



LAND USE COMMISSION  
STATE OF HAWAII

2019 NOV 29 A 11:59

BEFORE THE LAND USE COMMISSION  
STATE OF HAWAII

In the matter of the Petition of

WAIKOLOA MAUKA, LLC

To Amend the Agricultural Land Use  
District Boundaries into the Rural Land  
Use District for Approximately 731.581  
Acres in South Kohala District, Island of  
Hawaii, Tax Map Key No. (3) 6-8-02:016  
(portion)

DOCKET NO. A06-767

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

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

This is to certify that this is a true and correct  
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State Land Use Commission, Honolulu, Hawaii

November 29, 2019 by

Executive Officer



LAND USE COMMISSION  
STATE OF HAWAII

2010 NOV 29 A 11:58

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

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

**AND**

**CERTIFICATE OF SERVICE**



LAND USE COMMISSION  
STATE OF HAWAII

2010 NOV 29 A 11: 58

BEFORE THE LAND USE COMMISSION  
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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER  
REVERTING THE PETITION AREA**

**PROCEDURAL HISTORY**

1. On June 10, 2008, the Land Use Commission ("Commission") issued its original Findings of Fact, Conclusions of Law, and Decision and Order ("2008 Order") in this docket reclassifying approximately 731.581 acres of land, from the State Agricultural to the State Rural District, to develop 398 rural lots and supporting infrastructure for residential use with a minimum lot size of one-acre ("Project"). The first phase planned to develop 149 lots on about 319 acres and involve development of roads, infrastructure, and utilities. The second phase would develop 249 lots on 413 acres and installation of the remainder of site roads, infrastructure, and utilities. Each phase was projected to last approximately eight (8) to ten (10)

months, and both phases of the Project were represented by the Petitioner to be completed within ten (10) years.

2. The Commission's approval was subject to twenty-four (24) conditions; one of which required Waikoloa Mauka LLC ("Petitioner") to submit annual progress reports to the Commission, the State Office of Planning ("OP") and the County of Hawai'i, Planning Department ("County") documenting the Petitioner's progress in complying with the conditions imposed.

3. Petitioner filed no annual reports between the Commission's approval for the project in June 2008 and February 2014.

4. On February 6, 2014, the Commission mailed notice to Mr. Stefan Martirosian, Waikoloa Mauka, LLC representative, to provide the current status of the Project and progress towards complying with the conditions imposed by the June 10, 2008 D&O.

5. Petitioner's first annual report was filed with the Commission on February 19, 2014. The report indicated the concept of the project had not changed, the proposed golf course would instead be used for drainage and passive recreation, acknowledged the June 10, 2018 deadline for on-site infrastructure completion; but made no mention of any difficulty in meeting performance deadlines.

6. Petitioner filed a second annual report on March 2, 2016. This report indicated that no physical development had occurred on the ground; Petitioner was working to find a development partner, no water supply had yet been secured, no agreement had been reached with the State

Department of Transportation (“DOT”) on intersection improvements, discussions were ongoing with the County Office of Housing and Community Development (“OHCD”) regarding affordable housing requirements, and preparation of a preliminary drainage plan would be subject to revisions due to a change in plans for golf course area. Petitioner stated that no change of ownership to the Petition Area had occurred. Petitioner acknowledged the annual report was late and further acknowledged that the next annual report would be due in March 2017. Petitioner did not indicate that more time would be needed to meet the 2018 deadline for buildout of backbone infrastructure.

7. The Petitioner filed no annual report at any time during 2017.

8. Between May 7-12, 2018, the Commission attempted to locate an address to send the May 23-24, 2018, meeting notice to, because no annual report had been filed during 2017.

9. On May 15, 2018, the Commission mailed out the agenda and notice of hearing for the May 23, 2018 meeting in Kona, Hawai`i, to the Hawai`i County and Statewide mailing lists. The Commission mailed an agenda and notice via registered mail to the fee owner of the Petition Area (Waikoloa Highlands, LLC) as identified by the County of Hawai`i. The notice was signed for, but signee did not date the receipt or indicate that the address was incorrect. The Commission also sent notice to Benjamin Kudo, the last listed legal representative for Petitioner; and, to Sidney Fuke, the planning consultant who submitted the 2014 and 2016 annual reports. In addition, the Commission sent an electronic notice to Natalia Batichtcheva, who was identified as a contact for Waikoloa Mauka LLC, by their former planning consultant Mr. Sidney Fuke.

10. On May 18, 2018, the Commission received notice from Benjamin Kudo, Esq., of the firm Ashford and Wriston, LLP, that he no longer represented Waikoloa Mauka, LLC.

11. On May 18, 2018, the Commission received electronic correspondence from Sidney Fuke, Planning Consultant, stating that he no longer represented Waikoloa Mauka, LLC; and that Natalia Batichtcheva was his last contact for Petitioner.

12. On May 22, 2018, the Commission received an electronic correspondence from Natalia Batichtcheva who identified herself as a representative of the Petitioner. Ms. Batichtcheva indicated that Petitioner would not be able to attend the hearing.

13. On May 23, 2018, the Commission held a status hearing to provide the Petitioner an opportunity to update the Commission on their progress in complying with conditions of the Decision and Order and the representations and commitments made by Petitioner in obtaining reclassification of the Petition Area. A representative of the Petitioner (or successor Petitioner) received notice of the hearing and no representative of the Petitioner appeared at the hearing. The County stated that the Petitioner was currently in violation of the deadline set in their rezoning ordinance. The Commission moved and seconded, to issue an Order to Show Cause to show why the Property should not revert to its former land use district classification or be changed to a more appropriate classification.

14. On June 8, 2018, Petitioner provided notice of the transfer in ownership of the Petition Area from Waikoloa Mauka, LLC (“WML”) to Waikoloa Highlands, Inc. (“WHI”). This transfer of ownership took place in 2014 and was not previously disclosed to the Commission in violation of Condition 20.

15. On June 13, 2018, the Commission received Notice of Representation from Carlsmith Ball, that Steven S.C. Lim would be representing Waikoloa Highlands, Inc.

16. On July 3, 2018 the Commission issued an Order To Show Cause for A06-767 Waikoloa Mauka, LLC, as there was a reason to believe that Petitioner had failed to perform according to conditions imposed and to the representations and commitments made to the Commission in obtaining reclassification of the Petition Area. At that time the Commission set a hearing date of August 22-23, 2018 (approximately fifty days in advance) to be held in Kona, Hawai'i. Notice was sent to Petitioner – Waikoloa Highlands, Inc.; its legal representative Steven S.C. Lim, Esq.; Petitioner's representative – Natalia Batichtcheva; the State Office of Planning and their legal representative; and, the County of Hawai'i Planning Department and their legal representative.

17. Pursuant to HRS Chapter 91 and HAR §§ 15-15-51 and 15-15-93; the Notice of Hearing for the Order to Show Cause was published to appear by September 21, 2018, in the legal section of the following local and statewide newspapers: The Honolulu Star-Advertiser, the Hawai'i Tribune Herald, West Hawai'i Today, the Maui News, and the Garden Island.

18. No additional annual reports were received from the Petitioner since March 2, 2016.

19. On July 16, 2018, the Commission received electronic correspondence advising of a new email address for Natalia Batichtcheva.

20. On July 20, 2018 Petitioner - Waikoloa Highlands, Inc. ("WHI") representative (Mr. Derek Simon) verbally requested an administrative continuance of the OSC hearing. Executive

Officer, Daniel Orodener, denied the request at that time due to no other parties stipulating to such an extension request and the already set hearing date for OSC hearing served to the parties and published in the newspaper pursuant to HAR §15-15-93(b).

21. On July 24, 2018, Waikoloa Highlands, Inc. (“WHI”), successor-in-interest to Waikoloa Mauka, LLC, filed a Motion to Continue Hearing on Order to Show Cause (“Motion to Continue”), a Memorandum in Support of Motion, Declaration of Derek B. Simon, Declaration of Natalia Batichtcheva, Exhibits A – M, and a Certificate of Service. The Motion asked for a continuance of not less than sixty days in order to allow WHI sufficient time to prepare and respond to the Order to Show Cause (“OSC”) and to assure that the Commission has a fully-developed record. The Motion requested a hearing on the motion.

22. On July 25, 2018, WHI filed a digital copy of its Motion with the Commission.

23. On August 1, 2018, the State Office of Planning (“OP”) filed a Response to Petitioner’s Motion to Continue Hearing.

24. On August 8, 2018, WHI filed Waikoloa Highlands, Inc.’s Statement of Position on Order to Show Cause; Exhibits 1 to 17; Declaration of Natalia Batichtcheva; Declaration of Derek Simon; and Certificate of Service.

25. On August 14, 2018, the Commission mailed the notice and agenda for its meeting on August 22-23, 2018 in Kona, Hawai‘i to its Statewide and Hawai‘i island mailing lists.

26. On August 15, 2018, the County of Hawai‘i, Planning Department (“County”) filed a Statement of No Objection to Waikoloa Highlands, Inc.’s Motion to Continue Hearing on Order



to Show Cause.

27. On August 16, 2018, WHI filed a copy of a letter dated August 15, 2018 to the Commission with attachments of the 2017 and 2018 Annual Reports.
28. On August 17, 2018, the Commission received a voicemail message from Parker Ranch indicating they would not be attending the upcoming meeting.
29. On August 20, 2018, the Commission received a telephone call from Hawai'i Water Service advising that West Hawai'i Water Company and West Hawai'i Sewer Company would not be attending the upcoming meeting.
30. On August 21, 2018, the Commission received public comment via electronic mail from Cindy Kester and Julia Alos.
31. On August 21, 2018, the Commission received notification, based on a Governor's announcement, from the Natural Energy Laboratory Hawai'i Authority ("NELHA") that its meeting facilities and all airline flights in and out of Kona, Hawai'i would be closed due to the anticipated landfall of Hurricane Lane.
32. On August 22, 2018, the Commission notified all parties via electronic mail that the scheduled meeting had been cancelled and all non-essential State employees had been placed on administrative leave by the Governor due to the anticipated landfall of Hurricane Lane.
33. On August 27, 2018, the Commission mailed notice and agenda for its rescheduled meeting on September 6, 2018 in Kona, Hawai'i to its Statewide and Hawai'i island mailing lists.

34. On September 4, 2018, the Commission received additional public testimony via electronic mail from Julia Alos.

35. On September 6, 2018, at Kona, Hawai'i, the Commission considered WHI's Motion to Continue at its meeting. Steven Lim, Esq., Natalia Batichtcheva, and Joel La Pinta were present on behalf of WHI; Dawn Takeuchi-Apuna, Esq. appeared on behalf of OP; and, Ronald Kim, Esq., and Jeff Darrow appeared on behalf of the County. At the meeting, Nancy Kester provided public testimony on behalf of Julia Alos. The Chair accepted into the record WHI's pleadings filed on July 24, 2018, their Motion to Continue the Hearing, and its August 6, 2018 Statement of Position on the OSC. Mr. Lim also requested that the Commission consider that all references in pleadings, hearing testimony, and argument by Waikoloa Heights regarding Stefan Martirosian, to be merely allegations of misconduct and not representations of fact. Following the receipt of public testimony, the parties provided oral argument on WHI's Motion. Thereafter, a motion was made and seconded to grant WHI's motion to continue the hearing until October 24-25, 2018, when the Order to Show Cause would be heard. During discussion on the motion, commissioners requested that WHI provide evidence that their representative, Natalia Batichtcheva has legal authority to make representations and binding agreements on behalf of WHI. Following discussion by the commissioners, a vote was taken on this motion. There being a tally of 5 ayes, 0 nays, and 3 excused, the motion carried.<sup>1</sup>

36. On September 14, 2018, the Commission issued an Order Granting Waikoloa Highlands' Motion to Continue Hearings on Order to Show Cause ("LUC Order to Continue OSC") and

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There are currently only eight sitting commissioners; currently the Kaua'I seat remains vacant.

mailed to all parties.

37. On September 20, 2018, the Commission mailed notice of OSC hearing, published legal ad, and Exhibit A for its scheduled meeting on October 24-25, 2018 in Kona, Hawai'i to all parties.

38. On September 25, 2018, the Commission mailed notice of OSC hearing, published legal ad, and Exhibit A for its scheduled meeting on October 24-25, 2018 in Kona, Hawai'i to all parties via certified mail.

39. On October 12, 2018, OP filed the Statement of Position of OP on Order to Show Cause.

40. On October 12, 2018, WHI filed WHI's Supplemental Statement of Position on Order to Show Cause and Reversion of the Petition Area, Exhibits 18-37, Declaration of Natalia Batichtcheva, Declaration of Derek Simon.

41. On October 15, 2018, the Commission mailed notice and agenda for its scheduled meeting on October 24-25, 2018 in Kona, Hawai'i to all parties, the Statewide, O'ahu, and Hawai'i island mailing lists.

42. On October 15, 2018, WHI filed a compact disk copy of WHI's Supplemental Statement of Position on Order to Show Cause and Reversion of the Petition Area, Exhibits 18-37, Declaration of Natalia Batichtcheva, Declaration of Derek Simon.

43. On October 24-25, 2018, the Commission held a meeting on the Order to Show Cause for Docket No. A06-767 and later set November 28, 2018 as the continued hearing date for proceedings.

44. At the October 24-25, 2018 proceedings, the Commission received the written and oral testimony of Julia Alos, and the Curriculum Vitae of Russian Language Interpreter Irina Francis McGiff. The Chair entered into the record with no objections from the parties: Petitioner's Motion to Continue and attached exhibits, Petitioner's Statement of Position, and Petitioner's Supplemental Statement of Position filed October 12, 2018; no exhibits from the County; and OP's Exhibits 1-4.

45. At the October 24-25, 2018 hearing the following attended: for the Petitioner WHI was Steven Lim, Esq., Mr. Valery Grigoriants (Vice-President of Arch Limited), Natalia Batichtcheva (President of WHI) and Joel LaPinta (Project Manager of WHI); for the County Ronald Kim, Esq., and Jeff Darrow (Planning Program Manager for the Planning Division of the Planning Department); and for OP Dawn Apuna, Esq., and Rodney Funikoshi.

46. At the October 24, 2018 hearing OP asked the Commission to take notice of an error in OP's Statement of Position on page 6, paragraph 3 and on page 8; the reference to Condition No. 9 should refer to Condition No. 4.

47. At the October 24, 2018 hearing Vice-Chair Cabral disclosed that she had an unsolicited phone call with WHI project manager Joel LaPinta in which he made statements that appeared to be an attempt to influence her vote on the OSC. Chair Scheuer noted for the record that Mr. LaPinta had attempted to have ex-parte communication with Commissioner Cabral in violation of HRS Chapter 91 and LUC administrative rules and warned Petitioner's counsel, Mr. Lim, to advise his clients against any further ex-parte contact.

48. During the October 25, 2018 hearing, Chair indicated that the evidentiary portion of the

hearing was not being closed but would provide all parties an opportunity to present closing arguments and additional briefings on the matters identified by the Commission. Petitioner's counsel requested re-opening of direct examination to call additional previously unnamed witnesses. The issue of additional witnesses appeared to be focused on whether a representative of the Office of Planning (Mr. Funakoshi) would be called.

49. On November 2, 2018, the Commission mailed LUC Chair's correspondence to the parties regarding the filing dates of witness and exhibit lists for the November 28, 2018 meeting.

50. On November 7, 2018, the Commission received Petitioner's Motion for Issuance of a Subpoena for a Representative of County of Hawai'i Office of Housing and Community and Subpoenas Duces Tecum for various listed documents from the Office of Housing and Community Services and the County of Hawai'i Mayor's Office ("WHI County Motion"); Memorandum in Support of Motion, and Exhibits "38"- "41". Petitioner did not request a hearing on its motions.

51. On November 8, 2018, the Commission received Petitioner's Errata Statement regarding Exhibit Numbering and Re-numbered Exhibit copies "39"- "42" for WHI's Motion for Issuance of a Subpoena and Subpoenas Duces Tecum; and Exhibit "A".

52. On November 9, 2018, the Commission returned signed copies of Petitioner's Subpoena and Subpoena Duces Tecum to Petitioner to be issued. The Commission Chair signed and issued the requested subpoena and subpoena duces tecum pursuant to HAR §15-15-69(d).

53. On November 13, 2018, the Commission received County of Hawai'i Planning

Department's ("County") Memorandum In Opposition to Waikoloa Highlands, Inc.'s Motion for Issuance of a Subpoena and Subpoena Duces Tecum and/or Motion to Quash Subpoena and Subpoena Duces Tecum, Declaration of Ronald N.W. Kim, Esq., and Exhibit A.

54. On November 14, 2018, the Commission received OP's Response to WHI's Motion for Issuance of Subpoena and Subpoena Duces Tecum.

55. On November 15, 2018, the Commission received signed copies of service of Petitioner's Subpoena Duces Tecum; and WHI's Motion for Issuance of Subpoena to an Authorized Representative of the State of Hawai'i Office of Planning ("WHI OP Motion"), Memorandum in Support of Motion, and Petitioner's Exhibits "41"- "43".

56. On November 19, 2018, a LUC meeting notice and agenda for its scheduled November 28-29, 2018 LUC meeting in Kona, Hawai'i was sent to the Parties and the Statewide, Maui and Hawai'i mailing and electronic mailing lists.

57. On November 19, 2018, the Commission received County of Hawai'i- Mayor Kim's correspondence re: non-fulfillment of Condition 9- Affordable Housing, and County of Hawai'i briefs submitted in response to LUC Chair's direction at October 24-25, 2018 meeting.

58. On November 19, 2018, the Commission received OP's Supplemental Statement of Position on the Land Use Commission's Order to Show Cause.

59. On November 19, 2018, the Commission received WHI's Second Supplemental Statement of Position and Memorandum of Law, and, Exhibits "45"- "64".

60. On November 21, 2018, the Commission received a signed copy of service of Petitioner's

Subpoena of County of Hawai`i's Office of Housing and Community Development.

61. On November 21, 2018, the Commission received the County of Hawai`i's Motion to Quash Petitioner's Subpoena and Subpoenas Duces Tecum.

62. On November 21, 2018, the Commission Chair issued an order that denied in part and granted in part the County's Motion to Quash Petitioner's Subpoena and Subpoena Duces Tecum.<sup>2</sup>

63. On November 21, 2018, the Commission Chair sent a letter to all parties indicating that the Commission would hear WHI's Motion for Issuance of Subpoena Duces Tecum and Subpoena to an Authorized Representative of the State of Hawai`i Office of Planning at the November 28, 2018 hearing scheduled in Kona, Hawai`i.

64. On November 21, 2018, the Commission sent Notice of Hearing on WHI's Motion for Issuance of Subpoena to an Authorized Representative of the State of Hawai`i Office of Planning; and Continued Hearing on the Order to Show Cause on November 28, 2018 to the Statewide and Hawai`i Island mailing lists.

65. On November 26, 2018, the Commission received notice via email of a new email address for WHI's representative - Ms. Natalia Batichtcheva.

66. On November 28, 2018, the Commission held a hearing in Kona, Hawai`i. At the

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<sup>2</sup> The Chair's Order addressed the County's Motion to Quash the subpoena requiring a representative of the County's OHCD to appear for cross-examination and subpoenas duces tecum requiring the County to provide certain specific documents along with a request for any other documents relevant to the Commission's OSC. The Chair determined the subpoenas duces tecum request was repetitious, irrelevant or immaterial; and, that the County must provide a representative of the County OHCD who can address any of the issues being raised by WHI.

hearing the following attended: for the Petitioner WHI was Steven Lim, Esq., Irina McGriff (interpreter for WHI); Valery Grigoriants (Vice-President of Arch Limited), Natalia Batichtcheva (President of WHI) and Joel LaPinta (Project Manager of WHI); for the County Ronald Kim, Esq., Jeff Darrow (Planning Program Manager for the Planning Division of the Planning Department), and, Neil Gytoku, Ann Bailey, and Dwayne Osaka (County Department of Housing and Community Development (“DHCD”)); and for OP Dawn Apuna, Esq., and Rodney Funikoshi (OP Land Use Division Manager). Written public testimony was submitted by Julia Alos. Oral public testimony was received from Darlene Osorio and Julia Alos.

67. On November 28, 2018, at the hearing Petitioner submitted a new exhibit, Exhibit 65, and requested that previously filed exhibits in Petitioner’s Supplemental Statement of Position be allowed into the record. The Chair allowed the following Petitioner exhibits into the record: 53d, 54d, 57, 62, 63a, and 63b, and 65 (allowed but noted as a late submittal). Exhibits 57, 62, 63a, and 63b were noted as submitted without normal reviews or certifications. The other exhibits were excluded from the record with the Chair providing the reason for denying each one.

68. On November 28, 2018, at the hearing Petitioner argued for its motion for subpoena of an authorized representative of the State of Hawai`i Office of Planning. After discussion, the Commission unanimously voted to deny the motion.

69. On November 28, 2018, at the hearing, the Chair noted that he had denied in part and granted in part Petitioner’s request for a subpoena for a County Housing agency witness to appear. The County produced Neil Gytoku from the DHCD for examination.<sup>3</sup> Mr. Gytoku

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<sup>3</sup> Commission Cabral disclosed that her company receives rental income from DHCD but felt she could remain fair and impartial. There were no objections from the parties.



affirmed that the County of Hawai'i Mayor's office correctly identified the County's position<sup>4</sup> that the affordable housing condition had not been fulfilled; and that Petitioner's Exhibit 65 and 11 provide evidence to support that position. Mr. Gytoku was the last witness for any of the parties.

70. On November 28, 2018, at the hearing the parties presented their briefs in response to a request from the Commission at the previous hearing. Commissioners questioned each of the parties regarding their positions on the briefed items. The parties then delivered closing arguments. Mr. Lim requested a ruling on an oral motion to dismiss the OSC; the Chair responded that the oral motion was in line with what the proceedings sought to determine, and the proceedings would move forward. The Chair confirmed that the commissioners had each reviewed the records and transcripts for all meetings and were prepared to deliberate on the subject matter. A motion was made and seconded to revert the property to the original land use classification due to a violation of conditions and that there had not been substantial commencement of use of the land. The Commission motion passed by a vote of 7 ayes, 1 nay, and none excused.<sup>5</sup>

71. On November 30, 2018, the Commission mailed Order Granting Land Use Commission's Own Motion to Correct September 6, 2018 Transcript of Hearing on Order to Show Cause.<sup>6</sup>

72. On April 30, 2019, a LUC meeting notice and agenda for its scheduled May 7, 2019 LUC

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<sup>4</sup> The County had submitted a letter from the Mayor's office attesting to their position on the affordable housing condition on November 9, 2018, but had not offered it as an exhibit. Chair summarized that the position information in the letter had been requested by the Commission at the last hearing. The letter was admitted as County Exhibit 1.

<sup>5</sup> There are currently only eight sitting commissioners; the Kaua'i seat is presently vacant.

meeting in Kona, Hawai`i was sent to the Parties and the Statewide and Hawai`i mailing and electronic mailing lists.

73. None of the parties submitted a proposed decision and order pursuant to HAR §15-15-82(a).

74. On May 7, 2019, the Commission held a hearing in Kona, Hawai`i. At the hearing the following attended: for the Petitioner WHI was Steven Lim, Esq.; for the County Ronald Kim, Esq., Duane Kanuha (Deputy Director of the Planning Department); and for OP Dawn Apuna, Esq. There was no oral or written public testimony submitted.

75. On May 7, 2019, at the hearing Petitioner requested an opportunity to address the Commission. Petitioner identified several legal issues that they felt the Commission needed to address. The Commission made and approved a motion to defer action on adoption of the form of the Order and requested Petitioner to provide a legal brief on the issues raised at the hearing, served on all parties by May 10, 2019. OP and the County were given the opportunity to respond to Petitioner's brief by May 17, 2019. And, Petitioner was provided until May 20, 2019 to further comment upon any responses by OP or the County.

76. On May 9, 2019, the Commission received Petitioner's Memorandum of Law Regarding the Requirements for Issuance of Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

77. On May 21, 2019, the Commission received OP's Response to Petitioner's Memorandum

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<sup>6</sup> The transcript was corrected to accurately reflect public testimony by Cindy Kester on September 6, 2018, on behalf of Julia Alos. The corrected passage clarified that a "Roundabout has not been constructed."

of Law Regarding the Requirements for Issuance of Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

78. On May 22, 2019, the Commission received Petitioner's Response to OP's Response to Petitioner's Memorandum of Law Regarding the Requirements for Issuance of Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

### **FINDINGS OF FACT**

Based on the foregoing and after carefully considering and reviewing all the evidence received including the testimony of witnesses, documents received in evidence and considering the entire record, the Land Use Commission makes the following Findings of Fact.

### **THE PARTIES AND PERSONS RELATED TO THE PETITIONER**

79. According to the QUITCLAIM DEED dated October 16, 2014, submitted by Petitioner and received in evidence as Petitioner's Exhibit "1", Petitioner WAIKOLOA MAUKA, LLC is a Delaware limited liability company.

80. By the QUITCLAIM DEED dated October 16, 2014, WAIKOLOA MAUKA, LLC, as Grantor, conveyed to WAIKOLOA HIGHLANDS, INC., a Colorado corporation, as Grantee, the property which is subject to the 2008 Order. The QUITCLAIM DEED was recorded on October 22, 2014 in the Bureau of Conveyances of the State of Hawaii as Document No. A-54080020.

81. WAIKOLOA MAUKA, LLC, and WAIKOLOA HIGHLANDS, INC. have common

ownership and control. At all times relevant, both entities were owned or controlled by either or both brothers Vitaly Grigoryants and Valery Grigoryants, or by entities owned or controlled by either or both of the brothers Grigoryants.

82. Exhibit "28" titled "CORPORATE STRUCTURE OF WAIKOLOA HIGHLANDS AS OF OCTOBER 11, 2018, was prepared by Petitioner and received in evidence. According to Exhibit "28", Vitaly Grigoryants is the 100% "ultimate beneficial owner" of Davies Partners Limited which in turn has 100% of Arch, Ltd., a Bahamas corporation, which in turn has 100% of Vitiol Corporation, a California corporation, which in turn has 100% of Waikoloa Highlands.

83. Valery Grigoryants testified that he and his brother Vitaly Grigoryants make all decisions jointly. Valery Grigoryants testified "The owner is, as you can see, is my brother. We have a separate agreements where we make all decisions together."

TRANSCRIPT (10/24/18), p. 47, lines 20-22.

84. Notwithstanding oral testimony presented, Petitioner's evidence was sometimes erroneous, misleading or simply contained wrong information.

85. Petitioners prepared and submitted Exhibit "5", which was thereafter received in evidence. Exhibit "5" was a document titled "SHAREHOLDERS' ACTION BY WRITTEN CONSENT - Waikoloa Highlands, Inc., a Colorado corporation" and was dated "05/06/16".

86. Exhibit "5" was signed by the following two individuals, with the following words below each respective signature line: "Arch LTD - Representative Ovasafyan Aykaz, Percentage Ownership - 80%" and "Vitoil corporation - Representative Stefan Martirosian Percentage

Ownership - 20%”

87. Petitioner’s Exhibit “5” contradicted Petitioner’s Exhibit “28”: Exhibit “28” stated that Arch, Ltd., a Bahamas corporation, had 100% of Vitoil Corporation, a California corporation, which in turn had 100% of Waikoloa Highlands.

88. In response to questioning by the Chairperson, Petitioner admitted Exhibit “5” contained inaccurate information.

[CHAIRPERSON SCHEUER:] On that Exhibit 5, I read Exhibit 5 as listing Stefan Martirosian as owning 20 percent of the property through Vitoil; is that incorrect?

THE WITNESS: Incorrect, by mistake, happened by mistake only. That was a mistake, you can check, review the files and records of the company Vitoil, and you can see that Arch was always the only owner.

CHAIRPERSON SCHEUER: And does Mr. Martirosian have any interest in Vitoil? Any ownership?

THE WITNESS: He never had any interest before, and he still -- and now he doesn't have any interest as well.

CHAIRPERSON SCHEUER: So immediately regarding Exhibit 5, it was given to us as an exhibit by the Petitioner, by you, as a basis for our decision-making, but you're stating now that it's erroneous in regards to Mr. Martirosian's ownership and role?

THE WITNESS: Yes, and I can explain. Well, we give you what we had. There was a mistake on this document but this is the only document we had. So you asked us for document, we gave it to you. We didn't make any changes on that document.

CHAIRPERSON SCHEUER: Thank you. Is there any written documentation otherwise provided to us that explains the error in this record that you've just described?

THE WITNESS: As far as I know, no.

TRANSCRIPT (10/24/18), p.67, line 22 - p.69, line 2.

89. Counsel for Petitioner identified the exhibits received in evidence which contained erroneous information about ownership and control of the persons and entities involved with the subject property.

MR. LIM: The ones I'm aware of are Exhibit 5, our last filing which was May 9th, 2016, where I think Mr. Grigoryants already testified that that was in error by identifying Mr. Martirosian as a shareholder.

And I don't know if it's in error or not, but the other issue was the organizational chart which showed his brother as being the ultimate decisionmaker, and I think he's clarified today that they have an agreement to share both control and ownership.

TRANSCRIPT (10/24/18), p.837, lines 4-14.

90. In this proceeding, WAIKOLOA HIGHLANDS, INC. referred to itself as "the Petitioner". Petitioner's Exhibit "7" was received in evidence. The exhibit was titled "LUC Conditions of Approval Matrix Summary of Actions to Date". Above the title was the heading stating the following: "LAND USE COMMISSION - Docket No. A06-767. Successor Petitioner Waikoloa Highlands, Inc. (the "Petitioner")". Exhibit "7" was prepared by the Petitioner.

91. Therefore, references to the "Petitioner" in this FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA shall mean WAIKOLOA MAUKA, LLC and/or WAIKOLOA HIGHLANDS, INC. as the case or context may be.

**PETITIONER'S OBLIGATIONS PURSUANT TO THE 2008 ORDER**

92. The Findings of Fact, Conclusions of Law, and Decision and Order (“2008 Order”) in this docket were issued on June 10, 2018.

93. Findings of Fact No. 44 in the 2008 Order stated:

44. Reclassification for the Petition Area is being sought to develop 398 rural lots for residential use with a minimum lot size of one-acre. The Project will provide an alternative to the current available stock of housing options in the area. The Petitioner has chosen to pursue a reclassification from Agricultural to Rural District, as opposed to Agricultural to Urban because of the Petitioner's desire to have a lower density development and preserve the character of the land. Petitioner has completed all County zoning requirements including a third revised tentative map and subdivision approval.

94. With respect to the “Petitioner's Financial Capability to Undertake the Project”, Finding of Fact No. 51 in the 2008 Order stated:

51. Petitioner intends to use \$4 million in funds held by Morgan Stanley for pre-development costs for the Project. In addition, the Petitioner plans to use proceeds from sales of its properties to fund the Project. In conjunction with sale proceeds, Petitioner will also obtain funding from Arch, Ltd., one of the Petitioner's members, to complete the Project.

95. Finding of Fact No. 59 in the 2008 Order stated:

59. The lots in the Project are anticipated to sell between \$350,000 and \$500,000, with an average price of \$400,000. With a house and lot package, the selling price is anticipated to be from about \$700,000 to several million dollars. Petitioner has estimated that the selling price for the lots would be \$250,000 to \$350,000.

96. Regarding the economic impact of the proposed project, the Findings of Fact in the 2008

Order stated:

64. The Project is projected to generate \$340 million in direct new capital investment and spending into the County's economy and create an estimated \$48 million in profits for local contractors and suppliers.
65. During the construction period, the Project is estimated to generate 1,640 worker years of direct onsite employment, along with 656 worker years in associated and indirect offsite employment. The wages paid to these workers is estimated to total approximately \$113 million,
66. After completion, the Project is estimated to require the equivalent of 56 full-time maintenance, renovation, repair, and other workers being paid approximately \$1.6 million in wages each year.
67. Residents and guests of the Project will spend approximately \$39 million per year in the local economy.

97. With respect to the schedule of development, the Findings of Fact in the 2008 Order stated:

158. The Project is planned to be developed in two phases. Phase 1 is projected to start upon approval of the required land use entitlements and last approximately 8 to 10 months. This first phase will involve 149 lots on about 319 acres and involve the development of roads, infrastructure, and utilities.
159. Phase 2 is also projected to last approximately 8 to 10 months and will include 249 lots on 413 acres following the completion of Phase 1. The remainder of the site roads, infrastructure, and utilities will be installed. The Project is expected to be completed within 10 years of the date of receipt of the last land use entitlement allowing



site work and development activities. Therefore, incremental districting is not necessary.

98. The 2008 Order further stated:

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

1. Compliance with Representations to the Commission. Petitioner shall develop the Petition Area in substantial compliance with the representations made to the Commission. Failure to develop the Petition Area may result in reversion of the Petition Area to its former classification, or change to a more appropriate classification.
2. Completion of Project. Petitioner shall develop the Petition Area and complete buildout of the Project no later than ten (10) years from the date of the Commission's decision and order. For purposes of the Commission's decision and order, "buildout" means completion of the backbone infrastructure to allow for the sale of individual lots.
3. Reversion on Failure to Complete Project. If Petitioner fails to complete buildout of the Project or secure a bond for the completion thereof within ten (10) years from the date of the Commission's decision and order, the Commission may, on its own motion or at the request of any party or interested person, file an Order to Show Cause and require Petitioner to appear before the Commission to explain why the Petition Area should not revert to its previous Agricultural classification.
4. Water Resource Allocation. Petitioner shall provide drinking and irrigation water source, storage, and transmission facilities and improvements to accommodate development of the Petition Area, to the satisfaction of the County of Hawaii and appropriate State agencies. Petitioner shall notify the Commission of changes to its proposed water source for the Project's drinking water and irrigation water needs.
5. Water Conservation Measures. Petitioner shall implement water conservation measures as may be required by the

applicable provisions of the Hawaii County Code, and shall implement BMPs, such as use of indigenous and drought tolerant plants and turf and incorporate such measures in the Project's landscape planting. Petitioner shall require the use of native drought tolerant plants on the Petition Area in the Conditions, Covenants and Restrictions ("CC&Rs") associated with the Project or in deed restrictions for each lot in the Project. Petitioner shall provide a copy of the complete CC&Rs to the Commission within 30 days' after the CC&Rs become enforceable.

6. Transportation. Petitioner shall reach an agreement with the State DOT for the construction of the following improvements related to the Project:

a. For the intersection, Waikoloa Road and Queen Ka'ahumanu Highway, the State DOT has requested that the Petitioner include improvements to make the makai bound approach from Waikoloa Road have one left-turn only lane, one through/left-turn lane, and a right turn lane with the appropriate signalization. In addition, an acceleration lane would be added to Queen Ka'ahumanu Highway to accommodate the additional leftturn lane;

b. Petitioner will provide a left-turn shelter lane on Mamalahoa Highway from Waikoloa Road, and two advanced warning lights, one located on mauka-bound Waikoloa Road, and the other on southbound Mamalahoa Highway. Prior to final subdivision approval, Petitioner will enter into a Memorandum of Understanding with the State DOT outlining the proposed improvements. Petitioner will provide the Commission with a copy of the fully executed agreement within 30 days from the date the agreement is fully executed. Petitioner will also comply with Condition C of Ordinance No, 07-1271 as may be amended from time to time, which fulfills the Petitioner's transportation obligations to the County in relation to the Project.

7. Street Lights. Petitioner shall use shielded or low sodium streetlights within the Project to avoid impacts to flight birds and other population.

8. Plant Species. Petitioner shall preserve native wiliwili trees and kawelu grassland assemblages located outside of the construction and grading areas, if practicable, consistent with

the development of the Project.

9. Affordable Housing. Petitioner shall provide affordable housing opportunities for residents in the State of Hawaii in accordance with applicable affordable housing requirements of the County. The location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between Petitioner and the County. Petitioner shall provide the Commission with a fully executed copy of the affordable housing agreement within 30 days of the execution of the agreement.

10. Previously Unidentified Burial/Archaeological/Historic Sites. In the event that historic resources, including human skeletal remains, lava tubes and lava blisters/bubbles are identified during the construction activities, all work shall cease in the immediate vicinity of the find, the find shall be protected from additional disturbance, and the State Historic Preservation Division ("SHPD"), Hawai'i Island Section, shall be contacted immediately. Without any limitation to any other condition found herein, if any burials or archaeological or historic sites, such as artifacts, marine shell concentrations, charcoal deposits, stone platforms, paving, and walls not previously identified in the studies referred to herein, are discovered during the course of construction of the Project, then all construction activity in the vicinity of the discovery shall stop until the issuance of an archaeological clearance from the SHPD that mitigative measures have been implemented to its satisfaction.

11. Archeological Site 22. Petitioner shall consult and comply with all SHPD recommendations in regards to the treatment of Site 22.

12. Drainage. Petitioner shall prepare a drainage study and the recommended drainage system shall be constructed, meeting with the approval of the County of Hawaii Department of Public Works.

13. Wastewater. Petitioner shall fund and construct adequate wastewater treatment, transmission and disposal facilities, as determined by the County of Hawai'i Department of Environmental Management and the State Department of Health.

14. Solid Waste. Petitioner shall develop a solid waste management plan in conformance with the Integrated Solid Waste Management Act, HRS Chapter 342G. The solid waste management plan shall be approved by the County of Hawai'i Department of Environmental Management and the DOH.
15. Civil Defense. Petitioner shall, on a fair-share basis, fund and construct adequate solar-powered civil defense measures serving the Petition Area as determined by the State of Hawai'i, Department of Defense, Office of Civil Defense, and the County of Hawai'i, Civil Defense Agency.
16. Established Access Rights Protected. Petitioner shall preserve any established access rights of native Hawaiians to undeveloped lands, who have customarily and traditionally used the Petition Area to exercise subsistence, cultural, and religious practices or for access to other areas.
17. Air Quality Monitoring. Petitioner shall participate in an air quality monitoring program if required by the DOH.
18. Best Management Practices. Petitioner shall implement applicable Best Management Practices ("BMPs") applicable to each proposed land use in order to minimize infiltration and runoff from construction and vehicle operations, reduce or eliminate soil erosion and ground water pollution, and formulate dust control measures to be implemented during and after the development process in accordance with the State Department of Health guidelines.
19. Energy Conservation Measures. Petitioner shall implement energy conservation and sustainable design measures, that are feasible and practicable, such as use of solar energy and solar heating and the standards and guidelines promulgated by the Building Industry Association of Hawai'i, the U.S. Green Building Council, the Hawai'i Commercial Building Guidelines for Energy Efficiency, the Guidelines for Sustainable Building Design in Hawai'i, and the applicable county building codes, as amended, into the design and construction of the Project and the structures within the Petition Area.
20. Notice of Change of Ownership. Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership

interests in the Petition Area, prior to development of the Petition Area.

21. Annual Reports. Petitioner shall timely provide without any prior notice, annual reports to the Commission, OP, and County in connection with the Petition Area and Petitioner's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission.

22. Release of Conditions. The Commission may fully or partially release the conditions provided herein as to all or any portion of the Petition Area upon timely motion and upon the provision of adequate assurance of satisfaction of these conditions by Petitioner.

23. Notice of Imposition of Conditions. Within seven days of issuance of the Commission's Decision and Order for the subject reclassification, Petitioner shall (a) record with the Bureau of Conveyances a statement that the Petition Area is subject to conditions imposed herein by the Commission in the reclassification of the Petition Area; and (b) file a copy of such recorded statement with the Commission.

24. Recordation of Conditions. Petitioner shall record the conditions imposed herein by the Commission with the Bureau of Conveyances pursuant to HAR §15-15-92. Such conditions shall run with the land, pursuant to HRS §205-4(g).

99. The Land Use Commission carefully considered the record of this Docket and matter, including the testimony of the witnesses, exhibits received in evidence, the arguments and presentation of counsel and all parties and the files and records of this matter. Based on the foregoing, the Land Use Commissions made the Findings of Fact which follow.

**PETITIONER FAILED TO COMPLY WITH THE 2008 ORDER**

100. Contrary to Finding No. 44 of the 2008 Order and the representations reflected by that Finding, Petitioner has not developed 398 rural lots for residential use with a minimum lot size of

one-acre. Petitioner (including its successor in interest WHI) has not developed the Project where it provides an alternative *to* the current available stock of housing options in the area.

101. Contrary to Finding No. 51 of the 2008 Order and the representations reflected by that Finding, Petitioner has not used \$4 million in funds held by Morgan Stanley for pre-development costs for the Project. Petitioner has not used proceeds from sales of its properties to fund the Project. Petitioner has not used in conjunction with sale proceeds, funding from Arch, Ltd., one of the Petitioner's members, to complete the Project.

102. Contrary to Finding Nos. 64 through 67 of the 2008 Order and the representations reflected by those Findings, no evidence was presented that the Project has generated direct new capital investment and spending nor created profits for local contractors and suppliers. The Project has not generated 1,640 worker years of direct onsite employment, nor 656 worker years in associated and indirect offsite employment. No evidence was presented that the wages paid to these workers is estimated to total approximately \$113 million. No evidence was presented that residents and guests of the Project spend approximately \$39 million per year in the local economy.

103. Contrary to Finding No. 158 through 159 and Finding No. 76 of the 2008 Order and the representations reflected by those Findings, Petitioner did not develop the Project as represented. Phase 1 did not start upon approval of the required land use entitlements and did not last approximately 8 to 10 months. Petitioner did not develop as represented 149 lots on about 319 acres and did not develop roads, infrastructure, and utilities.

104. Contrary to Finding No. 159 of the 2008 Order and the representations reflected by that

Finding, Petitioner did not develop Phase 2 as represented and did not develop this phase within approximately 8 to 10 months. Petitioner did not develop the 249 lots on 413 acres, as represented. Petitioner did not install the remainder of the site roads, infrastructure, and utilities.

105. Contrary to Finding No. 159 of the 2008 Order and the representations reflected by that Finding, Petitioner did not complete the Project within 10 years of the date of receipt of the last land use entitlement allowing site work and development activities.

106. The 2016 ANNUAL REPORT for "WAIKOLOA MAUKA, LLC - DOCKET NO. A06-767" stated the following:

A. Compliance with Representations to the Commission

The concept of the project has not changed, which is to develop 398+/- 1-acre sized lots.

The area intended for a golf course will be used for both drainage ways as well as open passive recreational areas that will include walking trails.

B. Completion of Project

The Commission required that the project be completed no later than ten (10) years of the date of the Commission's decision or June 10, 2018. "Buildout" was defined as having completed the backbone infrastructure to allow for the sale of individual lots.

Notwithstanding the County's rezoning time extension of fifty (50) lots by March 21, 2018 and the balance by March 21, 2023, the **Petitioner understands that the more stringent performance requirement of buildout by June 10, 2018 is binding.** The basic on-site construction plans have been completed. The Petitioner will thus work towards fulfilling that performance requirement.

Although **nothing physical has occurred on the ground to date,** the Petitioner has been working diligently to secure a

development partner, as well as trying to address other conditions of approval as will be discussed below.

C. Reversion on Failure to Complete Project

**The Petitioner understands that its failure to complete buildout of the project or secure a bond will be subject to possible further review by the Commission to determine whether the property should revert to its previous Agricultural classification.**

2016 ANNUAL REPORT, at p.3. (Emphasis added.)

107. Petitioner has failed to Comply with the following conditions of the 2008 Order.

A. Petitioner has failed to comply with Condition 1. Petitioner failed to develop the Petition Area in substantial compliance with the representations made to the Commission. Without limiting the foregoing, Petitioner has failed to comply with conditions 2, 3, 4, 6, 9, 11 through 15, 20 and 21.

B. Petitioner has failed to comply with Condition 2. Petitioner failed to develop the Petition Area and complete buildout of the Project no later than ten (10) years from the date of the Commission's decision and order. "Buildout" meant completion of the backbone infrastructure to allow for the sale of individual lots. Petitioner has not commenced construction of the backbone infrastructure to allow for the sale of individual lots.

C. Petitioner has failed to comply with Condition 4. Petitioner failed to provide drinking and irrigation water source, storage, and transmission facilities and improvements to accommodate development of the Petition Area, to the satisfaction of



the County of Hawaii and appropriate State agencies.

D. Petitioner has failed to comply with Condition 6. Petitioner failed to reach an agreement with the State DOT for the construction of the improvements related to the Project described in Condition 6.

E. Petitioner has failed to comply with Condition 9. Petitioner failed to provide affordable housing opportunities for residents in the State of Hawaii in accordance with applicable affordable housing requirements of the County.

F. Petitioner has failed to comply with Condition 11. Petitioner failed to consult and comply with all SHPD recommendations in regards to the treatment of Site 22.

G. Petitioner has failed to comply with Condition 12. Petitioner failed to prepare a drainage study and has failed to construct the recommended drainage system, meeting with the approval of the County of Hawaii Department of Public Works.

H. Petitioner has failed to comply with Condition 13. Petitioner failed to fund and construct adequate wastewater treatment, transmission and disposal facilities, as determined by the County of Hawai'i Department of Environmental Management and the State Department of Health.

I. Petitioner has failed to comply with Condition 14. Petitioner failed to develop a solid waste management plan in conformance with the Integrated Solid Waste Management Act, HRS Chapter 342G. The Petitioner also failed to obtain approval of the solid waste management plan by the County of Hawai'i Department of Environmental

Management and the DOH.

J. Petitioner has failed to comply with Condition 15. Petitioner failed, on a fair-share basis, to fund and construct adequate solar-powered civil defense measures serving the Petition Area as determined by the State of Hawai'i, Department of Defense, Office of Civil Defense, and the County of Hawai'i, Civil Defense Agency.

K. Petitioner has failed to comply with Condition 20. Petitioner failed to give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Petition Area, prior to development of the Petition Area.

L. Petitioner has failed to comply with Condition 21. Petitioner failed to timely provide without any prior notice, annual reports to the Commission, OP, and County in connection with the Petition Area and Petitioner's progress in complying with the conditions imposed.

**NO SUBSTANTIAL COMMENCEMENT OF USE OF THE LAND**

108. Based on the record, and including the foregoing Findings of Fact, the Commission also finds that the Petitioner has not substantially commenced use of the land in accordance with Petitioner's representations to the Land Use Commission.

109. No credible evidence was presented that the Petitioner had substantially commenced the use of the Petition Area nor the buildout of the Project. No credible evidence was presented of project-related expenditures which demonstrated that Petitioner had substantially commenced use

of the land in accordance with Petitioner's representations to the Land Use Commission.

110. Petitioner's Exhibit "7" was received in evidence. The exhibit was titled "LUC Conditions of Approval Matrix Summary of Actions to Date". Exhibit "7" was prepared by the Petitioner.

111. According to Exhibit "7", the following conditions had an "X" placed in the column headed with the words "Satisfaction of LUC condition (X)": LUC condition No. 6a ("Transportation: Waikoloa Road and Queen Ka'ahumanu Highway intersection improvements"), LUC condition No. No. 9 ("Affordable Housing"); LUC condition No. 20 ("Notice of Change of Ownership"); LUC condition No. 21 ("Annual Reports"); LUC condition No. 23 ("Notice of Imposition of Conditions"); and LUC condition No. 24 ("Recordation of Conditions").

112. Therefore, according to Petitioner's Exhibit "7", LUC conditions Nos. 1, 2, 3, 4, 5, 6b, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 22 have not been satisfied.

113. Because Petitioner prepared and submitted Exhibit "7", the Land Use Commission finds and concludes that Petitioner admitted that LUC conditions Nos. 1, 2, 3, 4, 5, 6b, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 22 have not been satisfied.

114. According to Exhibit "7", Petitioner admitted that it did not itself satisfy LUC condition No. 6a. With respect to Condition No. 6a, Petitioner stated that "[t]he Waikoloa Road/Queen Ka'ahumanu Highway intersection improvements were undertaken and completed by the Hilton Grand Vacation Corporation for its additional time share operations."

115. OP presented evidence on behalf of DOT, that Petitioner has not fully complied with the

Condition No.6.

116. OP presented evidence that the budget estimates for Condition 6b improvements were submitted to DOT in 2007 and that Petitioner needs to submit updated construction estimates, development construction plans and implementation schedules, subject to DOT review and approval.

117. Petitioner presented no evidence that construction of traffic improvements as required has commenced. Members of the public testified that badly needed traffic improvements have not been undertaken.

118. Petitioner stipulated as follows with respect to Condition 6:

MR. LIM: Petitioner will stipulate that Condition 6 on the DOT intersection requires that Petitioner shall reach an agreement with the State Department of Transportation.

I'll represent to you that no agreement was made, although the improvement did get built.

TRANSCRIPT (10/24/18), p.130, lines 4-9.

119. The Land Use Commission therefore finds that Petitioner did not satisfy LUC Condition No. 6.

120. With respect to LUC condition No. 9, Petitioner has not commenced construction of affordable housing in accordance with applicable affordable housing requirements of the County.

121. The OHCD administrator testified that Petitioner's transaction made purportedly to satisfy the requirements of LUC Condition No. 9 do not comply with the Hawai'i County Code

Chapter 11 or the Project's zoning Ordinance 13-29.

122. The Commission finds that Petitioner's transaction made purportedly to satisfy the requirements of LUC Condition No. 9 do not comply with the Hawai'i County Code Chapter 11 or the Project's zoning Ordinance 13-29.

123. The 20% housing requirement for Petitioner's project (being 80 units or credits) will not be met on the 11+ acres ("AH parcel") transferred by Petitioner to a third party (where only 32 units are planned).

124. The Hawai'i County Code required that the transfer of land for affordable housing must be to a non-profit entity.

125. Petitioner, however, transferred the land on which affordable housing was to be located to a for-profit entity incorporated for real estate development; the land was shortly thereafter sold to a third party for a substantial profit.

126. The transfer of 11.7 acres purportedly for affordable housing constitutes only 1.6% of the total Petition Area of 731+ acres; the AH parcel remains vacant, no grading done, no infrastructure developed, and no affordable housing built.

127. In deciding whether the Petitioner had satisfied Condition 9, the Commission heard the testimony of witnesses and observed their demeanor, and considered documents received in evidence and considered the arguments and representations of counsel and the entire record of this case. The Commission found more credible the position of the County of Hawai'i that Petitioner has failed to provide affordable housing opportunities for residents in the State of

Hawai'i in accordance with applicable affordable housing requirements of the County. Without limiting the foregoing, no affordable housing was constructed on the subject property, and Petitioner did not provide any credible evidence that it had substantially commenced use of the land in accordance with Petitioner's representations to the Land Use Commission to construct affordable housing.

128. The following colloquy took place between one of the Commissioners and Joel LaPinta, the development consultant for Petitioner.

COMMISSIONER CHANG: So in your opinion there has been no land use on the property?

THE WITNESS: No, not the land.

TRANSCRIPT (10/24/18), p.134, line 11-13.

129. Petitioner's principal, Valery Grigoryants, testified that the property at present was not being used.

COMMISSIONER OKUDA: And right now, as of today, what is the property being used for?

THE WITNESS: As far as I know, as of today, it's not being used.

TRANSCRIPT (10/24/18), p.50, lines 22-25.

130. Public witness Julia Alos testified that she would pass by the subject property nearly every day and has seen no improvements on the property since 2008.

131. In response to the question from the Chairperson of the Commission "Has there been

physical improvements to the property since the time that the Decision and Order was passed ten years ago?”, Petitioner’s representative, Valery Grigoryants testified “I did not notice any changes”. TRANSCRIPT (10/24/18), p.73, lines 15-18.

132. Petitioner’s representative, Valery Grigoryants testified that Petitioner had “invested” \$1.5 million in the property, but could not tell the Commission how much of the \$1.5 million was spent after the entry of the Decision and Order. TRANSCRIPT (10/24/18), p.74, lines 17-24.

133. The following was the representation made by the Petitioner’s attorney to the Commission at the hearing:

CHAIRPERSON SCHEUER: And how many of the \$1.5 million that you said was invested was spent after the point at which the Decision and Order was passed, but before the point to which this Order to Show Cause hearing began?

THE INTERPRETER: Sorry, can you rephrase for the interpreter?

CHAIRPERSON SCHEUER: Yes. I can break it up.

The witness testified that \$1.5 million had been invested in the property. How much of that was spent after the Decision and Order but before these Order to Show Cause proceedings began?

THE WITNESS: I do not really understand the question. To what time?

CHAIRPERSON SCHEUER: Don't have exact dates in front of me.

MR. LIM: The majority of the money was spent previous to -- Petitioner will stipulate that the majority of the money was spent prior to the 2008 reclassification by the Commission.

TRANSCRIPT (10/24/18), p.74, line 10 - p.75, line 5.

134. In response to questioning by the Office of Planning, Joel LaPinta, the development consultant for Petitioner testified that no infrastructure or utilities were placed on the Petition Area after the date of the Decision and Order:

Q: The road infrastructure and utilities that you claim are on the Petition Area at this time, were they placed there by the Petitioner since the Decision and Order was made?

A: No.

Q: Are there any other structures on the property that were built by the Petitioner since the Decision and Order?

A: Not that I'm aware of.

TRANSCRIPT (10/24/18), p.113, lines 1-9.

135. Petitioner itself was not certain whether changed conditions now prevented development of the subject property, because of the passage of time and the occurrence of intervening events and requirements. Petitioner could not present evidence demonstrating that previous studies and reports were still viable to allow development of the subject property. In response to questions from the Chairperson of the Commission, Joel LaPinta, the development consultant for Petitioner testified:

CHAIRPERSON SCHEUER: What year was the original archaeological study completed?

THE WITNESS: I don't know.

CHAIRPERSON SCHEUER: Do you know when SHPD revised its rules for archaeological surveys?

THE WITNESS: No.

CHAIRPERSON SCHEUER: Are you aware that they revised their rules



since that study was done?

THE WITNESS: No, I wasn't aware of that.

CHAIRPERSON SCHEUER: You testified that you have spoken to water companies for providing water to this development.

What's the aggregate amount of water that would be needed for full buildout?

THE WITNESS: I would just inquire for the first phase, which is what I'm focusing on.

CHAIRPERSON SCHEUER: So you did no inquiry as to the amount of water needed for the entirety of the development?

THE WITNESS: No. We would have to negotiate an extension agreement to improve the system and build storage tanks and pumps, was my understanding. And I don't have -- I would rely on an engineer when the time comes for doing that.

CHAIRPERSON SCHEUER: Do you know what aquifer this development is in?

THE WITNESS: I don't know the name of it, but I know it's in a specific aquifer.

CHAIRPERSON SCHEUER: Do you know whether the water source is in the same aquifer?

THE WITNESS: I'm relying on the West Hawaii Water Company. That's their business. That's not within the purview of my work.

TRANSCRIPT (10/24/18), p.145, line 13 - p.146, line 20.

136. Joel LaPinta, the development consultant for Petitioner, furthermore could not provide information on the following questions relevant to the current availability of water to sustain development of the subject property.

CHAIRPERSON SCHEUER: You are not aware of the aquifer, you're not aware of what the sustainable yields are for this aquifer?

THE WITNESS: No, I'm not.

TRANSCRIPT (10/24/18), p.147, lines 18 - 21.

137. Petitioner acknowledged that its traffic impact study needed to be updated. Joel LaPinta, the development consultant for Petitioner, testified:

[CHAIRPERSON SCHEUER:] Do you know how old the transportation impact analysis study was?

THE WITNESS: No, but that we know we need to redo that.

CHAIRPERSON SCHEUER: So you acknowledge that that –

THE WITNESS: That that component needs to be redone, I know that.

CHAIRPERSON SCHEUER: That's usually part of an EIS, correct?

THE WITNESS: Right.

TRANSCRIPT (10/24/18), p.149, lines 9 - 19.

138. At best, Petitioner's use of the land can only be characterized as minimal and not substantial.

139. The Commission finds that Petitioner's use of the land is not considerable in amount or value and is not large in volume or number.

140. The Commission finds that expenditures were made by the Petitioner prior to the entry of the Decision and Order in this docket in 2008, and were not made in compliance with Petitioner's representations to the Commission or subsequent to the reclassification.

141. Therefore, the Commission finds that the Petitioner has not substantially commenced use of the land in accordance with Petitioner's representations to the Land Use Commission.

**PETITIONER WAS NOT DENIED EQUAL PROTECTION OF THE LAW**

142. During the proceedings, Petitioner's representative made the following statement:

I would like to say that, yes, we are investors, and we invest here in Hawai'i. We would like to ask you committee to protect us the same way as you would protect any other investors from Japan or China. You can consider us as Japanese investors.

TRANSCRIPT (11/28/18), p.38, lines 7-11.

143. During the proceedings, Petitioner was assured that race, national origin, language or any other suspect classification does not play a part in the Land Use Commission's decision-making process.

COMMISSIONER OKUDA: Let me assure you about how the Commission makes its decisions. We do not have any preconceptions about anyone's background, ethnicity or what country they come from. I personally do not view you or anyone connected with this project as being connected with any type of criminal activity or anything like that.

I'm not an expert in Eastern European history, but I do know the Armenian people have suffered at the hands of many people who have oppressed, and in fact attempted to exterminate Armenian people.

That is the reason why our Commission follows American legal principles, which is basically that cases should be decided based on the law and the facts, and not on anyone's background or ethnicity. We neither favor nor disfavor people whether they come from Europe, Eastern Europe or Asia.

In fact, let me assure you that I personally, as a lawyer, am very aware of the infamous United States Supreme Court case called Korematsu versus United States, which allows Japanese-Americans to be in prison even though they did no wrong during World War II.

So let me again assure you, we are just looking at the facts and the application of the law here, and nothing else.

TRANSCRIPT (11/28/18), p.45, line 24 - p.46, line 25.

144. Except for the fact that the Land Use Commission issued an Order to Show Cause, Petitioner could not point to any evidence that the Order was issued because of race, religion or other arbitrary classification.

145. The following colloquy took place between one of the Commissioners and counsel for Petitioner.

COMMISSIONER OKUDA: Well, let me ask you this then, because what you raise is a very serious concern and issue and allegation.

What evidence in the record shows that there's any selection based on race, ethnicity, national origin or the language anyone speaks?

MR. LIM: I guess the fact that we have the OSC issued against this particular project.

COMMISSIONER OKUDA: So the only evidence you have of an alleged selection based on race, religion or what we all lawyers call a suspect classification under the law, is the fact that an OSC was issued and nothing else?

MR. LIM: Well, based upon the facts of the particular Petitioner, yes.

TRANSCRIPT (11/28/18), p.44, line 23 - p. 45, line 12.

146. The Order to Show Cause was issued to Petitioner because the Commission had reason to believe that there had been a failure to perform according to the conditions imposed, or the representations or commitments made by the Petitioner.

147. The Order to Show Cause was not issued to Petitioner based upon an unjustifiable standard such as race, religion or other arbitrary classification.

148. The Land Use Commission's actions in this docket were therefore not motivated by or based on an unjustifiable standard such as race, religion or other arbitrary classification.

149. Petitioner was therefore not denied the equal protection of the law.

### **PETITIONER WAS NOT DENIED DUE PROCESS**

150. Petitioner was served with the Order to Show Cause, had notice of all issues regarding the Order to Show Cause, and was provided every and all opportunities to call witnesses, submit evidence, make argument and otherwise be heard on the issues raised by the Order to Show Cause.

151. The ORDER TO SHOW CAUSE, filed July 3, 2018 (hereafter, "the OSC") stated the following:

### **ORDER TO SHOW CAUSE**

TO: WAIKOLOA MAUKA, LLC ("Petitioner"),

YOU ARE HEREBY COMMANDED, under the authority of section 205-4, Hawai'i Revised Statutes ("HRS"), and section 15-15-93, Hawai'i Administrative Rules ("HAR"), to appear before the Land Use Commission, State of Hawai'i ("Commission"), at the Natural Energy Laboratory of Hawai'i (NELHA) - Hale Iako Training Room #119, on August 22-23, 2018, at 9:00 a.m., to show cause as to why that certain land at Waikoloa, South Kohala, County of Hawai'i, Tax Map Key No. (3) 6-8-02:016 (portion), covering approximately 731.581 acres of land referred to as the Subject Area, and approximately identified on Exhibit "A", attached hereto and incorporated herein, should not revert to its former land use classification or be changed to a more appropriate classification.

The Commission has reason to believe that you have failed to perform according to the conditions imposed and to the representations and

commitments made to the Commission in obtaining reclassification of the Subject Area. The conditions of the Decision and Order which may have been violated or not been met include, but may not be limited to the following:

1. Condition 1 Compliance With Representations to the Commission;
2. Condition 2 Completion of Project;
3. Condition 3 Reversion on Failure to Complete Project;
4. Condition 4 Water Resource Allocation;
5. Condition 6 Transportation;
6. Condition 9 Affordable Housing;
7. Condition 11 Archaeological Site 22;
8. Condition 12 Drainage;
9. Condition 13 Wastewater;
10. Condition 14 Solid Waste;
11. Condition 20 Notice of Change in Ownership; and,
12. Condition 21 Annual Reports.

152. The OSC was issued and filed on July 3, 2018, after Petitioner filed its 2016 ANNUAL REPORT on March 2, 2016.

153. Because of Petitioner's statements in its 2016 ANNUAL REPORT, the Land Use Commission had reason to believe that there had been a failure to perform according to the conditions imposed, or the representations or commitments made by the Petitioner.

154. The Commission finds and concludes that it had 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.

155. The Commission finds and concludes that it had the authority to issue the ORDER TO SHOW CAUSE and take the actions taken with respect to the ORDER TO SHOW CAUSE.

156. Petitioner had notice of the OSC and that the LUC might revert the certain land identified and described in the OSC.

157. Petitioner had a meaningful opportunity to be heard on all issue regarding the OSC.

158. In making its decision, the Commission carefully considered the evidence submitted, including documents received in evidence, the testimony of witnesses, and the representations and arguments of counsel.

159. Petitioner's rights to due process were therefore not violated.

**WHI HAS NOT SHOWN GOOD CAUSE AS TO WHY THE PROPERTY SHOULD  
NOT BE REVERTED AND THE ALLEGED CONDUCT OF STEFAN  
MARTIROSIAN DOES NOT EXCUSE PETITIONER'S NON-COMPLIANCE WITH  
THE 2008 ORDER**

160. Petitioner has attempted to excuse its non-compliance with the 2008 Order by contending that the non-compliance was caused by the acts or omissions of Stefan Martirosian.

161. Petitioner, however, was equivocal in its statements about Mr. Martirosian's conduct. Petitioner's attorney, for example, stated:

MR. LIM: Again, for the record, as I stated at the Commission initial hearing

for Motion to Continue Waikoloa Highlands, Incorporated would like to **reiterate that all pleadings and statements made by Waikoloa Highlands, Inc.'s witnesses and counsel relating to Stefan Martirosan, the former director are allegations that he has not been adjudicated to date**, however, we wish stress that Waikoloa – I'll refer to it as Waikoloa for short – Waikoloa strongly believes in the strength of the allegations of fraud and other mismanagement against Mr. Martirosian, and that we are taking this precaution to not expose ourselves to any claims by him.

TRANSCRIPT (11/28/18), p.27, lines 6-19 (emphasis added).

162. The Land Use Commission finds that under the facts and circumstances of this docket, the Commission cannot base its decision on statements which Petitioner itself describes as “allegations”.

163. The Land Use Commissions finds that the statements about Mr. Martirosian’s conduct made by Petitioner and its witnesses are, as stated by Petitioner’s attorney, “allegations”.

164. Even if the statements about Mr. Martirosian’s conduct made by Petitioner and its witnesses were considered, the alleged conduct of Mr. Martirosian does not excuse Petitioner’s failure to comply with the 2008 Order.

165. Mr. Sidney Fuke, Planning Consultant, filed an Annual Report for Petitioner on February 19, 2014. Therefore, at least by February 19, 2014, Petitioner had available to it a competent planning consultant to advise Petitioner about complying with the 2008 Order.

166. Notwithstanding the above, Petitioner has not substantially commenced use of the land in accordance with Petitioner’s representations to the Land Use Commission.

167. Petitioner could have filed a motion or other pleading to modify the 2008 Order.



168. Petitioner, however, has not filed any motion or other pleading to modify the 2008 Order.

169. Petitioner stated that they have brought in new management, Ms. Natalia Batichtcheva (May 2016) and Mr. Joel LaPinta (July 2018), to continue to advance development and marketing of the Property. However, the team was brought on only after the Commission issued the Order to Show Cause. Mr. Martirosian is still listed as a principal on some of the documents submitted by Petitioner.

170. Petitioner admitted that Ms. Batichtcheva is the representative of the owner in the United States, and the owners are in Russia. However, Petitioner also admitted the decision-makers are in Russia; and they make all the decisions on the Project, and Ms. Batichtcheva just implements and is not authorized to make independent decisions.

171. Petitioner's development team started work in June and July of the summer of 2018, just sixty days prior to the OSC hearing; and, only met with the County Planning Department and their counsel two days before the Order to Show Cause hearing.

172. Petitioner's hiring of new management to address future development activities does not address past compliance issues, nor whether substantial commencement has occurred.

173. Throughout WHI's pleadings and testimony various inconsistencies were evident.

174. Mr. Valery Grigoriants' testimony on when Mr. Martirosian was fired was inconsistent, both 2014 and 2016 were identified in direct testimony; and, Petitioner's exhibits also were inconsistent on the matter.

175. Once the inconsistencies were pointed out; Mr. Valery Grigoriants then acknowledged

and testified that there are discrepancies in the corporate documents that were submitted as Petitioner's exhibits. However, he could not explain why Petitioner's Exhibit 5, signed on May 9, 2016 appointing Natalia Batichtcheva as director for WHI, is signed by Mr. Martirosian as a 20% owner of Vitoil Corporation.

176. Mr. Valery Grigoriants and Ovasafyan Aykaz were identified as the only decision makers for the Project but that they were not part of WHI; just owners of stock in the company. Later testimony by Mr. Valery Grigoriants indicated his brother, Vitaly, was the ultimate owner of and in control of all the companies linked to WHI.

177. Petitioner's Exhibit 33, shows that Mr. Valery Grigoriants is a vice-president of Arch Ltd. and Mr. Vitaly Grigoriants is the president. However, there is no documentation in the record showing Mr. Valery Grigoriants has any authority to sign for or bind WHI.

178. Mr. Lim represented that Waikoloa Highlands, Inc. was 100 percent owned by Arch Limited. Arch Limited shareholders are Valery Grigoriants and Ovasafyan Aykaz. Waikoloa Highlands, Inc. is an entity separate from the original Petitioner Waikoloa Mauka, LLC.

179. Petitioner's Exhibit 28 provided a diagram of the ownership structure behind WHI. Mr. Valery Grigoriants was not shown anywhere in the ownership structure. Petitioner agreed that the exhibit information was incorrect.

180. Testimony and exhibits indicate that for the relevant time since the 2008 Decision and Order, the same group that controlled Waikoloa Mauka, LLC also controls Waikoloa Highlands, Inc.

181. Petitioner also provided information that points to some of their new management having worked under Mr. Martirosian during the time of the alleged mismanagement and fraud.

182. Petitioner provided no reasonable explanation for the lack of progress in the Project during the time between Mr. Martirosian allegedly leaving the Project in 2016 and the present; a period of approximately two years and five months.

183. Joel LaPinta, WHI budget consultant and project manager, testified that he had conducted a financial feasibility study for the Project. Petitioner did not provide any evidence to the Commission of such a study.

184. Petitioner has not presented its proposed development plan, updated project timeline, shown the financial capability or a credible financial plan to move forward.

185. Therefore, good cause does not exist which would excuse Petitioner's failure to comply with the 2008 Order.

186. Any of the proposed findings of fact not already ruled upon by the Commission by adoption, or rejected by clearly contrary findings of fact, are hereby denied and rejected. Any conclusions of law herein improperly designated as a finding of fact should be deemed and construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed and construed as a finding of fact.

**FINDINGS AND RULINGS IN RESPONSE TO WAIKOLOA HIGHLANDS, INC.'S COMMENTS AND OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA (PLEADING FILED JUNE 20, 2019).**

1. On June 20, 2019, Petitioner filed WAIKOLOA HIGHLANDS, INC.'S COMMENTS AND OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA.

2. H.R.S. Sec. 91-12 provides:

Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time to each party or to the party's attorney of record.

3. The requirement that an agency incorporate in its decision a ruling upon each proposed finding of fact filed by any party does not require that there be a separate ruling on each proposed finding of fact, although the agency must make its findings reasonably clear. In Outdoor Circle v. Harold K.L. Castle Tr. Estate, 4 Haw. App. 633, 644–45, 675 P.2d 784, 792 (Hawaii App. 1983), the Hawaii Intermediate Court of Appeals stated:

It is not indispensable that there be a separate ruling on each proposed finding of fact. Mitchell v. BWK Joint Venture, 57 Haw. 535, 560 P.2d 1292 (1977); In re Terminal Transportation, Inc., 54 Haw. 134, 504 P.2d 1214 (1972); Freitas v. Pacific Contractors Co., 1 Haw.App. 77, 613 P.2d 927 (1980). However, “the agency must make its findings reasonably clear.” In re Terminal Transportation, Inc., 54 Haw. at 139, 504 P.2d at 1217. In its March 7, 1978 order and decision, LUC made and incorporated reasonably clear findings. By choosing those, it impliedly rejected all others. LUC did not err in doing so.

Outdoor Circle v. Harold K.L. Castle Tr. Estate, 4 Haw. App. 633, 644–45, 675 P.2d 784, 792 (Hawaii App. 1983).

4. The Land Use Commission held a hearing on WAIKOLOA HIGHLANDS, INC.'S COMMENTS AND OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA on July 10, 2019.

5. At the hearing, Petitioner WAIKOLOA HIGHLANDS, INC., through its attorney, stated that it was not prevented from making any arguments to the Commission, but was prevented from introducing certain evidence. Petitioner stated that it was prevented from questioning Rodney Funakoshi of the Office of Planning regarding other petitions or dockets which were not reverted. Petitioner also stated that it wanted the Land Use Commission to take administrative notice of other status hearings or orders to show cause. Except for these two items, Petitioner could not identify any other evidence it was prevented from introducing.

6. At the hearing, Petitioner could not specifically identify the Conclusions of Law which Petitioner contended was an inaccurate statement of the law.

7. At the hearing, Petitioner listed only Finding of Fact no. 123 which it contended was clearly erroneous. In response to a question to list all Findings of Fact which Petitioner contended were clearly erroneous, Petitioner listed only Findings of Fact no. 123.

8. Based on the foregoing, and having carefully considered WAIKOLOA HIGHLANDS, INC.'S COMMENTS AND OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA, the entire record of this docket and the evidence adduced, the Land Use Commission rules on WAIKOLOA HIGHLANDS, INC.'S COMMENTS AND OBJECTIONS TO

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA by making the following findings and rulings.

9. **WAIKOLOA HIGHLANDS, INC.'S "PM 35"**. The reference to “Waikoloa Heights” should have referred to WAIKOLOA HIGHLANDS, INC. Petitioner, however, was equivocal in its statements about Mr. Martirosian’s conduct. Petitioner’s attorney, for example, stated:

MR. LIM: Again, for the record, as I stated at the Commission initial hearing for Motion to Continue Waikoloa Highlands, Incorporated would like to **reiterate that all pleadings and statements made by Waikoloa Highlands, Inc.'s witnesses and counsel relating to Stefan Martirosan, the former director are allegations that he has not been adjudicated to date**, however, we wish stress that Waikoloa – I'll refer to it as Waikoloa for short – Waikoloa strongly believes in the strength of the allegations of fraud and other mismanagement against Mr. Martirosian, and that we are taking this precaution to not expose ourselves to any claims by him.

TRANSCRIPT (11/28/18), p.27, lines 6-19 (emphasis added).

10. The Land Use Commission finds that the statements about Mr. Martirosian’s conduct made by Petitioner and its witnesses are, as stated by Petitioner’s attorney, “allegations”.

11. The Land Use Commission finds that “allegations” are not sufficient to demonstrate good cause or excusable neglect.

12. The allegations about Mr. Martirosian’s conduct are neither good cause of excusable neglect excusing or justifying Petitioner’s failure to comply with the 2008 Order.

13. Even if the statements about Mr. Martirosian’s conduct made by Petitioner and its witnesses are considered more than “allegations”, the alleged conduct of Mr. Martirosian does not excuse Petitioner’s failure to comply with the 2008 Order.

14. WAIKOLOA HIGHLANDS, INC.'S "PM 37-38". The Land Use Commission finds and rules that the objections stated in "PM 37-38" are not supported by the record.

15. WAIKOLOA HIGHLANDS, INC.'S "PM 47". The Land Use Commission finds and rules that to the extent a clarification or supplementation is necessary, the Findings of Fact shall be deemed to include the following from the Transcript:

[VICE CHAIR CABRAL:] I wanted to let you know, Mr. Chair, that for the record I would like to disclose that I do know Mr. Joel LaPinta as real estate agent, and that I did receive an unsolicited phone call from him last week.

Mr. LaPinta informed me that he was calling regarding the Waikoloa matter, and he continued to talk in what could appear to be an attempt to influence my vote in this matter. He made statements regarding the ownership of the property, and that ownership was distinguishable from the old former ownership.

He also indicated he was part of the current management group. He impressed upon me the need for Hawai'i to have additional housing that has been proposed that this project should be able to move forward.

I had repeatedly instructed Mr. LaPinta that he should contact the LUC staff, and that his attorney would be able to work with him and work with the staff on this matter.

I would also -- indicated that I should not have discussed anything with him, and I informed Mr. Orodener, our Executive Director who would be the one to discuss this matter with him.

I'm making this disclosure and bringing it to the attention of the Commission to ensure that full disclosure has been taken place with the public and that all parties and that has not been any ex-parte communication influencing the Commission's decision. Thank you.

CHAIRPERSON SCHEUER: Thank you, Commissioner Cabral.

Mr. Lim, I would like to ask you a few questions regarding this disclosure.

Are you familiar with HRS Chapter 91, the Hawai'i Administratives Procedure Act?

MR. LIM: Yes, I am.

CHAIRPERSON SCHEUER: Are you also familiar with Hawai'i Administrative Rules 15-15, the Land Use Commission Administrative Rules?

MR. LIM: Yes, I am.

CHAIRPERSON SCHEUER: I'm going to note for the record that a member of your client new management team, Mr. Joel LaPinta, attempted to have ex-parte communication with the Commission's Hawai'i Island representative, Nancy Cabral, which is in violation of HRS Chapter 91 and the LUC Administrative Rules.

These interactions appear to have been intended to provide information to the Commissioner outside of scheduled public hearings in order to influence her vote.

This is an extremely serious matter and should not be taken lightly. The Commission is taking notice of this on the record and warning that you need to advise your clients to avoid any further ex-parte contact with any of the Commissioners.

Any and all future communications need to be through the Commission's Executive Officer, or staff or the Deputy Attorney General.

Is that understood, Mr. Lim?

MR. LIM: That's understood you.

TRANSCRIPT (10/24/18), p.13, line 20 - p.16, line 7.

16. **WAIKOLOA HIGHLANDS, INC.'S "PM 48"**. The Land Use Commission finds and rules that the objections stated in "PM 48" are not supported by the record. Viewing the



record in its entirety, Petitioner's right to due process and equal protection were not violated.

Without limiting the foregoing, the Transcript documented the following statements:

MR. LIM: The reason for the request is that we believe that the Petition Area, both in terms of the history of its long time 28-year zoning, and the fact that the Commission, over the years has, at least to my knowledge, only reverted involuntarily two properties. I believe one was the Aina Le'a project, which was subsequently reversed by the Supreme Court, and I think the Commission just acted on the Hale Mua project to revert that just last month, I believe it was.

But as I understood for that proceeding, although the developer wanted to develop the project, the project landowner and lender did not.

So those are the reasons for trying to distinguish the current proceeding from what has happened before, both what happened before and also the circumstances of the other pending OSC matters.

CHAIRPERSON SCHEUER: Thank you for your responses, Mr. Lim.

I'm not -- first, I'm not seeing how these are questions necessarily directed toward the Office of Planning so much as statements of argument.

I want to clarify again where we are going to go procedurally. I'm not closing the evidentiary portion of this proceeding. I want to ask the Commissioners to have a discussion about additional areas in which we would like to be briefed. The matters which you're raising could be among the areas on which we would ask for additional briefings from the parties that we would have in writing prior to reconvening this proceeding on November 28<sup>th</sup>.

MR. LIM: I would like, at this point, make a formal request that Commission take administrative notice of all pending proceedings before you on status reports and/or Order to Show Cause.

CHAIRPERSON SCHEUER: We'll take a five-minute break.

(Recess taken.)

CHAIRPERSON SCHEUER: We're back on.

Mr. Lim, I heard your request. I'm not going to act on it. Again, I'm repeating myself. You have the opportunity to raise issues in arguments about your case in front of you in the closing arguments which are still to come in this matter.

Commissioners, I would like to have a discussion about the additional areas of briefing on which we might want to –

TRANSCRIPT (10/25/18), p.100, line 6 - p.102, line 3.

17. Petitioner was not prevented from making whatever arguments Petitioner deemed necessary with respect to this matter and the Land Use Commission carefully considered all of Petitioner's argument.

18. With respect to the issue of due process, the Hawaii Supreme Court explained in DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 191, 339 P.3d 685, 689 (Hawaii 2014):

The circuit court also erred in concluding that Bridge's and DW's procedural and substantive due process rights and equal protection rights were violated. With respect to procedural due process, both Bridge and DW had **notice of the OSC and that the LUC might revert the property.** They also each had a **meaningful opportunity to be heard on the proposed reversion.** With regard to substantive due process, **the LUC's reversion was not "clearly arbitrary and unreasonable," given the project's long history, the various representations made to the LUC, and the petitioners' failure to meet deadlines.** With respect to Bridge's and DW's equal protection arguments, **the record does not establish that the LUC's imposition of a condition and subsequent reversion of the property constituted a violation of the petitioners' equal protection rights**

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 191, 339 P.3d 685, 689 (Hawaii 2014) (emphasis added).

19. Petitioner has not identified the arguments Petitioner was prevented from presenting.
20. The Chairperson’s statements reflected in the Transcript were a reasonable and appropriate exercise of the Chairperson’s discretion to manage and control the hearing.
21. Petitioner, for example, could not enunciate or offer all the elements necessary to sustain a claim for a violation of the right to equal protection.
22. To prove a violation of equal protection, a party must first demonstrate that the law is administered differently against others similarly situated; and second, the party must establish that its selection was “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.” State v. Villeza, 85 Haw. 258, 267–68, 942 P.2d 522, 531–32 (Hawaii 1997). See also Mahiai v. Suwa, 69 Haw. 349, 360–61, 742 P.2d 359, 368 (Hawaii 1987), and State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 615 P.2d 730 (Hawaii 1980).
23. The Hawaii Supreme Court so held in State v. Villeza, 85 Haw. 258, 267–68, 942 P.2d 522, 531–32 (Hawaii 1997):

To substantiate a claim of discriminatory enforcement of the law, the party raising the claim must satisfy a two-part test. First, **the party must demonstrate that the law is administered differently against others similarly situated.** Second, **the party must establish that its selection was “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.”** Id. (quoting State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 227, 615 P.2d 730, 734–35 (1980)). If a party does not satisfy both parts of the test, the party's equal protection claim fails. Id.

State v. Villeza, 85 Haw. 258, 267–68, 942 P.2d 522, 531–32 (Hawaii 1997) (emphasis added).

24. The following colloquy took place between one of the Commissioners and counsel for Petitioner.

COMMISSIONER OKUDA: Well, let me ask you this then, because what you raise is a very serious concern and issue and allegation.

What evidence in the record shows that there's any selection based on race, ethnicity, national origin or the language anyone speaks?

MR. LIM: I guess the fact that we have the OSC issued against this particular project.

COMMISSIONER OKUDA: So the only evidence you have of an alleged selection based on race, religion or what we all lawyers call a suspect classification under the law, is the fact that an OSC was issued and nothing else?

MR. LIM: Well, based upon the facts of the particular Petitioner, yes.

TRANSCRIPT (11/28/18), p.44, line 23 - p. 45, line 12.

25. H.R.S. Sec. 91-1 provides for the rules of evidence applicable in contested cases. H.R.S. Sec. 91-1 provides as follows:

§ 91-10. Rules of evidence; official notice

In contested cases:

(1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence \*\*\* “

26. The Land Use Commission therefore finds that the request for evidence of other dockets or testimony about other dockets would be irrelevant or immaterial because Petitioner could not demonstrate that the Land Use Commission selected enforcement against Petitioner

**“deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.”** Cf. *Mahiai v. Suwa*, 69 Haw. 349, 360–61, 742 P.2d 359, 368 (Hawaii 1987).

27. **WAIKOLOA HIGHLANDS, INC.'S “PM 66”**. The Land Use Commission finds and rules that the names of Duane Hosaka, the Office of Housing and Community Development (“OHCD”) and Delene Osorio should be corrected.

28. **WAIKOLOA HIGHLANDS, INC.'S “PM 67”**. Petitioner’s objection references “October 24, 2018 Hearing Transcript at 3:3-7.” Page 3 of the Transcript, however, is the “Index” and contains no transcript of the proceedings at that page. The Land Use Commission cannot determine with certainty the basis for Petitioner’s objections.

29. Written testimony of certain witnesses, proffered by Petitioner, were excluded, based on representations and statements made by Petitioner’s counsel. The Transcript documents the following:

[CHAIRPERSON SCHEUER:] Exhibit 56 is the written direct testimony of Mr. LaPinta. Exhibit 61 is the written direct testimony of Mr. Grigoryants, Valery Grigoryants, and Exhibit 64 is written direct testimony of Natalia Batichtcheva; is that correct?

MR. LIM: That's correct.

CHAIRPERSON SCHEUER: So on those, I'm going to actually read to you a section of the LUC transcripts from the second day, October 25<sup>th</sup> hearing. And this is I think specifically relevant in regards to any testimony from these three witnesses on page 9 of the October 25th transcript.

I started to go over the procedures at the top of the page. Then starting at line 6 it says:

**“Mr. Lim:** Thank you, Mr. Chairman. Steven Lim with my client, Waikoloa Highlands. Today **I was going to recall Mr.**

**Grigoryants just to address one issue and then we will be closing."**

So on that basis, because we have concluded examination and cross-examination on those three witnesses, I'm excluding those three direct written testimony.

Exhibits 59A, 59B, and 60 are letters that were written regarding affordable housing, however, after the Order to Show Cause was submitted. Is that correct?

MR. LIM: 59A, 59B, and 60; that's correct.

CHAIRPERSON SCHEUER: And because the issue at hand is whether or not, prior to the Order to Show Cause, the conditions were violated, or substantial commencement was made, those three letters are being excluded.

TRANSCRIPT (11/28/18), p.59, line 5 - p. 60, line 11 (emphasis added).

30. The Transcript shows that the Chairperson allowed Petitioner latitude in submitting documents into the record.

[CHAIRPERSON SCHEUER:] Finally, I want to ask you about Exhibits 57, 62, 63A and 63B, which are collectively letters of confirmation, certification and authorization. I believe, if I understand it correctly, you actually submitted these letters in response to the Commission's specific request to understand the ownership structure of the entities that ultimately control Waikoloa Highlands's Inc.; is that correct?

MR. LIM: That's correct, 57 --

CHAIRPERSON SCHEUER: 62, 63A, and 63B.

MR. LIM: That's correct.

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CHAIRPERSON SCHEUER: **I'm prepared to allow those into the record**, but I'm noting for the record that those were submitted

to us without normal reviews or certification. They are unsworn documents.

**That I believe includes the entirety of all the exhibits that you've proposed to us except for 65.** This is the one that was admitted today – excuse me, not admitted, submitted today.

MR. LIM: Yes. Our understanding -- is my understanding correct that with the exceptions of exhibits that you've excluded over the past couple of minutes, that everything else is included?

CHAIRPERSON SCHEUER: **Please correct me if I'm wrong if I have not mentioned one of the exhibits.**

MR. LIM: No, that's why I was asking the question, because you're excluding certain ones, but you are not mentioning which ones are received.

CHAIRPERSON SCHEUER: **I believe I've gone over every -- except with 65 still to be addressed,** which actually there is a timing issue with introducing new evidence today as well.

MR. LIM: Right.

CHAIRPERSON SCHEUER: But even with the timing issue aside, it has to do with an attempt to substantiate claims that you've met the affordable housing requirement of the County with documents that post date the Order to Show Cause, is that correct?

MR. LIM: These predate.

CHAIRPERSON SCHEUER: They predate the Order to Show Cause, so if they predate the Order to Show Cause, and **there was no objection to 65 due to timeliness, I'm prepared to let that one into the record.**

I'm happy if we want to take the time to go over each one of those, but **I believe the list is complete and there is nothing that I have not mentioned, so there is nothing that I've either said is admitted or is excluded.**

MR. LIM: **I think you're correct.**

CHAIRPERSON SCHEUER: We're done with the first ten minutes of the hearing.

COMMISSIONER OHIGASHI: Mr. Chair, you're admitting 65 subject to the clarification given by the County that they have the original documents within --

CHAIRPERSON SCHEUER: Thank you, Commissioner. County.

MR. KIM: I believe that would be correct, because the County's position would be that these documents came from Petitioner's files. We will accept that representation from Petitioner.

And, you know, the County would just argue as to the authenticity of the document or weight. Authenticity, we reserve that argument as to weight, not as to admissibility.

CHAIRPERSON SCHEUER: Yeah, under those conditions. That would be the legal term of art what he said.

TRANSCRIPT (11/28/18), p.60, line 12 - p. 64, line 1 (emphasis added).

31. The Chairperson therefore did not prevent Petitioner from submitting the referenced exhibits into the record and thereafter considered by the Land Use Commission.

32. To the extent the exhibits Petitioner was attempted to offer were intended to show a violation of equal protection, the exhibits were not relevant.

33. As discussed above, Petitioner needed to demonstrate that the action by the Land Use Commission was “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.” Cf. Mahiai v. Suwa, 69 Haw. 349, 360–61, 742 P.2d 359, 368 (Hawaii 1987).

34. However, when questioned about the relevance of Petitioner’s proffered evidence, Petitioner’s attorney responded as follows:



COMMISSIONER OKUDA: With respect to the equal protection claim, did you look at any Hawaii Supreme Court cases to evaluate what the elements are of equal protection claim?

MR. LIM: Correct, I did.

COMMISSIONER OKUDA: Did you, for example, look at Mahiai, M-A-H-I-A-I, versus Suwa, S-u-w-a, 69 Hawai'i 349, a 1987 Hawai'i Supreme Court case?

MR. LIM: I don't recall.

COMMISSIONER OKUDA: This is the statement from Mahiai as far as -- let me ask you this.

Your equal protection claim is it really summed up in saying, hey, there are a bunch of other people whose violations have been allowed to go forward without any real sanction, so therefore, the Commission, if it attempts to enforce now certain conditions, it violates your client's equal protection rights under the constitution?

MR. LIM: Essentially. It also is what we think is an example of the Commission's reasonable exercise of discretion in this matter.

We see the disparate treatment of the various Petitioners, and there may or may not be reasons for that, but we just don't know that. That's why we wanted to question the Office of Planning on these issues, and that's why we put those other dockets into the record.

COMMISSIONER OKUDA: But relevance – whether or not evidence is relevant depends on what the legal standards are, correct?

MR. LIM: Correct.

COMMISSIONER OKUDA: Tell me whether or not you disagree that this is what the Hawai'i Supreme Court stated as the applicable rule in Mahiai versus Suwa, specifically at pages 360 to -61 of -69 Hawai'i reports, and 368 of 742 Pacific 3d.

And I quote: **It is insufficient to show merely that other offenders have not been prosecuted, or that there has been laxity of enforcement, or that there has been some conscious selectivity and prosecution. Recognition of the defense will not permit the guilty to go free simply by showing that other violators exist.**

And that's the Hawaii Supreme Court citing a criminal case, State versus Kailua Auto Wreckers, 62 Hawaii 222, a 1980 Hawaii'i Supreme Court case, but that's cited in that Mahiai.

If that's the rule being cited by the Hawaii Supreme Court, wouldn't that suggest that these exhibits are really not relevant?

MR. LIM: We have to disagree. We think they are relevant. Like I said, there's also the ancillary reason of showing what is the reasonable exercise of discretion by the Commission on an Order to Show Cause.

COMMISSIONER OKUDA: Yeah, but going on what the Supreme Court in Mahiai said, this is what you have to demonstrate -- not you, but this is what someone who claims selective enforcement in a civil or criminal case has to demonstrate, and I quote:

**To substantiate a claim of discriminatory enforcement, ranchers -- because in that case, the Mahiai case is enforcement against ranchers -- ranchers must satisfy a two-part test.**

**First, they must demonstrate that the Department generally has not enforced Section 142-6 against others similarly situated.**

And there is a citation to 9th Circuit Court: **Ranchers must establish that their selection was, quote, deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification, close quotes.**

And, again, the Hawaii'i Supreme Court cites Auto Wreckers case which, in parenthesis quotes Oyler, O-y-l-e-r, versus Boles, B-o-l-e-s, the United States Supreme Court case, 368 U.S. at 456.

So not to get too technical here, but I think the technicality is important because, again, as I mentioned at our earlier hearing, I'm

very conscious for many reasons of claims of discrimination, because I think **we must be vigilant about claims of discrimination, because all people should be treated equal under the law.**

But the standard that the supreme Court here says is that you not only have to show, number one, that the standard or enforcement has not been enforced against other people; but number two, **the party who claims discrimination also has to show that the selection was, quote, deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.**

So is it the Petitioner's contention that the OSC here was based, deliberately based, upon an unjustifiable standard such as race, religion, or other arbitrary classification? Is that the Petitioner's claims.

MR. LIM: That is the one thing, the elephant in the room that we have been arguing about from the very beginning is that **we think that the Commission has taken aggressive action against this project because they are from Russia.** And we have had some initial discussion on that.

And we also think that the Commission was prejudiced from the very start of the proceedings due to some, I don't know what you call it, periodical reporting by Environment Hawai'i.

COMMISSIONER OKUDA: Well, let me ask you this then, because what you raise is a very serious concern and issue and allegation.

**What evidence in the record shows that there's any selection based on race, ethnicity, national origin or the language anyone speaks?**

MR. LIM: **I guess the fact that we have the OSC issued against this particular project.**

COMMISSIONER OKUDA: So the only evidence you have of an alleged selection based on race, religion or what we all lawyers call a suspect classification under the law, **is the fact that an OSC was issued and nothing else?**

MR. LIM: Well, based upon the facts of the particular Petitioner, yes.

COMMISSIONER OKUDA: That's the only thing?

MR. LIM: Yes.

COMMISSIONER OKUDA: Chair, I have no further questions of this witness. And based on the responses, I would actually modify my request. And I think based on the responses, it does not satisfy Mahiai versus Suwa, and I think based on that the evidence is irrelevant.

TRANSCRIPT (11/28/18), p.40, line 17 - p. 45, line 20 (emphasis added).

35. Petitioner suggested that the deliberations of the Land Use Commission may evidence an unlawful intent to discriminate against Petitioner. However, Commissioner Chang pointed out, all of the deliberations of the Land Use Commission are had in public; no deliberations are in private, and Petitioner failed to produce any evidence of the deliberations by the Land Use Commission where any intent to discriminate based on a suspect or illegal class or classification was considered. Petitioner provided the following response to questions from Commissioner Chang:

COMMISSIONER CHANG: Good morning, Mr. Lim.

Based upon the questions that Commissioner Okuda asked, is your assertion that the Petitioner has been unfairly treated because of his ethnicity? Are you alleging that the exhibits that you're proposing to enter are similarly situated cases involving a Petitioner who is, in your case, you're saying we discriminated against him or treated unfairly because he's Russian?

So the exhibits that you're proposing to enter, are they also based upon someone's ethnicity?

MR. LIM: No. Those are entered to show that other Petitioners, who may not be Russian or whoever, have not been treated the same.

It's been our -- because we don't know what the Commission does in their deliberations, but it's been our position that had the Petitioner possibly not been Russian, and had Petitioner shown up at the original status hearing earlier this year, we might not be

sitting here. But because of those things, we believe that the Commission had whatever it had before it at the time, decided to issue the Order to Show Cause, so we have been kind of on the downhill slope ever since then.

COMMISSIONER CHANG: I just remind you that **the Land Use Commission is probably one of the only commissions that our total deliberation is in public.** So I think **you have access to all of our deliberations.** I have no further questions.

TRANSCRIPT (11/28/18), p.49, line 4 - p. 50, line 7 (emphasis added).

36. In addition, no offer of proof or argument was presented about how specific documents or additional written testimony excluded by the Chairperson deprived Petitioner from presenting a fact or argument which Petitioner had not already presented or argued. To this extent, such evidence may be considered commutative and within the discretion of the Chairperson to exclude as being commutative.

37. Petitioner also failed to request that the Commission as a whole overrule the decision of the Chairperson. To the extent Petitioner could have appealed the decision of the Chairperson to the entire Commission but failed to do so, the Petitioner waived its objection to the evidentiary rulings made by the Chairperson.

38. Evidence regarding rule-making was also irrelevant, because the Order To Show Cause was a proceeding to an adjudicatory proceeding to enforce the 2008 Order.

39. Enforcement of a condition does not involve rule-making. See the cases discussed above, including Application of Hawaiian Elec. Co., Inc., 81 Haw. 459, 465–67, 918 P.2d 561, 567–69 (Hawaii 1996).

40. The Hawaii Supreme Court recognized that rule making is intended to govern future conduct, in contrast to an administrative agency's adjudication of a respondent's possible

violation of law caused by past conduct. See Pilaa 400, LLC v. Bd. of Land & Nat. Res., 132 Haw. 247, 266, 320 P.3d 912, 931 (Hawaii 2014).

41. Notwithstanding the foregoing, the Land Use Commission carefully considered each and every argument made by Petitioner and made its findings, conclusions and decision based on the record as a whole. No finding was made or not made simply because Petitioner's requested evidence was not admitted. Indeed, Petitioner never argued that evidence which was not admitted, if admitted would have necessitated a change in any of the Land Use Commission's Findings of Fact, Conclusions of Law, Decision or Order.

42. The Land Use Commission therefore finds and rules that Petitioner's objections contained in WAIKOLOA HIGHLANDS, INC.'S "PM 67" are not supported by the evidence and the law applicable to this action.

43. WAIKOLOA HIGHLANDS, INC.'S "PM 70" HAR Sec. 15-15-82 states:

Sec. 15-15-82 Issuance of decisions and orders.

(a) A proceeding shall stand submitted for decision by the commission after the taking of evidence, and the filing of briefs or the presentation of oral argument as may have been prescribed by the presiding officer or hearings officer. Each party to the proceeding shall submit a proposed decision and order which shall include proposed findings of fact. If a party enters into a partial stipulation as authorized in section 15-15-82.1, the party shall nevertheless file a proposed decision and order indicating the findings of fact, conclusions of law and proposed conditions that are stipulated to and also set forth proposed findings of fact, conclusions of law and proposed conditions that it proposes that are different than the stipulation. A proposed decision and order shall be filed with the commission consisting of one original, one paper copy, and one electronic copy, and a copy served upon each party to the proceeding and an opportunity given to each party to comment thereon.

(b) A commission member may prepare a proposed findings of fact and conclusions of law, and serve the document upon each party not less than ten business days prior to the meeting at which the proposed findings of fact and conclusions of law shall be presented.

(c) Notwithstanding any provision of this chapter to the contrary, each party may provide its position on the commission members' proposed findings of fact and conclusions of law within five business days from the date of service. Any party providing its position shall provide a summary of its reasons for support or objection.

(d) Every decision and order adverse to a party to the proceeding, rendered by the commission in a contested case, shall be accompanied by separate findings of fact and conclusions of law.

(e) Findings of fact, conclusions of law, and decision and order shall be issued by the commission for district boundary amendments and special permits deemed approved pursuant to section 91-13.5, HRS. The decision and order shall include mandatory conditions pursuant to section 15-15-90(e).

44. The term “decision and order” refers to the decision and order issued disposing of a petition, either by granting the petition or denying the petition. See, e.g., HAR Sec. 15-15-82 (“Issuance of decision and orders”); HAR Sec. 15-15-82.1 (“Stipulation as to findings of fact, conclusions of law, conditions of reclassification and decision and Order”); HAR Sec. 15-15-83 (“Service of decisions and orders”); HAR Sec. 15-15-96 (“Decision and order by the land use commission”). The term “decision and order” does not refer to a motion to dismiss an Order To Show Cause. The denial of a motion to dismiss an Order To Show Cause therefore does not require then issuance of separate Findings of Fact and Conclusions of Law regarding the denial.

45. The record of this docket documented the facts and the law supporting the denials of Petitioner’s motion to dismiss the Order To Show Cause. Without limitation, the Findings of

Fact and Conclusions of Law set forth in this pleading state and describe the facts and law supporting the decision of the Land Use Commission.

46. The Order to Show Cause was issued to Petitioner because the Commission had 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, including the following conditions:

1. Condition 1 Compliance With Representations to the Commission;
2. Condition 2 Completion of Project;
3. Condition 3 Reversion on Failure to Complete Project;
4. Condition 4 Water Resource Allocation;
5. Condition 6 Transportation;
6. Condition 9 Affordable Housing;
7. Condition 11 Archaeological Site 22;
8. Condition 12 Drainage;
9. Condition 13 Wastewater;
10. Condition 14 Solid Waste;
11. Condition 20 Notice of Change in Ownership; and,
12. Condition 21 Annual Reports.

47. The OSC was issued and filed on July 3, 2018, after Petitioner filed its 2016 ANNUAL REPORT on February 19, 2014.



48. Because of Petitioner's statements in its 2016 ANNUAL REPORT, the Land Use Commission 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.

49. The 2016 ANNUAL REPORT for "WAIKOLOA MAUKA, LLC - DOCKET NO. A06-767" stated the following:

A. Compliance with Representations to the Commission

The concept of the project has not changed, which is to develop 398+/- 1-acre sized lots.

The area intended for a golf course will be used for both drainage ways as well as open passive recreational areas that will include walking trails.

B. Completion of Project

The Commission required that the project be completed no later than ten (10) years of the date of the Commission's decision or June 10, 2018. "Buildout" was defined as having completed the backbone infrastructure to allow for the sale of individual lots.

Notwithstanding the County's rezoning time extension of fifty (50) lots by March 21, 2018 and the balance by March 21, 2023, the **Petitioner understands that the more stringent performance requirement of buildout by June 10, 2018 is binding.** The basic on-site construction plans have been completed. The Petitioner will thus work towards fulfilling that performance requirement.

Although **nothing physical has occurred on the ground to date,** the Petitioner has been working diligently to secure a development partner, as well as trying to address other conditions of approval as will be discussed below.

C. Reversion on Failure to Complete Project

**The Petitioner understands that its failure to complete buildout of the project or secure a bond will be subject to possible further review by the Commission to determine whether the**

**property should revert to its previous Agricultural classification.**

2016 ANNUAL REPORT, at p.3. (Emphasis added.)

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

51. Whenever the Land Use 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. See HAR Sec. 15-15-93(b).

52. See also DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 196, 339 P.3d 685, 694 fn.2 (Hawaii 2014) (“HAR § 15–15–93 provided: \*\*\* (b) **Whenever the commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.** \*\*\* “[emphasis in original]).

53. To the extent Petitioner is entitled to Findings of Fact and Conclusions of Law with respect to the denial of its motion to dismiss the OSC, the Land Use Commission incorporates the preceding paragraphs.

54. Therefore, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "PM 70".

55. WAIKOLOA HIGHLANDS, INC.'S "PM 73". It is undisputed that no party submitted proposed findings of fact or conclusions of law. HAR Sec. 15-15-82(a) provides that "Each party to the proceeding shall submit a proposed decision and order which shall include proposed findings of fact."

56. Therefore, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "PM 73".

57. WAIKOLOA HIGHLANDS, INC.'S "PM 75". The paragraph as written is accurate. Therefore, the Land Use Commission finds and rules that no revision of the paragraph is necessary.

58. WAIKOLOA HIGHLANDS, INC.'S "FOF 84, 87-89". Notwithstanding Petitioner's objection, Finding of Fact 84 is an accurate statement, as evidenced by Findings of Fact 85 through 89. These Findings of Fact stated:

85. Petitioners prepared and submitted Exhibit "5", which was thereafter received in evidence. Exhibit "5" was a document titled "SHAREHOLDERS' ACTION BY WRITTEN CONSENT - Waikoloa Highlands, Inc., a Colorado corporation" and was dated "05/06/16".

86. Exhibit "5" was signed by the following two individuals, with the following words below each respective signature line: "Arch LTD - Representative Ovasalyan Aykaz, Percentage Ownership - 80%" and "Vitoil corporation - Representative Stefan Martirosian Percentage Ownership - 20%"

87. Petitioner's Exhibit "5" contradicted Petitioner's Exhibit "28": Exhibit "28" stated that Arch, Ltd., a Bahamas corporation, had 100% of Vitoil Corporation, a California corporation, which in turn had 100% of Waikoloa Highlands.

88. In response to questioning by the Chairperson, Petitioner admitted Exhibit "5" contained inaccurate information.

[CHAIRPERSON SCHEUER:] On that Exhibit 5, I read Exhibit 5 as listing Stefan Martirosian as owning 20 percent of the property through Vitoil; is that incorrect?

THE WITNESS: Incorrect, by mistake, happened by mistake only.

That was a mistake, you can check, review the files and records of the company Vitoil, and you can see that Arch was always the only owner.

CHAIRPERSON SCHEUER: And does Mr. Martirosian have any interest in Vitoil? Any ownership?

THE WITNESS: He never had any interest before, and he still -- and now he doesn't have any interest as well.

CHAIRPERSON SCHEUER: So immediately regarding Exhibit 5, it was given to us as an exhibit by the Petitioner, by you, as a basis for our decision-making, but you're stating now that it's erroneous in regards to Mr. Martirosian's ownership and role?

THE WITNESS: Yes, and I can explain.

Well, we give you what we had. There was a mistake on this document but this is the only document we had. So you asked us for document, we gave it to you. We didn't make any changes on that document.

CHAIRPERSON SCHEUER: Thank you.

Is there any written documentation otherwise provided to us that explains the error in this record that you've just described?

THE WITNESS: As far as I know, no.

TRANSCRIPT (10/24/18), p.67, line 22 - p.69, line 2.

89. Counsel for Petitioner identified the exhibits received in evidence which contained erroneous information about ownership and control of the persons and entities involved with the subject property.

MR. LIM: **The ones I'm aware of are Exhibit 5,** our last filing which was May 9th, 2016, where I think Mr. Grigoryants already testified that that was in error by identifying Mr. Martirosian as a shareholder.

And I don't know if it's in error or not, but the other issue was the organizational chart which showed his brother as being the ultimate decisionmaker, and I think he's clarified today that they have an agreement to share both control and ownership.

TRANSCRIPT (10/24/18), p.83, lines 4-14.

(Emphasis added.)

59. Petitioner identified Exhibit "5" as an exhibit containing discrepancies or erroneous information.

COMMISSIONER OKUDA: Counsel can answer this question also just to speed things up.

Since in response to your question, Mr. Lim, about discrepancies in the documents, can you **identify by specific exhibit number documents which contain discrepancies or erroneous information?**

MR. LIM: **The ones I'm aware of are Exhibit 5**, our last filing which was May 9th, 2016, where I think **Mr. Grigoryants already testified that that was in error by identifying Mr. Martirosian as a shareholder.**

TRANSCRIPT (10/24/18), p.82, line 23 - p.83, line 8. (Emphasis added.)

60. Given the above representations and Petitioner's counsel's description of the substance of the testimony of Petitioner's representative ("I think **Mr. Grigoryants already testified that that was in error by identifying Mr. Martirosian as a shareholder**" [emphasis added]), Petitioner's statement that "**[t]he information in Exhibit 5 is correct**", bold and highlighted by Petitioner in its **WAIKOLOA HIGHLANDS, INC.'S COMMENTS AND OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA (PLEADING FILED JUNE 20, 2019)**, at the top of p.12, is curious and potentially troubling. With respect to the accuracy of Exhibit "5", the statement of counsel at the hearing on October 24, 2018 is directly contradicted by **WAIKOLOA HIGHLANDS, INC.'S COMMENTS AND OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA (PLEADING FILED JUNE 20, 2019)**.

61. Therefore, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 84, 87-89"**.

62. **WAIKOLOA HIGHLANDS, INC.'S "FOF 107A"**. The Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 107A"**. Petitioner has failed to comply with Condition 1. Petitioner failed to develop the Petition Area in substantial compliance with the representations made to the Commission. Without limiting the foregoing, Petitioner has failed to comply with conditions 2, 3, 4, 6, 9, 11 through 15, 20 and 21.

63. **WAIKOLOA HIGHLANDS, INC.'S "FOF 107B"**. The Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 107B"**. Petitioner has failed to comply with Condition 2. Petitioner failed to develop the Petition Area and complete buildout of the Project no later than ten (10) years from the date of the Commission's decision and Order. "Buildout" meant completion of the backbone infrastructure to allow for the sale of individual lots. Petitioner has not commenced construction of the backbone infrastructure to allow for the sale of individual lots. No evidence was submitted of any bond for the performance sufficient under the condition.

64. **WAIKOLOA HIGHLANDS, INC.'S "FOF 107E"**. The Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 107E"**. Petitioner has failed to comply with Condition 9. Petitioner failed to provide affordable housing opportunities for residents in the State of Hawaii in accordance with applicable affordable housing requirements of the County.

65. WAIKOLOA HIGHLANDS, INC.'S "FOF 107F". The Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "FOF 107F". Petitioner has failed to comply with Condition 11.

66. WAIKOLOA HIGHLANDS, INC.'S "FOF 109". The Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "FOF 109". Petitioner had not substantially commenced the use of the Petition Area nor the buildout of the Project. Evidence of project related expenditures did not demonstrate that Petitioner had substantially commenced use of the land in accordance with Petitioner's representations to the Land Use Commission.

67. The following colloquy took place between one of the Commissioners and Joel LaPinta, the development consultant for Petitioner.

COMMISSIONER CHANG: So in your opinion there has been no land use on the property?

THE WITNESS: No, not the land.

TRANSCRIPT (10/24/18), p.134, line 11-13.

68. Petitioner's principal, Valery Grigoryants, testified that the property at present was not being used.

COMMISSIONER OKUDA: And right now, as of today, what is the property being used for?

THE WITNESS: As far as I know, as of today, it's not being used.

TRANSCRIPT (10/24/18), p.50, lines 22-25.



69. Public witness Julia Alos testified that she would pass by the subject property nearly every day and has seen no improvements on the property since 2008.

70. In response to the question from the Chairperson of the Commission “Has there been physical improvements to the property since the time that the Decision and Order was passed ten years ago?”, Petitioner’s representative, Valery Grigoryants testified “I did not notice any changes”. TRANSCRIPT (10/24/18), p.73, lines 15-18.

71. Petitioner’s representative, Valery Grigoryants testified that Petitioner had “invested” \$1.5 million in the property, but could not tell the Commission how much of the \$1.5 million was spent after the entry of the Decision and Order. TRANSCRIPT (10/24/18), p.74, lines 17-24.

72. The following was the representation made by the Petitioner’s attorney to the Commission at the hearing:

CHAIRPERSON SCHEUER: And how many of the \$1.5 million that you said was invested was spent after the point at which the Decision and Order was passed, but before the point to which this Order to Show Cause hearing began?

THE INTERPRETER: Sorry, can you rephrase for the interpreter?

CHAIRPERSON SCHEUER: Yes. I can break it up.

The witness testified that \$1.5 million had been invested in the property. How much of that was spent after the Decision and Order but before these Order to Show Cause proceedings began?

THE WITNESS: I do not really understand the question. To what time?

CHAIRPERSON SCHEUER: Don't have exact dates in front of me.

MR. LIM: The majority of the money was spent previous to --  
Petitioner will stipulate that the majority of the money was spent  
prior to the 2008 reclassification by the Commission.

TRANSCRIPT (10/24/18), p.74, line 10 - p.75, line 5.

73. In response to questioning by the Office of Planning, Joel LaPinta, the development consultant for Petitioner testified that no infrastructure or utilities were placed on the Petition Area after the date of the Decision and Order:

Q The road infrastructure and utilities that you claim are on the Petition Area at this time, **were they placed there by the Petitioner since the Decision and Order was made?**

A **No.**

Q **Are there any other structures on the property that were built by the Petitioner since the Decision and Order?**

A **Not that I'm aware of.**

Q And to confirm **the backbone infrastructure has not been built out on the Petition Area, is that correct?**

A The definition of "backbone infrastructure" is ambiguous. But **there is no infrastructure that I see that was built since the 2008 Petition.**

TRANSCRIPT (10/24/18), p.113, lines 1-15. (Emphasis added.)

74. Therefore, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 109"**.

75. **WAIKOLOA HIGHLANDS, INC.'S "FOF 112 - 113"**. The Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 112 - 113"**. According to Exhibit

“7”, prepared by Petitioner, the following conditions were had an “X” placed in the column headed with the words “Satisfaction of LUC condition (X)”: LUC condition No. 6a (“Transportation: Waikoloa Road and Queen Ka'ahumanu Highway intersection improvements”), LUC condition No. No. 9 (“Affordable Housing”); LUC condition No. 20 (“Notice of Change of Ownership”); LUC condition No. 21 (“Annual Reports”); LUC condition No. 23 (“Notice of Imposition of Conditions”); and LUC condition No. 24 (“Recordation of Conditions”). As a result, the Land Use Commission could reasonably conclude that according to Petitioner’s Exhibit “7”, LUC conditions Nos. 1, 2, 3, 4, 5, 6b, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 22 have not been satisfied.

76. **WAIKOLOA HIGHLANDS, INC.'S “FOF 114”**. The Land Use Commission finds and rules that the record of this docket does not support Petitioner’s claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S “FOF 114”**. According to Exhibit “7”, Petitioner admitted that it did not itself satisfy LUC condition No. 6a. With respect to Condition No. 6a, Petitioner stated that “[t]he Waikoloa Road/Queen Ka'ahumanu Highway intersection improvements were undertaken and completed by the Hilton Grand Vacation Corporation for its additional time share operations.”

77. **WAIKOLOA HIGHLANDS, INC.'S “FOF 115 - 119”**. The Land Use Commission finds and rules that the record of this docket does not support Petitioner’s claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S “FOF 115 - 119”**.

78. A finding of fact need not have a specific reference to the record.<sup>1</sup>

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<sup>1</sup> In fact, a party challenging a finding of fact has the obligation to identify to the appellate court specifically where the record demonstrates that a finding is erroneous. The Hawaii Supreme Court stated the rule in Campbell v. DePonte, 57 Haw. 510, 512-13, 559 P.2d 739, 741 (Hawaii 1977), as follows:

79. Nevertheless, without limiting the foregoing, In response to questioning by Deputy Attorney General Dawn T. Apuna representing the Office of Planning, Joel LaPinta, the development consultant for Petitioner testified with respect to Condition no.6:

Q Has an agreement been reached with DOT with regard to Condition No. 6 highway improvements?

A Condition No. 6 satisfied by the intersection improvement that was done down at the Queen Kaahumanu intersection I understand.

Q That wasn't my question.

Was there agreement between the Petitioner and DOT with regard to the improvement required under Condition No. 6? Is there a document that says that DOT and Petitioner agree?

A I don't know of a mutual document, no.

Q A unilateral agreement? I mean unilateral document? No agreement, is that correct?

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Appellant's opening brief includes, among the points relied upon on the appeal, the contentions that certain of the findings of fact were not supported by the evidence. However, Appellant offers in support of these contentions only statements to the effect that evidence was adduced which was contrary to the findings. We are not informed where this evidence appears in the record. Findings of fact shall not be set aside unless clearly erroneous, Rule 52(a), H.R.C.P., and are presumptively correct. 9 Wright & Miller, Federal Practice and Procedure: Civil s 2585 (1971). As was said in Glens Falls Indemnity Co. v. United States, 229 F.2d 370, 373 (9th Cir. 1955):

In most instances the points urged either involve only questions of fact or are based on assertions of fact contrary to the findings of the trial court. It is not the function of this court to retry cases on appeal. Findings of fact by the trial court are presumptively correct and will not be set aside unless clearly erroneous. F.R.Civ.P. Rule 52(a), 28 U.S.C.A. An appellant's mere challenge of a finding does not case the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are clearly erroneous.

Appellant has not met this burden and his challenge to the findings of fact of the trial court will not be further considered.

Campbell v. DePonte, 57 Haw. 510, 512-13, 559 P.2d 739, 741 (Hawaii 1977).

A Steve Lim's office reviewed that and cleared it. I, right now, can't hold out a document or what the basis of that was, but they cleared that it had been satisfied by the improvements at the intersection.

Q But you can't point to a written agreement?

A No.

TRANSCRIPT (10/24/18), p.113, lines 16 - p.114, line 10.

80. Petitioner stipulated as follows with respect to Condition 6:

MR. LIM: Petitioner will stipulate that Condition 6 on the DOT intersection requires that Petitioner shall reach an agreement with the State Department of Transportation.

I'll represent to you that no agreement was made, although the improvement did get built.

TRANSCRIPT (10/24/18), p.130, lines 4-9.

81. Therefore, based on the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in

WAIKOLOA HIGHLANDS, INC.'S "FOF 115 - 119".

82. WAIKOLOA HIGHLANDS, INC.'S "FOF 120 - 127". The Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "FOF 120 - 127".

83. With respect to LUC condition No. 9, Petitioner has not commenced construction of affordable housing in accordance with applicable affordable housing requirements of the County.

84. The representative of the County of Hawaii testified that Petitioner's transaction made purportedly to satisfy the requirements of LUC Condition No. 9 do not comply with the Hawai'i County Code Chapter 11 or the Project's zoning Ordinance 13-29.

85. Petitioner's transaction made purportedly to satisfy the requirements of LUC Condition No. 9 does not comply with the Hawai'i County Code Chapter 11 or the Project's zoning Ordinance 13-29.

86. The 20% housing requirement for Petitioner's project (being 80 units or credits) will not be met on the 11+ acres ("AH parcel") transferred by Petitioner to a third party (where only 32 units are planned).

87. The Hawaii County Code required that the transfer of land for affordable housing must be to a non-profit entity.

88. Petitioner, however, transferred the land on which affordable housing was to be located to a for-profit entity incorporated for real estate development; the land was shortly thereafter sold to a third party for a substantial profit.

89. The transfer of 11.7 acres purportedly for affordable housing constitutes only 1.6% of the total Petition Area of 731+ acres; the AH parcel remains vacant, no grading done, no infrastructure developed, and no affordable housing built.

90. The County of Hawaii testified that Petitioner had not satisfied LUC Condition No. 9. Neil Gyotoku, the Housing Administrator for the County of Hawai'i testified as follows:

COMMISSIONER CHANG: Thank you.

Are you familiar with -- your counsel submitted a letter of November 9, 2018, from Mayor Kim, Harry Kim.

THE WITNESS: Yes. I believe Mr. Kim can answer that.

COMMISSIONER CHANG: Are you familiar with this letter?

THE WITNESS: Yes.

COMMISSIONER CHANG: It is to: Dear Chair Scheuer and Land Use Commissioners. **The official position of the County of Hawaii is that Waikoloa Mauka LLC has not yet fulfilled Condition 9 affordable housing** of the State Land Use Commission's Findings of Fact, Conclusions of Law, Decision & Order, et cetera. Dated June 10th, 2018.

And it does say the Petitioner is engaging in negotiation with the County towards fulfilling this condition.

Is it your -- **do you disagree with Mayor Kim's letter?**

THE WITNESS: **Oh, never.**

COMMISSIONER CHANG: So it is your position that the mayor, that his most recent letter, that your preliminary discussions predated this letter of November 9th, 2018?

THE WITNESS: Yes.

COMMISSIONER CHANG: **That this is the official position of the County?**

THE WITNESS: **Yes.**

TRANSCRIPT (11/28/18), p.90, line 11 - p.91, line 15. (Emphasis added.)

91. In deciding whether the Petitioner had satisfied Condition 9, the Commission heard the testimony of witnesses and observed their demeanor, and considered documents received in evidence and considered the arguments and representations of counsel and the entire record of this case. The Commission found more credible the position of the County of Hawaii that Petitioner has failed to provide affordable housing opportunities for residents in the State of Hawaii in accordance with applicable affordable housing requirements of the County. Without limiting the foregoing, no affordable housing was constructed on the subject property, and Petitioner did not provide any credible evidence that it had substantially commenced use of the

land in accordance with Petitioner’s representations to the Land Use Commission to construct affordable housing.

92. Therefore, based on the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner’s claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.’S “FOF 120 - 127”**.

93. **WAIKOLOA HIGHLANDS, INC.’S “FOF 131”**. The Land Use Commission finds and rules that the record of this docket does not support Petitioner’s claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.’S “FOF 131”**.

94. The Land Use Commission need not adopt a rule before proceeding with an Order To Show Cause. Application of Hawaiian Elec. Co., Inc., 81 Haw. 459, 465–67, 918 P.2d 561, 567–69 (Hawaii 1996). The Hawaii Supreme Court has provided the standard to determine whether a Petitioner has substantially commenced use of the land in accordance with Petitioner’s representations to the Land Use Commission. Whether the petitioner has substantially commenced use of the land in accordance with representations made to the LUC is a question of fact to be determined by the Land Use Commission. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 214, 339 P.3d 685, 712, fn.16 (Hawaii 2014) (“In the absence of both a statutory definition of “substantial commencement” and an expression of LUC’s interpretation of “substantial commencement” for a particular project, a determination of whether a party has substantially commenced use of the land will turn on the circumstances of each case, not on a dollar amount or percentage of work completed.”).”

95. The following colloquy took place between one of the Commissioners and Joel LaPinta, the development consultant for Petitioner.



COMMISSIONER CHANG: So in your opinion there has been no land use on the property?

THE WITNESS: No, not the land.

TRANSCRIPT (10/24/18), p.134, lines 11-13.

96. In response to questions from the Chairperson of the LAND USE COMMISSION, Petitioners's representative Valery Grigoryants testified as follows:

CHAIRPERSON SCHEUER: **Has there been physical improvements to the property since the time that the Decision and Order was passed ten years ago?**

THE WITNESS: **I did not notice any changes,** but what I would like to add is that I do not take off responsibility for myself. I am completely responsible, and otherwise I wouldn't be here today. And what else I can say?

TRANSCRIPT (10/24/18), p.73, lines 15-22. (Emphasis added.)

97. Petitioner's representative could not state how much money Petitioner invested in the property, after the 2008 Order. Valery Grigoryants testified as follows:

CHAIRPERSON SCHEUER: Thank you. I just have one more question about your testimony regarding how much has been invested in the property.

When you testified that the acquisition price of the land was \$60 million, that was for a much larger property of which this is a part, correct?

THE WITNESS: Yes, that was for the 14,000 acres.

CHAIRPERSON SCHEUER: And how many of the \$1.5 million that you said was invested was spent after the point at which the Decision and Order was passed, but before the point to which this Order to Show Cause hearing began?

THE INTERPRETER: Sorry, can you rephrase for the interpreter?

CHAIRPERSON SCHEUER: Yes. I can break it up.

The witness testified that \$1.5 million had been invested in the property. How much of that was spent after the Decision and Order but before these Order to Show Cause proceedings began?

THE WITNESS: I do not really understand the question. To what time?

CHAIRPERSON SCHEUER: Don't have exact dates in front of me.

MR. LIM: The majority of the money was spent previous to -- Petitioner will stipulate that the majority of the money was spent prior to the 2008 reclassification by the Commission.

CHAIRPERSON SCHEUER: I will still have the question, but we cannot address it now. I will still have the question of how much was spent during that particular period of time.

TRANSCRIPT (10/24/18), p.74, lines 1- p.75, line 9.

98. However, in response to questions from Commissioner Chang, Petitioner's representative Valery Grigoryants testified that the only work done since the 2008 Order was the transfer of the parcel of property in an attempt to satisfy the affordable housing condition.

COMMISSIONER CHANG: Let me just ask another question.

How much money have you actually spent? You said 1.5 million, and I know I heard your counsel that most of that money was spent prior to 2008.

So could you tell us approximately how much money has actually been spent on this development since 2008?

THE WITNESS: So **the only work we managed to do since 2008 was transferring 11 acres for the affordable housing.** And then since 2017, just because only in 2017 that's when we learned that nothing were happening.

TRANSCRIPT (10/24/18), p.77, line 241- p.78, line 9. (Emphasis added.)

99. Therefore, based on the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "FOF 131".

100. WAIKOLOA HIGHLANDS, INC.'S "FOF 135-136". The Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "FOF 135-136". Without limiting the foregoing, the Land Use Commission relies on the testimony quoted of Joel LaPinta, the development consultant for Petitioner.

101. WAIKOLOA HIGHLANDS, INC.'S "FOF 138-139". Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "FOF 138-139".

102. WAIKOLOA HIGHLANDS, INC.'S "FOF 140". Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "FOF 140".

103. WAIKOLOA HIGHLANDS, INC.'S "FOF 141". Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "FOF 141".

104. WAIKOLOA HIGHLANDS, INC.'S "FOF 146 - 149". Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "FOF 146 - 149".

105. WAIKOLOA HIGHLANDS, INC.'S "FOF 150 - 159". Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "FOF 150 - 159".

106. Petitioner was not denied due process. Petitioner was served with the Order to Show Cause, had notice of all issues regarding the Order to Show Cause, and was provided every and all opportunities to call witnesses, submit evidence, make argument and otherwise be heard on the issues raised by the Order to Show Cause.

107. The ORDER TO SHOW CAUSE, filed July 3, 2018 (hereafter, "the OSC") stated the following:

#### **ORDER TO SHOW CAUSE**

TO: WAIKOLOA MAUKA, LLC ("Petitioner"),

YOU ARE HEREBY COMMANDED, under the authority of section 205-4, Hawai'i Revised Statutes ("HRS"), and section 15-15-93, Hawai'i Administrative Rules ("HAR"), to appear before the Land Use Commission, State of Hawai'i ("Commission"), at the Natural Energy Laboratory of Hawai'i (NELHA) - Hale Iako Training Room #1 19, on August 22-23, 2018, at 9:00 a.m., to show cause as to why that certain land at Waikoloa, South Kohala, County of Hawai'i, Tax Map Key No. (3) 6-8-02:016 (portion), covering approximately 731.581 acres of land referred to as the Subject Area, and approximately identified on Exhibit "A", attached hereto and incorporated herein, should not revert to its former land use classification or be changed to a more appropriate classification.

The Commission has reason to believe that you have failed to perform according to the conditions imposed and to the representations and commitments made to the Commission in obtaining reclassification of the Subject Area. The conditions of

the Decision and Order which may have been violated or not been met include, but may not be limited to the following:

1. Condition 1 Compliance With Representations to the Commission;
2. Condition 2 Completion of Project;
3. Condition 3 Reversion on Failure to Complete Project;
4. Condition 4 Water Resource Allocation;
5. Condition 6 Transportation;
6. Condition 9 Affordable Housing;
7. Condition 11 Archaeological Site 22;
8. Condition 12 Drainage;
9. Condition 13 Wastewater;
10. Condition 14 Solid Waste;
11. Condition 20 Notice of Change in Ownership; and,
12. Condition 21 Annual Reports.

108. The OSC was issued and filed on July 3, 2018, after Petitioner filed its 2016 ANNUAL REPORT on February 19, 2014.

109. Because of Petitioner's statements in its 2016 ANNUAL REPORT, the Land Use Commission 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.

110. The Commission finds and concludes that it had 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.

111. The Commission finds and concludes that it had the authority to issue the ORDER TO SHOW CAUSE and take the actions taken with respect to the ORDER TO SHOW CAUSE.

112. Petitioner had notice of the OSC and that the LUC might revert the certain land identified and described in the OSC.

113. \_\_\_Petitioner had a meaningful opportunity to be heard on all issue regarding the OSC.

114. In making its decision, the Commission carefully considered the evidence submitted, including documents received in evidence, the testimony of witnesses, and the representations and arguments of counsel.

115. Petitioner's rights to due process were therefore not violated.

116. As discussed above, Petitioner's right to equal protection of the law was not violated.

See, e.g., State v. Villeza, 85 Haw. 258, 267–68, 942 P.2d 522, 531–32 (Hawaii 1997); Mahiai v. Suwa, 69 Haw. 349, 360–61, 742 P.2d 359, 368 (Hawaii 1987); State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 615 P.2d 730 (Hawaii 1980).

117. Therefore, based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in

**WAIKOLOA HIGHLANDS, INC.'S "FOF 150 - 159"**.

118. **WAIKOLOA HIGHLANDS, INC.'S "FOF 161 - 163"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support

Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 161 - 163"**.

119. **WAIKOLOA HIGHLANDS, INC.'S "FOF 166"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 166"**.

120. **WAIKOLOA HIGHLANDS, INC.'S "FOF 169"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 169"**.

121. **WAIKOLOA HIGHLANDS, INC.'S "FOF 172"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 172"**.

122. **WAIKOLOA HIGHLANDS, INC.'S "FOF 173"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 173"**.

123. **WAIKOLOA HIGHLANDS, INC.'S "FOF 174"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 174"**.

Without limiting the foregoing, the Land Use Commission does not find credible Petitioner's continued reliance on its Exhibit "5", which its attorney identified as containing erroneous information.

124. **WAIKOLOA HIGHLANDS, INC.'S "FOF 175"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 175"**.

125. The testimony of Petitioner's representative Valery Grigoryants makes questionable the accuracy of Petitioner's Exhibit "5".

[CHAIRPERSON SCHEUER:] **On that Exhibit 5, I read Exhibit 5 as listing Stefan Martirosian as owning 20 percent of the property through Vitoil; is that incorrect?**

THE WITNESS: **Incorrect**, by mistake, happened by mistake only.

That was a mistake, you can check, review the files and records of the company Vitoil, and you can see that Arch was always the only owner.

CHAIRPERSON SCHEUER: And does Mr. Martirosian have any interest in Vitoil? Any ownership?

THE WITNESS: He never had any interest before, and he still -- and now he doesn't have any interest as well.

CHAIRPERSON SCHEUER: So immediately regarding **Exhibit 5, it was given to us as an exhibit by the Petitioner, by you, as a basis for our decision-making, but you're stating now that it's erroneous in regards to Mr. Martirosian's ownership and role?**

THE WITNESS: **Yes**, and I can explain.

Well, we give you what we had. There was a mistake on this document but this is the only document we had. So you asked us for document, we gave it to you. We didn't make any changes on that document.

CHAIRPERSON SCHEUER: Thank you.

**Is there any written documentation otherwise provided to us that explains the error in this record that you've just described?**

THE WITNESS: **As far as I know, no.**

TRANSCRIPT (10/24/18), p.67, line 22 - p.69 line 2. (Emphasis added.)



126. The actual ownership and control of Petitioner, through the several companies related to Petitioner, was relevant, material and important to the decisions being made by the Land Use Commission. These facts were relevant to consideration and evaluation related to the persons responsible for Petitioner's failure to comply with the 2008 Order

127. In making its Findings of Fact, the LAND USE COMMISSION may assess the credibility of witnesses and weigh the evidence presented to the Commission. Moi v. State, Dep't of Pub. Safety, 118 Haw. 239, 242, 188 P.3d 753, 756 (Hawaii App. 2008) ("In reviewing the LIRAB's decision on this issue, we give deference to the LIRAB's assessment of the credibility of witnesses and the weight the LIRAB gives to the evidence. 'It is well established that courts decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing with a specialized field.' Id. (block quote format changed) (quoting Igawa v. Koa House Restaurant, 97 Hawai'i 402, 409–10, 38 P.3d 570, 577–78 (2001)). We review the LIRAB's findings of fact under the clearly erroneous standard and its conclusions of law de novo. Id. at 267, 47 P.3d at 734.").

128. To assess the credibility of witnesses and weigh the evidence presented, the Land Use Commission may consider whether and the extent to which exhibits containing erroneous information was submitted to the Commission during a contested case proceeding.

129. **WAIKOLOA HIGHLANDS, INC.'S "FOF 176"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 176"**.

130. **WAIKOLOA HIGHLANDS, INC.'S "FOF 177"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 177"**.

131. **WAIKOLOA HIGHLANDS, INC.'S "FOF 178"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 178"**.

132. **WAIKOLOA HIGHLANDS, INC.'S "FOF 179"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 179"**.

133. **WAIKOLOA HIGHLANDS, INC.'S "FOF 180"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 180"**.

134. **WAIKOLOA HIGHLANDS, INC.'S "FOF 181"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 181"**.

135. **WAIKOLOA HIGHLANDS, INC.'S "FOF 183"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 183"**.

136. **WAIKOLOA HIGHLANDS, INC.'S "FOF 184"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 184"**.

137. Without limiting the foregoing, Petitioner's claim of a lending commitment of \$45 million to Arch for the project is not guaranteed. Petitioner's representative Valery Grigoryants testified as follows:

COMMISSIONER CHANG: So what assurances do we have now that you have the \$45 million, your brother has committed to this project, that something else won't come up?

THE WITNESS: It's no brother, it's a bank, two different things.

COMMISSIONER CHANG: Would you put that money in an escrow account to assure that it's dedicated to this project?

THE WITNESS: Well, it's not a business approach, nobody would put 45 million in their escrow for ten years.

TRANSCRIPT (10/24/18), p.77, lines 5 - 16.

138. **WAIKOLOA HIGHLANDS, INC.'S "FOF 185"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "FOF 185"**.

139. **WAIKOLOA HIGHLANDS, INC.'S "COL 6"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "COL 6"**.

140. The Conclusion of Law is an accurate statement of the law. The Land Use Commission's issuance of an Order To Show Cause where the Commission has 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, does not violate due process or equal protection.

141. In DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 191, 339 P.3d 685, 689 (Hawaii 2014), the Hawaii Supreme Court explained:

The circuit court also erred in concluding that Bridge's and DW's procedural and substantive due process rights and equal protection rights were violated. With respect to procedural due process, both Bridge and DW had **notice of the OSC and that the LUC might revert the property.** They also each had a **meaningful opportunity to be heard on the proposed reversion.** With regard to **substantive due process, the LUC's reversion was not “clearly arbitrary and unreasonable,” given the project's long history, the various representations made to the LUC, and the petitioners' failure to meet deadlines.** With respect to Bridge's and DW's equal protection arguments, **the record does not establish that the LUC's imposition of a condition and subsequent reversion of the property constituted a violation of the petitioners' equal protection rights**

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 191, 339 P.3d 685, 689 (Hawaii 2014) (emphasis added).

142. The Commission finds and concludes that it had reason to believe that Petitioner had failed to perform according to the conditions imposed, or the representations or commitments made by the Petitioner.

143. The Commission finds and concludes that it had the authority to issue the ORDER TO SHOW CAUSE issued in this matter and to take the actions taken with respect to the ORDER TO SHOW CAUSE.

144. Therefore, because COL 6 is an accurate statement of the law, and based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S “COL 6”**.

145. **WAIKOLOA HIGHLANDS, INC.'S "COL 21"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "COL 21"**. The Conclusion of Law is an accurate statement of the law.

146. **WAIKOLOA HIGHLANDS, INC.'S "COL 24"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "COL 24"**. The Conclusion of Law is an accurate statement of the law.

147. **WAIKOLOA HIGHLANDS, INC.'S "COL 26 - 29"**. Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in **WAIKOLOA HIGHLANDS, INC.'S "COL 26 - 29"**. The Conclusions of Law are accurate statements of the law.

148. The issuance of an Order To Show Cause by the Land Use Commission does not require the promulgation of additional rules. Application of Hawaiian Elec. Co., Inc., 81 Haw. 459, 465–67, 918 P.2d 561, 567–69 (Hawaii 1996).

149. The Hawaii Supreme Court recognized that rule making is intended to govern future conduct, in contrast to an administrative agency's adjudication of a respondent's possible violation of law caused by past conduct. See Pilaa 400, LLC v. Bd. of Land & Nat. Res., 132 Haw. 247, 266, 320 P.3d 912, 931 (Hawaii 2014).

150. Therefore, the Land Use Commission was not required to adopt or promulgate additional rules as a condition precedent to proceeding with the instant ORDER TO SHOW CAUSE. As a result and based on all the foregoing, the Land Use Commission finds and rules that the record of

this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "COL 26 - 29".

151. WAIKOLOA HIGHLANDS, INC.'S "COL 31". Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "COL 31". The Conclusion of Law is an accurate statement of the law.

152. WAIKOLOA HIGHLANDS, INC.'S "COL 39". Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "COL 39". The Conclusion of Law is an accurate statement of the law.

153. WAIKOLOA HIGHLANDS, INC.'S "COL 40". Based on all the foregoing, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's claims, assertions and arguments in WAIKOLOA HIGHLANDS, INC.'S "COL 40". The Conclusion of Law is an accurate statement of the law.

154. To the extent this document does not specifically address Petitioner's objections or comments which conflict with the FINDINGS OF FACT, CONCLUSIONS OF LAW or the DECISION & ORDER, the Land Use Commission finds and rules that the record of this docket does not support Petitioner's objections or comments which conflict with the FINDINGS OF FACT, CONCLUSIONS OF LAW or the DECISION & ORDER.

155. The Land Use Commission's Findings and Rulings is also appropriate, because (1) Petitioner identified only one finding of fact which Petitioner contended was clearly erroneous

and (2) Petitioner could not identify with specificity the conclusions of law which Petitioner contended were not accurate statements of the law.

**FINDINGS AND RULINGS IN RESPONSE TO COUNTY OF HAWAII PLANNING DEPARTMENT'S COMMENTS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING PETITION AREA**

1. The LAND USE COMMISSION received by email on June 21, 2019 the **COUNTY OF HAWAII PLANNING DEPARTMENT'S COMMENTS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING PETITION AREA**.

2. The LAND USE COMMISSION, having carefully considered the **COUNTY OF HAWAII PLANNING DEPARTMENT'S COMMENTS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING PETITION AREA** the entire record of this docket and the evidence adduced, rules on the **COUNTY OF HAWAII PLANNING DEPARTMENT'S COMMENTS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING PETITION AREA** by making the following findings and rulings.

3. The correct name of the County's housing agency is the Office of Housing and Community Development ("OHCD").

4. The correct name of one of the OHCD attendee was Duane Hosaka.

5. The LAND USE COMMISSION carefully considered the County's position about the most appropriate classification of the Subject Area.

6. The Hawaii Supreme Court, however, in DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC, 134 Haw. 187, 211–13, 339 P.3d 685, 709–11 (Hawaii 2014), described the following in detail.

The one exception to this general rule is found in HRS § 205–4(g). That section provides in relevant part that, “The commission may provide by condition that **absent substantial commencement of use of the land in accordance with such representations [made to the LUC by the petitioner], the commission shall issue and serve upon the party bound by the condition an OSC why the property should not revert to its former land use classification or be changed to a more appropriate classification.**”

This sentence was added to HRS § 205–4(g) in 1990. 1990 Haw. Sess. Laws Act 261 § 1 at 563–64. The legislative history indicates that **the legislature sought to empower the LUC to void a district boundary amendment where the petitioner does not substantially commence use of the land in accordance with representations made to the LUC.** In this regard, the Senate Committee on Energy and Natural Resources explained in its report that the purpose of adding this sentence was “to allow the Land Use Commission to attach a condition to a boundary amendment decision which would void the boundary amendment when substantial commencement of the approved land use activity does not occur in accordance with representations made by the petitioner.” S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915 (emphasis added). The House Committee on Planning, Energy, and Environmental Protection similarly stated in its report that the purpose of the bill was to “**strengthen existing statutes by permitting the Land Use Commission further control over a proposed development by voiding a change in zoning if the petitioner does not make a substantial commencement of the approved land use activity.**” H. Stand. Comm. Rep. No. 1086–90, in 1990 H. Journal, at 1265 (emphasis added).

The legislative history further indicates that the legislature added this language in order to **empower the LUC to address a particular situation, namely, where the landowner does not develop the property in a timely manner.** The Senate Committee on Energy and Natural Resources specifically noted that “[v]acant land with the appropriate state and county land use designation is



often subjected to undesirable private land speculation and uncertain development schedules[,]” and that “[s]uch speculation and untimely development inflates the value of land, increases development costs, and frustrates federal, state, county, and private coordination of planning efforts, adequate funding, public services, and facilities.” S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915.

The fact that the legislature sought to address situations where the petitioner has not substantially commenced use of the land is further evidenced in the testimony presented to both the Senate and House committees. In both the Senate and the House, the Office of State Planning offered testimony that **“[a] positive approach to comprehensive land use planning and a strong preventive measure to land speculation, necessitates this bill which will require that successful applicants for land use boundary amendments either ‘use it, or lose it.’ ”** Letter from Office of State Planning, to S. Comm. on Energy & Natural Res. (Feb. 7, 1990) (on file with the Hawai‘I State Archives) (emphasis added); Letter from Office of State Planning, to H. Comm. on Planning, Energy & Env’tl. Protection (Mar. 8, 1990) (on file with the Hawai‘I State Archives) (emphasis added). The LUC also offered testimony to both the Senate and the House, stating that “the proposed amendment will clarify the Commission’s authority to impose a specific condition to downzone property in the event that the Petitioner does not develop the property in a timely manner.” Letter from Land Use Comm’n, to S. Comm. on Energy & Natural Res. (Feb. 7, 1990) (on file with the Hawai‘I State Archives) (emphasis added); Letter from Land Use Comm’n, to H. Comm. on Planning, Energy & Env’tl. Protection (Mar. 8, 1990) (on file with the Hawai‘I State Archives) (emphasis added). **Thus, the legislative history establishes that by adding this sentence to HRS § 205–4(g) in 1990, the legislature sought to empower the LUC to void a boundary amendment, after giving the landowner the opportunity for a hearing, if the landowner failed to substantially commence use of the land in accordance with its representations.**

The proper procedure to be followed by the LUC in ruling on the OSC therefore depends on whether the petitioner has substantially commenced use of the land in accordance with its representations. Section 205–4(g) represents a limited exception to the general principles set forth in HRS Chapter 205, which require consideration of whether the boundary change violates HRS §

205-2 (setting forth general considerations in districting and classifying land), is consistent with the policies and criteria set forth in HRS § 205-16 (compliance with the Hawai‘I state plan) and HRS § 205-17 (setting forth decision-making criteria for the LUC).

**Where the LUC issues an OSC and seeks to revert property based on a petitioner's failure to substantially commence use of the land in accordance with its representations, the LUC is not required to follow the procedures otherwise applicable to boundary changes under HRS Chapter 205.** A reversion in such circumstances **simply restores the status quo ante, prior to the original reclassification.** Following the general procedures set forth in HRS § 205-4 would serve no purpose under these circumstances.

Indeed, as noted above, the legislative history of HRS § 205-4(g) indicates that the **legislature intended to empower the LUC to void a boundary change where the petitioner failed to substantially commence use of the property in accordance with its representations.** S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915 (“The purpose of this bill is to amend section 205-4(g), Hawaii Revised Statutes, to allow the Land Use Commission to attach a condition to a boundary amendment decision which would void the boundary amendment when substantial commencement of the approved land use activity does not occur in accordance with \*213 representations made by the petitioner.” (Emphasis added)); H. Stand. Comm. Rep. No. 1086-90, in 1990 H. Journal, at 1265 (“The purpose of this bill is to strengthen existing statutes by permitting the Land Use Commission further control over a proposed development by voiding a change in zoning if the petitioner does not make substantial commencement of the approved land use activity.” (Emphasis added)). In other words, the **legislative history of HRS § 205-4(g) indicates that compliance with all of the procedures of HRS § 205-4 is unnecessary when the petitioner has not substantially commenced use of the land because the prior reclassification is simply voided.** Thus, **when the petitioner has not substantially commenced use of the land, the LUC may revert the land without following the procedures set forth in HRS § 205-4.**

*DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC*, 134 Haw. 187, 211-13, 339 P.3d 685, 709-11 (Hawaii 2014) (emphasis added).

7. The preceding FINDINGS OF FACT, CONCLUSIONS OF LAW and the **FINDINGS AND RULINGS IN RESPONSE TO WAIKOLOA HIGHLANDS, INC.'S COMMENTS AND OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA (PLEADING FILED JUNE 20, 2019)**, describe how the Petitioner failed to substantially commence use of the property in accordance with its representations. To the extent necessary, the preceding FINDINGS OF FACT, CONCLUSIONS OF LAW and the **FINDINGS AND RULINGS IN RESPONSE TO WAIKOLOA HIGHLANDS, INC.'S COMMENTS AND OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA (PLEADING FILED JUNE 20, 2019)** are incorporated by reference into this paragraph.

8. Therefore, except with respect to the matters described in paragraphs 3 and 4 of this section, the Land Use Commission finds and rules that to the extent that the **COUNTY OF HAWAII PLANNING DEPARTMENT'S COMMENTS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING PETITION AREA** contradicts the FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION & ORDER reverting the subject property, the FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION & ORDER entered in this docket shall control. To the extent that the **COUNTY OF HAWAII PLANNING DEPARTMENT'S COMMENTS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING PETITION AREA** does not specifically address the **COUNTY OF HAWAII PLANNING DEPARTMENT'S COMMENTS TO PROPOSED FINDINGS OF**

**FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING PETITION AREA** which conflict with the FINDINGS OF FACT, CONCLUSIONS OF LAW or the DECISION & ORDER, the Land Use Commission finds and rules that the record of this docket does not support the **COUNTY OF HAWAII PLANNING DEPARTMENT'S COMMENTS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING PETITION AREA**, except with respect to the matters described in paragraphs 3 and 4 of this section.

#### **CONCLUSIONS OF LAW**

The Land Use Commission makes the following Conclusions of Law.

#### **THE AUTHORITY OF THE LAND USE COMMISSION TO REVERT A PETITION AREA TO ITS ORIGINAL LAND USE CLASSIFICATION**

1. The Land Use Commission has the authority to revert a Petition Area to its original land use classification for failure to comply with the conditions imposed by the Commission. Lanai Co. v. Land Use Comm'n, 105 Haw. 296, 317, 97 P.3d 372, 393 (Hawaii 2004) (“\*\*\* HRS § 205-4(g)47 expressly authorizes the LUC to “impose conditions.” Moreover, “absent substantial commencement of use of the land in accordance with such representations made ... in seeking [the] boundary change [,]”48 the LUC is expressly authorized to order a reversion of land to the prior classification. HRS § 205-4(g).”)

#### **CONCLUSIONS OF LAW REGARDING THE ORDER TO SHOW CAUSE**

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

3. Whenever the Land Use 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.

4. HAR §15-15-93(b) with respect to Enforcement of conditions, representations, or commitments provides in relevant part:

(b) Whenever the commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification. The commission shall serve the order to show cause in writing by registered or certified mail with return receipt requested at least thirty days before the hearing. A copy shall be also sent to all parties in the boundary amendment proceedings. The order to show cause shall include:

- (1) A statement of the date, time, place, and nature of the hearing;
- (2) A description and a map of the property to be affected;
- (3) A statement of the legal authority under which the hearing is to be held;
- (4) The specific sections of the statutes, or rules, or both, involved; and

(5) A statement that any party may retain counsel if the party so desires.

(c) The commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7, where applicable. Any procedure in an order to show cause hearing may be modified or waived by stipulation of the parties and informal disposition may be made in any case by stipulation, agreed settlement, consent order, or default.

(d) Post hearing procedures shall conform to subchapter 7 or subchapter 9. Decisions and orders shall be issued in accordance with subchapter 7 or subchapter 9.

(e) The commission shall amend its decision and order to incorporate the order to show cause by including the reversion of the property to its former land use classification or to a more appropriate classification.

5. See also DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC, 134 Haw. 187, 196, 339 P.3d 685, 694 fn.2 (Hawaii 2014) (“HAR § 15–15–93 provided: \*\*\* (b) **Whenever the commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.** \*\*\* “ [emphasis in original]).

**THE ISSUANCE OF AN ORDER TO SHOW CAUSE DOES NOT VIOLATE EQUAL PROTECTION OF THE LAWS OR DUE PROCESS**

6. The Land Use Commission’s issuance of an Order To Show Cause where the Commission has 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, does not

violate due process or equal protection.

7. In DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 191, 339 P.3d 685, 689 (Hawaii 2014), the Hawaii Supreme Court explained:

The circuit court also erred in concluding that Bridge's and DW's procedural and substantive due process rights and equal protection rights were violated. With respect to procedural due process, both Bridge and DW had **notice of the OSC and that the LUC might revert the property.** They also each had a **meaningful opportunity to be heard on the proposed reversion.** With regard to **substantive due process, the LUC's reversion was not “clearly arbitrary and unreasonable,” given the project's long history, the various representations made to the LUC, and the petitioners' failure to meet deadlines.** With respect to Bridge's and DW's equal protection arguments, **the record does not establish that the LUC's imposition of a condition and subsequent reversion of the property constituted a violation of the petitioners' equal protection rights**

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 191, 339 P.3d 685, 689 (Hawaii 2014) (emphasis added).

8. The Commission finds and concludes that it had reason to believe that Petitioner had failed to perform according to the conditions imposed, or the representations or commitments made by the Petitioner.

9. The Commission finds and concludes that it had the authority to issue the ORDER TO SHOW CAUSE issued in this matter and to take the actions taken with respect to the ORDER TO SHOW CAUSE.

**THE LAW REGARDING SUBSTANTIAL COMMENCEMENT OF THE USE OF  
THE LAND IN ACCORDANCE WITH REPRESENTATIONS MADE TO THE LAND**

## USE COMMISSION

10. Once the LUC issues an OSC, the relevant considerations to be taken into account by the LUC and the procedures it must follow turn on whether the petitioner has substantially commenced use of the land in accordance with its representations. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 209, 339 P.3d 685, 707 (Hawaii 2014) (“**once the LUC issues an OSC, the relevant considerations to be taken into account by the LUC and the procedures it must follow turn on whether the petitioner has substantially commenced use of the land in accordance with its representations.** When the LUC reverts property before the petitioner has substantially commenced use of the land, the LUC may do so without following the procedures otherwise applicable under HRS § 205–4.”).”

11. To determine whether the use of the land has been substantially commenced, the Hawaii Supreme Court has provided the following guidance:

“Substantial” is, according to Blacks's Law Dictionary, “considerable in amount or value; large in volume or number.” Black's Law Dictionary 1656 (10th ed. 2014).”

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 213–14, 339 P.3d 685, 711–12 (Hawaii 2014).

12. The Hawaii Supreme Court, in DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 211–12, 339 P.3d 685, 709–10 (Hawaii 2014), explained that the legislature sought to empower the LUC to void a district boundary amendment where the petitioner does not substantially commence use of the land in accordance with representations made to the LUC.

This court explained that “[t]here is no provision in HRS § 205–12 that expressly delegates enforcement power to the LUC,” and that “[i]f the



legislature intended to grant the LUC enforcement powers, it could have expressly provided the LUC with such power.” Id. Thus, this court observed, “looking to the express language of HRS § 205–12, it is clear and unambiguous that enforcement power resides with the appropriate officer or agency charged with the administration of county zoning laws, namely the counties, and not the LUC.” Id.

The one exception to this general rule is found in HRS § 205–4(g). That section provides in relevant part that, “The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations [made to the LUC by the petitioner], the commission shall issue and serve upon the party bound by the condition an OSC why the property should not revert to its former land use classification or be changed to a more appropriate classification.”

This sentence was added to HRS § 205–4(g) in 1990. 1990 Haw. Sess. Laws Act 261 § 1 at 563–64. The legislative history indicates that the legislature sought to empower the LUC to void a district boundary amendment where the petitioner does not substantially commence use of the land in accordance with representations made to the LUC. In this regard, the Senate Committee on Energy and Natural Resources explained in its report that the purpose of adding this sentence was “to allow the Land Use Commission to attach a condition to a boundary amendment decision which would void the boundary amendment when substantial commencement of the approved land use activity does not occur in accordance with representations made by the petitioner.” S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915 (emphasis added). The House Committee on Planning, Energy, and Environmental Protection similarly stated in its report that the purpose of the bill was to “strengthen existing statutes by permitting the Land Use Commission further control over a proposed development by voiding a change in zoning if the petitioner does not make a substantial commencement of the approved land use activity.” H. Stand. Comm. Rep. No. 1086–90, in 1990 H. Journal, at 1265 (emphasis added).

The legislative history further indicates that the legislature added this language in order to empower the LUC to address a particular situation, namely, where the landowner does not develop the property in a timely manner. The Senate Committee on Energy and Natural Resources specifically noted that “[v]acant land with the appropriate state and county land use designation is often subjected to undesirable private land speculation and uncertain development schedules[,]” and that “[s]uch speculation and untimely development inflates the value of land, increases development costs, and frustrates federal, state, county, and private coordination of planning efforts, adequate funding, public services, and facilities.” S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915.

The fact that the legislature sought to address situations where the petitioner has not substantially commenced use of the land is further evidenced in the testimony presented to both the Senate and House committees. In both the Senate and the House, the Office of State Planning offered testimony that “[a] positive approach to comprehensive land use planning and a strong preventive measure to land speculation, necessitates this bill which will require that successful applicants for land use boundary amendments either ‘use it, or lose it.’ ” Letter from Office of State Planning, to S. Comm. on Energy & Natural Res. (Feb. 7, 1990) (on file with the Hawai‘i State Archives) (emphasis added); Letter from Office of State Planning, to H. Comm. on Planning, Energy & Env’tl. Protection (Mar. 8, 1990) (on file with the Hawai‘i State Archives) (emphasis added). The LUC also offered testimony to both the Senate and the House, stating that “the proposed amendment will clarify the Commission’s authority to impose a specific condition to downzone property in the event that the Petitioner does not develop the property in a timely manner.” Letter from Land Use Comm’n, to S. Comm. on Energy & Natural Res. (Feb. 7, 1990) (on file with the Hawai‘i State Archives) (emphasis added); Letter from Land Use Comm’n, to H. Comm. on Planning, Energy & Env’tl. Protection (Mar. 8, 1990) (on file with the Hawai‘i State Archives) (emphasis added). Thus, the legislative history establishes that by adding this sentence to HRS § 205–4(g) in 1990, the legislature sought to empower the LUC to void a boundary amendment, after giving the landowner the opportunity for a hearing, if the landowner failed to substantially commence use of the land in accordance with its representations.

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 211–12, 339 P.3d 685, 709–10 (Hawaii 2014).

13. Whether the petitioner has substantially commenced use of the land in accordance with representations made to the LUC is a question of fact to be determined by the Land Use Commission. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 214, 339 P.3d 685, 712, fn.16 (Hawaii 2014) (“In the absence of both a statutory definition of “substantial commencement” and an expression of LUC’s interpretation of “substantial commencement” for a particular project, a determination of whether a party has substantially commenced use of the land will turn on the circumstances of each case, not on a dollar amount or percentage of work

completed.”).

**THE PROCEEDING REGARDING THE ORDER TO SHOW CAUSE IS A  
CONTESTED CASE.**

14. An order to show cause proceeding by the Commission is a contested case.

15. A “contested case” is defined “as a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” [HRS §91-1]

16. Pursuant to HAR §15-15-93(c), “[t]he commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7 (“Agency Hearing and Post Hearing Procedures”), where applicable.”

**THE QUANTUM OF PROOF IN A CONTESTED CASE IS THE PREPONDERANCE  
OF THE EVIDENCE**

17. Pursuant to HRS Chapter 91, the Administrative Procedures Act, in contested cases, “[t]he degree or quantum of proof shall be a preponderance of the evidence.” [In HRS §91-10(5)]

18. “Agency adjudicators are also required to apply the preponderance of the evidence burden of proof in contested cases, like trial judges in civil cases.” Kilakila 'O Haleakala v. Bd. of Land, 138 Haw. 383, 416, 382 P.3d 195, 228 (Hawaii 2016).

19. The preponderance standard directs the factfinder to decide whether the existence of the

contested fact is more probable than its nonexistence. Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (Hawaii 1989) (“The preponderance standard directs the factfinder to decide whether “the existence of the contested fact is more probable than its nonexistence.” E. Cleary, McCormick on Evidence, § 339, at 957 (3d ed. 1984). As one commentator points out, to prevail, “[a] plaintiff need only offer evidence sufficient to tip the scale slightly in his or her favor, and a defendant can succeed by merely keeping the scale evenly balanced.” Comment, The Imposition of Punitive Damages in Product Liability Actions in Pennsylvania, 57 Temp.L.Q. 203, 224 (1984).”).

### **THE RULES OF EVIDENCE**

20. HRS § 91-1 provides for the rules of evidence applicable in contested cases. HRS § 91-1 provides as follows:

§ 91-10. Rules of evidence; official notice

In contested cases:

(1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except 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. The agencies shall give effect to the rules of privilege recognized by law;

(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original;

(3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence;

(4) Agencies may take notice of judicially recognizable facts. In addition, they may

take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed; and

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

**AUTHORITY OF THE LAND USE COMMISSION TO REVERT THE PROPERTY  
TO ITS PRIOR LAND USE CLASSIFICATION WHERE THE PETITIONER HAS  
NOT SUBSTANTIALLY COMMENCED USE OF THE PROPERTY IN  
ACCORDANCE WITH ITS REPRESENTATIONS.**

21. Once the LUC issues an OSC, the relevant considerations to be taken into account by the LUC and the procedures it must follow turn on whether the petitioner has substantially commenced use of the land in accordance with its representations. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 209, 339 P.3d 685, 707 (Hawaii 2014) (“once the LUC issues an OSC, the relevant considerations to be taken into account by the LUC and the procedures it must follow turn on whether the petitioner has substantially commenced use of the land in accordance with its representations. When the LUC reverts property before the petitioner has substantially commenced use of the land, the LUC may do so without following the procedures otherwise applicable under HRS § 205-4.”).

22. In DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 209, 339 P.3d 685, 707 (Hawaii 2014), the Hawaii Supreme Court explained:

To the extent DW and Bridge argue that the LUC must comply with the general requirements of HRS § 205–4 anytime it seeks to revert property, they are mistaken. The express language of HRS § 205–4(g) and its legislative history establish that **the LUC may revert property without following those procedures, provided that the petitioner has not substantially commenced use of the property in accordance with its representations. In such a situation, the original reclassification is simply voided.**

Thus, once the LUC issues an OSC, the relevant considerations to be taken into account by the LUC and the procedures it must follow **turn on whether the petitioner has substantially commenced use of the land in accordance with its representations. When the LUC reverts property before the petitioner has substantially commenced use of the land, the LUC may do so without following the procedures otherwise applicable under HRS § 205–4.** However, if the LUC seeks to revert property after use of the land has substantially commenced, then the LUC is bound by the requirements of HRS § 205–4. Applying these principles to the facts of this case, the circuit court correctly concluded that the LUC erred in reverting the property to agricultural use without complying with the requirements of HRS § 205–4 because, by the time the LUC reverted the property, DW and Bridge had substantially commenced use of the land in accordance with their representations.

*DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC.*, 134 Haw. 187, 209, 339 P.3d 685, 707 (Hawaii 2014) (emphasis added).

### **DETERMINATION OF “SUBSTANTIAL COMMENCEMENT” OF USE OF THE PROPERTY**

23. The Hawaii Supreme Court, in *DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC.*, 134 Haw. 187, 213–14, 339 P.3d 685, 711–12 (Hawaii 2014), explained how the Land Use Commission should make the factual determination of whether the petitioner has substantially commenced the use of the land in accordance with its representations.

Section 205–4(g) does not include a definition of “substantial commencement,” and the LUC's April 25, 2011 order does not explain how the LUC interpreted that term. The interpretation of a statute is a question of law which is freely reviewable by this court. See Univ. of Haw. v. Befitel, 105 Hawai‘I 485, 488, 100 P.3d 55, 58 (2004). “**Substantial**” is, according to Blacks's Law Dictionary, “**considerable in amount or value; large in volume or number.**” Black's Law Dictionary 1656 (10th ed. 2014). In drafting HRS § 205–4(g), the legislature did not require that the use be substantially completed, but rather that it be substantially commenced. This is consistent with the concerns identified by the legislature in the legislative history of the statute, i.e., that it was trying to **deter speculators who obtained favorable land-use rulings and then sat on the land for speculative purposes.**

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 213–14, 339 P.3d 685, 711–12 (Hawaii 2014) (emphasis added).

24. The Commission finds and concludes that the Petitioner did not substantially commence the use of the land in accordance with its representations.

25. The Commission finds and concludes that the requirements of HRS § 205-4 are inapplicable with respect to whether the Land should be reverted to its prior land use classification, because the Petitioner had not substantially commenced use of the land in accordance with its representations.

#### **ENFORCEMENT OF A CONDITION IS NOT RULE MAKING**

26. The issuance of an Order To Show Cause by the Land Use Commission does not require the promulgation of additional rules.

27. In Application of Hawaiian Elec. Co., Inc., 81 Haw. 459, 465–67, 918 P.2d 561, 567–69 (Hawaii 1996), the Hawaii Supreme Court explained at length whether an agency was required to promulgate rules:

**Appellants generally contend that the PUC violated HAPA by failing to properly promulgate rules to establish when transmission lines will be placed underground.** Appellants argue that, prior to proceeding with the case, the PUC should have issued a “rule,” as defined by HRS § 91–1(4) (1993), as to when the PUC will defer to another governmental agency, as to when power lines will be undergrounded, as to how the visual impact of overhead lines will be weighed, and to define when transmission lines will be placed underground for social equity reasons. The PUC instead granted HECO's application, merely stating that it needed “additional justification”<sup>12</sup> to place lines underground for social equity reasons. Appellants argue that what would qualify as “additional justification” or criteria is clearly a statement of policy by the PUC, thereby requiring a rule-making proceeding prior to a contested case hearing under HAPA.

Under HRS § 91–1(4), a “rule”

means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency.

HRS § 91–1(4) (1993).

We begin our discussion by first recognizing **the distinction between rule-making and adjudication.**

The distinction between rule-making and adjudication is often troublesome statutory language. However, it is generally accepted that the distinguishing characteristic of rule-making is the generality of effect of the agency decision and that literal application of the words “or particular” would obviate completely the adjudicatory functions of administrative agencies. [Aguilar v. Hawaii Housing Authority, 55 Haw. 478, 485 n. 13, 522 P.2d 1255, 1261 n. 13 (1974) ]; 1 Davis, Administrative Law Treatise § 5.02 (1958) (hereinafter “Davis”).

**This distinction [between rule-making and adjudication] reflects the consideration that in rule-making policy is dominant, rather than accusatory or disciplinary elements, and consequently such factors as the**



**demeanor of witnesses are of little significance.**

\* \* \* \* \*

Rule-making is an agency action governing the future conduct either of groups of persons or of a single individual; it is essentially legislative in nature, not only because it operates in the future, but also because it is concerned largely with considerations of policy. In rule-making, disciplinary or accusatory elements are absent. Typically, the issues relate not to the evidentiary facts, as to which the demeanor of witnesses would often be important, but rather as to the inferences to be drawn from the facts or as to the predictions of future trends to be based upon them.

\* \* \* \* \*

**Adjudication, conversely, is concerned with the determination of past and present rights and liabilities.** Typically, there is **involved a determination as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.** Inevitably, in such proceedings, issues of fact often are sharply controverted, with the consequence that the demeanor of witnesses becomes important and should be observed by an agency officer who will play a substantial role in the decision.

Note, "Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act, 95 U. Pa. L.Rev. 621 (1946-47).

In his treatise on administrative law, Professor Davis writes:

One of the most helpful definitions of rule-making is that

of Professor Fuchs, who concludes that rule-making should be defined as ‘the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations.’ Another definition is that of Mr. Dickinson: ‘What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity.’

1 Davis, *supra*, § 5.01.

Foster Village Community Ass'n v. Hess, 4 Haw.App. 463, 475–77, 667 P.2d 850, 858 (1983) (brackets added).

Accordingly, because the “literal application of the words ‘or particular’ would obviate completely the adjudicatory functions of administrative agencies,” *id.* at 475, 667 P.2d at 858 (citing Aguiar, 55 Haw. at 485 n. 13, 522 P.2d at 1261 n. 13), we reject Appellants' general contention that all statements of policy by the PUC require a rule-making procedure under HAPA prior to proceeding with the case. Rather, we recognize that rule-making is essentially legislative in nature because it operates in the future; whereas, **adjudication is concerned with the determination of past and present rights and liabilities of individuals where “issues of fact often are sharply controverted.”** See Shoreline Transp., Inc. v. Robert's Tours & Transp., 70 Haw. 585, 591, 779 P.2d 868, 872 (1989).

Secondly, **the choice between proceeding by “general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”** Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947). Thus, **“most courts have allowed agencies broad discretion in choosing whether to develop policy by rule[-]making or adjudication.”** Consumer Protection Division v. Consumer Publishing Co., 304 Md. 731, 501 A.2d 48, 60 (1985) (brackets added).

Application of Hawaiian Elec. Co., Inc., 81 Haw. 459, 465–67, 918 P.2d 561, 567–69 (Hawaii 1996) (emphasis added).

28. The Hawaii Supreme Court recognized that rule making is intended to govern future conduct, in contrast to an administrative agency's adjudication of a respondent's possible violation of law caused by past conduct. See Pilaa 400, LLC v. Bd. of Land & Nat. Res., 132 Haw. 247, 266, 320 P.3d 912, 931 (Hawaii 2014):

**This court has also acknowledged a distinction between the circumstances appropriate for rule-making versus adjudication duties of an agency.** In the most general terms, the purpose of rule-making is to govern the future conduct of groups and individuals, not determining damages resulting from past conduct.

Rule-making is an agency action governing the future conduct either of groups of persons or of a single individual; it is essentially legislative in nature, not only because it operates in the future but also because it is concerned largely with considerations of policy. In rule-making, disciplinary or accusatory elements are absent.

In re HECO, 81 Hawai'i at 466, 918 P.2d at 568 (emphasis added) (quoting Note, "Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act, 95 U. Pa. L.Rev. 621 (1946-47)). See also Coney v. Lihue Plantation Co., 39 Haw. 129, 138-39 (1951) (holding that in a determination of damages, the finder of fact has a right and a duty to draw reasonable and probable inferences from the facts and circumstances in evidence, and in reference to the amount of damages, "the law never insists upon a higher degree of certainty as to the amount of damages than the nature of the case admits, and that where ... the fact of damage is established, a more liberal rule is allowed in determining the amount.")

Setting a general standard in this situation would be impracticable to define by general rule because the November 26, 2001 mudflow and damage to the reef was an "unforeseeable situation" and "so specialized and varying in nature so as to be impossible of capture within the boundaries of a general rule."

Pilaa 400, LLC v. Bd. of Land & Nat. Res., 132 Haw. 247, 266, 320 P.3d 912, 931 (Hawaii 2014) (emphasis added).

29. Therefore, the Land Use Commission was not required to adopt or promulgate additional rules as a condition precedent to proceeding with the instant ORDER TO SHOW CAUSE.

## THE LAW REGARDING EQUAL PROTECTION

30. The fact that an administrative agency takes enforcement actions which it had not taken in the past does not itself violate equal protection.

31. To prove a violation of equal protection, a party must first demonstrate that the law is administered differently against others similarly situated; and second, the party must establish that its selection was “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.”

32. The Hawaii Supreme Court so held in State v. Villeza, 85 Haw. 258, 267–68, 942 P.2d 522, 531–32 (Hawaii 1997):

To substantiate a claim of discriminatory enforcement of the law, the party raising the claim must satisfy a two-part test. First, **the party must demonstrate that the law is administered differently against others similarly situated.** Second, **the party must establish that its selection was “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.”** Id. (quoting State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 227, 615 P.2d 730, 734–35 (1980)). If a party does not satisfy both parts of the test, the party's equal protection claim fails. Id.

State v. Villeza, 85 Haw. 258, 267–68, 942 P.2d 522, 531–32 (Hawaii 1997) (emphasis added).

33. In Mahiai v. Suwa, 69 Haw. 349, 360–61, 742 P.2d 359, 368 (Hawaii 1987), the Hawaii Supreme Court also explained:

In State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 615 P.2d 730 (1980), we recognized the defense of discriminatory enforcement in the context of a criminal prosecution. There we stated:

The burden of proving discriminatory enforcement of the law rests upon the party raising the defense. That party must present sufficient evidence to establish the existence of intentional or purposeful discrimination, that is “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.” **It is insufficient to show merely that \*361 other offenders have not been prosecuted, or that there has been laxity of enforcement, or that there has been some conscious selectivity in prosecution.** Recognition of the defense **will not permit the guilty to go free simply by showing that other violators exist.**

Id. at 226–27, 615 P.2d at 734–35 (quoting *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962) (citations omitted)). See also *State v. Tookes*, 67 Haw. 608, 615, 699 P.2d 983, 988 (1985).<sup>10</sup> **Although the case at bar does not involve a criminal prosecution, we find the case law pertaining to allegations of discriminatory prosecution instructive.** See *Henson v. Department of Law Enforcement*, 107 Idaho 19, 23 n. 3, 684 P.2d 996, 1000 n. 3 (1984) (allegation of selective enforcement in revocation of retail liquor license).

To substantiate a claim of discriminatory enforcement, Ranchers must satisfy a two-part test. First, they must **demonstrate that the Department generally has not enforced section 142–6 against others similarly situated.** See *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir.1982). Second, Ranchers must **establish that their selection was “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.”** *State v. Kailua Auto Wreckers, Inc.*, 62 Haw. at 227, 615 P.2d at 734–35 (quoting *Oyler v. Boles*, 368 U.S. at 456, 82 S.Ct. at 506). If Ranchers do not satisfy both parts of this test, their equal protection claim fails. For that reason, the claim fails here.

*Mahiai v. Suwa*, 69 Haw. 349, 360–61, 742 P.2d 359, 368 (Hawaii 1987) (emphasis added).

34. The Commission finds and concludes that Petitioner did not **“establish that [it’s] selection was “deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.”** Cf. *Mahiai v. Suwa*, 69 Haw. 349, 360–61, 742 P.2d 359, 368 (Hawaii 1987).

35. The Commission therefore finds that Petitioner's right to equal protection of the laws were not violated.

**PETITIONER'S VIOLATION OF THE 2008 ORDER**

36. The Commission finds and concludes that the Petitioner failed to perform according to the conditions imposed and to the representations and commitments made to the Commission in obtaining reclassification of the Subject Area.

37. The Commission finds and concludes the following with respect to the following conditions:

**Condition No.1 (Compliance with Representations to the Commission).**

**Condition No.2 (Completion of Project).**

**Condition No.3 (Reversion on Failure to Complete Project).**

**Condition No.4 (Water Resource Allocation).**

**Condition No.6. (Transportation).**

**Condition No.9. (Affordable Housing.)**

**Condition No. 11.(Archaeological Site 22).**

**Condition No. 12. (Drainage.)**

**Condition No. 13. (Wastewater.)**

**Condition No. 14. (Solid Waste.)**

**Condition No. 20. (Notice of Change of Ownership.)**

**Condition No. 21. (Annual Reports.)**

**GOOD CAUSE**

38. As a general rule, ‘good cause’ means a substantial reason; one that affords a legal excuse.” State v. Estencion, 63 Haw. 264, 267, 625, P.2d 1040, 1042 (1981). “Good cause” is also dependent upon the specific circumstances of an individual case. A finding of “good cause” is left to the discretion of the decision-making body to determine.

39. WHI alleged that the Project had been internally mismanaged. However, internal mismanagement does not qualify as a legal excuse and would appear to be solely under the control of the Petitioner.

40. WHI has not demonstrated the ability or intention to move forward with the Project.

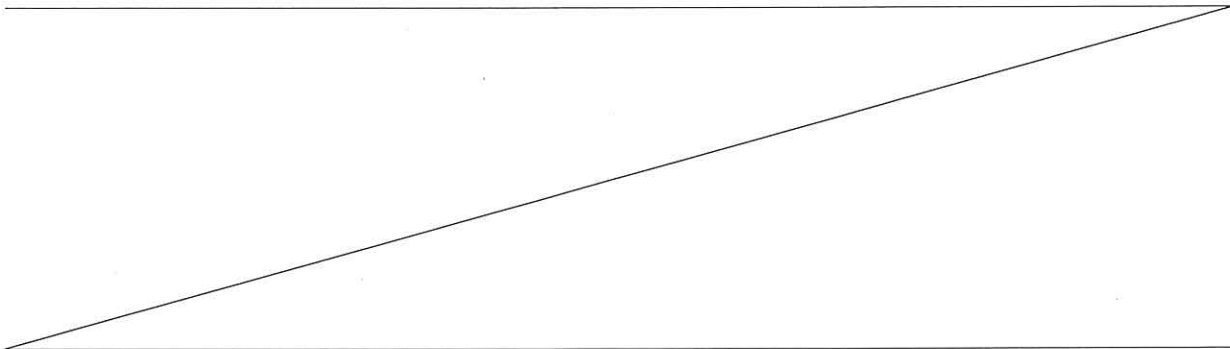
41. Therefore, based on a careful consideration of the evidence and the law, WHI has not shown good cause as to why the Petition Area should not revert to its former classification.

**ORDER**

This Commission having duly considered written briefs, pleadings, oral and written statements and testimony, and oral arguments of the parties and the public in the proceedings, and a motion having been made and seconded at a hearing on November 28, 2018, in Kona, Hawai'i, and the motion having received the affirmative votes required by HAR §15-15-13, and there being good cause for the motion,

HEREBY ORDERS that:

1. The Petition Area of approximately 731.581 acres of land consisting of Tax Map Key No. (3) 6-8-002:016 (portion), is therefore reverted to the State Agricultural District.
  
2. In compliance with HAR §15-15-93(e), the June 10, 2008 Decision and Order, is amended to incorporate the order to show cause and to include the reversion of the Petition Area to its former land use classification; including the cancellation and release of all conditions imposed by that certain 2008 Decision and Order.





**ADOPTION OF ORDER**

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, Hawai'i, this 29<sup>th</sup> day of November, 2019, per motion on July 10, 2019.

APPROVED AS TO FORM

LAND USE COMMISSION  
STATE OF HAWAI'I

*Randall S. Ashiyama*  
Deputy Attorney General

By   
JONATHAN LIKEKE SCHEUER  
Chairperson and Commissioner

Filed and effective on:

11/29/19

Certified by:

  
DANIEL E. ORODENKER  
Executive Officer



BEFORE THE LAND USE COMMISSION  
STATE OF HAWAII

In the matter of the Petition of

WAIKOLOA MAUKA, LLC

To Amend the Agricultural Land Use  
District Boundaries into the Rural Land  
Use District for Approximately 731.581  
Acres in South Kohala District, Island of  
Hawaii, Tax Map Key No. (3) 6-8-02:016  
(portion)

DOCKET NO. A06-767

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I hereby certify that a certified copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, was served upon the following by depositing the same in the U.S. Postal Service by registered mail or certified mail as noted:

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Dated: Honolulu, Hawai'i, November 29, 2019



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Daniel E. Orodener  
Executive Officer