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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI‘I

In the Matter of the Petition of

TOM GENTRY AND GENTRY-PACIFIC, LTD.

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

DOCKET NO. A87-610

TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, DBA KAMEHAMEHA SCHOOLS' **SUPPLEMENTAL MEMORANDUM IN SUPPORT** OF ITS DECEMBER 10, 2021, MOTION FOR MODIFICATION, TIME EXTENSION, AND RELEASE AND MODIFICATION OF CONDITIONS (OF THE COMMISSION'S NOVEMBER 26, 2014, ORDER GRANTING MOTION FOR ORDER AMENDING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER DATED MAY 17, 1988); TABLE 1; CERTIFICATE OF SERVICE

TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, DBA KAMEHAMEHA SCHOOLS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS DECEMBER 10, 2021, MOTION FOR MODIFICATION, TIME EXTENSION, AND RELEASE AND MODIFICATION OF CONDITIONS (OF THE COMMISSION'S NOVEMBER 26, 2014, ORDER GRANTING MOTION FOR ORDER AMENDING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER DATED MAY 17, 1988)

Successor Petitioner LANCE KEAWE WILHELM, ELLIOT K. MILLS, ROBERT K.W.H. NOBRIGA, CRYSTAL KAUILANI ROSE and JENNIFER NOELANI GOODYEAR-KA'ŌPUA, as TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, dba KAMEHAMEHA SCHOOLS ("**KS**"), by and through its legal counsel, submits this Supplemental Memorandum in Support of its pending December 10, 2021, *Motion for Modification, Time Extension, and Release and Modification of Conditions* (the "**2021 Motion**"), through which KS has requested certain modifications to the *Order Granting Motion for Order Amending Findings of Fact, Conclusions of Law and Decision and Order Dated May 17, 1988*, filed on November 26, 2014 (the "**2014 Order**").

The purpose of this Supplemental Memorandum is to respectfully provide the State of Hawai'i Land Use Commission ("**LUC**") with legal context for understanding why the "substantial commencement" test and the associated power to revert the land use classification does not apply to **this** Docket, A87-610.

I. INTRODUCTION.

The LUC reclassified approximately 1,395 acres of land situate at Waiawa, 'Ewa, O'ahu (the "**Petition Area**"), into the Urban District subject to 10 conditions of approval by its *Findings of Fact, Conclusions of Law and Decision and Order* filed May 17, 1988 (the "**1988 Order**"; as amended in 1990,[1] collectively, the "**Waiawa Order**").[2] The following

[1] By Order dated November 30, 1990, the LUC amended Condition No. 6 of the 1988 Order and reaffirmed all other conditions.

[2] A copy of the Waiawa Order has been filed as Exhibits 48 (1988 order) and 49 (1990 order).

All exhibits referred to herein have been filed with KS' Third List of Exhibits, filed at the same time as this Supplemental Memorandum, and therefore copies of the exhibits referenced herein are not also attached to this Supplemental Memorandum.

distinguishing features of the Waiawa Order are fundamental to understanding the inapplicability of the "substantial commencement" test in this Docket:

- The LUC did **not** impose a condition requiring substantial commencement of use of the land under the Waiawa Order.
- The LUC did **not** impose a development deadline under the Waiawa Order.
- The LUC did **not** impose a condition to assure substantial compliance with the representations made by the petitioner in seeking the boundary change under the Waiawa Order.
- The LUC has **never**, over the objections of the landowner, reverted property in the absence of the foregoing conditions.

Because no time or use sensitive conditions were imposed under the Waiawa Order, the "substantial commencement" test and the associated power to revert land use designations under Hawai'i Revised Statutes ("**HRS**") § 205-4(g) does not apply to the Petition Area.

In the future, when KS files a new motion to substantially modify the master plan project that was presented to the LUC by Gentry, KS expects that the LUC will impose appropriate conditions, which may include development timeframes and/or a requirement for substantial commencement. Until that time, applying the "substantial commencement" analysis in this Docket, in the absence of the required conditions, when the LUC has never done so absent an explicit condition, and when KS and others have reasonably and justifiably relied on the Urban District classification of the Petition Area, would clearly violate the law.

II. "SUBSTANTIAL COMMENCEMENT" DOES NOT APPLY TO THIS PETITION AREA.

The powers of the LUC are limited to those delegated to it by the legislature, and no enforcement powers have been granted to the LUC. *See Lanai Co. v. Land Use Comm'n*, 105 Hawai'i 296, 318, 97 P.3d 372, 394 (2004) ("If the legislature intended to grant the LUC enforcement powers, it could have expressly provided the LUC with such power."). Thus, the general rule is that the LUC has no enforcement powers.

The one exception to this general rule was created by the legislature in 1990, more than two years after the Waiawa Order was issued. It is found in HRS § 205-4(g).

> 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.

DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC, 134 Hawai'i 187, 211, 339 P.3d 685, 709 (2014) ("***Aina Le'a***") (emphasis added). The plain and unambiguous language in the statute requires that, for the LUC to possess and exercise its sole enforcement power, it must expressly impose a condition calling for substantial commencement.

"This sentence was added to HRS § 205-4(g) in 1990." *Aina Le'a*, 134 Hawai'i at 211, 339 P.3d at 709 (citing 1990 Haw. Sess. Laws Act 261 § 1 at 563-64). As explained by the Hawai'i Supreme Court, through Act 261, it was added:

> [T]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.

Id., 339 P.3d at 709 (emphasis added and omitted) (citing S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915).

The *Aina Le'a* court pointed out that the LUC itself recognized the requirement to impose an express condition in order to effectuate the power to revert. "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.'" *Id.* at 212, 339 P.3d at 710 (2014) (emphasis added).

Act 261 became effective on June 25, 1990, more than two years **after** the LUC issued the Waiawa Order. Accordingly, no substantial commencement condition was imposed under

the Waiawa Order. Act 261 made the following relevant amendments to HRS § 205-4(g):[3]

ACT 261 S.B. NO. 3028

A Bill for an Act Relating to Land Use Boundary Changes.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Section 205-4, Hawaii Revised Statutes, is amended by amending subsection (g) to read as follows:

"(g) Within a period of not more than one hundred twenty days after the close of the hearing, unless otherwise ordered by a court, the commission shall, by filing findings of fact and conclusions of law, act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change. The 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. Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances."

***

SECTION 3. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.
(Approved June 25, 1990)

The plain and obvious meaning of HRS § 205-4(g) is that in making boundary amendment decisions **after** June 25, 1990, the LUC had power to impose a condition on those decisions requiring substantial commencement of the use of the land. A cardinal rule of statutory construction is that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found that will give force to and preserve all words of the statute. *Santiago v. Tanaka*, 137 Hawai'i 137, 156, 366 P.3d 612, 631 (2015). Accordingly, the only plausible way to read HRS § 205-4(g) is that the LUC's reversion authority must be expressed in a condition imposed on an order granting a district boundary amendment.

In the same way that the substantial commencement clause under HRS § 205-4(g) does not apply to the Waiawa Order, the LUC's related administrative rules regarding reversion do

[3] A copy of Act 261 has been filed as Exhibit 50.

not apply. The LUC has authority to exercise implied powers that have not been expressly granted, such as through administrative rules. "However, such implied powers are limited to those reasonably necessary to carry out the powers expressly granted." *Asato v. Procurement Policy Bd.*, 132 Hawai'i 333, 347, 322 P.3d 228, 242 (2014) (quoting another source). Moreover, it is "axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement." *Id.* (internal quotation marks omitted) (citing authority).

An administrative rule that violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, is invalid. *See* HRS § 91-7(b). If applied to the Waiawa Order, the LUC's current rules regarding reversion, Hawai'i Administrative Rules ("**HAR**") § 15-15-93, would violate the law.

HAR § 15-15-93(e) purports to allow the LUC to revert land absent substantial commencement of use of the land.[4] The LUC would exceed its statutory authority if it were to interpret this rule as allowing it to revert land in a docket where no substantial commencement condition was imposed. *See* HRS § 205-4(g).

In order to revert land, by statute, the LUC must have first imposed a condition on the reclassification stating that absent substantial commencement of the use of the land, it can issue an order to show cause for reversion. Without such a condition, the LUC cannot revert the land. If the LUC wishes to change the land use classification in this Docket, it must follow the district boundary amendment requirements under HRS § 205-4. *Aina Le'a*, 134 Hawai'i at 213, 339 P.3d at 711 (Within 365 days, the LUC is "required to find by a clear preponderance of the evidence that the reclassification is reasonable, not violative of HRS § 205-2, and consistent with the policies of HRS §§ 205-16 and 205-17. . . . [and] obtain six votes in favor of the reclassification.").

[4] HAR § 15-15-93 (e) provides as follows:

> Absent substantial commencement of use of the land, the commission may revert the property to its former land use classification or a more appropriate classification. For the purposes of this subsection (e) substantial commencement shall be determined based on the circumstances or facts presented in the order to show cause regardless of dollar amount expended or percentage of work completed.

HRS § 205-4(g) authorizes the LUC to impose a potentially broad range of conditions on its boundary amendment decisions, subject to statutory and constitutional limitations. However, the LUC's authority to revert land (as opposed to pursuing reclassification through a boundary amendment proceeding) is limited by statute to situations where: (i) the LUC has imposed a condition stating that absent substantial commencement of the use of the land, the LUC may issue an order to show cause and pursue reversion; and (ii) it is determined, after notice and hearings, that substantial commencement has not occurred. *Aina Le'a*, 134 Hawai'i at 211, 339 P.3d at 709.

In this Docket, it is unquestionable that the LUC never imposed a condition requiring substantial commencement.[5] Accordingly, it is legally impossible for the LUC to revert the Petition Area under the substantial commencement test. *Cf. Aina Le'a*, 134 Hawai'i at 214, 339 P.3d at 712 (LUC order with the condition "Petitioner shall develop the Property in substantial compliance with the representations made to the Commission[,] and that [f]ailure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification" would have permitted the LUC to legally revert the reclassification if the landowner had not substantially commenced use of the land).

A. THE LUC NEVER IMPOSED A CONDITION REQUIRING SUBSTANTIAL COMMENCEMENT OF USE OF THE LAND UNDER THE WAIAWA ORDER.

As set forth above, the LUC's authority to revert land for failure to substantially commence the use of that land must be articulated as a condition imposed by the LUC in

[5] The only time-related deadlines imposed in this Docket were not imposed as part of the original reclassification. Rather, they were imposed under the 2014 Order on the interim use of portions of the Petition Area for solar and relate to those solar uses. Under the 2014 Order, the LUC required the Phase 1 Solar project to be substantially completed by November 2019, and allowed the solar uses to remain in place until November 2049. The LUC also imposed a "substantial compliance with representations" condition on the interim solar uses. Because it was impossible for the original solar developer to perform, in light of these conditions, KS filed the 2021 Motion requesting modest changes to what was approved under the 2014 Order. KS asks for the Phase 1 Solar project to be substantially completed within five years. KS also asks to have a portion of the Phase 1 Solar project removed five years earlier than authorized under the 2014 Order, and for the other portion to be removed five years later than allowed under the current authorization.

granting a district boundary amendment. However, prior to June 25, 1990, the LUC had no such authority. "[T]he 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." *Aina Le'a*, 134 Hawai'i at 212, 339 P.3d at 710. Legislative history cited by the Hawai'i Supreme Court explained that "[t]he purpose of [Act 261] 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 representations made by the petitioner." *Id.* (emphasis added).

In other words, when the LUC granted reclassification under the Waiawa Order, it did not have the legal authority to mandate substantial commencement, much less order a reversion. Accordingly, no such condition was imposed under the Waiawa Order.

Moreover, such a condition cannot be applied retroactively. In Hawai'i, "[n]o law has any retrospective operation, unless otherwise expressed or obviously intended." HRS § 1-3. Therefore, the power given to the LUC in 1990 to condition its reclassification approvals with a substantial commencement obligation cannot now be imposed upon the Petition Area.

"Hawai'i statutory and case law discourage retroactive application of laws and rules in the absence of language showing that such operation was intended." *Gap v. Puna Geothermal Venture*, 106 Hawai'i 325, 333, 104 P.3d 912, 920 (2004); *see also Kaho'ohanohano v. Dep't of Human Servs.*, 117 Hawai'i 262, 310, 178 P.3d 538, 586 (2008), *citing Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. . . . [A]dministrative rules will not be construed to have retroactive effect . . . a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules[.]"); *Taniguchi v. Assoc. of Apartment Owners of King Manor, Inc.*, 114 Hawai'i 37, 48, 155 P.3d 1138, 1149 (2007) (providing that "it is well settled that all statutes are to be construed as having only a prospective operation unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used.") (internal quotation marks and citations omitted).

A retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability, in respect to transactions or considerations already past." *In re Webber*, 674 F.2d 796, 801 (9th Cir. 1982); *and see Clark v. Cassidy*, 64 Haw. 74, 77, 636 P.2d 1344, 1346 (1981) (holding that a change in the law that increased the potential recovery from the Real Estate Recovery Fund from $20,000 against a licensee to $40,000, affected substantive (as opposed to procedural) rights of claimants and could not be applied to transactions made, or claims pending, prior to the effective date of the new law). The Urban District classification granted in 1988 is a substantive right. That right cannot be impaired by laws enacted after the reclassification was granted.

In the absence of the required condition imposed upon the granting of a boundary amendment, the LUC has no authority to void a boundary amendment. No such condition was imposed by the LUC on the Waiawa Order. Therefore, the LUC has no authority to revert the Petition Area. Layering on such a condition now would violate the express language in HRS §205-4(g). Any other construction of the statute would be an impermissible retroactive application of the law.

B. THE LUC NEVER IMPOSED A DEVELOPMENT DEADLINE UNDER THE WAIAWA ORDER.

Not only is there no substantial commencement condition in the Waiawa Order, none of the 10 conditions imposed by the LUC therein explicitly required the petitioner (Gentry) to comply with any projected development timelines. Waiawa Order at 33-36. "Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies." *Lanai Co.*, 105 Hawai'i 296, 314, 97 P.3d 372, 390 (2004). The Waiawa Order gave no warning of any kind of deadlines within which development had to begin.

In this case, the LUC did not impose any deadlines when it reclassified the Petition Area pursuant to the Waiawa Order. While the LUC may wish it otherwise, the LUC cannot read into the Waiawa Order a nonexistent development deadline. "The LUC cannot now enforce a construction of [the Waiawa Order] that was not expressly adopted." *Id.* (rejecting the LUC's post hoc interpretation of a condition it imposed upon a district boundary amendment). The

LUC had the obligation, when it granted the district boundary amendment in 1988, to clearly and plainly express what conditions it expected the landowner to satisfy. Pursuant to the Hawaii Supreme Court's admonition, the Waiawa Order "cannot be construed to mean what the LUC may have intended but did not express." *Id.* The LUC did not impose any development deadlines under the Waiawa Order. Therefore, reversion is not possible.

C. THE LUC NEVER IMPOSED A CONDITION REQUIRING SUBSTANTIAL COMPLIANCE WITH THE REPRESENTATIONS MADE BY THE PETITIONER UNDER THE WAIAWA ORDER.

Not even implicitly does the Waiawa Order require development by a time certain. Since June 3, 1972, the LUC has had the authority, when granting district boundary amendments, to impose conditions "to assure substantial compliance with representations made by the petitioner." *See* 1972 Haw. Sess. Laws Act 187 § 2;[6] *and see* S. Stand. Comm. Rep. 803-72, in 1972 S. Journal, at 1084-1085.[7] While the LUC imposed conditions under the Waiawa Order, it did not impose a general catch all condition requiring substantial compliance with representations. Therefore, even under the most generous reading of HRS § 205-4(g), the LUC has no authority to require substantial commencement of the use of the Petition Area or to revert the land use classification in the absence of substantial commencement of the use of the land.

1972 Haw. Sess. Laws Act 187 amended HRS § 205-4 in relevant part to provide as follows:

> Within a period of not more than ninety days and not less than forty-five days after the hearing, **the commission shall act to** approve the petition, deny the petition, or to **modify the petition by imposing conditions** necessary to uphold the general intent and spirit of this chapter and **to assure substantial compliance with representations made by the petitioner in seeking a boundary change.** Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances.

(Emphasis added). Thus, at the time of the Waiawa Order, the LUC clearly had authority to impose a condition requiring the petitioner (Gentry) to substantially comply with its representations. But, the LUC did not do so.

[6] A copy of 1972 Haw. Sess. Laws Act 187 has been filed as Exhibit 51.

[7] A copy of S. Stand. Comm. Rep. 803-72, in 1972 S. Journal has been filed as Exhibit 52.

The LUC's administrative rules in effect at the time of the Waiawa Order also recited the LUC's authority to impose conditions to assure substantial compliance. HAR § 15-15-90 (effective 1986-1997) ("In approving a petition for boundary change, the commission may impose conditions necessary to uphold the general intent and spirit of chapters 205 and 205A, HRS, and to assure substantial compliance with representations made by the petitioner in seeking the boundary amendment."). That same rule authorized the LUC to require petitioners to submit periodic reports regarding compliance with the conditions imposed, and to require petitioners to report to the LUC any intent to sell, lease, or otherwise change ownership of the land. *Id*. In the Waiawa Order, the LUC elected to require the periodic reports, but it did not elect to impose a general catchall condition calling for "substantial compliance with representations" or impose a condition requiring notice in the event landownership changed, as was the LUC's prerogative.

Despite the long-standing statutory authority to impose conditions to assure substantial compliance with representations, such as representations of development timelines, the LUC never imposed such conditions under the Waiawa Order. "[A]n administrative agency, such as the LUC, has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed.'" *Aina Le'a*, 134 Hawai'i at 215, 339 P.3d at 713 (citing *Lanai Co.*, 105 Hawai'i at 314, 97 P.3d at 390). None of the conditions imposed by the LUC under the Waiawa Order require development within a time certain.

The lack of such conditions under the Waiawa Order contrasts with the conditions the LUC imposed on several other reclassifications that were granted around the time of the Waiawa Order. *See, e.g., Lanai Co.*, 105 Hawai'i at 300-301, 97 P.3d at 376-377 (Condition 20 of the LUC's 1991 reclassification order for Lanai Co. required development of the property to be "in substantial compliance with representations made to the [LUC] in obtaining reclassification of the property[and f]ailure to so develop may result in reclassification of the property to its former land use classification.").

For context, Table 1, appended hereto, which is by no means exhaustive, provides examples of orders contemporaneous with the Waiawa Order, and limited to Oahu reclassifications to the Urban District, where the LUC did or did not impose substantial compliance and other performance conditions. Table 1 illustrates that the LUC had exercised its

power to impose such conditions upon reclassifications granted in other dockets, but did not do so in the Waiawa Order, demonstrating that such conditions were intentionally omitted.

Even the reclassification order in the infamous docket at issue in the *Aina Le'a* decision (Docket A87-617, incorporated herein by reference), included a condition requiring the petitioner to "develop the Property in substantial compliance with representations made to the Land Use Commission in obtaining the reclassification of the Property." Docket A87-617, Findings of Fact, Conclusions of Law, and Decision and Order, January 17, 1989, at 40.[8]

More importantly, however, and as cited by the Hawai'i Supreme Court, the LUC's July 9, 1991, Amended Findings of Fact, Conclusions of Law, and Decision and Order in Docket A87-617, issued **after** the enactment of Act 261, imposed the following condition, which the Court found compelling for the reversion analysis in *Aina Le'a.*

> 13. Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. Failure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification.

1991 LUC amendment order at 55; *and see Aina Le'a*, 134 Hawai'i at 194, 339 P.3d at 692 (analyzing the condition).

As the *Aina Le'a* court explained,

> The 1991 order amending the original reclassification order included a condition providing that "Petitioner shall develop the Property in substantial compliance with the representations made to the Commission[,]" and that "[f]ailure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification." The LUC initially issued Bridge an OSC stating that it had reason to believe that Bridge and its "predecessors in interest 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 and in obtaining amendments to conditions of reclassification." The LUC did not

[8] The original petitioner in Docket A87-617 was Signal Puako Corporation; its successor was Puako Hawaii Properties, whose successor was Bridge Aina Le'a, LLC.

> err in issuing the OSC. *See* HAR § 15-15-93(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 . . . an [OSC]."). Bridge and DW do not contend otherwise.

Id. at 214-15, 339 P.3d at 712-13. The combination of the "substantial compliance with representation made" condition paired with the possibility of "reversion of the Property to its former classification" provided an entry point for the LUC to entertain reversion in that docket. In contrast, no such condition(s) were imposed under the Waiawa Order.

The LUC's change to the conditions imposed in *Aina Le'a* (Docket A87-617), from 1989 to 1991, by adding in 1991 language that "Failure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification", was not arbitrary, capricious, or an abuse of discretion in the context of the landowner's request to the LUC in 1991. The LUC's 1991 amendment order was tantamount to a district boundary amendment. Therefore, it provided the LUC with a fresh opportunity to impose conditions consistent with what was then new law, such as the substantial commencement trigger authorized in 1990 by Act 261 and incorporated into HRS § 205-4(g).

Due to the "substantial compliance with representations" condition imposed in the LUC's 1989 reclassification order for Signal Puako, subsequent landowner Puako Hawaii Properties was obligated to obtain the LUC's approval for the significant changes it wanted to make to the originally approved project that Signal Puako had presented to the LUC. It was those significant changes for which the landowner requested LUC approval that made the 1991 proceedings in Docket A87-617 the functional equivalent of a district boundary amendment.

For example, the project presented by Signal Puako in the initial reclassification proposed 2,760 residential units, one golf course, and a major shopping complex. The estimated prices for the homes ranged from $80,000 to $160,000. In 1991, Puako Hawaii Properties sought substantial changes to that project. Puako Hawaii Properties wanted to develop a low-density residential village. It wanted to eliminate the major shopping complex, and develop two, rather than one, golf courses. Puako Hawaii Properties also wanted to build far fewer residential units

(only 1,550 residential units), and to sell them at considerably higher prices – $200,000 to $450,000.

Under such circumstances, and in light of the LUC's imposition of a condition requiring substantial compliance with representations on the initial reclassification order, the LUC could (and did) impose a substantial commencement condition on the amendment order. *Cf. Nollan v. California Coastal Comm'n*, 483 U.S. 825, 838-39 (1987) (conditions imposed must have an essential nexus to the development project upon which they are being levied); *see also Dolan v. City of Tigard*, 512 U.S. 374, 395-96 (1994) (conditions must be roughly proportional to the projected impact of the proposed land use). No similar facts are present in this KS Docket.

Unlike the Signal Puako/Puako Hawaii Properties/Aina Le'a docket, the amendment granted by the LUC under the 2014 Order (and the amendment requested under the pending 2021 Motion) are not like a new district boundary amendment proceeding. They are interim approvals for a limited period of time, and ones that the LUC already determined are compliant with the conditions imposed under the Waiawa Order.

Although the LUC cannot impose those kinds of conditions now, in response to KS' pending 2021 Motion, in the future, when KS files a motion to request LUC approval of substantial changes to the master plan project that was presented by the original petitioner, Gentry, that request will be substantively tantamount to a new district boundary amendment proceeding. As such, the LUC will have the discretion to impose reasonable and appropriate conditions on the land for the development of that proposal. Until that time, the substantial commencement test cannot be applied to this Petition Area.

D. THE LUC CANNOT TREAT THIS PETITION AREA, WHERE NO DEVELOPMENT DEADLINES WERE IMPOSED, LIKE OTHER DOCKETS WHERE EXPLICIT DEVELOPMENT DEADLINES WERE IMPOSED.

The LUC has never reverted property based upon a "substantial commencement" analysis when the order approving the reclassification was completely lacking in any such condition, and the LUC cannot begin to do so now. There is no rational basis for the LUC to single out this Petition Area landowner for punishment (*i.e.*, reversion) when the LUC's reversion actions have been limited to dockets with express "substantial commencement" conditions.

For the LUC's involuntary reversion in Docket A06-767 (order issued November 29, 2019), the LUC's decision and order granting the district boundary amendment included explicit conditions requiring compliance with representations, development within 10 years, and reversion if the petitioner failed to complete the project within those 10 years.[9] *See* Docket A06-767 (Waikoloa Mauka), incorporated herein by reference.

In Docket A05-755 (Hale Mau), incorporated herein by reference, with the cooperation of the landowner, the LUC reverted the property by order issued December 3, 2018, because "Petitioners have failed to satisfy Condition 1 and have failed to substantially comply with representations made to the Commission, in violation of Condition 13 [*sic*]." *See* COL No. 3, Findings of Fact, Conclusions of Law, and Decision and Order Reverting the Petition Area in Docket A05-755.[10]

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[9] The Waikoloa Mauka Findings of Fact, Conclusions of Law, and Decision and Order dated June 10, 2008, granting the reclassification included 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.

[10] Condition 1 of the district boundary decision and order required petitioner to construct at least 77 affordable units by February 12, 2012, which was not done. Condition 23 of the district boundary amendment decision and order (the LUC's reference to Condition 13 in the reversion order is an error), required petitioner to "develop the Reclassified Area in substantial compliance with the representations made to the LUC. Failure to so develop the Reclassified Area may

The LUC's most recent reversion action was also taken at the request of the landowner. *See* Docket A11-790 (Kula Ridge), incorporated herein by reference. In granting the reclassification, the LUC had imposed several time and use relevant conditions. For example, infrastructure had to be in place by a date certain.[11] Another condition required petitioner to develop the property in substantial compliance with its representations, and that failure to do so could result in reversion.[12] *See* Docket A11-790, reverted by LUC order issued August 12, 2021.

Unlike the foregoing cases, the LUC in this case did not impose any development or infrastructure deadlines under the Waiawa Order. The LUC did not impose a condition requiring performance by a time certain, or warn that failure to so perform could result in reversion. The LUC did not even condition the Waiawa Order upon a requirement to substantially comply with representations made to the LUC. Unlike the petitioners in the cases referenced above, the LUC cannot point to any conditions under the Waiawa Order that KS is in violation of. Reversion in this Docket A87-610 would be an impermissible violation of equal protection because the LUC has no rational basis to intentionally treat KS differently from other petitioners and punish KS for violating conditions that do not exist.

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result in reversion of the Reclassified Area to its former classification, or change to a more appropriate classification."

[11] The Kula Ridge Findings of Fact, Conclusions of Law, and Decision and Order dated February 21, 2012, granting the reclassification included the following condition:

> 18. Infrastructure Deadline. Petitioner shall complete construction of the proposed backbone infrastructure, which consists of the primary roadways and access points, internal roadways, on- and offsite water and electrical system improvements, and stormwater/drainage and other utility system improvements, within ten years from the effective date of this Decision and Order granting the requested reclassification.

[12] The Kula Ridge Findings of Fact, Conclusions of Law, and Decision and Order dated February 21, 2012, granting the reclassification included the following condition:

> 20. Compliance with Representations to the Commission. Petitioner shall develop the Petition Area in substantial compliance with representations made to the Commission. Failure to so develop the Petition Area may result in reversion of the Petition Area to its former classifications, or change to a more appropriate classification.

III. IN GOOD FAITH, KS HAS RELIED ON THE LUC'S DECISIONS AND URBAN DESIGNATION OF THE PETITION AREA.

KS and others, including the City and County of Honolulu ("**City**"), have long relied upon the Urban District classification of the Petition Area. Accordingly, in the absence of a condition in the Waiawa Order requiring substantial commencement of the use of the land, and the legal impossibility of imposing such a condition retroactively, the LUC cannot revert this Petition Area.

Zoning ordinances in furtherance of the Urban District classification were enacted into law in 1998 and 2005.[13] At least since 2002, when the Honolulu City Council enacted Ordinance 02-62 (Central O'ahu Sustainable Communities Plan ("**COSCP**")), the Urban District designation of the Petition Area has been recognized and relied upon in the City's planning.

Most recently, through Ordinance 21-6, effective March 30, 2021, the amended COSCP continues to recognize the Petition Area for Urban land uses and retains it in the Community Growth Boundary. Now, the COSCP recognizes the Petition Area as including the two utility scale solar facilities together with eventual development of a master planned community.[14]

KS' justifiable reliance on the Urban District classification of the Petition Area was confirmed through the LUC's 2014 Order, which gave further official assurances to KS of the ongoing validity of the Urban District classification and KS' compliance with conditions, and authorized solar (and only solar) as the permitted use on the Petition Area through November 2049. For example, Conclusion of Law ("**COL**") 1 of the 2014 Order provides:

> 1. Pursuant to HRS chapter 205 and the Commission Rules under HAR chapter 15-15, and upon consideration of the Commission

[13] Ordinance 98-55 amended a portion of the Development Plan Land Use Map to support the Waiawa project. Ordinance No. 98-01, effective January 15, 1998 (as amended by Ordinance 98-69, effective December 17, 1998) rezoned 874 acres within the Petition Area from Restricted Agriculture (AG-1) to Neighborhood Business District (B1), Community Business District (B2), Low Density Apartment District (A1), Industrial-Commercial Mixed Use District (IMX1), Residential (RS) and General Preservation (P-2). Ordinance No. 03-01, effective February 12, 2003, rezoned 175.43 acres within the Petition Area from AG-1 to R-5, A-1, Medium Density Apartment District (A-2) and P-2.

[14] Relevant excerpts of the 2021 COSP have been filed as Exhibit 53; *see also* Exhibit 4 (COSCP Map A-2: Urban Land Use, showing designations within the Petition Area).

> decision-making criteria under HRS section 205-17, the Commission finds upon the clear preponderance of the evidence that the use of the identified portions of the KS Property, consisting of approximately 655 acres of land . . . as a solar farm to include all related utility and other infrastructure for a period not to exceed 35 years from the date of this Order, and subject to the conditions imposed herein, is reasonable, not violative of HRS section 205-2 and part III of HRS chapter 205, and is consistent with the policies and criteria established pursuant to HRS sections 205-16, 205-17, and 205A-2.

COL 2 of the 2014 Order confirmed that KS and the solar farm uses were in compliance with all conditions under the Waiawa Order:

> 2. Pursuant to HRS chapter 205 and the Commission Rules under HAR chapter 15-15, and upon consideration of the Commission decision-making criteria under HRS section 205-17, the Commission finds upon the clear preponderance of the evidence that the development and operation of the solar farm is consistent with the prior conditions of approval imposed under the Waiawa Order.

Conditions 7 and 10 of the 2014 Order expressly authorize only one use—solar—during this interim period. Furthermore, condition 10 states that any non-solar use of the Petition Area is allowed only **after** the interim solar period **and** pursuant to an approved motion to amend (which motion to amend KS has not yet filed, but is needed in order to develop a project that is substantially different from the master plan presented by Gentry). Conditions 7 and 10 of the 2014 Order provide as follows:

> 7. Interim Use of the Petition Area. The interim use of the Petition Area shall be limited to a utility-scale solar energy development, or solar farm. No other use shall be permitted without the prior written approval of the Commission.
>
> 10. Decommissioning of the Solar Farm. The solar farm shall be decommissioned following its operational timeframe. The decommissioning activities shall include, but not be limited to, the complete removal of the foundational piers and modules and all associated components. All metal components shall be recycled to the extent possible and no solar farm components shall be disposed of in any landfill in the State of Hawai‘i.
>
> Any future use of the Petition Area following the decommissioning of the solar farm shall be subject to the environmental review

> process promulgated under HRS chapter 343, as applicable, and shall require the filing of a motion to amend the Decision and Order with the Commission. Such motion to amend shall include a revised master development plan of the proposed use and shall further include, but not be limited to, a revised Traffic Impact Analysis Report, Engineering Report, Socio-Economic Analysis Report, Environmental Report, and AIS.

Condition 11 of the 2014 Order mandated compliance with representations limited to the solar farm development, as follows:

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

The LUC cannot now enforce a construction of the Waiawa Order or the 2014 Order that was not expressly adopted. *Lanai Co.*, 105 Hawai‘i at 314, 97 P.3d at 390 (LUC is obligated to ground its decision in reasonably clear findings of fact and conclusions of law, and parties subject to those decisions must have fair warning of the conduct required or prohibited by the LUC). Rules of statutory construction apply equally to LUC orders. *See Lāna‘ians for Sensible Growth v. Land Use Comm’n*, 146 Hawai‘i 496, 502 - 503, 463 P.3d 1153, 1159 - 1160 (2020). The conditions imposed must be understood in their plain and unambiguous language. *Id.* It was and is reasonable for KS to rely on the plain language of the conditions in the Waiawa Order and the 2014 Order.

In reliance on this Urban District classification, and permitted interim use of portions of the Petition Area for solar farms, KS has made considerable efforts to pursue the solar uses approved under the 2014 Order, including securing the solar developers for both solar areas.

Additionally, KS has expended substantial funds since regaining control of the Petition Area from Gentry in late 2012. KS spent approximately $3 million in furtherance of the master plan, including engineering and other studies. KS has also spent significant time working with State and City agencies to confirm and/or explore the infrastructure and resources needed for the KS master plan. KS submitted a sewer connection application to the City in 2020. KS continues to pursue a development plan that will start from the bottom of the Petition Area, thereby allowing the first homes to be developed closest to the rail station, and will include at grade access from Waihona Street and Kamehameha Highway across from Waipahu Street. KS executed a Letter of Understanding with the State of Hawai‘i Department of Transportation memorializing the department's concurrence that the crossing of the sewer line and road beneath the freeway are conceptually appropriate and feasible. KS has been in consultation with the Commission on Water Resource Management regarding availability of water for the master plan, and has tested salinity and depth of its exiting onsite wells. KS has also closely coordinated its master plan design with Solar Phases 1 and 2 to ensure utility scale solar and homes will co-exist within the Petition Area.

Tremendous investment has also been made by the solar developer for the Phase 2 Solar Site. Waiawa Solar Power LLC (a wholly-owned indirect subsidiary of Clearway Energy Group LLC) has substantially completed the Phase 2 Solar project. All work related to grading, structural, mechanical, gen-tie construction, and substation work is 100% complete, as is installation of the PV panels and mechanical racking. All work on access roads has also been completed. Commercial operation of the Phase 2 Solar project is expected by the end of 2022.[15]

It should also be recognized that Waiawa Phase 2 Solar, LLC, a subsidiary of The AES Corporation, the proposed developer of the Phase 1 Solar project as set forth in KS' 2021 Motion, has spent approximately $6,200,000 to date toward that solar farm. In addition, the developer has approximately $25,500,000 in committed funds via open purchase orders or forecasted payments, mostly related to procurement of equipment for the Phase 1 Solar project. It is estimated that Waiawa Phase 2 Solar, LLC would spend another approximately

[15] Aerial photographs of the Phase 2 Solar project, taken on April 15, 2022, have been filed as Exhibit 54.

$158,800,000 in the next two years to develop the Phase 1 Solar project. Included in those cost figures are improvements to the access road required by KS and Hawaiian Electric.

IV. SUMMARY AND CONCLUSION

KS is in compliance with all conditions imposed by the LUC. The LUC did not, and had no legal authority in 1988 to, impose a condition requiring substantial commencement of use of the land under the Waiawa Order. Indeed, the LUC never imposed any development deadline under the Waiawa Order, and did not impose a condition to assure substantial compliance with representations made. The LUC has never reverted property over the objections of the landowner in any docket where such conditions were lacking. Doing so now would be illegal, unfair, and an unequal application of the law.

For the reasons discussed above, the LUC's reversion authority under HRS § 205-4(g) and the associated "substantial commencement" test does not apply to this Docket, A87-610. However, in the future, when KS files a motion to request LUC approval of substantial changes to the master plan project that was presented by the original petitioner (Gentry), that request will be the functional equivalent of a new district boundary amendment proceeding. As such, the LUC will have the discretion, based upon the evidence presented at that time, to impose reasonable and appropriate conditions on the land, that have an essential nexus to the project being proposed, and that are roughly proportional to the anticipated impacts of that master plan project. Such conditions may well impose explicit use and time deadlines. Until then, however, the substantial commencement test and reversion cannot be applied to this Petition Area.

DATED: Honolulu, Hawai'i, May 2, 2022

/s/ Jennifer A. Lim
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TABLE 1 Some LUC Reclassification Orders Issued Contemporaneous with the Waiawa Order, and Limited to Oahu Urban District Reclassifications (With & Without Substantial Compliance Conditions)			
Docket No.	**Date of D&O**	**Action**	**Condition Requiring Substantial Compliance?**
Docket A85-594	Feb. 1986	Reclassifying 577.21 acres	No. Subject to five conditions, none of which required "substantial compliance" or development within a stated timeframe.
Docket A86-600	Oct. 1986	Reclassifying 547.5 acres of land	No. Subject to five conditions, none of which required "substantial compliance" or development within a stated timeframe.
Docket A87-609	May 1988	Reclassifying 723 acres of land	No. Subject to 11 conditions, none of which required "substantial compliance" or development within a stated timeframe.
Docket A88-622 Housing Finance and Development Corporation	Aug. 1988	Reclassifying 830 acres of land	Yes, #13. "Petitioner shall develop the Property in substantial compliance with representations made to the Land Use Commission in obtaining the reclassification of the Property."
Docket A87-613 The Trustees Under The Will and of The Estate of James Campbell, Deceased	Sept 1988	Reclassifying 135 acres of land	Yes, #12. "Petitioner shall develop the Property in substantial compliance with representations made to the Land Use Commission in obtaining the reclassification of the Property."
Docket A88-624 The Lusk Company	April 1989	Reclassifying 26.4 acres	Yes, #11. "Petitioner shall develop the property in substantial compliance with representations made to the Land Use Commission in obtaining the reclassification of the subject Property."

Docket A88-627 Gentry Development Company	May 1989	Reclassifying 685 acres of land	Yes, #24. "Petitioner shall complete the development on the Property in substantial compliance with the representations made before the Commission."
Docket A89-638 Dep't of General Planning City & Cnty. of Honolulu	Sept. 1989	Reclassifying 269.4 acres of land	No. Subject to 21 conditions, none of which required "substantial compliance" or development within a stated timeframe.
Docket A88-628 The Lusk Company	Nov. 1989	Reclassifying 76.8 acres of land	Yes, #12. "Petitioner shall develop the Property in substantial compliance with representations made to the Land Use Commission in obtaining the reclassification of the Property."
Docket A89-635 Henry Shigekane Revocable Trust, et.al.	Nov. 1989	Reclassifying 9.9 acres of land	Yes, #8. "Petitioner shall develop the Property in substantial compliance with representations made to the Land Use Commission in obtaining the reclassification of the Property."
Docket A89-640 Halekua Development Corporation	Jan. 1990	Reclassifying 161 acres of land	Yes, #7. "Petitioner shall complete the project in substantial compliance with the representations made before the Land Use Commission."
Docket A89-648 The Trustees Under The Will and of The Estate of James Campbell, Deceased	March 1990	Reclassifying 63.57 acres of land	Yes, #1. "Petitioner shall develop the subject Property for maritime industrial uses in support of and compatible with activities at Barbers Point Harbor in substantial compliance with the representations made before the Commission."
Docket A90-653 Housing Finance and Development Corporation	June 1990	Reclassifying 58 acres of land	Yes, #9. "Petitioner shall develop the Property in substantial compliance with the representations made to the Land Use Commission in obtaining reclassification of the Property."
Docket A89-651 Haseko (Hawaii),	Oct. 1990	Reclassifying 403 acres of land	Yes, #17. "Petitioner shall complete the development on the Petition Area in substantial compliance with the

Inc.			representations made before the Land Use Commission. Failure to so develop may result in reclassification of the property to its former land use classification."
Docket A90-655 West Beach Estates	Feb. 1991	Reclassifying 372.6 acres of land	Yes, #18. "Petitioner shall complete the development on the Property in substantial compliance with the representations made before the Land Use Commission. Failure to so develop may result in the Land Use Commission taking any action authorized under, and pursuant to Act 261."

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI‘I

In the Matter of the Petition of TOM GENTRY AND GENTRY-PACIFIC, LTD To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for Approximately 1,395 Acres at Waiawa, ‘Ewa, O‘ahu, State of Hawai‘i, Tax Map Key Nos.: 9-4-06: Portion of 26; 9-6-04: Portion of 1 and Portion of 16; and 9-6-05: Portion of 1, Portion of 7 and Portion of 14	DOCKET NO. A87-610 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a filed copy of the foregoing document was served upon the following by depositing the same in the U.S. Postal Service, postage prepaid.

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