

McCORRISTON MILLER MUKAI MacKINNON LLP

LAND USE COMMISSION  
STATE OF HAWAII

RANDALL F. SAKUMOTO 4848  
LISA W. CATALDO 6159  
CATHERINE A. TASCHNER 9585  
Five Waterfront Plaza, 4th Floor  
500 Ala Moana Boulevard  
Honolulu, Hawai'i 96813  
Telephone: (808) 529-7300  
Facsimile: (808) 524-8293

2019 FEB -1 P 1:34

Attorneys for Petitioners  
PIILANI PROMENADE SOUTH, LLC and  
PIILANI PROMENADE NORTH, LLC

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of	)	Docket No. A94-706
	)	
KAONOULU RANCH to Amend the	)	PETITIONERS' MOTION TO DISMISS
Agricultural Land Use District Boundary	)	THE ORDER TO SHOW CAUSE
into the Urban Land Use District for	)	PROCEEDING; MEMORANDUM IN
Approximately 88 acres at Kaonoulu,	)	SUPPORT OF MOTION;
Makawao-Wailuku, Maui, Hawai'i; Tax	)	DECLARATION OF RANDALL F.
Map Key Nos. (2) 2-2-02: por. 15 and 3-9-	)	SAKUMOTO; EXHIBIT "1";
01:16	)	CERTIFICATE OF SERVICE
	)	
_____	)	

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. RELEVANT BACKGROUND .....	2
A. Ownership of the Petition Area.....	2
B. Procedural History .....	2
C. Community Outreach.....	4
III. ANALYSIS.....	5
A. The OSC Proceeding Should Be Dismissed Because Phase I Has Not Been and Cannot Be Completed .....	6
B. The Oral Findings of Phase I Are Factually Inaccurate and There Is No Basis to Proceed with Phase II of the OSC Proceeding.....	11
1. Piilani Affirms Compliance with Condition 5 .....	12
2. In Accordance with Condition 15, Piilani Will Develop the Piilani Parcels in Substantial Compliance with the Representations Made to the Commission .....	13
3. Piilani is in Compliance with Condition 17.....	18
C. Piilani Substantially Commenced Use of the Petition Area .....	19
IV. CONCLUSION.....	22

## TABLE OF AUTHORITIES

Page(s)

### CASES

DW Aina Le‘a Dev., LLC v. Bridge Aina Le‘a, LLC,  
134 Hawai‘i 187, 339 P.3d 685 (2014)..... passim

In re J.T. Thomas,  
73 Haw. 223, 832 P.2d 253 (1992)..... 19

Ka Pa‘akai O Ka ‘Aina v. Land Use Comm’n,  
94 Hawai‘i 31, 7 P.3d 1068 (2000), as amended (Jan. 18, 2001)..... 11

Town v. Land Use Comm’n,  
55 Haw. 538, 524 P.2d 84 (1974)..... 8

### STATUTES

Haw. Rev. Stat. § 205-17(6) ..... 13

Haw. Rev. Stat. § 205-4(g) ..... 13

Haw. Rev. Stat. § 91-12 ..... 6

### RULES

Haw. Admin. R. § § 15-15-93(c) ..... 6

Haw. Admin. R. § 15-15-93(d) ..... 6

Haw. Admin. R. §15-15-74(b) ..... 6, 7

### OTHER AUTHORITIES

Conf. Comm. Rep. No. 52, in 1995 Senate Journal, at 782-83 ..... 8

S. Stand. Comm. Rep. No. 708, in 1975 Senate Journal, at 1098..... 14

S.C. Rep. 2, in 1995 Senate Journal, at 833..... 8

**PETITIONERS' MOTION TO DISMISS THE  
ORDER TO SHOW CAUSE PROCEEDING**

Petitioners PIILANI PROMENADE SOUTH, LLC and PIILANI PROMENADE NORTH, LLC (collectively, "Piilani") through their attorneys, McCorriston Miller Mukai MacKinnon LLP, respectfully move the State of Hawai'i Land Use Commission (the "Commission") to dismiss the Order to Show Cause ("OSC") proceeding (the "OSC Proceeding"). Piilani requests a hearing on this Motion.

This Motion should be granted because: (1) the Commission lacks the authority to conclude Phase I of the OSC Proceeding and commence Phase II of the OSC Proceeding; (2) the Commission's oral findings of violation in Phase I of the OSC Proceeding are no longer factually accurate and cannot serve as a basis for Phase II of the OSC Proceeding; and (3) the Commission does not have the authority to enforce reversion or otherwise reclassify the real property at issue under Docket A94-706 (the "Petition Area") through Phase II of the OSC Proceeding because Piilani has substantially commenced use of the Petition Area.

This Motion is based upon Rule 15-15-70, Hawai'i Administrative Rules, and is further supported by the attached memorandum of law, all papers and pleadings on file herein, and any other evidence or information that may be presented before or at the hearing on this Motion.

DATED: Honolulu, Hawai'i, February 1, 2019.



---

RANDALL F. SAKUMOTO  
LISA W. CATALDO  
CATHERINE A. TASCHNER

Attorneys for PIILANI PROMENADE  
SOUTH, LLC and PIILANI PROMENADE  
NORTH, LLC

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

In the Matter of the Petition of	)	Docket No. A94-706
	)	
KAONOULU RANCH to Amend the	)	MEMORANDUM IN SUPPORT OF
Agricultural Land Use District Boundary	)	MOTION
into the Urban Land Use District for	)	
Approximately 88 acres at Kaonoulu,	)	
Makawao-Wailuku, Maui, Hawai'i; Tax	)	
Map Key Nos. (2) 2-2-02: por. 15 and 3-9-	)	
01:16	)	
_____	)	

**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION**

Petitioners PIILANI PROMENADE SOUTH, LLC and PIILANI PROMENADE NORTH, LLC (collectively, "Piilani"), move for an order dismissing the Order to Show Cause ("OSC") proceeding (the "OSC Proceeding"). The Land Use Commission of the State of Hawai'i (the "Commission") lacks the authority to conclude Phase I of the OSC Proceeding by entering written findings of fact and conclusions of law. Because the Commission cannot conclude Phase I, it is procedurally barred from proceeding to Phase II of the OSC Proceeding. Additionally, since Phase I of the OSC Proceeding, Piilani has cured each of the oral findings of violations of the Findings of Fact, Conclusions of Law, and Decision and Order issued on February 10, 1995 (the "D&O") identified by the Commission. Thus, the Commission's oral findings of violation are erroneous, and cannot serve as grounds for the Commission to proceed with Phase II of the OSC Proceeding. Furthermore, the Commission does not have authority to enforce reversion or otherwise reclassify the real property at issue under Docket A94-706 (the "Petition Area") through Phase II of the OSC Proceeding, because Piilani has substantially

commenced use of the Petition Area. Accordingly, Piilani requests that the Commission grant this Motion and dismiss the OSC Proceeding.

## **II. RELEVANT BACKGROUND**

### **A. Ownership of the Petition Area**

Piilani is the successor-in-interest to Kaonoulu Ranch, a Hawai'i limited partnership. Piilani owns six of the seven tax map key parcels (collectively, the "Piilani Parcels") encumbered by the D&O. The Piilani Parcels are identified as tax map key parcels (2) 3-9-001:016 and :170-174. The seventh parcel encumbered by the D&O is owned by Honua'ula Partners, LLC ("Honua'ula"), which has no affiliation with Piilani. Honua'ula owns property identified as tax map key parcel (2) 3-9-001:169, referred to herein as the "Honua'ula Parcel." The Honua'ula Parcel and the Piilani Parcels collectively comprise the Petition Area.

### **B. Procedural History**

On May 23, 2012, Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahale (collectively, the "Intervenors") filed a Motion for a Hearing, Issuance of Order to Show Cause, and Other Relief (the "OSC Motion"). In the OSC Motion, Intervenors contended in part that Piilani's intended use of the Piilani Parcels for the development of a proposed retail project (the "Retail Project") violated Conditions 5, 15, and 17 of the D&O.

On September 10, 2012, the Commission granted Intervenors' OSC Motion, issued the OSC, and ordered the OSC Proceeding. Pursuant to the Prehearing Order entered on September 11, 2012 (the "Prehearing Order"), the Commission would "first consider whether [Piilani] and [Honua'ula had] violated the applicable conditions of the [D&O]" ("Phase I") and "should [the] Commission find that Piilani and/or Honua'ula has failed to perform according to the conditions imposed or the representations or commitments made, [the] Commission will then determine

whether reversion or other designation is the appropriate remedy” (“Phase II”).

On November 1, 2, 15, and 16, 2012, the Commission heard evidence and arguments in Phase I of the OSC Proceeding. At a meeting on February 7, 2013, the Commission orally found that Piilani’s and Honua‘ula’s proposed uses of the Petition Area as shown on the proposed site plan would violate Conditions 5 and 15 of the D&O, and that Condition 17 had also been violated. No written order reflecting that oral decision was entered.

On April 18, 2013—because Piilani sought to amend the D&O to allow Piilani to develop a project different from the project originally presented to the Commission as part of the 1995 D&O proceedings—Piilani filed a Motion to Stay Phase II of the OSC Proceeding (the “Motion to Stay”). In the Motion to Stay, Piilani requested a stay of Phase II of the OSC Proceeding so the Commission could consider Piilani’s Motion for Order Amending the Findings of Fact, Conclusions of Law, and Decision and Order dated February 10, 1995 (the “Motion to Amend”). On June 27, 2013, the Commission granted the Motion to Stay and ordered Phase II of the OSC Proceeding stayed on the conditions that Piilani filed its Motion to Amend not later than December 31, 2013 and that no construction on the Petition Area occur during the stay. Piilani filed its Motion to Amend on December 31, 2013.

In connection with a new mixed-use project contemplated by the Motion to Amend, which incorporated light industrial, business/commercial, and multi-family uses (the “Mixed Use Project”), Piilani prepared an environmental impact statement (“EIS”). In June 2017, Piilani submitted the final EIS to the Commission for processing in connection with its review of the Motion to Amend. After two days of public hearings, the Commission denied the acceptance of the final EIS prepared for the Mixed Use Project on July 20, 2017.

**C. Community Outreach**

Following the non-acceptance of the EIS, Piilani and Honua‘ula determined that the Petition Area would be developed in substantial compliance with the representations made to the Commission during the 1995 D&O proceedings (the “Original Plan”). The Original Plan was to develop a 123-lot commercial and light industrial subdivision within the Petition Area.

In January 2018, Piilani retained Koa Partners, LLC (“KP”) to identify, contact, and discuss the Original Plan with stakeholders, including the Intervenor, ancestral descendants of the Petition Area and surrounding region, testifiers from the EIS hearing, and other interested community members. See Exhibit “1.” As part of these outreach efforts, KP conducted more than two dozen meetings with the community and numerous one-on-one meetings, including a large meeting held on September 17, 2018 that was advertised in The Maui News for all interested members of the public. See Exhibit “1.”

The discussion of each meeting and correspondence with community members was intended to solicit feedback on matters of community interest, and to share Piilani’s obligations to develop the Petition Area in substantial compliance with the representations made by the original petitioner in the 1995 D&O proceedings. KP never received any specific objections to the Original Plan. Rather, the Intervenor and other community members expressed their interest in development concepts that reflected cultural sensitivity, open space, and other types of uses in addition to light industrial. See Exhibit “1.”

Based on community input, KP prepared different versions of development plans that modified the Original Plan and incorporated concepts introduced by the community. The latest iteration of the development plan was prepared following the September 17, 2018 community meeting and after discussion with Piilani’s cultural consultant. This latest development plan preserved an unnamed natural drainageway that transects the Petition Area in a northeast-to-



southwest direction, certain archaeological sites, a celestial viewing area, and vernal and autumnal equinox view planes (the “Modified Original Plan”). See Exhibit “1.”

After almost a year of meaningful progress toward the Modified Original Plan, which was intended to be a mutually acceptable development proposal compatible with the Original Plan, the Intervenor decided to terminate all further discussions with KP. Shortly thereafter, on November 30, 2018, the Intervenor filed a Motion to Conduct Phase II of Contested Case Pending Since 2012, and for Final Decision (the “Phase II Motion”). Since the Intervenor were no longer interested in meaningful discussions, Piilani was left with only one alternative: to abandon the Modified Original Plan and to instead proceed with a development that is substantially compliant with the Original Plan. Piilani affirms that it will continue to proceed with development in substantial compliance with the Original Plan.

### **III. ANALYSIS**

There are three main reasons that the Commission should dismiss the OSC Proceeding: (1) the Commission lacks the authority to conclude Phase I of the OSC Proceeding and commence Phase II of the OSC Proceeding; (2) the Commission’s oral findings of violation in Phase I are no longer factually accurate; and (3) the Commission does not have the authority to enforce reversion or otherwise reclassify the Petition Area through Phase II of the OSC Proceeding.

In support of this Motion, Piilani hereby incorporates and adopts by reference their Memorandum in Opposition to Intervenor’s Motion to Conduct Phase II of Contested Case Pending Since 2012, and for Final Decision, Filed December 3, 2018, filed January 10, 2019 and the evidence filed in support thereof.

**A. The OSC Proceeding Should Be Dismissed Because Phase I Has Not Been and Cannot Be Completed**

The Commission entered the OSC on September 10, 2012 and thereafter bifurcated the OSC Proceeding into two phases: first, the Phase I evidentiary hearings to determine whether a violation had occurred, and second, if a violation was found, the Phase II hearings to determine the appropriate remedy.

The OSC states that the Commission “will conduct a hearing on this matter in accordance with the requirements of chapter 91, [Hawai‘i Revised Statutes (“HRS”)], and subchapters 7 and 9 of chapter 15-15, [Hawai‘i Administrative Rules (“HAR”)]. More specifically, the Commission “shall conduct a hearing on an order to show cause in accordance with the requirements of [title 15, chapter 15,] subchapter 7, where applicable” with “decisions and orders [to] be issued in accordance with subchapter 7 or subchapter 9.” HAR §§ 15-15-93(c), (d).

Subchapter 7, HAR provides in relevant part that any decision must be rendered:

*[P]rior to a period of **not more than three hundred sixty-five days after the petition has been deemed a proper filing** by the commission or the executive officer, unless otherwise ordered by a court, or unless a time extension, not to exceed ninety days, is established by a two-thirds vote of the members of the commission, **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 in accordance with subchapter 11. If the commission fails to act on the petition pursuant to Section 205-4(g), HRS, the petition shall be deemed approved, subject to the provisions of section 15-15-90(e).*

HAR § 15-15-74(b) emphases added). Section 91-12, HRS similarly requires conclusion of the proceeding by entry of written findings of fact, conclusions of law, and decision and order in a timely fashion:

Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, **shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law**. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the

decision and order and accompanying findings and conclusions *within a reasonable time* to each party or to the party's attorney of record.

(Emphases added).

Following the Phase I evidentiary hearings, the Commission chair asked the parties to draft their individual proposed findings of fact, conclusions of law, and decision and order. Transcript of Hearing at 173 (Nov. 16, 2012). Each of the parties timely submitted their proposed findings of fact, conclusions of law, and decision and order.<sup>1</sup> Despite receiving the parties' proposals, and despite an oral finding by the Commission that Piilani violated certain conditions of the D&O at its February 7, 2013 hearing, the Commission did not enter written findings of fact, conclusions of law, and decision and order.

The provision that governs the OSC Proceeding, section 15-15-74(b), HAR, mandates that the Commission enter its findings of fact, conclusions of law, and decision and order within a 365-day period after the order to show cause is issued.<sup>2</sup> Here, the Commission issued the OSC on September 10, 2012. Therefore, the Commission had a duty to file its findings of fact, conclusions of law, and decision and order by September 10, 2013. Beyond that period, the Commission does not have the authority to enter its findings of fact, conclusions of law, and decision and order.

This 365-day period is mandatory and gives certainty to land use proceedings and avoids requests from being stalled indefinitely. Town v. Land Use Comm'n, 55 Haw. 538, 544, 524

---

<sup>1</sup> Piilani submitted its proposed Findings of Fact and Conclusions of Law and Decision and Order on December 21, 2012, and the County of Maui Department of Planning filed its joinder to Piilani's proposed findings on December 21, 2012. The State of Hawai'i Office of Planning also submitted their Proposed Findings of Fact, Conclusions of Law, and Decision and Order on Petitioners' Failure to Perform According to Conditions Imposed on the Petition on December 21, 2012, and the Intervenors submitted their Proposed Findings of Fact for Phase One on December 24, 2012.

<sup>2</sup> This 365-day period may be extended only when "ordered by a court, or [by] a time extension, not to exceed ninety days, is established by a two-thirds vote of the members of the Commission." Section 15-15-74(b), HAR. Here, no extension of the 365-day period was ordered by a court or approved by the Commission.

P.2d 84, 88 (1974) (stating that the interested parties to the hearing “should not be placed in a state of limbo at the discretion of the applicant or the [Commission], and the time limitations prescribed by [Section 205-4, HRS] and LUC Regulation 2.35 insures the protection of both the applicant and the adjoining landowners at both extremes”). The purpose of the 365-day statutory limitation is to expedite the state land use decision-making process. Conf. Comm. Rep. No. 52, in 1995 Senate Journal, at 782-83. The Legislature imposed the 365-day limitation upon the Commission, recognizing that “[p]roblems arise where proceedings before the [C]ommission are unduly lengthy which results in increased costs to the parties involved.” S.C. Rep. 2, in 1995 Senate Journal, at 833.

Findings of fact, conclusions of law, and a decision and order concluding Phase I of the OSC Proceeding have never been filed by the Commission. This is unlike DW Aina Le‘a Development, LLC v. Bridge Aina Le‘a, LLC, 134 Hawai‘i 187, 339 P.3d 685 (2014), where the Commission did file findings of fact and conclusions of law, albeit almost two and a half years after the Commission issued the order to show cause. The Hawai‘i Supreme Court specifically applied the mandatory 365-day period to the resolution of the order to show cause, explaining that the Commission’s duty to resolve an order to show cause must be completed within “365 days after the initial [order to show cause] was issued.” Id. at 216, 339 P.3d at 714. Ultimately, the Hawai‘i Supreme Court determined that the Commission’s “rolling and continuing” order to show cause proceedings failed to comply with the requirements of section 205-4, HRS.

In Bridge Aina Le‘a, the Hawai‘i Supreme Court considered whether the Commission’s action to revert the subject property required compliance with the 365-day deadline set forth in section 205-4(g), HRS. Because the Commission had already acted to revert the subject property, the Court had to analyze whether the developers had substantially commenced use of

the land in accordance with section 205-4(g), HRS. Here, where there is no reversionary action, application of the 365-day deadline as set forth in *section 205-4(g), HRS* is inappropriate and the Court's analysis in Bridge Aina Le'a is irrelevant. Rather than section 205-4(g), HRS, the Commission must comply with chapter 91, HRS and subchapters 7 and 9 of chapter 15-15, HAR. The OSC on its face states that the hearings will be held "in accordance with the requirements of *chapter 91, HRS, and subchapters 7 and 9 of chapter 15-15, HAR.*" (Emphasis added). There is no reference in the OSC to the application of the provisions of section 205-4, HRS. Because the OSC Proceeding was not held in accordance with section 205-4, HRS and the Commission has not yet sought to revert the Petition Area—in other words, the facts of this case are distinguishable from the facts of Bridge Aina Le'a—the Bridge Aina Le'a analysis of the 365-day deadline is inapplicable.

The primary issue here is a *procedural* one: whether the Commission has the authority to issue written findings of fact and conclusions of law more than six years after the issuance of the OSC and almost six years since the Commission orally found a violation. An affirmative determination that the Commission may issue written findings of fact and conclusions of law at such a late date is directly contrary to the 365-day rule set forth in section 15-15-74(b), HAR.

Moreover, the Commission's decision here to bifurcate the OSC Proceeding into two phases further distinguishes the Hawai'i Supreme Court's decision in Bridge Aina Le'a. In Bridge Aina Le'a, the Court explained that "once the [Commission] issues an OSC, the relevant considerations to be taken into account by the [Commission] and the procedures it must follow turn on whether the petitioner has substantially commenced used of the land in accordance with its representations." 134 Hawai'i at 209, 339 P.3d at 707. In a singular proceeding, the Commission necessarily had to analyze whether substantial commencement had occurred.

However, here, in a bifurcated proceeding, analysis of whether substantial commencement had occurred—a relevant consideration when considering the appropriate remedy—is prematurely considered in the Phase I analysis. To that end, the Commission directed that “the witnesses and exhibits presented by the parties *at this time* should address the first phase of the proceeding only, that is, whether there has been a violation.” Prehearing Order. Based on the Commission’s Prehearing Order, which was entered prior to the Bridge Aina Le’a decision—the only consideration at hand is whether a violation had occurred; substantial commencement is wholly irrelevant to Phase I and is therefore not ripe for consideration by the Commission. Accordingly, an analysis of whether substantial commencement of the use of the land has occurred is premature.<sup>3</sup>

Instead, the 365-day rule stated in section 15-15-74(b), HAR, is the sole determining factor when considering whether the Commission may enter findings of fact and conclusions of law on this matter and at this time. The Commission is unable to act in excess of the authority conferred to it under section 15-15-74(b), HAR, and thus cannot now enter findings of fact and conclusions of law as to Phase I of the OSC Proceeding.

The conclusion that the Commission may not enter findings of fact and conclusions of law as to Phase I of the OSC Proceeding is not altered by the Motion to Stay Piilani filed on April 18, 2013. The Motion to Stay addressed and pertained to Phase II of the OSC Proceeding only. Piilani did not request that the Commission delay, extend, or toll any action by the Commission to enter findings of fact and conclusions of law, as required under chapter 91, HRS and section 15-15-74(b), HAR. Rather, Piilani pointed out in its Motion to Strike and Objection

---

<sup>3</sup> Even assuming, *arguendo*, that the Bridge Aina Le’a analysis is applied by the Commission, Piilani has substantially commenced use of the Petition Area as discussed further in this memorandum, and therefore the Commission is required to adhere to the 365-day deadline prescribed in section 205-4, HRS.

to Intervenors' Supplemental Memorandum in Support, filed June 12, 2013, "[w]hether and when to enter [written findings of fact and conclusions of law] is wholly within the discretion of the Commission, particularly in light on the pending Motion to Stay Phase II."

The Commission's decision not to abide by its statutory obligations relating to proceedings cannot be waived or altered by a party. The Hawai'i Supreme Court has repeatedly emphasized that the Commission holds certain statutory obligations that the Commission cannot abdicate. See, e.g., Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Hawai'i 31, 44-45, 7 P.3d 1068, 1081-82 (2000), as amended (Jan. 18, 2001) (opining on the Commission's statutory and constitutional obligations to assess the impact of a proposed reclassification on traditional and customary practices of Hawaiians). Thus, the Commission must abide by its own rules.

Entering the findings of fact, conclusions of law, and a decision and order more than 365 days after the issuance of the OSC is a violation of section 15-15-74(b), HAR. Because the 365-day deadline has lapsed, the Commission has no authority to enter the findings of fact, conclusions of law, and decision and order. Without conclusion of Phase I of the OSC Proceeding, Phase II of the OSC Proceeding cannot commence. Because the Commission cannot complete Phase I and has no authority to commence Phase II of the OSC Proceeding, the Commission should grant this Motion to dismiss the OSC Proceeding.

**B. The Oral Findings of Phase I Are Factually Inaccurate and There Is No Basis to Proceed with Phase II of the OSC Proceeding**

Although the Commission found that Piilani's and Honua'ula's proposed uses of the Petition Area would violate Conditions 5 and 15 of the D&O, and that Condition 17 had also been violated, the Commission granted Petitioner's Motion to Stay, which allowed Piilani to cure the violations by submitting their Motion to Amend requesting amendment of the D&O conditions.

After several years of preparation, Piilani submitted an EIS to the Commission to be accepted prior to the Commission's review of the Motion to Amend. However, because the Commission denied the EIS, the Commission could not proceed with the Motion to Amend.

Determined to continue development of the Piilani Parcels, Piilani has elected to forego development of the Piilani Parcels in accordance with the plans shown in the EIS. Instead, Piilani will continue development of the Piilani Parcels in substantial compliance with the representations made to the Commission during the D&O proceedings.

Development of the Piilani Parcels in substantial compliance with the Original Plan was previously supported by the Intervenors. At the February 7, 2013 hearing, Intervenors explained that "back in 1994 the public heard that the Petitioner planned to do a 123-lot light industrial park. And the public was okay with that. *And today the Intervenors are still okay with that.*" Transcript of Hearing at 78 (Feb. 7, 2013) (emphasis added).

Piilani's decision to develop the Piilani Parcels in substantial compliance with the Original Plan ensures that all previous violations of the D&O have been cured, and further reflects Piilani's commitment to comply with all D&O conditions as documented below. Accordingly, the Commission's oral findings in Phase I are now factually inaccurate, and there is no basis to proceed with Phase II of the OSC Proceeding.

1. Piilani Affirms Compliance with Condition 5

The Commission orally found that Piilani would violate Condition 5 of the D&O because its proposed use did not include the construction of a frontage road. Condition 5 provides in relevant part:

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.



Piilani will fund, design, and construct the traffic and roadway improvements required by the D&O, including the frontage road parallel to Piilani Highway and other connector roads within the Petition Area. Piilani is committed to working with the State of Hawai‘i Department of Transportation to provide a frontage road parallel to Piilani Highway or otherwise incorporate within the design of the Piilani Parcels something substantially compliant with the requirement to complete a frontage road, as reviewed and approved by the State of Hawai‘i Department of Transportation and the County of Maui Department of Transportation. Accordingly, there is no current or prospective violation of Condition 5.

2. In Accordance with Condition 15, Piilani Will Develop the Piilani Parcels in Substantial Compliance with the Representations Made to the Commission

Piilani will develop the Piilani Parcels in substantial compliance with the Original Plan, and in compliance with applicable law. Piilani therefore meets the requirements of Condition 15 of the D&O, which states in full:

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.

The Piilani Parcels will be developed as a commercial and light industrial subdivision, sold in fee simple or leased on a long-term basis.

Piilani has reviewed the findings of fact and conclusions of law set forth in the D&O to determine what representations were made to the Commission.<sup>4</sup> Given that the Commission is

---

<sup>4</sup> Section 205-4, HRS twice refers to “representations made by the petitioner”—first, the Commission may “assure substantial compliance with *representations made by the petitioner* in seeking a boundary change”; and second, the Commission may also provide by condition “that absent substantial commencement of use of the land in accordance with *such representations*,” the Commission shall issue an OSC. Section 205-4(g), HRS (emphases added). When adding the latter reference to *representations of the petitioner*, the state legislature also amended section 205-17, HRS to require that the Commission must specifically consider “[t]he representations and commitments made by the petitioner in securing a boundary change” in its review of any petition for reclassification. HRS § 205-17(6) (emphasis added).

required to file written findings of fact and conclusions of law, and the Commission is “require[ed] . . . to base written decisions on proven facts,” the D&O findings of fact are the most reasonable source of the representations made by the original petitioner upon which the Commission based its decision to amend a land use classification. HRS § 205-4(g); S. Stand. Comm. Rep. No. 708, in 1975 Senate Journal, at 1098.

The use of the D&O findings of fact and conclusions of law to define the representations made to the Commission is a position that is supported and encouraged by the Intervenors. See Transcript of Hearing at 79 (Feb. 7, 2013) (“We’ve argued on several occasions before this Commission that *it is sufficient and it’s actually the law, that the Land Use Commission need look no further than those findings of fact to make its decision.*” (Emphasis added)); see also Ex. 2 to Intervenors’ Proposed Findings of Fact for Phase One (“The findings of fact and conclusions of law set forth in the D&O define the representations and commitments made to the Commission by the Petitioner and its successors in interest[.]”).

Piilani will develop the Piilani Parcels in substantial compliance with the following representations:

- Lot Sizes:
  - “The size of the lots will range from approximately 14,000 square feet to 54,000 square feet.” D&O Finding of Fact (“FOF”) ¶ 21.
- State and County Plans and Programs:
  - “The Project would conform with the proposed Light Industrial designation for the Property. Light industrial uses include warehousing, light assembly, and service and craft-type industrial operations.” FOF ¶ 32.

- Need for the Proposed Development:
  - “Petitioner has represented that the Project will provide new employment opportunities for Maui residents and will serve the needs of the Kihei-Makena region. There is a shortage of commercial and light industrial space for businesses servicing the Kihei-Makena region.” FOF ¶ 36.
  - “Petitioner has represented that the Property presents a convenient location for future commercial and light industrial development, resulting in the reduction of transportation and other costs.” FOF ¶ 37.
- Archaeological Resources:
  - “Petitioner has represented that it will work with the Historic Preservation Division on a long-term preservation plan.” FOF ¶ 53.
- Scenic and Visual:
  - “The landscaping plan proposed for the Project will minimize the visual impacts of the proposed development on the Project’s relatively long frontage along Piilani Highway. Design controls for setbacks will be imposed within the Project to further foster mitigation of visual impacts. The size and design of the individual lots provide relatively large areas so buildings can be constructed fairly deep in the lot to further minimize the visual impact of the Project from Piilani Highway. Petitioner has represented that site planning, architecture, landscape designs, signage and lighting will be addressed during the zoning process.” FOF ¶ 54.
  - “The 30 foot landscape setback will still allow widening of Piilani Highway without lessening the 30 foot setback along the frontage of the Kaonoulu Industrial Park project.” FOF ¶ 55.
  - “Landscaping materials and the irrigation system for the Project will apply County xeriscape principles and take into account Kihei’s environs and water conditions.” FOF ¶ 56.
- Environmental Quality:
  - “Heavy manufacturing and processing of raw materials will not be allowed in the Project. Mitigation measures include limiting construction activities to daylight working hours, and maximum setbacks.” FOF ¶ 57.
  - “Petitioner has represented that dust control measures will be implemented during construction to minimize expected wind-blown emissions.” FOF ¶ 58.

- Solid Waste Disposal:
  - “Petitioner has represented that it will develop a solid waste management plan in coordination with the Solid Waste Division of [Department of Public Works and Waste Management (“DPWWM”)], that the Project will be serviced by a private refuse collection company, and that waste will be disposed of in the Central Maui landfill.” FOF ¶ 61.
  
- Electricity and Telephone Service:
  - “Electrical and telephone trunk lines will be extended underground across Piilani Highway to the Petition Area from Kaonoulu Street. The distribution system for these facilities will also be placed underground in accordance with the provisions of the Maui County Code.” FOF ¶ 67.
  
- Highways and Roadways:
  - “Primary access to the Property is proposed from Piilani Highway through a new segment of East Kaonoulu Street, within an 80-foot wide right of way, designed to accommodate five (5) eleven-foot (11’) lanes of traffic. The four access roadways into the Project off of East Kaonoulu Street are proposed within a 64 foot right-of-way to accommodate four (4) ten-foot (10’) lanes. All other interior roadways will have a thirty-six (36) feet wide pavement section within a 60 foot right-of-way.” FOF ¶ 69.
  - “The proposed project would change the existing T-intersection of Piilani Highway and Kaonoulu Street to a cross intersection and alter the traffic demand in the vicinity of Kaonoulu Street. Left turn storage lanes and a deceleration lane for right turns would be required to the existing two-lane Piilani Highway to accommodate the proposed industrial subdivision. Improvements to accommodate traffic would also be required on the makai side of the Kaonoulu intersection, such as a conversion of the existing right turn only lane to a right turn and through option lane. This improvement would require striping, signage, and may require the removal and/or relocation of a small traffic island.” FOF ¶ 70.
  - “A road widening strip will also be provided along the westerly boundary of the project for future widening of Piilani Highway. Widening of the highway will not affect the landscaping setback planned for the frontage along Piilani Highway.” FOF ¶ 71.
  - “The traffic generated by the Kaonoulu Industrial Park project by the year 2000 would also justify signalization at the intersection of the proposed subdivision and Piilani Highway.” FOF ¶ 73.
  - “Petitioner has represented that it will construct all streets within the industrial park to County standards in compliance with the comment by

DPWWM that streets include concrete curbs and gutters, six-foot sidewalks, and four feet wide planting strips, which improvements would be dedicated to the County upon completion.” FOF ¶ 74.

- “Petitioner has represented that water for the Project will be provided by the domestic system servicing the area and that the average daily demand for the Project is estimated to be approximately 429,500 gallons per day based on Department of Water Supply criteria of 6,000 gallons per acre per day.” FOF ¶ 77.
- “Petitioner also represented that a new 12-inch line is proposed to be installed between Ohukai Road and the Project site. An easement would have to be obtained across land owned by Haleakala Ranch. A new distribution system would be installed within the subdivision streets to meet the required fire and domestic flow demands of the Project. Fire hydrants would be installed at appropriate intervals throughout the project. The existing 36-inch transmission line which extends diagonally across the Petition Area may be relocated within the subdivision street right-of-ways.” FOF ¶ 78.
- Wastewater Treatment and Disposal:
  - “A new wastewater collection system will be installed within the subdivision streets to be connected by gravity lines to the existing sewer system located makai of Piilani Highway at the intersection of Kaiola and Kenolio Streets. Petitioner is willing to participate with the County and other users in upgrading the wastewater transmission treatment and reclamation facilities on an equitable pro-rata basis if necessary.” FOF ¶ 83.
- Drainage:
  - “Petitioner has represented that various erosion control measures will be in place during development of the Project. The Project will not adversely affect adjoining properties and sedimentation hazards to coastal waters and downstream properties will be minimized.” FOF ¶ 89.
  - “Petitioner has represented two options for on-site drainage improvements, neither of which will increase the runoff into Kulanihakoi Gulch. One option is to send all runoff generated from the individual lots to subsurface systems constructed in each lot and buried in the parking lot; while runoff from the common areas of the Project, approximately 45 cfs, would be collected into a storm drain system and directed to Kulanihakoi Gulch. The other option is to build a detention basin offsite and mauka of the Project, on other property owned by the Petitioner to retain and release offsite runoff slowly while onsite runoff will flow directly into Kulanihakoi Gulch. The detention basin will be designed in a way that does not release the runoff

flowing into Kulanihakoi Gulch from both offsite and the post-development project site beyond the current levels.” FOF ¶ 90.

- “Petitioner proposes, as an off-site drainage improvement, construction of a concrete-lined diversion ditch along the easterly boundary of the Project site. The diversion ditch would intercept the off-site surface runoff which presently flows through the Project site and divert it around the Project site, where it will be discharged into Kulanihakoi Gulch as it is presently doing.” FOF ¶ 91.
- “The drainage improvements will mitigate silt and maintenance of the system will be spelled out in the Covenants and Restrictions for the Project.” FOF ¶ 92.
- Conformance to Applicable District Standards:
  - “Uses are anticipated to primarily be light industrial and commercial uses oriented to serve the Kihei-Makena community.” FOF ¶ 96.

Piilani affirms its commitment to develop a commercial and light industrial subdivision in substantial compliance with the above representations made to the Commission, and in compliance with applicable law. Because Piilani will develop the Piilani Parcels as stated, there is no current or prospective violation of Condition 15.

### 3. Piilani is in Compliance with Condition 17

Condition 17 requires that Piilani “timely provide without any prior notice, annual reports to the Commission, the Office of State Planning, and the County of Maui Planning Department in connection with the status of the subject Project and Petitioner’s progress in complying with the conditions imposed [in the D&O].” Following the Commission’s oral findings in Phase I, Piilani corrected the violation and submitted the missing annual reports. Piilani is current with the filing of its annual reports, and filed its most recent annual report, the Twenty-Second Annual Report (2017), on March 12, 2018. Accordingly, there is no current violation of Condition 17.

“A case is moot where the question to be determined is abstract and does not rest on existing facts or rights.” In re J.T. Thomas, 73 Haw. 223, 226, 832 P.2d 253, 254 (1992). Here, all oral findings of violation have been cured, and there are no existing facts that allow the Commission to proceed with Phase II. As such, the issue of whether to revert or otherwise change the classification of the Petition Area is an abstract question that does not rest on the existing facts.

C. **Piilani Substantially Commenced Use of the Petition Area**

The Hawai‘i Supreme Court has held that the Commission may revert a property to its former land use classification or be changed to a more appropriate classification without following the process set forth in section 205-4, HRS only in the absence of “substantial commencement of use of the land.” Bridge Aina Le‘a, 134 Hawai‘i at 213, 339 P.3d at 711 (citation omitted). Here, Piilani has substantially commenced use of the Petition Area. Therefore, the Commission cannot revert or otherwise classify the Petition Area as contemplated in Phase II, except in accordance with section 205-4, HRS.

In analyzing whether the developers in Bridge Aina Le‘a substantially commenced use of the land, the Court considered the developers’ preparation of plans and studies, as well as work on infrastructure. The Court specifically noted that the developers had “continued to actively proceed with *preparation of plans and studies*, including building plans and studies for the EIS” and “continued work on infrastructure.” Id. at 214, 339 P.3d at 712 (emphasis added). The Court recognized that “more than \$20,000,000.00 had been expended for plans and construction work on the project” and explained that the developers’ investment was “a considerable amount of money and effort, by any reasonable measure.” Id. at 214, 339 P.3d at 712. Accordingly, the Court held that the developers substantially commenced use of the land. Id. at 214, 339 P.3d at 712.

Piilani has undertaken considerable effort and incurred great expense to develop the Piilani Parcels in substantial compliance with the representations made to the Commission. To complete the final subdivision approval process, which had begun under the prior landowner, and as required by the County of Maui Department of Public Works' Development Services Administration, Piilani deposited \$22,058,826.00 in cash to fund civil infrastructure improvements to support implementation of the Original Plan. Approximately \$1,900,000.00 of the cash bond has been released to purchase materials, which have been located upon the Piilani Parcels since 2012 and remain located on the site as of this date, waiting to be utilized. The County of Maui continues to hold the remaining \$20,150,000.00 as a bond for the improvements and infrastructure required by the subdivision approval.

Piilani has spent \$3,418,822.01 on construction materials. More than \$880,000.00 has been spent on labor and construction costs to clear the Piilani Parcels, to erect fencing around the perimeter, and to mobilize for the installation of necessary infrastructure and other startup costs. Approximately 5 acres of the Piilani Parcels were cleared by stripping away brush, grass, and top soil. Additionally, Piilani has expended approximately \$85,000.00 on engineering and surveying work on the Piilani Parcels that is necessary to the development of the Original Plan. In total, Piilani has invested more than \$22,000,000.00 in support of development of the Piilani Parcels and implementation of a proposal in substantial compliance with the Original Plan.

Moreover, the use of the Petition Area in accordance with the representations made to the Commission substantially commenced even before Piilani acquired title. The prior landowners secured additional entitlements and governmental approvals to develop the Petition Area in accordance with the representations made to the Commission, including an amendment to the Kihei Makena Community Plan, a zoning change, and a preliminary subdivision approval for a



56-lot light industrial subdivision that is still pending with the County of Maui. The prior landowners also engaged in substantial work and expense to develop the Petition Area in substantial compliance with the Original Plan. For example, one prior landowner—Maui Industrial Partners—invested more than \$408,000.00 in the use of the Petition Area under the Original Plan and engaged Warren S. Unemori Engineering, Inc. to complete certain engineering work, including preparation and processing of maps and subdivision applications and the design and processing of construction permits for major infrastructure improvements.

As the Hawai‘i Supreme Court has stated: “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.” Bridge Aina Le‘a, 134 Hawai‘i at 214 n.16, 339 P.3d at 712 n.16. The Court emphasized that the legislature “did not require that the use be substantially *completed*, but rather that it be substantially *commenced*.” Id. at 214, 339 P.3d at 712. In this case, Piilani alone has spent more than \$22,000,000.00—at least \$2 million more than the developers in Bridge Aina Le‘a—in its effort to develop the Piilani Parcels in substantial compliance with the Original Plan.

Because Piilani has substantially commenced use of the Petition Area, the Commission may not revert or change the Petition Area’s land use classification without following the process set forth in section 205-4, HRS. Id. at 213, 339 P.3d at 711. As the Court explained, “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.” Id. at 209, 339 P.3d at 707. Furthermore, “[a]fter the petitioner substantially commences use of the land, the circumstances have changed and it may no longer be appropriate to revert the land to its prior classification.” Id. at 213, 339 P.3d at 711. As the Court recognized in Bridge Aina Le‘a, Piilani has invested

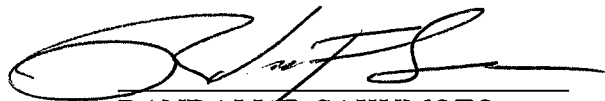
substantial work, time, and expense in its development of the Piilani Parcels and therefore it is no longer appropriate to revert the Petition Area to its prior land use classification.

Piilani has substantially commenced use of the Petition Area and, therefore, the Commission cannot revert or otherwise change the land use classification of the Petition Area, except in accordance with section 205-4, HRS. Instead, “it is clear and unambiguous that enforcement power resides with the appropriate officer or agency charged with the administration of county zoning laws, namely the counties, and not the [Commission].” *Id.* at 211, 339 P.3d at 709. The Commission thus cannot proceed with the primary purpose of Phase II, namely, determination of “whether reversion or other designation is the appropriate remedy.” Prehearing Order. Accordingly, there is no basis to proceed with the OSC Proceeding, and the Commission should grant the Motion to Dismiss.

#### IV. CONCLUSION

For the foregoing reasons, Piilani requests that the Commission grant Petitioners’ Motion to Dismiss the Order to Show Cause Proceeding.

DATED: Honolulu, Hawai‘i, February 1, 2019.



RANDALL F. SAKUMOTO  
LISA W. CATALDO  
CATHERINE A. TASCHNER

Attorneys for PIILANI PROMENADE  
SOUTH, LLC and PIILANI PROMENADE  
NORTH, LLC

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of	)	Docket No. A94-706
	)	
KAONOULU RANCH to Amend the	)	DECLARATION OF
Agricultural Land Use District Boundary	)	RANDALL F. SAKUMOTO; EXHIBIT
into the Urban Land Use District for	)	"1"
Approximately 88 acres at Kaonoulu,	)	
Makawao-Wailuku, Maui, Hawai'i; Tax	)	
Map Key Nos. (2) 2-2: por. 15 and 3-9-	)	
01:16	)	
_____	)	

DECLARATION OF RANDALL F. SAKUMOTO

I, RANDALL F. SAKUMOTO, hereby declare:

1. I am licensed to practice law in all courts of the State of Hawai'i.
2. I am an attorney with the law firm of McCorrison Miller Mukai MacKinnon LLP, attorneys for Petitioners Piilani Promenade South, LLC and Piilani Promenade North, (collectively, "Piilani"), as referenced above in this matter.
3. This declaration is submitted in support of Petitioners' Motion to Dismiss the Order to Show Cause Proceeding.
4. As an attorney at McCorrison Miller Mukai MacKinnon LLP, I have personal knowledge of the filings in the above-referenced case and access to records and files kept in the normal course of the business conducted by McCorrison Miller Mukai MacKinnon LLP.
5. Submitted herewith as Exhibit "1" is the Declaration of Harry Lake, Chief Executive Officer of Koa Partners, which contains an electronic signature of Mr. Lake. I understand that the original is being mailed to my office and I intend to file the original with the

Land Use Commission of the State of Hawai'i (the "Commission") upon our receipt of the document.

I, RANDALL F. SAKUMOTO, declare under penalty of law that the foregoing is true and correct.

Executed this 1st day of February, 2019, at Honolulu, Hawai'i.



RANDALL F. SAKUMOTO