

CARLSMITH BALL LLP

JENNIFER A. LIM 8357
PUANANIONAONA P. THOENE 10005
ASB TOWER
1001 Bishop Street, Suite 2100
Honolulu, Hawai'i 96813
Tel No. 808.523.2500

Attorneys for Successor Petitioner
KAMEHAMEHA SCHOOLS

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

LAND USE COMMISSION
STATE OF HAWAII
2019 NOV - 4 P. 4: 26

In the Matter of the Petition of

TOM GENTRY AND GENTRY-PACIFIC,
LTD.

To Amend the Agricultural Land Use District
Boundary into the Urban Land Use District for
Approximately 1,395 Acres of Land at
Waiawa, Ewa, O'ahu, City and County of
Honolulu, State of Hawai'i, Tax Map Key
Nos.: 9-4-06: Portion of 26; 9-6-04: Portion of
1 and Portion of 16; and 9-6-05: Portion of 1,
Portion of 7 and Portion of 14

DOCKET NO. A87-610

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 October 21, 2019];
EXHIBITS 42 - 44; CERTIFICATE OF
SERVICE

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

Successor Petitioner LANCE KEAWE WILHELM, ROBERT K.W.H. NOBRIGA,
ELLIOT K. MILLS, MICAH A. KANE, and CRYSTAL KAUILANI ROSE, as TRUSTEES OF
THE ESTATE OF BERNICE PAUAHI BISHOP, dba KAMEHAMEHA SCHOOLS ("KS" or
"Petitioner"), by and through its legal counsel, CARLSMITH BALL LLP, hereby submits it
rebuttal 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 October 21, 2019
("OP's Response").

I. STATEMENT OF THE CASE

KS sincerely appreciates OP's support for KS' *Motion for Modification and Time Extension* filed on July 24, 2019 ("**2019 Motion**"), but KS strongly objects to OP's recommendation of the imposition of condition 1 set forth in OP's Response. *See* OP's Response at 10.

By *Findings of Fact, Conclusions of Law and Decision and Order* filed May 17, 1988 (the "**Waiawa Order**"), the State of Hawai'i Land Use Commission ("**Commission**") reclassified approximately 1,395 acres of land situate at Waiawa, Ewa, Oahu (the "**KS Property**" or "**Petition Area**"), from the State Land Use Agricultural District to the State Land Use Urban District, subject to 10 conditions of approval. A copy of the Waiawa Order is provided as **KS Exhibit 42**. Condition 6 of the Waiawa Order was later amended pursuant to a motion filed by Tom Gentry and Gentry-Pacific, Ltd. (the original petitioners in this Docket), as documented in the Commission's *Order Granting Motion to Amend Condition No. 6 of the Decision and Order Dated May 17, 1988*, filed on November 30, 1990 (the "**1990 Amendment**"). A copy of the 1990 Amendment is provided as **KS Exhibit 43**. Unless otherwise stated, as used herein the term "Waiawa Order" shall refer to both the order issued in 1988 and the 1990 Amendment.

By that certain *Order Granting Motion for Order Amending Findings of Fact, Conclusions of Law and Decision and Order Dated May 17, 1988*, filed on November 26, 2014 (hereinafter referred to as the "**2014 Order**"), a copy of which is provided as **KS Exhibit 44**, the Commission amended the Waiawa Order to expressly authorize the use of approximately 655-acres within the KS Property (an area of approximately 387 acres and an area of approximately 268 acres) for the development of utility scale solar farms for an interim period not to exceed 35 years, i.e., for a period terminating as of November 26, 2049. The 2014 Order was issued subject to 16 conditions of approval.

Condition 1 of the 2014 Order required KS to submit to the Commission a revised master plan and schedule for development for the Petition Area by November 26, 2014. Notably, condition 1 of the 2014 Order does not require KS to obtain approval of the master plan and development schedule. KS submitted a 21-page master plan, conceptual site plans, and a detailed development schedule for the Petition Area (collectively, the "**KS Master Plan**"), on October 7, 2019. The submittal of the KS Master Plan is outside of the filings and proceedings

related to KS' pending 2019 Motion. The submittal of the KS Master Plan is a requirement that exists irrespective of the 2019 Motion and that requirement has been satisfied.

The pleadings that are before the Commission today arise out of KS' 2019 Motion, whereby KS is seeking very limited modifications to the 2014 Order. Specifically, KS is seeking to extend the period of time for which portions of the Petition Area can be used as a solar farm from November 2049 to December 2059, and to make related alterations to reflect the currently proposed solar farm e.g., to reduce the solar farm footprint and expressly authorize certain utility infrastructure. The amendments sought through the 2019 Motion are necessary due to unavoidable delays and difficulties faced by the initial solar farm developer. Those difficulties have been documented in KS' annual reports to the Commission and in the 2019 Motion. In summary, the original developer was not able to obtain a required approval from the Hawai'i Public Utilities Commission ("PUC") and shortly thereafter went bankrupt. As detailed in the 2019 Motion, the current solar farm developer, Waiawa Solar Power LLC, has obtained approval from the PUC for its power purchase agreement with Hawaiian Electric Company, Inc. Moreover, renewable energy is needed now more than ever. Under Act 97 (2015), the State is committed to generating 100 percent electricity from renewable energy resources by the year 2045. The currently proposed solar farm will provide 36 megawatts with a 144 megawatt-hour battery energy storage system.

It appears that the Office of Planning ("OP") is mistaken about which matter is before the Commission. On October 21, 2019—approximately three months after KS filed the 2019 Motion—OP's Response was filed. As previously stated, KS genuinely appreciates the support presented in OP's Response, but KS must object to one of the conditions that OP asks this Commission impose. In the context of the pending 2019 Motion requesting minor modifications to the previously approved solar farms, OP recommends that the Commission impose a requirement that KS complete a massive residential/commercial development project within the next 10 years. OP recommends the Commission impose the following condition upon KS' request for modifications related to the timing of the solar farm project:

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.

See OP's Response at 10 ("**OP's New Condition**"). As set forth in detail below, however, OP's New Condition is procedurally and substantially improper to impose in this limited proceeding that seeks a minor modification for a previously approved solar farm, and does not involve a petition for District Boundary Amendment or modifications related to the development of the KS Master Plan.

II. ARGUMENT

KS strongly objects to OP's New Condition on several grounds. First, OP's New Condition runs contrary to the Commission's 2014 Order, which expressly ordered that no other development was to take place within the Petition Area until the previously approved solar farms were decommissioned, which decommissioning was to be completed by November 2049. *See* 2014 Order, conditions 10 and 7. OP's New Condition would mandate the completion of a significant new non-solar project by 2029, which is contrary to the 2014 Order.

Second, the Commission intentionally never imposed a development deadline upon the Petition Area under the Waiawa Order. The Commission granted the reclassification of the Petition Area in 1988 subject to 10 conditions of approval. None of those conditions included a development deadline, although the Commission certainly had the legal authority and discretion to impose such a deadline at that time if it so chose. Furthermore, OP was a party to the Waiawa Order and never sought to impose a development timeframe upon the Petition Area in 1988, 1990, or in the proceedings that led up to the 2014 Order. In fact, in the 2014 proceedings OP expressly declined to recommend a non-solar development timeframe on the Petition Area. Consideration of OP's New Condition is barred by the doctrine of *res judicata*.

Third, the timing for the non-solar development of the Petition Area is not a matter for review under the 2019 Motion. Through the 2019 Motion, and to be fully compliant with condition 11 of the 2014 Order,¹ pursuant to Hawai'i Administrative Rules ("**HAR**") § 15-15-94,

¹ Condition 11 of the 2014 Order provides as follows: Compliance with Representations. Petitioner shall cause the solar farm operator to develop and operate Phase 1 and Phase 2 of the solar farm, including the implementation of measures to mitigate potential impacts of the development, in substantial compliance with the representations made to the Commission as reflected in this Decision and Order. Such mitigation measures include, but are not limited to, the use of temporary and permanent BMPs to ensure that the development and operation of the solar farm do not result in an increase in stormwater runoff that adversely impacts downstream properties. Failure to do so may result in reversion of the Petition Area to its former classification, or change to a more appropriate classification.

KS presents good cause for the Commission to authorize some modest alterations to the previously approved solar farms, including an extension of time due to unavoidable delays in the initiation of development of the solar farms. KS is not seeking Commission approval for new, non-solar related, development. OP presents no evidence to the contrary. Furthermore, the law cited by OP (HAR § 15-15-50) does not apply to motions for modifications, it applies to petitions for District Boundary Amendments. As such, OP's New Condition lacks any nexus to the relief KS is seeking through the pending 2019 Motion.

The U.S. Supreme Court has made it clear that there must be a nexus between a condition imposed upon a land use approval and the impacts that approval could bring. Furthermore, the proposed condition must be roughly proportional to the expected impacts. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (government may compel a landowner to convey an easement to the public as a condition of development approval when such a dedication would ameliorate problems that could be caused by the proposed project) ("*Nollan*"); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (the consideration is whether the exaction is roughly proportional to the projected impact of the proposed land use) ("*Dolan*"). Here, KS is requesting some minor modifications to the solar farm that was approved under the 2014 Order. There is no connection, or nexus, between those modifications and imposition of a development deadline for a wholly unrelated project. Issues of fundamental fairness, i.e. procedural and substantive due process, preclude the imposition of OP's New Condition.

Fourth, OP's New Condition seeks to impose upon the Petition Area a new obligation that will compromise KS' ability to identify and negotiate with a suitable development partner. OP's New Condition will put a cloud over KS and the Petition Area that could have the perverse effect of delaying KS' ability to get non-solar development started at Waiawa.

A. OP'S NEW CONDITION VIOLATES THE 2014 ORDER

The 2014 Order authorized as an interim use of the Petition Area the development of two utility scale solar farms, including all related utility and other infrastructure, for a period not to exceed 35 years from the date of the 2014 Order. *See* 2014 Order at 59. No other development was proposed to take place during this 35-year interim period. This is expressed through the Commission's findings of fact ("**FOF**") as well as through the conditions imposed under the 2014 Order.

At the Commission's hearings in 2014 the Commission heard that KS intended to use this interim period to generate some financial return from the Petition Area while KS deliberatively considers what development is the most appropriate for the Petition Area. *See e.g.* 2014 Order, FOF 123 ("KS represents that using portions of the KS Property for a solar farm project will provide KS with the time and opportunity to assess potential development options for the entire KS Property."); *id.* at FOF 124 ("KS believes that the Waiawa Ridge Project (i.e., the Gentry plan), which was conceptualized over 25 year ago, needs to be re-assessed to be more reflective of current market conditions and other changes.").

KS also informed the Commission that it was likely to return in the future to seek approval for modifications to the development proposal originally presented by Gentry. *See e.g.*, 2014 Order, FOF 150:

Petitioner is preparing a Master Plan for the Petition Area, and anticipates that substantial changes may be made to the original Waiawa Ridge Project proposal. If substantial changes are made, Petitioner represented that it will return to the Commission through a motion to amend that examines the new uses and impacts and to amend the original Waiawa Order and to possibly add or change the original conditions.

Based upon the filings and testimony presented, the Commission authorized the interim use of the Petition Area subject to certain conditions, which OP now apparently wishes to overturn through the imposition of OP's New Condition. Conditions 7 and 10 of the 2014 Order expressly authorize only one use only during this interim period. Furthermore, condition 10 states that any non-solar use of the Petition Area is allowed only *after* the interim solar period and pursuant to a motion to amend. Conditions 7 and 10 of the 2014 Order provide as follows:

7. 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.

10. Decommissioning of the Solar Farm. The solar farm shall be decommissioned following its operational timeframe. The decommissioning activities shall include, but not be limited to, the complete removal of the foundational piers and modules and all associated components. All metal components shall be recycled to the extent possible and no solar farm components shall be disposed of in any landfill in the State of Hawai'i.

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. Such motion to amend shall include a revised master development plan of the proposed use and shall further include, but not be limited to, a revised Traffic Impact Analysis Report, Engineering Report, Socio-Economic Analysis Report, Environmental Report, and AIS.

Notwithstanding these conditions and the prior representations, OP now recommends that the Commission require KS, within the next ten years, to complete substantial infrastructure improvements that are entirely unrelated to the solar farms. OP's New Condition expressly contradicts the Commission's rulings that solar be the exclusive uses within the Petition Area from 2014 through 2049. Moreover, it is clear under condition 11 that the Commission intended for KS to develop the Petition Area only after the solar farms have been decommissioned and the LUC has approved the new development proposal presented through a motion to amend. OP's New Condition not only disregards the Commission's decision under the 2014 Order, it also runs contrary to the position OP presented to the Commission in 2014.

B. KS' 2019 MOTION DOES NOT CREATE AN OPPORTUNITY TO RELITIGATE SETTLED MATTERS

The imposition of OP's New Condition is barred by the doctrine of res judicata. Hawai'i courts have long recognized a variety of "preclusive doctrines that share the common goals of preventing inconsistent results, preventing a multiplicity of suits, and promoting finality and judicial economy." *Smallwood v. City and Cty. of Honolulu*, 118 Hawai'i 139, 146, 185 P.3d 887, 894 (App. 2008). The doctrine of res judicata "permits every litigant to have an opportunity to try his case on the merits," but limits the opportunity to litigate to one chance. *Kauhane v. Acutron*, 71 Haw. 458, 463, 795 P.2d 276, 279 (1990) (quoting *In re Estate of Ho Poi*, 54 Haw. 35, 38, 501 P.2d 973, 975 (1972)). The doctrine of res judicata applies to matters litigated before an administrative agency. *Santos v. State*, 64 Haw. 648, 653, 646 P.2d 962, 966 (1982) (citations omitted).

Res judicata prohibits a party from litigating a previously adjudicated matter when (1) there was a final judgment on the merits, (2) both parties are the same or in privity with the parties in the original suit, and (3) the claim presented in the action in question is identical to the

one decided in the original suit, or to a claim or defense that might have been properly litigated in the first action but was not litigated or decided. *See E. Sav. Bank, FSB v. Esteban*, 129 Hawai'i 154, 160, 296 P.3d 1062, 1068 (2013), *citing Bremer v. Weeks*, 104 Hawai'i 53, 54, 85 P.3d 150, 161 (2004). Importantly, the bar applies to claims and issues that were **actually** litigated in the first action, and also to all claims and issues that **could have been** litigated and decided in the first action. *Craig v. Cnty. of Maui*, 157 F. Supp. 2d 1137, 1140-41 (D. Haw. 2001), *citing Santos*, 64 Haw. at 652-52, 646 P.2d at 965. "The purpose behind res judicata is to ensure judicial economy, consistent results, and to increase public reliance on judicial pronouncements." *Craig*, 157 F.Supp.2d at 1140. A party "cannot avoid the bar of claim preclusion merely by alleging conduct that was not alleged in his prior action or by pleading a new legal theory. **All claims arising from a single injury must be raised in a single action or they will be barred by res judicata.**" *Pedrina v. Chun*, 906 F. Supp. 1377, 1400-1401 (D. Haw. 1995) (citations omitted) (emphasis added). As discussed below, all of the elements of res judicata are present in this case.

1. The Commission Never Imposed a Development Deadline on the Petition Area Under the Waiawa Order or the 1990 Amendment

The Waiawa Order was issued in 1988 under the Chapter 205, Hawai'i Revised Statutes ("HRS") and HAR Title 15, Subchapter 3, Chapter 15 in effect at that time. The Waiawa Order was then amended in 1990 under the 1990 Amendment. In 1988, under HRS § 205-4, the Commission was empowered to impose conditions expressly requiring petitioners to comply with representations made to the Commission. However, despite the legislative authority to impose conditions to assure substantial compliance, such as projected development timelines, the Commission never imposed such conditions under the Waiawa Order.² Nor did the Commission

² The lack of such conditions under the Waiawa Order is in contrast to the conditions imposed by the Commission upon numerous other reclassifications that were granted around the time of the Waiawa Order. *See e.g.*, Docket A87-613 (1988 decision approving incremental reclassification of 135 acres of land for the Trustees Under the Will and of the Estate of James Campbell, Deceased, subject to an express condition that the "Petitioner shall develop the Property in substantial compliance with representations made to the Land Use Commission in obtaining the reclassification of the Property."); Docket A87-617 (1989 decision approving the reclassification of 1,060 acres of land for Signal Puako, subject to an express condition that "Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. Failure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification."). In good faith, KS has long relied upon the Urban District reclassification of the Waiawa property and the related absence of development deadlines thereon.

impose a development deadline and a "use it or lose it" condition under the 1990 Amendment, although it had the legislative authority to impose such requirements under Act 261, effective June 1990.³

OP was a party to the proceedings leading up to the Waiawa Order and the proceedings leading up to the 1990 Amendment and is barred by the doctrine of res judicata from relitigating those decisions now by advocating for the imposition of a development deadline on the Petition Area.

2. The Commission Never Imposed a Development Deadline on the Petition Area Under the 2014 Order

In 2014, during the motion to amend proceedings leading up to the 2014 Order, OP acknowledged on the record that a motion to amend under HAR § 15-15-94 is a proceeding by which a Petitioner can seek a modification of an order or deletion or amendment to conditions for good cause, but that such motions are not an opportunity to relitigate prior Commission decisions. Therefore, OP expressly declined to advocate for a development schedule for the Petition Area, recognizing that the proceedings before the Commission were limited to the requested solar farms, and not an opportunity to re-open consideration of the timing for the eventual development of the Petition Area.

OP's counsel presented the following position to the Commission at the October 29, 2014 hearing:

I start with Hawaii Administrative Rules 15-15-94 which sets out the basis by which you can amend or modify a decision. That basically says you can amend or modify any decision for good cause. Good cause is not a very easy concept. It's not a -- it's a very broad standard. It's substantial. It's based upon the individual facts and circumstances.

It doesn't really help you a lot with the analysis of any particular case. What the Office of Planning does, when we look at these Motions to Amend is that parameters are the structure of the

³ Neither the Waiawa Order nor the 1990 Amendment contain explicit language regarding the timeframe for the development of the Petition Area, an express "use it or lose it" condition, or a condition expressly requiring the development to be in substantial conformance with what was originally represented to the LUC. These facts were confirmed on the record at the October 29, 2014 hearing before the Commission, where the OP witness confirmed that the Commission did not impose any development timelines under the Waiawa Order and that the Waiawa Order was issued without a requirement that the Petitioner develop the property in substantial compliance with the representations made.

analysis *we start with is we accept the prior decision. We don't try to re-litigate the prior decision.*

So we sometimes look at a case, we look at the conditions, we think, "I could have done a better job on that. I could have suggested this other condition." *You know if it wasn't included we don't try to re-litigate that question.*

This will come up more specifically when you look at, for example, two conditions. The Office of Planning recommends that there be a development schedule for Phase 1 and Phase 2 [i.e. the solar farm projects under review in 2014]. *Without recommending the imposition of a development schedule for the original Project or the remainder of the Project, but because this is new we are recommending a development schedule for the new leases, the new proposal.* Similarly with the compliance with representations. We're not asking that a condition be imposed requiring the Petitioner to comply with their old representations that may or may not be an implied condition.

Transcript, 10/29/14, Counsel for OP, Deputy Attorney General B.Yee (emphasis added).

KS agreed with OP's representations in 2014. Furthermore, KS has continued to rely upon such representations and the absence of any development schedule for non-solar related development within the Petition Area.

3. Res Judicata Bars the Imposition of OP's New Condition

The Waiawa Order is a final judgment on the reclassification of the Petition Area. OP was a party to those proceedings, and KS as landowner was in privity with the original petitioner and has relied on the Waiawa Order. The Commission was empowered to impose development timeframes upon the reclassification of the Petition Area, but did not do so. OP did not pursue development timeframes during the Commission's proceedings under the Waiawa Order, and expressly declined to pursue non-solar development timeframes in the proceedings under the 2014 Order. Even if there was a nexus between the pending 2019 Motion and a non-solar development deadline, which there is not, the doctrine of res judicata would preclude the imposition of a development timeframe upon the Petition Area.

C. KS HAS PRESENTED THE COMMISSION WITH GOOD CAUSE TO MODIFY THE 2014 ORDER: OP'S NEW CONDITION LACKS A NEXUS TO THE APPROVAL CURRENTLY BEING SOUGHT BY KS

KS' 2019 Motion is a request to modify the 2014 Order to address minor modifications needed for the currently proposed solar farm. The 2019 Motion was brought under HRS Chapter 205 and HAR §§ 15-15-70 (dealing with motions in general) and 15-15-94 (dealing with the modification and deletion of conditions and orders). The touchstone for decisions under HAR § 15-15-94 is for "good cause shown." Using that standard, the Commission can act to modify a previously issued order or modify or delete previously imposed conditions. The proceedings on the 2019 Motion are also quasi-judicial and the Commission's decisions must be made upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. *See* HAR § 15-15-34, HRS § 91-10. KS has provided substantial evidence showing good cause for the requested modifications to the 2014 Order. KS has also provided substantial evidence demonstrating that the Commission has already determined not to impose a development timeline on the Petition Area. OP offers no evidence to the contrary, and therefore OP's New Condition cannot stand.

The Commission's rules do not provide the parameters of "good cause shown." However, in the employment law context courts have interpreted "good cause" for terminating employment as reasonable grounds based on failure to satisfactorily perform job duties or other legitimate business reasons. *See Marcy v. Delta Airlines*, 166 F.3d 1279, 1283 (9th Cir. 1999) (citations omitted). When faced with a "good cause shown" determination, the Commission's decision, "therefore, ultimately is no more than a comparative evaluation of competing claims of need and prejudice." *Jacques v. Cassidy*, 257 A.2d 29, 33 (Conn. Super Ct. 1969) (citations omitted).

KS has presented substantial evidence and justification in support of its request under the 2019 Motion. The Commission was timely informed of the difficulties that the initial solar farm developer faced (e.g., KS' June 1, 2016 annual report alerted the Commission to the issue and stated that KS was continuing to explore acceptable alternatives that would result in the development of a solar farm within portions of the Petition Area). KS has presented substantial evidence that the development of solar farms within the Petition Area remains consistent with the Hawai'i State Plan, supports the State's renewable energy policy, and will provide a financial

return to support KS' educational mission. *See generally* 2019 Motion at 26 - 30. Furthermore, the modifications being requested are modest but necessary to support the Waiawa Solar Power, LLC solar farm, for which the PUC has already approved a power purchase agreement with HECO. Therefore, Petitioner has provided the Commission with good cause for the requested modifications and extension, and evidence to support those requests. In contrast, OP has not presented any legitimate legal justification for OP's New Condition.

OP points to HAR § 15-15-50 (19)⁴ [sic] as support for requiring the completion of non-solar development within ten years. OP's Response at 8. However, HAR § 15-15-90(c)(20)⁵ is not applicable to the pending 2019 Motion, and would not be applicable to any future motion that KS may file to seek approval of the KS Master Plan. HAR § 15-15-50 provides the Commission's rules regarding the contents of a petition for District Boundary Amendment. KS has not filed any such petition and no such petition is currently under review by the Commission. KS' 2019 Motion was brought under HAR § 15-15-94, and rules regarding the content requirements for District Boundary Amendment petitions are therefore wholly inapplicable.

OP has not established any nexus between the 2019 Motion and the Commission's rule regarding petitions for District Boundary Amendments because there is no nexus whatsoever. As the U.S. Supreme Court has made it abundantly clear, to constitute valid and enforceable land use development conditions, such conditions must be connected and proportional to the proposed development. *See Nollan, Dolan*.

In *Nollan* the U.S. Supreme Court held that there was no nexus between a coastal development permit for a beach house and a permit condition requiring the landowner to provide a public access easement through its backyard. 483 U.S. at 838-39. The Court very clearly held such ad hoc administrative bargaining lacking a valid nexus to the proposed project was invalid. 483 U.S. 825 (1987).

⁴ OP cites HAR § 15-15-50 (19). However, we believe the rule OP meant to cite is HAR § 15-15-50(c)(20).

⁵ HAR § 15-15-50(c)(20) provides as follows:

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 therefor 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 such increment to be completed within no more than a ten-year period.

In *Dolan* the Court reaffirmed *Nollan* and further required the degree of connection between the condition imposed and the actual impacts of the proposed development to be proportional. The Court struck down a condition requiring dedication of land for a public greenway and a public pedestrian accessway because it was disproportional to the building permit Dolan sought to expand its plumbing and electrical supply store. 512 U.S. at 374-75. Accordingly, in well-settled law, the U.S. Supreme Court in *Nollan* and *Dolan* requires that to pass constitutional muster, land development conditions imposed by government must: (1) seek to promote a legitimate state interest; (2) have an essential nexus to the development project upon which they are being levied; and (3) be proportional to a need that the project is expected to generate. *See Nollan*, 483 U.S. at 838-39; *Dolan*, 512 U.S. at 395-96. OP's New Condition fails these requirements in all respects.

Here, KS is requesting some minor modifications to the solar farm that was approved under the 2014 Order. KS is not seeking Commission approval for new, non-solar related development. Indeed, under the 2014 Order solar is expressly noted as an *interim use* of the Petition Area, and the solar farms are to be decommissioned prior to the development of the KS Master Plan. To further illustrate the lack of nexus, the law cited by OP (HAR § 15-15-50) to justify the imposition the OP's New Condition is wholly inapplicable to the pending 2019 Motion: the law cited by OP only applies to petitions for District Boundary Amendments. There is no connection, or nexus, between the modifications KS seeks through its 2019 Motion and OP's proposed imposition of a development deadline for the infrastructure for Phase A of the KS Master Plan, which is a wholly unrelated and independent project. In light of the lack of an essential nexus, there is no proportionality. OP's New Condition would not pass constitutional muster.

Moreover, OP does not address the fact that the rules of the Commission that were in place at the time of the Waiawa Order empowered the Commission to require full urban development of the Petition Area within five years, and to specify by condition a reasonable period by which substantial progress in developing the Petition Area must be made. *See* HAR §§ 15-15-78, 15-15-79 (1986). Despite this authority, the Commission never imposed such requirements under the Waiawa Order. The 2019 Motion is not an opportunity for OP or any other party to revisit Commission decisions long-relied upon by KS.

D. OP'S NEW CONDITION WILL HAVE THE PERVERSE EFFECT OF DELAYING THE DEVELOPMENT OF THE PETITION AREA FOR NON-SOLAR PURPOSES

In addition to OP's New Condition being totally unrelated to any impacts that could arise from the solar farm project, it is unrealistic. OP wants the Commission to require KS to complete all of the backbone infrastructure for Phase A by 2029. This arbitrary deadline disregards the significant steps that must be completed before KS can initiate development of Phase A.

As currently conceptualized under the KS Master Plan, Phase A will consist of some 410 acres in the south of the Petition Area. A large portion (71 acres) of those 410 acres are not currently in the Urban District and will require the approval of a District Boundary Amendment, and those portions of Phase A that are within the current Urban District boundaries will require approval of the Commission through a motion to amend. *See* 2014 Order, conditions 7, 10.

KS is a private, educational, charitable trust committed to improving the capability and well-being of Native Hawaiians through education. KS is a Section 501(c)(3) entity organized and operated for educational purposes. As such, with KS focused on its educational mission, KS must identify a development partner to help KS realize its vision for Waiawa. KS cannot independently pursue the development envisioned under the KS Master Plan. KS provided a detailed and transparent development schedule as part of the KS Master Plan, and identified the projected timeframe for entering into a development agreement with that partner to be approximately 2020 - 2021, although that timing is obviously not entirely within the control of KS. KS further projected that the HRS chapter 343 process to assess environmental impacts from a new development proposal for the Petition Area would be done in 2022 - 2023, and estimated that KS and its development partner would seek Commission approval through a petition for District Boundary Amendment and a motion to amend in 2024 - 2025. Should all required steps be completed within the estimated timeframes, and all necessary conditions for development be in place, KS projected that the development of Phase A could be completed by 2040.

If the Commission were to impose OP's New Condition, requiring the installation of all necessary infrastructure for Phase A by 2029, it is very likely that potential development partners will turn away from the KS Master Plan and pursue projects that are not under such a cloud of uncertainty. OP's New Condition also injects a new layer of uncertainty upon the Petition Area.

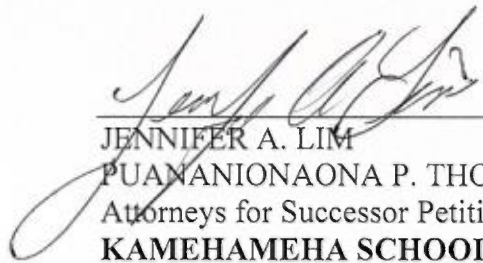
Uncertainty raises project costs and compromises the ability to secure financing. Uncertainty would put the development of the Petition Area at risk.

KS projects that complete development of the KS Master Plan (encompassing approximately 2,010 acres, an estimated 11,109 homes, 51 agricultural lots, approximately 105 acres of schools, 371 acres of open space, 134 acres of parks, and 558,666 square feet of neighborhood retail/commercial uses) will take place over the next 56 years. To fulfill this vision a long-term development partner will be needed. OP's New Condition will compromise KS' ability to find that partner, and will likely raise development costs and result in delays in implementation of the development.

III. SUMMARY AND CONCLUSION

As set forth herein, OP's New Condition is improper both procedurally and substantially. Based on all of the foregoing, KS respectfully requests that the Commission disregard OP's recommendation that the Commission impose, in connection with KS' pending 2019 Motion requesting modest modifications to the solar farms approved under the Commission's 2014 Order, a new condition requiring KS to complete the development of all backbone infrastructure for Phase A of the KS Master Plan by 2029.

DATED: Honolulu, Hawai'i, November 4, 2019



JENNIFER A. LIM
PUANANIONAONA P. THOENE
Attorneys for Successor Petitioner
KAMEHAMEHA SCHOOLS