i 187, 339 P.3d 685 (2014) (“*Aina Le ‘a*”), notwithstanding that the stated purpose of the Proposed Amendment is allegedly to conform HAR § 15-15-93 to *Aina Le ‘a*. Nowhere in *Aina Le ‘a* did the Court interpret either HRS § 205-4(g) or HAR § 15-15-93 as requiring a petitioner to demonstrate that it has substantially commenced “construction” of its project. Rather, the Court unequivocally held that “where the petitioner has *substantially commenced use of the land*, the [Commission] is required to follow the procedures set forth in HRS § 205-4 that are generally applicable when boundaries are changed.” *Id.* at 213, 339 P.3d at 711 (emphases added).

Moreover, in concluding that the lower court did not err in determining that the petitioner had substantially commenced use of its land, the Court explicitly pointed out that, *inter alia*, the petitioner “continued to actively proceed with preparation of plans and studies, including building plans and studies for the [environmental impact statement].” *Id.* at 214, 339 P.3d at 712. As explained above, these plans and studies are concrete steps required for use of the land, in addition to being extremely costly and time consuming, yet some could argue do not constitute “construction” as that term is commonly understood or intended by the Proposed Amendment.

The Court’s review of the legislative history behind the operative portion of HRS § 205-4(g) also makes clear that “use” -- and not “construction” -- is the intended measure. See *id.* at 211-13, 339 P.3d 709-11. For example, the Court noted that the Senate Committee on Energy and Natural Resources “explained in its report that the purpose . . . was ‘to allow the . . . Commission to attach a condition to a boundary amendment decision which would void the boundary amendment when *substantial commencement of the approved land use activity does not occur in accordance with representations made by the petitioner.*’” *Id.* at 211, 339 P.3d at

² Others, including WHI, would argue that these studies and plans, as well as the conveyance of real property in satisfaction of affordable housing requirements, all constitute the act of “combining or arranging parts or elements” for the thing to be built.

³ Examples of these conditions can be found in the Findings of Fact, Conclusions of Law, and Decision and Orders in WHI’s Docket, and The Shopoff Group, LLC Docket (A06-770), which we understand is also being considered for issuance of an OSC by the Commission.

709 (citing S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915) (emphases added). Similarly, the Court noted that the House Committee on Planning, Energy, and Environmental Protection reported that “the purpose of the bill was to ‘strengthen existing statutes by permitting the . . . Commission further control over a proposed development by voiding a change in zoning if the petitioner *does not make a substantial commencement of the approved land use activity.*’” *Id.* (emphases added) (citing H. Stand. Comm. Rep. No. 1086–90, in 1990 H. Journal, at 1265). As explained above, a petitioner can unquestionably commence an “approved land use activity” without completing any “construction.” The Legislature clearly could have used the term “construction” but did not, so the Proposed Amendment must fail.

WHI also strongly objects to the abbreviated rule-making process the Commission has employed. In total, the Commission has scheduled only four hearings (one for each County) over the course of approximately one month, and has not indicated whether it will publish subsequent drafts of the proposed revisions for further public comment or hold additional public hearings. Moreover, as far as WHI is aware, the Commission has not establish any community outreach programs specifically seeking input and feedback from the stakeholders who stand to be most significantly affected by the Proposed Amendment, including present petitioners, the development and planning communities, and County planning agencies. HRS Chapter 91 sets the bare minimum that an agency must do when promulgating rules; nothing prevents the Commission from making further efforts to ensure that the Proposed Amendment is both legally sound and the product of informed decision-making.

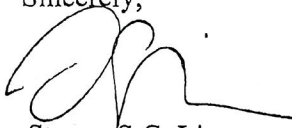
The Commission’s expedited rule-making process is in stark contrast to that currently being utilized by the Environmental Council to revise the rules governing environmental review under HRS Chapter 343. Since commencing the process in July of 2017, the Environmental Council has held fourteen regular Council hearings, nine public comment hearings on the rules and one hearing by the Small Business Regulatory Review Board, and published six versions of the proposed revised rules.

There is simply no compelling reason for the Commission to have taken the present expedited approach to the rule-making process for the Proposed Amendment. Prior to moving forward with any amendments, the Commission should hold additional public hearings, publish one or more updated versions of the revised rules for further public comment, and form outreach programs targeting those that stand to be most affected by the amendments.

In conclusion, WHI strongly objects to the Proposed Amendment on the grounds that it exceeds the Commission’s authority under HRS Chapter 205, is contrary to the Hawai’i Supreme Court’s decision in *Aina Le ‘a*, and is violative of the due process rights of WHI and others in similar situations. The Proposed Amendment is also the product of an expedited rule-making process that has not meaningfully attempted to obtain and consider input from the stakeholders who will be most significantly affected by the Proposed Amendment.

Jonathan Likeke Scheuer, Chairperson
Commissioners, State Land Use Commission
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Thank you for your attention to this matter. If you have any questions, please feel free to contact me.

Sincerely,

Steven S.C. Lim

Enclosure

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Via E-Mail

September 10, 2018

Land Use Commission
Department of Business, Economic Development & Tourism
State of Hawaii

Comments in Strong Opposition to the Land Use Commission's
Proposed Amendment to §15-15-93 (e) Relating to Substantial Commencement
and Acceptance of the LURF's Proposed Amendment to §15-15-93 (e)

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. LURF's mission is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources, and public health and safety.

This is written to respectfully request your consideration of LURF's **opposition** to the Land Use Commission's (LUC) proposed Rules Amendment §15-15-93(e) and **acceptance of the attached LURF proposed amendment to §15-15-93(e)**, based on the Hawaii Supreme Court's decision in the Bridge 'Aina Lea case, and the reasons and discussion below.

The proposed rule change proposed by the LUC should be rejected, based on the following:

1. The proposed rule directly contradicts, circumvent and attempts an end-run around the Hawaii Supreme Court's decision in a prior, significant land use case, Bridge 'Aina Lea;
2. The LUC failed to seek input from the LUC petitioners and counties. The LUC has repeatedly failed to seek input from the parties which would be most affected by this particular changes in the law, and this particular rule change, relating to the Bridge 'aina Lea case, despite the fact that the petitioners/landowners which have obtained LUC approvals and counties would suffer the effects of the major unanticipated negative consequences of such changes. LURF would respectfully request that the LUC should convene these stakeholders to discuss proposed amendments.

3. It is opposed by housing developers and county planning departments. In addition, since the Bridge 'Aina Lea decision, all four county planning departments, landowners and housing developers, as well as the building industry are strongly opposed to the LUC's many attempts to change the law to circumvent the decision by the Hawaii Supreme Court.
4. The LUC's proposed rule would impede the anticipated construction of much-needed affordable housing, by subjecting housing developments to orders to show cause actions;
5. There is no evidence of any compelling need for the addition of a rule amendment relating to "substantial commencement" in the LUC rules. Based on discussions with the county Planning Directors, the Land Use Commission (LUC) and the Office of Planning earlier in 2018, LURF understands that the LUC has not transmitted any enforcement complaints to the counties, and the counties are unaware of any current LUC violations or complaints that would justify this measure.
6. The LUC website includes a LUC Index of Proposed Changes, which is misleading and deceptive to the public, as it specifically refers to the term "substantial compliance," which is erroneous.
7. The proposed LUC rule unsuitably and inappropriately expand the LUC's enforcement powers in a manner that lawmakers never intended or envisioned the LUC to wield;
8. It is also inconsistent with the existing two-tiered (State/County) system of land use approvals and enforcement process established by state statutory law;
9. The LUC proposed rule fails to properly recognize and defer to the counties' expertise in application and enforcement of land use laws;
10. It impinges upon and violate the contractual and constitutional vested rights of landowners and developers;
11. The proposed LUC rule invites needless contentious harassment and litigation against LUC petitioners, the counties and other state agencies; and
12. It would result in other economic repercussions for this State,

Conclusion. The LUC's proposed amendment to add a new LUC Rule §15-15-93 (e) **should be rejected**; and if an amendment is deemed necessary, the LUC should **adopt the attached amendment proposed by LURF**, which is specifically based on the Hawaii Supreme Court decision in the Bridge 'Aina Lea case.

In view of the unanticipated negative consequences of, and the lack of any factual support for the proposed rule change, LURF believes it would be unwarranted and unreasonable for the Commission to agree to support this measure which may potentially violate petitioners' constitutional rights and result in other negative economic consequences including the stifling, if not reversal of the current growth of the State's economy, without thorough review, analysis, and vetting of all the facts and information relating to the legitimacy of the purpose of the proposed measure, as well as the potential consequences thereof.

At the very least, it is necessary and prudent that the Commission require a study or report which would validate the alleged need for the proposed rule change.

LURF's Proposed LUC Rule Change to Define
"Substantial Commencement of Use of the Land"
(based on the Bridge 'Aina Lea decision of the Hawaii Supreme Court)

(e) 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. For purposes of this subsection (e), substantial commencement of use of the land in accordance with representations made to the commission shall be determined based on the circumstances or facts presented, including, among other things, the dollar amount expended on the project, percentage of work completed, or any of the following:

- (i) The definition of "substantial" is "considerable in amount or value; large in volume or number."¹
- (ii) Substantial completion is not required,
- (iii) Actively proceeding with plans and studies, including building plans and studies for an Environmental Impact Statement,
- (iv) Continued work on infrastructure,
- (v) Proceeding forward with building portions of the project, or on portions of the land, 4% or more of total residential units represented and required,²
- (vi) Completion of exteriors and interiors of some of the structures,
- (vii) Installation of some appliances,
- (viii) Some electrical, plumbing and other utilities ready for hookup,
- (ix) Partial construction of structures in various stages of completion,
- (x) Partial mass grading of the land, grading of portions of the land for immediate access and internal roadways,
- (xi) Foundation slabs for some of the land,
- (xii) A considerable amount of money expended for plans and construction work on the project or land, or
- (xiii) Other facts relating to the commencement of use of the land in accordance with representations made to the commission.

The interpretation of substantial commencement of use of the land, this subsection (e), and Section 205-4(g), Hawaii Revised Statutes is a question of law which is freely reviewable by appellate courts.³

¹ Black's Law Dictionary 1656 (10th ed. 2014), cited in the Bridge 'Aina Lea decision.

² In its Bridge 'Aina Lea decision, the Hawaii Supreme Court specifically found that 72 of the required 1,924 housing units (3.74%) were in various stages of construction, and none of the required units had been completed.

³ Paragraphs (i) to (xii) and the review standard are findings by the Hawaii Supreme Court in the Bridge 'Aina Lea decision.