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LAND USE COMMISSION  
STATE OF HAWAII

2019 OCT 22 P 2: 26

Attorneys for OFFICE OF PLANNING,  
STATE OF HAWAII

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

|   |   |                               |
|---|---|-------------------------------|
| In the Matter of the Petition of          | ) | DOCKET NO. A02-737            |
|   | ) |                               |
| U OF N BENCORP                            | ) | OFFICE OF PLANNING'S RESPONSE |
|   | ) | TO PETITIONER'S MOTION FOR    |
| To Amend the Agricultural Land Use        | ) | RECONSIDERATION OF ORDER TO   |
| District Boundary Into the Urban Land Use | ) | [SIC] GRANTING UNITED NATION  |
| District for Approximately 62 acres, Tax  | ) | [SIC] OF KONA'S MOTION TO     |
| Map Key Nos. (3) 7-5-010: 085 and 7-5-    | ) | CONTINUE HEARING ON ORDER TO  |
| 017: 006, situated at Waiaha, North Kona, | ) | SHOW CAUSE; CERTIFICATE OF    |
| County and State of Hawaii                | ) | SERVICE                       |
|   | ) |                               |

**OFFICE OF PLANNING'S RESPONSE TO PETITIONER'S MOTION FOR  
RECONSIDERATION OF ORDER TO [SIC] GRANTING UNITED NATION [SIC]  
OF KONA'S MOTION TO CONTINUE HEARING ON ORDER TO SHOW CAUSE**

Pursuant to Hawaii Administrative Rules ("HAR") § 15-15-70, the Office of Planning, State of Hawaii ("OP") provides the following response to successor-in-interest to Petitioner U of N Bencorp, Petitioner University of the Nations, Kona, Inc.'s ("Petitioner's") *Motion for Reconsideration of Order to [sic] Granting United Nations of Kona's Motion to Continue Hearing on Order to Show Cause, received on October 15, 2019 ("Petitioner's Motion")*.

Petitioner is requesting that the Land Use Commission (“Commission”) reconsider certain statements made in the Caption, Procedural Background, Findings of Fact (“FOF”), Conclusions of Law (“COL”) and Order sections of the *Order to Granting United Nation of Kona’s Motion to Continue Hearing on Order to Show Cause, filed October 7, 2019* (“Order”), that Petitioner believes are not an accurate reflection of the record.

OP responds to each of Petitioner’s points of clarification as follows:

- A. The Caption. OP does not object to Petitioner’s suggested corrections to the typographical errors and Petitioner’s name in the Caption.
- B. Procedural Background, Paragraph No. 9. OP does not object to Petitioner’s request for correction of the date of the change in Petitioner’s corporate name.
- C. Procedural Background, Paragraph No. 13. OP objects to Petitioner’s request to delete the phrase “and to determine whether Petitioner was in compliance with the conditions of the 2003 Decision and Order” of Procedural Background Paragraph No. 13 regarding the purpose of the March 28, 2019 status report hearing. Petitioner argues that “In order for the Commission to determine whether Petitioner was in compliance with the conditions of the 2003 Decision and Order it must issue an order to show cause. This is procedurally incorrect. It would be inconsistent with applicable Hawaii Administrative Rules (“HAR”), and against Petitioner’s due process interests to move directly to an Order to Show Cause (“OSC”) hearing without first determining the basis for an OSC hearing.

Hawaii Administrative Rules (“HAR”) § 15-15-93(b), states,

Whenever the [C]ommission 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 [C]ommission 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...

HAR § 15-15-93(b) requires a two-step process: First, the Commission examines any testimony and evidence to determine whether there is a reason to believe that petitioner has failed to perform conditions, representations or commitments of the Decision and Order. Like a preliminary or probable cause hearing, the Commission evaluates whether there is sufficient evidence of noncompliance with the Decision and Order by the Petitioner. If the Commission determines there is sufficient evidence that Petitioner has failed to perform conditions, representations or commitments of the Decision and Order, it moves to step two of the issuance of an Order to Show Cause ("OSC") why the property should not revert to its former land use classification. At the OSC hearing, the Commission may further examine Petitioner's compliance with the Decision and Order, including Petitioner's arguments of Petitioner compliance, however, the Commission is not limited to determine whether Petitioner was in compliance with the conditions of the Decision and Order only at the OSC hearing. It must make a preliminary determination on Petitioner's compliance through the status report hearing in order to move to the OSC hearing.

The March 28, 2019 status report hearing fulfilled step one of HAR § 15-15-93(b) by providing the Commission the opportunity to examine the 2003 Decision and Order and any testimony and evidence to determine that there was reason to believe that Petitioner failed to perform conditions, representations or commitments of the 2003 Decision and Order. After hearing from the Parties and finding reason to believe that Petitioner had failed to perform according to the conditions, representations or commitments of the 2003 Decision and Order, the Commission voted to set an OSC hearing as to why the Petition Area should not revert to its former land use classification or be changed to amore appropriate classification.



The phrase “and to determine whether Petitioner was in compliance with the conditions of the 2003 Decision and Order” is thus an accurate statement of the record and the proper procedure taken by the Commission pursuant to HAR § 15-15-93(b), and should not be deleted.

D. Procedural Background, Paragraph No. 16. OP objects to the deletion of Procedural Background Paragraph No. 16, which states, “Petitioner acknowledged it had not met various conditions... and provided explanations for why they had failed to comply with conditions of the D&O.” Petitioner believes this is an inaccurate statement of the record.

While Petitioner may have disagreed with rather than "acknowledged" its noncompliance with the 2003 Decision and Order when Mr. Ching stated, “Commissioner, I would respectfully disagree with that representation that Petitioner has failed to deliver on LUC Conditions,” there were several instances at the March 28, 2019 hearing and in the record where Petitioner acknowledged its noncompliance.

1. At hearing transcript for the status report hearing held on March 28, 2019 (“hearing transcript”) page 35, lines 13-17, Mr. Ching admitted that “In 2003 the Petitioner indicated that they would be selling 297 market housing units. And they’ve represented today as well as in 2007, that they will not be developing any market housing units.”
2. At hearing transcript page 23, lines 6-11, Petitioner acknowledged noncompliance in stating, “With reference previously that they have – there have been changes to title, and we recognize that they should be appropriately noticed and recorded to the Commission. So we acknowledge a greater diligence on our part is required with respect to the submission of its annual reports.”

3. At hearing transcript page 24, lines 20-24, Petitioner acknowledged noncompliance by stating, "With respect to Condition No. 17 in terms of annual reports, you can see where annual reports have been submitted. We understand that we need to perform better with respect to that standard of annual reports being given without fail."
4. At hearing transcript page 26, lines 20-25, Petitioner acknowledged noncompliance by stating, "In regards to LUC Condition No. 7, we also will be moving towards forming the KWC... and will be moving towards formally establishing the KWC."
5. Petitioner's Annual Report, dated March 28, 2019, that was provided to the Commission prior to the hearing that day, acknowledged Petitioner's noncompliance and willingness to comply in the future, including "[Petitioner] had not provided affordable housing on the subject area..."; regarding drainage improvements, "This has not happened yet..."; "[Petitioner has] not finalized any agreements with the Department of Education"; "[Petitioner] is working with the Department of Water Supply of the County of Hawaii; "[Petitioner] currently has no wastewater being generated...as the project develops, we need to apply to the State Department of Health and the County... and will seek connection to the county system"; "[Petitioner] has not finalized the local and regional transportation programs"; "[Petitioner] agrees to, prior to obtaining County zoning, submit a revised Traffic Impact Analysis Report.."; "As the development program progresses, [Petitioner] shall develop a Solid Waste Management Plan".

Additionally, at transcript hearing page 27, lines 1-19, Petitioner provided explanations for why it had failed to comply with conditions of the 2003 Decision and Order, including, "a

fraud perpetrated on [Petitioner],” and litigation against Petitioner in connection with an accident on the mainland.

As the record is replete with Petitioner's acknowledgements that it had not met, or had yet to meet, various conditions, and provided explanations for why it had failed to comply with conditions of the 2003 Decision and Order, Procedural Background, Paragraph No. 16 should not be deleted.

E. Procedural Background Paragraph No. 35. OP does not object to including language directly from the Parties' Stipulation to Continue in lieu of Procedural Background Paragraph No. 35.

F. Procedural Background Paragraph No. 36. OP does not object to the revision of Procedural Background Paragraph No. 36 to reflect that the May 22, 2019 hearing was held on Petitioner's Motion to Rescind Order to Show Cause, rather than an OSC.

G. FOF No. 40. OP objects to Petitioner's replacement of “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...”, with “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.”

The transcript clearly indicates Petitioner explained the reasons why Petitioner had not complied with conditions of its approval. At hearing transcript page 27, lines 1-19, Petitioner implied it had failed to comply with conditions of the 2003 Decision and Order due to certain events, including, “a fraud perpetrated on” Petitioner, and litigation against Petitioner in connection with an accident on the mainland.



H. FOF No. 42. OP objects to Petitioner's deletion or modification of FOF No. 42 that states, "Petitioner agreed that neither the Commission or its staff were responsible for the 2006 Motion to amend not going forward."

Presumably, FOF No. 42 is based on the exchange between Chair Jonathan Scheuer and Mr. Ching at page 45, lines 13-18 of the hearing transcript, as follows:

CHAIRPERSON SCHEUER: So just to be clear for the record, it wasn't necessarily the action of the Land Use Commission in any professional capacity that prevented the Petitioner to come back to us to take action on that Petition to Amend Conditions?

MR. CHING: Yes.

Based on this exchange, it is clear that Petitioner agreed that the Commission or its staff did not prevent Petitioner from moving forward on the Petition to Amend Conditions, and therefore the Commission was not responsible for the Motion not moving forward.

Petitioner suggests, in the alternative, a revision of FOF No. 42 that Petitioner was also not responsible for the 2006 Motion to Amend not going forward. However, there is nothing in the record to support this assertion.

I. FOF No. 47. OP does not object to Petitioner's revision of FOF No. 47 regarding its provision of affordable housing.

J. FOF No. 49. OP does not object to Petitioner's revisions to FOF No. 49 regarding Petitioner's ability to argue what periods of time "substantial commencement" took place.

K. COL No. 4. OP objects to the deletion of COL No. 4, which states, "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's reasons for deleting COL No. 4 are that Petitioner "objects to this characterization of the law," "[Petitioner] has not had an opportunity to argue this point to the Commission because the OSC

was continued,” and “because the OSC was continued, there is no reason for COL No. 4 to be contained in the Order.”

HAR § 15-15-50(c) states in pertinent part,

The following information shall also be provided... Petitioner submitting applications for reclassification 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 the 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.

(Emphasis added.)

Similarly, as part of the district boundary amendment (“DBA”) decision-making process, HAR § 15-15-78(a) requires the Commission to evaluate whether a proposed DBA project could be substantially completed within ten years. HAR § 15-15-78(a) 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: (i) Grant the petitioner's request to amend the land use boundary for the entire subject property; 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.

It is therefore well established that the general timeline limitation under HAR §§ 15-15-50(c) and 15-15-78(a) for DBA projects, is ten years, unless incremental districting is employed. COL No.



4's characterization of the law is simply a restatement of the law and is therefore accurate and should not be deleted.

Additionally, Petitioner had the opportunity and *did* argue its point regarding a ten-year timeline to the Commission on pages 33-36 of its *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 Land Use Commission on March 29, 2019*, filed May 3, 2019 with the Commission.

Lastly, the inclusion of COL No. 4 serves to support the continuation of the OSC. Petitioner's failure to substantially commence the Project within the ten-year deadline demonstrates in part Petitioner's noncompliance with its commitments and representations under the 2003 Decision and Order. Therefore, even though the OSC was continued, COL No. 4 helps to justify the continuation rather than a dismissal of the OSC, and is therefore essential to the Order.

L. COL No. 5. OP objects to the deletion of COL No. 5, which states, "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) and 15-15-78(a)." For the reasons discussed *supra*, COL No. 5 is necessary and should not be deleted.


M. Order No. 3. OP objects to the amendment of the phrase "Substantial commencement has not occurred..." in Order No. 3. Petitioner argues that 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, the Commission could not have found that substantial commencement has not occurred."

As demonstrated *supra*, Petitioner was afforded an opportunity to argue that substantial commencement occurred in its Position Statement and at the status report hearing, and the Commission *did* take evidence on whether substantial commencement occurred, including all testimony and Petitioner's annual report. Petitioner implied that it had not developed and admitted it no longer plans to develop the Petition Area as represented in the 2003 Decision and Order. Petitioner's Slide #21 at the status report hearing clearly depicted a vacant lot with no physical grading or development of the Petition Area. Petitioner has not commenced construction on the Petition Area, and provides no evidence of financial investment or comparable effort amounting to substantial commencement.

Again, pursuant to HAR § 15-15-93(b), the Commission considered the 2003 Decision and Order along with any relevant evidence and testimony to arrive at a preliminary determination that Petitioner had not substantially commenced use of the land. Order No. 3 is therefore accurate in that the Commission determined that substantial commencement has not occurred, and should not be amended.

DATED: Honolulu, Hawai'i, October 22, 2019.

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| In the Matter of the Petition of               | ) | DOCKET NO. A02-737     |
|  | ) |                        |
| U OF N BENCORP                                 | ) | CERTIFICATE OF SERVICE |
|  | ) |                        |
| To amend the Agricultural Land Use District    | ) |                        |
| Boundary Into the Rural Land Use District for  | ) |                        |
| Approximately 62 acres, Tax Map Key Nos. (3)   | ) |                        |
| 7-5-002:010: 085 and 7-5-017: 006, situated at | ) |                        |
| Wai'aha 1st, North Kona, County and State of   | ) |                        |
| Hawaii   | ) |                        |
|  | ) |                        |

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**CERTIFICATE OF SERVICE**

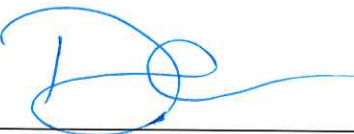
I hereby certify that a copy of the foregoing was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular mail.

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DATED: Honolulu, Hawai'i, October 22, 2019.



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