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NATIONS, KONA, INC.

LAND USE COMMISSION  
STATE OF HAWAII

2020 JUL -7 P 1:47

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of

U of N BENCORP

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

DOCKET NO. A02-737

UNIVERSITY OF THE NATIONS,  
KONA, INC.'S RESPONSE TO THE  
OFFICE OF PLANNING'S AND  
COUNTY OF HAWAI'I'S STATEMENTS  
OF POSITION RE: (A) UNIVERSITY OF  
THE NATIONS, KONA, INC.'S MOTION  
TO AMEND FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
DECISION AND ORDER, FILED  
MARCH 23, 2020; AND (B) ORDER TO  
SHOW CAUSE, FILED MARCH 29, 2019;  
CERTIFICATE OF SERVICE

**UNIVERSITY OF THE NATIONS, KONA, INC.'S RESPONSE TO OFFICE OF  
PLANNING'S AND COUNTY OF HAWAI'I'S STATEMENTS OF POSITION RE: (A)  
UNIVERSITY OF THE NATIONS, KONA, INC.'S MOTION TO AMEND THE FINDINGS  
OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, FILED MARCH 23,  
2020; AND (B) ORDER TO SHOW CAUSE, FILED MARCH 29, 2019**

**I. INTRODUCTION.**

University of the Nations, Kona, Inc., a Hawai'i nonprofit corporation ("UNK"), as  
successor-in-interest to Petitioner U of N Bencorp to those certain parcels of land consisting of  
approximately 62 acres and currently identified by Tax Map Key Nos. (3) 7-5-010:085 and (3) 7-

5-017:006 (the "**Petition Area**"), by and through its legal counsel, Carlsmith Ball LLP, hereby respectfully responds to: (i) the State of Hawai'i Office of Planning ("**OP**")'s (a) *Statement of Position in [sic] University of the Nations, Kona, Inc.s [sic] Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order* ("**OP's Motion SOP**"), and (b) *Amended Statement of Position on the Land Use Commission's Order to Show Cause* ("**OP's Amended OSC SOP**"), both filed on June 23, 2020; and (ii) the County of Hawai'i Planning Department ("**County**")'s *Position Statement of the County of Hawai'i Planning Department on the Land Use Commission's Order to Show Cause and Petitioner's Motion to Amend*, filed on June 24, 2020 ("**County's Position Statement**").

The filings of both OP and the County support granting of UNK's *Motion to Amend the Findings of Fact, Conclusions of Law, and Decision and Order*, filed March 23, 2020 ("**Motion to Amend**")<sup>1</sup>, and dismissal of the *Order to Show Cause* filed by the Land Use Commission of the State of Hawai'i (the "**Commission**") on March 29, 2019 (the "**OSC**").<sup>2</sup>

As discussed herein and in prior filings, and as agreed to by OP, there is good cause to dismiss the OSC because UNK has provided sufficient evidence that the delay in development of the Petition Area was beyond the control of UNK. Further, both the County and OP agree that UNK's 2020 Master Plan for development of the Petition Area ("**Revised Project**") is a viable and appropriate project for the Petition Area. OP specifically believes that UNK has demonstrated its financial capability to develop the Revised Project and that the currently proposed 30-year development timeline is reasonable under the circumstances. Moreover, both OP and the County agree with UNK that the Petition Area is best suited to remain in the State Land Use ("**SLU**") Urban District, as opposed to being reverted back to the SLU Agricultural District.

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<sup>1</sup> In addition to being a standalone motion to amend the *Findings of Fact, Conclusions of Law, and Decision and Order in Docket No. A02-737*, filed on August 8, 2003 ("**D&O**"), the Motion to Amend was also submitted as further evidence of good cause to dismiss the OSC.

<sup>2</sup> OP subjects the granting of the Motion to Amend to certain conditions discussed herein.

## II. DISCUSSION.

### 1. OP AND THE COUNTY SUPPORT DISMISSING THE OSC.

#### a. OP And The County Believe There Is Good Cause To Dismiss The OSC.

OP's Motion SOP and the County's Position Statement clearly support the dismissal of the OSC. *See* OP's Amended OSC SOP at 5; County's Position Statement at 3. UNK has demonstrated good cause pursuant to Hawaii Revised Statutes ("**HRS**") Section 205-4(g) to not revert the Petition Area to its former SLU Agricultural classification or another more appropriate classification by (i) providing sufficient evidence of a chain of bad events beyond its control that prevented UNK from developing the originally approved project, and (ii) by demonstrating that the Revised Project is a viable and appropriate project for the Petition Area. *See* OP's Amended OSC SOP at 2; *University of the Nations, Kona, Inc.'s Statement of Position and Rebuttal to the Statement of Position of the Office of Planning on the Order to Show Cause Issued by the State of Hawai'i Land Use Commission on March 29, 2019*, filed on May 3, 2019 ("**UNK's OSC SOP**"), *passim*.; Motion to Amend, *passim*.

First, OP is in agreement with UNK that the chain of bad events, mainly (i) the integral internal reorganization of UNK, (ii) the multi-million fraud scheme perpetuated upon UNK by one of its volunteers, (iii) the out-of-state litigation in which the plaintiff sought \$25 million in damages from UNK, and (iv) the added strain from the Great Recession of 2008, are all circumstances that exhibit good cause to not revert the Petition Area. *See* OP's Amended OSC SOP at 2-3, UNK's OSC SOP, *passim*.

Second, OP agrees that UNK's Revised Project demonstrates good cause not to revert the Petition Area because it "presents [UNK's] vision and capability to effectively move forward in developing the Petition Area." *Id.* at 2. As explained in great detail in the Motion to Amend, in contrast to the originally approved project, the Revised Project focuses on expanding educational and housing opportunities for the University's<sup>3</sup> faculty and students, and preserving the significant archaeological resources within the Petition Area. *See* Motion to Amend at 9-13. OP believes that the Revised Project will have lesser impacts on the Petition Area and its surrounding areas than the project originally approved by the Commission. *See* OP's Amended

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<sup>3</sup> The University is a mission-based educational facility founded in Kona in 1978 by UNK, which is immediately adjacent to and shares a common boundary with the Petition Area.



OSC SOP at 3. These lesser impacts are demonstrated by the updated studies provided in conjunction with the Motion to Amend.<sup>4</sup>

OP agrees that UNK has demonstrated its financial capability to develop the Revised Project. *See id.* at 4. By utilizing traditional financing, increased revenue from tuition from an increase in the student body, general donations, project specific fundraising, drawing down on cash reserves, and general fundraising, OP believes, and UNK concurs, that UNK has sufficient funds to finance the development of the Revised Project.

OP also supports the 30-year phased build-out of the Revised Project. As discussed in the Motion to Amend, the Commission has the authority to grant the 30-year phased build-out of the entire Petition Area as long as it finds that there is good cause to amend the D&O to allow for the development of the Revised Project. *See* Motion to Amend at 31-33; *see also* Hawaii Administrative Rules ("HAR") § 15-15-94(c). OP finds that the proposed 30-year phased build-out is reasonable under the proposed financing structure that allocates student tuition towards the Revised Project as student enrollment increases. *Id.* at 4.

Notably, OP believes that the completion of the components during Phase I<sup>5</sup> of the Revised Project, scheduled to be completed within the first five to ten years following approval of the Revised Project by the Commission, are "sufficient to comply with the substantial commencement standard of HRS § 205-4(g)." *Id.* at 4. Although UNK maintains that it has substantially commenced its use of the Petition Area and is in substantial compliance with the conditions of the D&O to the extent they have been triggered, UNK concurs with OP that the completion of Phase I will constitute substantial commencement of the use of the Petition Area. "In drafting HRS § 205-4(g), the legislature did not require that the use be substantially **completed**, but rather that it be substantially **commenced**." *DW Aina Le 'a Dev., LLC v. Bridge Aina Le 'a, LLC*, 134 Hawai'i 187, 214, 339 P.3d 685, 712 (2014) (emphases in original). "[A] determination of whether a party has substantially commenced use of the land **will turn on the**

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<sup>4</sup> Mainly the flora and fauna study (Motion to Amend, Appendix A of Exhibit 3), the traffic impact assessment (Motion to Amend, Appendix B of Exhibit 3), the preliminary infrastructure assessment (Motion to Amend, Appendix C of Exhibit 3), the water supply study (Motion to Amend, Appendix D of Exhibit 3), and the cultural impact assessment (Motion to Amend, Appendix N of Exhibit 3).

<sup>5</sup> Phase I foresees the construction of the roadway/utility corridor (known as the Spine Road), a chapel, instruction building, student dormitory, gymnasium, and maintenance/storage warehouse, parking areas, athletic field, and archaeological preservation sites (including restoration of burial sites, Kuakini Wall dismantling and restoration plan, installation of rock walls, permanent preservation buffer areas, etc.).

*circumstances of each case, not on a dollar amount or percentage of work completed."* *Id.* at 214, 339 P.3d at 712 n.16 (emphasis added).

Although the County does not expressly state that the chain of bad events and the Revised Project constitute good cause, the County supports the Revised Project and "concur[s] that the [Revised Project] presented by [UNK] demonstrates both a workable development and provides justification as to why reversion to an agricultural designation is inappropriate." County's Position Statement at 2-3. Thus, similar to OP, the County believes that the preferable solution is for the Commission to *dismiss* and "withdraw the [OSC] hearing altogether." County's Position Statement at 3.

- b. OP And The County Agree with the UNK That The Petition Area Is Best Suited To Remain In The SLU Urban District.

In accord with the position of UNK, the County and OP agree that even if the Commission determines that UNK has not substantially commenced its use of the Petition Area and that good cause has not been established, the Commission nevertheless should not revert the Petition Area back to the SLU Agricultural District because the SLU Urban District is the most appropriate SLU District.

As emphasized by UNK and the County throughout these proceedings, the SLU Urban classification "is consistent with the County's General Plan, the Kona Community Development Plan, and the zoning for surrounding properties. Therefore, the previous recommendation made by the County, that the [Commission] **not revert the [Petition Area] to its former [SLU] Agricultural . . . classification or change to some other classification, remains the County's present position.**" County's Position Statement at 2 (emphasis added); *see also* OP's Amended OSC SOP at 5 ("County plans envision the area as urban, and adjacent properties are in the Urban District").

Although the foregoing represents sufficient evidence to keep the Petition Area in the SLU Urban District, the annual rainfall and poor soil classifications of the Petition Area also demonstrate that the Petition Area is not suitable for uses intended by lands located within the SLU Agricultural District. *See* OP's Amended OSC SOP at 5. Indeed, based on these characteristics, the Commission has already found that the Petition Area is not suited for intensive agricultural uses. *See* D&O, Findings of Fact at 32. While UNK recognizes that the SLU Agricultural District can include lands of marginal agricultural value, *see* HAR § 15-15-



19(3), that does not make it the most appropriate SLU District for the Petition Area, which the County and OP both agree with. *See* OP's Amended OSC SOP at 5; County's Position Statement at 2. The standard for a reversion is that the Petition Area must be reverted either to its previous classification or to a more appropriate classification. As indicated herein and throughout these proceedings, there is little justification for a reversion to the SLU Agricultural District other than the Commission's obligation to enforce conditions as it sees best, and the most appropriate classification for the Petition Area is the SLU Urban classification.

2. OP AND THE COUNTY SUPPORT GRANTING OF THE MOTION TO AMEND SUBJECT TO CERTAIN CONDITIONS

In general, OP and the County support the approval of the Motion to Amend. *See* OP's Motion SOP at 9; County's Position Statement at 2-3. However, OP subjects its approval to certain conditions, including: (i) revisions to UNK's proposed amended D&O Condition No. 6; (ii) revisions imposed by the State of Hawaii Department of Transportation ("**HDOT**") to certain traffic studies and D&O Conditions Nos. 9 and 10; and (iii) mitigation measures to comply with concerns raised by the State Department of Land and Natural Resources, Division of Forestry and Wildlife ("**DOFAW**"), all of which are discussed in turn in Sections 2.a., 2.b., and 2.c. *infra*. Overall, OP finds that the development timeline for the Revised Project "appears to be reasonable, and provides for full use of the Petition Area for school use." *Id.* In response to OP conditions and OHA's concerns, UNK proposes an amendment to D&O Condition No. 6 and agrees to work with HDOT and DOFAW as set forth below.

a. UNK's Response to OHA's Comments.

Included with OP's Motion SOP were comments from the Office of Hawaiian Affairs ("**OHA**") on UNK's proposed amendments to D&O Condition No. 6 related to the protection of archaeological resources within the Petition Area. In light of OHA's comments, and after further consultation with ASM Affiliates, UNK withdraws its requested amendment to D&O Condition No. 6 as stated on pages 34 and 35 of its Motion to Amend and instead provides the following to replace the current D&O Condition No. 6:

- a. *Petitioner shall submit an archaeological monitoring plan in accordance with HAR §13-279 to be reviewed and accepted by the State Historic Preservation Division of the Department of Land and Natural Resources (DLNR-SHPD). The plan shall specify that archaeological monitoring will be required for all ground-disturbing development activity.*

- b. *Petitioner shall submit the already-completed Dismantling/Restoration Plan for a portion of the Kuakini Wall (Site 6302) to be reviewed and accepted by the DLNR-SHPD. This is a requested addendum to the DLNR-SHPD accepted Preservation Plan.*
- c. *Petitioner shall maintain in good condition the interim protection measures at the two archaeological preservation sites (Sites 6302 and 23681) as specified in the DLNR-SHPD accepted Preservation Plan until such time that the permanent preservation measures are implemented.*
- d. *Petitioner shall maintain in good condition the interim protection measures at the three burial preservation sites (Sites 23683, 23684, and 23685) until such time that the permanent preservation measures are implemented. Further, when implementing the permanent preservation measures, the Petitioner shall repair the damage to Site 23683 caused during fire suppression activities in 2013.*
- e. *Petitioner shall preserve the approximate alignment of at least one of the mauka-makai trail segments. Due to the difficulty of development on this site, the grading would occur first, then Petitioner shall reestablish a minimum of one of the two trail segments, Site 23679 (20 meter segment) or Site 23680 (ten meter segment), at a mutually agreeable site, giving allowances for building footprints, on finished grade, in consultation with the Office of Hawaiian Affairs.*
- f. *Petitioner will work with DLNR-SHPD to facilitate DLNR-SHPD review and acceptance of the Data Recovery Report, which was completed in 2007.*
- g. *All mitigation commitments and activities shall be monitored by the "Waiaha Community Advisory Committee" ("WCAC").*

UNK's proposed replacement for D&O Condition No. 6 removes what is currently subsection (b), related to the discovery of previously unidentified archaeological resources, because that provision is generally imposed when there is no archaeological monitoring plan ("AMP") in place. Under subsection (a), UNK will be submitting an AMP to the State of Hawai'i Department of Land and Natural Resources, Historic Preservation Division for approval. The AMP will require archaeological monitoring for all ground-disturbing development activity.

b. UNK's Response to HDOT's Comments.

OP's Motion SOP includes 12 comments from the HDOT. **Comments 1 and 2** relate to D&O Conditions Nos. 9 and 10, stating that these conditions are still relevant, noting, however, that D&O Condition No. 10 could be amended to exclude portions of the development which are not part of the Revised Project, such as the Hualalai Village project and the Cultural Center. Because the Hualalai Village project and the Cultural Center are not part of the Revised Project, UNK agrees with HDOT's comment to delete the language in D&O Condition No. 10 referring to these developments.



**Comment 3** relates to the Environmental Planning Report ("EPR")<sup>6</sup> recommending that the EPR reflect the holistic approach for a single integrated Kona campus and address the environmental impacts of the improvements proposed for the entire development area, rather than only the Petition Area. UNK agrees with this comment and notes that no action is needed at this time.

**Comment 4** indicates that the Mobility Analysis Report ("MAR")<sup>7</sup> is consistent with D&O Condition No. 10 and addresses the proposed development in all phases of the Revised Project, however, the estimates of students and staff on campus should be clarified. UNK notes that the total number of students, faculty, and staff was updated in the EPR but not in the MAR. These numbers will be updated in subsequent versions of the MAR. It is important to note that the total number of students, faculty, and staff was reduced after the MAR was completed and thus the MAR represents a conservative estimate of potential effects by the Revised Project.

**Comment 5** relates to the proposed emergency access roads and gates. UNK notes that emergency access roads from the future campus could be made through the Kona Hillcrest subdivision, either via Lelehuna Street or near Hillcrest Park. The identification and discussion of these roads will be included in subsequent versions of the MAR.

**Comment 6** asks UNK to clarify the need for two parallel internal east-west bounds, one of which would extend east to a new UNK driveway on Hualalai Road and the other which would extend to Hualalai Village Road, which intersects with Hualalai Road. As shown on Figure 2-2 of the MAR, two parallel internal east-west roadways are included on the site plan. This includes the central Spine Road and a new east-road that would traverse the northern edge of the Petition Area and connect with Hualalai Road. The need for the second road helps to distribute vehicular traffic throughout the campus and avoids a single internal roadway with a higher traffic volume.

**Comment 7** asks UNK to edit the graphics of the EPR/MAR to clearly identify all existing and proposed access driveways and primary interior circulation routes to these driveways for the entire development area. UNK agrees with this comment and plans to have the graphics of the MAR edited accordingly.

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<sup>6</sup> Exhibit 3 of the Motion to Amend.

<sup>7</sup> Appendix B of Exhibit 3 of the Motion to Amend.



**Comment 8** proposes recommendation measures to mitigate traffic impacts related to safety, congestion, and capacity at the intersections of Queen Kaahumanu Highway and Hualalai Road and Queen Kaahumanu Highway and Kuakini Highway. HDOT also recommends that UNK meet with the HDOT Hawaii District Engineer to review the impact analysis, recommendations and pro-rata share of regional HDOT improvements. UNK notes that at Queen Kaahumanu Highway and Hualalai Road, the LOS for the side street approach is undesirable but signal warrants would not be met with the Revised Project in place. As such, a significant project impact would not occur, and no mitigation is required. At Queen Kaahumanu Highway and Kuakini Highway, the increase in delay resulting from the Revised Project through year 2030 is less than five seconds, which is the threshold used to identify a significant impact where undesirable baseline operations are exacerbated. UNK will meet with the HDOT Hawaii District Engineer to review the anticipated project impacts and determine if improvements are required. For agreed upon improvements, it is expected that the UNK will contribute its pro-rata share of cost of said improvements.

**Comment 9** relates to a typo-like error in the MAR. UNK agrees with the comment and will revise the MAR accordingly.

**Comment 10** relates to updating of the MAR throughout the life span of the Revised Project. UNK agrees with this comment and will update the MAR whenever required.

**Comment 11** indicates that UNK should commit to implementing a transportation management program as recommended in the MAR. UNK agrees with this comment and will implement a transportation management program, including transportation demand management elements, as recommended in the MAR.

**Comment 12** relates to incorporating of a conceptual plan into the Revised Project, identifying the opportunities for internal campus paths to connect with the existing and proposed public roadway routes in the vicinity, as well as adjacent residential communities. Although this is not directly relevant to HDOT's roadways, UNK agrees that such conceptual plan should be included in the Revised Project.

c. UNK's Response to DOFAW's Comments.

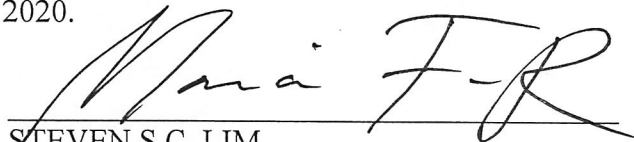
OP's Motion SOP also includes comments from the DOFAW. The DOFAW raises concerns about the Hawaiian Hawk, the Blackburn's Sphink Moth, the Hawaiian Hoary Bat, seabirds, and native plants. As recommended by the DOFAW, UNK will take the following

actions to mitigate and comply with the concerns of DOFAW: (i) UNK will survey the area for nests of the Hawaiian Hawk during its nesting period; (ii) UNK will contact the DOFAW Hawaii Island office for information regarding the Blackburn's Sphink Moth and will not remove plants less than one meter high and/or tobacco trees during the dry time of the year, without checking the plants for the presence of eggs and larvae; (iii) UNK will not conduct site clearing involving removal of woody plants of over 15 feet during the pupping season of the hoary bat, which runs June 1 through September 15; (iv) UNK will apply the mitigation measures for seabirds that may pass through the Petition Area as stated in the Motion to Amend; (v) UNK will take action to minimize predator presence by removing feral cats, placing bait stations for rodents and mongoose, and by providing covered trash receptacles; (vi) UNK will minimize the movement of plant or soil material to minimize the risk of spreading invasive species; and (v) UNK will use native plant species for landscaping that are appropriate for the Petition Area and will not plant invasive species.

### **III. CONCLUSION**

For the foregoing reasons, the Commission should dismiss the OSC and grant UNK's Motion to Amend subject to the conditions recommended by OP discussed herein.

DATED: Honolulu, Hawai'i, July 7, 2020.



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DOCKET NO. A02-737

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

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

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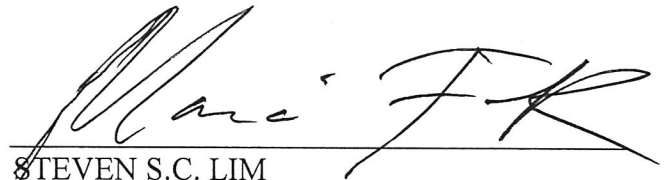
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DATED: Honolulu, Hawai'i, July 7, 2020.

A handwritten signature in black ink, appearing to read "Maria F. Fagerstroem-Ryder", written over a horizontal line.

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