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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 WITHDRAWAL OF RESPONSE TO PETITIONER'S MOTION TO DISMISS THE ORDER TO SHOW CAUSE PROCEEDING, FILED FEBRUARY 12, 2019, AND AMENDED RESPONSE TO PETITIONER'S MOTION TO DISMISS THE ORDER TO SHOW CAUSE PROCEEDING; CERTIFICATE OF SERVICE
To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for approximately 88 acres at Kaonoulu, Makawao-Wailuku, Maui, Hawaii, TMK Nos. 2-2-02: por. of 15 and 3-9-01:16	

OFFICE OF PLANNING'S WITHDRAWAL OF RESPONSE TO PETITIONER'S MOTION TO DISMISS THE ORDER TO SHOW CAUSE PROCEEDING, AND AMENDED RESPONSE TO PETITIONER'S MOTION TO DISMISS THE ORDER TO SHOW CAUSE PROCEEDING

The Office of Planning (OP) withdraws its Response to Petitioner's Motion to Dismiss the Order to Show Cause Proceeding, filed February 12, 2019, and replaces it with the following amended response:

In response to Petitioner's Motion to Dismiss the Order to Show Cause Proceeding, filed February 1, 2019, the Office of Planning (OP) offers a roadmap of the proceedings and events

thus far, as well as the applicable laws and rules to assist the Land Use Commission (LUC/Commission) in determining how to move forward with this docket, whether that may be dismissal of the OSC or moving forward with Phase II of the OSC.

A. MOTION FOR ISSUANCE OF AN OSC.

On May 21, 2012, Intervenors Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth and Daniel Kanahele (Intervenors) filed a Motion for Hearing, Issuance of Order to Show Cause, and Other Relief, which requested that the Commission issue an OSC why the Property should not revert to its former boundary classification because of the Petitioner's failure to use the property consistent with the 1995 Commission Order. The Motion argued that "The landowners are pursuing uses of the property which clearly violate the terms and conditions of the 1995 Commission Order", by pursing a retail shopping mall and outlet complexes that were entirely inconsistent with the D&O that contemplated a light industrial park.

B. THE OSC.

Based on the Intevenor's Motion for Issuance of an OSC, the Commission issued the OSC on September 17, 2012, citing within:

> This Commission has reason to believe that you have failed to perform according to the conditions imposed or to the representations or commitments made to the Commission in obtaining the reclassification of the Petition Area.
>
> Section 205-4, HRS, authorizes this Commission to impose conditions necessary to "assure substantial compliance with the representations made by the petitioner in seeking a boundary change" and 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.

C. PHASE I AND PHASE II OF THE OSC.

On September 11, 2012, the Commission entered a Prehearing Order that stated that for Phase I of the Order to Show Cause (OSC), the Commission would first hold hearings to consider whether Petitioner had violated the 1995 Findings of Fact, Conclusions of Law, and Decision and Order, Docket No. A94-706 (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]

Condition 5 in part states:

> ...Petitioner shall provide for a frontage road parallel to Piilani Highway and other connector roads within the Petition area, in coordination with other developments in the area with the review and approval of the State Department of transportation and the County of Maui.

Condition 15 states:

> Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. Failure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification.

Condition 17 state:

> Petitioner shall timely provide without any prior notice, annual reports to the Commission...

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[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.

By motion and without a written order, the Commission made these findings of condition violations, and these findings alone.

D. 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.

E. CURRENT FILINGS.

Now, Intervenors have asked that the Commission conduct Phase II of the OSC.[3] Petitioner has asked that the Commission dismiss the entire OSC proceeding, including Phase II. Petitioner has alluded to new information and events that potentially affect the current proceedings and facts as known by the Commission. The County and OP have asked that Petitioner update the Commission on the status of the Project.[4]

F. PETITIONER AFFIRMS COMPLIANCE WITH CONDITIONS 5, 15, AND 17.

In its Motion to Dismiss the Order to Show Cause Proceeding, Petitioner asserts that it is now in compliance with Conditions 5, 15, and 17. Should the Commission determine that Petitioner is no longer in violation of Conditions 5, 15, and 17, there may no longer be a basis for the Commission to move forward with Phase II, i.e., the penalty phase of the OSC. Without any

[3] Intervenors' 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 Intervenors' Motion to Conduct Phase II of Contested Case Pending since 2012, and for Final Decision, filed January 10, 2019.

violations by the Petitioner to impose penalties, further proceedings will have lost significance, and therefore, Phase II would be moot.

Should the Commission determine that the violations no longer stand as the Commission had found in Phase I, and that therefore, Phase II cannot proceed, the OSC could then be dismissed. OP recognizes that if the OSC is dismissed, Intervenors or any other interested party would not be barred from making a new motion for issuance of an OSC of the Petitioner on any alleged existing violations.

G. IF COMMISSION FAILS TO FIND THAT PETITIONER IS NO LONGER IS VIOLATION.

In the alternative, should the Commission determine that Petitioner continues to be in violation of Condition 5, 15 or 17, it may move forward with Phase II. However, the Commission may not proceed directly to whether the Petition Area should be reverted or reclassified as requested by Intervenor. The Commission must first determine whether Petitioner has substantially commenced use of the land in compliance with its representations made to the Commission.

Hawaii Revised Statutes (HRS) §205-4(g) establishes the OSC as:

> ...the commission, by filing findings of fact and conclusions of law, shall act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change. 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.

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) 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.*

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 if 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 has substantially commenced use of the land; and
> (2) There is good cause to not revert the land to its prior classification or other more appropriate classification.

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.

H. OTHER ISSUES FOR CONSIDERATION.

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, and therefore, we are well beyond and in violation of the September 16, 2013 deadline. However, Petitioner fails to recognize that the Stay of Phase II of the OSC, at the request of Petitioner to provide Petitioner opportunity to amend the D&O, would not just stay or halt the proceedings, but accordingly stay or suspend the 365-day clock. The Stay of Phase II of the OSC was granted to Petitioner on June 27, 2013. 283 days elapsed from the filing of the OSC to the granting of the Stay. Once the Stay is lifted, the Commission should have 82 days within which to enter findings on the OSC without violating the 365-day clock.

Notably, the 365-day clock only applies to the OSC if the Commission finds that Petitioner has substantially commenced use of the land in accordance with its representations to the Commission. In *Aina Lea*, the Hawaii Supreme Court incorporates the 365-day deadline in the OSC process *only* 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). On the other hand, if the petitioner has not substantially commenced use of the property, then the LUC may revert the property without following the strictures of HRS §205-4, so long as it otherwise complies with HAR §15-15-93.

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

Here, we don't yet know if the 365-day clock will apply as the Commission has yet to determine whether Petitioner has substantially commenced use of the land and whether the Commission desires to revert or reclassify the land.

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.

(Emphasis added). The statutory granting of authority in HRS §205-4(g) is permissive not mandatory based on the term "may". However, through the administrative rule interpreting and executing HRS §205-4(g), the Commission is authorized to issue the OSC "[w]henever 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.

In summary, the Commission may dismiss the OSC proceeding only if it determines that Petitioner is no longer in violation of D&O Conditions 5, 15 and 17. Should the Commission continue to find Petitioner in violation of any of these Conditions, it may proceed with Phase II, which must include the Commission's determination of substantial commencement of use of the land by the Petitioner. The Commission has not violated the 365-day deadline, and there need

not be a written condition in the D&O to revert the Petition Area for the Commission to move forward with the OSC.

DATED: Honolulu, Hawai'i, February 14, 2019.

OFFICE OF PLANNING,
STATE OF HAWAI'I

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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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DATED: Honolulu, Hawai'i, February 14, 2019.

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