



BEFORE THE LAND USE COMMISSION
STATE OF HAWAI'I

In the matter of the Petition of

WAIKOLOA MAUKA, LLC

To Amend the Agricultural Land Use
District Boundaries 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
(portion)

DOCKET NO. A06-767

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER REVERTING
THE PETITION AREA

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ORDER REVERTING THE PETITION AREA**

This is to certify that this is a true and correct
copy of the document on file in the office of the
State Land Use Commission, Honolulu, Hawai'i

_____ by

Executive Officer



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PROCEDURAL HISTORY

1. On June 10, 2008, the Land Use Commission (“Commission”) issued its original Findings of Fact, Conclusions of Law, and Decision and Order (“2008 Order”) in this docket reclassifying approximately 731.581 acres of land, from the State Agricultural to the State Rural District, to develop 398 rural lots and supporting infrastructure for residential use with a minimum lot size of one-acre (“Project”). The first phase planned to develop 149 lots on about 319 acres and involve development of roads, infrastructure, and utilities. The second phase would develop 249 lots on 413 acres and installation of the remainder of site roads, infrastructure, and utilities. Each phase was projected to last approximately eight (8) to ten (10)

months, and both phases of the Project were represented by the Petitioner to be completed within ten (10) years.

2. The Commission's approval was subject to twenty-four (24) conditions; one of which required Waikoloa Mauka LLC ("Petitioner") to submit annual progress reports to the Commission, the State Office of Planning ("OP") and the County of Hawai'i, Planning Department ("County") documenting the Petitioner's progress in complying with the conditions imposed.

3. Petitioner filed no annual reports between the Commission's approval for the project in June 2008 and February 2014.

4. On February 6, 2014, the Commission mailed notice to Mr. Stefan Martirosian, Waikoloa Mauka, LLC representative, to provide the current status of the Project and progress towards complying with the conditions imposed by the June 10, 2008 D&O.

5. Petitioner's first annual report was filed with the Commission on February 19, 2014. The report indicated the concept of the project had not changed, the proposed golf course would instead be used for drainage and passive recreation, acknowledged the June 10, 2018 deadline for on-site infrastructure completion; but made no mention of any difficulty in meeting performance deadlines.

6. Petitioner filed a second annual report on March 2, 2016. This report indicated that no physical development had occurred on the ground; Petitioner was working to find a development partner, no water supply had yet been secured, no agreement had been reached with the State

Department of Transportation (“DOT”) on intersection improvements, discussions were ongoing with the County Office of Housing and Community Development (“OHCD”) regarding affordable housing requirements, and preparation of a preliminary drainage plan would be subject to revisions due to a change in plans for golf course area. Petitioner stated that no change of ownership to the Petition Area had occurred. Petitioner acknowledged the annual report was late and further acknowledged that the next annual report would be due in March 2017. Petitioner did not indicate that more time would be needed to meet the 2018 deadline for buildout of backbone infrastructure.

7. The Petitioner filed no annual report at any time during 2017.

8. Between May 7-12, 2018, the Commission attempted to locate an address to send the May 23-24, 2018, meeting notice to, because no annual report had been filed during 2017.

9. On May 15, 2018, the Commission mailed out the agenda and notice of hearing for the May 23, 2018 meeting in Kona, Hawai`i, to the Hawai`i County and Statewide mailing lists. The Commission mailed an agenda and notice via registered mail to the fee owner of the Petition Area (Waikoloa Highlands, LLC) as identified by the County of Hawai`i. The notice was signed for, but signee did not date the receipt or indicate that the address was incorrect. The Commission also sent notice to Benjamin Kudo, the last listed legal representative for Petitioner; and, to Sidney Fuke, the planning consultant who submitted the 2014 and 2016 annual reports. In addition, the Commission sent an electronic notice to Natalia Batichtcheva, who was identified as a contact for Waikoloa Mauka LLC, by their former planning consultant Mr. Sidney Fuke.

10. On May 18, 2018, the Commission received notice from Benjamin Kudo, Esq., of the firm Ashford and Wriston, LLP, that he no longer represented Waikoloa Mauka, LLC.

11. On May 18, 2018, the Commission received electronic correspondence from Sidney Fuke, Planning Consultant, stating that he no longer represented Waikoloa Mauka, LLC; and that Natalia Batichtcheva was his last contact for Petitioner.

12. On May 22, 2018, the Commission received an electronic correspondence from Natalia Batichtcheva who identified herself as a representative of the Petitioner. Ms. Batichtcheva indicated that Petitioner would not be able to attend the hearing.

13. On May 23, 2018, the Commission held a status hearing to provide the Petitioner an opportunity to update the Commission on their progress in complying with conditions of the Decision and Order and the representations and commitments made by Petitioner in obtaining reclassification of the Petition Area. A representative of the Petitioner (or successor Petitioner) received notice of the hearing and no representative of the Petitioner appeared at the hearing. The County stated that the Petitioner was currently in violation of the deadline set in their rezoning ordinance. The Commission moved and seconded, to issue an Order to Show Cause to show why the Property should not revert to its former land use district classification or be changed to a more appropriate classification.

14. On June 8, 2018, Petitioner provided notice of the transfer in ownership of the Petition Area from Waikoloa Mauka, LLC (“WML”) to Waikoloa Highlands, Inc. (“WHI”). This transfer of ownership took place in 2014 and was not previously disclosed to the Commission in violation of Condition 20.

15. On June 13, 2018, the Commission received Notice of Representation from Carlsmith Ball, that Steven S.C. Lim would be representing Waikoloa Highlands, Inc.

16. On July 3, 2018 the Commission issued an Order To Show Cause for A06-767 Waikoloa Mauka, LLC, as there was a reason to believe that Petitioner had failed to perform according to conditions imposed and to the representations and commitments made to the Commission in obtaining reclassification of the Petition Area. At that time the Commission set a hearing date of August 22-23, 2018 (approximately fifty days in advance) to be held in Kona, Hawai`i. Notice was sent to Petitioner – Waikoloa Highlands, Inc.; its legal representative Steven S.C. Lim, Esq.; Petitioner’s representative – Natalia Batichtcheva; the State Office of Planning and their legal representative; and, the County of Hawai`i Planning Department and their legal representative.

17. Pursuant to HRS Chapter 91 and HAR §§ 15-15-51 and 15-15-93; the Notice of Hearing for the Order to Show Cause was published to appear by September 21, 2018, in the legal section of the following local and statewide newspapers: The Honolulu Star-Advertiser, the Hawai`i Tribune Herald, West Hawai`i Today, the Maui News, and the Garden Island.

18. No additional annual reports were received from the Petitioner since March 2, 2016.

19. On July 16, 2018, the Commission received electronic correspondence advising of a new email address for Natalia Batichtcheva.

20. On July 20, 2018 Petitioner - Waikoloa Highlands, Inc. (“WHI”) representative (Mr. Derek Simon) verbally requested an administrative continuance of the OSC hearing. Executive

Officer, Daniel Orodener, denied the request at that time due to no other parties stipulating to such an extension request and the already set hearing date for OSC hearing served to the parties and published in the newspaper pursuant to HAR §15-15-93(b).

21. On July 24, 2018, Waikoloa Highlands, Inc. (“WHI”), successor-in-interest to Waikoloa Mauka, LLC, filed a Motion to Continue Hearing on Order to Show Cause (“Motion to Continue”), a Memorandum in Support of Motion, Declaration of Derek B. Simon, Declaration of Natalia Batichtcheva, Exhibits A – M, and a Certificate of Service. The Motion asked for a continuance of not less than sixty days in order to allow WHI sufficient time to prepare and respond to the Order to Show Cause (“OSC”) and to assure that the Commission has a fully-developed record. The Motion requested a hearing on the motion.

22. On July 25, 2018, WHI filed a digital copy of its Motion with the Commission.

23. On August 1, 2018, the State Office of Planning (“OP”) filed a Response to Petitioner’s Motion to Continue Hearing.

24. On August 8, 2018, WHI filed Waikoloa Highlands, Inc.’s Statement of Position on Order to Show Cause; Exhibits 1 to 17; Declaration of Natalia Batichtcheva; Declaration of Derek Simon; and Certificate of Service.

25. On August 14, 2018, the Commission mailed the notice and agenda for its meeting on August 22-23, 2018 in Kona, Hawai‘i to its Statewide and Hawai‘i island mailing lists.

26. On August 15, 2018, the County of Hawai‘i, Planning Department (“County”) filed a Statement of No Objection to Waikoloa Highlands, Inc.’s Motion to Continue Hearing on Order

to Show Cause.

27. On August 16, 2018, WHI filed a copy of a letter dated August 15, 2018 to the Commission with attachments of the 2017 and 2018 Annual Reports.
28. On August 17, 2018, the Commission received a voicemail message from Parker Ranch indicating they would not be attending the upcoming meeting.
29. On August 20, 2018, the Commission received a telephone call from Hawai'i Water Service advising that West Hawai'i Water Company and West Hawai'i Sewer Company would not be attending the upcoming meeting.
30. On August 21, 2018, the Commission received public comment via electronic mail from Cindy Kester and Julia Alos.
31. On August 21, 2018, the Commission received notification, based on a Governor's announcement, from the Natural Energy Laboratory Hawai'i Authority ("NELHA") that its meeting facilities and all airline flights in and out of Kona, Hawai'i would be closed due to the anticipated landfall of Hurricane Lane.
32. On August 22, 2018, the Commission notified all parties via electronic mail that the scheduled meeting had been cancelled and all non-essential State employees had been placed on administrative leave by the Governor due to the anticipated landfall of Hurricane Lane.
33. On August 27, 2018, the Commission mailed notice and agenda for its rescheduled meeting on September 6, 2018 in Kona, Hawai'i to its Statewide and Hawai'i island mailing lists.

34. On September 4, 2018, the Commission received additional public testimony via electronic mail from Julia Alos.

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 La Pinta 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.¹

36. On September 14, 2018, the Commission issued an Order Granting Waikoloa Highlands’ Motion to Continue Hearings on Order to Show Cause (“LUC Order to Continue OSC”) and

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There are currently only eight sitting commissioners; currently the Kaua‘I seat remains vacant.

mailed to all parties.

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.

39. On October 12, 2018, OP filed the Statement of Position of OP on Order to Show Cause.

40. On October 12, 2018, WHI filed WHI's Supplemental Statement of Position on Order to Show Cause and Reversion of the Petition Area, Exhibits 18-37, Declaration of Natalia Batichtcheva, Declaration of Derek Simon.

41. On October 15, 2018, the Commission mailed notice and agenda for its scheduled meeting on October 24-25, 2018 in Kona, Hawai'i to all parties, the Statewide, O'ahu, and Hawai'i island mailing lists.

42. On October 15, 2018, WHI filed a compact disk copy of WHI's Supplemental Statement of Position on Order to Show Cause and Reversion of the Petition Area, Exhibits 18-37, Declaration of Natalia Batichtcheva, Declaration of Derek Simon.

43. On October 24-25, 2018, the Commission held a meeting on the Order to Show Cause for Docket No. A06-767 and later set November 28, 2018 as the continued hearing date for proceedings.

44. At the October 24-25, 2018 proceedings, the Commission received the written and oral testimony of Julia Alos, and the Curriculum Vitae of Russian Language Interpreter Irina Francis McGiff. The Chair entered into the record with no objections from the parties: Petitioner's Motion to Continue and attached exhibits, Petitioner's Statement of Position, and Petitioner's Supplemental Statement of Position filed October 12, 2018; no exhibits from the County; and OP's Exhibits 1-4.

45. At the October 24-25, 2018 hearing the following attended: for the Petitioner WHI was Steven Lim, Esq., Mr. 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., and Jeff Darrow (Planning Program Manager for the Planning Division of the Planning Department); and for OP Dawn Apuna, Esq., and Rodney Funikoshi.

46. At the October 24, 2018 hearing OP asked the Commission to take notice of an error in OP's Statement of Position on page 6, paragraph 3 and on page 8; the reference to Condition No. 9 should refer to Condition No. 4.

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.

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.

49. On November 2, 2018, the Commission mailed LUC Chair's correspondence to the parties regarding the filing dates of witness and exhibit lists for the November 28, 2018 meeting.

50. On November 7, 2018, the Commission received Petitioner's Motion for Issuance of a Subpoena for a Representative of County of Hawai'i Office of Housing and Community and Subpoenas Duces Tecum for various listed documents from the Office of Housing and Community Services and the County of Hawai'i Mayor's Office ("WHI County Motion"); Memorandum in Support of Motion, and Exhibits "38"- "41". Petitioner did not request a hearing on its motions.

51. On November 8, 2018, the Commission received Petitioner's Errata Statement regarding Exhibit Numbering and Re-numbered Exhibit copies "39"- "42" for WHI's Motion for Issuance of a Subpoena and Subpoenas Duces Tecum; and Exhibit "A".

52. On November 9, 2018, the Commission returned signed copies of Petitioner's Subpoena and Subpoena Duces Tecum to Petitioner to be issued. The Commission Chair signed and issued the requested subpoena and subpoena duces tecum pursuant to HAR §15-15-69(d).

53. On November 13, 2018, the Commission received County of Hawai'i Planning

Department's ("County") Memorandum In Opposition to Waikoloa Highlands, Inc.'s Motion for Issuance of a Subpoena and Subpoena Duces Tecum and/or Motion to Quash Subpoena and Subpoena Duces Tecum, Declaration of Ronald N.W. Kim, Esq., and Exhibit A.

54. On November 14, 2018, the Commission received OP's Response to WHI's Motion for Issuance of Subpoena and Subpoena Duces Tecum.

55. On November 15, 2018, the Commission received signed copies of service of Petitioner's Subpoena Duces Tecum; and WHI's Motion for Issuance of Subpoena to an Authorized Representative of the State of Hawai'i Office of Planning ("WHI OP Motion"), Memorandum in Support of Motion, and Petitioner's Exhibits "41"- "43".

56. On November 19, 2018, a LUC meeting notice and agenda for its scheduled November 28-29, 2018 LUC meeting in Kona, Hawai'i was sent to the Parties and the Statewide, Maui and Hawai'i mailing and electronic mailing lists.

57. On November 19, 2018, the Commission received County of Hawai'i- Mayor Kim's correspondence re: non-fulfillment of Condition 9- Affordable Housing, and County of Hawai'i briefs submitted in response to LUC Chair's direction at October 24-25, 2018 meeting.

58. On November 19, 2018, the Commission received OP's Supplemental Statement of Position on the Land Use Commission's Order to Show Cause.

59. On November 19, 2018, the Commission received WHI's Second Supplemental Statement of Position and Memorandum of Law, and, Exhibits "45"- "64".

60. On November 21, 2018, the Commission received a signed copy of service of Petitioner's

Subpoena of County of Hawai`i's Office of Housing and Community Development.

61. On November 21, 2018, the Commission received the County of Hawai`i's Motion to Quash Petitioner's Subpoena and Subpoenas Duces Tecum.

62. On November 21, 2018, the Commission Chair issued an order that denied in part and granted in part the County's Motion to Quash Petitioner's Subpoena and Subpoena Duces Tecum.²

63. On November 21, 2018, the Commission Chair sent a letter to all parties indicating that the Commission would hear WHI's Motion for Issuance of Subpoena Duces Tecum and Subpoena to an Authorized Representative of the State of Hawai`i Office of Planning at the November 28, 2018 hearing scheduled in Kona, Hawai`i.

64. On November 21, 2018, the Commission sent Notice of Hearing on WHI's Motion for Issuance of Subpoena to an Authorized Representative of the State of Hawai`i Office of Planning; and Continued Hearing on the Order to Show Cause on November 28, 2018 to the Statewide and Hawai`i Island mailing lists.

65. On November 26, 2018, the Commission received notice via email of a new email address for WHI's representative - Ms. Natalia Batichtcheva.

66. On November 28, 2018, the Commission held a hearing in Kona, Hawai`i. At the

² The Chair's Order addressed the County's Motion to Quash the subpoena requiring a representative of the County's OHCD to appear for cross-examination and subpoenas duces tecum requiring the County to provide certain specific documents along with a request for any other documents relevant to the Commission's OSC. The Chair determined the subpoenas duces tecum request was repetitious, irrelevant or immaterial; and, that the County must provide a representative of the County OHCD who can address any of the issues being raised by WHI.

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 Gytoku, 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.

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.

68. On November 28, 2018, at the hearing Petitioner argued for its motion for subpoena of an authorized representative of the State of Hawai`i Office of Planning. After discussion, the Commission unanimously voted to deny the motion.

69. On November 28, 2018, at the hearing, the Chair noted that he had denied in part and granted in part Petitioner’s request for a subpoena for a County Housing agency witness to appear. The County produced Neil Gytoku from the DHCD for examination.³ Mr. Gytoku

³ Commission Cabral disclosed that her company receives rental income from DHCD but felt she could remain fair and impartial. There were no objections from the parties.

affirmed that the County of Hawai`i Mayor's office correctly identified the County's position⁴ that the affordable housing condition had not been fulfilled; and that Petitioner's Exhibit 65 and 11 provide evidence to support that position. Mr. Gyotoku was the last witness for any of the parties.

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.⁵

71. On November 30, 2018, the Commission mailed Order Granting Land Use Commission's Own Motion to Correct September 6, 2018 Transcript of Hearing on Order to Show Cause.⁶

72. On April 30, 2019, a LUC meeting notice and agenda for its scheduled May 7, 2019 LUC

⁴ The County had submitted a letter from the Mayor's office attesting to their position on the affordable housing condition on November 9, 2018, but had not offered it as an exhibit. Chair summarized that the position information in the letter had been requested by the Commission at the last hearing. The letter was admitted as County Exhibit 1.

⁵ There are currently only eight sitting commissioners; the Kaua`i seat is presently vacant.

⁶ The transcript was corrected to accurately reflect public testimony by Cindy Kester on September 6, 2018, on

meeting in Kona, Hawai`i was sent to the Parties and the Statewide and Hawai`i mailing and electronic mailing lists.

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

74. On May 7, 2019, the Commission held a hearing in Kona, Hawai`i. At the hearing the following attended: for the Petitioner WHI was Steven Lim, Esq.; for the County Ronald Kim, Esq., Duane Kanuha (Deputy Director of the Planning Department); and for OP Dawn Apuna, Esq. There was no oral or written public testimony submitted.

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.

76. On May 9, 2019, the Commission received Petitioner's Memorandum of Law Regarding the Requirements for Issuance of Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

77. On May 21, 2019, the Commission received OP's Response to Petitioner's Memorandum of Law Regarding the Requirements for Issuance of Proposed Findings of Fact, Conclusions of

behalf of Julia Alos. The corrected passage clarified that a "Roundabout has not been constructed."

Law, and Decision and Order.

78. On May 22, 2019, the Commission received Petitioner's Response to OP's Response to Petitioner's Memorandum of Law Regarding the Requirements for Issuance of Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

FINDINGS OF FACT

Based on the foregoing and after carefully considering and reviewing all the evidence received including the testimony of witnesses, documents received in evidence and considering the entire record, the Land Use Commission makes the following Findings of Fact.

THE PARTIES AND PERSONS RELATED TO THE PETITIONER

79. According to the QUITCLAIM DEED dated October 16, 2014, submitted by Petitioner and received in evidence as Petitioner's Exhibit "1", Petitioner WAIKOLOA MAUKA, LLC is a Delaware limited liability company.

80. By the QUITCLAIM DEED dated October 16, 2014, WAIKOLOA MAUKA, LLC, as Grantor, conveyed to WAIKOLOA HIGHLANDS, INC., a Colorado corporation, as Grantee, the property which is subject to the 2008 Order. The QUITCLAIM DEED was recorded on October 22, 2014 in the Bureau of Conveyances of the State of Hawaii as Document No. A-54080020.

81. WAIKOLOA MAUKA, LLC, and WAIKOLOA HIGHLANDS, INC. have common ownership and control. At all times relevant, both entities were owned or controlled by either or

both brothers Vitaly Grigoryants and Valery Grigoryants, or by entities owned or controlled by either or both of the brothers Grigoryants.

82. Exhibit “28” titled “CORPORATE STRUCTURE OF WAIKOLOA HIGHLANDS AS OF OCTOBER 11, 2018, was prepared by Petitioner and received in evidence. According to Exhibit “28”, Vitaly Grigoryants is the 100% “ultimate beneficial owner” of Davies Partners Limited which in turn has 100% of Arch, Ltd., a Bahamas corporation, which in turn has 100% of Vitiol Corporation, a California corporation, which in turn has 100% of Waikoloa Highlands.

83. Valery Grigoryants testified that he and his brother Vitaly Grigoryants make all decisions jointly. Valery Grigoryants testified “The owner is, as you can see, is my brother. We have a separate agreements where we make all decisions together.”

TRANSCRIPT (10/24/18), p. 47, lines 20-22.

84. Notwithstanding oral testimony presented, Petitioner’s evidence was sometimes erroneous, misleading or simply contained 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”.

86. Exhibit “5” was signed by the following two individuals, with the following words below each respective signature line: “Arch LTD - Representative Ovasafyan Aykaz, Percentage Ownership - 80%” and “Vitoil corporation - Representative Stefan Martirosian Percentage Ownership - 20%”

87. Petitioner's Exhibit "5" contradicted Petitioner's Exhibit "28": Exhibit "28" stated that Arch, Ltd., a Bahamas corporation, had 100% of Vitiol 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.

[CHAIRPERSON SCHEUER:] On that Exhibit 5, I read Exhibit 5 as listing Stefan Martirosian as owning 20 percent of the property through Vitoil; is that incorrect?

THE WITNESS: Incorrect, by mistake, happened by mistake only. That was a mistake, you can check, review the files and records of the company Vitoil, and you can see that Arch was always the only owner.

CHAIRPERSON SCHEUER: And does Mr. Martirosian have any interest in Vitoil? Any ownership?

THE WITNESS: He never had any interest before, and he still -- and now he doesn't have any interest as well.

CHAIRPERSON SCHEUER: So immediately regarding Exhibit 5, it was given to us as an exhibit by the Petitioner, by you, as a basis for our decision-making, but you're stating now that it's erroneous in regards to Mr. Martirosian's ownership and role?

THE WITNESS: Yes, and I can explain. Well, we give you what we had. There was a mistake on this document but this is the only document we had. So you asked us for document, we gave it to you. We didn't make any changes on that document.

CHAIRPERSON SCHEUER: Thank you. Is there any written documentation otherwise provided to us that explains the error in this record that you've just described?

THE WITNESS: As far as I know, no.

TRANSCRIPT (10/24/18), p.67, line 22 - p.69, line 2.

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.

MR. LIM: The ones I'm aware of are Exhibit 5, our last filing which was May 9th, 2016, where I think Mr. Grigoryants already testified that that was in error by identifying Mr. Martirosian as a shareholder.

And I don't know if it's in error or not, but the other issue was the organizational chart which showed his brother as being the ultimate decisionmaker, and I think he's clarified today that they have an agreement to share both control and ownership.

TRANSCRIPT (10/24/18), p.837, lines 4-14.

90. In this proceeding, WAIKOLOA HIGHLANDS, INC. referred to itself as “the Petitioner”. Petitioner’s Exhibit “7” was received in evidence. The exhibit was titled “LUC Conditions of Approval Matrix Summary of Actions to Date”. Above the title was the heading stating the following: “LAND USE COMMISSION - Docket No. A06-767. Successor Petitioner Waikoloa Highlands, Inc. (the "Petitioner")”. Exhibit “7” was prepared by the Petitioner.

91. Therefore, references to the “Petitioner” in this FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA shall mean WAIKOLOA MAUKA, LLC and/or WAIKOLOA HIGHLANDS, INC. as the case or context may be.

PETITIONER’S OBLIGATIONS PURSUANT TO THE 2008 ORDER

92. The Findings of Fact, Conclusions of Law, and Decision and Order (“2008 Order”) in this

docket were issued on June 10, 2018.

93. Findings of Fact No. 44 in the 2008 Order stated:

44. Reclassification for the Petition Area is being sought to develop 398 rural lots for residential use with a minimum lot size of one-acre. The Project will provide an alternative to the current available stock of housing options in the area. The Petitioner has chosen to pursue a reclassification from Agricultural to Rural District, as opposed to Agricultural to Urban because of the Petitioner's desire to have a lower density development and preserve the character of the land. Petitioner has completed all County zoning requirements including a third revised tentative map and subdivision approval.

94. With respect to the "Petitioner's Financial Capability to Undertake the Project", Finding of Fact No. 51 in the 2008 Order stated:

51. Petitioner intends to use \$4 million in funds held by Morgan Stanley for pre-development costs for the Project. In addition, the Petitioner plans to use proceeds from sales of its properties to fund the Project. In conjunction with sale proceeds, Petitioner will also obtain funding from Arch, Ltd., one of the Petitioner's members, to complete the Project.

95. Finding of Fact No. 59 in the 2008 Order stated:

59. The lots in the Project are anticipated to sell between \$350,000 and \$500,000, with an average price of \$400,000. With a house and lot package, the selling price is anticipated to be from about \$700,000 to several million dollars. Petitioner has estimated that the selling price for the lots would be \$250,000 to \$350,000.

96. Regarding the economic impact of the proposed project, the Findings of Fact in the 2008

Order stated:

64. The Project is projected to generate \$340 million in direct new capital investment and spending into the County's economy and create an estimated \$48 million in profits for local contractors and suppliers.
65. During the construction period, the Project is estimated to generate 1,640 worker years of direct onsite employment, along with 656 worker years in associated and indirect offsite employment. The wages paid to these workers is estimated to total approximately \$113 million,
66. After completion, the Project is estimated to require the equivalent of 56 full-time maintenance, renovation, repair, and other workers being paid approximately \$1.6 million in wages each year.
67. Residents and guests of the Project will spend approximately \$39 million per year in the local economy.

97. With respect to the schedule of development, the Findings of Fact in the 2008 Order

stated:

158. The Project is planned to be developed in two phases. Phase 1 is projected to start upon approval of the required land use entitlements and last approximately 8 to 10 months. This first phase will involve 149 lots on about 319 acres and involve the development of roads, infrastructure, and utilities.
159. Phase 2 is also projected to last approximately 8 to 10 months and will include 249 lots on 413 acres following the completion of Phase 1. The remainder of the site roads, infrastructure, and utilities will be installed. The Project is expected to be completed within 10 years of the date of receipt of the last land use entitlement allowing site work and development activities. Therefore, incremental districting is not necessary.

98. The 2008 Order further stated:

IT IS FURTHER ORDERED that the reclassification of the Petition Area from the State Land Use Agricultural District to the State Land Use Rural District shall be subject to the following conditions:

1. Compliance with Representations to the Commission. Petitioner shall develop the Petition Area in substantial compliance with the representations made to the Commission. Failure to develop the Petition Area may result in reversion of the Petition Area to its former classification, or change to a more appropriate classification.
2. Completion of Project. Petitioner shall 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. For purposes of the Commission's decision and order, "buildout" means completion of the backbone infrastructure to allow for the sale of individual lots.
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.
4. Water Resource Allocation. Petitioner shall provide drinking and irrigation water source, storage, and transmission facilities and improvements to accommodate development of the Petition Area, to the satisfaction of the County of Hawaii and appropriate State agencies. Petitioner shall notify the Commission of changes to its proposed water source for the Project's drinking water and irrigation water needs.
5. Water Conservation Measures. Petitioner shall implement water conservation measures as may be required by the applicable provisions of the Hawaii County Code, and shall implement BMPs, such as use of indigenous and drought tolerant plants and turf and incorporate such measures in the

Project's landscape planting. Petitioner shall require the use of native drought tolerant plants on the Petition Area in the Conditions, Covenants and Restrictions ("CC&Rs") associated with the Project or in deed restrictions for each lot in the Project. Petitioner shall provide a copy of the complete CC&Rs to the Commission within 30 days' after the CC&Rs become enforceable.

6. Transportation. Petitioner shall reach an agreement with the State DOT for the construction of the following improvements related to the Project:

a. For the intersection, Waikoloa Road and Queen Ka'ahumanu Highway, the State DOT has requested that the Petitioner include improvements to make the makai bound approach from Waikoloa Road have one left-turn only lane, one through/left-turn lane, and a right turn lane with the appropriate signalization. In addition, an acceleration lane would be added to Queen Ka'ahumanu Highway to accommodate the additional leftturn lane;

b. Petitioner will provide a left-turn shelter lane on Mamalahoa Highway from Waikoloa Road, and two advanced warning lights, one located on mauka-bound Waikoloa Road, and the other on southbound Mamalahoa Highway. Prior to final subdivision approval, Petitioner will enter into a Memorandum of Understanding with the State DOT outlining the proposed improvements. Petitioner will provide the Commission with a copy of the fully executed agreement within 30 days from the date the agreement is fully executed. Petitioner will also comply with Condition C of Ordinance No, 07-1271 as may be amended from time to time, which fulfills the Petitioner's transportation obligations to the County in relation to the Project.

7. Street Lights. Petitioner shall use shielded or low sodium streetlights within the Project to avoid impacts to flight birds and other population.

8. Plant Species. Petitioner shall preserve native wiliwili trees and kawelu grassland assemblages located outside of the construction and grading areas, if practicable, consistent with the development of the Project.

9. Affordable Housing. Petitioner shall provide affordable

housing opportunities for residents in the State of Hawaii 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.

10. Previously Unidentified Burial/Archaeological/Historic Sites. In the event that historic resources, including human skeletal remains, lava tubes and lava blisters/bubbles are identified during the construction activities, all work shall cease in the immediate vicinity of the find, the find shall be protected from additional disturbance, and the State Historic Preservation Division ("SHPD"), Hawai'i Island Section, shall be contacted immediately. Without any limitation to any other condition found herein, if any burials or archaeological or historic sites, such as artifacts, marine shell concentrations, charcoal deposits, stone platforms, paving, and walls not previously identified in the studies referred to herein, are discovered during the course of construction of the Project, then all construction activity in the vicinity of the discovery shall stop until the issuance of an archaeological clearance from the SHPD that mitigative measures have been implemented to its satisfaction.

11. Archeological Site 22. Petitioner shall consult and comply with all SHPD recommendations in regards to the treatment of Site 22.

12. Drainage. Petitioner shall prepare a drainage study and the recommended drainage system shall be constructed, meeting with the approval of the County of Hawaii Department of Public Works.

13. Wastewater. Petitioner shall fund and construct adequate wastewater treatment, transmission and disposal facilities, as determined by the County of Hawai'i Department of Environmental Management and the State Department of Health.

14. Solid Waste. Petitioner shall develop a solid waste management plan in conformance with the Integrated Solid Waste Management Act, HRS Chapter 342G. The solid waste

management plan shall be approved by the County of Hawai'i Department of Environmental Management and the DOH.

15. Civil Defense. Petitioner shall, on a fair-share basis, fund and construct adequate solar-powered civil defense measures serving the Petition Area as determined by the State of Hawai'i, Department of Defense, Office of Civil Defense, and the County of Hawai'i, Civil Defense Agency.

16. Established Access Rights Protected. Petitioner shall preserve any established access rights of native Hawaiians to undeveloped lands, who have customarily and traditionally used the Petition Area to exercise subsistence, cultural, and religious practices or for access to other areas.

17. Air Quality Monitoring. Petitioner shall participate in an air quality monitoring program if required by the DOH.

18. Best Management Practices. Petitioner shall implement applicable Best Management Practices ("BMPs") applicable to each proposed land use in order to minimize infiltration and runoff from construction and vehicle operations, reduce or eliminate soil erosion and ground water pollution, and formulate dust control measures to be implemented during and after the development process in accordance with the State Department of Health guidelines.

19. Energy Conservation Measures. Petitioner shall implement energy conservation and sustainable design measures, that are feasible and practicable, such as use of solar energy and solar heating and the standards and guidelines promulgated by the Building Industry Association of Hawai'i, the U.S. Green Building Council, the Hawai'i Commercial Building Guidelines for Energy Efficiency, the Guidelines for Sustainable Building Design in Hawai'i, and the applicable county building codes, as amended, into the design and construction of the Project and the structures within the Petition Area.

20. Notice of Change of Ownership. Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Petition Area, prior to development of the Petition Area.

21. Annual Reports. Petitioner shall timely provide without

any prior notice, annual reports to the Commission, OP, and County in connection with the Petition Area and Petitioner's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission.

22. Release of Conditions. The Commission may fully or partially release the conditions provided herein as to all or any portion of the Petition Area upon timely motion and upon the provision of adequate assurance of satisfaction of these conditions by Petitioner.

23. Notice of Imposition of Conditions. Within seven days of issuance of the Commission's Decision and Order for the subject reclassification, Petitioner shall (a) record with the Bureau of Conveyances a statement that the Petition Area is subject to conditions imposed herein by the Commission in the reclassification of the Petition Area; and (b) file a copy of such recorded statement with the Commission.

24. Recordation of Conditions. Petitioner shall record the conditions imposed herein by the Commission with the Bureau of Conveyances pursuant to HAR §15-15-92. Such conditions shall run with the land, pursuant to HRS §205-4(g).

99. The Land Use Commission carefully considered the record of this Docket and matter, including the testimony of the witnesses, exhibits received in evidence, the arguments and presentation of counsel and all parties and the files and records of this matter. Based on the foregoing, the Land Use Commissions made the Findings of Fact which follow.

PETITIONER FAILED TO COMPLY WITH THE 2008 ORDER

100. Contrary to Finding No. 44 of the 2008 Order and the representations reflected by that Finding, Petitioner has not developed 398 rural lots for residential use with a minimum lot size of one-acre. Petitioner (including its successor in interest WHI) has not developed the Project where it provides an alternative *to* the current available stock of housing options in the area.

101. Contrary to Finding No. 51 of the 2008 Order and the representations reflected by that Finding, Petitioner has not used \$4 million in funds held by Morgan Stanley for pre-development costs for the Project. Petitioner has not used proceeds from sales of its properties to fund the Project. Petitioner has not used in conjunction with sale proceeds, funding from Arch, Ltd., one of the Petitioner's members, to complete the Project.

102. Contrary to Finding Nos. 64 through 67 of the 2008 Order and the representations reflected by those Findings, no evidence was presented that the Project has generated direct new capital investment and spending nor created profits for local contractors and suppliers. The Project has not generated 1,640 worker years of direct onsite employment, nor 656 worker years in associated and indirect offsite employment. No evidence was presented that the wages paid to these workers is estimated to total approximately \$113 million. No evidence was presented that residents and guests of the Project spend approximately \$39 million per year in the local economy.

103. Contrary to Finding No. 158 through 159 and Finding No. 76 of the 2008 Order and the representations reflected by those Findings, Petitioner did not develop the Project as represented. Phase 1 did not start upon approval of the required land use entitlements and did not last approximately 8 to 10 months. Petitioner did not develop as represented 149 lots on about 319 acres and did not develop roads, infrastructure, and utilities.

104. Contrary to Finding No. 159 of the 2008 Order and the representations reflected by that Finding, Petitioner did not develop Phase 2 as represented and did not develop this phase within approximately 8 to 10 months. Petitioner did not develop the 249 lots on 413 acres, as

represented. Petitioner did not install the remainder of the site roads, infrastructure, and utilities.

105. Contrary to Finding No. 159 of the 2008 Order and the representations reflected by that Finding, Petitioner did not complete the Project within 10 years of the date of receipt of the last land use entitlement allowing site work and development activities.

106. The 2016 ANNUAL REPORT for "WAIKOLOA MAUKA, LLC - DOCKET NO. A06-767" stated the following:

A. Compliance with Representations to the Commission

The concept of the project has not changed, which is to develop 398+/- 1-acre sized lots.

The area intended for a golf course will be used for both drainage ways as well as open passive recreational areas that will include walking trails.

B. Completion of Project

The Commission required that the project be completed no later than ten (10) years of the date of the Commission's decision or June 10, 2018. "Buildout" was defined as having completed the backbone infrastructure to allow for the sale of individual lots.

Notwithstanding the County's rezoning time extension of fifty (50) lots by March 21, 2018 and the balance by March 21, 2023, the **Petitioner understands that the more stringent performance requirement of buildout by June 10, 2018 is binding.** The basic on-site construction plans have been completed. The Petitioner will thus work towards fulfilling that performance requirement.

Although **nothing physical has occurred on the ground to date,** the Petitioner has been working diligently to secure a development partner, as well as trying to address other conditions of approval as will be discussed below.

C. Reversion on Failure to Complete Project

The Petitioner understands that its failure to complete buildout of the project or secure a bond will be subject to possible further review by the Commission to determine whether the property should revert to its previous Agricultural classification.

2016 ANNUAL REPORT, at p.3. (Emphasis added.)

107. Petitioner has failed to Comply with the following conditions of the 2008 Order.
- A. 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.
 - B. 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.
 - C. Petitioner has failed to comply with Condition 4. Petitioner failed to provide drinking and irrigation water source, storage, and transmission facilities and improvements to accommodate development of the Petition Area, to the satisfaction of the County of Hawaii and appropriate State agencies.
 - D. Petitioner has failed to comply with Condition 6. Petitioner failed to reach an

agreement with the State DOT for the construction of the improvements related to the Project described in Condition 6.

E. 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.

F. 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.

G. Petitioner has failed to comply with Condition 12. Petitioner failed to prepare a drainage study and has failed to construct the recommended drainage system, meeting with the approval of the County of Hawaii Department of Public Works.

H. Petitioner has failed to comply with Condition 13. Petitioner failed to fund and construct adequate wastewater treatment, transmission and disposal facilities, as determined by the County of Hawai'i Department of Environmental Management and the State Department of Health.

I. Petitioner has failed to comply with Condition 14. Petitioner failed to develop a solid waste management plan in conformance with the Integrated Solid Waste Management Act, HRS Chapter 342G. The Petitioner also failed to obtain approval of the solid waste management plan by the County of Hawai'i Department of Environmental Management and the DOH.

J. Petitioner has failed to comply with Condition 15. Petitioner failed, on a

fair-share basis, to fund and construct adequate solar-powered civil defense measures serving the Petition Area as determined by the State of Hawai'i, Department of Defense, Office of Civil Defense, and the County of Hawai'i, Civil Defense Agency.

K. Petitioner has failed to comply with Condition 20. Petitioner failed to give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Petition Area, prior to development of the Petition Area.

L. Petitioner has failed to comply with Condition 21. Petitioner failed to timely provide without any prior notice, annual reports to the Commission, OP, and County in connection with the Petition Area and Petitioner's progress in complying with the conditions imposed.

NO SUBSTANTIAL COMMENCEMENT OF USE OF THE LAND

108. Based on the record, and including the foregoing Findings of Fact, the Commission also finds that the Petitioner has not substantially commenced use of the land in accordance with Petitioner's representations to the Land Use Commission.

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.

110. Petitioner's Exhibit "7" was received in evidence. The exhibit was titled "LUC

Conditions of Approval Matrix Summary of Actions to Date”. Exhibit “7” was prepared by the Petitioner.

111. According to Exhibit “7”, the following conditions had an “X” placed in the column headed with the words “Satisfaction of LUC condition (X)”: LUC condition No. 6a (“Transportation: Waikoloa Road and Queen Ka’ahumanu Highway intersection improvements”), LUC condition No. No. 9 (“Affordable Housing“); LUC condition No. 20 (“Notice of Change of Ownership”); LUC condition No. 21 (“Annual Reports”); LUC condition No. 23 (“Notice of Imposition of Conditions”); and LUC condition No. 24 (“Recordation of Conditions”).

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.

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.”

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

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.

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.

118. Petitioner stipulated as follows with respect to Condition 6:

MR. LIM: Petitioner will stipulate that Condition 6 on the DOT intersection requires that Petitioner shall reach an agreement with the State Department of Transportation.

I'll represent to you that no agreement was made, although the improvement did get built.

TRANSCRIPT (10/24/18), p.130, lines 4-9.

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

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.

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.

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.

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).

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.

126. The transfer of 11.7 acres purportedly for affordable housing constitutes only 1.6% of the total Petition Area of 731+ acres; the AH parcel remains vacant, no grading done, no infrastructure developed, and no affordable housing built.

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.

128. The following colloquy took place between one of the Commissioners and Joel LaPinta, the development consultant for Petitioner.

COMMISSIONER CHANG: So in your opinion there has been no land use on the property?

THE WITNESS: No, not the land.

TRANSCRIPT (10/24/18), p.134, line 11-13.

129. Petitioner's principal, Valery Grigoryants, testified that the property at present was not being used.

COMMISSIONER OKUDA: And right now, as of today, what is the property being used for?

THE WITNESS: As far as I know, as of today, it's not being used.

TRANSCRIPT (10/24/18), p.50, lines 22-25.

130. Public witness Julia Alos testified that she would pass by the subject property nearly every day and has seen no improvements on the property since 2008.

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.

132. Petitioner’s representative, Valery Grigoryants testified that Petitioner had “invested” \$1.5 million in the property, but could not tell the Commission how much of the \$1.5 million was spent after the entry of the Decision and Order. TRANSCRIPT (10/24/18), p.74, lines 17-24.

133. The following was the representation made by the Petitioner’s attorney to the Commission at the hearing:

CHAIRPERSON SCHEUER: And how many of the \$1.5 million that you said was invested was spent after the point at which the Decision and Order was passed, but before the point to which this Order to Show Cause hearing began?

THE INTERPRETER: Sorry, can you rephrase for the interpreter?

CHAIRPERSON SCHEUER: Yes. I can break it up.

The witness testified that \$1.5 million had been invested in the property. How much of that was spent after the Decision and Order but before these Order to Show Cause proceedings began?

THE WITNESS: I do not really understand the question. To what time?

CHAIRPERSON SCHEUER: Don't have exact dates in front of me.

MR. LIM: The majority of the money was spent previous to -- Petitioner will stipulate that the majority of the money was spent prior to the 2008 reclassification by the Commission.

TRANSCRIPT (10/24/18), p.74, line 10 - p.75, line 5.

134. In response to questioning by the Office of Planning, Joel LaPinta, the development consultant for Petitioner testified that no infrastructure or utilities were placed on the Petition

Area after the date of the Decision and Order:

Q: The road infrastructure and utilities that you claim are on the Petition Area at this time, were they placed there by the Petitioner since the Decision and Order was made?

A: No.

Q: Are there any other structures on the property that were built by the Petitioner since the Decision and Order?

A: Not that I'm aware of.

TRANSCRIPT (10/24/18), p.113, lines 1-9.

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.

137. Petitioner acknowledged that its traffic impact study needed to be updated. Joel LaPinta, the development consultant for Petitioner, testified:

[CHAIRPERSON SCHEUER:] Do you know how old the transportation impact analysis study was?

THE WITNESS: No, but that we know we need to redo that.

CHAIRPERSON SCHEUER: So you acknowledge that that –

THE WITNESS: That that component needs to be redone, I know that.

CHAIRPERSON SCHEUER: That's usually part of an EIS, correct?

THE WITNESS: Right.

TRANSCRIPT (10/24/18), p.149, lines 9 - 19.

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.

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.

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.

PETITIONER WAS NOT DENIED EQUAL PROTECTION OF THE LAW

142. During the proceedings, Petitioner's representative made the following statement:

I would like to say that, yes, we are investors, and we invest here in Hawai'i. We would like to ask you committee to protect us the same way as you would protect any other investors from Japan or China. You can consider us as Japanese investors.

TRANSCRIPT (11/28/18), p.38, lines 7-11.

143. During the proceedings, Petitioner was assured that race, national origin, language or any other suspect classification does not play a part in the Land Use Commission's decision-making process.

COMMISSIONER OKUDA: Let me assure you about how the Commission makes its decisions. We do not have any preconceptions about anyone's background, ethnicity or what country they come from. I personally do not view you or anyone connected with this project as being connected with any type of criminal activity or anything like that.

I'm not an expert in Eastern European history, but I do know the Armenian people have suffered at the hands of many people who have oppressed, and in fact attempted to exterminate Armenian people.

That is the reason why our Commission follows American legal principles, which is basically that cases should be decided based on the law and the facts, and not on anyone's background or ethnicity. We neither favor nor disfavor people whether they come from Europe, Eastern Europe or Asia.

In fact, let me assure you that I personally, as a lawyer, am very aware of the infamous United States Supreme Court case called Korematsu versus United States, which allows Japanese-Americans to be in prison even though they did no wrong during World War II.

So let me again assure you, we are just looking at the facts and the application of the law here, and nothing else.

TRANSCRIPT (11/28/18), p.45, line 24 - p.46, line 25.

144. Except for the fact that the Land Use Commission issued an Order to Show Cause, Petitioner could not point to any evidence that the Order was issued because of race, religion or other arbitrary classification.

145. The following colloquy took place between one of the Commissioners and counsel for Petitioner.

COMMISSIONER OKUDA: Well, let me ask you this then, because what you raise is a very serious concern and issue and allegation.

What evidence in the record shows that there's any selection based on race, ethnicity, national origin or the language anyone speaks?

MR. LIM: I guess the fact that we have the OSC issued against this particular project.

COMMISSIONER OKUDA: So the only evidence you have of an alleged selection based on race, religion or what we all lawyers call a suspect classification under the law, is the fact that an OSC was issued and nothing else?

MR. LIM: Well, based upon the facts of the particular Petitioner, yes.

TRANSCRIPT (11/28/18), p.44, line 23 - p. 45, line 12.

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.

PETITIONER WAS NOT DENIED DUE PROCESS

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:

ORDER TO SHOW CAUSE

TO: WAIKOLOA MAUKA, LLC ("Petitioner"),

YOU ARE HEREBY COMMANDED, under the authority of section 205-4, Hawai'i Revised Statutes ("HRS"), and section 15-15-93, Hawai'i Administrative Rules ("HAR"), to appear before the Land Use Commission, State of Hawai'i ("Commission"), at the Natural Energy Laboratory of Hawai'i (NELHA) - Hale Iako Training Room #119, on August 22-23, 2018, at 9:00 a.m., to show cause as to why that certain land at Waikoloa, South Kohala, County of Hawai'i, Tax Map Key No. (3) 6-8-02:016 (portion), covering approximately 731.581 acres of land referred to as the Subject Area, and approximately identified on Exhibit "A", attached hereto and incorporated herein, should not revert to its former land use classification or be changed to a more appropriate classification.

The Commission has reason to believe that you have failed to perform according to the conditions imposed and to the representations and

commitments made to the Commission in obtaining reclassification of the Subject Area. The conditions of the Decision and Order which may have been violated or not been met include, but may not be limited to the following:

1. Condition 1 Compliance With Representations to the Commission;
2. Condition 2 Completion of Project;
3. Condition 3 Reversion on Failure to Complete Project;
4. Condition 4 Water Resource Allocation;
5. Condition 6 Transportation;
6. Condition 9 Affordable Housing;
7. Condition 11 Archaeological Site 22;
8. Condition 12 Drainage;
9. Condition 13 Wastewater;
10. Condition 14 Solid Waste;
11. Condition 20 Notice of Change in Ownership; and,
12. Condition 21 Annual Reports.

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.

WHI HAS NOT SHOWN GOOD CAUSE AS TO WHY THE PROPERTY SHOULD NOT BE REVERTED AND THE ALLEGED CONDUCT OF STEFAN MARTIROSIAN DOES NOT EXCUSE PETITIONER'S NON-COMPLIANCE WITH THE 2008 ORDER

160. Petitioner has attempted to excuse its non-compliance with the 2008 Order by contending that the non-compliance was caused by the acts or omissions of Stefan Martirosian.

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. The 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”.

164. Even if the statements about Mr. Martirosian’s conduct made by Petitioner and its witnesses were considered, the alleged conduct of Mr. Martirosian does not excuse Petitioner’s failure to comply with the 2008 Order.

165. Mr. Sidney Fuke, Planning Consultant, filed an Annual Report for Petitioner on February 19, 2014. Therefore, at least by February 19, 2014, Petitioner had available to it a competent planning consultant to advise Petitioner about complying with the 2008 Order.

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

167. Petitioner could have filed a motion or other pleading to modify the 2008 Order.

168. Petitioner, however, has not filed any motion or other pleading to modify the 2008 Order.

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.

170. Petitioner admitted that Ms. Batichtcheva is the representative of the owner in the United States, and the owners are in Russia. However, Petitioner also admitted the decision-makers are in Russia; and they make all the decisions on the Project, and Ms. Batichtcheva just implements and is not authorized to make independent decisions.

171. Petitioner's development team started work in June and July of the summer of 2018, just sixty days prior to the OSC hearing; and, only met with the County Planning Department and their counsel two days before the Order to Show Cause hearing.

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

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

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.

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.

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.

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.

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

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.

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.

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.

182. Petitioner provided no reasonable explanation for the lack of progress in the Project during the time between Mr. Martirosian allegedly leaving the Project in 2016 and the present; a period of approximately two years and five months.

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.

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

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

186. Any of the proposed findings of fact not already ruled upon by the Commission by adoption, or rejected by clearly contrary findings of fact, are hereby denied and rejected. Any conclusions of law herein improperly designated as a finding of fact should be deemed and construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed and construed as a finding of fact.

CONCLUSIONS OF LAW

The Land Use Commission makes the following Conclusions of Law.

THE AUTHORITY OF THE LAND USE COMMISSION TO REVERT A PETITION AREA TO ITS ORIGINAL LAND USE CLASSIFICATION

1. The Land Use Commission has the authority to revert a Petition Area to its original land use classification for failure to comply with the conditions imposed by the Commission. Lanai Co. v. Land Use Comm'n, 105 Haw. 296, 317, 97 P.3d 372, 393 (Hawaii 2004) (“*** HRS § 205–4(g)⁴⁷ expressly authorizes the LUC to “impose conditions.” Moreover, “absent substantial commencement of use of the land in accordance with such representations made ... in seeking [the] boundary change [,]”⁴⁸ the LUC is expressly authorized to order a reversion of land to the prior classification. HRS § 205–4(g).”)

CONCLUSIONS OF LAW REGARDING THE ORDER TO SHOW CAUSE

2. The Land Use 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.” HRS § 205-4(g).

3. Whenever the Land Use Commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve upon the party or person bound by

the conditions, representations, or commitments, 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.

4. HAR §15-15-93(b) with respect to Enforcement of conditions, representations, or commitments provides in relevant part:

(b) Whenever the commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification. The commission shall serve the order to show cause in writing by registered or certified mail with return receipt requested at least thirty days before the hearing. A copy shall be also sent to all parties in the boundary amendment proceedings. The order to show cause shall include:

- (1) A statement of the date, time, place, and nature of the hearing;
- (2) A description and a map of the property to be affected;
- (3) A statement of the legal authority under which the hearing is to be held;
- (4) The specific sections of the statutes, or rules, or both, involved; and
- (5) A statement that any party may retain counsel if the party so desires.

(c) The commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7, where applicable. Any procedure in an order to show cause hearing may be modified or waived by stipulation of the parties and informal disposition may be made in any case by stipulation, agreed settlement, consent order, or default.

(d) Post hearing procedures shall conform to subchapter 7 or subchapter 9. Decisions and orders shall be issued in accordance with subchapter 7 or subchapter 9.

(e) The commission shall amend its decision and order to incorporate the order to show cause by including the reversion of the property to its former land use classification or to a more appropriate classification.

5. See also DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 196, 339 P.3d 685, 694 fn.2 (Hawaii 2014) (“HAR § 15–15–93 provided: *** (b) **Whenever the commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.** *** “ [emphasis in original]).

THE ISSUANCE OF AN ORDER TO SHOW CAUSE DOES NOT VIOLATE EQUAL PROTECTION OF THE LAWS OR DUE PROCESS

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.

7. In DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 191, 339 P.3d 685, 689 (Hawaii 2014), the Hawaii Supreme Court explained:

The circuit court also erred in concluding that Bridge's and DW's procedural and substantive due process rights and equal protection rights were violated. With respect to procedural due process, both Bridge and DW had **notice of the OSC and that the LUC might revert the property.** They also each had a **meaningful opportunity to be heard on the proposed reversion.** With regard to **substantive due process, the LUC's reversion was not “clearly arbitrary and**

unreasonable,” given the project's long history, the various representations made to the LUC, and the petitioners' failure to meet deadlines. With respect to Bridge's and DW's equal protection arguments, **the record does not establish that the LUC's imposition of a condition and subsequent reversion of the property constituted a violation of the petitioners' equal protection rights**

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 191, 339 P.3d 685, 689 (Hawaii 2014) (emphasis added).

8. The Commission finds and concludes that it had reason to believe that Petitioner had failed to perform according to the conditions imposed, or the representations or commitments made by the Petitioner.

9. The Commission finds and concludes that it had the authority to issue the ORDER TO SHOW CAUSE issued in this matter and to take the actions taken with respect to the ORDER TO SHOW CAUSE.

THE LAW REGARDING SUBSTANTIAL COMMENCEMENT OF THE USE OF THE LAND IN ACCORDANCE WITH REPRESENTATIONS MADE TO THE LAND USE COMMISSION

10. 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.”.”

11. To determine whether the use of the land has been substantially commenced, the Hawaii Supreme Court has provided the following guidance:

“Substantial” is, according to Blacks's Law Dictionary, “considerable in amount or value; large in volume or number.” Black's Law Dictionary 1656 (10th ed. 2014).”

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 213–14, 339 P.3d 685, 711–12 (Hawaii 2014).

12. The Hawaii Supreme Court, in DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 211–12, 339 P.3d 685, 709–10 (Hawaii 2014), explained that the legislature sought to empower the LUC to void a district boundary amendment where the petitioner does not substantially commence use of the land in accordance with representations made to the LUC.

This court explained that “[t]here is no provision in HRS § 205–12 that expressly delegates enforcement power to the LUC,” and that “[i]f the legislature intended to grant the LUC enforcement powers, it could have expressly provided the LUC with such power.” Id. Thus, this court observed, “looking to the express language of HRS § 205–12, it is clear and unambiguous that enforcement power resides with the appropriate officer or agency charged with the administration of county zoning laws, namely the counties, and not the LUC.” Id.

The one exception to this general rule is found in HRS § 205–4(g). That section provides in relevant part that, “The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations [made to the LUC by the petitioner], the commission shall issue and serve upon the party bound by the condition an OSC why the property should not revert to its former land use classification or be changed to a more appropriate classification.”

This sentence was added to HRS § 205–4(g) in 1990. 1990 Haw. Sess. Laws Act 261 § 1 at 563–64. The legislative history indicates that the legislature sought to empower the LUC to void a district boundary amendment where the petitioner does not substantially commence use of the land in accordance with representations made to the LUC. In this regard, the Senate Committee on Energy and Natural Resources explained in its report that the purpose of adding this sentence was “to allow the Land Use Commission to attach a condition to a boundary amendment decision which would void the boundary amendment when substantial commencement of the approved land use activity does not occur in accordance with representations made by the petitioner.” S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915 (emphasis added). The House Committee on Planning, Energy, and Environmental Protection similarly stated in its report that the purpose of the bill was to “strengthen existing statutes by permitting the Land Use Commission further control over a proposed development by voiding a change in zoning if the petitioner does not make a substantial commencement of the approved land use activity.” H. Stand. Comm. Rep. No. 1086–90, in 1990 H. Journal, at 1265 (emphasis added).

The legislative history further indicates that the legislature added this language in order to empower the LUC to address a particular situation, namely, where the landowner does not develop the property in a timely manner. The Senate Committee on Energy and Natural Resources specifically noted that “[v]acant land with the appropriate state and county land use designation is often subjected to undesirable private land speculation and uncertain development schedules[,]” and that “[s]uch speculation and untimely development inflates the value of land, increases development costs, and frustrates federal, state, county, and private coordination of planning efforts, adequate funding, public services, and facilities.” S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915.

The fact that the legislature sought to address situations where the petitioner has not substantially commenced use of the land is further evidenced in the testimony presented to both the Senate and House committees. In both the Senate and the House, the Office of State Planning offered testimony that “[a] positive approach to comprehensive land use planning and a strong preventive measure to land speculation, necessitates this bill which will require that successful applicants for land use boundary amendments either ‘use it, or lose it.’ ” Letter from Office of State Planning, to S. Comm. on Energy & Natural Res. (Feb. 7, 1990) (on file with the Hawai‘i State Archives) (emphasis added); Letter from Office of State Planning, to H. Comm. on Planning, Energy & Env’tl. Protection (Mar. 8, 1990) (on file with the Hawai‘i State Archives) (emphasis added). The LUC also offered testimony to both the Senate and the House, stating that “the proposed amendment will clarify the Commission's authority to impose a specific

condition to downzone property in the event that the Petitioner does not develop the property in a timely manner.” Letter from Land Use Comm'n, to S. Comm. on Energy & Natural Res. (Feb. 7, 1990) (on file with the Hawai‘i State Archives) (emphasis added); Letter from Land Use Comm'n, to H. Comm. on Planning, Energy & Env'tl. Protection (Mar. 8, 1990) (on file with the Hawai‘i State Archives) (emphasis added). Thus, the legislative history establishes that by adding this sentence to HRS § 205–4(g) in 1990, the legislature sought to empower the LUC to void a boundary amendment, after giving the landowner the opportunity for a hearing, if the landowner failed to substantially commence use of the land in accordance with its representations.

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 211–12, 339 P.3d 685, 709–10 (Hawaii 2014).

13. Whether the petitioner has substantially commenced use of the land in accordance with representations made to the LUC is a question of fact to be determined by the Land Use Commission. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 214, 339 P.3d 685, 712, fn.16 (Hawaii 2014) (“In the absence of both a statutory definition of “substantial commencement” and an expression of LUC's interpretation of “substantial commencement” for a particular project, a determination of whether a party has substantially commenced use of the land will turn on the circumstances of each case, not on a dollar amount or percentage of work completed.”).”

**THE PROCEEDING REGARDING THE ORDER TO SHOW CAUSE IS A
CONTESTED CASE.**

14. An order to show cause proceeding by the Commission is a contested case.

15. A “contested case” is defined “as a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency

hearing.” [HRS §91-1]

16. Pursuant to HAR §15-15-93(c), “[t]he commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7 (“Agency Hearing and Post Hearing Procedures”), where applicable.”

**THE QUANTUM OF PROOF IN A CONTESTED CASE IS THE PREPONDERANCE
OF THE EVIDENCE**

17. Pursuant to HRS Chapter 91, the Administrative Procedures Act, in contested cases, “[t]he degree or quantum of proof shall be a preponderance of the evidence.” [In HRS §91-10(5)]

18. “Agency adjudicators are also required to apply the preponderance of the evidence burden of proof in contested cases, like trial judges in civil cases.” Kilakila 'O Haleakala v. Bd. of Land, 138 Haw. 383, 416, 382 P.3d 195, 228 (Hawaii 2016).

19. The preponderance standard directs the factfinder to decide whether the existence of the contested fact is more probable than its nonexistence. Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (Hawaii 1989) (“The preponderance standard directs the factfinder to decide whether “the existence of the contested fact is more probable than its nonexistence.” E. Cleary, McCormick on Evidence, § 339, at 957 (3d ed. 1984). As one commentator points out, to prevail, “[a] plaintiff need only offer evidence sufficient to tip the scale slightly in his or her favor, and a defendant can succeed by merely keeping the scale evenly balanced.” Comment, The Imposition of Punitive Damages in Product Liability Actions in Pennsylvania, 57 Temp.L.Q.

203, 224 (1984).”).

THE RULES OF EVIDENCE

20. HRS § 91-1 provides for the rules of evidence applicable in contested cases. HRS §. 91-1 provides as follows:

§ 91-10. Rules of evidence; official notice

In contested cases:

- (1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law;
- (2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original;
- (3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence;
- (4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed; and
- (5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

**AUTHORITY OF THE LAND USE COMMISSION TO REVERT THE PROPERTY
TO ITS PRIOR LAND USE CLASSIFICATION WHERE THE PETITIONER HAS
NOT SUBSTANTIALLY COMMENCED USE OF THE PROPERTY IN
ACCORDANCE WITH ITS REPRESENTATIONS.**

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.”).

22. In DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 209, 339 P.3d 685, 707 (Hawaii 2014), the Hawaii Supreme Court explained:

To the extent DW and Bridge argue that the LUC must comply with the general requirements of HRS § 205–4 anytime it seeks to revert property, they are mistaken. The express language of HRS § 205–4(g) and its legislative history establish that **the LUC may revert property without following those procedures, provided that the petitioner has not substantially commenced use of the property in accordance with its representations. In such a situation, the original reclassification is simply voided.**

Thus, 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. Applying these principles to the facts of this case, the circuit court correctly concluded that the LUC erred in reverting the property to agricultural use without complying with the requirements of HRS § 205–4 because, by the time the LUC reverted the property, DW and Bridge had substantially commenced use of the land in accordance with their representations.

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

DETERMINATION OF “SUBSTANTIAL COMMENCEMENT” OF USE OF THE PROPERTY

23. The Hawaii Supreme Court, in DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 213–14, 339 P.3d 685, 711–12 (Hawaii 2014), explained how the Land Use Commission should make the factual determination of whether the petitioner has substantially commenced the use of the land in accordance with its representations.

Section 205–4(g) does not include a definition of “substantial commencement,” and the LUC’s April 25, 2011 order does not explain how the LUC interpreted that term. The interpretation of a statute is a question of law which is freely reviewable by this court. See Univ. of Haw. v. Befitel, 105 Hawai‘I 485, 488, 100 P.3d 55, 58 (2004).

“**Substantial**” is, according to Blacks’s Law Dictionary, “**considerable in amount or value; large in volume or number.**” Black’s Law Dictionary 1656 (10th ed. 2014). In drafting HRS § 205–4(g), the legislature did not require that the use be substantially completed, but rather that it be substantially commenced. This is consistent with the concerns identified by the legislature in the legislative history of the statute, i.e., that it was trying to **deter speculators who obtained**

favorable land-use rulings and then sat on the land for speculative purposes.

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 213–14, 339 P.3d 685, 711–12 (Hawaii 2014) (emphasis added).

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

25. The Commission finds and concludes that the requirements of HRS § 205-4 are inapplicable with respect to whether the Land should be reverted to its prior land use classification, because the Petitioner had not substantially commenced use of the land in accordance with its representations.

ENFORCEMENT OF A CONDITION IS NOT RULE MAKING

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:

Appellants generally contend that the PUC violated HAPA by failing to properly promulgate rules to establish when transmission lines will be placed underground. Appellants argue that, prior to proceeding with the case, the PUC should have issued a “rule,” as defined by HRS § 91–1(4) (1993), as to when the PUC will defer to another governmental agency, as to when power lines will be undergrounded, as to how the visual impact of overhead lines will be weighed, and to define when transmission lines will be placed underground for social equity reasons. The PUC instead granted HECO’s application, merely stating that it needed “additional justification”¹² to place lines underground for social equity reasons.

Appellants argue that what would qualify as “additional justification” or criteria is clearly a statement of policy by the PUC, thereby requiring a rule-making proceeding prior to a contested case hearing under HAPA.

Under HRS § 91–1(4), a “rule”

means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency.

HRS § 91–1(4) (1993).

We begin our discussion by first recognizing **the distinction between rule-making and adjudication.**

The distinction between rule-making and adjudication is often troublesome statutory language. However, it is generally accepted that the distinguishing characteristic of rule-making is the generality of effect of the agency decision and that literal application of the words “or particular” would obviate completely the adjudicatory functions of administrative agencies. [Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 485 n. 13, 522 P.2d 1255, 1261 n. 13 (1974)]; 1 Davis, Administrative Law Treatise § 5.02 (1958) (hereinafter “Davis”).

This distinction [between rule-making and adjudication] reflects the consideration that in rule-making policy is dominant, rather than accusatory or disciplinary elements, and consequently such factors as the demeanor of witnesses are of little significance.

* * * * *

Rule-making is an agency action governing the future conduct either of groups of persons or of a single individual; it is essentially legislative in nature, not only because it operates in the future, but also because it is concerned largely with considerations of policy. In

rule-making, disciplinary or accusatory elements are absent. Typically, the issues relate not to the evidentiary facts, as to which the demeanor of witnesses would often be important, but rather as to the inferences to be drawn from the facts or as to the predictions of future trends to be based upon them.

* * * * *

Adjudication, conversely, is concerned with the determination of past and present rights and liabilities. Typically, there is **involved a determination as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.** Inevitably, in such proceedings, issues of fact often are sharply controverted, with the consequence that the demeanor of witnesses becomes important and should be observed by an agency officer who will play a substantial role in the decision.

Note, “Rule Making,” “Adjudication” and Exemptions Under the Administrative Procedure Act, 95 U. Pa. L.Rev. 621 (1946–47).

In his treatise on administrative law, Professor Davis writes:

One of the most helpful definitions of rule-making is that of Professor Fuchs, who concludes that rule-making should be defined as ‘the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations.’ Another definition is that of Mr. Dickinson: ‘What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity.’

1 Davis, supra, § 5.01.

Foster Village Community Ass'n v. Hess, 4 Haw.App. 463, 475–77, 667 P.2d 850, 858 (1983) (brackets added).

Accordingly, because the “literal application of the words ‘or particular’ would obviate completely the adjudicatory functions of administrative agencies,” id. at 475, 667 P.2d at 858 (citing Aguiar, 55 Haw. at 485 n. 13, 522 P.2d at 1261 n. 13), we reject Appellants' general contention that all statements of policy by the PUC require a rule-making procedure under HAPA prior to proceeding with the case. Rather, we recognize that rule-making is essentially legislative in nature because it operates in the future; whereas, **adjudication is concerned with the determination of past and present rights and liabilities of individuals where “issues of fact often are sharply controverted.”** See Shoreline Transp., Inc. v. Robert's Tours & Transp., 70 Haw. 585, 591, 779 P.2d 868, 872 (1989).

Secondly, **the choice between proceeding by “general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”** Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947). Thus, **“most courts have allowed agencies broad discretion in choosing whether to develop policy by rule[-]making or adjudication.”** Consumer Protection Division v. Consumer Publishing Co., 304 Md. 731, 501 A.2d 48, 60 (1985) (brackets added).

Application of Hawaiian Elec. Co., Inc., 81 Haw. 459, 465–67, 918 P.2d 561, 567–69 (Hawaii 1996) (emphasis added).

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):

This court has also acknowledged a distinction between the circumstances appropriate for rule-making versus adjudication duties of an agency. In the most general terms, the purpose of rule-making is to govern the future conduct of

groups and individuals, not determining damages resulting from past conduct.

Rule-making is an agency action governing the future conduct either of groups of persons or of a single individual; it is essentially legislative in nature, not only because it operates in the future but also because it is concerned largely with considerations of policy. In rule-making, disciplinary or accusatory elements are absent.

In re HECO, 81 Hawai‘I at 466, 918 P.2d at 568 (emphasis added) (quoting Note, “Rule Making,” “Adjudication” and Exemptions Under the Administrative Procedure Act, 95 U. Pa. L.Rev. 621 (1946–47)). See also Coney v. Lihue Plantation Co., 39 Haw. 129, 138–39 (1951) (holding that in a determination of damages, the finder of fact has a right and a duty to draw reasonable and probable inferences from the facts and circumstances in evidence, and in reference to the amount of damages, “the law never insists upon a higher degree of certainty as to the amount of damages than the nature of the case admits, and that where ... the fact of damage is established, a more liberal rule is allowed in determining the amount.”)

Setting a general standard in this situation would be impracticable to define by general rule because the November 26, 2001 mudflow and damage to the reef was an “unforeseeable situation” and “so specialized and varying in nature so as to be impossible of capture within the boundaries of a general rule.”

Pilaa 400, LLC v. Bd. of Land & Nat. Res., 132 Haw. 247, 266, 320 P.3d 912, 931 (Hawaii 2014) (emphasis added).

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.

THE LAW REGARDING EQUAL PROTECTION

30. The fact that an administrative agency takes enforcement actions which it had not taken in the past does not itself violate equal protection.

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.”

32. The Hawaii Supreme Court so held in State v. Villeza, 85 Haw. 258, 267–68, 942 P.2d 522, 531–32 (Hawaii 1997):

To substantiate a claim of discriminatory enforcement of the law, the party raising the claim must satisfy a two-part test. First, **the party must demonstrate that the law is administered differently against others similarly situated.** Second, **the party must establish that its selection was “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.”** Id. (quoting State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 227, 615 P.2d 730, 734–35 (1980)). If a party does not satisfy both parts of the test, the party's equal protection claim fails. Id.

State v. Villeza, 85 Haw. 258, 267–68, 942 P.2d 522, 531–32 (Hawaii 1997) (emphasis added).

33. In Mahiai v. Suwa, 69 Haw. 349, 360–61, 742 P.2d 359, 368 (Hawaii 1987), the Hawaii Supreme Court also explained:

In State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 615 P.2d 730 (1980), we recognized the defense of discriminatory enforcement in the context of a criminal prosecution. There we stated:

The burden of proving discriminatory enforcement of the law rests upon the party raising the defense. That party must present sufficient evidence to establish the existence of intentional or purposeful discrimination, that is “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.” **It is insufficient to show merely that *361 other offenders have not been prosecuted,** or that **there has been laxity of enforcement,** or that **there has been some conscious selectivity in prosecution.** Recognition of the defense **will not permit the guilty to go free simply by showing that other**

violators exist.

Id. at 226–27, 615 P.2d at 734–35 (quoting Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962) (citations omitted)). See also State v. Tookes, 67 Haw. 608, 615, 699 P.2d 983, 988 (1985).¹⁰ **Although the case at bar does not involve a criminal prosecution, we find the case law pertaining to allegations of discriminatory prosecution instructive.** See Henson v. Department of Law Enforcement, 107 Idaho 19, 23 n. 3, 684 P.2d 996, 1000 n. 3 (1984) (allegation of selective enforcement in revocation of retail liquor license).

To substantiate a claim of discriminatory enforcement, Ranchers must satisfy a two-part test. First, they must **demonstrate that the Department generally has not enforced section 142–6 against others similarly situated.** See Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir.1982). Second, Ranchers must **establish that their selection was “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.”** State v. Kailua Auto Wreckers, Inc., 62 Haw. at 227, 615 P.2d at 734–35 (quoting Oyler v. Boles, 368 U.S. at 456, 82 S.Ct. at 506). If Ranchers do not satisfy both parts of this test, their equal protection claim fails. For that reason, the claim fails here.

Mahiai v. Suwa, 69 Haw. 349, 360–61, 742 P.2d 359, 368 (Hawaii 1987) (emphasis added).

34. The Commission finds and concludes that Petitioner did not **“establish that [it’s] selection was “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.”** Cf. Mahiai v. Suwa, 69 Haw. 349, 360–61, 742 P.2d 359, 368 (Hawaii 1987).

35. The Commission therefore finds that Petitioner’s right to equal protection of the laws were not violated.

PETITIONER'S VIOLATION OF THE 2008 ORDER

36. The Commission finds and concludes that the Petitioner failed to perform according to the conditions imposed and to the representations and commitments made to the Commission in obtaining reclassification of the Subject Area.

37. The Commission finds and concludes the following with respect to the following conditions:

Condition No.1 (Compliance with Representations to the Commission).

Condition No.2 (Completion of Project).

Condition No.3 (Reversion on Failure to Complete Project).

Condition No.4 (Water Resource Allocation).

Condition No.6. (Transportation).

Condition No.9. (Affordable Housing.)

Condition No. 11.(Archaeological Site 22).

Condition No. 12. (Drainage.)

Condition No. 13. (Wastewater.)

Condition No. 14. (Solid Waste.)

Condition No. 20. (Notice of Change of Ownership.)

Condition No. 21. (Annual Reports.)

GOOD CAUSE

38. As a general rule, ‘good cause’ means a substantial reason; one that affords a legal excuse.” State v. Estencion, 63 Haw. 264, 267, 625, P.2d 1040, 1042 (1981). “Good cause” is also dependent upon the specific circumstances of an individual case. A finding of “good cause” is left to the discretion of the decision-making body to determine.

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.

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

41. Therefore, based on a careful consideration of the evidence and the law, WHI has not shown good cause as to why the Petition Area should not revert to its former classification.

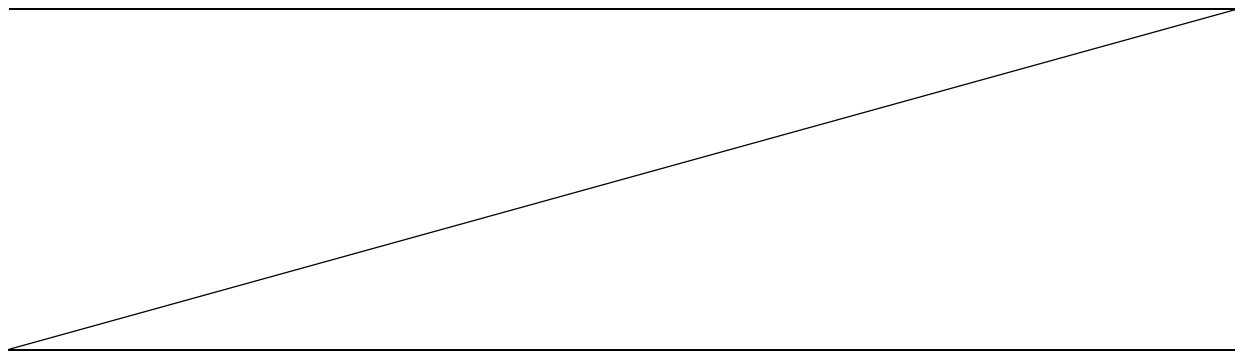
ORDER

This Commission having duly considered written briefs, pleadings, oral and written statements and testimony, and oral arguments of the parties and the public in the proceedings, and a motion having been made and seconded at a hearing on November 28, 2018, in Kona, Hawai'i, and the motion having received the affirmative votes required by HAR §15-15-13, and there being good cause for the motion,

HEREBY ORDERS that:

1. The Petition Area of approximately 731.581 acres of land consisting of Tax Map Key No. (3) 6-8-002:016 (portion), is therefore reverted to the State Agricultural District.

2. In compliance with HAR §15-15-93(e), the June 10, 2008 Decision and Order, is amended to incorporate the order to show cause and to include the reversion of the Petition Area to its former land use classification; including the cancellation and release of all conditions imposed by that certain 2008 Decision and Order.



ADOPTION OF ORDER

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, Hawai'i, this _____ day of July, 2019, per motion on July 10, 2019.

APPROVED AS TO FORM

LAND USE COMMISSION
STATE OF HAWAII

Deputy Attorney General

By _____
JONATHAN LIKEKE SCHEUER
Chairperson and Commissioner

Filed and effective on:

Certified by:

DANIEL E. ORODENKER
Executive Officer



BEFORE THE LAND USE COMMISSION
STATE OF HAWAII

In the matter of the Petition of

WAIKOLOA MAUKA, LLC

To Amend the Agricultural Land Use
District Boundaries into the Rural Land
Use District for Approximately 731.581
Acres in South Kohala District, Island of
Hawaii, Tax Map Key No. (3) 6-8-02:016
(portion)

DOCKET NO. A06-767

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a certified copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, was served upon the following by depositing the same in the U.S. Postal Service by registered mail or certified mail as noted:

DEL. Attention:
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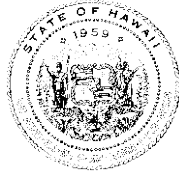
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Glendale, California 91204-2641

Dated: Honolulu, Hawai'i, _____

Daniel E. Orodener
Executive Officer



BEFORE THE LAND USE COMMISSION
STATE OF HAWAI'I

In the matter of the Petition of

WAIKOLOA MAUKA, LLC

To Amend the Agricultural Land Use
District Boundaries into the Rural Land
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Acres in South Kohala District, Island of
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(portion)

DOCKET NO. A06-767

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER REVERTING
THE PETITION AREA AND
CERTIFICATE OF SERVICE

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND
ORDER REVERTING THE PETITION AREA**

AND

CERTIFICATE OF SERVICE