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WAIKOLOA HIGHLANDS, INC.

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

In the Matter of the Petition Of

WAIKOLOA MAUKA, LLC

To Amend the Agricultural Land Use District
Boundary Into the Rural Land Use District for
Approximately 731.581 Acres in South Kohala
District, Island of Hawai'i, Tax Map Key No.
(3) 6-8-02:016 (por.)



DOCKET NO. A06-767

WAIKOLOA HIGHLANDS, INC.'S
COMMENTS AND OBJECTIONS TO
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER REVERTING
THE PETITION AREA; CERTIFICATE
OF SERVICE

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**WAIKOLOA HIGHLANDS, INC.'S COMMENTS AND OBJECTIONS TO PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
REVERTING THE PETITION AREA**

I. INTRODUCTION

Pursuant to the State of Hawai'i ("**State**") Land Use Commission's (the "**Commission**") directive by letter dated June 3, 2019 regarding the Order to Show Cause, filed July 3, 2018 (the "**OSC**"), Waikoloa Highlands, Inc. ("**WHI**" or "**Petitioner**"), as successor-in-interest to Petitioner Waikoloa Mauka, LLC ("**WML**") to that certain parcel of land consisting of approximately 731.581 acres and currently identified by Tax Map Key No. (3) 6-8-002: 016 (the "**Petition Area**"), by and through its legal counsel, Carlsmith Ball LLP, hereby respectfully submits its comments and objections to the Commission's *Proposed Findings of Fact, Conclusions of Law, and Decision and Order reverting the Petition Area*, filed with the parties to these OSC proceedings on June 4, 2019 ("**Proposed D&O**").

WHI's detailed comments and objections to specific procedural matters ("**PM**"), findings of fact ("**FOF**"), conclusions of law ("**COL**"), and decision and order ("**D&O**") are made pursuant to Hawai'i Revised Statutes ("**HRS**") §§ 91-11 and 91-12, and stated below in bold after the reprinted PM's, FOF's, COL's, and D&O's.

Overall, the Commission's Proposed D&O fails to recognize that, unlike the other order to show cause proceedings that have come before the Commission, before this Petition Area even came before the Commission for its original 2008 reclassification from the State Land Use Agricultural District to the Rural District, the Petition Area has long been zoned for urban uses by the County of Hawai'i ("**County**"), and has held its present RA-1a (Rural-Agricultural, one-acre minimum) zoning classification for 28 years, having been rezoned back in 1990 (from Multiple-Family Residential 1.5 and Open for the former golf area). *See* Cnty. Ord. 90-160.

This factor alone should distinguish the Petition Area for different treatment from the other order to show cause proceedings currently before the Commission.

The comments and objections offered herein indicate that the Commission's Proposed D&O contains multiple errors of law and fact and cannot be adopted as proposed, or face the risk that a reviewing court will find certain PM's, FOF's, COL's, and the ultimate decision to be arbitrary, capricious, or clearly erroneous.

The record is clear that at its May 7, 2019 hearing, the Commission fully intended to adopt a written D&O on the OSC without following the requirements of Chapter 91, HRS. The fact that the Commission's June 4, 2019 Proposed D&O, which is under review here, was only prepared for comments by the parties at the suggestion of the aggrieved Petitioner further highlights the Commission's failure to follow and/or adopt administrative rules necessary to protect the due process and property rights of all parties to these OSC proceedings. This extends to the Commission's failure to adopt administrative rules relating to the ultimate issue of "substantial commencement of the use of the land" and other substantive and procedural rules necessary to enable the parties to adequately address the issues in these OSC proceedings.

II. PROCEDURAL HISTORY

35. On September 6, 2018, at Kona, Hawai'i, the Commission considered WHI's Motion to Continue at its meeting. Steven Lim, Esq., Natalia Batichtcheva, and Joel LaPinta were present on behalf of WHI; Dawn Takeuchi-Apuna, Esq. appeared on behalf of OP; and, Ronald Kim, Esq., and Jeff Darrow appeared on behalf of the County. At the meeting, Nancy Kester provided public testimony on behalf of Julia Alos. The Chair accepted into the record WHI's pleadings filed on July 24, 2018, their Motion to Continue the Hearing, and its August 6, 2018

Statement of Position on the OSC. Mr. Lim also requested that the Commission consider that all references in pleadings, hearing testimony, and argument by Waikoloa Heights regarding Stefan Martirosian, to be merely allegations of misconduct and not representations of fact. Following the receipt of public testimony, the parties provided oral argument on WHI's Motion.

Thereafter, a motion was made and seconded to grant WHI's motion to continue the hearing until October 24-25, 2018, when the Order to Show Cause would be heard. During discussion on the motion, commissioners requested that WHI provide evidence that their representative, Natalia Batichtcheva has legal authority to make representations and binding agreements on behalf of WHI. Following discussion by the commissioners, a vote was taken on this motion. There being a tally of 5 ayes, 0 nays, and 3 excused, the motion carried.

PM 35: The following sentence of PM 35 is misleading and speculative, and should be deleted: "Mr. Lim also requested that the Commission consider that all references in pleadings, hearing testimony, and argument by Waikoloa Heights regarding Stefan Martirosian, to be merely allegations of misconduct and not representations of fact." Although Mr. Martirosian was in prison at the time the October 24-25, 2019 hearings were held (and may still be), WHI's counsel referred to Mr. Martirosian's conduct as "allegations of misconduct" for legal liability purposes only -- not to equivocate on WHI's position of Mr. Martirosian's complete abdication of his corporate duties, fraudulent activities, and his failure to inform the decision-makers of WHI of his true business dealings, each one of which constitutes good cause to excuse WHI's failure to timely develop the Project.

PM 35 also refers to "Waikoloa Heights" as the entity. The correct entity is "Waikoloa Highlands, Inc."

37. On September 20, 2018, the Commission mailed notice of OSC hearing, published legal ad, and Exhibit A for its scheduled meeting on October 24-25, 2018 in Kona, Hawai'i to all parties.

38. On September 25, 2018, the Commission mailed notice of OSC hearing, published legal ad, and Exhibit A for its scheduled meeting on October 24-25, 2018 in Kona, Hawai'i to all parties via certified mail.

PM 37 - 38: PM 38 is almost a duplicate of PM 37 and should be deleted. The only difference is that PM 37 states that the notice was mailed on September 20, 2018, whereas PM 38 states that the notice was mailed on September 25, 2018 by certified mail. The correct date is September 20, 2018 and thus, PM 38 should be deleted.

47. At the October 24, 2018 hearing Vice-Chair Cabral disclosed that she had an unsolicited phone call with WHI project manager Joel LaPinta in which he made statements that appeared to be an attempt to influence her vote on the OSC. Chair Scheuer noted for the record that Mr. LaPinta had attempted to have ex-parte communication with Commissioner Cabral in violation of HRS Chapter 91 and LUC administrative rules and warned Petitioner's counsel, Mr. Lim, to advise his clients against any further ex-parte contact.

PM 47: The first sentence of PM 47 is misleading and speculative, and should be amended to include the exact language of what Commissioner Cabral stated for the record: "Mr. LaPinta informed me that he was calling regarding the Waikoloa matter, and continued to talk in what could appear to be an attempt to influence my vote in this matter." October 24, 2018 Hearing Transcript at 13:25-14.3.

48. During the October 25, 2018 hearing, Chair indicated that the evidentiary portion of the hearing was not being closed but would provide all parties an opportunity to present closing arguments and additional briefings on the matters identified by the Commission. Petitioner's counsel requested re-opening of direct examination to call additional previously unnamed witnesses. The issue of additional witnesses appeared to be focused on whether a representative of the Office of Planning (Mr. Funakoshi) would be called.

PM 48: The last sentence of PM 48 is vague, speculative and irrelevant, and should be amended to reflect the Chairperson's denial of WHI's request to call for testimony of Mr. Rodney Funakoshi from the State Office of Planning. WHI's offer of proof was that Mr. Funakoshi's testimony on similarly situated projects subject to order to show cause or status hearing proceedings would advance WHI's argument that these OSC proceedings are in violation of WHI's rights to due process and equal protection. See October 25, 2018 Hearing Transcript at 98:9-101:25, and 108:15-110:16.

The Proposed D&O also fails to reflect the Chairperson's ruling to deny WHI's request to take administrative notice of all pending order to show cause proceedings and status reports before the Commission. See October 25, 2018 Hearing Transcript at 101:12-25.

66. On November 28, 2018, the Commission held a hearing in Kona, Hawai'i. At the hearing the following attended: for the Petitioner WHI was Steven Lim, Esq., Irina McGriff (interpreter for WHI); Valery Grigoriants (Vice-President of Arch Limited), Natalia Batichtcheva (President of WHI) and Joel LaPinta (Project Manager of WHI); for the County Ronald Kim, Esq., Jeff Darrow (Planning Program Manager for the Planning Division of the

Planning Department), and, Neil Gyotoku, Ann Bailey, and Dwayne Osaka (County Department of Housing and Community Development ("DHCD")); and for OP Dawn Apuna, Esq., and Rodney Funikoshi (OP Land Use Division Manager). Written public testimony was submitted by Julia Alos. Oral public testimony was received from Darlene Osorio and Julia Alos.

PM 66: The first sentence of PM 66 should be amended to read: ". . . Duane Hosaka ("Office of Housing and Community Development ("OHCD")" The last sentence of PM 66 should be amended to read: "Oral public testimony was received from Delene Osorio and Julia Alos."

67. On November 28, 2018, at the hearing Petitioner submitted a new exhibit, Exhibit 65, and requested that previously filed exhibits in Petitioner's Supplemental Statement of Position be allowed into the record. The Chair allowed the following Petitioner exhibits into the record: 53d, 54d, 57, 62, 63a, and 63b, and 65 (allowed but noted as a late submittal). Exhibits 57, 62, 63a, and 63b were noted as submitted without normal reviews or certifications. The other exhibits were excluded from the record with the Chair providing the reason for denying each one.

PM 67: The following two sentences of PM 67 are misleading and speculative, and should be deleted: (i) "Exhibits 57, 62, 63a, and 63b were noted as submitted without normal reviews or certifications" and (ii); "The other exhibits were excluded from the record with the Chair providing the reason for denying each one."

The first quoted sentence should be deleted because "reviews and certifications", *i.e.*, sworn documents, are not a requirement when submitting exhibits under the Hawai'i Administrative Rules ("HAR") § 15-15-91 and the Commission had the opportunity to

examine WHI's witness Mr. Grigoryants about the authenticity of the exhibits during the hearings on this OSC. *See* October 24, 2018 Hearing Transcript at 3:3-7.

The second quoted sentence of PM 67 should be deleted because exclusion of relevant evidence is arbitrary and capricious. All evidence excluded by Chairperson Scheuer is relevant to these OSC proceedings. The Commission rules (HAR § 15-15-63(a)) only allow for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. Here, all evidence provided by WHI was relevant, material, and not repetitive, and neither the Commission nor the Chairperson articulated the reasons for exclusion at the time of the ruling.

WHI specifically notes that the decision to exclude the written testimony of Joel LaPinta, Valery Grigoryants, and Natalia Batichtcheva, and the exhibits regarding the Commission's rule amendments is both arbitrary and capricious. The written testimonies are reliable, probative, and substantial evidence that contain material information regarding these OSC proceedings (e.g., information about the financial feasibility study, water resources, development plan, and corporate structure). Chairperson Scheuer excluded the written testimonies by stating: "I started to go over the procedures at the top of the page. Then starting at line 6 it says: 'Mr. Lim: Thank you, Mr. Chairman. Steven Lim with my client, Waikoloa Highlands. Today I was going to recall Mr. Grigoryants just to address one issue and then we will be closing.' So on that basis, because we have concluded examination and cross-examination on those three witnesses, I'm excluding those three direct written testimony." November 28, 2018 Hearing Transcript at 59:17-60:1. Chairperson Scheuer's exclusion of this evidence is clearly arbitrary and capricious because it denies WHI due process and prejudices its substantial right to provide evidence.

It is also against Chairperson Scheuer's statement at the October 25, 2018 hearing: "I'm not closing the evidentiary portion of this proceeding." October 25, 2018 Hearing Transcript at 101:4-5. Chairperson Scheuer provided WHI with no explanation as to why Joel LaPinta's and Natalia Batichtcheva's written testimonies were excluded -- *i.e.*, how the testimonies were irrelevant, immaterial, and/or repetitive. Moreover, Chairperson Scheuer's decision to exclude Mr. Grigoryants written testimony based on WHI's counsel's request at an earlier hearing to address one last issue with Mr. Grigoryants at that specific hearing should under no circumstances exclude WHI from providing further written testimony by Mr. Grigoryants.

Further, WHI strongly objects to Chairperson Scheuer ruling that the exhibits regarding the Commission's proposed rule amendments are irrelevant and immaterial to this OSC. *See* November 28, 2018 Hearing Transcript at 58:24-59:4. This evidence is extremely relevant because it highlights WHI's due process concerns as explained in FOF 150 - 159, *infra*.

70. On November 28, 2018, at the hearing the parties presented their briefs in response to a request from the Commission at the previous hearing. Commissioners questioned each of the parties regarding their positions on the briefed items. The parties then delivered closing arguments. Mr. Lim requested a ruling on an oral motion to dismiss the OSC; the Chair responded that the oral motion was in line with what the proceedings sought to determine, and the proceedings would move forward. The Chair confirmed that the commissioners had each reviewed the records and transcripts for all meetings and were prepared to deliberate on the subject matter. A motion was made and seconded to revert the property to the original land use classification due to a violation of conditions and that there had not been substantial

commencement of use of the land. The Commission motion passed by a vote of 7 ayes, 1 nay, and none excused.

PM 70: PM 70 is vague and contains incorrect information, which should be deleted or amended. The Commission has not issued FOFs and COLs on WHI's oral motion to dismiss the OSC. HAR § 15-15-82(d) requires the Commission to provide a party with separate FOFs and COLs for every D&O that is adverse to a party to the proceeding. Assuming *arguendo* that the Commission implicitly denied WHI's oral motion to dismiss the OSC by voting to revert the Petition Area back to State Land Use Agricultural District, WHI should have been provided with FOFs and COLs specific to its oral motion to dismiss the OSC.

73. None of the parties submitted a proposed decision and order pursuant to HAR §15-15-82(a).

PM 73: PM 73 should either be deleted in its entirety or amended to accurately reflect that the Commission never set scheduling for the filing of a proposed D&O for the parties and that at the May 7, 2019 Commission hearing, the parties agreed that the Commission, as the proponent in an order to show cause hearing, has the duty to prepare and submit a proposed decision and order for comment by the parties. *See* May 7, 2019 Hearing Transcript at 26:17-27:4.

75. On May 7, 2019, at the hearing Petitioner requested an opportunity to address the Commission. Petitioner identified several legal issues that they felt the Commission needed to address. The Commission made and approved a motion to defer action on adoption of the form of the Order and requested Petitioner to provide a legal brief on the issues raised at the hearing,

served on all parties by May 10, 2019. OP and the County were given the opportunity to respond to Petitioner's brief by May 17, 2019. And, Petitioner was provided until May 20, 2019 to further comment upon any responses by OP or the County.

PM 75: PM 75 should be amended by specifying what "several legal issues" were identified by WHI at the May 7, 2019 hearing. The "several legal issues" referenced in PM 75 refer to, among other things, the Commission's failure to comply with HRS § 91-11 and HAR § 15-15-93(d), and the requirement for six affirmative votes to take action on an order to show cause. See May 7, 2019 Hearing Transcript at 11:4-13:12.

III. FINDINGS OF FACT

84. Notwithstanding oral testimony presented, Petitioner's evidence was sometimes erroneous, misleading or simply contained wrong information.

FOF 84: FOF 84 is inaccurate and should be deleted. As explained in WHI's Second Supplemental Statement of Position and on Order to Show Cause and Memorandum of Law, filed with the Commission on November 19, 2018 ("Second Supplemental Statement of Position") and in FOF 87 - 89 *infra*, the evidence presented to the Commission was not erroneous, or misleading, and did not contain wrong information.

85. Petitioners prepared and submitted Exhibit "5", which was thereafter received in evidence. Exhibit "5" was a document titled "SHAREHOLDERS' ACTION BY WRITTEN CONSENT - Waikoloa Highlands, Inc., a Colorado corporation" and was dated "05/06/16".

FOF 85: FOF 85 should be amended. The Shareholder's action is dated 05/09/16, not 05/06/16.

87. Petitioner's Exhibit "5" contradicted Petitioner's Exhibit "28": Exhibit "28" stated that Arch, Ltd., a Bahamas corporation, had 100% of Vitoil Corporation, a California corporation, which in turn had 100% of Waikoloa Highlands.

88. In response to questioning by the Chairperson, Petitioner admitted Exhibit "5" contained inaccurate information. . . .

89. Counsel for Petitioner identified the exhibits received in evidence which contained erroneous information about ownership and control of the persons and entities involved with the subject property.

FOF 87 - 89: FOFs 87 through 89 are inaccurate and should be deleted. As previously explained to the Commission in WHI's Second Supplemental Statement of Position, Mr. Martirosian did not previously and does not currently have an ownership interest in WHI or its affiliates, including Vitoil Corporation. See e.g., October 24, 2018 hearing transcript at 29:16-24. Under both signature lines of Exhibit 5, it states that Mr. Martirosian and Mr. Ovasafyan signed the resolution in their representative capacities. At the time Exhibit 5 was executed, Arch Ltd. ("Arch") had an 80% ownership interest in WHI and Vitoil Corporation had a 20% ownership interest in WHI; however, on December 28, 2017, Arch transferred the entirety of its ownership interest in WHI to Vitoil Corporation as a capital contribution, thereby making Vitoil Corporation WHI's sole shareholder. See Exhibit 27 (Resolution authorizing capital contribution); Exhibit 29 (confirming Mr. Martirosian never held ownership interest in or management position with Arch). Mr. Martirosian served as the Director of Vitoil Corporation until June 19, 2017, which was after Exhibit 5 was executed. See Exhibit 31; Exhibit 32.

The information in Exhibit 5 is correct. Vitoil Corporation is a legal entity that has, just like all other legal entities, authorized representatives who sign on behalf of it. At the time Exhibit 5 was executed, Vitoil Corporation owned 20% of WHI and Mr. Martirosian was an authorized representative of Vitoil Corporation. Thus, Mr. Martirosian signed Exhibit 5 on behalf of Vitoil Corporation. Currently, after Arch transferred its shares in WHI to Vitoil Corporation in 2017, as illustrated in Exhibit 28 (Corporate Structure of WHI), Vitoil Corporation is the sole shareholder of WHI. See Exhibits 27-29.

107A. Petitioner has failed to comply with Condition 1. Petitioner failed to develop the Petition Area in substantial compliance with the representations made to the Commission. Without limiting the foregoing, Petitioner has failed to comply with conditions 2, 3, 4, 6, 9, 11 through 15, 20 and 21.

FOF 107A: FOF 107A is inaccurate and should be deleted or amended as stated *infra*. WHI has substantially complied with the representations made to the Commission. WHI has fully satisfied Condition No. 6a, 9, and 20. WHI is in the process of satisfying the remaining conditions stated in FOF 107A.

FOF 107B. Petitioner has failed to comply with Condition 2. Petitioner failed to develop the Petition Area and complete buildout of the Project no later than ten (10) years from the date of the Commission's decision and order. "Buildout" meant completion of the backbone infrastructure to allow for the sale of individual lots. Petitioner has not commenced construction of the backbone infrastructure to allow for the sale of individual lots.

FOF 107B: FOF 107B is misleading and should be amended to include that a "buildout" may be completed by securing a bond. The last sentence of FOF 170B is

incorrect and should be deleted.

D&O Condition No. 3 provides in full as follows:

3. Reversion on Failure to Complete Project. If Petitioner fails to complete buildout of the Project or secure a bond for the completion thereof within ten (10) years from the date of the Commission's decision and order, the Commission may, on its own motion or at the request of any party or interested person, file an Order to Show Cause and require Petitioner to appear before the Commission to explain why the Petition Area should not revert to its previous Agricultural classification.

(Emphases added).

D&O Condition No. 3 provides that the Commission may issue an order to show cause if WHI fails to complete "buildout of the Project or secure a bond for completion thereof."

The Project proposed the subdivision and sale of vacant lots, without any construction of homes. As stated by the County during the October 25, 2018 hearing and as represented by WHI's development consultant and project manager, Joel LaPinta, the Project lots could be subdivided and sold without ever touching the ground. See October 25, 2018 Hearing Transcript at 86:10-15; October 24, 2018 Hearing Transcript at 97:3-7. Jeff Darrow, the Planning Program Manager for the County's Planning Department, testified that receipt of final subdivision approval and selling of the lots could be accomplished without touching the ground. See October 25, 2018 Hearing Transcript at 86:10-15. Joel LaPinta similarly testified that no construction is required prior to selling the individual lots of the subdivision. See October 24, 2018 Hearing Transcript at 97:3-7.

Thus, actual construction or "buildout" is not required to sell individual lots or to fully satisfy D&O Condition No. 3.

107E. Petitioner has failed to comply with Condition 9. Petitioner failed to provide affordable housing opportunities for residents in the State of Hawaii in accordance with applicable affordable housing requirements of the County.

FOF 107E: FOF 107E is inaccurate and should be deleted. WHI has fully satisfied D&O Condition No. 9.

D&O Condition No. 9 provides that:

Affordable Housing. Petitioner shall provide affordable housing opportunities for residents in the State of Hawai'i in accordance with applicable affordable housing requirements of the County. The location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between Petitioner and the County, Petitioner shall provide the Commission with a fully executed copy of the affordable housing agreement within 30 days of the execution of the agreement.

(Emphases added).

As discussed in all of WHI's filings to the Commission, WHI has satisfied D&O Condition No. 9 relating to affordable housing. On December 1, 2016, WHI executed an Affordable Housing Agreement (the "AH Agreement") with the County. See Exhibit 8. The AH Agreement required WHI to subdivide an approximately 11.8 acres lot (the "AH

Lot") from the Petition Area, and to convey the AH Lot to Plumeria at Waikoloa LLC ("PWL") within 180 days of the AH Agreement.

At its sole cost and in furtherance of the AH Agreement, WHI processed a subdivision application to subdivide the 11.707-acre AH Parcel from the Petition Area in 2017. *See Exhibit 9 & Exhibit 14.* Thereafter, on June 1, 2017, WHI conveyed the AH Parcel to an entity selected by the County, PWL, at no cost to PWL or the County. *See Exhibit 23.* That Warranty Deed was recorded in the Bureau on January 29, 2018, as Regular System Document No. A-66030880. On July 20, 2017, the County and WHI executed the Affordable Housing Release Agreement ("AH Release"). *See Exhibit 11.*

The AH Release unambiguously states that WHI "has taken such actions and has executed all necessary documents as required it under [the AH] Agreement," and that County "confirmed that [WHI] has taken such actions and has satisfied the conditions as set forth in [the AH] Agreement." Exhibit 11. Based on these findings, the AH Release provides that "the affordable housing requirement for the Highlands project is hereby deemed to have been satisfied." *See id.* The AH Release is signed by the County's then Acting Director and approved as to form in legality by the County's Deputy Corporation Counsel. *See id; see also* October 24, 2018 Hearing Transcript at 28:25-29:8.

As authorized by the Hawai'i County Code, WHI and the County agreed that WHI would satisfy its affordable housing obligations through the subdivision and conveyance of a portion of the Petition Area, and not the construction of affordable housing units. Thus, as determined by the County, WHI has taken irrevocable action by conveying its real property to PWL at no cost, and thereby attaining full satisfaction of the affordable

housing requirements for the Project under D&O Condition No. 9.

WHI was never expected or required to develop affordable housing units.

Moreover, once the land was subdivided and conveyed, WHI had absolutely no control over the number of units to be built or when those units were to be built.

107F. Petitioner has failed to comply with Condition 11. Petitioner failed to consult and comply with all SHPD recommendations in regards to the treatment of Site 22.

FOF 107F: FOF 107F is inaccurate and should be deleted.

WHI engaged ASM Affiliates to assist it with satisfying D&O Condition No. 11 in consultation with the Department of Land and Natural Resources, State Historic Preservation Division ("SHPD"). As represented to the Commission during these OSC proceedings, on August 8, 2018, fieldworkers from ASM conducted a field inspection at the Petition Area to further assess and document Site 22, a complex of rock walls with the dominant features being two bi-faced, core-filled walls. Thereafter, ASM completed and submitted SHPD's Preliminary Site Information Form for Requesting Hawai'i State Inventory of Historic Places ("SIHP") Number. *See Exhibit 24; see also* October 24, 2018 Hearing Transcript at 114:20-21. In November 2018, WHI received a SIHP Number for Site 22 (SIHP Site 50-10-11-31024). ASM and SHPD have been working toward treatment recommendations for Site 22.

109. No credible evidence was presented that the Petitioner had substantially commenced the use of the Petition Area nor the buildout of the Project. No credible evidence was presented of project-related expenditures which demonstrated that Petitioner had

substantially commenced use of the land in accordance with Petitioner's representations to the Land Use Commission.

FOF 109: FOF 109 is inaccurate and should be deleted. WHI has presented credible evidence that it has substantially commenced the use of the Petition Area. As explained in detail herein, WHI has fully satisfied D&O Condition No. 9 (Affordable Housing) which is dispositive evidence of substantial commencement of its use of the Petition Area.

In determining whether the developers had substantially commenced their use of the land, the Hawai'i Supreme Court in *DW Aina Le'a Dev., LLC v. Bridge Aina Le'a* focused, in large part, on the developers' efforts to satisfy their affordable housing obligations imposed by the Commission:

Rather than holding the land undeveloped for speculative purposes—the result which the legislature sought to avoid in HRS § 205–4(g)—Bridge and DW invested a considerable amount of money and effort, by any reasonable measure, to develop the affordable housing. In these circumstances, Bridge and DW substantially commenced use of the land.

Aina Le'a, 134 Hawai'i at 214, 339 P.3d at 712 (emphases added).

Aina Le'a establishes that a petitioner's efforts towards satisfying its affordable housing obligations are relevant to, and potentially determinative of, whether there has been substantial commencement. The fact that *Aina Le'a* involved the construction of affordable housing units, while WHI satisfied D&O Condition No. 9 through the

conveyance of undeveloped land, is of no consequence and does not mean that satisfaction of D&O Condition No. 9 does not constitute substantial commencement. Here, nothing in D&O Condition No. 9 requires WHI to build affordable housing units - it only requires that "the location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between Petitioner and the County." (Emphasis added). Also, the Project, unlike the project in *Aina Le'a*, does not involve vertical construction of single- or multiple-family residential units -- the Project only includes subdivision and sale of vacant lots within the Petition Area. In fact, the Project can be completed and individual lots can be sold *without ever touching the ground.* See October 25, 2018 Hearing Transcript at 86:10-15; October 24, 2018 Hearing Transcript at 97:3-7. Instead of developing affordable housing units within the Petition Area, WHI and the County agreed that WHI would satisfy its affordable housing obligations through the subdivision and conveyance of a portion of the Petition Area, and that obligation has been completed. See October 25, 2018 Hearing Transcript at 30:21-31:13.

The AH Agreement and the AH Release were specifically negotiated and executed to comply with D&O Condition No. 9 and WHI's parallel affordable housing obligations under Condition E of County Rezoning Ordinance No. 13-29. The County is already on record admitting this. See October 25, 2018 Hearing Transcript at 27:22-24 and 30:21-31:13.

The subdivision and conveyance of land is clearly a "use" of the land and constitutes "substantial commencement of the use of land" when doing so is required as a condition under a D&O. Thus, WHI's satisfaction of D&O Condition No. 9 is dispositive

evidence of substantial commencement of its use of the land comprising the Petition Area.

112. Therefore, according to Petitioner's Exhibit "7", LUC conditions Nos. 1, 2, 3, 4, 5, 6b, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 22 have not been satisfied.

113. Because Petitioner prepared and submitted Exhibit "7", the Land Use Commission finds and concludes that Petitioner admitted that LUC conditions Nos. 1, 2, 3, 4, 5, 6b, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 22 have not been satisfied.

FOF 112 - 113: FOF 112 and 113 are misleading and should be deleted. Exhibit 7 (LUC Conditions of Approval Matrix Summary of Actions to Date) sets forth all the conditions of the 2008 D&O. These Conditions marked with an "X" are those conditions that WHI has fully satisfied. These conditions not marked with an "X" are conditions that WHI is currently working toward satisfying, and the absence of an "X" is in no way an admissions that WHI has failed to satisfy those conditions.

114. According to Exhibit "7", Petitioner admitted that it did not itself satisfy LUC condition No. 6a. With respect to Condition No. 6a, Petitioner stated that "[t]he Waikoloa Road/Queen Ka'ahumanu Highway intersection improvements were undertaken and completed by the Hilton Grand Vacation Corporation for its additional time share operations."

FOF 114: FOF 114 is misleading, irrelevant, and should be deleted. Even though WHI did not itself satisfy D&O Condition No. 6a, the condition has been satisfied. D&O Condition No. 6a requires the construction of certain improvements to the intersection of Waikoloa Road and Queen Ka'ahumau Highway. These improvements were completed by Hilton Grand Vacation Corporation for its additional time share operations. *See* Waikoloa

Highlands, Inc.'s Statement of Position on Order to Show Cause, filed on August 8, 2018 with the Commission ("Statement of Position") at 18-19. Therefore, the requirement to enter into an agreement with the State Department of Transportation and construct these improvements is moot.

115: OP presented evidence on behalf of DOT, that Petitioner has not fully complied with the Condition No.6.

FOF 115: FOF 115 is not supported by any evidence and should be deleted. The Commission has failed to cite to a hearing transcript or other evidence in the record to support FOF 115.

116: OP presented evidence that the budget estimates for Condition 6b improvements were submitted to DOT in 2007 and that Petitioner needs to submit updated construction estimates, development construction plans and implementation schedules, subject to DOT review and approval.

FOF 116: FOF 116 is not supported by any evidence and should be deleted. The Commission has failed to cite to a hearing transcript or other evidence in the record to support FOF 116.

117. Petitioner presented no evidence that construction of traffic improvements as required has commenced. Members of the public testified that badly needed traffic improvements have not been undertaken.

FOF 117: FOF 117 contains inaccurate information and is not supported by any evidence, and should be deleted. The Commission has failed to cite to a hearing transcript

or other evidence in the record to support FOF 117.

As stated in FOF 114 *supra*, WHI has presented evidence of the completion of the traffic improvements under D&O Condition 6a. *See* Statement of Position at 18-19. Thus, the first sentence of FOF 117 is inaccurate.

119: The Land Use Commission therefore finds that Petitioner did not satisfy LUC Condition No. 6.

FOF 119: FOF 119 is inaccurate and should be deleted. As discussed in FOF 116 and 117 *supra*, D&O Condition 6a has been satisfied.

120. With respect to LUC condition No. 9, Petitioner has not commenced construction of affordable housing in accordance with applicable affordable housing requirements of the County.

FOF 120: FOF 120 is inaccurate and should be deleted. Nothing in D&O Condition No. 9, nor the affordable housing requirements of the County, requires WHI to "commence construction of affordable housing units." D&O Condition No. 9 only requires that "the location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between Petitioner and the County." (Emphasis added).

Here, the Project does not involve vertical construction of single- or multi-family residential units, and the AH Agreement does not contain any language requiring WHI to construct affordable housing units on the AH Parcel. Instead of constructing affordable housing units within the Petition Area, WHI and the County agreed that WHI would satisfy its affordable housing obligations through the subdivision and conveyance of a

portion of the Petition Area. See October 25, 2018 Hearing Transcript at 27:22-24 and 30:21-31:13. Moreover, after the AH Parcel was subdivided and conveyed to PWL pursuant to the AH Agreement, WHI has had absolutely no control over the development of affordable housing on the AH Parcel -- that is a matter to be determined between the County and the current land owner Pua Melia LLC ("PML") under the HRS Chapter 201H process.

121. The OHCD administrator testified that Petitioner's transaction made purportedly to satisfy the requirements of LUC Condition No. 9 do not comply with the Hawai'i County Code Chapter 11 or the Project's zoning Ordinance 13-29.

FOF 121: FOF 121 is speculative and an assertion unsupported by any evidence, and should be deleted. It is undisputed that the AH Agreement and the AH Release were specifically negotiated and executed to comply with D&O Condition No. 9 and WHI's parallel affordable housing obligations under Condition E of County Rezoning Ordinance No. 13-29. See October 25, 2018 Hearing Transcript at 27:22-24 and 30:21-31:13. As evidenced by the AH Release, WHI did everything required of it under the AH Agreement. Moreover, the Commission has failed to cite to a hearing transcript or other evidence in support of the second portion (regarding Rezoning Ordinance No. 13-29) of FOF 121.

122. The Commission finds that Petitioner's transaction made purportedly to satisfy the requirements of LUC Condition No. 9 do not comply with the Hawai'i County Code Chapter 11 or the Project's zoning Ordinance 13-29.

FOF 122: FOF 122 is *ultra vires*, inaccurate and should be deleted. The AH Agreement and the AH Release were specifically negotiated and executed to comply with

D&O Condition No. 9 and WHI's parallel affordable housing obligations under Condition E of County Rezoning Ordinance No. 13-29. See October 25, 2018 Hearing Transcript at 27:22-24 and 30:21-31:13. As evidenced by the AH Release, WHI did everything required of it under the County-approved and executed AH Agreement. The Commission lacks legal authority to make any finding of compliance with a condition of approval for which compliance was delegated to the County.

123. The 20% housing requirement for Petitioner's project (being 80 units or credits) will not be met on the 11+ acres ("AH parcel") transferred by Petitioner to a third party (where only 32 units are planned).

FOF 123: FOF 123 is speculative, inaccurate and should be deleted. There is nothing in the record indicating that the AH Parcel is not large enough to support 80 affordable housing units. To the contrary, the record reflects that the AH Agreement specifically contemplated that "11.8+/- acres of land" were to be conveyed in satisfaction of D&O Condition No. 9, and Exhibit D to the AH Agreement showed the specific portion of the Petition Area that was to be subdivided to create the AH Parcel. See e.g., October 25, 2018 Hearing Transcript at 30:21-31:13. At the time the AH Agreement was executed, the County was clearly aware of WHI's 20% (or 80 unit) affordable housing obligation, and the AH Agreement was specifically negotiated and executed for the purpose of satisfying that obligation. The record is also clear that the County knew of and approved the size and shape of the AH Parcel before it was subdivided from the Petition Area and conveyed to PWL. See id.

The record also reflects that PML submitted a HRS Chapter 201H application to

the County for a mixed-use development that is to include 32 affordable housing units, a True Value hardware store, and potentially other commercial uses. *See* October 25, 2018 Hearing Transcript at 106:16-24. Without the True Value hardware store, the AH Parcel could have been developed with 80 affordable housing units or, for example, with at least 40 affordable housing units available for rent to qualified renters at the 80% median income level, thus obtaining the double credit necessary to satisfy the minimum 80 affordable housing credits needed by WHI's Project. WHI has absolutely no control over the design, density, or non-affordable housing components of PML's proposed project; those are matters to be determined between the County and PML under the HRS Chapter 201H process.

124. The Hawai'i County Code required that the transfer of land for affordable housing must be to a non-profit entity.

125. Petitioner, however, transferred the land on which affordable housing was to be located to a for-profit entity incorporated for real estate development; the land was shortly thereafter sold to a third party for a substantial profit.

FOF 124 - 125: FOFs 124 and FOF 125 are vague and speculative, and should be amended to include information of the County's role in the transfer of the AH Parcel. It was the County, not WHI, who selected PWL to take title to the AH Parcel under the AH Agreement. While it is true that Hawai'i County Code § 11-5(a)(5) requires that land dedicated to satisfy a developer's affordable housing obligations be conveyed to "the County or, at the County's direction to a non-profit entity", the County cannot now claim a failure to comply with D&O Condition No. 9 when all WHI did was follow the County's

instructions. *See Burmeister v. County of Kaua'i*, No. CV 16-00402 LEK-KJM, 2018 WL 2050131, at *7 (D. Haw. May 2, 2018) ("The County's contention that the Planning Director and Deputy County Attorney exceeded their actual authority [in executing the settlement agreement] is not reached; it is enough that they acted with apparent authority." (citation omitted)).

In fact, when WHI executed the conveyance deed, the deed listed PWL as a non-profit entity. However, the cover sheet of the deed was replaced (with a new cover sheet listing PWL as a limited liability company) while the deed was in the custody of the County and subsequently recorded as such, all without the knowledge or participation of WHI. This clearly contradicts the County's testimony to the Commission that it only recently learned that PWL was not a non-profit entity. *See November 28, 2018 Hearing Transcript at 104:11-17. It made absolutely no difference to WHI who the AH Parcel was to be conveyed to; it simply followed the County's instructions.*

In addition, the initial conveyance of the AH Parcel to PWL by WHI will ultimately satisfy Hawai'i County Code § 11-5(a)(5). WHI understands that PML, who purchased the AH Parcel from PWL, is working towards developing affordable housing on the AH Parcel with a non-profit entity.

WHI had no involvement in, and in no way benefitted from, the sale of the AH Parcel from PWL to PML. *See, e.g., Exhibit 23 at ¶9.* As noted, WHI understands that the sale of the AH Parcel from PWL to PML was consummated with the County's approval.

127. In deciding whether the Petitioner had satisfied Condition 9, the Commission heard the testimony of witnesses and observed their demeanor, and considered documents received in

evidence and considered the arguments and representations of counsel and the entire record of this case. The Commission found more credible the position of the County of Hawai'i that Petitioner has failed to provide affordable housing opportunities for residents in the State of Hawai'i in accordance with applicable affordable housing requirements of the County. Without limiting the foregoing, no affordable housing was constructed on the subject property, and Petitioner did not provide any credible evidence that it had substantially commenced use of the land in accordance with Petitioner's representations to the Land Use Commission to construct affordable housing.

FOF 127: FOF 127 contains false and inaccurate information and should be amended. As explained in FOFs 109 and 120, D&O Condition No. 9 regarding affordable housing has been fully satisfied, which is dispositive evidence of substantial commencement of WHI's use of the land. Further, D&O Condition No. 9 does not require the construction of affordable housing units. Instead of constructing affordable housing units within the Petition Area, WHI and the County agreed that WHI would satisfy its affordable housing obligations through the subdivision and conveyance of a portion of the Petition Area. See October 25, 2018 Hearing Transcript at 27:22-24 and 30:21-31:13.

131. In response to the question from the Chairperson of the Commission "Has there been physical improvements to the property since the time that the Decision and Order was passed ten years ago?", Petitioner's representative, Valery Grigoryants testified "I did not notice any changes". TRANSCRIPT (10/24/18), p.73, lines 15-18.

FOF 131: FOF 131 is vague and speculative, and should be deleted. FOF 131 also highlights the impropriety of the Commission attempting to rule on the pivotal issue of

whether WHI attained "substantial commencement of use of the land" without adopting a clear administrative rule defining that critical standard. Not all development projects are the same, so the inquiry on "substantial commencement" must be flexible to address a wide range of projects, including the Project here, where the proposed action is to subdivide and sell undeveloped lots. The clear and uncontroverted evidence in the record shows that the proposed action could be completed (and all lots sold), without touching the ground. *See* October 24, 2018 Hearing Transcript at 97:3-7; October 25, 2018 Hearing Transcript at 86:10-15; *see also* Exhibit 56 at 7:6-7.

As stated by the County during the October 25, 2018 hearing and as represented by WHI's development consultant and project manager, Joel LaPinta, the Project could be completed without ever touching the ground. Jeff Darrow, the Planning Program Manager for the County's Planning Department, testified that receipt of final subdivision approval and selling of the lots could be accomplished without touching the ground. *See* October 25, 2018 Hearing Transcript at 86:10-15. Joel LaPinta, WHI's expert witness in the area of real estate development and sales, echoed this finding by stating that no construction is required prior to selling the individual lots of the subdivision. *See* October 24, 2018 Hearing Transcript at 97:3-7; *see also* Exhibit 56 at 7:6-7 ("[T]he subdivider may convey title to individual lots and receive payment from lot buyers. The subdivider has not yet touched the soil."). No physical improvements or construction within the Petition Area are required prior to selling the subdivided lots.

135. Petitioner itself was not certain whether changed conditions now prevented development of the subject property, because of the passage of time and the occurrence of intervening events and requirements. Petitioner could not present evidence demonstrating that

previous studies and reports were still viable to allow development of the subject property. In response to questions from the Chairperson of the Commission, Joel LaPinta, the development consultant for Petitioner testified:

CHAIRPERSON SCHEUER: What year was the original archaeological study completed?

THE WITNESS: I don't know.

CHAIRPERSON SCHEUER: Do you know when SHPD revised its rules for archaeological surveys?

THE WITNESS: No.

CHAIRPERSON SCHEUER: Are you aware that they revised their rules since that study was done?

THE WITNESS: No, I wasn't aware of that.

CHAIRPERSON SCHEUER: You testified that you have spoken to water companies for providing water to this development.

What's the aggregate amount of water that would be needed for full buildout?

THE WITNESS: I would just inquire for the first phase, which is what I'm focusing on.

CHAIRPERSON SCHEUER: So you did no inquiry as to the amount of water needed for the entirety of the development?

THE WITNESS: No. We would have to negotiate an extension agreement to improve the system and build storage tanks and pumps, was my understanding. And I don't have -- I would rely on an engineer when the time comes for doing that.

CHAIRPERSON SCHEUER: Do you know what aquifer this development is in?

THE WITNESS: I don't know the name of it, but I know it's in a specific aquifer.

CHAIRPERSON SCHEUER: Do you know whether the water source is in the same aquifer?

THE WITNESS: I'm relying on the West Hawaii Water Company. That's their business. That's not within the purview of my work.

TRANSCRIPT (10/24/18), p.145, line 13 - p.146, line 20.

136. Joel LaPinta, the development consultant for Petitioner, furthermore could not provide information on the following questions relevant to the current availability of water to sustain development of the subject property,

CHAIRPERSON SCHEUER: You are not aware of the aquifer, you're not aware of what the sustainable yields are for this aquifer?

THE WITNESS: No, I'm not.

TRANSCRIPT (10/24/18), p.147, lines 18 - 21.

FOF 135 - 136: FOFs 135 and 136 are erroneous, vague and speculative, and should be deleted. As represented by WHI's expert witness, development consultant and project manager, Joel LaPinta, there is sufficient potable water to service the entire proposed Project of approximately 398 1-acre lots and ancillary uses. See October 24, 2018 Hearing Transcript at 92:9-25; Exhibit 56 10:19-28; 11:1-10.

138. At best, Petitioner's use of the land can only be characterized as minimal and not substantial.

139. The Commission finds that Petitioner's use of the land is not considerable in amount or value and is not large in volume or number.

FOF 138 - 139: FOFs 138 and 139 are inaccurate and should be deleted. As explained herein, WHI has substantially commenced the use of the Petition Area.

140. The Commission finds that expenditures were made by the Petitioner prior to the entry of the Decision and Order in this docket in 2008, and were not made in compliance with Petitioner's representations to the Commission or subsequent to the reclassification.

FOF 140: FOF 140 is misleading and should be amended. WHI has stipulated that "the majority of the money was spent prior to the 2008 reclassification by the Commission." October 24, 2018 Hearing Transcript at 75:2-5. Thus, not all the expenditures were made prior to the entry of the 2008 D&O. FOF 140 should also include information about the conveyance of the AH Parcel, which in itself is a large expenditure as well as fully complying with the D&O Condition No. 9.

141. Therefore, the Commission finds that the Petitioner has not substantially commenced use of the land in accordance with Petitioner's representations to the Land Use Commission.

FOF 141: As explained *supra*, WHI disagrees with the Commissions' finding that WHI has not substantially commenced the use of the Petition Area. The only expert testimony on the issue of substantial commencement of use of the Petition Area was the statement by expert witness Joel LaPinta, who stated his expert opinion, "[T]he Project has attained substantial commencement of use of the Petition Area because the unusual entitlement history for this Project, where the County zoning had been approved for years and substantial development activities had commenced, even before the Project came before the Land Use Commission in 2007-2008. After approval of the D&O in this matter, the Petitioner also caused preparation of additional construction and other plans for review by governmental agencies, and irrevocably conveyed at no cost a 11.7 acre parcel in satisfaction of the affordable housing requirements of this D&O and the County's zoning Ordinance." See Exhibit 56 at 13:18-28.

146. The Order to Show Cause was issued to Petitioner because the Commission had

reason to believe that there had been a failure to perform according to the conditions imposed, or the representations or commitments made by the Petitioner.

147. The Order to Show Cause was not issued to Petitioner based upon an unjustifiable standard such as race, religion or other arbitrary classification.

148. The Land Use Commission's actions in this docket were therefore not motivated by or based on an unjustifiable standard such as race, religion or other arbitrary classification.

149. Petitioner was therefore not denied the equal protection of the law.

FOF 146 - 149: FOFs 146 through 149 are inaccurate and should be deleted. A reversion under these circumstances would violate WHI's right to equal protection of the law. To WHI's knowledge, *Aina Le'a* is the only time the Commission has ordered a reversion over the objection of a landowner. This is, in part, because the Commission has a long-standing practice of providing petitioners at least one opportunity (but often many more) to get their projects back on track without immediately resorting to the "death penalty" of a reversion (hence, the absence of any involuntary reversions other than *Aina Le'a*). That is all that WHI has asked for throughout these OSC proceedings. *See, e.g.,* November 28, 2018 Hearing Transcript at 46:17-47:8; *see also* Exhibit 18 (WHI proposed -- on numerous occasions -- a stipulation that was specifically intended to provide WHI with sufficient time to complete all the necessary studies, update all the project plans, and refresh the County rezoning ordinance for the Project. The County agreed to the concept of the Proposed Stipulation. *See* September 6, 2018 Hearing Transcript at 26:5-12).

Also, the Commission's refusal to afford WHI the opportunity to cross-examine Mr.

Rodney Funakoshi of the State Office of Planning, as well as take administrative notice of similarly situated projects pending before the Commission on status reports and order to show cause proceedings denied WHI of its rights of due process and equal protection. See October 25, 2018 Hearing Transcript at 98:9-101:12-25, and 108:15-110:16.

150. Petitioner was served with the Order to Show Cause, had notice of all issues regarding the Order to Show Cause, and was provided every and all opportunities to call witnesses, submit evidence, make argument and otherwise be heard on the issues raised by the Order to Show Cause.

151. The ORDER TO SHOW CAUSE, filed July 3, 2018 (hereafter, “the OSC”) stated the following . . .

152. The OSC was issued and filed on July 3, 2018, after Petitioner filed its 2016 ANNUAL REPORT on March 2, 2016.

153. Because of Petitioner’s statements in its 2016 ANNUAL REPORT, the Land Use Commission had reason to believe that there had been a failure to perform according to the conditions imposed, or the representations or commitments made by the Petitioner.

154. The Commission finds and concludes that it had 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.

155. The Commission finds and concludes that it had the authority to issue the ORDER TO SHOW CAUSE and take the actions taken with respect to the ORDER TO SHOW CAUSE.

156. Petitioner had notice of the OSC and that the LUC might revert the certain land identified and described in the OSC.

157. Petitioner had a meaningful opportunity to be heard on all issue regarding the OSC.

158. In making its decision, the Commission carefully considered the evidence submitted, including documents received in evidence, the testimony of witnesses, and the representations and arguments of counsel.

159. Petitioner's rights to due process were therefore not violated.

FOF 150 - 159: FOFs 150 through 159 are inaccurate and should be deleted. WHI strongly believes that its right to due process has been violated. As stated in WHI's Second Supplemental Statement of Position, the Commission failed to promulgate necessary rules to implement HRS § 205-4(g) before commencing these OSC proceedings, and the Commission initiated these proceedings before having a clear understanding of the controlling legal standards. See Second Supplemental Statement of Position at 9-10. Any ruling by the Commission would be arbitrary and capricious, because that ruling would be based solely on the Commission's subjective and shifting interpretation of the standard for "substantial commencement," rather than on the application of a valid standard to the facts of this case. At the same time, WHI would be deprived of its right to meaningful notice and a meaningful opportunity to be heard; WHI is facing the "death penalty" for its property interest, but WHI was given no notice of the standard the Commission will use to determine that sentence, and WHI was not given a chance to present evidence tailored to the controlling standard.

The Commission requested WHI to provide supplemental briefing on "substantial commencement" and "good cause" after the Commission had already held two hearings on this OSC. *See* October 25, 2018 Hearing Transcript at 102:11-108:3. It is not clear how the Commission could have fairly evaluated WHI's evidence without a firm understanding of the central legal standards it is supposed to apply to that evidence.

WHI's due process concerns are also highlighted by the Commission's waffling on the standard for "substantial commencement" in its proposed addition of a new subsection (e) to HAR § 15-15-93 (the "Proposed Amendment"). Not only did the Commission revise the Proposed Amendment to remove the word "construction" and replace it with "use of the land," but it also has provided no standard for either the Commission or WHI to rely on. *See* Exhibit 46. The Proposed Amendment simply paraphrases a portion of the Hawai'i Supreme Court's in *Aina Le'a*. It does not provide any factors to weigh, criteria to assess, or milestones to meet. WHI should not be forced to try to meet an undefined objective, or aim at a moving target. And, conversely, the Commission should not take action, particularly action as extreme as the "death penalty" of a reversion, without a firm understanding of the standards to be applied.

Moreover, as explained in PM 67 *supra*, Chairperson Scheuer's exclusion of relevant evidence during the November 28, 2018 hearing is clearly arbitrary and capricious because it denies WHI due process and prejudices its substantial right to provide evidence. Therefore, FOF 150's statement that WHI "was provided every and all opportunities to call witnesses, submit evidence, make argument and otherwise be heard on the issues raised by the Order to Show Cause" is false.

161. Petitioner, however, was equivocal in its statements about Mr. Martirosian's conduct. Petitioner's attorney, for example, stated:

MR. LIM: Again, for the record, as I stated at the Commission initial hearing for Motion to Continue Waikoloa Highlands, Incorporated would like to **reiterate that all pleadings and statements made by Waikoloa Highlands, Inc.'s witnesses and counsel relating to Stefan Martirosan, the former director are allegations that he has not been adjudicated to date**, however, we wish stress that Waikoloa – I'll refer to it as Waikoloa for short – Waikoloa strongly believes in the strength of the allegations of fraud and other mismanagement against Mr. Martirosian, and that we are taking this precaution to not expose ourselves to any claims by him.

TRANSCRIPT (11/28/18), p.27, lines 6-19 (emphasis added).

162. Land Use Commission finds that under the facts and circumstances of this docket, the Commission cannot base its decision on statements which Petitioner itself describes as "allegations".

163. The Land Use Commissions finds that the statements about Mr. Martirosian's conduct made by Petitioner and its witnesses are, as stated by Petitioner's attorney, "allegations".

FOF 161 - 163: FOFs 161 through 163 are misleading and speculative, and should be deleted. As stated by WHI's counsel at the November 28, 2018 hearing, the alleged misconduct by Mr. Martirosian is "alleged" because the matter has not yet been adjudicated by a court. WHI's counsel only used the term "alleged" for liability purposes

and not to equivocate on its position with respect to Mr. Martirosian's actions.

166. Notwithstanding the above, Petitioner has not substantially commenced use of the land in accordance with Petitioner's representations to the Land Use Commission.

FOF 166: FOF 166 is not supported by the record, irrelevant and unnecessary, and should be deleted.

169. Petitioner stated that they have brought in new management, Ms. Natalia Batichtcheva (May 2016) and Mr. Joel LaPinta (July 2018), to continue to advance development and marketing of the Property. However, the team was brought on only after the Commission issued the Order to Show Cause. Mr. Martirosian is still listed as a principal on some of the documents submitted by Petitioner.

FOF 169: FOF 169 is vague, irrelevant, unsupported by citation to the record, and should be amended. The last sentence of FOF 169 is inaccurate and should be deleted. All corporate documents that were signed by Mr. Martirosian were signed when he still was an authorized representative of those entities. WHI has on several occasions made it clear to the Commission that Mr. Martirosian has been fired from all the positions he once held and Mr. Martirosian did not previously and does not currently have an ownership interest in WHI or its affiliates. See e.g., October 24, 2018 hearing transcript at 29:16-24 ("Q: At the last hearing, the Commission was concerned that somehow Mr. Martirosian was somehow still involved with the Waikoloa Highlands project. A: No, he is not involved in with company." (emphasis added)); 33:16-19 ("Q: Does Mr. Martirosian today have any shareholder interest or other management control of any of the Waikoloa companies? A: I would like to confirm with members of the committee, just because there were so many

gossips and speculations before. I would like to let you know that Mr. Martirosian was never owner of the company or any other companies I'm involved in United States as well as abroad. He was just a hired manager. He was not and is not the owner of the companies. And now he's fired from all the positions." (emphasis added))

172. Petitioner's hiring of new management to address future development activities does not address past compliance issues, nor whether substantial commencement has occurred.

FOF 172: FOF 172 is misleading because it does not address the issue of as "good cause" and should be deleted. As represented to the Commission on multiple occasions, good cause exists to maintain the Petition Area's State Land Use Rural District classification. WHI's timely development of the Project was delayed by the alleged fraud and gross mismanagement of a former director of WHI and WML, Mr. Martirosian, but it has since implemented new management and development teams. The Commission's apparent position that a new development and/or management team is not relevant to good cause is a radical departure from its past findings in numerous Dockets. See, e.g., Second Supplemental Statement of Position at 19.

WHI has also explained to the Commission that the new development team and the principals of WHI who have assumed development control of the Project are now much more aware of their obligations to the Commission under the D&O, as well as the serious nature of the OSC. See September 6, 2018 Hearing Transcript at 14:18-23, 17:9-10, 57:17-23. WHI has repeatedly emphasized that with its new development team and Project financing commitment, it is ready, willing, and able to proceed with the Project. See *id.* at 42:13-14, 49:10-13, 58:15-16.

173. Throughout WHI's pleadings and testimony various inconsistencies were evident.

FOF 173: FOF 173 is vague, conclusory, and unsupported by any evidence, and should be deleted. The Commission does not identify the "various inconsistencies" and has failed to cite to a hearing transcript or other evidence in the record in support of FOF 173.

174. Mr. Valery Grigoriants' testimony on when Mr. Martirosian was fired was inconsistent, both 2014 and 2016 were identified in direct testimony; and, Petitioner's exhibits also were inconsistent on the matter.

FOF 174: FOF 174 is inaccurate and should be deleted. WHI is not aware of anything in the record indicating that Martirosian was fired in 2014. Both Exhibit 30 and Exhibit 32 clearly state that Mr. Martirosian was fired/resigned from WML and Vitoil Corporation on June 19, 2017. Mr. Martirosian was fired from WHI on May 9, 2016. See Exhibit 5.

175. Once the inconsistencies were pointed out; Mr. Valery Grigoriants then acknowledged and testified that there are discrepancies in the corporate documents that were submitted as Petitioner's exhibits. However, he could not explain why Petitioner's Exhibit 5, signed on May 9, 2016 appointing Natalia Batichtcheva as director for WHI, is signed by Mr. Martirosian as a 20% owner of Vitoil Corporation.

FOF 175: FOF 175 is inaccurate and should be deleted. As explained in WHI's Second Supplemental Statement of Position and in FOF 87 - 89 *supra*, there were no discrepancies in the corporate documents that were submitted as WHI's exhibits. Mr. Martirosian did not previously and does not currently have an ownership interest in WHI

or its affiliates, including Vitoil Corporation. At the time Exhibit 5 was executed, Vitoil Corporation owned 20% of WHI and Mr. Martirosian was an authorized representative of Vitoil Corporation. Thus, Mr. Martirosian only signed Exhibit 5 on behalf of Vitoil Corporation. Currently, after Arch transferred its shares in WHI to Vitoil Corporation in 2017, as illustrated in the corporate structure (Exhibit 27), Vitoil Corporation is the sole shareholder of WHI.

176. Mr. Valery Grigoriants and Ovasafyan Aykaz were identified as the only decision makers for the Project but that they were not part of WHI; just owners of stock in the company. Later testimony by Mr. Valery Grigoriants indicated his brother, Vitaly, was the ultimate owner of and in control of all the companies linked to WHI.

FOF 176: FOF 176 is misleading and inaccurate, and should be deleted. WHI has not identified Ovasafyan Aykaz as a decision-maker for WHI. See October 24, 2018 Hearing Transcript at 66:18-67:4. In fact, Exhibit 63a and Exhibit 63b indicate that both Valery and Vitaly Grigoryants are ultimate decision-makers on all issues regarding WHI, Vitoil Corporation, and Arch, including all matters relating to the Project and the Petition Area. See October 24, 2018 Hearing Transcript at 28:11-23. Valery Grigoryants has been the decision-maker of WHI, together with his brother Vitaly Grigoryants, since it was incorporated in 2015. See Exhibit 61 at 2:1-3; see also October 24, 2018 Hearing Transcript at 81:18-24.

177. Petitioner's Exhibit 33, shows that Mr. Valery Grigoriants is a vice-president of Arch Ltd. and Mr. Vitaly Grigoriants is the president. However, there is no documentation in the record showing Mr. Valery Grigoriants has any authority to sign for or bind WHI.

FOF 177: FOF 177 is inaccurate and should be deleted. As indicated in Exhibit 63a and Exhibit 63b, both Valery and Vitaly Grigoryants are ultimate decision-makers on all issues regarding WHI, Vitoil Corporation, and Arch, including all matters relating to the Project and the Petition Area. See October 24, 2018 Hearing Transcript at 28:11-23. Valery Grigoryants has been the decision-maker of WHI, together with his brother Vitaly Grigoryants, since it was incorporated in 2015. See Exhibit 61 at 2:1-3; see also October 24, 2018 Hearing Transcript at 81:18-24.

Further, Vitaly Grigoryants has authorized Valery Grigoryants with full authority to act and represent Arch, Vitoil Corporation, and WHI in the proceedings regarding the Petition Area before the Commission as well as with the County. See Exhibit 63a and Exhibit 63b.

178. Mr. Lim represented that Waikoloa Highlands, Inc. was 100 percent owned by Arch Limited. Arch Limited shareholders are Valery Grigoryants and Ovasafyan Aykaz. Waikoloa Highlands, Inc. is an entity separate from the original Petitioner Waikoloa Mauka, LLC.

FOF 178: The second sentence of FOF 178 is inaccurate and should be deleted. Arch is currently owned by Davies Partners Limited ("Davies"). Vitaly Grigoryants, not Valery Grigoryants, is effectively the sole shareholder of Davies and the ultimate beneficial owner of the corporate structure of WHI. See Exhibit 28; Exhibit 61 at 1:11-17. Vitaly Grigoryants and Mr. Ovasafyan have entered into a Trust Agreement, pursuant to which Mr. Ovasafyan owns a nominal amount of shares in Davies for the benefit of Vitaly Grigoryants. See October 24, 2018 Hearing Transcript at 66:18-67:4; Exhibit 62; Exhibit 61 at 2:10-14.

179. Petitioner's Exhibit 28 provided a diagram of the ownership structure behind WHI. Mr. Valery Grigoriants was not shown anywhere in the ownership structure. Petitioner agreed that the exhibit information was incorrect.

FOF 179: FOF 179 is inaccurate, unsupported by a citation to record evidence, and should be deleted. As explained herein, Exhibit 28 is correct in all aspects.

While Vitaly Grigoryants is the ultimate shareholder of WHI's corporate structure, Valery and Vitaly Grigoryants have equal rights to make decisions for the various corporations, including WHI. See October 24, 2018 Hearing Transcript at 81:18-24; see also Exhibit 63a & Exhibit 63b; Exhibit 61 at 1:11-26; Exhibit 33. Hence, both Valery and Vitaly Grigoryants are ultimate decision-makers on all issues regarding WHI, Vitoil Corporation, and Arch, including all matters relating to the Project and the Petition Area. Further, Vitaly Grigoryants has authorized Valery Grigoryants with full authority to act and represent Arch, Vitoil Corporation, and WHI in the proceedings regarding the Petition Area before the Commission as well as with the County. See October 24, 2018 Hearing Transcript at 28:11-23; Exhibit 62; Exhibit 63b; see also Exhibit 61 at 1:24-26. Valery Grigoryants has been the decision-maker of WHI, together with his brother Vitaly Grigoryants, since it was incorporated in 2015. Exhibit 61 at 2:1-3. Thus, based on the foregoing, Valery Grigoryants is authorized to make binding representations and decisions regarding WHI, the Petition Area, and the Project even though he is not mentioned in Exhibit 28.

180. Testimony and exhibits indicate that for the relevant time since the 2008 Decision and Order, the same group that controlled Waikoloa Mauka, LLC also controls Waikoloa

Highlands, Inc.

FOF 180: FOF 180 is inaccurate, unsupported by a citation to record evidence, and should be deleted. For example, at the time the 2008 Decision and Order was issued, Mr. Martirosian was involved in the management of WML. Mr. Martirosian was fired from his representative positions of Vitoil Corporation and WML on June 19, 2017. See Exhibit 30 and 32. The uncontroverted evidence on the record clearly proves that the mismanagement, and fraudulent conduct of Mr. Martirosian was the direct cause of WHI's delay in development of the Petition Area, and such mismanagement and fraud constitutes good cause for the Commission to have denied, or at least delayed action on the OSC. See e.g., October 24, 2018 Hearing Transcript at 33:20-34:16; Waikoloa Highlands, Inc's Supplemental Statement of Position on Order to Show Cause and Reversion of Petition Area, filed with the Commission on October 12, 2018 at 13-17. Mr. Martirosian was fired from WHI on May 9, 2016. See Exhibit 5. Also, Valery Grigoryants has been the decision-maker of WHI, together with his brother Vitaly Grigoryants, since it was incorporated in 2015. See October 24, 2018 Hearing Transcript at 28:11-23; Exhibit 61 at 2:1-3.

181. Petitioner also provided information that points to some of their new management having worked under Mr. Martirosian during the time of the alleged mismanagement and fraud.

FOF 181: FOF 181 is irrelevant and should be deleted.

183. Joel LaPinta, WHI budget consultant and project manager, testified that he had conducted a financial feasibility study for the Project. Petitioner did not provide any evidence to the Commission of such a study.

FOF 183: FOF 183 is inaccurate and should be deleted. Joel LaPinta provided oral testimony under oath of a financial feasibility study, which is sufficient to prove that WHI has conducted a financial feasibility study. See October 24, 2018 Hearing Transcript at 122:3-125:12. To the extent the Commission had questions regarding Mr. LaPinta's feasibility study, Mr. LaPinta was available to answer (and did) those questions. See *id.* Further, Joel LaPinta's written testimony, which the Chairperson arbitrarily excluded from the evidence, explains in detail what the feasibility study entails. See Exhibit 56 at 8:15-10:3. As explained *supra*, the Commission may only exclude evidence that is irrelevant, immaterial, or unduly repetitious evidence. The Commission cannot now argue that WHI did not present the Commission with evidence of such feasibility study when it in fact did -- both orally (by Joel LaPinta's oral testimony) and in writing. The Commission cannot blame WHI for its own arbitrary and capricious decision to exclude relevant written evidence of, among other things, the financial feasibility study. See November 28, 2018 Hearing Transcript at 59:17-60:1; October 25, 2018 Hearing Transcript at 101:4-5.

184. Petitioner has not presented its proposed development plan, updated project timeline, shown the financial capability or a credible financial plan to move forward.

FOF 184: FOF 184 is inaccurate and should be deleted. WHI provided evidence that WHI has secured sufficient funding to complete the Project. See Exhibit 20; see also October 24, 2018 Hearing Transcript at 13-16. As set forth in Exhibit 20, Armbusinessbank CJSC has committed to lending \$45,000,000 to Arch, and has consented to the transfer of those funds from Arch to WHI for the specific purpose of developing the Project on the Petition Area. Exhibit 20 demonstrates that WHI has the current financial capacity to complete the Project.

Also, the finding by the Commission that the Petitioner did not present a proposed development plan is false. WHI's expert witness, Joel LaPinta, provided lengthy and detailed testimony of such development plan. *See* October 24, 2018 Hearing Transcript at 93:20-97:7. Moreover, WHI proposed -- on numerous occasions -- a stipulation that was specifically intended to provide WHI with sufficient time to complete all the necessary studies, update all the project plans, and refresh the County rezoning ordinance for the Project. *See* Exhibit 18; *see also* September 6, 2018 Hearing Transcript at 26:5-12 (where the County is on record stating that it "could agree to the concept of [the Proposed Stipulation]."); November 28, 2018 Hearing Transcript at 145:20-146:5 (County stating that it would not object to WHI amending the D&O or the Commission deferring the action on the OSC.).

185. Therefore, good cause does not exist which would excuse Petitioner's failure to comply with the 2008 Order.

FOF 185: FOF 185 is inaccurate and should be deleted. Mr. Martirosian's fraud, gross mismanagement, and breach of fiduciary duties to WML and WHI, as well as the extensive measures WHI has subsequently taken to correct course and show the ability to complete the Project, constitute good cause to excuse WHI's failure to timely develop the Project. Moreover, the D&O and record before the Commission establishes that the most appropriate State Land Use district for the Petition Area is the current State Land Use Rural District.

IV. CONCLUSIONS OF LAW

6. The Land Use Commission's issuance of an Order To Show Cause where the Commission has 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, does not violate due process or equal protection.

COL 6: WHI objects to the Commission's findings and conclusions in COL 6. As explained *supra* in FOFs 146 through 149 and FOFs 150 through 159, WHI's rights to due process and equal protection have been violated.

21. 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. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 209, 339 P.3d 685, 707 (Hawaii 2014) (“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.”).

COL 21: COL 21 is duplicative of COL 10 and should be deleted.

24. The Commission finds and concludes that the Petitioner did not substantially commence the use of the land in accordance with its representations.

COL 24: WHI objects to the Commission's findings and conclusions in COL 24. As explained *supra*, WHI has substantially commenced the use of the Petition Area.

Moreover, the Commission has not adopted administrative rules defining the standard

used to determine whether and how a petitioner can obtain substantial commencement in different forms of projects, such as the case of subdividing and selling vacant subdivided lots (which can be completed through bonding), as is the case here.

26. The issuance of an Order To Show Cause by the Land Use Commission does not require the promulgation of additional rules.

27. In Application of Hawaiian Elec. Co., Inc., 81 Haw. 459, 465–67, 918 P.2d 561, 567–69 (Hawaii 1996), the Hawaii Supreme Court explained at length whether an agency was required to promulgate rules: . . .

28. The Hawaii Supreme Court recognized that rule making is intended to govern future conduct, in contrast to an administrative agency’s adjudication of a respondent’s possible violation of law caused by past conduct. See Pilaa 400, LLC v. Bd. of Land & Nat. Res., 132 Haw. 247, 266, 320 P.3d 912, 931 (Hawaii 2014): . . .

29. Therefore, the Land Use Commission was not required to adopt or promulgate additional rules as a condition precedent to proceeding with the instant ORDER TO SHOW CAUSE.

COL 26 - 29: WHI objects to the Commission's findings and conclusions in COLs 26 through 29. The Commission's uncertainty on the standard for determining whether WHI has shown "substantial commencement of use of the land" weighs heavily in favor of deferring action on OSC until administrative rules are adopted. Chairperson Scheuer's request for supplemental briefing after the Commission having held two hearings on this OSC is an admission that the Commission was struggling to develop and understand the

standards it would use to resolve the OSC. In fact, the Commission even attempted to further define "substantial commencement" in its administrative rules during the pendency of this proceeding. That is troubling, because the Commission should have determined (and published) the applicable standard before it proceeded with the OSC. By acting on the OSC using undefined, newly-crafted standards, the Commission is violating the plain language of HRS Chapter 205, engaged in impermissible rulemaking in violation of HRS Chapter 91, and deprived WHI of its right to substantive due process and equal protection under the United States and Hawai'i Constitutions.

31. To prove a violation of equal protection, a party must first demonstrate that the law is administered differently against others similarly situated; and second, the party must establish that its selection was "deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification."

COL 31: WHI objects to the Commission's findings and conclusions in COL 31.

COL 31 uses quotation marks but does not cite to any legal source.

The Commission rejected Petitioner's requests to include in the record evidence of other order to show cause proceedings, as well as its request to question a representative of the Office of Planning to testify on those other order to show cause proceedings, all of which evidence is relevant to the question of equal protection. See October 25, 2018 Hearing Transcript at 109:10-20; November 28, 2018 Hearing Transcript at 33:13-18

39. WHI alleged that the Project had been internally mismanaged. However, internal mismanagement does not qualify as a legal excuse and would appear to be solely under the control of the Petitioner.

COL 39: WHI objects to the Commission's findings and conclusions in COL 39. The internal mismanagement of the Project and fraudulent acts committed by Mr. Martirosian is "good cause" to excuse WHI's failure to timely develop the Project and to maintain the Petition Area's State Land Use Rural District classification.

The contours of "good cause" are not defined by statute, rule or case law in the present context. Instead, a finding of good cause is a discretionary determination to be made by the Commission based upon the facts and circumstances of the case being presented. The concept of "good cause" is not rigid or formulaic; rather, it is intended to be flexible to address the facts and circumstances of each particular case. *See Doe v. Doe*, 98 Hawai'i at 154, 44 P.3d at 1095; HRS § 205-4(g). "Good cause" is a "substantial reason" to excuse a legal obligation, and a finding of good cause is within the Commission's discretion. *See Doe*, 98 Hawai'i at 154, 44 P.3d at 1095. Mr. Martirosian's complete abdication of his corporate duties, fraudulent activities, and his failure to inform the decision-makers of WHI of his true business dealings constitutes good cause to excuse WHI's failure to timely develop the Project.

40. WHI has not demonstrated the ability or intention to move forward with the Project.

COL 40: WHI objects to the Commission's findings and conclusions in COL 40 as clearly erroneous. WHI presented uncontroverted evidence and credible testimony assuring the Commission that it is ready, willing, and able to proceed with the Project. WHI has secured financing for the Project, hired a third-party project manager (whom the Commission recognized as an expert in real estate development and sales), had preliminary discussions with potential development partners, and conveyed 11.7-acres of land in

satisfaction of its affordable housing obligations under D&O Condition No. 9. In addition, similar to the delay caused in Docket A92-683 (Halekua Development Corporation) as a result of its bankruptcy, WHI has submitted substantial evidence and elicited credible testimony that Mr. Martirosian's numerous bad acts resulted in the delay of the Project being timely developed.

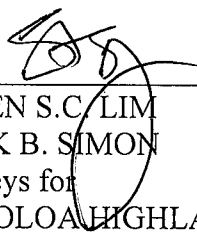
V. ORDER

WHI generally objects to the Proposed D&O's order.

VI. CONCLUSION

For the foregoing reasons, the Proposed D&O should not be adopted. WHI hereby reserves its right to submit further comments and objections through the conclusion of these OSC proceedings.

DATED: Honolulu, Hawai'i, June 20, 2019.



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WAIKOLOA HIGHLANDS, INC.

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

In the Matter of the Petition Of

WAIKOLOA MAUKA, LLC

To Amend the Agricultural Land Use District Boundary Into the Rural Land Use District for Approximately 731.581 Acres in South Kohala District, Island of Hawai'i, Tax Map Key No. (3) 6-8-02:016 (por.)

DOCKET NO. A06-767

CERTIFICATE OF SERVICE

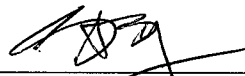
CERTIFICATE OF SERVICE

I hereby certify that a filed copy of the Waikoloa Highlands, Inc.'s Comments and Objections to Proposed Findings of Fact, Conclusions of Law, and Decision and Order Reverting the Petition Area, was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular or certified mail as noted:

<p>MICHAEL YEE, DIRECTOR Department of Planning, County of Hawai'i Aupuni Center 101 Pauahi Street, Suite 3 Hilo, HI 96720</p>	<p>U.S. MAIL, POSTAGE PREPAID</p>
<p>JOSEPH K. KAMELAMELA, ESQ. Corporation Counsel Department of the Corporation Counsel County of Hawai'i Hilo Lagoon Centre, 101 Aupuni Street, Unit 325 Hilo, HI 96720</p> <p>Attorneys for County of Hawai'i Department of Planning</p>	<p>U.S. MAIL, POSTAGE PREPAID</p>
<p>LEO R. ASUNCION, JR. Director Office of Planning, State of Hawai'i 235 S. Beretania Street, Suite 600</p>	<p>HAND DELIVERY</p>

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DATED: Honolulu, Hawai'i, June 20, 2019.



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