

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition Of

U of N BENCORP

To Amend the Agricultural Land Use District
to the Urban Land Use District for
Approximately 62 Acres, Tax Map Key Nos.:
(3) 7-5-010:085 and 7-5-017:006 situated at
Wai'aha, North Kona, County and State of
Hawaii'i

DOCKET NO. A02-737

MEMORANDUM IN SUPPORT OF
MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION.

At its May 22, 2019 hearing (the "**May 22nd Hearing**"), the Land Use Commission of the State of Hawaii'i (the "**Commission**") granted Successor Petitioner the University of Nations, Kona, Inc's ("**Petitioner**") *Motion to Continue Hearing on Order to Show Cause* (the "**Motion to Continue**") subject to certain stipulations and conditions. Petitioner is grateful to the Commission for granting the Motion to Continue, and will soon be submitting its six (6) month status report in conformance with the Commission's action at the May 22nd Hearing. However, Petitioner also believes that certain statements, Findings of Fact ("**FOF**") and Conclusions of Law ("**COL**") in the Commission's *Order to* [sic] *Granting United Nation* [sic] *of Kona's Motion to Continue Hearing on Order to Show Cause*, filed October 7, 2019 (the "**Order**"), contain errors and utilize language implying, incorrectly, that the merits of the *Order to Show Cause*, filed March 29, 2019 (the "**OSC**"), were addressed at the May 22nd Hearing. Petitioner

respectfully brings this Motion to ensure that the Order accurately reflects the record and action taken by the Commission at the May 22nd Hearing. This Motion is not intended to express any dissatisfaction with the Order.

II. BACKGROUND.

The Commission agenzized the following two (2) items for Petitioner at the May 22nd Hearing:

V. ACTION

A02-737 U of N BENCORP (HAWAII)

Consider Motion to Rescind Order to Show Cause or to Continue Hearing on Order to Show Cause

VI. HEARING AND ACTION

A02-737 U of N BENCORP (HAWAII)

Hear evidence, deliberate and take action on order to show cause issued March 29, 2019.

See Petitioner's Exhibit A, attached hereto.

The Commission first called and received argument on item V, Petitioner's *Motion to Rescind Order to Show Cause* (the "**Motion to Rescind**") or to *Continue Hearing on Order to Show Cause* (i.e., the Motion to Continue). Petitioner subsequently withdrew the Motion to Rescind and the Commission granted the Motion to Continue, subject to certain stipulations made between the Parties and additional conditions imposed by the Commission. Thus, because the Motion to Continue was granted, the Commission did not hold a hearing or take action on the OSC (Item VI).

III. POINTS OF CLARIFICATION.

A. THE CAPTION.

The Order contains typographical errors in the Caption. The Caption presently states: "Order to [sic] Granting United Nation [sic] of Kona's Motion to Continue Hearing on Order to Show Cause."

In addition to containing an extra "to," Petitioner's name is incorrect – Petitioner's correct name is the "University of Nations, Kona, Inc.," not "United Nation of Kona." Petitioner respectfully requests that the appropriate corrections be made to the Caption to address these errors..

B. PROCEDURAL BACKGROUND, PARAGRAPH NO. 9.

Paragraph 9 of the Procedural Background ("PB") section of the Order currently states that: "The original Petitioner, Bencorp changed the corporate name to AEKO Hawai'i, in 2006." However, U of N Bencorp changed its corporate name to AEKO Hawai'i on May 18, **2005**, not 2006. See **Petitioner's Exhibit B** (Petitioner's Notice of Representation of Counsel and Change in Ownership, filed May 1, 2019), attached hereto. Therefore, Petitioner respectfully requests that the appropriate correction be made to PB ¶9.

C. PROCEDURAL BACKGROUND, PARAGRAPH NO. 13.

PB ¶13 presently provides, in relevant part, that:

On March 28, 2019, The Commission held a hearing in Kailua-Kona, Hawai'i to hear from Petitioner regarding progress on the development **and to determine whether Petitioner was in compliance with the conditions of the 2003 Decision and Order**

(Emphasis added). Petitioner does not believe this is an accurate statement of the record. The March 28, 2019 hearing was requested by the Petitioner to provide the Commission with a Status Report. In order for the Commission to **determine**¹ whether Petitioner was in compliance with

¹ HAR § 15-15-93(b) provides, in pertinent part, that:

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.

Thus, under HAR § 15-15-93(b), a determination of whether a petitioner is in compliance with a decision and order must be made through a hearing held on an order to show cause, not a status report.

the conditions of the 2003 Decision and Order, it must issue an order to show cause.

Petitioner respectfully requests that "and to determine whether Petitioner was in compliance with the conditions of the 2003 Decision and Order" be deleted from PB ¶13.

D. PROCEDURAL BACKGROUND, PARAGRAPH NO. 16.

PB ¶16 presently provides that:

Petitioner acknowledged it had not met various conditions (Affordable Housing; Drainage Improvements; Public School Facilities; Water Resources; Wastewater Facilities; Archaeology, Cultural, Historical, Customary and Traditional Rights and Resources; Soil Erosion and Dust Control; Transportation; Traffic; Cultural Center; Civil Defense; Solid Waste; Compliance with Representations to the Commission; Notice of Change of Ownership; Annual Reports; and Release of the Conditions Imposed by the Commission) and provided explanations for why they had failed to comply with conditions of the D&O.

Petitioner does not believe this is an accurate statement of the record. Attached hereto as **Petitioner's Exhibit C** is the transcript of the March 28, 2019 hearing referred to in PB ¶16. As noted in the Order, that hearing was a Status Report. During the Status Report, Paul Childers and Anthony Ching spoke to Petitioner's compliance with the conditions of approval ("**D&O Conditions**") imposed under the *Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment*, filed August 8, 2003 (the "**D&O**"). *See, e.g.*, Exhibit B at 21:21-25:45:18. Mr. Ching also stated that certain D&O Conditions had not yet been triggered. *See id.* at 31:4-19. In fact, when asked point blank whether Petitioner had failed to comply with the D&O conditions, Mr. Ching stated: "Commissioner, I would respectfully disagree with that representation that Petitioner has failed to deliver on LUC Conditions." *See id.* at 41:16-42:3.

Based on the foregoing, Petitioner did not "acknowledge it had not met various conditions" or that it "failed to comply with conditions of the D&O," as set forth in PB ¶16. To accurately reflect the record, Petitioner respectfully requests that PB ¶16 be deleted.

E. PROCEDURAL BACKGROUND, PARAGRAPH NO. 35.

PB ¶35 presently provides, in relevant part, that:

On May 20, 2019, Petitioner filed a Joint Stipulation to Stay Hearing on OSC and Reservation of Rights ("Stipulation") Petitioner be allowed to conduct certain activities on the Project **that would not be considered to constitute substantial commencement**

(Emphasis added).

Attached here to as Petitioner's Exhibit D is a copy of the *University of the Nations, Kona, Inc., State of Hawaii Office of Planning and County of Hawaii, Planning Department's Joint Stipulation to Stay Hearing on Order to Show Cause and Reservation of Rights*, filed May 20, 2019 ("**Stipulation to Continue**"), which is the stipulation referred to in PB ¶35. The Stipulation to Continue specifically states:

Nothing in this Stipulation waives UNK's right to argue in any OSC proceedings that UNK has 'substantially commenced' its use of the Petition Area in accordance with the representations made to the Commission and all such rights are hereby reserved. *See DW Aina Le'a Dev., LLC v. Bridge Aina Le`a, LLC*, 134 Hawai'i 187, 339 P.3d 685 (2014).

To remove any ambiguity and potential for confusion, Petitioner respectfully requests that PB ¶35 be revised to simply recite the terms of the Stipulation to Continue in whole, as follows:

35. On May 20, 2019, Petitioner filed *University of the Nations, Kona, Inc., State of Hawaii Office of Planning and County of Hawaii, Planning Department's Joint Stipulation to Stay Hearing on Order to Show Cause and Reservation of Rights* ("Stipulation") between Petitioner, OP and the County. In the Stipulation to Continue, the parties stipulated to the following:

1. UNK shall not conduct any development activities, including, but not limited to, construction, grading, or performing any ground-disturbing activities, within the Petition Area during the pendency of the OSC Proceedings; provided, however, that pending final action by the Commission on the Amended Motion to Amend, UNK shall retain the right to continue with one or more of the following activities on and relating to the Petition Area:

- a. Revise, update and proceed with any and all new or existing development plans and studies necessary to support the Amended Motion to Amend;
 - b. Establish new and/or improve existing fire breaks and any other emergency work for the health and safety of the properties surrounding the Petition Area;
 - c. Conduct any and all further work to protect and preserve archaeological and historical sites within the Petition Area pursuant to plans approved by the State of Hawai'i Department of Land and Natural Resources, State Historic Preservation Division, including, without limitation, the installation of signage, the establishment of one or more access easements, and the restoration of damaged or disturbed burial sites;
 - d. Continue to pursue development of water sources within the Petition Area, including but not limited to the drilling of a test well;
 - e. Construct a security wall and/or fence around the perimeter of the Petition Area.
2. UNK shall submit a written six-month status report to the Commission and Parties no later than November 30, 2019.
 3. Nothing in this Stipulation waives UNK's right to argue in any OSC proceedings that UNK has "substantially commenced" its use of the Petition Area in accordance with the representations made to the Commission and all such rights are hereby reserved. *See DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC*, 134 Hawai'i 187, 339 P.3d 685 (2014).

F. PROCEDURAL BACKGROUND, PARAGRAPH NO. 36.

PB ¶36 presently provides, in relevant part, that: "On May 22, 2019, the Commission held the OSC hearing in Kailua-Kona"

As discussed *supra*, the Commission did not hold a hearing on the OSC at the May 22nd Hearing. The Commission **continued**, without commencing, its hearing on the OSC for one (1) year after granting the Motion to Continue. Therefore, the Commission did not hold a hearing or take any action on the OSC at the May 22nd Hearing. *See* Petitioner's Exhibit A.

Based upon the foregoing, Petitioner respectfully requests that the first portion of PB ¶36 be revised as follows:

On May 22, 2019 the Commission held a hearing on Petitioners Motion to Rescind Order to Show Cause or to Continue Hearing on Order to Show Cause in Kailua-Kona

G. FINDINGS OF FACT, PARAGRAPH NO. 40.

FOF ¶40 presently provides, in relevant part, that: ¶

Petitioner provided oral argument on the Motion to Continue the OSC Hearings, **explained the reason why Petitioner had not complied with conditions of its approval**

(Emphasis added).

Implicit in this statement is that Petitioner admitted that it had not complied with the D&O Conditions and/or that the Commission reached the "good cause" phase of an order to show cause hearing. Attached hereto as Petitioner's Exhibit E is a copy of the transcript of the May 22, 2019 hearing (the "**May 22nd Transcript**"). With respect, nothing in the May 22nd Transcript supports FOF ¶40.

Therefore, Petitioner respectfully requests that FOF ¶40 be revised as follows:

Petitioner provided oral argument on the Motion to Continue the OSC hearings, and expressed Petitioner's genuine interest and intent to develop the Petition Area.

H. FINDINGS OF FACT, PARAGRAPH NO. 42.

FOF ¶42 presently provides that: "Petitioner agreed that neither the Commission or its staff were responsible for the 2006 Motion to Amend not going forward."

Implicit in FOF ¶42 is that Petitioner was at fault for not bringing the matter forward. However, throughout the May 22nd Hearing on the Motion to Rescind, the issue raised was procedural, *i.e.*, that the Commission could not move forward with the OSC without first addressing the 2006 Motion to Amend, and not whose responsibility it was that the 2006 Motion to Amend was not heard. Standing alone, FOF ¶47 is misleading.

Petitioner requests that either FOF ¶47 be deleted in its entirety or be revised to provide:

Petitioner agreed that neither Petitioner, the Commission nor its staff were responsible for the 2006 Motion to Amend not going forward.

I. FINDINGS OF FACT, PARAGRAPH NO. 47.

FOF ¶47 presently provides that:

Petitioner represented it is willing to further develop the Property and to provide affordable housing for people to live and work, to provide a solution to the homelessness crisis.

A review of the May 22nd Transcript shows that the only reference to providing a solution to homelessness came from Commissioner Nancy Cabral. *See* Exhibit D at 130:129:24-130:3. Petitioner does not want to give the impression that it represented it was going to provide a solution to the homelessness crisis, although, like many, Petitioner is concerned about the homelessness crisis.

Based upon the foregoing, Petitioner respectfully requests that that FOF ¶47 be revised as follows:

Petitioner represented it is willing to further develop the Property and to provide affordable housing in accordance with the applicable housing requirements.

J. FINDINGS OF FACT, PARAGRAPH NO. 49.

FOF ¶49 presently provides that:

Petitioner stipulated and agreed that from the date of the Order to Show Cause going forward, that it will not argue or claim that it has substantially commenced the use of the land

While Petitioner acknowledges that the "going forward" language was used during its discussions with the Commissioners, Petitioner is concerned that FOF ¶49 is ambiguous and could be misconstrued. The stipulation that Petitioner agreed to, and which the Commission ultimately voted on (with additional conditions), was limited to not arguing that the activities that occur on and with the Petition Area in the period of time between the issuance of the OSC and the date of the continued OSC hearing (if ever) – *i.e.* one year the issuance of the OSC – would

not be used to argue "substantially commencement." The context of the entire exchange between Petitioner and the Commissioners at the May 22nd Hearing makes this clear.

For example, following his questioning of Petitioner regarding what Petitioner would agree to not argue as counting towards substantial commencement, Commissioner Gary Okuda concluded his questioning as follows:

And by the way, the time frame for those questions would be the time from the date of the entry of the order to show cause forward. **The Petitioner would still be able to make their argument on things that took place or did not take place prior to the entry of the Order to Show Cause.**

Petitioner's Exhibit D at 112:17-22. Petitioner's counsel subsequently confirmed that her understanding was consistent with Commissioner Okuda's:

Ms. Garson: Just so the record is clear, **we are stipulating that we will not argue that anything we do between the time of the issuance of the OSC and the hearing on the OSC constitutes substantial commencement.**

Chairperson Scheuer: Mr. Okuda.

Commissioner Okuda: **Yes, that is satisfactory. . . . So with your clarification, I think your clarification makes the question a lot clearer.**

Id. at 120:24-121:3 (emphasis added).

Therefore, for the sake of clarity, Petitioner respectfully requests that FOF ¶49 be amended to read as follows:

Petitioner stipulated and agreed that from the date of the Order to Show Cause going forward, that it will not argue or claim that it has substantially commenced its use of the land based on actions taken between the issuance of the Order to Show Cause and any subsequent hearing on the Order to Show Cause; provided, however, that Petitioner may make its argument that actions that took place prior to the issuance of the Order to Show Cause count towards substantial commencement.

K. CONCLUSIONS OF LAW, PARAGRAPH NO. 4.

COL ¶4 presently provides that:

HAR §§15-15-50(c) and 15-15-78(a) establish a ten-year deadline for completion of

district boundary amendment projects, unless incremental districting has been approved or waived.

Petitioner objects to this characterization of the law and requests that it be deleted, particularly given that this COL is unnecessary given that the Order is granting a continuance of the OSC (*i.e.*, Petitioner's Motion to Continue) and not an order on the OSC itself. The *University of Nations, Kona, Inc.'s Statement of Position and Rebuttal to the Statement of Position of the Office of Planning on the Order to Show Cause issued by the State of Hawaii Land Use Commission on March 29, 2019*, filed on May 3, 2019 ("**Statement of Position**"), rebutted the statement in COL ¶4, and Petitioner has not had an opportunity to argue this point to the Commission because the OSC was continued.

One of the arguments in the Statement of Position was that there was no time limitation to complete the project in the D&O. *Compare, e.g.*, Waikapu Properties, LLC; MTP Land Partners, LLC; William S. Filios, Docket No. A15-798, entered on February 26, 2018, Order ¶25 ("Petitioner shall complete construction of the proposed backbone infrastructure, . . . within ten years from the date of the Decision and Order approving the Petition"); CMBY 2011 Investment, LLC, Docket No. A13-797, entered on November 22, 2013, Order ¶19 ("Petitioner shall complete construction of the proposed backbone infrastructure for the project, . . . within ten (10) years from the date of this Decision and Order approving the Petition.").

Again, because the OSC was continued, there is no reason for COL ¶4 to be contained in the Order, and Petitioner respectfully requests that it be deleted.

L. CONCLUSIONS OF LAW, PARAGRAPH NO. 5.

COL ¶5 presently provides that:

Petitioner has failed to meet its representations on timely completion of the project and failed to meet the deadlines inherent in and pursuant to HAR §§15-15-50(c)(20) and 15-15-78(a).

Respectfully, for the reasons discussed *supra*, the Commission could not have made this conclusion because the hearing on the OSC was continued.

Therefore, based upon the foregoing, Petitioner respectfully requests that COL ¶5 be deleted.

M. ORDER, PARAGRAPH NO. 3.

Paragraph No. 3 of the Order begins by stating that: "Substantial commencement has not occurred"

The Commission's hearing on the OSC was continued without ever starting. Petitioner was not afforded an opportunity to argue that substantial commencement has occurred, and the Commission did not take evidence on whether substantial commencement has occurred.

Therefore, with respect, the Commission could not have found that substantial commencement has not occurred. The remainder of the Paragraph No. 3 is correct.

Based on the foregoing, Petitioner respectfully requests that Paragraph 3 of the Order be amended to read as follows:

Petitioner will not argue that substantial commencement has occurred during the extension of the Order to Show Cause hearing based on Petitioner's work on any of the five activities identified in the May 20, 2019 Joint Stipulation to Stay Hearing signed by Petitioner, the State Office of Planning, and the County of Hawai'i.

IV. CONCLUSION

In order to accurately reflect the record and prevent confusion in the future, Petitioner respectfully requests that the Commission reconsider the Order and make the corrections and revisions requested herein.

//

//

//

DATED: Honolulu, Hawai'i, October 14, 2019.



STEVEN S.C. LIM
KATHERINE A. GARSON
DEREK B. SIMON

Attorneys for
UNIVERSITY OF THE NATIONS, KONA,
INC.