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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

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| In the Matter of the Petition of<br><br>U OF N BENCORP<br><br>To Amend the Agricultural Land Use District Boundary Into the Urban Land Use District for Approximately 62 acres, Tax Map Key Nos. (3) 7-5-010: 085 and 7-5-017: 006, situated at Waiaha, North Kona, County and State of Hawaii | DOCKET NO. A02-737<br><br>OFFICE OF PLANNING'S RESPONSE TO PETITIONER'S MOTION TO RESCIND ORDER TO SHOW CAUSE OR TO CONTINUE HEARING ON ORDER TO SHOW CAUSE; EXHIBIT "A"; CERTIFICATE OF SERVICE |

**OFFICE OF PLANNING'S RESPONSE TO PETITIONER'S MOTION TO RESCIND ORDER TO SHOW CAUSE OR TO CONTINUE HEARING ON ORDER TO SHOW CAUSE**

Pursuant to Hawaii Administrative Rules ("HAR") § 15-15-70, the Office of Planning, State of Hawaii ("OP") provides the following response to successor-in-interest to Petitioner U of N Bencorp, Petitioner University of the Nations, Kona, Inc.'s ("Petitioner's") Motion to Rescind Order to Show Cause or to Continue Hearing on Order to Show Cause, dated May 8, 2019 ("Petitioner's Motion").

Petitioner is requesting that the Land Use Commission ("LUC"/"Commission") either: (a) rescind the Order to Show Cause ("OSC"); or (b) continue the OSC Hearing for a period of one (1) year to allow Petitioner to file a revised Motion to Amend, filed on December 21, 2006 ("Motion to Amend"); or (c) grant sufficient additional time to prepare for and be heard on the OSC.

OP believes the OSC should not be rescinded, but would not object to a one-year stay of the OSC proceedings to allow Petitioner a reasonable amount of time to prepare a revised Motion to Amend. OP requests that during the one-year stay, Petitioner refrains from developing the Petition Area.

## I. The OSC Should Not Be Rescinded.

### A. The OSC Complies with HRS § 205-4(g).

Petitioner argues that the Findings of Fact, Conclusions of Law and Decision and Order, dated August 8, 2003 ("Petitioner's D&O"), fails to include the term "substantial commencement" within a condition of the D&O, and therefore does not comply with HRS § 205-4(g). However, Petitioner misinterprets HRS § 205-4(g) as requiring that the term "substantial commencement" be included in the Petitioner's D&O in order for the LUC to properly issue an OSC. HRS § 205-4(g) states:

> ...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 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.** Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances.

(Emphases added.)

First, the statutory granting of authority under HRS § 205-4(g) is permissive, not required, based on the term "may". Consequently, the Commission, interpreted and executed HRS § 205-4(g), through administrative rule to authorize the LUC to issue an OSC *without* an express D&O condition. HAR § 15-15-93(b) provides that the Commission may issue an OSC "[w]henever the [C]ommission 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 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, let alone a condition that includes "substantial commencement".

Secondly, the absence of the term "substantial commencement" in previous D&Os has not been identified as a defect to an OSC proceeding. Petitioner points to Petitioner's D&O Condition No. 15 as referring to "substantial compliance" but not including "substantial commencement", and therefore flawed. Pursuant to HAR § 15-15-90(e), Condition No. 15 is a mandatory condition, which states:

> Petitioner shall develop the Reclassified Area in substantial compliance with the representations made by the Petitioner to the Commission in this Docket, as proposed in its Petition and in documentary evidence and testimony before the Commission. Failure to do so for any reason including economic feasibility, may result in the imposition of fines as provided by law, removal of improvements by Petitioner at Petitioner's own expense, reversion of the Reclassified Area to its former classification, a change to a more appropriate classification, or any other legal remedies.

In simplest terms, Condition No. 15, or as we'll refer to as the "substantial *compliance*" condition, requires that Petitioner develop the property in substantial compliance with its D&O representations or may be subject to reversion or appropriate reclassification. Again, this "substantial compliance" condition is required as condition for all district boundary amendment ("DBA") D&Os pursuant to HAR § 15-15-90(e), but more broadly and importantly, the Commission is empowered to issue an OSC to revert the land based on a finding of no "substantial commencement", without a written condition stating so pursuant to HRS § 205-4(g) and HAR § 15-15-93(b).

In the two Hawaii Supreme Court cases cited and relied upon by Petitioner in Petitioner's Motion, the Court acknowledged each "substantial compliance" condition, which did not include the term "substantial commencement". In *Aina Lea*, D&O Condition No. 13 stated:

> 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.

In *Lanai Co., Inc. v. Land Use Comm'n*, 105 Haw. 296, 97 P.3d 372 (2004) ("*Lanai Co.*"), Condition No. 20 stated:

> Petitioner shall develop the property in substantial compliance with representations made to the Commission in obtaining reclassification of the property. Failure to so develop may result in reclassification of the property to its former land use classification.

However, the Hawaii Supreme Court did not take issue with or question the absence of the term "substantial commencement" in either the *Aina Lea* D&O Condition No. 13 or the *Lanai Co.* D&O Condition No. 20, which are substantially similar to Petitioner's D&O Condition No. 15. It is therefore reasonable to presume that Petitioner's D&O Condition No. 15 is similarly not defective.

Thirdly, "substantial commencement", while a fundamental expectation of the Petitioner, serves not as a specific, enumerated condition upon the Petitioner, but as a finding to be made by the Commission for the purposes of determining whether the Commission may simply void the boundary amendment or must comply with the statutory procedures for reclassification under HRS § 205-4. In *DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC*, 134 Haw. 187, 209, 339 P.3d 685, 707 (2014) ("*Aina Lea*"), the Hawaii Supreme Court determined that, "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. 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. However, 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."

Based on the foregoing, the Commission has the authority to issue an OSC without a written condition that includes the term "substantial commencement" in Petitioner's D&O. Therefore, the issuance of the OSC is consistent with and does not violate HRS §205-4.

**B. <u>Petitioner's Completion of the Project is Subject to Time Limitation.</u>**

Petitioner argues that there is no time limitation in the D&O Conditions, and presumably, therefore, Petitioner is not subject to any time limitation within which to develop the proposed Project. OP disagrees.

D&O Condition No. 15 states, in pertinent part, "Petitioner shall develop the Reclassified Area <u>*in substantial compliance with the representations made by the Petitioner*</u> to the

Commission in this Docket, as proposed in its Petition..." (Emphasis added). Petitioner represented in Finding of Fact No. 64 the following "Development Timeline":

> The Hualalai Village residential development is slated to run over a period of five years and *will be completed* during the Year 2007. Commencement of the Cultural Center is targeted to begin during the Year 2007 and the Educational Facility is being planned for commencement in 2005/2006.

(Emphasis added.)

Petitioner has thus represented in plain and unambiguous language that the Hualalai Village residential development "will be completed" during the Year 2007, which Petitioner is subject to based on D&O Condition No. 15. Even if the words "slated", "targeted" and "planned" are considered *tentative*, twelve years past those *tentative* completion and commencement dates without any progress in the development of the Hualalai Village residential development, the Cultural Center or the Educational Facility can at least be described as long overdue.

Petitioner's representation in Finding of Fact No. 64 that the Hualalai Village residential development would be completed in 2007, and the commencement of the Cultural Center and Educational Facility in 2007 and 2005/2006 respectively, is consistent with and pursuant to HAR §15-15-50(c)(20), which establishes that any Project for a DBA shall be substantially completed within ten years, with the exception of incremental districting. HAR § 15-15-50(c)(20) states:

> Petitioners submitting petitions for boundary amendment to the urban district shall also represent that development of the subject property in accordance with the demonstrated need therefor *will be accomplished before ten years after the date of commission approval*. In the event full urban development cannot substantially be completed within such period, the petitioner shall also submit a schedule for development of the total of such project in increments together with a map identifying the location of each increment, each such increment to be completed within no more than a ten-year period;

(Emphasis added).

Similarly, as part of the DBA decision-making process, HAR § 15-15-78(a) requires the Commission to evaluate whether a proposed DBA project could be substantially completed within ten years. HAR § 15-15-78(a) states in pertinent part:

> If it appears to the commission that full development of the subject property cannot substantially be completed within ten years after the date of the commission's approval and that the incremental development plan submitted by the petitioner can be substantially completed, and if the commission is satisfied that all other pertinent criteria for amending the land use boundary for the subject property or part thereof are present, then the commission may: (i) Grant the petitioner's request to amend the land use boundary for the entire subject property; or (2) Amend the land use boundary for only that portion of the subject property which the petitioner plans to develop first and upon which it appears that substantial development can be completed within ten years after the date of the commission's approval.

It is therefore well established that the general timeline limitation under administrative rule for DBA projects, including Petitioner's project, is ten years, unless incremental districting is employed. Here, Petitioner's project was not approved for incremental districting; therefore, the deadline for substantial completion should be *no later than* ten years. The D&O was approved on August 8, 2003. Ten years from August 8, 2003 means a deadline of August 8, 2013, within which to substantially complete the Project. Petitioner is six years past the general ten-year deadline in non-compliance with the D&O.

Petitioner argues that Petitioner's D&O Condition No. 11[1] is the only specified time limit, which Petitioner believes it has complied with by submitting a Motion to Amend in 2006, and appearing before the Commission on the Motion. However, the Commission did not rule on the

[1] Petitioner's D&O Condition No. 11 states: "The Petitioner shall develop the Cultural Center with sensitivity to the host native Hawaiian culture, and provide for outreach and educational opportunities for the children of Hawaii... If, for any reason, the Cultural Center does not commence operations by January 1, 2008, the Petitioner shall return to the Commission for a hearing to review compliance with the requirements of this Condition."

2006 Motion to Amend, and therefore, Petitioner's representation in D&O Finding of Fact No. 64 continues to require Petitioner to have built the Cultural Center twelve years ago in 2007.

Based on the foregoing, Petitioner represented, and is bound by D&O Condition No. 15, to complete or commence components of the Project by 2007. Moreover, Petitioner has failed to meet the general ten-year deadline established by HAR §§ 15-15-50(c)(20) and 15-15-78(a).

The absence of the term "substantial commencement" in Petitioner's D&O does not render the OSC noncompliant with HRS § 205-4(g), and Petitioner is subject to its "Development Timeline" as represented in Petitioner's D&O, as well as the ten-year timeline established by administrative rule. The OSC is thus proper and Petitioner is in violation of its represented timeline and the ten-year deadline. For these reasons, the Commission should not rescind the OSC.

## II. The Commission Should Stay the OSC to Allow Petitioner A Reasonable Amount of Time to File an Amended Motion to Amend.

In the alternative to the Commission's rescission of the OSC, the Petitioner requests a stay of the OSC to allow time to "continue its update of the Project master plans and studies, which may take up to one (1) year to complete... to complete revisions to the 2006 Updated Project, review the project studies, and consult with community leaders and other stakeholders, including lineal descendants of the Petition Area," all in an effort to prepare and file a revised Motion to Amend. Petitioner cites various unforeseeable and uncontrollable events that prevented Petitioner from returning sooner to the Commission for action on the 2006 Motion to Amend.

OP would not object to a stay of the OSC proceedings to allow Petitioner a reasonable amount of time to prepare a revised Motion to Amend. In OP's view, one year would be a reasonable amount of time for Petitioner to accomplish the items listed by Petitioner, as well as

updating any pertinent studies for a newly proposed project. The Hawaii Department of Transportation ("DOT") has commented that due to the dated 2006 Traffic Impact Analysis Report ("TIAR"), Petitioner should submit a revised TIAR to DOT for review and acceptance. *See* Exhibit A.

Should the Commission approve the stay, OP respectfully requests the following:

(1) The stay of the OSC hearing shall be for one year from the date of the Commission's approval of the stay;

(2) Petitioner shall submit to the Commission and Parties a written status report within six months from the Commission's approval of the stay; and

(3) In preservation of the OSC proceeding and as Petitioner has stated it does not intend to move forward with the currently approved Project, Petitioner agrees not to grade, develop, construct, or perform any ground-disturbing activities within the Petition Area during the term of the stay.

DATED: Honolulu, Hawai'i, May 15, 2019.

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IN REPLY REFER TO:
STP 19-044
STP 8.2654

April 30, 2019

TO: THE HONORABLE MARY ALICE EVANS
DIRECTOR, OFFICE OF PLANNING

FROM: JADE T. BUTAY
DIRECTOR OF TRANSPORTATION

SUBJECT: STATE LAND USE COMMISSION, ORDER TO SHOW CAUSE
DOCKET NO. A02-737, UNIVERSITY OF THE NATIONS, KONA BENCORP
KAILUA-KONA, NORTH KONA, HAWAII
TMK: (3) 7-5-010:085 AND 7-5-017:006

The Department of Transportation (DOT) offers the following on the subject action.

1. The applicant has not met the Transportation (#9) and Traffic (#10) conditions of the August 8, 2003 Decision & Order. Specifically, the applicant has not completed a) an agreement with DOT regarding pro-rata share of transportation improvements and b) a revised Traffic Impact Analysis Report (TIAR).

2. Due to the age of the original 2006 TIAR and possible revisions to the project, Bencorp should submit a revised project TIAR to DOT for review and acceptance.

3. If the developer plans to implement an incremental development plan that extends through several years, an updated TIAR would be needed before execution of each phase.

4. The TIAR should recommend direct improvements, as may be needed, to State highways. Such improvements shall be at the cost of Bencorp.

5. The TIAR should evaluate and assess their pro-rata share to regional State transportation improvements.

If there are any questions, please contact Mr. Blayne Nikaido of the DOT Statewide Transportation Planning Office at (808) 831-7979 or via email at blayne.h.nikaido@hawaii.gov.

**EXHIBIT "A"**

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

| | | |
|---|---|---|
| In the Matter of the Petition of<br><br>U OF N BENCORP<br><br>To amend the Agricultural Land Use District Boundary Into the Rural Land Use District for Approximately 62 acres, Tax Map Key Nos. (3) 7-5-002:010: 085 and 7-5-017: 006, situated at Wai'aha 1st, North Kona, County and State of Hawaii | ) | DOCKET NO. A02-737<br><br>CERTIFICATE OF SERVICE |

**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, May 15, 2019.

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