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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of	DOCKET NO. A87-610
TOM GENTRY AND GENTRY-PACIFIC, LTD.	OFFICE OF PLANNING'S RESPONSE TO SUCCESSOR PETITIONER'S REBUTTAL MEMORANDUM IN RESPONSE TO OFFICE OF PLANNING'S RESPONSE TO TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, DBA KAMEHAMEHA SCHOOLS, MOTION FOR MODIFICATION AND TIME EXTENSION; CERTIFICATE OF SERVICE
To Amend the Agricultural Land Use District Boundary into the Urban Land Use District of Approximately 1,395 Acres of Land at Waiawa, 'Ewa, Island of O'ahu, Hawai'i, Tax Map Key Nos: (1) 9-4-006: por. of 026; 9-6-004: por. of 001 and 016; and 9-6-005: por. of 007 and 014.	

OFFICE OF PLANNING'S RESPONSE TO SUCCESSOR PETITIONER'S REBUTTAL MEMORANDUM IN RESPONSE TO OFFICE OF PLANNING'S RESPONSE TO TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, DBA KAMEHAMEHA SCHOOLS, MOTION FOR MODIFICATION AND TIME EXTENSION

The Office of Planning, State of Hawai'i ("OP"), provides this response to Successor Petitioner's Rebuttal Memorandum in Response to Office of Planning's Response to Trustees of

the Estate of Bernice Pauahi Bishop, dba Kamehameha Schools, Motion for Modification and Time Extension, filed on November 4, 2019 ("Petitioner's Rebuttal Memo").

OP has recommended approval of Petitioner's Trustees of the Estate of Bernice Pauahi Bishop, dba Kamehameha Schools, Motion for Modification and Time Extension ("Petitioner's Motion") subject to a condition[1] requiring that Petitioner shall complete construction of the backbone infrastructure of Phase A of the proposed Project within ten (10) years from the Commission's Order approving Petitioner's Motion ("Infrastructure Deadline Condition"). OP has recommended this condition based on Petitioner's unreasonable and untimely proposed development schedule and the lack thus far of Petitioner to abide by its representations made to the Commission.

Under Petitioner's Revised Master Plan and Schedule for Development, filed with the Commission on October 1, 2019 ("Petitioner's Development Schedule"), Petitioner will not begin construction of Phase A of the Project, consisting of 410 acres, 210 of which are not part of the Petition Area, until 2030, which is ten (10) years from now and forty-two (42) years following the original 1988 Decision and Order ("1988 D&O"). Build out of Phase A is to be completed in 2040. Phase B of the Project, consisting of 617 acres of the Petition Area, will begin construction in 2038, with build out completed by 2048. Phase C of the Project, consisting of 316 acres, 114 of which are not part of the Petition Area will begin construction in 2046, with build out completed by 2060. Phase D of the Project, consisting of 268 acres will begin construction in 2056, with build out completed by 2066. Phase E of the Project, consisting of

[1] OP's proposed condition states: "Waiawa Master Plan Infrastructure Deadline. Petitioner shall complete construction of the backbone infrastructure for the proposed Waiawa Master Plan Phase A, consisting of the primary roadways and access points, internal roadways, on-and off-site water and electrical system improvements, and stormwater/drainage and other utility system improvements, within ten (10) years from the Commission's Order approving this Motion."

399 acres, 291 of which are not within the Petition Area, will begin construction in 2062 with completion in 2076.

For the reasons stated below, OP believes that the Commission should, and is authorized to, impose OP's Infrastructure Deadline Condition to ensure timely development of the Petition Area.

I. Petitioner is Subject to and in Violation of the Project Timeline of the Original 1988 Decision and Order, and OP is not Barred From "Relitigating" Petitioner's Newly Proposed Development Schedule.

Petitioner argues that there was no deadline or project timeline for the Petition Area under any Commission order and that OP is now "barred by the doctrine of res judicata from relitigating those decisions." *Pg. 9 of Petitioner's Rebuttal Memo.*

A. Petitioner is Subject to and In Violation of the Project Timeline of the Original 1988 Decision and Order.

Petitioner incorrectly assumes that Petitioner cannot be held to a schedule of development *unless* there is an explicit condition in the D&O. In fact, there is a twelve (12) year deadline as represented by Petitioner to the Commission in the original Findings of Fact, Conclusions of Law and Decision and Order, dated May 17, 1988 ("1988 D&O"), and Petitioner can be held to such "representations" that were made by Petitioner in seeking the boundary amendment.

Petitioner represented to the Commission and the Commission adopted Finding of Fact ("FoF") No. 39 on page 13 of the 1988 D&O that "Petitioner proposes to develop the Property over a twelve-year period... Construction is projected to begin in 1990." Petitioner also represented under FoF No. 47 on page 13 that "Petitioner proposes to provide 3,900 units of conventional housing over 10 years and 4,000 units in the leisure village over 12 years." As such, the residential/commercial project under the 1988 D&O should have been completed by the year 2002. The Commission relied on this and other representations made by Petitioner

when it approved the district boundary amendment. There is an expectation that Petitioner substantially commence use of the land "in accordance with such representations". *Hawai'i Revised Statutes ("HRS") § 205-4(g).* It would be unfair and unreasonable to allow a petitioner to simply disregard its representations made to the Commission in receiving the DBA approval once the approval was made. It is now 2019, seventeen (17) years past the deadline, and therefore Petitioner is in violation of the 1988 D&O. While there have been two amendments to the 1988 D&O -- in 1990 and 2014 -- neither of those amendments altered, superseded or canceled Petitioner's representation of the twelve-year project deadline. The twelve-year deadline still stands and Petitioner is in continued non-compliance with that deadline.

For argument's sake, even if Petitioner could not be held to its representation that the project would be constructed in twelve-years, Petitioner's Development Schedule that would commence construction ten years from now and will be completed in 57 years is simply not a reasonable timeframe for development. *See Part III below.*

B. The Doctrine of Res Judicata Does Not Apply to Petitioner's Newly Submitted Development Schedule.

The doctrine of res judicata, which prohibits the relitigation of all grounds and defenses which might have been properly litigated in the prior action, even if the issues were not litigated or decided in the earlier adjudication of the subject claim or cause of action, does not apply here. *Smallwood v. City and County of Honolulu, 118 Hawaii 139, 147 185 P.3d 887, 895 (2008).* Res judicata is applicable when: (1) the claim or cause of action in the present action is identical to the one decided in the prior adjudication; (2) there was a final judgment on the merits in the prior adjudication; and (3) the parties to the present action are the same or in privity with the parties in the prior action. *Id. at 146, 185 P.3d 894.*

First, OP's "claim" in the present action – that Petitioner be held to a reasonable timeframe for development – is not identical to the one decided in prior Commission orders. OP's claim is based on and specific to Petitioner's Development Schedule that was newly provided to the Commission on October 1, 2019, and therefore could not have been "litigated" prior to the 1988 D&O, the 1990 D&O Amendment, or the 2014 D&O Amendment. Petitioner never indicated prior to its October 1, 2019 Development Schedule that it would develop the property in such an excessively drawn out manner. This is the only and earliest time at which OP could address this particular issue.

Secondly, while there was a final decision on a twelve-year timeframe for the development in the 1988 D&O, which Petitioner has failed to comply with, Petitioner has now reopened and "revisited" that final decision as Petitioner now seeks to dramatically alter the timeframe. OP being in privity with the Parties of the original action should not be barred now from reviewing and challenging Petitioner's proposed change to that final decision.

In sum, Petitioner's newly provided Development Plan that reopens and "revisits" the final decision on Petitioner's timeframe for development does not meet the requirements of the doctrine of res judicata. OP is therefore not barred from "relitigating" any decision of the Commission on Petitioner's timing of development.

II. Petitioner Misconstrues the 2014 D&O Amendments.

Petitioner argues that under Condition Nos. 7 and 10 of the 2014 D&O Amendment, no other development is to take place within the 1,395-acre Petition Area until the solar farms are decommissioned, which decommissioning is to be completed by November 2049. *Pg. 4 of Petitioner's Rebuttal Memo.* Phase I of the solar project would occupy 387 acres and Phase II of the solar project would occupy 268 acres, for a total of 655 acres of the Petition Area. And

therefore, Petitioner is prevented from developing its proposed residential/commercial development project on the remaining 740 acres -- which is more than half of the Petition Area -- until November 2049.

Petitioner misconstrues Condition Nos. 7 and 10 as only allowing development of the solar project occupying 655 acres of the Petition Area and no other development throughout the remaining 740 acres. Condition No. 7 states,

> Interim Use of the Petition Area. The interim use of the Petition Area shall be limited to a utility-scale solar energy development or solar farm. No other use shall be permitted without the prior written approval of the Commission.

(Emphasis added.) Condition No. 7 clearly states that the "interim use of the Petition Area", not simply the "Petition Area", shall be limited to the solar project. In other words, the 655-acre area of the Petition Area for the solar project may not include other uses.

Condition No. 10 states in pertinent part,

> ...Any future use of the Petition Area following the decommissioning of the solar farm shall be subject to the environmental review process promulgated under HRS chapter 343, as applicable, and shall require the filing of a motion to amend the Decision and Order with the Commission.

(Emphasis added). Condition No. 10, requiring environmental review and a motion to amend applies to the future use of the 655 acres of the Petition Area following its use for the solar project, not the entire Petition Area.

Moreover, the Decision and Order of the 2014 Amended D&O is specific and limited to the 655 acres of the Petition Area, not the entire 1,395-acre Petition Area. The Decision and Order of the 2014 Amended D&O states in pertinent part,

> IT IS HEREBY ORDERED that the identified areas within the KS Property, consisting of approximately 655 acres of land

> situate at Waiawa and Waipi'o, 'Ewa, O'ahu, Hawaii, ... may be used as a solar farm ...
>
> IT IS FURTHER ORDERED that the use of the identified areas within the KS Property for a solar farm shall be subject to the following conditions: ...

(Emphases added).

Condition Nos. 7 and 10 of the 2014 Amended D&O therefore apply only to the 655-acre portion of the Petition Area, not the entire 1,395-acre Petition Area. Therefore, all representations and conditions unmodified by the 1990 and 2014 amendments remain in effect, including the requirement and representation that Petitioner develop the 7,906 housing units throughout the remaining 1,395-acre Petition Area within twelve years of the 1988 D&O.

III. Petitioner's Proposed Timing of Development of the Petition Area Far Exceeds the Statutory and Reasonable Timeline for Development Under HRS Chapter 205.

Even as the project is seventeen years past its twelve-year deadline for development, Petitioner now proposes a schedule that far exceeds a reasonable timeframe for development in the future. Petitioner's Development Schedule, submitted to the Commission on October 1, 2019, pursuant to Condition No. 1 of the Order Granting Motion for Order Amending Findings of Fact, Conclusions of Law and Decision and Order dated May 17, 1988, filed November 26, 2014 with the LUC ("2014 Amended D&O"), is an unreasonably protracted timeframe that amounts to untimely development of the Petition Area. Notably, OP urged the Commission to adopt Condition No. 1 specifically because in 2014, it was obvious that Petitioner was well behind in its development schedule and should be required to demonstrate how it would timely move the Project forward. FoF No. 135 stated, "Given the length of inactivity in the Petition Area, the importance of the land bridge and infrastructure cost-sharing agreement to the incremental districting in Docket No. A11-793, and the plan changes necessitated by the 35-year

use of approximately 655 acres for solar farms, OP believes Petitioner needs to move forward with its planning for the Petition Area."

A. The Legislature Recognized and Intended Timely Development of District Boundary Projects.

With development of the Project set to commence more than four decades after the original Commission approval, and commencement of construction for only the first 200 acres of the 1,395-acre Petition Area to commence construction ten years from now, and full completion fifty-seven (57) years from now, the Project timeline defies the basic premise that projects shall substantially commence within a reasonable amount of time upon Commission approval.

The Hawaii Revised Statutes ("HRS") § 205-4(g) states in pertinent part,

> The[C]ommission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the [C]ommission 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.

(Emphasis added). In *DW 'Aina Le'a Development, LLC v. Bridge 'Aina Le'a, LLC,* 134 Hawai'i 187, 339 P.3d 685 (2014) ("*'Aina Le'a*"), the Hawai'i Supreme Court recognized 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." *'Aina Le'a* at 211, 339 P.3d at 709. Importantly here, HRS § 205-4(g) "empowered the LUC to address a particular situation, namely, where the landowner does not develop the property in a timely manner." *Id.* (Emphasis added). 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 subject to ... uncertain development schedules[.]" and that "[s]uch ... 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." *Id.* quoting *S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915.* The Legislature therefore sought to curb untimely development and scrutinize projects failing to commence soon after Commission approval. Including the twelve-year deadline, Petitioner is asking to commence the project thirty-two (32) years from the 1988 D&O, and completion of the project eighty-eight (88) years from the 1988 D&O.

B. The Standard Timeframe forDistrict Boundary Projects is Ten (10) Years.

In stark contrast to the timeframe proposed by Petitioner, the standard timeframe for district boundary amendment projects is ten (10) years, unless Petitioner can justify a longer timeframe, or the Commission allows ten-year increments of development with each increment requiring Commission approval. Hawai'i Administrative Rules ("HAR") § 15-15-50(c)(20) requires in each Petition submitted to the Commission for boundary amendment that:

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

(Emphases added).

Additionally, the district boundary process requires that the Commission consider whether a proposed project for district boundary amendment will be substantially completed within ten (10) years. Otherwise, it must consider incremental districting of the petition area. HAR § 15-15-78 states in pertinent part,

> If it appears to the commission that full development of the subject property cannot substantially be completed within ten years after the date of the commission's approval and that the incremental development plan submitted by the petitioner can be substantially completed, and if the commission is satisfied that all other pertinent criteria for amending the land use boundary for the subject property or part thereof are present, then the commission may,
>
> (1) Grant the petitioners request to amend...; or
> (2) Amend the land use boundary for only that portion of the subject property which the petitioner plans to develop first and upon which it appears that substantial development can be completed within ten years after the date of the commission's approval.

Based on this ten-year standard which has been applied consistently to other district boundary amendment projects[2], there is no basis for the Commission to allow Petitioner's Development Schedule that has no regard for and strays far from the standard ten-year timeframe.

IV. The Commission Should Treat All Projects and Developers Equally.

This Commission is aware of the need for developers to timely develop DBA approved projects as it has scrutinized other projects that failed to substantially commence development in a timely manner. In the last two years, pursuant to HRS § 205-4(g), the Commission has issued Orders to Show Cause for Docket Nos. A06-767 Waikoloa Mauka, LLC, A02-737 U of N Bencorp, and A06-770 The Shopoff Group (collectively "the OSC dockets"). The OSC dockets, like this Docket, had failed to commence any physical development on the petition areas within the timeframe represented to the Commission. Notably, compared to the OSC Dockets, this

[2] For example, A06-771 - D.R. Horton-Schuler Homes, LLC, "Ho'opili Project", proposing a mixed-use, transit-ready community of 11,750 residential units on 1,525.516 acres, is subject to a ten-year off-site infrastructure and certain onsite backbone roadway and utility infrastructure deadline, and a twenty-year backbone infrastructure associated with subdivision and utility systems. A11-793 - Castle & Cooke Homes, Inc., "Koa Ridge Project", proposing a mixed use village, including 5,000 residential units, hotel, medical component, light industrial, schools, etc., on 767.649 acres, is subject to two increments – the first increment to be substantially completed in 2022 (eight years after approval), and the second increment to be completed by 2026 (twelve years after approval).

Docket has significantly more Petition Area acreage, more proposed housing units and more years since the D&Os was approved by the Commission. *See* table below.

Petitioner	DBA Approval Date	Project Timeframe	Time Since D&O Approval	Petition Area	Proposed Use
Kamehameha Schools	May 17, 1988	12 years (D&O No. 39)	31 years	1,395 acres	Residential community including **7,906** housing units.
Waikoloa Mauka, LLC	June 10, 2008	10 years, (Condition No. 2)	11 years	731.581 acres	**398** rural lots for residential use with a minimum one-acre lot size.
U o N Bencorp	August 8, 2003	5 years for residential (FoF No. 64)	16 years	62 acres	**400**-unit condominium complex, cultural center and educational facility.
The Shopoff Group	October 21, 2008	10 years (FoF No. 204)	11 years	129.99 acres	Residential subdivision for **270** residential units.

To be clear, OP is not advocating for the Commission to issue an Order to Show Cause for this Docket, although it probably could based on the record. OP is merely asking that the Commission hold this Petitioner to the same standard and expectation as other Petitioners who have not timely commenced development. Petitioner should be required to submit a development schedule that demonstrates substantial commencement or project completion will occur within ten years of approval, or justify an incremental districting schedule.

V. Delayed Timing of Development Disrupts State Planning Processes and Policies.

As the Legislature stated, "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." In approving this boundary amendment, the LUC relied on Petitioner's representations, including that there was a need for (*FoF No. 46*) and that Petitioner would build 7,906 housing units by the year 2000. The State's

goal of providing not just affordable housing but an adequate housing inventory in general is hampered by projects like these that fail to fulfill its obligations.

And while 7,906 housing units of housing have yet to be realized, the Petition Area has laid fallow. According to the State Department of Agriculture's Agricultural Lands of Importance to the State of Hawaii (ALISH) system, the majority of the 1,395-acre Petition Area is classified as "Prime" and a smaller portion is classified as "Other Important Agricultural Lands". *FoF No. 15 of 1988 D&O.* The Land Study Bureau Detailed Land Classification for the Petition Area is rated "A" and "B" lands. *FoF No. 16 of 1988 D&O.* It could not have been the Legislature's or the Commission's intent under a district boundary amendment approval to allow 1,395 acres of "Prime" classified and "A" and "B" -rated agricultural land to lay fallow and forego the completion of 7,906 housing units for eighty-eight (88) years.

VI. The Commission Has the Authority to Require A Reasonable and Timely Development of the Project.

A. OP's Proposed Condition is Appropriate and Has An Essential Nexus to the Untimely Project.

Petitioner argues that its Development Schedule is not a matter for review under this Motion. Petitioner believes that because it is "requesting some minor modifications to the solar farm... [and] ... is not seeking Commission approval for new, non-solar related development," OP's proposed Infrastructure Deadline condition lacks an "essential nexus" to Petitioner's Motion, and is therefore barred from raising its Infrastructure Deadline Condition. OP disagrees.

Petitioner states that there must be a clear nexus between a condition imposed upon a land use approval and the impacts that approval could bring. Petitioner mistakenly argues the "essential nexus" between OP's proposed condition and Petitioner's modification to the solar farm. The "essential nexus" is between requiring Petitioner to timely develop its proposed

project and Petitioner's failure to abide by the twelve-year deadline of the 1998 D&O, and Petitioner's recently proposed untimely land unreasonable development schedule. There is a legitimate State interest in adopting OP's condition is to ensure that Petitioner timely and reasonably develops the Petition Area.

The solar project and the proposed modifications to the solar project, the timing of the proposed project in the 1998 D&O and Petitioner's proposed development schedule for the residential/commercial component are all within the same docket. Petitioner points to no authority limiting the Commission to Petitioner's "very limited modifications to the 2014 Order", and prohibiting the Commission to address an unreasonable timeframe for the proposed development and the violation of Petitioner to abide by its 1998 D&O representations.

Moreover, if the Commission were to adopt Petitioner's theory that OP cannot raise its condition regarding timely development unless and until Petitioner makes a Motion regarding its development schedule, Petitioner may never do so and continue to proceed in violation of the 1998 D&O and under the assumption that it need not develop the Petition Area in a timely and reasonable manner. OP recommends its Infrastructure Deadline Condition specifically as a result of Petitioner's October 1, 2019 filing of its Development Schedule, which was prompted by Condition 1 of the 2014 Amended D&O. Petitioner complied with Condition 1 of the 2014 Amended D&O by timely submitting the Development Schedule, however, the substance of the Development Schedule are objectionable. It is appropriate now for OP to address the Development Schedule through recommendation of its Infrastructure Deadline Condition.

B. The Commission Has Clear Authority to Adopt OP's Condition Requiring Timely Development of the Project.

Based on Petitioner's proposed unreasonable and untimely development schedule, and in the interests of fairness and upholding the intent and spirit of HRS Chapter 205, OP is requesting

a condition requiring substantial commencement of the project within ten years of approval of this Motion. The Commission is clearly authorized to require such condition based on HAR § 15-15-79, which states:

> Petitioners granted district boundary amendments shall make substantial progress within a reasonable period, as specified by the commission, from the date of approval of the boundary amendment, in developing the property receiving the boundary amendment. The commission may act to amend, nullify, change or reverse its decision and order if the petitioner fails to perform as represented to the commission within the specified period.

Petitioner has failed to make substantial progress within a reasonable period as specified in the 1988 D&O in developing the property, and therefore, the Commission may amend its decision and order to include OP's Infrastructure Deadline Condition as Petition has failed to perform as represented to the Commission.

For the aforementioned reasons, OP again requests that the Commission adopt its proposed Infrastructure Deadline Condition.

DATED: Honolulu, Hawai'i, November 19, 2019.

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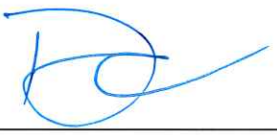

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	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular mail.

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