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LAND USE COMMISSION
STATE OF HAWAII

2018 NOV 19 A 10:01

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)	DOCKET NO. A06-767
)	
WAIKOLOA MAUKA, LLC)	OFFICE OF PLANNING'S
)	SUPPLEMENTAL STATEMENT OF
To amend the Agricultural Land Use District)	POSITION ON THE LAND USE
Boundary Into the Rural Land Use District)	COMMISSION'S ORDER TO SHOW
for Approximately 731.581 in South Kohala)	CAUSE; CERTIFICATE OF SERVICE
District, Island of Hawaii, Tax Map Key No.)	
(3) 6-8-002:016 (por.))	
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**OFFICE OF PLANNING'S SUPPLEMENTAL STATEMENT OF POSITION
ON THE LAND USE COMMISSION'S ORDER TO SHOW CAUSE**

The Office of Planning ("OP") provides this Supplemental Statement of Position in response to the Land Use Commission's ("Commission") request, made at the hearing on the above-captioned Docket on October 25, 2018, for additional briefing on the following six issues.

I. "Substantial Commencement of Use of the Land".

The Commission has asked the parties, "What constitutes 'substantial commencement of use of the land' and what is the definition of 'use'?"

Pursuant to Hawaii Revised Statutes ("HRS") § 205-4(g):

The [C]ommission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the [C]ommission 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.

“Substantial commencement of use of the land” is not defined in HRS Chapter 205 or Hawaii Administrative Rules (“HAR”) Chapter 15-15, and is not defined in the above-captioned Decision & Order (“D&O”). We therefore apply statutory construction to determine its meaning. In construing the language of a statute, Hawaii courts follow these established rules of statutory construction:

First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

Citizens Against Reckless Development v. Zoning Bd. Of Appeals of City and County of Honolulu, 114 Hawaii 184, 193, 159 P.3d 143, 152(2007). When there is ambiguity in a statute, “the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.” *Id.* (quoting HRS § 1–15(1)(1993)). Moreover, the courts may resort to extrinsic aids in determining legislative intent, such as legislative history, or the reason and spirit of the law. *Id.*

A plain reading of “substantial commencement of use of the land” requires that Petitioner’s commencement of the Project be (1) “substantial” and (2) “of use of the land”. In *DW Aina Le’a Dev, LLC v. Bridge Aina Le’a, LLC.*, 134 Hawaii 187, 339 P.3d 685 (2014) (“*Aina Le’a*”), the Hawaii Supreme Court recognized that with regard to substantial commencement, “substantial” is “considerable in amount or value; large in volume or number.”

Id. at 213, 339 P.3d at 712. Therefore, Petitioner must demonstrate, not simply that it has commenced the Project, but that Petitioner's commencement of the Project was considerable in amount or value and large in volume or number.

Petitioner is also required, by the plain language of the statute, to demonstrate that the commencement is of the "*use of the land*". The Senate Committee on Energy and Natural Resources specifically noted that the intent of the order to show cause provision of HRS §205-4(g) was to deter the particular situation where "the landowner does not develop the property in a timely manner." *Aina Le 'a* at 211; 339 P.3d 709. The Legislature disfavored "[v]acant land with the appropriate state and county land use designation [that] is often subject to undesirable private land speculation and uncertain development schedules." *Id.* quoting S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915. Substantial commencement of *use of the land* should therefore occupy or touch the land so as not to leave it vacant, and county land use designations, e.g., zoning and permitting, alone would not constitute substantial commencement of *use of the land*.

The Hawaii Supreme Court in *Aina Le 'a* noted that "[i]n the absence of both a statutory definition of 'substantial commencement' and an expression of [the Commission's] interpretation of 'substantial commencement' for a particular project, a determination of whether a party has substantially commenced use of the land will turn on the circumstances of each case, not on a dollar amount or percentage of work completed." *Id.* at Footnote 16.

In sum, "substantial commencement of use of the land" must be considerable in amount or value and large in volume or number, use or occupancy of the land as opposed to it remaining vacant and untouched, and determined on a case-by-case basis. County land use designations or approvals, a dollar amount, or a percentage of work completed, each alone, would not constitute "substantial commencement of use of the land".

II. Legal Standard to Revert the Land.

The Commission has asked the parties, “If the Commission finds there has not been substantial commencement of use of the land, what is the legal standard the Commission must apply before reclassifying the land?”

Pursuant to HRS Chapter 91, the Administrative Procedures Act, in contested cases, “[t]he degree or quantum of proof shall be a preponderance of the evidence.” HRS § 91-10(5). A “contested case” is defined as “a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” HRS § 91-1. Pursuant to HAR § 15-15-93(c), “[t]he [C]ommission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7 (“Agency Hearing and Post Hearing Procedures”), where applicable.” An order to show cause proceeding by the Commission is a contested case in which the Petitioner’s legal rights, duties, or privileges in the reversion of a district boundary amendment are required by law to be determined after an opportunity for agency hearing. As a contested case, the legal standard or quantum of proof for an order to show cause proceeding by the Commission is therefore whether Petitioner by a preponderance of the evidence has substantially commenced use of the land in accordance with representations made by the petitioner in seeking the boundary amendment.

To prove by a preponderance of the evidence means “to prove that something is more likely so than not so. It means to prove by evidence which, in your opinion, convinces you that something is more probably true than not true.” HI R. Civ. Jury Instr. 3.3. Here, to revert the land to its prior classification, the Commission must find that Petitioner has not proven by a preponderance of the evidence that it has substantially commenced use of the land in accordance with representations made by Petitioner in seeking the boundary change.

III. Affordable Housing Documents.

The Commission has asked the Parties whether the affordable housing documents, i.e., the Affordable Housing Agreement (Petitioner's Exhibit 8), the Subdivision Application (Petitioner's Exhibit 9), the Warranty Deed (Petitioner's Exhibit 10) and the Release Agreement for Waikoloa Highlands (Petitioner's Exhibit 11) (collectively "the Affordable Housing documents"), constitute substantial commencement of use of the land.

The affordable housing condition, D&O Condition No. 9, states:

Petitioner shall provide affordable housing opportunities for residents in the State of Hawaii in accordance with applicable affordable housing requirements of the County. The location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between Petitioner and the County. Petitioner shall provide the Commission with a fully executed copy of the affordable housing agreement within 30 days of the execution of the agreement.

First, it is questionable whether the Affordable Housing documents comply with D&O Condition No. 9. Condition No. 9 states that Petitioner shall provide affordable housing opportunities for Hawaii residents "in accordance with applicable affordable housing requirements of the County," specifically Hawaii County Code ("HCC") Chapter 11, Article 1. HCC Chapter 11, Article 1 requires Petitioner to earn affordable housing credits equal to twenty percent of the number of units or lots. HCC § 11-4(b). This is consistent with D&O FOF 47¹, as well as Ordinance 13-29².

¹ D&O Finding of Fact 47 states: "The Planning Director for the County testified that the affordable housing requirement for the County is 20 percent. This requirement represents the number of housing credits that the Petitioner must meet."

² Ordinance 13-29, County of Hawaii (Petitioner's Exhibit 4), Section 1, Part E. states: To ensure that the goals and policies of the Housing Element of the General Plan are implemented, the applicant shall comply with the requirements of Chapter 11, Article 1, Hawaii County Code relating to Affordable Housing Policy. This requirement shall be approved by the Administrator of the Office of Housing and Community Development prior to final subdivision approval;"

For the proposed 398 residential lot project, Petitioner is therefore required to fulfill 80 credits or units to meet its affordable housing requirement. The current owner of the 11.8 acre parcel, Pua Melia, has proposed under its 201H application to develop 32 affordable units on the 11.8 acre lot, which is 48 credits or units short of fulfilling the affordable housing requirement.

Additionally, HCC Chapter 11, Article 1, requires that the transfer of land be made to a nonprofit corporation. HCC § 11-5(c)(11). Neither Plumeria at Waikoloa LLC, the entity that Petitioner transferred the 11.8 acres to, nor Pua Melia the successor and current owner, is a nonprofit corporation according to records of the Hawaii State Department of Commerce and Consumer Affairs' Business Registration Division.

At the October 25, 2018 hearing, the County testified and its counsel confirmed that the Affordable Housing Agreement and the Release Agreement do not comply with HCC Chapter 11, Article 1 affordable housing requirements, which also begs the question whether any of the Affordable Housing agreements were "mutually agreeable" between Petitioner and the County.

Secondly, the transfer of the 11.8 acre lot is unlikely to constitute substantial commencement of use of the land. As discussed in part I. above, commencement of the Project must be "substantial" and "of use of the land". The transfer of the 11.8 acre lot amounts to merely 1.6 percent of the total 731.581 acre Petition Area. The 11.8 acre lot remains vacant, without any affordable housing units developed thereon, and has not been graded or otherwise "used".

Based on the foregoing, Petitioner has not complied with the requirements of HCC Chapter 11, Article 1, or the affordable housing D&O Condition No. 9, and has not substantially commenced use of the land with the transfer of the 11.8 acre vacant lot.

IV. Relevance of Internal Project Management Issues.

The Commission asked the Parties, “Are the internal project management issues of Petitioner relevant to the proceedings? (‘Relevant’ meaning having tendency of any existence of fact to be more probable or less probable.)”

The Petitioner’s internal project management issues are relevant to Petitioner’s showing of good cause why the Petition Area should not be reverted to its former land use classification. Petitioner has attempted to demonstrate that Mr. Stepan Martirosian’s fraud and gross mismanagement delayed the Project. The Commission must determine whether the delay due to Mr. Martirosian’s misdeeds is excusable. The internal project management issues may also be relevant in demonstrating Petitioner’s capability to move forward with the Project to completion, if given the opportunity by the Commission.

“As a general rule, ‘good cause’ means a substantial reason; one that affords a legal excuse.” *State v. Estencion*, 63 Haw. 264, 267, 625 P.2d 1040, 1042 (1981) (citations omitted). “Good cause” may include circumstances that are unforeseeable and beyond the control of the Petitioner, e.g., a turn in the economy or a natural disaster preventing a project from moving forward as scheduled. Here, it is unclear that Mr. Martirosian’s fraud and mismanagement were beyond the control of Petitioner. Mr. Valery Grigoryants admitted that he was “responsible” for the Project and he completely trusted but was betrayed by Mr. Martirosian. *Hearing Transcript for October 24, 2018* at pg. 73. Mr. Grigoryants testified that he had oversight of Mr. Martirosian, including speaking to Mr. Martirosian every day while he was in charge of the Project. *Id.* at 42. Mr. Grigoryants supervision, or lack thereof, over Mr. Martirosian may have had a role in the mismanagement of the Project, which would be within the control of Petitioner.

While the internal project management issues are relevant to the proceeding in Petitioner’s attempt to show good cause to not revert the Petition Area to its former land use

classification, they are unnecessary for this Commission to revert the Petition Area. As provided in OP's Statement of Position, Petitioner's failure to comply with and/or non-fulfillment of certain conditions of the D&O and lack of substantial commencement of use of the land are sufficient for this Commission to revert the Petition Area to its former land use classification, regardless of a determination of the validity or relevance of the internal project management issues.

V. The County Planning Process in Light of Reversion or Nonreversion.

The Commission has asked the Parties to provide an outline of the County of Hawaii planning process, including the steps and timeline required for reversion or non-reversion. OP defers to the County and its expertise to provide an outline of the County planning process and the steps necessary following reversion or nonreversion of the Petition Area.

VI. Applicability of D&O Conditions No. 2 and No. 3.

The Commission has asked the Parties, "Does *Aina Le'a* apply in light of D&O Conditions No. 2 and No. 3?"

Condition No. 2 states:

Completion of the Project. Petitioner shall develop the Petition Area and complete buildout of the Project no later than ten (10) years from the date of the Commission's decision and order. For purposes of the Commission's decision and order, "buildout" means completion of the backbone infrastructure to allow for the sale of individual lots.

Condition No. 3 states:

Reversion on Failure to Complete Project. If Petitioner fails to complete buildout of the Project or secure a bond for the completion thereof within ten (10) years from the date of the Commission's decision and order, the Commission may, on its own motion or at the request of any party or interested person, file an Order to Show Cause and require Petition to appear before the Commission to explain why the Petition Area should not revert to its previous Agricultural classification.

Condition No. 2 requires Petitioner to have completed the backbone infrastructure of the Project by June 10, 2018. Condition No. 3 provides that Petitioner's failure to complete the backbone infrastructure of the Project by June 10, 2018, authorizes the Commission or other party or interested person to file an order to show cause why the Commission should not revert the Petition Area.

The authority from which Conditions No. 2 and No. 3 were included in the D&O is HRS § 205-4(g), which states in pertinent part, "The [C]ommission may provide by *condition* that absent substantial commencement of use of the land..." (Emphasis added). Notably, the D&O and its Conditions were adopted in 2008, well before the *Aina Le'a* case was decided in 2014. Under *Aina Le'a*, the Hawaii Supreme Court construed HRS § 205-4(g)'s order to show cause provision to require that "when the petitioner has not substantially commenced use of the land, the LUC may revert the land without following the procedures set forth in HRS § 205-4.... On the other hand, if the LUC seeks to revert land after the petitioner has substantially commenced use of the land, the LUC is required to follow the procedures set forth in HRS § 205-4." *Aina Le'a* at 212, 339 P.3d 685, 710. In other words, the Commission must find that the petitioner has not substantially commenced use of the land in order to revert the land. Inconsistent with *Aina Le'a's* interpretation, D&O Condition No. 3 requires the Commission find that the Petitioner has not completed buildout of the Project or secured a bond for the completion thereof within ten (10) years, in order to revert the land.

Aina Le'a's interpretation of HRS § 205-4(g) overrides the language of D&O Condition No. 3. Based on *Aina Le'a*, D&O Condition No. 3 should be interpreted as, "If Petitioner fails to ~~complete buildout of the Project or secure a bond for the completion thereof~~ substantially commence use of the land in accordance with such representations within ten (10) years from the

date of the Commission's decision and order, the Commission may, on its own motion or at the request of any party or interested person, file an Order to Show Cause." Therefore, even without the substantial commencement language in D&O Conditions No. 2 and 3, the requirement under *Aina Le'a* that Petitioner's substantial commencement of use of the land be determined by the Commission in order to revert, applies in this matter.

DATED: Honolulu, Hawaii, November 19th, 2018

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District For Approximately 731.581 Acres)	
Of Land At South Kohala, Island Of Hawaii,)	
State of Hawaii, Tax Map No: (3) 6-8-02: 16)	
(por.))	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular mail.

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DATED: Honolulu, Hawaii, November 19th, 2018.

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