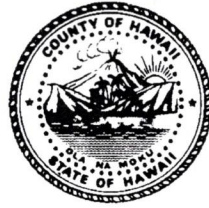


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**COUNTY OF HAWAI'I**  
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**TRANSMITTAL**

**DATE:** November 16, 2018

**TO:** State Land Use Commission  
P.O. Box 2359  
Honolulu, Hawai'i 96804

**FROM:**  Liza Osorio, Legal Technician I to  
Ronald Kim, Deputy Corporation Counsel

**RE:** In the Matter of the Petition of WAIKOLOA MAUKA, LLC, To Amend the  
Agricultural Land Use District Boundaries into the Rural Land Use District for  
Approximately 731.581 Acres in South Kohala District, Island of Hawai'i, Tax Map  
Key No. (3) 6-8-02:016 (portion)

<i>COPIES/ITEMS</i>	<i>DATE</i>	<i>DESCRIPTION</i>
Original and (1) copy	11-16-18	COUNTY OF HAWAI'I PLANNING DEPARTMENT'S BRIEF ON ISSUES RAISED AT THE LAND USE COMMISSION'S ORDER TO SHOW CAUSE; CERTIFICATE OF SERVICE

**TRANSMITTED FOR:**

- |  |   |
|--|---|
| <input type="checkbox"/> Your information and files                      | <input type="checkbox"/> Your approval                  |
| <input type="checkbox"/> Your signature and return                       | <input type="checkbox"/> Your review and comments       |
| <input type="checkbox"/> Your signature and forwarding<br>as noted below | <input type="checkbox"/> See remarks below              |
| <input type="checkbox"/> Per your request                                | <input checked="" type="checkbox"/> Filing with the LUC |

**REMARKS:** Enclosed for filing is an original and one copy of the above referenced document.  
Should you have any questions with regard to the enclosed please do not hesitate to contact our  
office. Thank you.

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BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAI'I

In the Matter of the Petition of

WAIKOLOA MAUKA LLC

To Amend the Agricultural Land Use District  
Boundary Into the Rural Land Use District for  
Approximately 731,581 Acres in South Kohala  
District, Island of Hawai'i, Tax Map Key No.  
(3) 6-8-002:016 (por.)

DOCKET NO. A06-767

COUNTY OF HAWAI'I PLANNING  
DEPARTMENT'S BRIEF ON ISSUES  
RAISED AT THE LAND USE  
COMMISSION'S ORDER TO SHOW  
CAUSE; CERTIFICATE OF SERVICE

**COUNTY OF HAWAI'I PLANNING DEPARTMENT'S BRIEF ON ISSUES  
RAISED AT THE LAND USE COMMISSION'S ORDER TO SHOW CAUSE**

The County of Hawai'i Planning Department ("County"), by and through its undersigned attorneys, hereby provides its brief on issues raised at the Land Use Commission's ("Commission") Order to Show Cause for Petitioner Waikoloa Highlands, Inc. ("Petitioner") to show why that certain land at Waikoloa, South Kohala, County and Island of Hawai'i, Tax Map Key No. (3) 6-8-002:016 (por.), covering approximately 731.581 acres of land ("Subject Area"), should not revert to its former land use classification or be changed to a more appropriate

classification. At the continued hearing on this Order to Show Cause on October 25, 2018, the Commission ordered the parties to brief five issues: 1) whether the standard stated in *DW Aina Le'a Development, LLC* applies to the present matter, 2) if that standard does not apply, then what standard does, 3) if Petitioner's efforts towards fulfilling its affordable housing condition are a substantial commencement of the use of land, 4) whether Petitioner's internal management affairs are relevant to this proceeding pursuant to HRE Rule 401, and 5) what County procedures the Petitioner will need to follow if the Commission decides to, or does not decide to, revert the Subject Area.

A. *DW Aina Le'a Development, LLC* States the Standards that Apply to This Matter<sup>1</sup>

The County believes that the standards articulated by the Hawai'i Supreme Court in *DW Aina Le'a Development, LLC v. Bridge Aina Le'a, LLC*, 134 Hawai'i 187, 339 P.3d 685 (2014) ("*Aina Le'a*"), as to an Order to Show Cause are applicable to this matter. *Aina Le'a* should generally be applicable here because that matter similarly arose from an Order to Show Cause as to why land should not be reverted before this Commission, and the Commission's Decision and Order in that case also had a condition requiring the petitioner to develop the property in substantial compliance with the representations made to the Commission and stating that the failure to do so may result in the reversion of the property.

The standards associated with "substantial commencement of the use of land" articulated by the Court in *Aina Le'a* should be applicable to the matter at hand because this Commission's authority to act on an Order to Show Cause arises from HRS § 205-4(g). That section provides the Commission with the authority to "provide by condition that absent substantial commencement of use of the land in accordance with such representations [made by the

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<sup>1</sup> Because the County believes that the standards articulated by the Hawai'i Supreme Court in *DW Aina Le'a Development, LLC v. Bridge Aina Le'a, LLC*, 134 Hawai'i 187, 339 P.3d 685 (2014) are applicable to this matter, it is not able to state a position on the issue of what alternate standard should apply.



petitioner in seeking a boundary change], 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.” In *Aina Le ‘a* the Court stated that this language had been added to HRS § 205-4 to empower the Commission to address a situation where a landowner does not develop property in a timely manner, or substantially commence the approved land use activity in accordance with the landowner’s representations to the Commission. *Id.* at 211, 339 P.3d at 709. Under those circumstances the Commission could “void” a district boundary amendment and restore the status quo of the prior classification. *Id.* at 212-213, 339 P.3d at 710-711.

In the matter at hand Condition 1 of the D&O required Petitioner to develop the Subject Area in substantial compliance with its representations to the Commission and that the failure to do so may result in reversion. Condition 2 of the D&O required the “complete buildout” of the project, meaning the completion of “backbone infrastructure” to allow for the sale of individual lots. Condition 3 of the D&O stated that if Petitioner failed to complete buildout (or secure a bond for the completion) of the project within ten years of the D&O, then the Commission may file an Order to Show Cause to require Petitioner to explain why the Subject Area should not revert. In light of the foregoing Conditions it appears that in the matter at hand Petitioner’s “substantial commencement of the use of land” would have to be substantial commencement towards the completion of the background infrastructure for the project.

In *Aina Le ‘a* the Court articulated two distinct standards to be applied in an Order to Show Cause before the Commission: 1) if a petitioner has substantially commenced the use of land in accordance with its representations to the Commission, then the Commission should follow HRS § 205-4(h) and consider the factors in HRS §§ 205-16 and 205-17, or 2) if a petitioner has not substantially commenced the use of land, then the Commission may revert the

property without following those procedures and instead consider reversion pursuant to HRS § 205-4(g). *DW Aina Le‘a Development, LLC*, 134 Hawai‘i at 209, 339 P.3d at 707.

The County defers to the Commission’s judgment and authority as to which standard to apply, to be determined by whether Petitioner has substantially commenced the use of land in accordance with its representations to the Commission. Because the Commission ordered the parties to brief the issue of whether Petitioner has substantially commenced the use of land, the County respectfully submits that the evidence presented to date does not show that Petitioner has substantially commenced the use of land in accordance with its representations to the Commission. The Commission identified twelve conditions that the Commission believed Petitioner had violated or not yet fulfilled and Petitioner only presented evidence of substantial commencement towards fulfilling one of those twelve conditions, Condition 9 (Affordable Housing). Petitioner has not substantially commenced on the use of land and condition which was paramount to this Commission, namely the complete buildout of the infrastructure for the project.

B. Petitioner’s Efforts Towards Fulfilling Affordable Housing Did Not Substantially Commence Use of Land

Although Petitioner has made steps towards, and possibly substantially commenced, fulfilling Condition 9 (Affordable Housing), it does not appear to have substantially commenced use of land in light of the remaining conditions cited in the D&O, particularly the complete buildout or completion of background infrastructure for the project. In *Aina Le‘a* the Court cited existing legal definitions to define “substantial” as “considerable in amount or value, large in volume or number. *Id.* at 213-214, 339 P.3d at 711-712. In that case the Commission had focused its findings of violations on a condition for the petitioner to build affordable housing. *Id.* at 203-205, 339 P.3d at 701-703. The Court there found substantial commencement when the owner had “invested a considerable amount of money and effort ... to develop the affordable

housing” by actually constructing some structures, grading for sites and roadways, completing some foundations, and actively proceeding with preparing plans and studies. *Id.* at 214, 339 P.3d at 712.

In the matter at hand the Commission’s D&O further specified that substantial commencement needs to be towards the complete buildout of infrastructure for the project, and the OSC here identified twelve conditions that the Commission believed Petitioner had violated or failed to fulfill. Petitioner presented evidence that it has conveyed certain property towards fulfilling the affordable housing condition and is engaging in good faith negotiations to fulfill the condition; however, even if Petitioner has substantially commenced work on fulfilling this condition, it has not substantially commenced the use of land or buildout of infrastructure and the affordable housing was only one of twelve conditions the Commission believes Petitioner has violated or failed to fulfill.

C. Petitioner’s Internal Management Issues Do Not Appear Relevant to this Proceeding

Petitioner has made allegations that it was internally mismanaged, which it is apparently citing as cause for this Commission to not revert the Subject Area. However, this does not appear to be the type of “cause” contemplated by HRS § 205-4(g) as to why the Commission should not revert. The legislative history of HRS § 205-4(g) states that the ability for a petitioner to show cause as to why a property should not revert to its former land use classification was added in response to concerns that the delay in use of land could be attributable to potentially lengthy county planning or zoning processes, during which the county may require substantial changes in the proposed use of land. HRS H. Stand. Comm. Rep. No. 1086-90, in 1990 H. Journal, at 1265.

D. Further Development of the Subject Area Will Need to Be Consistent With County Zoning and the General Plan



If this Commission reverts the Subject Area, then its State Land Use designation will become inconsistent with the County's General Plan and zoning. To proceed with a development Petitioner would need to realign its State Land Use designation with the County's General Plan and zoning. Petitioner may reapply to the Commission to amend the boundary and have the Subject Area classified as Rural again. Petitioner would then submit an amendment request to the County Planning Commission and the County Council to request additional time to secure Final Subdivision Approval for the Change of Zone Ordinance. Petitioner would then be able to proceed with securing Final Subdivision Approval. The County estimates this process may take two years and notes that Final Subdivision Approval would depend on existing site infrastructure constraints, including roads, water, and wastewater.

Alternately, Petitioner could request that the County consider changing the General Plan LUPAG map designation for the property in the Comprehensive General Plan Update from Rural and Open to the previous designation of Extensive Agriculture. Petitioner would submit a Change of Zone application to the County Planning Commission and County Council to change the zoning from Rural-Agriculture (RA-1a) to Family Agriculture (FA-1a). Petitioner would then be able to proceed with securing Final Subdivision Approval. The County estimates this process may take four or more years and notes that Final Subdivision Approval would depend on existing site infrastructure constraints, including roads, water, and wastewater.


If the Commission decides to allow the Subject Area to retain its Rural classification, then Petitioner would submit an amendment request to the County Planning Commission and the County Council to request additional time to secure Final Subdivision Approval for the Change of Zone Ordinance. Petitioner would then be able to proceed with securing Final Subdivision Approval. The County estimates this process may take six months to one year and notes that

Final Subdivision Approval would depend on existing site infrastructure constraints, including roads, water, and wastewater.

The County's Planning Department will have a member available at the continued hearing on this matter to respond to further questions from the Commission on this issue.

Dated: Hilo, Hawai'i, November 16, 2018.

COUNTY OF HAWAI'I, PLANNING  
DEPARTMENT

By   
\_\_\_\_\_  
RONALD KIM  
Deputy Corporation Counsel  
Its attorney



BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAI'I

In the Matter of the Petition of

WAIKOLOA MAUKA LLC

To Amend the Agricultural Land Use District  
Boundary Into the Rural Land Use District for  
Approximately 731,581 Acres in South Kohala  
District, Island of Hawai'i, Tax Map Key No.  
(3) 6-8-002:016 (por.)

DOCKET NO. A06-767

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by mailing  
the same, postage prepaid, on November 16, 2018:


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Dated: Hilo, Hawai'i, November 16, 2018.

COUNTY OF HAWAI'I, PLANNING  
DEPARTMENT

By   
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Its attorney