

CARLSMITH BALL LLP

JENNIFER A. LIM 8357
DEREK B. SIMON 10612
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842

Attorneys for Petitioner
KAPOLEI PROPERTIES LLC
f/k/a Kapolei Property Development LLC

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition Of

KAPOLEI PROPERTY DEVELOPMENT,
LLC

To Amend the Agricultural Land Use District
Boundary Into The Urban Land Use District
for Approximately 344.519 Acres Of Land At
'Ewa, O'ahu, Hawai'i, Tax Map Keys: 9-1-014:
Por. 33, 34, And 35 And 9-1-15: Por. 20

DOCKET NO. A06-763

PETITIONER'S MEMORANDUM IN
RESPONSE TO REVISED STATEMENT
OF POSITION OF THE OFFICE OF
PLANNING ON PETITIONER'S MOTION
FOR EXTENSION OF TIME TO
COMPLETE PROJECT AND TO
CHANGE PETITIONER'S NAME AND
AMEND CAPTION, FILED ON
NOVEMBER 28, 2018; EXHIBITS W - Y;
CERTIFICATE OF SERVICE

**PETITIONER'S MEMORANDUM IN RESPONSE TO REVISED STATEMENT OF
POSITION OF THE OFFICE OF PLANNING ON PETITIONER'S MOTION FOR
EXTENSION OF TIME TO COMPLETE TO COMPLETE PROJECT AND
TO CHANGE PETITIONER'S NAME AND AMEND CAPTION,
FILED ON NOVEMBER 28, 2018**

I. STATEMENT OF THE CASE

Petitioner Kapolei Properties LLC ("**Petitioner**"), fka Kapolei Property Development LLC, filed Petitioner's Motion for Extension of Time to Complete Project and to Change

2018 DEC -4 P 12:18

LAND USE COMMISSION
STATE OF HAWAII

Petitioner's Name and Amend Caption on August 8, 2018 ("**Petitioner's Motion**"). As documented in Petitioner's Motion, and in the Annual Reports Petitioner has regularly filed with the State of Hawai'i Land Use Commission ("**Commission**"), Petitioner has made substantial progress toward development of the Kapolei Harborside project ("**Project**") in the manner described in the Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed November 20, 2007 ("**D&O**"), and is in substantial compliance with the 23 conditions of approval under the D&O. Petitioner has not requested any amendments to the nature of the Project. Petitioner's Motion is simply a request to extend a deadline for the completion of backbone infrastructure for the Project, which the D&O sets forth as December 31, 2018, to a date that takes into account the economic changes that have taken place since the issuance of the D&O.

On October 23, 2018, the Office of Planning ("**OP**") filed its Statement of Position of the Office of Planning on Petitioner's Motion for Extension of Time to Complete Project and to Change Petitioner's Name and Amend Caption, which included several highly objectionable "supplemental conditions." Petitioner was pleased that OP filed its Revised Statement of Position of the Office of Planning on Petitioner's Motion for Extension of Time to Complete Project and to Change Petitioner's Name and Amend Caption on November 28, 2019 ("**OP's Revised SOP**"), which revised and replaced OP's original Statement of Position. However, OP's Revised SOP contains unnecessary and objectionable conditions that inappropriately single out the Petition Area relative to similar surrounding properties.

OP challenges Petitioner's evidence-based request to extend the development timeframe in Condition No. 17 to December 31, 2035. OP's Revised SOP at 3. OP also now seeks to impose a new obligation upon Petitioner in connection with Condition No. 17, to require Petitioner to "coordinate with DOT on the location, alignment, and features of all such [backbone infrastructure, drainage improvements, and sewer improvements] improvements." OP's Revised SOP at 3. OP also wants existing Condition No. 8, related to Department of Transportation ("**DOT**") Airports Division ("**DOT-A**"), to be amended to include a new obligation requiring an avigation easement be imposed upon the Petition Area based upon

nothing more than the passage of time.¹ OP's two proposed changes to Condition No. 17 and OP's addition of an avigation easement to Condition No. 8 shall hereinafter be collectively referred to as "OP's New Conditions."

II. ARGUMENT

OP's proposed avigation easement and DOT-coordination are unnecessary, unjustified, and offend the U.S. and Hawai'i Constitutions. Consequently, OP and this Commission are estopped from imposing OP's New Conditions at this point, after Petitioner has substantially commenced development of the Project in reliance on the conditions imposed by this Commission under the D&O. Additionally, OP's New Conditions are barred by the doctrine of res judicata, also known as claim preclusion, and also barred by the doctrine of collateral estoppel or issue preclusion, and therefore must be disregarded. Petitioner's request to extend the timeframe to complete the Project to December 31, 2035, is based upon substantial expert evidence and justification, and Petitioner has provided the Commission with good cause, i.e. substantial reasons that are beyond the sole control of Petitioner, for the time extension. Furthermore, there is no need for an additional condition to mandate coordination with DOT on infrastructure development, as such coordination is already occurring.

A. THERE HAVE BEEN NO CHANGES TO KALAELOA AIRPORT OPERATIONS

OP wants this Commission to require an avigation easement over the Petition Area. "An 'avigation easement' permits free flights over the land in question. It provides not just for flights in the air as a public highway; it provides for flights that may be so low and so frequent as to amount to a taking of the property." 2A C.J.S. *Aeronautics & Aerospace* § 3. However, there is nothing in the record to indicate that flights are currently restricted from traveling over the Petition Area even though there is no avigation easement. Furthermore, OP seeks the easement without recognition that such property rights are compensable to the landowner. If there is a

¹ OP proposes the following additional language to Condition No. 8:

"Petitioner shall enter into an avigation easement, with the State of Hawai'i Department of Transportation, Airports Division with respect to avigation and wildlife management requirements to address safety concerns for flight operations at Kalaeloa and Daniel K. Inouye International Airports. The avigation easement shall run with the land and shall be recorded with the Bureau of Conveyances of the State of Hawaii, and if appropriate, the Office of the Assistant Registrar of the Land Court of the State of Hawaii." OP's Revised SOP, 4-5.

genuine public purpose, airport authorities have the power to condemn an aviation easement, and pay the landowner just compensation for that taking of property. *See* HRS §§ 261-4(b);² 262-11.³ OP offers no rationale to justify the taking of Petitioner's property interest, i.e. an aviation easement, to address alleged concerns about wildlife management and flight safety. OP merely states that "significant time has elapsed" since the date of the D&O. OP's Revised SOP at 4. However, there have not been any material changes to flight operations at Kalaeloa Airport in the years since the Commission issued the D&O.

There are not now, nor will there be in the future, new or consequential wildlife attractants within the Petition Area. As it always has, the Petition Area contains areas of standing stormwater after major storm events. There is a drainage channel that runs the length of the Petition Area, and areas of interim and future stormwater drainage retention throughout. *See* D&O FOF 145. The Petition Area has long been identified as the location of a drainage channel, initially projected to be approximately 280 to 300 feet wide and approximately 10 feet deep. *Id.* at FOF 145, 148.

At its nearest point, the Petition Area is approximately 1.21 miles from Kalaeloa Airport (*see* OP Ex 1 at 1). The Petition Area is approximately 10 miles from the Daniel K. Inouye Airport, which is well outside of OP's five statute mile radius of concern (*see OP Technical Assistance Memorandum, TAM-2016, 08-01-2016*), making Kalaeloa Airport the only airport of concern for the Petition Area. Flights in and out of Kalaeloa Airport are not significantly greater now than when the Commission issued the D&O and imposed Condition No. 8, and the rate of wildlife strikes at Kalaeloa Airport has not increased over the years. *See* Table 1, listing the

² §261-4, Airports, general. . . (b) Acquisition of property. By purchase, gift, devise, lease, or condemnation in accordance with chapter 101, the department may acquire property, real or personal, or any interest therein, including the property rights, estates, and interests mentioned in section 262-11. . . "

³ §262-1, Acquisition of air rights. When (1) it is desired to remove, lower, or otherwise terminate a nonconforming structure or use; or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this chapter; or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the director of transportation on behalf of the State may acquire, by purchase, grant, or condemnation in the manner provided by chapter 101, such air right, aviation easement, or other estate or interest in the property or nonconforming structure or use in question as may be necessary or proper to effectuate the purposes of this chapter, including acquisition of a fee simple estate.

number of flights at Kalaeloa Airport between 2001 and 2016,⁴ and the number of wildlife strikes as reported in the Federal Aviation Administration's Wildlife Strike Database; similar data regarding the Daniel K. Inouye Airport is provided for comparison purposes.

Table 1				
	Kalaeloa - Takeoffs & Landings	Kalaeloa - Number of Wildlife Strikes	D.K. Inouye - Takeoffs & Landings ⁵	D.K. Inouye - Number of Wildlife Strikes
2001	183,600	2	327,006	41
2002	188,831	3	323,726	65
2003	166,160	5	301,919	46
2004	140,736	5	320,520	62
2005	164,948	6	330,506	67
2006	145,264	3	317,317	48
2007	123,184	2	310,607	68
2008	132,327	3	286,593	48
2009	128,732	1	274,434	52
2010	112,830	3	263,440	55
2011	123,219	7	263,354	80
2012	121,114	2	278,145	45
2013	139,124	5	290,237	45
2014	132,385	5	311,138	82
2015	128,558	4	312,655	91
2016	126,630	2	314,530	78

The number of flights has not materially changed in the time since the Petition for District Boundary Amendment was filed in 2006 ("**DBA**"), nor have the number of wildlife strikes, which have ranged from one in 2009, to seven in 2011. There is no rational nexus between Petitioner's Motion requesting a time extension and OP's proposed avigation easement.

In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994), the U.S. Supreme Court held that government may compel a landowner to convey an easement to the public as a condition of development approval when such a dedication would ameliorate problems that could be caused by the proposed project. Under *Nollan*, the consideration is whether a nexus exists between the condition and the proposed land use. Under *Dolan*, the consideration is whether the exaction is

⁴ See The State of Hawaii Airport Activity Statistics by Calendar Year, an annual Statistical Publication of the State of Hawaii Department of Transportation Airports Division.

⁵ In addition to takeoffs and landings, the DOT records for D.K. Inouye Airport include mail flights and cargo flights. However to keep the comparison equal, only takeoffs and landings are listed in Table 1.

roughly proportional to the projected impact of the proposed land use. Here, Petitioner is requesting a time extension. There is no connection, or nexus, between a time extension and the imposition of an easement upon the Petition Area.

OP appears to rely on a condition proposed by the Honolulu Planning Commission in a new Special Permit for the geographical expansion of the Honouliuli Wastewater Treatment Plant as an example of what should be imposed upon the Petition Area. *See* OP Ex. A. However, unlike industrial parks, wastewater treatment facilities and their associated settling ponds and related discharge of wastewater and sludge are activities expressly called out by the Federal Aviation Administration as sources of potential wildlife attractions whether located within airport property or outside of airport property. *See* FAA Advisory Circular 150/5200-33B (2007). Therefore, conditions that may have been imposed upon the expansion of the Honouliuli Wastewater Treatment Plant are irrelevant to the Petition Area.

B. OP INAPPROPRIATELY SINGLES OUT THE PETITION AREA

At their closest points, the boundary of the Petition Area is approximately 1.21 miles from the end of runway 11 at Kalaeloa Airport (*see* OP Ex. 1 at 1), and for this reason OP wants an aviation easement imposed on the Petition Area. OP ignores the fact that there are numerous other habitat-prone areas and like kind industrial projects located closer to Kalaeloa Airport. The Petition Area is an unlikely candidate to attract wildlife, as there are several wildlife attractions closer to the Airport.

A two-mile long ocean outfall drainage canal is located within 0.2 miles from the end of the closest runways at Kalaeloa Airport at its nearest point. *See* Petitioner's Exhibit W. The U.S. Fish and Wildlife Service Pearl Harbor National Wildlife Refuge (Kalaeloa Unit) is located immediately adjacent to Kalaeloa Airport. *See* Petitioner's Exhibit X. The Island Energy Services Refinery Wildlife Safe Harbor Area is in close proximity to Kalaeloa Airport. *Id.* An undeveloped property known as the State of Hawai'i DLNR feed lot, consisting of approximately 110.106 acres, is located approximately 1,050 feet from the end of Kalaeloa Airport runway 11. *Id.* The Board of Land and Natural Resources recently (November 9, 2018) agreed to set aside this property to the State Department of Agriculture, which intends to return the property to its use as a cattle feed lot. On the east side of Kalaeloa Airport, the large Hoakalei lagoon and over

ten golf course lakes are located only 1.23 miles from Kalaeloa Airport. *See* Petitioner's Exhibit Y. There are also several golf courses in the Kalaeloa area.

Similar to the surrounding industrial project areas, development at the Petition Area is subject to a 60-foot height limitation, as codified by Ordinance 08-25, which rezoned the Petition Area (*see* Petitioner's Exhibit D). As such, no vertical construction can take place within the Petition Area that could trigger the requirements under FAA Form 7460-1. The triggering events under Form 7460-1 are: (a) construction that is more than 200 feet above ground level (clearly not possible under existing zoning); or (b) construction that exceeds an imaginary surface extending outward and upward at a slope of 50 to 1. The very closest point between the Petition Area and the end of runway 11 is approximately 5,200 feet. Mathematically, that would require a building height of 100 feet within the Petition Area in order to trigger the Notice requirements under Form 7460-1, and that is clearly not allowed under the zoning ordinance. As such, there is no justification for OP's concerns about interference with flight operations.

OP does not offer any explanation regarding the "safety concerns for flight operations" it wants addressed through an aviation easement. DOT-A did not raise any concerns in its September 2018 letter to OP that DOT had not previously raised in its September 21 and December 20, 2006, letters to OP sent during the DBA proceedings. *See* Testimony of the Office of Planning in Support of the Petition, filed January 19, 2007 ("**OP's 2007 Testimony**"). There are no new safety concerns that could be presented by the completion of development of the Petition Area.

C. EQUITABLE ESTOPPEL, RES JUDICATA, AND COLLATERAL ESTOPPEL - OP CANNOT RELITIGATE AND HAVE NEW DEVELOPMENT CONDITIONS IMPOSED

The doctrine of equitable estoppel prevents the imposition of new conditions based upon Petitioner's reliance on the D&O. Hawai'i courts have long recognized a variety of "preclusive doctrines that share the common goals of preventing inconsistent results, preventing a multiplicity of suits, and promoting finality and judicial economy." *Smallwood v. City and Cty. of Honolulu*, 118 Hawai'i 139, 146, 185 P.3d 887, 895 (Haw. App. 2008). The doctrine of res judicata "permits every litigant to have an opportunity to try his case on the merits," but limits the opportunity to litigate to one chance. *Kauhane v. Acutron*, 71 Haw. 458, 463, 795 P.2d 276, 279 (Haw. 1990) (quoting *In re Estate of Ho Poi*, 54 Haw. 35, 38, 501 P.2d 973, 975 (Haw.

1972)). Collateral estoppel "precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies." *Flores v. Barretto*, 99 Hawai'i 270, 274, 54 P.3d 441, 445 (Haw. 2002). Collateral estoppel "applies to a subsequent suit between the parties or their privies on a *different* cause of action and prevents the parties or their privies from relitigating *any issue* that was actually litigated and finally decided in the earlier action." *Dorrance v. Lee*, 90 Hawai'i 143, 148, 976 P.2d 904, 909 (1999) (emphases in original). "The doctrines of res judicata and collateral estoppel also apply to matters litigated before an administrative agency." *Santos v. State*, 64 Haw. 648, 653, 646 P.2d 962, 966 (1982) (citations omitted).

1. Equitable Estoppel

Petitioner has relied in good faith upon the D&O and expended substantial sums toward the further entitlement and development of the Petition Area in reliance on the D&O.⁶ Therefore, the Commission is equitably estopped from imposing OP's New Conditions. *See Denning v. County of Maui*, 52 Haw. 653, 485 P.2d 1048 (1971) (remanding for agency to determine whether the developer had expended substantial sums for the preparation of plans and documents in good faith reliance on a prior zoning ordinance, thereby equitably estopping the County of Maui from applying a new and more restrictive zoning ordinance to the development); *see also Allen v. City & County*, 58 Haw. 432, 439, 571 P.2d 328, 331 (1977) (equitable estoppel precludes a regulatory body from enforcing newly enacted prohibitive conditions against a property owner);⁷ *and see Life of the Land, Inc. v. City Council of City & County of Honolulu*, 61 Haw. 390, 454, 606 P.2d 866, 903 (1980) (developer's expenditures of \$360,629.12 for planning and design work based upon a contingent City Council approval, and prior to the issuance of a building permit, brought the developer within the doctrine of equitable estoppel); *Cf.* Petitioner's Motion at 7.

⁶ Petitioner has spent over \$84 million (\$21.3 million allocated to the Project) on completed off-site infrastructure projects to serve the Project, and approximately \$12.7 million on completed on-site infrastructure projects within the Project based upon the Commission's D&O. *See* Petitioner's Motion at 9-10; Petitioner's Exhibit Q at 11. Petitioner has prepared and obtained approvals for several infrastructure master plans and other plans required for the development of the Project in compliance with the D&O, including a Regional Drainage Master Plan, Project Drainage Master Plan, and Sewer Master Plan. Costs for the plans alone are estimated at \$500,000.

⁷ In both *Denning* and *Allen*, the developers claimed good faith reliance upon existing law and based on that reliance expended substantial sums for architectural, engineering and other services necessary to obtain additional permits.

2. Res Judicata

Res judicata prohibits a party from litigating a previously adjudicated matter when (1) there was a final judgment on the merits, (2) both parties are the same or in privity with the parties in the original suit, and (3) the claim presented in the action in question is identical to the one decided in the original suit, or to a claim or defense that might have been properly litigated in the first action but was not litigated or decided. *See E. Sav. Bank, FSB v. Esteban*, 129 Hawai'i 154, 160, 296 P.3d 1062, 1068 (Haw. 2013), *citing Bremer v. Weeks*, 104 Hawai'i 53, 54, 85 P.3d 150, 161 (2004). Importantly, the bar applies to claims and issues that were actually litigated in the first action, and also to all claims and issues that could have been litigated and decided in the first action. *Craig v. County of Maui*, 157 F. Supp. 2d 1137, 1140-41 (D. Haw. 2001), *citing Santos*, 64 Haw. at 652, 646 P.2d 962. "The purpose behind res judicata is to ensure judicial economy, consistent results, and to increase public reliance on judicial pronouncements." *Id.* A party "cannot avoid the bar of claim preclusion merely by alleging conduct that was not alleged in his prior action or by pleading a new legal theory. All claims arising from a single injury must be raised in a single action or they will be barred by res judicata." *Pedrina v. Chun*, 906 F. Supp. 1377, 1400-1401 (D. Haw. 1995) (citations omitted) (emphasis added).

All of the elements of res judicata are present in this case. The D&O, effective November 20, 2007, is a final judgment that was not appealed. Both Petitioner and OP were parties to the original proceedings before the Commission, as required under HRS § 205-4(e); *see also* all filings in Docket A06-763. As such, the D&O, including D&O Condition No. 8, which is the sole condition related to DOT-A issues, is a final judgment and has a preclusive effect on any efforts by OP or others involved in the DBA proceedings to modify any DOT-A conditions.

DOT-related issues were litigated in the original DBA proceedings (*see* OP's 2007 Testimony at 11-12), but early in those proceedings OP moved away from its originally proposed avigation easement and agreed to the language presented in Condition No. 8. OP cannot relitigate that condition now. OP justified its initial proposal upon concerns expressed by DOT-A by letter dated December 20, 2006 ("The Office of Planning supports the use of avigation easements that provide protection to the State as well as notification to buyers and lessees who

may be impacted by aircraft and airport operations."). OP's 2007 Testimony at 7.⁸ OP's proposed DOT-A condition was never accepted by the Commission. The Commission's Condition No. 8 cannot be revisited now in response to Petitioner's request for time extension.

The filings in this Docket make clear that in 2007, OP retreated from its aviation easement condition request and never objected to Condition No. 8 in its draft or final form. Petitioner's Stipulated Proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed on June 5, 2007 ("**Stipulated D&O**") contained proposed Condition No. 8, which was identical to the Commission's final Condition No. 8. *See* Stipulated D&O at 48-49. OP filed Exceptions to the Stipulated D&O on June 20, 2007 and did not present any objection to Petitioner's proposed Condition No. 8, nor did OP raise any additional DOT-A issues or conditions.

Nor did OP object to proposed Condition No. 8 in response to a subsequent filing by Commissioner Teves, who filed his proposed Findings of Fact, Conclusions of Law, and Decision and Order on August 1, 2007 ("**Teves D&O**"). *See* Teves D&O at 64-65. Condition No. 8 in the Teves D&O is identical to the final Condition No. 8. OP filed its Response to the Teves D&O on August 7, 2007 and did not object or even comment on proposed Condition No. 8, and did not propose any additional DOT-A conditions.

⁸ Table 2 compares the condition OP initially, and for only a short time, sought in 2007, and the Commission's final Condition No. 8.

Table 2	
OP's 1/22/07 Proposed DOT-A Condition	Commission's Final Condition No. 8
Petitioner shall notify and disclose to all prospective buyers and/or lessees of the Property, in accordance with State law, the potential adverse impacts of aircraft and airport activity from the adjacent airfields at Kalaeloa and Honolulu International Airports, such as but not limited to noise, right of flight, emissions, vibrations and other incidences of aircraft operations.	Petitioner shall notify and disclose to all prospective buyers and/or lessees of the Project, in accordance with State law, of the potential adverse impacts of aircraft and airport activity from the adjacent airfields at Kalaeloa and Honolulu International Airport, such as but not limited to noise, right of flight, emissions, vibrations and other incidences of aircraft operations.
Petitioner shall implement procedures and provide covenants in any grant or transfer of interest in the Property, or portions therefore, by aviation easement or other document acceptable to DOT, to buyers and lessees and to other future owners, lessees, or occupants, to indemnify and defend the State of Hawaii from and against all claims, liability and losses resulting from aircraft and airport operations.	Petitioner shall implement procedures and provide covenants in any grant or transfer of interest in the Petition Area or portion thereof to buyers and lessees and to other future owners, lessees or occupants, to release claims against the State of nuisance relating to aircraft and airport operations.

OP fully litigated the concept of an avigation easement and other DOT-A measures and is therefore precluded from raising such issues again. It should be noted that in 2007, OP was aware of DOT-A general concerns regarding building heights, photovoltaic panel reflection, and wildlife attractions, and reported those concerns to the Commission. However, OP did not seek to impose conditions related to such items. Res judicata bars claims and issues that were actually litigated in the first action, and also to all claims and issues that could have been litigated and decided in the first action. *Craig*, 157 F. Supp. 2d 1137 at 1140-41. In its 2007 filings, OP acknowledged that DOT raised concerns about factors that could affect aircraft flight, such as building height, emissions and airwave (e.g. smoke and heat), light reflection, and attractants (e.g. water ponds) to wildlife. See OP's 2007 Testimony at 7. OP's 2007 Testimony also included a letter from DOT dated December 20, 2006, wherein DOT advocated that developments within the Petition Area "should be required to submit a Notice of Proposed Construction or Alteration (FAA Form 7460-1) to the local [FAA] office." OP's 2007 Testimony, OP Ex. 5. OP elected not to pursue such additional conditions in 2007 and is legally precluded from doing so now.

3. Collateral Estoppel

There are four elements to establishing collateral estoppel: (1) the fact or issue in the present action is identical to the one decided in the prior adjudication; (2) there was a final judgment on the merits in the prior adjudication; (3) the parties present in the action are the same or in privity with the parties in the prior action; and (4) the fact or issue decided in the prior action was actually litigated, finally decided, and essential to the earlier valid and final judgment. *In re Price*, 589 B.R. 690, 698 (D. Haw. 2018), citing *Dannenberg v. Hawai'i*, 139 Haw. 39, 60, 383 P.3d 1177, 1198 (2016). All of the elements of collateral estoppel are present here.

Prong one is satisfied because all DOT issues were decided in the original proceedings and the Commission's final decisions relative to DOT issues were set forth in the D&O. The issues are the same and OP is precluded from relitigating those issues now. See *Keahole Def. Coal., Inc. v. Bd. of Land & Nat. Res.*, 110 Hawai'i 419, 429, 134 P.3d 585, 595 (2006), as amended (May 26, 2006). Prongs two and three are satisfied because OP and Petitioner were both parties to the original contested case proceedings before the Commission, and those proceedings concluded with the issuance of the uncontested D&O. Prong four is satisfied

because the issue decided – the language of appropriate condition(s) to address DOT concerns – was essential to the D&O, which has 23 conditions of approval. An issue decided in a prior adjudication is essential to the final judgment when the final determination of the litigation would have changed if the issue had been decided differently. *Bridge Aina Le'a, LLC v. State of Hawai'i Land Use Comm'n*, No. CV 11-00414 SOM-BMK, 2016 WL 797567, at *5 (D. Haw. Feb. 29, 2016). OP is therefore collaterally estopped from relitigating DOT-A issues or conditions.

D. TIME EXTENSION

OP asserts, without justification, that the length of Petitioner's requested time extension is unreasonable, but that an extension of 10 years (to December 31, 2028) is reasonable. OP's Revised SOP at 3. Petitioner's request to extend the timeframe to complete the Project to December 31, 2035, is based upon expert evidence and justification. OP acknowledges that Petitioner has demonstrated good faith efforts in complying with the D&O, but without explanation OP concludes that a 17-year extension is not justified. *Id.* at 3. OP seems to ignore the fact that Petitioner has already spent over \$84 million (\$21.3 million allocated to the Project) on completed off-site infrastructure projects to serve the Project, approximately \$12.7 million on completed on-site infrastructure projects within the Project, and that completion of the Project backbone infrastructure will cost an additional \$215 million to \$260 million. *See* Petitioner's Motion at 9-10; Petitioner's Exhibit Q at 11; Affidavit of S. Kelly at ¶ 30. Petitioner's progress on development of the Petition Area and the factors impacting the timing of the development provide good cause for Petitioner's requested time extension.

Neither HRS Chapter 205 nor HAR 15-15 provide a definition of "good cause." However, in the employment law context "good cause" for terminating employment has been described as reasonable grounds based on failure to satisfactorily perform job duties or other legitimate business reasons. *Cartwright v. Scheels All Sports, Inc.*, 2013 MT 158, ¶ 20, 370 Mont. 369, 373, 310 P.3d 1080, 1084 (emphasis added).

The Commission's rules establish "good cause" as a standard, but provide no frame of reference. The Commission's decision, "therefore, ultimately is no more than a comparative evaluation of competing claims of need and prejudice." *Jacques v. Cassidy*, 28 Conn.Supp. 212,

220, 257 A.2d 29, 33 (Super. Ct. 1969). Petitioner has presented substantial evidence and justification in support of its request, and demonstrated its ongoing and continued work toward development of the Project. Therefore, Petitioner has provided the Commission with good cause for the requested extension, and evidence to support the length of the requested extension.

E. LANGUAGE STATING ADDITIONAL COORDINATION WITH DOT ON INFRASTRUCTURE DEVELOPMENT

Petitioner, and several of its affiliated companies, are parties to agreements and conditions of approval that already require coordination with DOT on infrastructure development and other issues affecting the Petition Area and Kalaeloa Harbor, including the existing D&O. In addition, the practical realities of the Petition Area adjoining Kalaeloa Harbor and DOT's permitting and plan approval role, including for the Harbor Access Road infrastructure project, necessitates close coordination between Petitioner and DOT. *See e.g.*, Petitioner's Exhibits S - V. Petitioner has closely coordinated with DOT Harbors and Highways divisions for the past decade and will continue to do so as the Project advances. Therefore, adding language for a condition to require coordination is redundant and unnecessary.

III. SUMMARY AND CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the Commission disregard OP's request that the Commission impose, by condition, an unnecessary requirement that Petitioner engage in additional coordination with DOT on infrastructure development. Petitioner also requests that the Commission deny OP's request for a relitigated avigation easement condition, and that the Commission grant Petitioner's well-reasoned request for a time extension to December 31, 2035.




JENNIFER A. LIM
DEREK B. SIMON
Attorneys for Petitioner
KAPOLEI PROPERTIES LLC

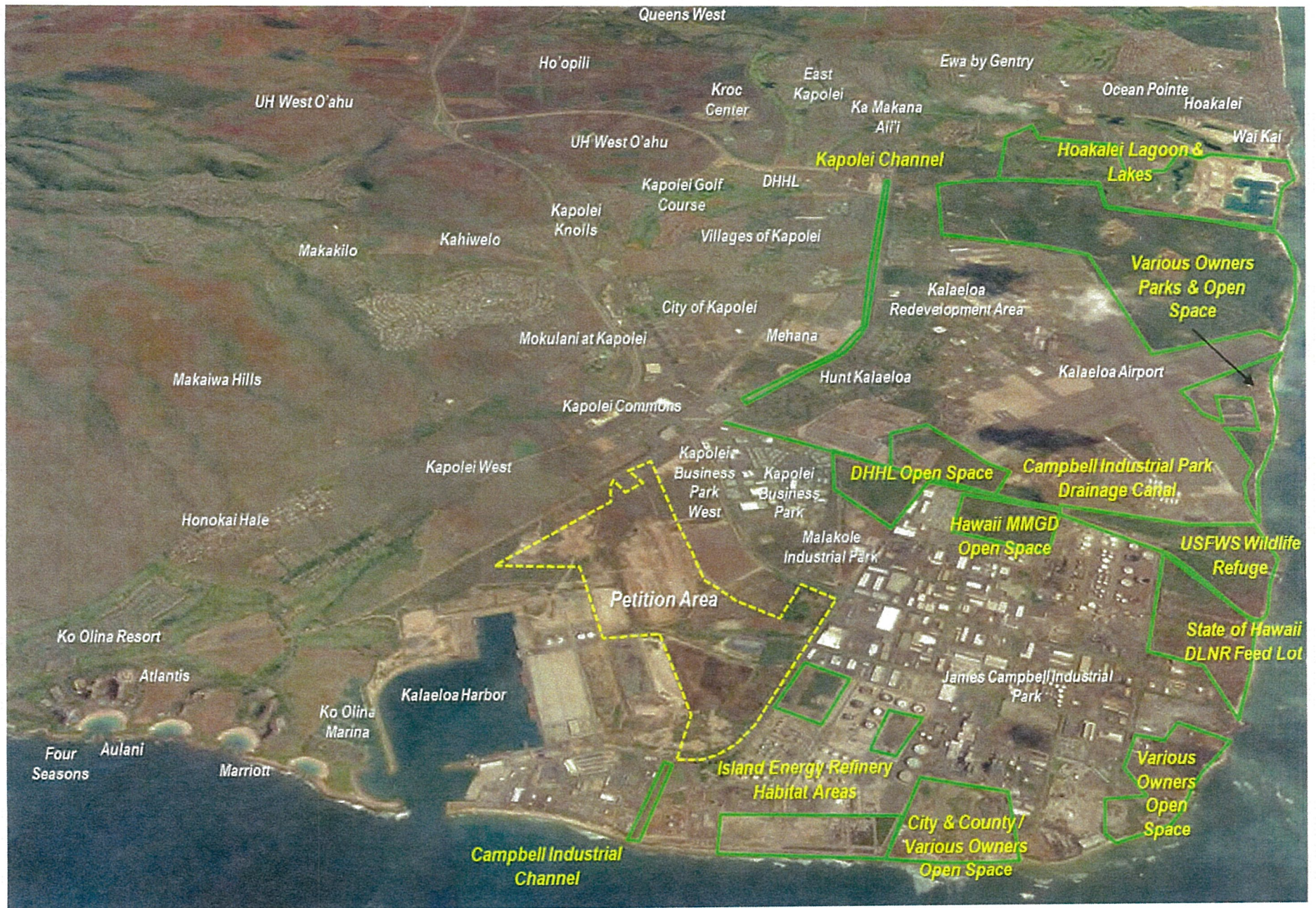
Dated: Honolulu, Hawai'i, December 4, 2018

Kalaeloa Airport - Ditch

Legend

 Barber s Point - Coast Guard Jetty







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

In the Matter of the Petition Of

KAPOLEI PROPERTY DEVELOPMENT,
LLC

To Amend the Agricultural Land Use District
Boundary Into The Urban Land Use District
for Approximately 344.519 Acres Of Land At
'Ewa, O'ahu, Hawai'i, Tax Map Keys: 9-1-014:
Por. 33, 34, And 35 And 9-1-15: Por. 20

DOCKET NO. A06-763

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that service of a copy of the foregoing document was made to the
following parties by the methods indicated, on December 4, 2018, to the addresses below:

Donna Y.L. Leong, Corporation Counsel Department of Corporation Counsel City and County of Honolulu 530 South King Street, Room 110 Honolulu, Hawaii 96813	[Via Hand Delivery]
Kathy K. Sokugawa, Acting Director Department of Planning And Permitting City and County of Honolulu 650 South King Street, 7th Floor Honolulu, Hawaii 96813	[Via Hand Delivery]
Leo Asuncion, Director Office of Planning State of Hawaii 235 South Beretania Street, 6th Floor Honolulu, HI 96813	[Via Hand Delivery]
Dawn T. Apuna, Deputy Attorney General Office of the Attorney General State of Hawaii 425 Queen Street Honolulu, Hawaii 96813	[Via Hand Delivery]

DATED: Honolulu, Hawaii, December 4, 2018.



JENNIFER A. LIM
DEREK B. SIMON

Attorneys for Petitioner
KAPOLEI PROPERTIES LLC