

DOCKET NO. A02-737
U of N Bencorp nka U of N Kona

Status Report June -2023

STAFF
REPORT

ACTION MEETING
June 22, 2023



Daniel E. Orodener, Executive Officer

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1. EXPLANATION OF PROCEEDING

The proceeding before the Land Use Commission (“LUC”) is to hear a status report by THE UNIVERSITY OF NATIONS KONA, INC., (“UNK”), successor-in-interest to the original Petitioner U of N BENCORP, a Hawai‘i nonprofit corporation.(“BENCORP”), on the development approved in Docket No. A02-737.

The original A02-737 docket involved the reclassification of approximately 62 acres of land from the State Land Use Agricultural District to the State Land Use Urban District at North Kona, Island of Hawai‘i, identified as Tax Map Keys: (3) 7-5-010: 085 and (3) 7-5-017: 006, for the development of the Hualālai Village, a 400-unit condominium with approximately 26.5 acres dedicated to the multi-functional Cultural Center including parking that could accommodate 15 tour buses and up to 840 cars, and a five-acre Educational Facility (“Project”). Also proposed were a two to three-acre passive park between Hualālai Village and the Cultural Center, a wastewater treatment plant, individual wastewater systems, an offsite drinking water well, water storage reservoirs, water transmission lines, an internal roadway circulation system, and offsite roadway connections. No Environmental Assessment was done at that time.

On March 23, 2020, Petitioner UNK submitted a Motion to Amend The Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment, dated August 8, 2003, to reflect UNK’s revised project which expands the educational facility component of the prior project and deletes the for-profit development, and to approve its thirty (30) year full build-out timetable. Please refer to **Section 3- Background Information** of this report and **Section 6 Unresolved Issues** for specifics. The Motion was never heard by the LUC.

Status and Progress Report hearings provide the Petitioner an opportunity to update the Commission on progress or problems in compliance with the representations and conditions of the decision and order.

2. AUTHORITY

Pursuant to HAR 15-15-90(c) “The Commission may require the petitioner to submit periodic reports indicating what progress has been made in complying with any conditions that may have been imposed by the commission.”

Pursuant to HRS 205 and HAR 15-15-79(a): “Petitioners granted district boundary amendments shall make substantial progress within a reasonable period, as specified by the commission, from the date of approval of the boundary amendment, in developing the property receiving the boundary amendment. The Commission may act to amend,

nullify, change, or reverse its decision and order if the petitioner fails to perform as represented to the Commission within the specified time.”

After hearing from the Petitioner and other parties, the Commission decides whether to allow additional time to move forward or that there is a reason to believe that Petitioner is non-compliant with representations and conditions in the D&O and set an Order to Show Cause hearing pursuant to HAR 15-15-79 and 15-15-93(b).

The Commission, for good cause shown, may act to modify or delete any of the conditions imposed or modify the Commission’s order pursuant to HAR 15-15-94(b).

3. BACKGROUND INFORMATION

The Petitioner sought to reclassify approximately 62 acres of land at Kailua-Kona, District of North Kona, County and State of Hawai`i designated by TMK Nos.: (3) 7-5-010: 085 and 7-5-017: 006 (the “Property” or “Petition Area”) to allow for the development of the Hualalai Village condominiums, a multi-function Cultural Center, and a five-acre Educational Facility (the “Project”).

The following chronology represents the significant events in Docket No. A02-737/ U of N Bencorp:

On November 21, 2002, U of N Bencorp (“Petitioner”) filed its State Land Use District Boundary Application (“Petition”) which was deemed incomplete.

On December 5, 2002, Petitioner filed an Amended State Land Use District Boundary Application (“Amended Petition”).

From March to August 2003, the Commission held hearings on this matter.

On August 8, 2003, the LUC issued its Findings of Fact, Conclusions of Law, and [Decision and Order](#) (“D&O”) approving the Project subject to 19 conditions of approval.

2004-2006 Annual Reports

The Petitioner failed to file annual reports for years of 2004 and 2005.

On September 6, 2006, the Commission received a late Annual Report filed for 2004, 2005, and 2006.

The Commission sent a letter to the attorney for Bencorp stating it had not complied with certain conditions in the Findings of Fact, Conclusions of Law, and Decision and Order (The “D&O”).

2006 Motion to Amend

On September 20, 2006, upon receipt of Petitioner’s untimely annual report for 2006, LUC staff notified the Petitioner that in addition to the noncompliance of conditions generally associated with the delay in commencing site construction, the Petitioner failed to timely comply with Conditions 7a, 7b, 7e and Condition 17 of the D&O. The Executive Officer set a status report hearing on this matter for the LUC’s November 2-3, 2006, meeting in Kailua-Kona. The Petitioner represented that it intended to file a motion to amend the D&O shortly and requested to have the status report postponed.

On December 21, 2006, UNK’s predecessor-in-interest, Aero Hawaii, a Hawai`i nonprofit corporation (“AERO”) filed a [Motion](#) to Amend Findings of Fact, Conclusions of Law, and Decision and Order and its Motion to Change Petitioner’s Name and Amend Caption (“2006 Motion to Amend”) seeking approval of a modification to the Original Project involving the elimination of the Cultural Center (due to it being profit-driven) and instead expand the University’s academic and recreational facilities and replace the market-rate phases of Hualalai Village on the Petition Area with staff and student housing.

From December 21, 2006, till February 26, 2007, the Parties submitted various filings and participated in a pre-hearing conference in preparation for a March 1, 2007, meeting to consider Petitioner’s Motion.

On March 1, 2007, the Commission held a meeting to consider Petitioner AERO’s Motion to Change Petitioner’s Name and Amend Caption; and its Motion to Amend Findings of Facts, Conclusions of Law, and Decision and Order dtd August 8, 2003. The Commission granted the Motion to Change Petitioner’s Name. No decision was rendered on the 2006 Motion to Amend pending Petitioner returning to Land Use Commission (“LUC”) with additional information.

From 2007 to 2019 there was no activity or correspondence from Petitioner.

In its 2019 Annual Report and in a letter dated May 1, 2019, UNK provided notice of a transfer in ownership of the Petition Area to the Commission when it took title to the Petition Area pursuant to two (2) Warranty Deeds recorded in the State of Hawai'i Bureau of Conveyances (the "**Bureau**") on June 14, 2018, as Regular System Doc. Nos. A-67390372 and A-67390373.

2019 Motion to Substitute

On February 4, 2019, Petitioner filed a [Motion](#) to Substitute Petitioner and Withdraw Land Use Commission Approval And to Revert Land Use District Boundary Classification to Agricultural.

On March 15, 2019, Petitioner requested to Withdraw its Motion to Substitute Petitioner and Withdraw Land Use Commission Approval and to Revert Land Use District Boundary Classification to Agricultural.

On March 28, 2019, the Commission held a Status hearing and the parties provided background information, history on how UNK was attempting to re-establish itself to fulfill its mission and move forward. LUC received an Annual Report covering 2008-2019 on March 28, 2019, and a copy of a PowerPoint Presentation.

Order to Show Cause

At the March 2019 status hearing, Petitioner admitted it had failed to meet conditions in the D&O. The record, therefore, supported a motion for an Order to Show Cause (“OSC”). The Commission voted to set an OSC hearing to address why the Petition Area should not revert to its former Agricultural land use classification or be changed to a more appropriate classification. There was reason to believe that the Petitioner had failed to perform according to the conditions imposed in the docket and to the representations or commitments made to the Commission.

On March 29, 2019, the LUC issued an Order to Show Cause for A02-737 U of N Bencorp, on the grounds that there was reason to believe that Petitioner had failed to perform according to conditions imposed and representations and commitments made to the LUC in obtaining reclassification of the Petition Area. At that time the LUC set a hearing date of May 22-23, 2019 (approximately 54 days in advance) to be held in Kona, Hawai`i.

On May 8, 2019, the University of the Nations, Kona, Inc. filed a [Motion to Rescind](#) Order to Show Cause or to Continue Hearing on Order to Show Cause; Memorandum in Support of Motion; Verification of Julie B. Anjo; Certificate of Service

An OSC hearing was held on May 22, 2019. At the hearing the Commission deferred making a final decision on the OSC and ordered UNK to appear before the Commission in 6 months time with an update on the status of the project and its efforts to comply with the original Decision and Order of August 8, 2003.

On October 7, 2019 The Commission issued its [Decision and Order](#) and Granted UNK’s Motion to Continue Order to Show Cause Hearing with conditions.

The Decision and Order adopted pursuant to the Motion for Order to Show Cause hearing stated:

*“Petitioner shall come before the Commission within six (6) months of this Decision and Order to present a status report **with specific plans for moving the project forward**. If at that time the Petitioner has not shown or made significant progress on its **plans for financing and developing the Petition Area** or the Commission feels that the Petitioner will not meet the one-year deadline for **filing***

an amendment to the 2006 Motion to Amend or the 2003 Decision and Order then the OSC proceedings will be reinstated”.

Motion to Reconsider

On October 14, 2019, Petitioner filed a [Motion to Reconsider](#) Order to [sic] Granting United Nation [sic] of Kona’s Motion to Continue Hearing On Order to Show Cause.

On November 13, 2019, UNK filed a Status Report in compliance with Order Granting UNK’s Motion to Continue Hearing on Order to Show Cause, Filed on Oct 7, 2019

On December 24, 2019, Petitioner filed “[Status Report](#) Pursuant to order to Granting United Nation of Kona’s Motion to Continue Hearing on OSC, supplement Information-Financial”

On January 8, 2020, The Commission met in Kailua-Kona and voted to deny U of N Bencorp’s Reconsideration of Order to [sic] Granting United Nation [sic] of Kona’s Motion to Continue Hearing On Order to Show Cause and to only allow typographical corrections, date changes to Petitioner’s Corporate name change, and associated amendments and corrections to the caption

Withdrawal of Motion to amend and 2020 Motion to Amend

On March 23, 2020, Petitioner filed a [Withdrawal of its 2006 Motion](#) to Amend Findings of Fact, Conclusions of Law, and Decision and Order Dated December 21, 2006, COS

Also on March 23, 2020, Petitioner filed a [2020 Motion to Amend](#) Findings of Fact, Conclusions of Law, and Decision and Order Dated 3-23-2020, Memorandum in Support of Motion, Declaration of Maria F. Fagerstrom-Rydet, Petitioner’s Exhibits 1-20, Verification of Julie B. Anjo, COS

On July 23, 2020, the Commission dismissed the Order to Show Cause without prejudice but encouraged the Petitioner to proceed with Hawai‘i Revised Statutes Chapter 343 compliance.

Motion requesting LUC be Accepting authority of EIS

On January 21, 2021 Petitioner filed its [Motion](#) Requesting the Land Use Commission to A) Be the Accepting Authority for an EIS and B) Determine that the Proposed Action Warrants the Preparation of an EIS, to be Initiated with the Preparation of an EISPN, Memorandum

On February 10, 2021, The Commission held a meeting and voted to grant the Petitioners Motion.

On February 18, 2021, the LUC issued an order granting University of the Nations, Kona, Inc.’s Motion Requesting the Land Use Commission to (A) Be the Accepting Authority for an Environmental Impact Statement and (B) Determine that the Proposed Action Warrants the

Preparation of an Environmental Impact Statement, to be initiated with the Preparation of an Environmental Impact Statement Preparation Notice to Parties.

On August 8, 2022 , the 2022 [Annual Report](#) was filed

On September 12, 2022. The 2022 [Supplemental Annual Report](#) was filed

On September 26, 2022, the LUC emailed Petitioner that a November 2, 2022, Status Report hearing was being scheduled

On December 8, 2022- LUC emailed Petitioner its [Decision on 2022 Status Report](#) and posted it to its website.

4. Decision on the 2022 Status Report Findings:

FINDINGS BY THE COMMISSION

1. Petitioner exhibited good cause that the 2022 Annual Report and the 2022 Supplemental Annual Report satisfy the condition for a yearly annual report on the status of compliance with the conditions stated in the Decision and Order.
 - a. Petitioner uses nonprofit type fundraising to fund the Organization and its individual projects, including for this Project [Tr. 11/02/2022; pgs. 41-44]. Nonprofit type fundraising is the ongoing process of soliciting donations or voluntary funds. Fundraising for the Petition Area has not begun by the United Nations of Kona [Tr. 11/02/2022; pgs. 80- 81]. When the Petitioner accumulates enough donations and revenue generated, the Petitioner will then enter contracts for construction [Tr. 11/02/2022; pg. 63]. Construction will proceed incrementally, and three phases will be proposed by the Petitioner. A timetable including financing

will be included in the Petitioner’s Master Plan [Tr. 11/02/2022; pgs. 64-65, 127].

- b. Petitioner will utilize donated labor from volunteers to construct and renovate preexisting housing in the Kailua-Kona area [Tr. 11/02/2022; pg. 54]. Petitioner represented that all the staff including faculty, operational staff, and administrative staff on the United Nations of Kona Campus are volunteers that serve as members of Youth With A Mission (“YWAM”). David Hamilton, president of UNK, stated that he does not have a salaried position [Tr.11/02/2022; pgs. 135-136].
- c. G-70 has completed the beginnings of an EIS with an EISPN which was made available for public comment on March 8, 2021 (available on the LUC record), the civil engineering division is working on the infrastructure studies and is working with several different consultants for technical studies [Tr. 11/02/2022; pgs. 111-113].
- d. Mobility Analysis Report and Water Supply Study need to be updated [Tr. 11/02/2022; pgs. 113].
- e. Petitioner represented that a virtual public scoping meeting for the EISPN was held on March 25, 2021, and there were about a dozen participants including a few neighbors [Tr. 11/02/2022; pg. 116].
- f. A Noise Study is to be added [Tr. 11/02/2022; pgs. 116].
- g. The Petitioner represented that it has faced significant challenges but that

the timetable is back on track and G-70 is targeting the second quarter of 2023 for the publication of the Draft EIS [Tr. 11/02/2022; pgs. 118]. The Petitioner anticipates coming before the Commission with a Motion to Amend in the near future [Tr. 11/02/2022; pgs. 172].

h. Petitioner agreed to include a Greenhouse Gas Analysis in the EIS as required by law [Tr. 11/02/2022; pgs. 146].

i. The Petitioner represented that the Project's Master Plan does not trigger affordable housing requirements under the Hawai'i County Code, based on the dormitory uses and the anticipated zoning [Tr. 11/02/2022; pg. 51]. Hawai'i County Code Chapter 11 does not identify dormitories as a type of housing [Tr. 11/02/2022; pgs. 151].

5. **Issues and Concerns**

The 2003 Original Project was primarily intended to generate income that would be reinvested in the University. However, in the time since the reclassification of the Petition Area, UNK (and its predecessors) determined that the market-based model that the Original Project was based upon was not consistent with UNK's mission and goals and have made significant changes to their plans. **[The original 2003 Decision and Order and its conditions are still in force although there have been two subsequent Motions to Amend that were filed in 2006 and 2020 to alter them.](#)**

[2006 Motion to Amend](#)

Petitioner Aero filed a 2006 Motion to Amend to get Commission approval of revisions to the original project that it believed would better align with its institutional and faith-based values. Petitioner's 2006 Motion to Amend provided for 1) a staff housing community of up to 400 units ranging from studios to three-

bedroom units, along with six single family residences; 2) three Student Villages consisting of 300 low-cost residential units, classrooms, offices, and a library; and 3) expanded Academic and Recreational Facilities consisting of a College of Arts and Communications; a College of Education, a multi-purpose gymnasium; and additional sports facilities. (See Petitioner's Exhibit 5)

On March 1, 2007, the Commission held a hearing on the 2006 Motion to Amend, but no action was taken. (Petitioner stated in their 2020 Motion to Amend that UNK and its predecessors were not able to return to the Commission to complete action on the 2006 Motion to Amend due to internal reorganization and a series of unforeseen events.)

There was limited activity on this docket from 2007 till 2019.

Petitioner withdrew this 2006 Motion on March 23, 2020 and filed a 2020 Motion to Amend that has not yet been acted upon by the Commission on the same day.

[2020 Motion to Amend](#)

The 2020 Motion to Amend was never heard and may no longer represent what UNK's current plans are. Since the Motion may be stale, UNK should clarify whether it intends to file another Motion to Amend.

In this 2020 Motion to Amend, UNK sought:

- to allow for the development of UNK's master-planned expansion of the University (the "**Revised Project**"). The Revised Project focused on expanding educational and housing opportunities for the University's faculty and students and preserving the significant archaeological resources within the Petition Area.
- to modify and delete certain conditions. Specifically, UNK requests modifications to D&O Conditions Nos. 6 (Archaeology), 7 (Cultural,

Historical, Customary and Traditional Rights and Resources) and 15 (Compliance with Representations to the Commission) as detailed herein, and UNK requests the deletion of D&O Conditions Nos. 11 (Cultural Center) and 12 (Ka Haka 'Ula O Ke'elikolani, College of Hawaiian Language at University of Hawaii-Hilo).

The 2020 Motion to Amend did not contain any for sale housing and focused on expanding the educational facilities on the originally planned 5 acres of the Petition Area. The Hualalai Village condominiums and the Cultural Center are no longer included.

UNK commissioned G70 to prepare the 2020 Master Plan Update for the Revised Project and an Environmental Planning Report in support of this Motion to Amend, which are attached hereto as **Petitioner's Exhibits 2 and 3**, respectively.¹¹ The Archaeological Inventory Study, Archaeological Data Recovery Plan, Preservations Plan, and Dismantling/Restoration Plan for a Portion of the Kuakini Wall, and technical studies and investigations included in the Environmental Planning Report in support of the 2020 Motion to Amend include the following: (a) a flora fauna study; (b) a traffic study; (c) a preliminary infrastructure assessment; (d) a water supply study; (e) a cultural impact assessment; and (t) Ka Pa'aakai O Ka' Aina analysis

¹ The various technical studies prepared for this Motion to Amend are attached as appendices to G70's Environmental Planning Report

6. Unresolved Issues

After the 2022 status report, LUC Staff continued to have concerns regarding these issues:

- The financial viability of Petitioner and the status of fundraising and financing for the proposed construction remain unclear. According to the last annual reports, decreasing enrollments have hampered funding and revenue, but the forecasted revenues to fund the projects outside of traditional financing and fundraising are based on expanding enrollment and tuition projections. Since the December 2022 status report decision, no further clarification has been provided that would allay concerns that the projected revenue streams will remain on track. The non-traditional funding methods used by Petitioner have not tracked in a conventional manner and the lengthy delays associated with this Petition Area may require alternative development plans and proposals.
- UNK proposes to finance the development of the revised project with a combination of four capital sources- 1. Traditional financing; 2. Increase in tuition; 3) fundraising; and 4) volunteers. The projected revenues derived from non-traditional financing will be difficult to sustain for the required period needed to complete the project and it is questionable whether economic circumstances will remain that stable as well.
- The proposed 30-year time period for development of the subject property contained in the 2020 Motion to Amend would extend beyond the ten years after the date of the Commission’s approval and be more in line with incremental districting. Staff is concerned that the limited funding sources and heavy reliance on volunteer workers to assist in covering the construction costs would further complicate Petitioner’s ability to perform as represented. Incremental districting would require additional levels of

Petitioner compliance that have not been demonstrated to the Commission during the lifespan of this docket. (See [HAR§15-15-78](#) Incremental districting for details)

- To date, staff has not received any information on the status of the WCAC or any cultural activity reports. The Kahu Wai'aha Committee ("KWC") was initially proposed by the petitioner and imposed as a condition on the Original Project but because of the proposed Hualalai Village and the Cultural Center, are not being pursued as a part of the campus expansion, UNK reports that it has alternately worked closely with people with familial ties to the Petition Area and sought their input on numerous occasions. UNK reported that it had established the Waia'ha Community Advisory Committee ("WCAC"), to give advice on programs and the development of the Petition Area, including integrating its archaeological resources.
- Petitioner proposed in the 2020 Motion to Amend to modify and delete certain conditions of the D&O. Conditions Nos. 6 (Archaeology), 7 (Cultural, Historical, Customary and Traditional Rights and Resources) and 15 (Compliance with Representations to the Commission), and UNK requests the deletion of D&O Conditions Nos. 11 (Cultural Center) and 12 (Ka Haka 'Ula O Ke'elikolani, College of Hawaiian Language at University of Hawaii-Hilo). These conditions were significant components of the body of conditions contained in the initial D&O and are being altered and removed to attempt to balance expanding educational and housing opportunities for UNK faculty, students and staff and the cultural aspects that were once imbedded are being eliminated with only trace elements remaining.
- The Commission's stated concerns regarding its Condition on affordable housing have not effected changes to Petitioner's development plans and no correspondence on this

matter has been received since the November 2022 meeting. Nearly 300 affordable housing units will not become part of the County's housing inventory under the proposed amended Petition.

- The order that an EIS report be submitted by the end of June has not been complied with as of June 15, 2023. The following types of finalized technical studies, reports and updates are not yet available.
 - Status of grading permits, National Pollutant Discharge Elimination System (NPDES) permits and other construction activities
 - Status of Department of Education obligations for development, funding and/or construction of school facilities
 - Status of secured water supply and allocation resources.
 - Status of solid waste and new wastewater treatment, transmission, and disposal facilities for the proposed phased development
 - Status of archaeological buffers
 - Status of Traffic Studies and updates
- The EIS and the various technical studies and associated information still need to meet the Commission expectations.
 - Greenhouse Gas Analysis
 - Mobility Analysis Report and Water Supply Study
 - Water allocation resources
 - Noise Study

- Staff is concerned that due to the extreme length of time from 2006 to 2020 that has passed, Petitioner exhibits will need updated to be current and robust.
- UNK Management team -Have there been any significant ownership or personnel changes that might impact this new UNK plan during the last half-year or in the future?

The success of the proposed plan presented to the Commission in November 2022 depended heavily upon the leadership and teamwork of the management team that was put into place to meet the objectives set by UNK.

- Staff on-site discoveries. On April 12, 2023, LUC staff visited the UNK campus and observed significant activity occurring on undeveloped parcel areas. The following attached photos display the structures and tents that have been erected. Staff is curious to hear Petitioner's explanation of these photos.

A picture containing outdoor, tree, grass, house



















7. Staff Recommendation

The LUC has not received Position Statements from the County and OPSD as of June 15, 2023.

The EIS was promised at the end of June 2023 and if Petitioner provides appropriate responses to the Commission's questions during the status report, the Commission can decide on how to proceed. The issues of finance, affordable housing and the technical studies etc. will need to be assessed and decided upon individually.

8. Links

[Exhibit 2](#) – 2020 Master Plan Update for the Revised Project prepared by G70

[Exhibit 3](#) – Environmental Planning Report prepared by G70

[Appendix A](#)

[Appendix B](#)

[Appendix C](#)

[Appendix D](#)

[Appendix E](#)

[Appendix F](#)

[Appendix G](#)

[Appendix H](#)

[Appendix I-1](#)

[Appendix I-2](#)

[Appendix I-3](#)

[Appendix I-4](#)

[Appendix I-5](#)

[Appendix J](#)

[Appendix K](#)

[Appendix L](#)

[Appendix M](#)

[Appendix N](#)

[Exhibit 4](#) – Master Plan from the 2003 State Land Use District Boundary Amendment

[Exhibit 5](#) – Master Plan from the 2006 Motion to Amend