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LAND USE COMMISSION
STATE OF HAWAII

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STATE OF HAWAI'I

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of)	DOCKET NO. A94-706
)	
KAONOULU RANCH)	OFFICE OF PLANNING'S RESPONSE
)	TO PETITIONER'S MOTION TO
To Amend the Agricultural Land Use)	DISMISS THE ORDER TO SHOW
District Boundary into the Urban Land Use)	CAUSE PROCEEDING; CERTIFICATE
District for approximately 88 acres at)	OF SERVICE
Kaonoulu, Makawao-Wailuku, Maui,)	
Hawaii, TMK Nos. 2-2-02: por. of 15 and)	
3-9-01:16)	
_____)	

**OFFICE OF PLANNING'S RESPONSE TO PETITIONER'S
MOTION TO DISMISS THE ORDER TO SHOW CAUSE PROCEEDING**

The Office of Planning (OP) objects to Petitioner's Motion to Dismiss the Order to Show Cause Proceeding, to allow the continued evidentiary hearing of Phase II of the Order to Show Cause (OSC), including a review of Petitioner's substantial commencement of use of the land in accordance with its representations made to the Land Use Commission (LUC/Commission). In support of OP's objection, we offer a synopsis of the proceedings and events thus far, as well as the laws and rules that indicate that the OSC proceeding should continue.

A. PHASE I AND PHASE II OF THE OSC.

On September 11, 2012, the Commission entered a Prehearing Order, wherein it was stated that for Phase I of the OSC, the Commission would first hold hearings to consider whether Petitioner had violated the 1995 D&O. Thereafter, for Phase II of the OSC, if a violation was found, the Commission would then proceed to hold hearings to determine whether reversion or other designation is the appropriate remedy.¹

On February 7, 2013, the Commission determined that Petitioner's proposed plans for the project would violate Conditions 5 and 15, and that Petitioner violated Condition 17.² By motion and without a written order, the Commission made these findings, and these findings alone.

B. STAY OF PHASE II OF THE OSC.

Following Phase I of the OSC, Petitioner requested a stay of Phase II of the OSC to bring the Project into conformance with the D&O by amending the D&O. On June 27, 2013, the Commission granted the stay of Phase II subject to the following conditions:

- (1) Petitioner would refrain from commencing any construction or development activities on the Petition Area during the Stay; and
- (2) Petitioner would file a motion to amend the D&O to reflect the proposed changes to the development of the Petition Area, and request the bifurcation of the Docket, no later than December 31, 2013.

Order Granting Pi'ilani Promenade South, LLC, and Pi'ilani Promenade North, LLC's Motion to Stay Phase II of the Order to Show Cause Proceeding, filed July 7, 2013.

C. CURRENT FILINGS.

Now, Intervenors Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth and Daniel Kanahele (Intervenors) have asked that the Commission conduct Phase II of

¹ Page 2 of Pi'ilani Promenade South, LLC and Pi'ilani Promenade North, LLC's Motion to Stay Phase II of the Order to Show Cause Proceeding, filed April 8, 2013. The Actual "Prehearing Order" was not found on the LUC's website.

² Footnote 1 on page 1 of the LUC's Order Granting Pi'ilani Promenade South, LLC, and Pi'ilani Promenade North, LLC's, Motion to Stay Phase II of the Order to Show Cause Proceeding.

the OSC.³ Petitioner has asked that the Commission dismiss the entire OSC proceeding, including Phase II. The County and OP have asked that Petitioner update the Commission on the status of the Project.⁴

D. THE OSC PROCESS.

To understand how to proceed with the OSC, we take a closer look at what the OSC process entails. Hawaii Revised Statutes (HRS) §205-4(g) establishes the OSC as:

The commission 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.

Notably, HRS §205-4(g) was paraphrased in the OSC, filed September 17, 2012.

Hawaii Administrative Rules (HAR) §15-15-93 sets forth the procedure for the OSC, including who can request and how to file a motion for an OSC, the requirements for the issuance of an OSC, and the requirements for an OSC hearing.

In 2014, in *DW Aina Le'a Development, LLC v. Bridge Aina Lea, LLC, 134 Hawaii 187, 339 P.3d 685 (2014) (Aina Lea)*, the Hawaii Supreme Court's review of the OSC process recognized the following:

- (1) Once the LUC issues an OSC, the relevant considerations to be taken into account by the LUC and the procedures it must follow turn on whether the petitioner has substantially commenced use of the land in accordance with its representations. *Id. at 209, 339 P.3d at 707.*
- (2) When the LUC reverts property before the petitioner has substantially commenced use of the land, the LUC may do so without following the procedures otherwise applicable under HRS §205-4, i.e. district boundary amendment procedures. *Id.*

³ Intervenor's Motion to Conduct Phase II of Contested Case Pending Since 2012, and For Final Decision, filed December 3, 2018.

⁴ Position Statement of the Department of Planning, County of Maui, filed January 9, 2019; Office of Planning's Response to Intervenor's Motion to Conduct Phase II of Contested Case Pending since 2012, and for Final Decision, filed January 10, 2019.

- (3) If the LUC seeks to revert property after use of the land has substantially commenced, then the LUC is bound by the requirements of HRS §205-4. *Id.*
- (4) Whether there has been a breach of a condition is a determination to be made by the LUC. *Id. at 210, 339 P.3d at 709.*
- (5) The power to enforce LUC conditions and orders lies with the various counties, with the exception of the LUC's authority to void a boundary amendment when substantial commencement of use of the land does not occur in accordance with representations made by the petitioner. *Id. at 211, 339 P.3d at 709.*

In applying *Aina Lea* to this matter, while the Commission found that Petitioner had violated certain conditions of the D&O, the Commission did not specifically consider whether Petitioner had substantially commenced use of the land in accordance with its representations, as required under the OSC process. This would occur as the Commission proceeds with Phase II in which the Commission would determine whether to revert or change the Petition to a more appropriate classification, based on a finding of whether Petitioner had substantially commenced use of the land.

Through the evidentiary hearing process of Phase II, Petitioner would have the opportunity to demonstrate for the Commission's consideration that:

- (1) Petitioner no longer is in violation of Conditions 5, 15 and 17;
- (2) Petitioner has substantially commenced use of the land; and
- (3) Whether Petitioner has or has not substantially commenced use of the land, that there is good cause to not revert the land to its prior classification or other more appropriate classification.

Petitioner has asserted through their pleadings that particular events and actions during the stay of Phase II of the OSC, including but not limited to the Commission's rejection of the FEIS, and community interactions, have materially altered their ability to move forward with the Motion to Amend the D&O. An evidentiary hearing would allow the Parties to put on evidence and cross-examine witnesses, and the Commission to examine all evidence pertaining to these and the other Parties' assertions. If the Commission finds that the Petitioner has not substantially commenced use of the land in accordance with its representations, the Commission may then

determine whether the Petition Area should be reverted to its former classification or to a more appropriate classification.

Moving forward with the Phase II evidentiary hearing to determine whether Petitioners have substantially commenced use of the land in accordance with its representations will provide the Commission “with a full and complete record upon which it can render its decision.” *HAR §15-15-34(a)*.

E. OTHER ISSUES.

1. 365 Day Deadline on the OSC.

Petitioner argues that the Commission is not authorized to enter findings on the OSC more than 365 days following the filing of the OSC, which was September 17, 2012. Under HRS §205-4(g) and HAR §15-15-74, the 365-day deadline applies to the Commission’s filing of a final D&O on a district boundary amendment, triggered by the proper filing of the district boundary amendment petition. In *Aina Lea*, the Hawaii Supreme Court incorporates the 365-day deadline in the OSC process where a petitioner has substantially commenced use of the land:

Thus, where the petitioner has substantially commenced use of the land, the LUC is required to follow the procedures set forth in HRS §205-4 that are generally applicable when boundaries are changed. The LUC is therefore required to find by a clear preponderance of the evidence that the reclassification is reasonable, not violative of HRS §205-2, and consistent with the policies of HRS §§205-16 and 205-17. HRS §205-4(h)... Finally, the LUC must resolve the reversion or reclassification issue within three hundred sixty-five days. HRS 205-4(g).

Aina Lea at 213, 339 P.3d at 711.

Therefore, in an OSC proceeding, the 365-day deadline applies to the reversion or reclassification process, which is basically a boundary amendment, following the Commission’s determination that Petitioners have substantially commenced use of the land, and its decision to revert or reclassify the Petition Area. The 365-day clock starts, not from the filing of the OSC on

September 17, 2012, but from the day the Commission makes a finding that the Petitioners have substantially commenced use of the land and will revert or reclassify the Petition Area. From that date, the Commission has no more than 365 days to complete the reversion or reclassification, including but not limited to the requirements for a hearing (HRS §205-4(b)), and notice and serving of the petition upon the county and all persons with a property interest in the land (HRS §205-4(c)).

Here, the 365-day clock has yet to be triggered as the Commission must first determine whether Petitioner has substantially commenced use of the land and whether the Commission desires to revert or reclassify the land. Accordingly, the Commission has not exceeded the 365 day deadline for resolving the reversion or reclassification of the Petition Area in violation of HRS §205-4(g) and HAR §15-15-74.

2. The D&O Did Not Include a Condition Regarding Substantial Commencement.

Petitioner argues that the Commission has not reserved its right through a written D&O condition to revert the property in accordance with HRS §205-4(g), and, therefore, the Commission does not have authority to revert the land use classification of the Petition Area.

Again, HRS §205-4(g) states:

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.

The administrative rule interpreting and executing HRS §205-4(g), authorizes the Commission to issue the OSC as to why the property should not revert to its former classification or be changed to a more appropriate classification “[w]henver the commission shall have reason to believe that

there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner.” HAR §15-15-93(b). The Commission, through HRS §205-4(g) and HAR §15-15-93(b) is thus empowered to issue an OSC and revert the land upon the proper findings, without a reservation of that right through a written condition in the D&O.

For the foregoing reasons, OP objects to Petitioners’ Motion to Dismiss, in favor of moving forward with Phase II of the OSC, which would include a determination of substantial commencement by the Petitioner.

DATED: Honolulu, Hawai’i, February 12, 2019.

OFFICE OF PLANNING,
STATE OF HAWAII



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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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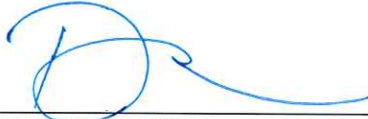
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DATED: Honolulu, Hawai'i, February 12, 2019.



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