LAND USE COMMISSION
STATE OF HAWAII
2019 JUL 11 P 2:24

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI`I

In The Matter Of The Petition Of THE SHOPOFF GROUP, L.P. To Amend The Agricultural Land Use District Boundaries Into The Urban Land Use District For Approximately 129.99 Acres In North Kona District, Island Of Hawai`i, Tax Map Key Nos. (3) 7-3-007: 038, 039, And (3) 7-3-009: 007	DOCKET NO. A06-770 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA; EXHIBIT "A"; CERTIFICATE OF SERVICE

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

AND

CERTIFICATE OF SERVICE

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.

July 11, 2019 by

Executive Officer

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GENERAL BACKGROUND

1. On November 27, 2006, The Shopoff Group, L.P. ("Shopoff") filed the Petition for Land Use District Boundary Amendment ("Petition") to reclassify approximately 129.99 acres of land from the State Land Use Agricultural District to the State Land Use Urban District in the North Kona District, Island of Hawai`i, identified as Tax Map Keys ("TMKs"): (3) 7-3-007: 038, 039, and (3) 7-3-009: 007 (collectively "Petition Area").

2. Shopoff proposed the development of approximately 270 residential units, including approximately 216 to 220 single-family homesites as well as

affordable housing units that were needed to conform to County of Hawai`i affordable housing requirements. Also proposed were a 4.4-acre private community park, a wastewater treatment plant, individual wastewater systems, an offsite drinking water well, storage reservoirs, water transmission lines, an internal roadway circulation system, and offsite roadway connections.

3. On December 18, 2006, the State of Hawai`i Land Use Commission ("Commission" or "LUC") issued its Order Determining: (1) That the Land Use Commission Agrees to be the Accepting Authority Pursuant to Chapter 343, Hawai`i Revised Statutes; and (2) That the Proposed Action May Have a "Significant Impact" to Warrant the Preparation of an Environmental Impact Statement ("EIS").

4. On December 6, 2007, the U.S. National Park Service ("NPS") filed an Application to Intervene.

5. On January 10, 2008, the NPS withdrew its Application to Intervene.

6. On January 31, 2008, the Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order Accepting a Final Environmental Impact Statement.

7. On January 24-25, 2008; March 19-20, 2008; and April 10, 2008, the Commission conducted hearings on the Petition.

8. On September 18, 2008, the Commission granted the Petition

subject to 28 conditions. Condition Nos. 2 through 23 pertained to matters that required action by Shopoff as a result of the development of its project.

9. On October 21, 2008, the Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order ("2008 Decision and Order").

10. On November 9, 2009; September 15, 2010; March 5, 2012; November 20, 2012; and November 12, 2013, annual reports were filed as required by Condition No. 25 of the 2008 Decision and Order.

11. At the time of the filing of the Petition, TMK: (3) 7-3-007: 039 (Lot 56 - 39.420 acres) and TMK: (3) 7-3-007: 038 (Lot 57 - 44.905 acres) of the Petition Area were owned by TSG Kula Nei, L.P. ("TSG"), formerly known as TSG O`oma, L.P. TMK: (3) 7-3-009: 007 (Lot 59 - 45.667 acres) was owned by Springbrook Investments, L.P. ("Springbrook"). Shopoff, as the managing entity, was responsible for managing the development process on behalf of both TSG and Springbrook (collectively "Owners").

12. By letter dated December 6, 2010, to the Commission, Shopoff provided notice that the Petition Area was scheduled to be conveyed to Central Pacific Bank ("CPB"), effective upon execution of certain settlement agreements between the Owners and CPB.

13. CPB subsequently acquired the Petition Area from the Owners via Warranty Deeds recorded in the State of Hawai`i Bureau of Conveyances ("Bureau of

Conveyances") on November 30, 2010, and December 15, 2010, as Document Nos. 2010-183716 and 2010-193784, respectively.

14. On December 9, 2014, Kula Nei Partners, LLC, a Hawai`i limited liability company ("KNP" or "Petitioner"), acquired the Petition Area from CPB via Limited Warranty Deed recorded in the Bureau of Conveyances on December 15, 2014, as Document No. A-54620208.

15. By letter dated September 22, 2017, Mr. Robert E. Lee, Jr., Co-Manager of KNP, provided the Commission with notice of the conveyance of the Petition Area to KNP and further indicated that KNP, as the successor-in-interest to Shopoff and CPB, was considering requesting that the Petition Area or portions thereof be reverted to its original or more appropriate land use classification.

16. By letters dated December 4, 2017, and December 8, 2017, Mr. Lee informed the Commission that KNP did not have the financial capability to comply with the deadline specified in Condition No. 1 of the 2008 Decision and Order, and that it was his intention to rescind the land use classification of the Petition Area.

17. By letter dated January 18, 2018, Mr. Lee requested that the Commission's January 24, 2018, meeting to consider whether to issue an Order to Show Cause ("OSC") on the matter based on the correspondences from Mr. Lee be continued to address the requests of the State of Hawai`i Office of Planning ("OP") and the

County of Hawai`i Planning Department ("Planning Department") for additional information.

18. By transmittal dated January 19, 2018, to the Commission, OP requested that additional information on the status of the development on the Petition Area relative to entitlements and any progress in infrastructure or other construction be submitted for review and comment to the Commission and the parties prior to any consideration of the matter.

19. On February 11, 2019, Mr. Lee filed the annual reports for 2014 through 2018.

20. On March 28, 2019, the Commission held a meeting in Kailua-Kona, Hawai`i, to hear a status report on the development approved in Docket No. A06-770. At the meeting, Mr. Lee appeared on behalf of KNP. Mr. Lee stated, among other things, that KNP would not be pursuing the development proposed by Shopoff primarily because of the significant financial costs that would be incurred with its development and the presence of significant cultural and archaeological sites onsite with which Mr. Lee and the Lee `ohana have personal and familial connections. Instead, Mr. Lee noted that KNP will be pursuing a 26-lot agricultural subdivision that is intended to address the housing needs of members of the Lee `ohana as well as of individuals outside of the `ohana.

21. At the end of the meeting, the Commission voted to set an OSC hearing as to why the Petition Area should not revert to its former Agricultural land use classification or be changed to a more appropriate classification, as there was reason to believe that KNP had failed to perform according to the conditions imposed in the docket and to the representations or commitments made by its predecessor, Shopoff.

22. On March 29, 2019, the Commission's OSC was filed and served upon KNP.

23. By letter dated March 29, 2019, the Commission informed the parties of the deadlines by which to file witness lists, exhibit lists, and all exhibits as well as rebuttal witness lists, rebuttal exhibit lists, and all rebuttal exhibits.

24. On April 5, 2019, notice of the OSC hearing was published in the *Honolulu Star-Advertiser, Maui News, Hawai`i Tribune-Herald, West Hawai`i Today,* and *The Garden Island.*

25. On May 6, 2019, KNP filed Exhibits 1 through 10.

26. On May 8, 2019, KNP filed an Exhibit List.

27. On May 14, 2019, a Stipulation of the Parties ("Stipulation") signed by representatives of KNP, OP, and the Planning Department was filed with the Commission. In the Stipulation, the parties stipulated to, among other things, the following: (a) KNP has not and does not intend to comply with the representations and conditions of the 2008 Decision and Order; (b) there has been no substantial

commencement by Shopoff to the parties' knowledge or by KNP of use of the Petition Area or substantial progress in developing the Petition Area in accordance with the representations and commitments made to the Commission; (c) the land use district boundary classification of the Petition Area shall revert from the State Land Use Urban District to the State Land Use Agricultural District, and KNP shall no longer be subject to the conditions in the 2008 Decision and Order upon motion by the Commission; (d) upon reversion of the Petition Area to the State Land Use Agricultural District, KNP stipulates that it intends to utilize the Petition Area in the manner described in the Declaration of Robert E. Lee Jr. (KNP Exhibit 9); (e) the parties shall not oppose a motion by the Commission to incorporate the OSC by including the reversion of the Petition Area to its former land use classification or to a more appropriate classification in accordance with Hawai`i Administrative Rules ("HAR") §15-15-93(e); and (f) the parties waive the procedural requirements set forth in Hawai`i Revised Statutes ("HRS") chapters 91 and 205 and HAR chapter 15-15 pertaining to notices, hearings and proceedings, and agree that the Commission may proceed with the disposition of the parties' requests.

28. On May 22, 2019, the Commission conducted the OSC hearing in Kailua-Kona, Hawai`i. Robert E. Lee, Jr., and Nohealani Baptista appeared on behalf of KNP. Dawn Takeuchi-Apuna, Esq., appeared on behalf of OP. Ronald Kim, Esq., and Duane Kanuha appeared on behalf of the Planning Department. At the hearing, Mr.

Lee and Ms. Baptista shared their connection with the Petition Area and provided an updated status of KNP's development proposal. Mr. Lee represented that the intent of KNP re-acquiring the Petition Area and reverting its land use classification to the Agricultural District was to retain the land within the Lee `ohana and utilize the Petition Area for lower impact uses that were more compatible with the extensive cultural and natural resources that exist on the Petition Area. Mr. Lee intends to create an `ohana style subdivision utilizing the existing County zoning which allows for a minimum five-acre lot size or possibly the Planned Unit Development provision of the County where agricultural activities, including a nursery for the propagation of native Hawaiian indigenous and endemic plants and foliage, will be pursued. Ms. Takeuchi-Apuna noted that OP joined in the Stipulation. Mr. Kanuha clarified the position of the Planning Department on the OSC and expressed his support for the Stipulation. Thereafter, a motion was made and seconded to accept KNP's exhibits and the Stipulation into the record and to close the evidentiary hearing. There being a vote tally of 7 ayes and 1 excused, this motion passed.[1] The Commission then entered into formal deliberations on the OSC. The Chair confirmed that the Commissioners had each reviewed the records and transcripts of all meetings and were prepared to deliberate on the matter. Another motion was subsequently made and seconded to revert the Petition Area to the State Land Use Agricultural District because (1) there has not been

[1] There are currently eight sitting members on the Commission. The Kaua`i seat is presently vacant.

substantial commencement of use of the land in accordance with the representations made to the Commission and (2) there has been a failure to perform according to the conditions, representations, and commitments of the 2008 Decision and Order. There being a vote tally of 7 ayes and 1 excused, this motion passed.

FINDINGS OF FACT

29. The 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 Commissions makes the following Findings of Fact.

30. The 2008 Decision & Order included the following with respect to representations by Petitioner:

> 50. The proposed improvements concentrate on the subdivision of the Petition Area to allow for the development of approximately 270 residential units including approximately 216 to 220 single-family homesites, as well as affordable housing units that are needed to conform to County affordable housing requirements. Subdivided residential lots may be sold in bulk to one or more homebuilders, individual lots may be sold to home purchasers, or the lots may be disposed of using a combination of both methods. The number of required affordable housing units is approximately 54 units, and Petitioner has represented that they will be located in the Petition Area.

51. The Petition Area will be connected to the Queen Ka`ahumanu Highway and Mamalahoa Highway by two existing roadways, Ka`iminani Drive and Hina Lani Street.

52. Proposed Project improvements include a 4.4-acre private community park, a wastewater treatment plant to serve the affordable housing area and residential lots immediately surrounding the affordable housing area, individual wastewater systems to serve the remaining residential lots, an offsite drinking water well, storage reservoirs, water transmission lines, an internal roadway circulation system and offsite roadway connections. The Project includes construction of Holoholo Street, a key mid-level connector in the North Kona region, through the Petition Area.

53. Additionally, Petitioner represents that it will preserve Homestead Road as a pedestrian trail open to the public. Homestead Road existed in the mid 1800s. It is a narrow roadway that is lined on each side by a lava rock wall. It ranges in width from about 10 to 20 feet and is overgrown with vegetation. Homestead Road is not suitable for a vehicular access, because it is lined on each side by existing lava walls and was never intended to accommodate motorized vehicles. There will be parking available to the public at various locations so the public can access Homestead Road.

54. The Lee family, including Robert Lee and Aunty Elizabeth Lee and their families, owned and lived on land in the Petition Area. The Lee family will develop the *makai* l0-acre portion of the Petition Area.

55. Petitioner will process grading plans and infrastructure improvement plans and anticipates construction of the Project to commence in 2011. Backbone infrastructure improvements would be completed within 10 years from the last discretionary land use approval for the Project. Backbone infrastructure is the construction of Holoholo Street through the Petition Area and the loop road within the Petition Area, access points, waterlines, and utilities to serve the future lots, the park, and construction of the water supply infrastructure.

56. Infrastructure construction, including a regional water supply well, reservoir, roadways (both on and potentially off the Petition Area), will take two to five years, putting aside market considerations.

57. Zoning and tentative subdivision approvals are anticipated to occur two to three years after issuance of the Commission's Decision and Order.

C. Petitioner's Financial Capability to Undertake the Project

58. Evidence of Petitioner's financial condition in the form of its financial statements was attached to the Petition as Exhibit "19".

59. Financing for land acquisition and entitlement (through subdivision approval) will be through limited partnerships, including TSG Kula Nei, LP. and Springbrook Investments, LP. An offering for investment in each of the two limited partnerships was made available to qualified investors to raise capital to finance the land acquisition and entitlements for the Project. Should additional capital be required

for Project entitlements, it will be raised through the limited partnerships.

31. The 2008 Decision & Order further provided:

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

1. Order to Show Cause. The Commission on its own motion, or at the request of any party or interested person, shall issue an order to show cause and require the Petitioner to appear before the Commission to explain why the Petition Area, or any part thereof, should not revert to its original classification or more appropriate classification for any of the following:

   A. Failure to accomplish development of the Petition Area as represented to the Commission or to secure a bond for the completion thereof within 10 years from the date of the Commission's decision and order. For purposes of this decision and order, "development" means completion of backbone infrastructure as defined in finding of fact 55; or

   B. Failure to accomplish substantial progress in developing the Petition Area as represented to the Commission by the commencement of construction of the Project in 2011, if necessary county approvals have been obtained or in any event no later than five years from issuance of the decision and order; or

   C. Failure to perform a condition of approval, or a representation or

commitment made on the part of the Petitioner.

2. **Water Resource Allocation**. Petitioner shall fund and construct drinking water source, storage and transmission facilities and improvements as required to accommodate development of the Petition Area, to the satisfaction of the County of Hawai`i and appropriate State agencies.

3. **Water Conservation Measures**. Petitioner shall implement water conservation measures as may be required by the applicable provisions of the Hawai`i County Code, including, but not limited to, low-flow water fixtures, and shall also implement BMPs, such as the use of indigenous and drought tolerant plants and turf and incorporate such measures in the Project's landscape planting. Petitioner shall recommend the use of native and require the use of drought tolerant plants in 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 also recommend that homeowners consider some form of water reuse or rainwater harvesting system for irrigation purposes.

4. **Transportation**. Based on an analysis of traffic-related impacts, Petitioner shall fund, design, and/or construct necessary local and regional roadway improvements related to the impact from the Project in accordance with the recommended mitigation measures and schedules accepted by the DOT and the county.

5. **Holoholo Street**. Petitioner shall construct that portion of Holoholo Street within the Petition

Area. The Petitioner shall reach an agreement with the County of Hawai`i to cause the construction of the north-south road (Holoholo Street) from Ka`iminani Drive to Hina Lani Street prior to receipt of Final Subdivision Approval for the Project. The obligation to construct any portion of the roadway may be bonded as part of Final Subdivision Approval.

6. **Street Lights**. Petitioner shall use shielded or low sodium street lights within the Project to avoid impacts to flight birds and other populations.

7. **Affordable Housing**. Petitioner shall provide affordable housing opportunities 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. The affordable units shall be constructed and offered for sale prior to the sale of more than fifty per cent of the market lots.

8. **Previously Unidentified Burials and Archaeological/Historic Sites**. Without any limitation to an 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 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. The finds shall be protected from additional disturbances, and SHPD shall be contacted immediately. Work shall not resume until the issuance of an archaeological clearance from SHPD that

mitigative measures have been implemented to its satisfaction.

9. **Archaeological Survey**. Petitioner shall comply with the conditions recommended and approved by SHPD, prior to issuance of a permit for grubbing and grading. Petitioner shall confirm in writing to the Commission that SHPD has found Petitioner's preservation mitigation commitments, if any, to be acceptable and has determined that any required historic preservation measures have been successfully implemented.

10. **Homestead Road**. Homestead Road shall be kept as a pedestrian trail open to the public, with public parking available at several locations to access it.

11. **Lava Tube Cave Preservation**. Petitioner shall preserve the areas recommended for preservation and comply with the list of mitigation measures recommended by Dr. White in Appendix F of the EIS, section 4.0, page 12.

12. **Subgrade Cavities**. If subgrade cavities are collapsed and a space large enough to be explored and surveyed is encountered where biology can exist, the space shall be inspected by a karst expert who shall recommend what mitigation measures, if any, should be implemented. Petitioner shall comply with such mitigation measures.

13. **NPS Agreement**. Petitioner shall comply with the agreement entered into between Petitioner and NPS regarding stormwater runoff and wastewater as follows:

    A. Storm and Surface Water Runoff

i. Prior to the occupancy of any residential unit within the Petition Area, Petitioner shall engineer, construct (or require to be constructed) and maintain storm and surface-water runoff best management practices ("BMPs") designed to prevent violation of State water quality standards as a result of storm-water discharges originating from the Petition Area. To the extent practicable and consistent with applicable laws, Petitioner shall design storm and surface runoff BMPs to treat the first-flush runoff volume, to remove pollutants from storm and surface-water runoff, and to prevent pollutants from reaching the Kaloko Honokohau National Historical Park (hereinafter, "National Park") or entering the water table. Petitioner shall submit designs for storm and surface water runoff BMPs to the National Park Service for consultation, review, and approval prior to construction. Said approval by the National Park Service shall not be unreasonably withheld. The National Park Service shall complete a review of the design for storm and surface water runoff BMPs within forty-five (45) calendar days of receiving the plan. If no response from the National Park Service is received within forty-five (45) calendar days of the submittal date, the plans will be considered approved by the National Park Service. Petitioner and/or its successors or assigns shall obtain all required permits and construct required improvements for storm water discharges related to the Project, on and from the Petition Area.

ii. No drainage injection well shall be constructed as an element of a storm and surface water runoff containment system in the Petition Area unless, prior to the start of any construction, applicable requirements of HAR Chapter 11-23 are satisfied and the Hawai`i State Department of Health issues an UIC (Underground Injection Control) permit,

iii. All drainage injection wells established in the Petition Area shall be operated and maintained in full compliance with Hawai`i State Department of Health's administrative rules under title 11 HAR, regulating various aspects of water quality and pollution, and HRS Chapters 342D and 342E. Relevant HAR include but, are not limited to:

a. Chapter 11-20, "Rules Relating to Potable Water Systems";

b. Chapter 11-23, "Underground Injection Control";

c. Chapter 1l-54, "Water Quality Standards";

d. Chapter 11-55, "Water Pollution Control"; and

e. Chapter 11-62, "Wastewater Systems".

iv. Any person who violates any of these conditions shall be subject to penalties as prescribed in appropriate chapters of the HRS and HAR as they relate to (but are not limited to): Potable Water Systems; Wastewater Systems; Water

Pollution Control; Safe Drinking Water; and Underground Injection Control.

v. Petitioner shall seek to participate with the County of Hawai`i in its pilot storm drain program for roadways within the Kaloko-Honokohau region (i.e., County Ordinance No. 02-114 condition F).

vi. Petitioner, successors and/or Home Owners Association in the Petition Area shall ensure that all drainage injection wells or subsurface drainage structures be designed with a debris catch basin to allow the detention and periodic removal of rubbish and sediments deposited by runoff. Storm water runoff shall first enter the debris catch basin before flowing into the drainage well. The debris catch basin's volume should be designed using current industry and engineering standards. The debris catch basin shall be periodically inspected and cleaned accordingly.

vii. To the extent practicable and consistent with applicable laws the Petitioner shall design and construct (or require to be constructed) landscaped areas, including grassed or vegetative swales, grass filter strips, vegetated open space areas, check dams, or other comparable advanced storm water BMPs, specifically engineered to treat the first flush runoff volume from roadways, and from exposed parking lots designed for more than 10 vehicles within the Petition Area to remove pollutants. Additionally, Petitioner shall consult with the National Park Service to design

and install storm water BMPs for treating the first flush runoff volume to remove suspended solids and oils and greases from storm runoff from Holoholo Street and parking lots designed for more than 50 vehicles.

viii. Petitioner shall provide signage for all drainage injection wells in the Petition Area with warnings such as the following: DUMP NO WASTES. DUMPING IS ILLEGAL AND MAY BE REPORTED TO 974-4000, ext 64258 GOES TO GROUNDWATER AND OCEAN. HELP PROTECT HAWAII'S ENVIRONMENT. Signage shall be stand up signs or riveted placards, or be painted on a paved surface next to the drainage well's inlet. Signage shall be situated so that it will not obscure scenic views, contribute to visual blight, or obstruct an accessible route.

B. Pollution Prevention

i. Before constructing any portion of the Petition Area, Petitioner shall develop, in consultation with the National Park Service, a Home Owner's Pollution Prevention Plan that 1) addresses environmental stewardship and the non-point sources of water pollution that can be generated in residential areas, and 2) provides BMPs for pollution prevention. The Home Owner's Pollution Prevention Plan shall include, but not be limited to: water conservation, lot and landscape runoff, erosion control, use of fertilizers, use of pesticides, environmentally safe automobile maintenance, and

management of household chemicals. The Plan shall include information on the National Park and the nationally significant cultural and natural resources within the National Park.

C. Wastewater

i. Petitioner and/or its successors and assigns shall refrain from obtaining a certificate of occupancy for a residential lot within the Petition Area until such time as the respective residential lot to be occupied is connected to one of the following: (1) a public wastewater treatment plant ("WWTP"); (2) a private WWTP and effluent disposal system serving the Petition Area (or portion thereof) designed to remove at least 80% Total Nitrogen and at least 90% Total Phosphorus (aerobic nitrification processes combined with anoxic/anaerobic process and/or intermittent sand filters/anaerobic sand filters to perform denitrification, or comparable technology); or (3) for lots 10,000 square feet or larger, an Individual Wastewater System ("IWS") that uses an enhanced treatment (such as Sequential Batch Reactor, CBT, or technology with a comparable nutrient removal efficiency) and an absorption field of import material, featuring adequate percolation rate, such that the IWS and absorption field are designed to achieve at least 80% reduction in Total Nitrogen and 90% reduction in Total Phosphorus. Effluent disposal for the WWTP shall be in accordance with applicable laws and will include either:

a) a horizontal absorption system with absorption trenches or beds of sufficient import material (meeting the Hawai`i State Department of Health specifications) featuring adequate percolation rate and constructed in a manner to achieve the level of nutrient removal stated above; or b) an irrigation system for disposing of effluent within the Petition Area in accordance with applicable laws and Hawai`i State Department of Health requirements; or c) a combination thereof. Installation is subject to conditions of approval by the Director of the Hawai`i State Department of Health and HAR Chapter 11-62.

ii. The owner of the IWS shall complete and sign an IWS Owner's Certification Form to certify with the Hawai`i State Department of Health that the IWS shall be operated and maintained in accordance with all of the provisions of the operation and maintenance manual developed pursuant to HAR Chapter 11-62. The certification shall include that upon the sale or transfer of ownership of the IWS, the sale or transfer will include the appropriate transfer documents and provisions binding the new owner to the operation and maintenance manual.

iii. If any portion of the Petition Area is served by a private WWTP or IWS, Petitioner and/or each individual lot owner(s), shall develop and participate in a Wastewater Treatment System Maintenance Agreement, before

issuance of a certificate of occupancy for any lots within the Petition Area, that shall provide for safe and effective operation and maintenance of the treatment units), whether shared or individual. This requirement shall be included in the conditions of sale of any lot and/or parcel in the Petition Area.

14. **Drainage and Stormwater**. Petitioner shall fund, design, and construct any drainage system improvements required to prevent adverse impacts resulting from the development of the Project. Petitioner shall be required to prevent runoff from the Petition Area from adversely affecting state highway facilities and downstream properties. Petitioner shall submit plans to the DOT and appropriate State and County agencies for review and approval. Plans shall be consistent with Petitioner's agreement with NPS.

15. **Wastewater Facilities**. Petitioner shall fund and construct adequate wastewater treatment, transmission and disposal facilities, as determined by the County of Hawai`i and State Department of Health, and consistent with Petitioner's agreement with NPS. The large lots will have individual WWTPs. The affordable units and smaller lots will be serviced by a WWTP built by Petitioner.

16. **Solid Waste Management Plan**. Petitioner shall develop a solid waste management plan in conformance with the Integrated Solid Waste Management Act, HRS Chapter 342G. Petitioner's solid waste management plan shall be approved by the County of Hawai`i and State Department of Health. The plan shall include provisions for reuse of construction debris generated in the construction of the overall Project. During construction, the Petitioner will recycle green waste, wood waste, cardboard, metals and glass to the extent practical.

17. **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 Department of Environmental Management and the State Department of Health.

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

19. **Air Quality Monitoring**. Petitioner will participate in an air quality monitoring program if required by State Department of Health.

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

21. **Energy Conservation Measures**. Petitioner and its successors shall implement energy conservation and sustainable design measures to promote energy conservation, and environmental stewardship in the Project such as, for instance, the use of solar energy and solar heating, consistent with 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, Energy Star, Green Communities, into the design and construction

of the Project and the structures within the Petition Area. Petitioner shall provide information to lot purchasers regarding energy conservation and sustainable design measures and encourage lot purchasers to design houses that meet at least the minimum requirements of one of the aforementioned programs.

22. **Prohibition on Interference with Farming Operations**. To the extent that the Petition Area is contiguous or adjacent to lands in the State land use Agricultural District, any action that would interfere with or restrain farming operations on those lands is prohibited; provided the farming operations are conducted in a manner consistent with generally accepted agricultural and management practices.

23. **Notification of Right to Farm Act**. Petitioner shall notify all prospective developers or purchasers of all or any portion of the Petition Area or any interest in the Petition Area, and shall require its purchasers to provide subsequent notification to lessees or tenants that farming operations and practices on adjacent or contiguous land in the State land use Agricultural District are protected under HRS chapter 165, the Hawaii Right to Farm Act. This notice shall be included in any disclosure required for the sale or transfer of all or any portion of the Petition Area or any interest in the Petition Area.

24. **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, at any time prior to completion of development of the Petition Area.

25. **Annual Reports**. Petitioner shall timely provide without any prior notice, annual reports to the Commission, OP, and the County, and their respective successors, in connection with the status of

the development of 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.

26. **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 or its successors and assigns.

27. **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 of the State of Hawai`i a statement that the Petition Area is subject to 1he 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.

28. **Recordation of Conditions**. Petitioner shall record the conditions imposed herein by the Commission with the Bureau of Conveyances pursuant to section 15-15-92, HAR.

32. The Commission had reason to believe that there has been a failure to perform according to the conditions imposed and to the representations and commitments made to the Commission in obtaining the reclassification of the Petition Area.

33. KNP, OP, and the Planning Department entered into a STIPULATION OF THE PARTIES filed May 14, 2019.

34. The STIPULATION OF THE PARTIES stated:

1. That the undersigned are not aware of compliance by the Original Petitioner, The Shopoff Group, L.P. ("Original Petitioner"). Successor Petitioner, Kula Nei Partners LLC ("Successor Petitioner"), has not and does not intend to comply with the representations and conditions of the Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment ("D&O"), dated October 21, 2008.

2. There has been no substantial commencement by the Original Petitioner to the Parties' knowledge or Successor Petitioner of use of the Petition Area or substantial progress in developing the Petition Area in accordance with the representations and commitments made to the Commission;

3. That certain Notice of Imposition of Conditions ("Notice") was recorded with the Bureau of Conveyances of the State of Hawai'i ("Bureau") on October 28, 2008, and a copy of the recorded statement was filed with the Commission by the Original Petitioner on October 28, 2008;

4. That the land use district boundary classification for the Petition Area, the subject 129.99 acres identified as Tax Map Key Nos. (3) 7-3-007:038, 039, and (3) 7-3-009:007, shall revert from its current "Urban" classification to its former "Agricultural" classification, and the Petitioner shall no longer be subject to the D&O Conditions upon appropriate motion by the Commission;

5. That upon reversion to the former "Agricultural" classification, the Successor Petitioner stipulates that they intend to utilize

the Property in the manner as described in Successor Petitioners Declaration of Robert E. Lee Jr.

6. That the Parties hereto shall not oppose a motion by the Commission to incorporate the order to show cause by including the reversion of the Reclassified Area to its former land use classification or to a more appropriate classification in accordance with Section 15-15-93(e), HAR;

7. That the Parties hereto hereby waive the procedural requirements as set forth in Chapters 91 and 205, Hawai`i Revised Statutes, and Chapter 15-15, HAR, pertaining to notices, hearings and proceedings, and agree that the Land Use Commission may proceed with the disposition of the requests herein made;

35. The Commission finds that the Petition Area has not been developed as represented to the Commission. The Commission finds that no bond has been secured for the completion thereof within 10 years from the date of the Commission's 2008 Decision & Order. "Development" means completion of backbone infrastructure as defined in finding of fact 55 of the 2008 Decision & Order.

36. The Commission finds that the record of this docket evidences a failure to accomplish substantial progress in developing the Petition Area as represented to the Commission by the commencement of construction of the Project in 2011, if necessary county approvals have been obtained or in any event no later than five years from issuance of the 2008 Decision & Order.

37. The Commission finds that the record of this docket evidences a failure to perform a condition of approval, or a representation or commitment made on the part of Petitioner's predecessor, Shopoff.

38. Without limiting the foregoing, the Commission finds that Condition Nos. 2 through 23 required by the 2008 Decision and Order have not been satisfied.

39. The Commission finds that Petitioner has not substantially commenced use of the land in accordance with the representations of Petitioner's predecessor, Shopoff, to the Commission.

40. The Commission finds that use of the land in accordance with the representations of Petitioner's predecessor, Shopoff, to the Commission has not been substantially commenced.

41. The Commission finds that the Petition Area should therefore revert to its former classification.

CONCLUSIONS OF LAW

1. The 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. Lana`i Co. v. Land Use Comm'n, 105 Haw. 296, 317, 97 P.3d 372, 393 (Hawai`i 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).")

2. The Commission "may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification." H.R.S. Sec. 205-4(g).

3. 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. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 196, 339 P.3d 685, 694 fn.2 (Hawai`i 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]).

4. 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 (Hawai`i 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.")."

5. To determine whether the use of the land has been substantially commenced, the Hawai`i 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 (Hawai`i 2014).

6. The Hawai`i Supreme Court, in DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 211–12, 339 P.3d 685, 709–10 (Hawai`i 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 & Envtl. 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 & Envtl. 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 (Hawai`i 2014).

7. Whether 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 Commission. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 214, 339 P.3d 685, 712, fn.16 (Hawai`i 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.")."

8. The Commission concludes that the Petition Area has not been developed as represented to the Commission. The Commission concludes that no bond has been secured for the completion thereof within 10 years from the date of the

Commission's 2008 Decision & Order. "Development" means completion of backbone infrastructure as defined in finding of fact 55 of the 2008 Decision & Order.

9. The Commission concludes that the record of this docket evidences a failure to accomplish substantial progress in developing the Petition Area as represented to the Commission by the commencement of construction of the Project in 2011, if necessary county approvals have been obtained or in any event no later than five years from issuance of the 2008 Decision & Order.

10. The Commission concludes that the record of this docket evidences a failure to perform a condition of approval, or a representation or commitment made on the part of Petitioner's predecessor, Shopoff.

11. The Commission concludes that Condition Nos. 2 through 23 required by the 2008 Decision and Order have not been satisfied.

12. The Commission concludes that Petitioner has not substantially commenced use of the land in accordance with the representations of Petitioner's predecessor, Shopoff, to the Commission.

13. The Commission concludes that use of the land in accordance with the representations of Petitioner's predecessor, Shopoff, to the Commission has not been substantially commenced.

14. The Commission concludes that the Petition Area should therefore revert to its former classification.

15. Any conclusion 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.

ORDER

This Commission, having duly considered the written pleadings, and oral and written statements and testimony, and oral arguments of the parties, and a motion having been made and seconded at a hearing on May 22, 2019, in Kailua-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,

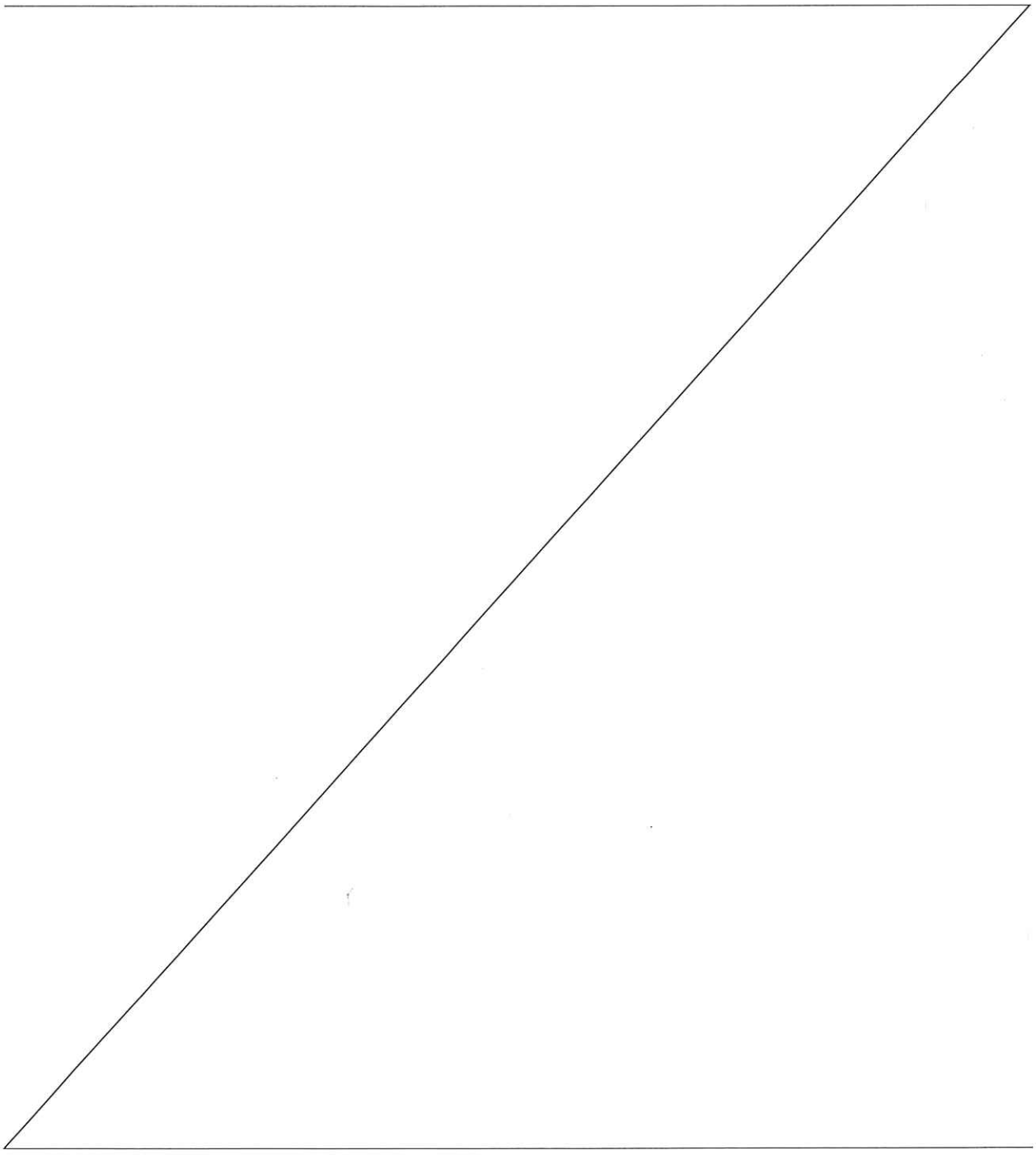
HEREBY ORDERS:

1. KNP, OP, and the Planning Department have jointly stipulated to an agreement with the reversion of the Petition Area.

2. The Petition Area, consisting of approximately 129.99 acres of land, identified as TMK: (3) 7-3-007: 038, 039, and (3) 7-3-009: 007, and shown on Exhibit "A" attached hereto and incorporated by reference herein, is therefore reverted to the State Land Use Agricultural District.

3. In compliance with HAR §15-15-93(e), the 2008 Decision and Order filed on October 21, 2008, is amended to incorporate the OSC 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

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 11th day of July, 2019. This ORDER may be executed in counterparts. This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, Hawai'i, this 27th day of June, 2019, per motion at Kailua-Kona, Hawaii on July 11, 2019..

APPROVED AS TO FORM

Randall S. Nishiyama

Deputy Attorney General

LAND USE COMMISSION

STATE OF HAWAI'I

JONATHAN SCHEUER

Chairperson and Commissioner

NANCY CABRAL

Vice Chair and Commissioner

AARON MAHI

Vice Chair and Commissioner

EDMUND ACZON

Commissioner

DAWN N. CHANG

Commissioner

Excused

DAN GIOVANNI

Commissioner

LEE OHIGASHI

Commissioner

GARY OKUDA

Commissioner

ARNOLD WONG

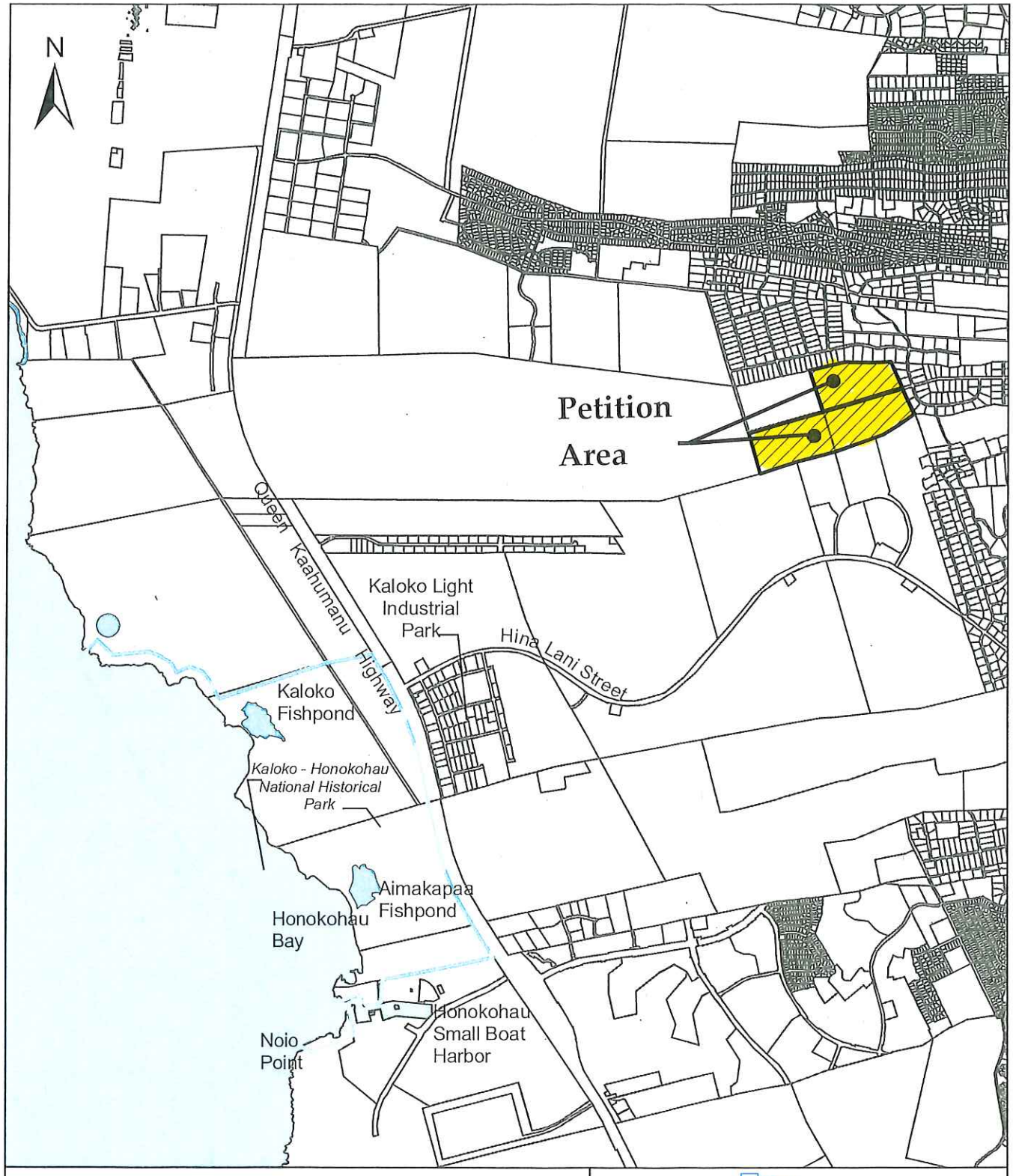
Commissioner

Filed and effective on: July _____, 11, 2019

Certified by:

DANIEL ORODENKER

Executive Officer



A06-770 THE SHOPOFF GROUP, L.P.

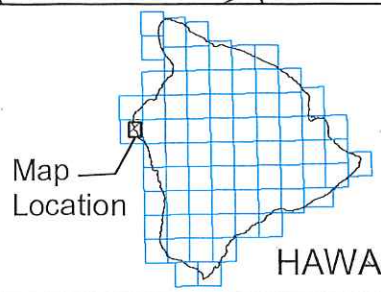
LOCATION MAP

TMK: (3) 7-3-007: 038, 039, and (3) 7-3-009: 007

North Kona District, Island of Hawai`i

Scale: 1" = 2,000 '

EXHIBIT "A"



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

In the matter of the Petition	)	DOCKET NO. A06-770
	)	
of	)	CERTIFICATE OF SERVICE
	)	
THE SHOPOFF GROUP, L. P.	)	
	)	
To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for Approximately 127.94 Acres at North Kona, Island of Hawai`i, TMK Nos.: (3) 7-3-007: 038, 039 and (3) 7-3-009: 007	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA; EXHIBIT A was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular and certified mail:

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Honolulu, Hawai`i, July 11, 2019.

Daniel Orodenker
Executive Officer