CAAP -13-0000091

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI‘I

DW AINA LE'A DEVELOPMENT, LLC,

Co-Petitioner-Appellant/Appellee,

vs.

BRIDGE AINA LE'A, LLC,

Co-Petitioner-Appellant/Appellee,

and

STATE OF HAWAI‘I LAND USE COMMISSION,

Appellee/Appellant,

and

STATE OF HAWAI‘I OFFICE OF STATE PLANNING; COUNTY OF HAWAI‘I

CIVIL NO. 11-1-0112K
(Agency Appeal)
(Kona)

APPEAL FROM:

(1) SECOND AMENDED FINAL JUDGMENT FILED FEBRUARY 8, 2013

(2) AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER REVERSING AND VACATING THE STATE OF HAWAII LAND USE COMMISSION'S FINAL ORDER FILED JUNE 15, 2012

(3) ALL SUBSIDIARY AND PRELIMINARY RULINGS AND ORDERS IN THESE CONSOLIDATED CASES

CIRCUIT COURT OF THE THIRD CIRCUIT,

PLANNING DEPARTMENT, Appellees.	CIRCUIT COURT OF THE FIRST CIRCUIT HON. ELIZABETH A. STRANCE HON. RHONDA A. NISHIMURA

APPELLANT STATE OF HAWAI'I LAND USE COMMISSION'S OPENING BRIEF

STATEMENT OF RELATED CASES

APPENDIX 1

CERTIFICATE OF SERVICE

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APPELLANT STATE OF HAWAI'I LAND USE COMMISSION'S OPENING BRIEF

INTRODUCTION

For 22 years, various developers failed to honor the conditions and representations they made to the State Land Use Commission ("LUC") when the LUC reclassified property from the agricultural district into the urban district pursuant to Haw. Rev. Stat. chapter 205.

This critical question in this case is whether the LUC can revert the property because of that failure. The applicable statute says yes. Haw. Rev. Stat. § 205-4(g) (2001). In fact, the legislature specifically gave the LUC this power to combat exactly what happened here – failure to "develop the property in a timely manner."

The Supreme Court said yes. *Lanai Co., Inc. v. Land Use Com'n*, 105 Hawai'i 296, 97 P.3d 372 (2004).

Respectfully, the circuit court erred by substituting its own judgment for that of the LUC and coming to the opposite conclusion. Its ruling should be reversed.

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

On January 17, 1989, the LUC conditionally approved a petition (LUC Docket No. A87-617) to reclassify approximately 1060 acres of land in Waikoloa on the Big Island from the agricultural district into the urban district. JEFS 009 at 368. [1]

As of December 2008 - one month shy of 20 years later - the conditions (as modified)

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[1] A portion of the record on appeal was filed electronically in six parts on April 15, 2013. JEFS Nos. 007, 009, 011, 013, 015, and 017. We refer to the record (including transcripts of proceedings before the LUC) by JEFS number and pdf page, e.g., JEFS __ at __. There are five transcripts of court proceedings. JEFS Nos. 46, 47, 55, 60, and 88. We refer to court transcripts by JEFS number and pdf page, e.g., JEFS __ at __.

As ordered by the ICA (JEFS 029), the circuit court later supplemented the "record" with 9917 pages from 16 other LUC dockets. JEFS 072. However, pleadings filed in the First Circuit Court have not yet been made part of the record.

remained unfulfilled. The LUC issued an Order to Show Cause as to "whether [the developer] has failed to perform according to representations and commitments made in seeking the land use reclassification and in obtaining amendments to conditions of reclassification." JEFS 011 at 1501.

After literally years of motions, proceedings, and hearings relating to the OSC, the conditions still were not fulfilled. On April 25, 2011, the LUC adopted the OSC reverting the property to its original agricultural classification for violation of conditions. JEFS 007 at 160.

This case is an administrative appeal pursuant to Haw. Rev. Stat. chapter 91 concerning the propriety of the LUC's decision.

B. COURSE AND DISPOSITION OF PROCEEDINGS IN CIRCUIT COURT

As mentioned above, the LUC took its final action on April 25, 2011. As of that date, the Waikoloa property was owned by Bridge Aina Le'a, LLC ("Bridge") and DW Aina Le'a Development LLC ("DW"). Bridge and DW are collectively referred to as "developers."

Bridge and DW timely filed separate administrative appeals in different circuits pursuant to Haw. Rev. Stat. chapter 91. JEFS 007 at 21 and JEFS 007 at 913. Venue of Bridge's First Circuit appeal was transferred to the Third Circuit. JEFS 007 at 1874. Judge Elizabeth Strance then consolidated the cases. JEFS 007 at 1879.

Two interim rulings are relevant. First, developers designated as the record on appeal not only the entire record in LUC Docket No. A87-617, but also "all transcripts, minutes, exhibits, depositions, written testimony, agendas, correspondence, recordings, documents, and any other relevant matter" relating to multiple different and unrelated Land Use Commission dockets. JEFS 007 at 116 – 119 and JEFS 007 at 985 – 986.[2] The relevant statute plainly states that these other dockets are <u>not</u> part of the record, Haw. Rev. Stat. § 91-9(e) (2012), and that the court may <u>not</u> consider extra-record material. Haw. Rev. Stat. § 91-14(f) (2012). Both the First Circuit Court and the Third Circuit Court nevertheless denied the LUC's motion to strike the extra record material, JEFS 007 at 1258. The court may have considered the material in its ultimate ruling but does not specifically refer to it.

[2] DW did not include extra-record items in its original designation. JEFS 007 at 43 - 46. After Bridge filed its designation mentioning 16 dockets, DW filed an amended designation that mentioned 6 dockets. 4 of these overlapped with Bridge's designation. The other 2 were not included in the "record" and were apparently abandoned.

Second, DW filed a motion to stay the LUC's April 25, 2011, order. JEFS 007 at 124. The court denied the motion. It agreed with the LUC that:

- "The LUC's action was not the result of a reclassification petition within the meaning and scope of Haw. Rev. Stat. § 205-4(a) (Cum. Supp. 2010)"

- "[T]he LUC acted to 'revert [the property] to its former land use classification' as provided in Haw. Rev. Stat. § 205-4(g) (2001)"

- *Lanai Co., Inc. v. Land Use Com'n*, 105 Hawai'i 296, 97 P.3d 372 (2004) authorized the LUC's action

- "[T]here is a difference between the Commission considering a 'petition . . . for a change in the boundary of a district' as provided in section 205-4(a) and an action by the Commission to 'revert [land] to its former land use classification' as provided in section 205-4(g).

JEFS 007 at 1154 – 1155.

Ultimately, however, the circuit reversed itself as to all these points. The court held that the LUC did not have the power to revert. It overturned the LUC's action. The court also held that the LUC violated developers' constitutional rights to due process and equal protection. JEFS 007 at 1819.

The court filed its second amended judgment on February 13, 2013. JEFS 007 at 1887.[3] The LUC timely appealed. JEFS 007 at 1890.

C. FACTS MATERIAL TO THIS APPEAL

The original petition to reclassify.

On November 25, 1987 (nearly 26 years ago) Signal Puako Corporation ("SPC") filed a petition pursuant to Haw. Rev. Stat. § 205-4(a) to reclassify approximately 1060 acres of land in Waikoloa on the Big Island from the agricultural district into the urban district. JEFS 009 at 416.

The LUC approved the petition on January 17, 1989 (more than 24 years ago), subject to various conditions. JEFS 009 at 368. At the time, SPC's proposed development involved 2760 housing units. Among other things, the LUC required that 60% of these housing units (i.e., 1656

[3]The circuit court previously issued an amended judgment. JEFS 007 at 1855. The LUC timely appealed, but this Court dismissed the appeal as not final. JEFS 0077 at 1935. The parties corrected the problem, JEFS 007 at 1882, leading to the second amended final judgment and this appeal.

units) be "affordable":

> 1. Petitioner shall provide housing opportunities for low-, low-moderate, and moderate income Hawaii residents by offering for sale at least thirty percent (30%) of the units at prices which families with an income range up to one hundred twenty percent (120%) of the County of Hawaii's median income can afford, and thirty percent (30%) of the units at prices which families with an income range of one hundred twenty to one hundred forty percent (120-140%) of the County of Hawaii's median income can afford.

JEFS 009 at 305. This condition was based upon the petitioner's representations to the LUC. JEFS 009 at 279 (FOF 50).

First (1991) modification to the conditions.

SPC transferred the property to Puako Hawai'i Properties ("PHP") which filed a motion to amend the LUC's original decision and order. JEFS 009 at 1139. PHP informed the LUC that the proposed project had been resized so that the total number of residential units proposed was reduced to 1550. JEFS 009 at 1146. The LUC approved the motion on July 9, 1991. JEFS 007 at 180. As amended, the affordable housing condition required the developer to include at least 1000 affordable units. JEFS 007 at 231.

Second (2005) modification to the conditions.

The project stalled for well over a decade. In 1999, PHP transferred the property to Bridge Aina Le'a, LLC ("Bridge"). JEFS 009 at 2850.

On September 1, 2005, Bridge filed a motion to amend the 1991 order.[4] JEFS 009 at 2843. Bridge proposed to increase the project to 1924 residential units but to decrease the affordable units from 1000 to 385.[5] JEFS 009 at 2852. In this motion, Bridge first began referencing the LUC's actions in other dockets. JEFS 009 at 2848. However, no portions of those other dockets were ever offered into evidence or made part of this LUC docket.

In connection with its motion to reduce the affordable housing component by two-thirds (a three-fourths reduction from the original project), Bridge made a number of representations to

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[4] Bridge filed a similar motion exactly one year earlier, JEFS 009 at 2552, but later withdrew it. *See* JEFS 009 at 2851. Bridge filed the motion again on June 3, 2005, and withdrew it again. *Id.*

[5] 20% of 1924 = 384.8. Bridge's motion stated in its pleadings it would build 384 units, the LUC rounded up to 385 units. JEFS 011 at 367 (FOF 8).

the LUC. Bridge said that if the motion were granted, the development would be completed within three years. JEFS 013 (Tr. 9/30/05) at 1915 (line 23) to 1916 (Line 5). Indeed, three years was offered as a "worse case scenario." JEFS 013 (Tr. 9/30/05) at 1937 (lines 6 - 7). Bridge said that the 60% affordable housing was not feasible but 20% was feasible. JEFS 013 (Tr. 10/19/05) at 2092 (line 20) to 2083 (line 5). Bridge said that the 20% requirement was consistent with the LUC's action in other dockets (without putting any portion of those other dockets in evidence). JEFS 009 at 2848 and 2857.

Bridge's attorney offered a number of justifications for the motion. For example, he said that Bridge offered a number of "concessions" to the community. These concessions included: (1) Bridge would actually build 384 affordable units (as opposed to previous developers who had done nothing); (2) the 384 affordable units would be on the project site, not in some other location, and (3) the affordable units would be physically spaced throughout the entire project, with all the rights and privileges of the other owners, including use of the golf course. JEFS 013 (Tr. 9/30/05) at 1891 (line 25) to 1892 (line 24). None of those promises have been kept.

Of particular importance, Bridge's attorney stated:

> The first of those [concessions to the community] is the agreement to actually build the 384 units. There are ways that the number could be changed or altered. They're [BRIDGE] not going to take advantage of any of those. They actually will build and agree to build and are willing to have your condition include the requirement that they build 384 units.

Id.

Other Bridge witnesses also emphasized to the LUC that the wait was over and the empty promises were done – if the LUC approved the motion, desperately needed affordable housing would actually be built.

Bridge said that it had entered into an agreement with Westwood Heritage Development Group to provide additional capital and development expertise. JEFS 013 (Tr. 9/30/05) at 1906 (line 20) to 1907 (line 24). Westwood's chairman of the board was "present here to assure everyone that this project will be built; the affordable housing would be built." *Id.* The only condition to Westwood's involvement was action by the LUC to amend the affordable housing provisions. JEFS 013 (Tr. 9/30/05) at 1911 (lines 1 - 6).

So, the choice presented to the LUC in 2005 was whether there should be a 60% affordable housing requirement in which no houses of any type would actually be built or a 20% affordable housing requirement in which both moderate and affordable houses would be actually and quickly built and offered to the public.

Faced with this "choice," the LUC granted the motion and filed its amended order on November 25, 2005. JEFS 011 at 367. The decision noted that Bridge's representation that the project could not be constructed with a 60% affordable housing requirement because of the costs. But the project would become economically feasible if the affordable housing requirement was reduced to 20%. JEFS 011 at 370 (FOF 4 - 6).

The LUC specifically noted that Bridge had "committed" to building no less than 385 affordable housing units on-site. JEFS 011 at 370 (FOF 9). Furthermore, Bridge represented that it was possible to obtain certificates of occupancy for all 385 affordable housing units within three years, and that it was reasonable to obtain certificates of occupancy within five years of the date of the 2005 Decision and order, "taking into account possible delays for permitting and other contingencies." JEFS 011 at 371 - 372 (FOF 12).

In addition, Bridge committed to building the affordable units instead of paying an in-lieu fee to the County of Hawaii because the need for affordable housing units in West Hawaii was critical and the cost of paying the in lieu fee was prohibitive. JEFS 011 at 372 (FOF 16).

Bridge represented that its construction plan would enable the market units and the affordable units to be constructed concurrently. JEFS 011 at 371 (FOF 11).

Bridge represented (inaccurately as it turned out, see below) that there were no additional discretionary governmental approvals required, except for the highway access approval by the State Department of Transportation. JEFS 011 at 375 (FOF 26).

Based upon Bridge's evidence and representations, the LUC granted Bridge's request to reduce the percentage of affordable units from 60% to 20%, i.e., 385 units. JEFS 011 at 378. The LUC also required Bridge to "obtain and provide copies to the Commission, the certificates of occupancy for all of the Project's affordable housing units within five (5) years of November 17, 2005." *Id.* These conditions and deadlines were adopted based on Bridge's representation that the affordable units could be built within 3 years of the LUC's decision and that a 5-year period was reasonable taking into account possible delays due to permitting and other

contingencies. JEFS 011 at 371 - 372 (FOF 12).

Bridge did not complain about the 2005 decision and order at the time. Indeed it got exactly what it asked for and represented it could and would do. Bridge did not appeal the 2005 decision and order.

Proceedings after the second modification.

At status conferences in 2006 and 2007, both the State Office of Planning ("OP") and LUC commissioners questioned whether Bridge could meet the November 2010 deadline to construct and obtain the certificates of occupancy for the 385 affordable units. "What I would want to know is when are the houses going to be built." JEFS 015 (Tr. 12/08/06) at 132 (lines 15 – 16).

Bridge continued to represent that it would meet the deadline. "They are still accomplishable within the time schedule that we gave to the Commission and the Commission in turn imposed on us." JEFS 015 (Tr. 12/08/06) at 130 (lines 2 – 4). Bridge stated that it "recognizes the importance of timely completion of the Project, particularly the timely development of the affordable housing units, as well as the positive impact such affordable units will have on the Hawaii community." JEFS 011 at 862.

In 2007 Bridge represented that it was in negotiations with Innovative Housing Solutions, LLC to perform the vertical construction of the 385 affordable housing units. Innovative Housing Solutions confirmed that it would complete the affordable units by November 2010. JEFS 011 1345 – 1346. The onsite vertical construction of the affordable housing units could begin around September 2008 and be completed in March 2010. Bridge clearly understood and stated to the LUC that "Certificates of Occupancy for affordable housing units cannot be issued until potable water, electricity and the waste water system become available to the site." JEFS 011 at 1278. Bridge represented that "Petitioner will be able to comply with" the November 2010 deadline. JEFS 011 at 1283.

The LUC continued to stress to Bridge the importance of the deadline. Bridge continued to maintain that it would meet the deadline.

> At the request of Commissioner Piltz at our last session we also have attached as Exhibit I an updated schedule for Phase 1 of the project which includes the affordable housing component. That schedule projects completion of Phase 1 in November of 2009, roughly a year ahead of the commission's deadline for the completion of the

affordable housing component of the project.

JEFS 015 (Tr. 08/09/07) at 217 (lines 8 – 14).

All of this proved to be in vain. On July 24, 2008, Bridge's attorney told the LUC that Bridge probably could not meet the deadline and would be asking again to amend the affordable housing condition. JEFS 015 (Tr. 07/24/08) at 308 (line 10) to 310 (line 2). Among other problems, Bridge had applied for a project district zoning in order to locate all of the affordable housing units in the southeast corner of the property (contrary to its promise to spread them throughout the project). *Id.*

In October 2008, Bridge's 2008 status report advised the LUC that affordable housing could NOT be built under the existing zoning. Zoning could not be changed in time to meet the existing deadline. JEFS 011 at 1471. "The present zoning would have required spreading the 385 affordable units throughout the project, making it impossible to develop by the November 2010 deadline." JEFS 011 at 1473.

Bridge had tried to keep on track by applying for a nonsignificant zoning change from the County of Hawai'i. But the County denied the application, explaining that Bridge should have known about the problem long ago:

> The stated reason for the nonsignificant zoning change is to facilitate construction of affordable housing. This is not a convincing reason because since Ord. 96-153, the major change in the project's affordable housing requirement was that it was reduced from 60% to 20%. It should be easier, not harder, to fulfill the project's affordable housing requirements, and fitting the construction of affordable housing into the zoning is something that the owner should have anticipated doing some time ago.

JEFS 011 at 1500 – 1501.

The December 9, 2008, Order to Show Cause.

Based on Bridge's own statements that it could not meet the deadline, the LUC issued an Order to Show Cause on December 9, 2008. The purpose of the OSC was to inquire as to "whether [Bridge] has failed to perform according to representations and commitments made in seeking the land use reclassification and in obtaining amendments to conditions of reclassification." JEFS 011 at 1518 – 1521.

The OSC referred to the provisions in Haw. Rev. Stat. § 205-4(g) (2012) that authorize the LUC to impose conditions necessary to "assure substantial compliance with representations made by the petitioner in seeking a boundary change." The OSC also quoted section 205-4(g) to the effect that "absent substantial commencement of use of the land in accordance with such representations, the [C]ommission 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." The OSC noted that the LUC would conduct a hearing pursuant to Haw. Rev. Stat. chapter 91. *Id.*

Proceedings regarding adoption of the December 9, 2008, Order to Show Cause.

On January 5, 2009, after receiving the OSC, Bridge filed a motion seeking to allow Bridge to build only 100 affordable rental units on-site, and either build other affordable units off-site or make an in lieu contribution to the County of Hawaii. The deadline for the 100 affordable units on-site would be delayed until 2012. JEFS 011 at 1540.

Also after receiving the OSC, Bridge reported that it conditionally sold or intended to sell the project to DW.[6]

The LUC took the following actions or considered the following items before acting on the OSC:

- A pre hearing was held on December 19, 2008. JEFS 015 (Tr. 01/09/09) at 440 (lines 17 - 19).
- The State Office of Planning ("OP") filed testimony in support of the OSC on December 24, 2009. OP detailed the history of the project and stated:

  > Clearly, at least some of the conditions or representations were either violated or not met. The power to revert is a necessary tool, but one that should be used sparingly. Whether or not that power should be exercised in this case will depend upon the information presented by Petitioner.

- A hearing was held on January 9, 2009. JEFS 015 (Tr. 01/09/09) at 437. Bridge and its attorney were present. The LUC heard testimony from numerous witnesses

[6] Bridge later explained that "DW has taken over the development responsibilities pursuant to the purchase and sale agreement. They are now basically in charge of the development. And Bridge Aina Le'a is more or less a landowner." JEFS 015 (Tr. 04/30/09) at 567 (lines 2 – 5).

including Bridge's witnesses. The hearing was continued with no action taken. JEFS 015 (Tr. 01/09/09) at 548.

- A further hearing was held on April 30, 2009. JEFS 015 (Tr. 04/30/09) at 551. At the meeting the LUC unanimously voted to approve the OSC. JEFS 015 (Tr. 04/30/09) at 640. No written order was filed. *See* JEFS 015 (Tr. 08/27/09) at 818 (lines 16 – 18).

Conditional rescission of the December 9, 2008, Order to Show Cause.

The LUC's action immediately led to a flurry of additional proceedings seeking to stay, change, or rescind the action:

- On May 21, 2009, DW filed a motion to be joined as co-petitioner. JEFS 011 at 1709. (The LUC granted the motion. *See* order filed September 28, 2009, JEFS 011 at 2443.)
- On May 28, 2009, DW filed a motion to stay the OSC. JEFS 011 at 1906.
- A hearing on these motions was held on June 5, 2009. JEFS 015 (Tr. 06/05/09) at 644. Bridge and DW and their attorneys were present. The LUC heard testimony and argument. It took no action on the motion to intervene, granted the motion to stay, and agreed to hear additional testimony relating to the OSC. *Id.* at 761.
- On August 19, 2009, Bridge filed a motion to rescind the OSC. JEFS 011 at 2344.
- A further hearing was held on August 27, 2009. JEFS 015 (Tr. 08/27/09) at 812. After hearing testimony and argument, the LUC rescinded the OSC provided that "Petitioner completes construction of at least 16 affordable units by March 31, 2010" and the County provide status reports. *Id.* at 928, 934, and 937. JEFS 007 at 258. The LUC granted DW's motion to be a co-petitioner. Id. at 938. See order filed September 28, 2009, JEFS 011 at 2443. The other conditions, including the requirement to build 385 affordable units by November 2010, remained in place.

Reinstatement of the December 9, 2008, Order to Show Cause.

After this action by the LUC in August 2009, months more went by. On May 4, 2010, OP filed its memorandum advising the LUC that the March 31, 2010, deadline for completion of 16 units had not been met. Although units had been built, construction was "not accompanied by

any utility connections, and the units cannot be occupied." The units had no electricity, water, sewage connection or roadway infrastructure. JEFS 011 at 2541. OP emphasized that it was "unalterably opposed to any further extensions." *Id.* at 2544.

Yet more proceedings ensued:

- The LUC made a site visit on May 6, 2010. JEFS 015 (Tr. 07/01/10) at 1183.
- The LUC held a hearing on July 1, 2010. It heard testimony, including testimony from the public, and heard from the attorneys. JEFS 015 (Tr. 07/01/10) at 1178 et seq. Critically, developers acknowledged (again) that they could not meet the deadline to build 385 units by November 17, 2010. *Id.* at 1231 – 1234 and 1237 - 1238.[7] The LUC voted that the March 31, 2010, deadline was not met and set a further hearing. *Id.* at 1280. *See* order filed July 26, 2010. JEFS 011 at 2700.
- On August 30, 2010, DW filed a motion to alter conditions so that, inter alia, affordable housing would be completed in 2012. JEFS 011 at 2714. OP filed an opposition detailing the history of developers' misrepresentations and failed promises. JEFS 011 at 2740.
- On November 12, 2010 (five days before the deadline to complete 385 units) Bridge filed a "Motion re: Order to Show Cause." JEFS 013 at 115. On that same day Bridge filed a motion to rescind the OSC. JEFS 013 at 148.
- The LUC held a hearing on November 18, 2010 (it was apparently a coincidence that this is the day AFTER the deadline to deliver certificates of occupancy on the 385 affordable units) to consider the OSC and DW's motion to amend conditions. The LUC heard testimony, including testimony from the public, and heard from the developers' attorneys. JEFS 015 (Tr. 11/18/10) at 1309 et seq. Among other things, DW confirmed that the 385 affordable units were not complete. *Id.* at 1405. DW also explained that its financing for the project was by way of selling undivided interests in the property to individual Asian investors. *Id.* at 1427 – 1428. At that point 619 persons had "invested" (but these persons were not added as co-petitioners). *Id.* at 1434. The LUC took no action at the meeting. *Id.* at 1469.

[7] DW's draft environmental statement estimated that affordable housing would not be completed until 2012. JEFS 011 at 2688 -2689.

- On December 23, 2010, OP filed a motion for another order to show cause. DW and Bridge filed opposition memoranda. DW's memorandum filed January 7, 2011, again confirmed that the 385 affordable units had not been built. By developers' own admission only 16 were "completed" (and these 16 could not actually be used). Another 40 "are in various stages of completion." JEFS 013 at 539, 546.
- The LUC held a hearing on January 20, 2011, to consider the OSC, Bridge's motion regarding the OSC, and OP's motion for an OSC. DW's motion to amend conditions was deferred. JEFS 015 (Tr. 01/20/11) at 1471, 1475. There was testimony and argument. DW's attorney confirmed that DW had the opportunity to present all its witnesses, evidence, and argument and had nothing further for the LUC to consider:

> 21 CHAIRMAN DEVENS: Thank you for your
> 22 argument, Mr. Okamoto. Just to confirm: You did
> 23 attend the November hearing that we had last on this
> 24 matter of last year?
> 25 MR. OKAMOTO: Yes, I did.
> 1 CHAIRMAN DEVENS: And you had an
> 2 opportunity to present any additional evidence and to
> 3 call any witnesses you wanted in response to the Order
> 4 to Show Cause?
> 5 MR. OKAMOTO: We did at that time. And
> 6 I was also given an opportunity to submit further
> 7 briefs after that.
> 8 CHAIRMAN DEVENS: Okay. Is there
> 9 anything else you want to present in terms of other
> 10 arguments other than what's contained in your
> 11 pleadings that you filed with the Commission?
> 12 MR. OKAMOTO: No, sir.

JEFS 015 (Tr. 01/20/11) at 1527 - 1528.

Bridge confirmed the same:

> 11 CHAIRMAN DEVENS: Thank you for your
> 12 argument, Mr. Voss. I also want to confirm with you
> 13 you did attend that last hearing we had in the matter
> 14 in November of last year, is that correct?
> 15 MR. VOSS: I did, Chair.
> 16 CHAIRMAN DEVENS: And did you also have
> 17 a full and fair opportunity to present any additional

18 arguments, witnesses and evidence that you wanted to
19 at that time in response to the Order to Show Cause?
20 MR. VOSS: We were given an opportunity
21 to present evidence, yes, Mr. Chairman.
22 CHAIRMAN DEVENS: Is there anything else
23 you want to present at this time?
24 MR. VOSS: Not at this time.

JEFS 015 (Tr. 01/20/11) at 1536.

The LUC then voted to approve a motion to find that the Petitioner failed to show cause why the property should not revert to its prior land use classification, and that the property therefore be reverted to the Agricultural District. JEFS 015 (Tr. 01/20/11) at 1591, 1602. Other motions were denied as moot. DW's motion to amend was deferred.

Proceedings after reinstatement of the December 9, 2008, Order to Show Cause.

The hearings and process were <u>still</u> not over.

- The LUC held another hearing on March 10, 2011. It adopted a proposed order for decision and set a schedule to brief and argue objections to the proposal. JEFS 015 (Tr. 03/10/11) at 1609 et seq.
- DW asked the LUC to defer and reconsider. JEFS 013 at 728 and 747.
- The LUC held another hearing on April 8, 2011, to consider DW's motions and hear argument on the proposed order. It heard testimony, including testimony from the public, and heard from developers' attorneys. JEFS 015 (Tr. 04/08/11) at 1745 et seq. The LUC took no action at the meeting. *Id.* at 1469.
- Finally, the LUC held another hearing on April 21, 2011, to deliberate and decide on DW's motions and the proposed order. Again, the LUC heard testimony. JEFS 015 (Tr. 04/21/11) at 1855 et seq. The LUC denied DW's motions. *Id.* at 1895 – 1896. It then turned to adoption of the proposed order. At that point - literally the last minute - Bridge made an oral motion that Commissioner Devens recuse himself.[8]

[8] There is no excuse for the delay. Bridge's law firm represented Bridge in the old lawsuit. The lawyer who made the motion personally worked on the old lawsuit. JEFS 015 (Tr. 0504/21/11) at 1855 et seq. and knew about the alleged "conflict" for years before raising it as a last minute desperation move. JEFS 015 (Tr. 05/13/11) at 1931. Moreover, Bridge's tactical decision to wait until the LUC ruled on pending motions was improper. *In re Sawyer*, 41 Haw, 270, 274 (1956):

Id. at 1897. The purported basis for the request was that Commissioner Devens' law firm represented a client that had sued Bridge in a suit filed in 2001 and settled in 2003. The LUC went into executive session. *Id.* at 1907. Commissioner Devens declined to recuse himself. The LUC then voted to adopt the proposed order. *Id.* at 1914.

The order reverting the property to its original agricultural classification for violation of conditions was filed on April 25, 2011. JEFS 013 at 1005.

Finally, the Court can take judicial notice of the following:

- On June 7, 2011, Bridge sued the LUC and the individual Commissioners who voted to revert the property for millions of dollars on various theories. Bridge Aina Le'a v. State of Hawai'i Land Use Commission et al; Civil No. 11-1-1145-06 KKS. Bridge did not sue individual Commissioners who voted against the reversion. Defendants removed the case to federal court where it was assigned Civil No. 11-00414 SOM BMK. Judge Mollway stayed the case and both parties appealed. The appeals are assigned Appeal Nos. 12-15971 and 12-16076.
- In Mauna Lani Resort Association v. County of Hawaii et al; Civil No. 11-01-005K, Judge Elizabeth Strance ruled that the EIS for the project was inadequate and "all development in the project is tolled." Order filed March 28, 2013.

II. POINTS OF ERROR

1. Haw. Rev. Stat. § 205-4(g) (2001) and Supreme Court case law specifically affirm that issue "an order to show cause why the property should not revert to its former classification or be changed to a more appropriate classification." The circuit court erred by ruling to the contrary.

This error occurred in the circuit court's Amended Findings of Fact, Conclusions of Law, and Order reversing and vacating the State of Hawai'i Land Use Commission's final order filed

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> Unless the matters of disqualification are unknown to the party at the time of the proceeding and are newly discovered, there can be no excuse for delaying the filing of the suggestion until after rulings are made in the matter, particularly where such rulings may be considered adverse to the movant.

June 15, 2012. JEFS 007 at 1819. The LUC objected to the error in its Consolidated Answering Brief filed November 21, 2011. JEFS 007 at 1559. Specifically, the LUC objects to the following findings of fact: 9, 15, 17, 18, 29, 34, 49, and 56. The LUC objects to the following conclusions of law: 11, 12, 14 – 20, 22 – 30, 34 – 39, 43, 44, 49 – 51, 54, 56, 58, 60 – 64, and 67 – 76. The findings and conclusions are attached as Appendix 1.

2. Haw. Rev. Stat. § 91-14(f) (2012) and Haw. Rev. Stat. § 91-9(e) (2012) provide that the court's review "shall be confined to the record." The circuit courts erred by considering matters not part of the record.

The first circuit court made its error by denying the LUC's motion to strike. Order filed July 19, 2011. The LUC objected to the error in its motion to strike filed June 16, 2011. The circuit court has not yet transmitted this portion of the record despite this Court's order. JEFS 029.[9]

The third circuit court made its error by following the first circuit court and denying the LUC's motion to strike. Order filed November 11, 2011. JEFS 007 at 1258. The LUC objected to the error in its motion to strike filed July 20, 2011. JEFS 007 at 890. The LUC objected to the error in its motion to strike filed June 16, 2011. The circuit court has not yet transmitted this portion of the record despite this Court's order. JEFS 029.[10]

3. The circuit court erred in ruling in an agency appeal - without any opportunity for presentation of evidence and without regard to the right to trial by jury - that the LUC and individual commissioners violated developers' constitutional rights to equal protection and due process. This error occurred in the circuit court's Amended Findings of Fact, Conclusions of Law, and Order reversing and vacating the State of Hawai'i Land Use Commission's final order filed June 15, 2012. JEFS 007 at 1819.

[9] This statement is not meant as a criticism of the circuit court. There has been confusion. The court has worked with the parties and is making a good faith effort to file the remaining portion of the record.

[10] This statement is not meant as a criticism of the circuit court. There has been confusion. The court has worked with the parties and is making a good faith effort to file the remaining portion of the record.

The LUC objected to the error in its Consolidated Answering Brief filed November 21, 2011. JEFS 007 at 1559. The LUC objects to the findings and conclusions listed above, especially conclusions of law 67– 76.

III. STANDARD OF REVIEW

> Review of a decision made by the circuit court upon its review of an administrative decision is a secondary appeal. *Ahn v. Liberty Mut. Fire Ins. Co.,* 126 Hawai'i 1, 9, 265 P.3d 470, 478 (2011) (citation omitted). The circuit court's decision is reviewed de novo. *Id.* The agency's decision is reviewed under the standards set forth in HRS § 91–14(g). *Id.* HRS § 91–14(g) (1993) provides:
>
> (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
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> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> "Under HRS § 91–14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and an agency's exercise of discretion under subsection (6)." *Sierra Club v. Office of Planning,* 109 Hawai'i 411, 414, 126 P.3d 1098, 1101 (2006) (citation, internal quotation marks and brackets omitted).

Liberty Dialysis-Hawaii, LLC v. Rainbow Dialysis, LLC, 2013 WL 3364102, 6 -7 (2013).

IV. ARGUMENT

A. Haw. Rev. Stat. § 205-4(g) (2001) and Supreme Court case law specifically affirm that issue "an order to show cause why the property should not revert to its former classification or be changed to a more appropriate classification." The circuit court erred by ruling to the contrary.

The circuit court's fundamental error was to equate the reclassification process, Haw. Rev. Stat. § 205-4(a) (Cum. Supp. 2012), with reversion pursuant to Haw. Rev. Stat. § 205-4(g) (2001). *See e.g.* Conclusion of Law 22 (the LUC's action "is a land use boundary amendment . . . as the 'reversion' from the Agricultural land use district to the Urban land use district amends the Property's land use district boundary."). JEFS 007 at 1840.

This error is particularly puzzling because the court had already ruled exactly the opposite. In its order denying a motion to stay (order filed October 4, 2011) the court clearly understood that reversion and reclassification are not the same. *See* conclusions of law 6 – 10, especially 10:

> 10. Based on the language of Haw. Rev. Stat. chapter 205, and on Lanai Co., Inc. v. Land Use Com'n, 105 Haw. 296, 97 P.3d 372 (2004), the court concludes that there is a difference between the Commission considering a "petition . . . for a change in the boundary of a district" as provided in section 205-4(a) and an action by the Commission to "revert [land] to its former land use classification" as provided in section 205-4(g).

JEFS 007 at 1145, 1155.

In any event, the circuit court was right the first time but wrong in its final decision. The LUC's action was not the result of a reclassification petition within the meaning and scope of Haw. Rev. Stat. § 205-4(a) (Cum. Supp. 2012). No one petitioned the LUC to change the classification of the property from urban to agricultural.

Section 205-4(a) is not applicable. Rather, the applicable law is Haw. Rev. Stat. § 205-4(g) (2001) which provides:

> (g) Within a period of not more than three hundred sixty-five days after the proper filing of a petition, unless otherwise ordered by a court, or unless a time extension, which shall not exceed ninety days, is established by a two-thirds vote of the members of the commission, the commission, by filing findings of fact and conclusions of law, shall 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 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.

Emphasis added.

This section specifically authorizes the LUC to do exactly what it did. It authorizes the LUC to impose conditions. It authorizes the LUC to "issue and serve upon the party bound by the conditions 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." It gives the LUC the power to "revert."

It is important to note that this section was added in 1990, long after the LUC was originally created. Act 261, 1990 Hawai‘i Session Laws 563. The legislature added it specifically to “clarif[y] 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.” SCRep No. 2116 on S.B. No. 3028, 1990 Senate Journal 915. The legislature gave the LUC power to address exactly the situation presented here: “Vacant land with the appropriate state and county land use designations is often subjected to undesirable private land speculation and uncertain development schedules.”

The Supreme Court has recognized and upheld this statutory authority. In *Lanai Co., Inc. v. Land Use Com'n*, 105 Hawai'i 296, 318, 97 P.3d 372, 394 (2004), the Court stated:

> HRS chapter 205 does not expressly authorize the LUC to issue cease and desist orders. But the legislature granted the LUC the authority to impose conditions and to down-zone land for the violation of such conditions for the purpose of "uphold[ing] the intent and spirit" of HRS chapter 205 and for "assur[ing] substantial compliance with representations made" by petitioners. HRS § 205-4(g); *Cf. Morgan*, 104 Hawai'i at 185, 86 P.3d at 994 (holding that although HRS chapter 205A does not expressly authorize the Planning Commission to modify permits, the Commission must

> have jurisdiction to do so to "ensure compliance" with the Coastal Zone Management Act and to "carry out [its] objectives, policies, and procedures"). Consequently, the LUC must necessarily be able to order that a condition it imposed be complied with, and that a violation of a condition cease.

Emphasis added. Thus, the LUC has the express statutory authority to "down-zone land for the violation of such conditions." That is exactly what occurred here.

The circuit court relied in part on this unambiguous language in *Lanai Co.* for its original ruling but then cited other language from the case to "support" its final ruling. Conclusions of law 11 and 13, JEFS 007 at 1838, 1839. It is, therefore, important to discuss the case in detail.

Lanai Company, Inc.'s (LCI) predecessor had petitioned the LUC in 1989 to amend the land use district boundary at Manele on the island of Lanai so that it could develop an eighteen-hole golf course as an amenity of the Manele Bay Hotel.

In 1991, the LUC granted the petition subject to various conditions, including conditions relating to water use. Condition 10 stated:

> 10. [LCI] shall not utilize the potable water from the high-level groundwater aquifer for golf course irrigation use, and shall instead develop and utilize only alternative non-potable sources of water (e.g., brackish water, reclaimed sewage effluent) for golf course irrigation requirements.

105 Haw. at 300, 97 P.3d at 376.

In 1993, the Maui County Council and citizen groups claimed LCI was violating the conditions. The Maui mayor and LCI disagreed. The controversy went to the LUC:

> On October 13, 1993, pursuant HRS § 205–4 (1993),[11] the LUC issued an order to show cause [hereinafter OSC or Order to Show

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[11] The relevant language is unchanged. The Court's footnote 14 stated:

> HRS chapter 205 established the LUC. HRS § 205–4(g) provides in relevant part as follows:
>
> > 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.*
>
> (Emphasis added.)

> Cause] as to why the land "should not revert to its former classification or be changed to a more appropriate classification." This OSC was based upon the LUC's belief that LCI had "failed to perform according to Condition No. 10" and LCI "[had] failed to develop and utilize alternative sources of non-potable water for golf course irrigation requirements."

105 Haw. at 302, 97 P.3d at 378.

The LUC "conducted a series of hearings" on the OSC over a three year period.

105 Haw. at 302, 97 P.3d at 378 fn. 15.

On May 17, 1996, the LUC issued findings, conclusions, and an order determining that LCI "failed to perform according to Condition 10."

> The LUC accordingly ordered that "LCI shall" (1) "comply with Condition No. 10 of the [1991 Order]" and, as previously mentioned, (2) "immediately cease and desist any use of water from the high level aquifer for golf course irrigation requirements[,]" and (3) "file a detailed plan with the LUC within [sixty] days, specifying how it [would] comply with this Order requiring water use from alternative non-potable water sources outside of the high level aquifer for golf course irrigation requirements." On May 20, 1996, the LUC issued an order denying LCI's amendment to the motion for an order modifying Condition No. 10.

105 Haw. at 305, 97 P.3d at 381.

LCI timely appealed to the circuit court. That court:

> issued an order reversing the 1996 Order to cease and desist. The court found that the "[c]ease and [d]esist [o]rder was in excess of the statutory authority or jurisdiction of the agency as provided in HRS § 91–14(g)(2)." The court specifically limited its ruling to the cease and desist order and did not disturb the LUC's finding that LCI violated Condition No. 10 of the LUC's 1991 Order or that LCI submit a plan for a source of irrigation water outside the high-level aquifer.

105 Haw. at 306, 97 P.3d at 382.

The Supreme Court dismissed the original appeal as premature. The case went back to circuit court which determined that "[t]he LUC's conclusion that [LCI] violated Condition No. 10 was arbitrary, capricious, and clearly erroneous."

The LUC and others timely appealed. The Supreme Court announced its ruling at the

start of the opinion:

> We affirm the court's order with respect to its ruling that LUC's determination that LCI had violated Condition 10 was clearly erroneous but on the grounds stated herein and only with respect to LUC's finding that LCI was prohibited from using any water from the high level aquifer. As mentioned, we remand the question of whether LCI was using potable water from the high level aquifer to the court, with instructions to remand the issue to the LUC.

105 Haw. at 306, 97 P.3d at 382. The Court's significant footnote 22 is omitted here but quoted and discussed below at pages 22 - 23 of this brief.

The Court then went on to explain the ruling. Basically, the Court determined that the LUC misinterpreted Condition 10. "The plain language of Condition No. 10 does not prohibit LCI from using *all* water from the high level aquifer." 105 Haw. at 310, 97 P.3d at 386. The Court explained the correct meaning of Condition 10, then ruled that the LUC had not determined whether or not LCI was violating that condition (as correctly construed). The Court therefore "remand[ed] the issue of whether LCI has violated Condition No. 10" to the circuit court or the LUC if necessary. 105 Haw. at 316, 97 P.3d at 392.

After making this dispositive ruling, the Court then went on to "confirm several propositions germane to our remand of this case." 105 Haw. at 317, 97 P.3d at 393. The five paragraphs that follow this sentence are the key part of the opinion for purposes of our case. Those paragraphs discuss two ideas. The first idea is that the statute plainly authorizes the LUC to do what it did here – revert property to its previous classification. The Court specifically says exactly that in two of the five paragraphs:

> Whether there has been a breach of Condition No. 10 is a determination to be made by the LUC. Such a determination falls within the authority of the LUC, for HRS § 205–4(g) expressly authorizes the LUC to "impose conditions." Moreover, "absent substantial commencement of use of the land *in accordance with such representations made* ... in seeking [the] boundary change [,]"[48] the LUC is expressly authorized to order a reversion of land to the prior classification. HRS § 205–4(g) (emphasis added). The language of HRS § 205–4(g) is broad, and empowers the LUC to use conditions as needed to (1) "uphold the intent and spirit" of HRS chapter 205, (2) uphold "the policies and criteria established pursuant to section 205–17,"[49] and (3) to "assure substantial compliance with representations made by petitioner in seeking a

> boundary change." *Id.* This statute, however, lacks an express provision regarding cease and desist orders. *See id.*

Id. Emphasis in original, footnotes omitted.

And again on the next page:

> HRS chapter 205 does not expressly authorize the LUC to issue cease and desist orders. But the legislature granted the LUC the authority to impose conditions and to down-zone land for the violation of such conditions for the purpose of "uphold[ing] the intent and spirit" of HRS chapter 205, and for "assur[ing] substantial compliance with representations made" by petitioners. HRS § 205–4(g); *Cf. Morgan,* 104 Hawai'i at 185, 86 P.3d at 994 (holding that although HRS chapter 205A does not expressly authorize the Planning Commission to modify permits, the Commission must have jurisdiction to do so to "ensure compliance" with the Coastal Zone Management Act and to "carry out [its] objectives, policies, and procedures").

105 Haw. at 318, 97 P.3d at 394

The second idea discussed by the Court is whether the LUC <u>also</u> has the power to enforce its conditions by way of a cease and desist order. As the Court noted (twice) in the above paragraphs, the LUC has no specific statutory authority to issue cease and desist orders (in pointed contrast to the specific statutory authority to issue an OSC). Accordingly the Court concluded that although the "the LUC must necessarily be able to order that a condition it imposed be complied with, and that violation of a condition cease" the enforcement of such an order lies with the County: "The power to enforce the LUC's conditions and orders, however, lies with the various counties." It noted that "HRS § 205–12 (1993) delegates the power to enforce district classifications to the counties." *Id.* Footnotes omitted.

This is the language in the opinion that the circuit court relied on to conclude that the LUC does not have the power to revert. But the circuit court's ruling overlooks the other language in the opinion that clearly recognizes the LUC's power to revert. That power was a given. The Court's language as to County enforcement is directed to whether the LUC <u>also</u> has the power to enforce by cease and desist. Importantly, the Court specifically stated that it was NOT deciding this question and the language is in any event dicta:

> The court also reversed the LUC's 1996 Order on the grounds that (1) "the LUC was ... without jurisdiction to issue an order requiring [LCI] to cease and desist using water from Lanai's high level

> aquifer [ ]" because "[a]ll waters of the State are subject to regulation by the [Water Commission,]" (2) "[t]he LUC ... lacked jurisdiction to enforce Condition No. 10" because "jurisdiction to enforce such conditions lies with the counties[,]" (3) "the LUC ... acted in excess of its statutory authority[,]" "[b]y issuing a cease and desist order," and (4) "[t]he 1996 Order violates the Hawaii State Plan by tending to destroy a golf course previously found by the LUC to conform to and help satisfy the provisions of [HRS] chapter 226." Because our disposition results in the remand of Condition 10, it is unnecessary or premature to consider such other grounds to the extent they are raised by the parties on appeal.

105 Haw. at 306, 97 P.3d at 382 fn.22.

For all these reasons, reversion pursuant to section 205-4(g) is not the same as reclassification pursuant to section 205-4(a). Once that is understood, the circuit court's procedural issues are quickly resolved. The LUC did not "sanction Bridge and DW with reclassification of the Property," Conclusion 14, because reversion is not reclassification.

The LUC did not have to consider "factors required for land use district boundary changes pursuant to HRS §§ 205-16 and 205-17," Conclusions 14 and 28 - 44, because reversion is not reclassification.

The LUC did not have to meet the requirements of section 205-4(h) (including a minimum of six affirmative votes), Conclusions 21 – 27, because reversion is not reclassification.

The LUC did not have to act within 365 days under section 205-4(a), Conclusions 41 -51, because reversion is not reclassification. In this regard, it is important to note that the OSC at issue in *Lanai Co.*, was issued on October 13, 1993 (105 Haw. at 302, 97 P.3d at 378) but not resolved until May 17, 1996. 105 Haw. at 303, 97 P.3d at 379. That interim of 947 days was, of course, far more than 365 days and even more than the "approximately" 863 days that the LUC took to resolve the OSC in this case. Conclusion of law 49.[12]

Importantly, at the time of the 2009 order, the LUC could have reverted the property to its former classification. Instead it generously gave developers additional time. As to "completion" it is odd that a unit that has no legal sewer, water, or electrical connection and that cannot be used

[12] The main point of Conclusion of Law 49 is that the LUC violated the 365 day deadline in its 2009 order requiring completion of 16 units by a certain date. But the deadline does not exist as to the OSC.

or occupied would be considered "complete." Such a notion is directly contrary to the thrust of the LUC's action which was to actually get some of the affordable housing that had been promised for decades and was so urgently needed.

But even aside from these issues, the status of the 16 units is an irrelevant red herring. Even in 2009, developers had already told the LUC they could not meet the condition that 385 affordable units be constructed by November 17, 2010. (The pseudo issue as to certificates of occupancy did not apply to this deadline. The LUC's 2005 order specifically mentioned and required certificates of occupancy. JEFS 011 at 378). By the time the LUC acted to revert, that date had passed. The condition was not met. So whether or not the 16 units were "complete" was moot.

B. The circuit court erred by considering matters not part of the record in direct violation of Haw. Rev. Stat. § 91-14(f) (2012) and Haw. Rev. Stat. § 91-9(e) (2012)

This is an administrative appeal. Judicial review of a contested case is purely statutory and is prescribed by Haw. Rev. Stat. chapter 91.

Haw. Rev. Stat. § 91-14(f) (2012) provides that court review of a final agency decision shall be "confined to the record." *See Kilauea Neighborhood Association v. Land Use Commission,* 7 Haw.App. 227, 236, 756 P.2d 1031, 1037 (1988) ("Judicial review of an agency decision is confined to the record of the agency proceedings.").[13]

The "record" that may be considered is defined by statute. Haw. Rev. Stat. § 91-9(e) (2012) provides:

> (e) For the purpose of agency decisions, the record shall include:
> (1) All pleadings, motions, intermediate rulings;
> (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
> (3) Offers of proof and rulings thereon;
> (4) Proposed findings and exceptions;
> (5) Report of the officer who presided at the hearing;
> (6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.

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[13] Developers did not seek to avail themselves of the provisions of section 91-14(e) whereby the court may order that "additional evidence be taken before the agency upon such conditions as the court deems proper."

Despite these clear provisions of the governing statute, developers purported to designate as part of the record on appeal not only the entire record in Land Use Commission Docket No. A87-617, but also all documents in numerous (16 by Bridge and 6 by DW) other and completely separate LUC dockets. *See* Bridge designation of the "record", JEFS 007 at 985-986 and DW amended designation of the "record." JEFS 007 at 116 – 117.

The circuit court refused to strike these designations and allowed 9917 pages from the documents to be entered as part of the "record."[14] JEFS 072.

Despite the clear mandate of the statute, the circuit courts refused to strike these extra-record materials. That was error.

C. The circuit court erred in determining in an agency appeal - without any opportunity for presentation of evidence and without regard to the right to trial by jury - that the LUC and individual commissioners violated developers' constitutional rights to equal protection and due process

The circuit court determined that the LUC – and by necessary implication individual Commissioners – violated developers' constitutional rights. Of course by the very nature of the proceeding, no formal complaint was filed against the LUC or the Commissioners. No evidence was taken on the claim. There was no trial and no jury. The court simply announced its ruling. Doing so is inappropriate and – ironically - deprived the LUC and Commissioners of any process whatsoever.

Bridge has already (and DW still may) filed a lawsuit claiming damages for violation of its constitutional rights. The lawsuit remains pending as Civil No. 11-00414 SOM BMK. If the circuit court's ruling is affirmed, then Bridge will undoubtedly claim that the ruling constitutes issue or claim preclusion in the federal lawsuit. The LUC and Commissioners dispute that, but the point remains that the court's ruling has real consequences and was unfair as well as wrong.

Even aside from these issues, the court's conclusions are obviously incorrect. As to "substantive due process," the substantive component of the Due Process Clause protects an individual's life, liberty, or property against certain government actions, regardless of the fairness of the procedures used to implement them. *Collins v. City of Harker Heights, Tex.,* 503 U.S. 115, 125 (1992). To establish a violation of substantive due process, a plaintiff must prove that

[14] These pages are some but by no means all of the contents of those dockets.

the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. *Ballock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988).

"[T]he alleged conduct must 'shock[ ] the conscience' and 'offend the community's sense of fair play and decency.'" *Marsh v. County of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) (quoting *Rochin v. California,* 342 U.S. 165, 172–73, 72 S.Ct. 205, 96 L.Ed. 183 (1952)). *See Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998) (providing example of stomach pumping as a form of oppression and abuse of power barred by the due process clause and ruling that officer who killed passenger in a high-speed car chase did not deprive passenger of due process because intent was "to do his job as a law enforcement officer, not to induce ... lawlessness, or to terrorize, cause harm, or kill.").

Substantive due process is a disfavored category of constitutional analysis.[15]

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

Williamson v. Lee Optical, 348 U.S. 483, 488 (1955). *See* G. Gunther, Constitutional Law, 772 (11th Ed. 1985) ("The modern [Supreme Court] has turned away due process challenges to economic regulation with a broad 'hands off' approach. No such law has been invalidated on substantive due process grounds since 1937.").

In this case, no finding of fact supports a conclusion that the LUC's action "shocks the conscience" and "offends the community's sense of fair play and decency." At most, the LUC (advised every step of the way by its attorneys from the Department of Attorney General) was wrong in its belief that reversion is not the same as reclassification.

As to procedural due process, developers received – by any standard – an enormous amount of process as described above. In addition to the various hearings, motions, and other process afforded by the LUC itself, developers had and availed themselves of the right of appeal

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[15] Except in regards to fundamental interests protected by heightened scrutiny. The economic interests at stake here are not in that category. Garneau v. City of Seattle, 147 F.3d 802, 821 (9th Cir. 1998) ("Because it burdens no fundamental rights, the TRAO is 'a classic example of an economic regulation' and is subject only to the minimum scrutiny rational basis test.").

to the circuit and appellate courts. They have received (and continue to receive) all process that is due (even assuming they had a protectable property interest). Attorneys for both developers specifically told the LUC that they had been given the opportunity to present evidence and argument and had nothing further to present. Pages 12 - 13 above. *See Burns v. Alexander*, 776 F.Supp.2d 57, 83 (W.D.Pa. 2011):

> "Once it is determined that the Due Process Clause is implicated by a specific deprivation of liberty or property, the relevant question becomes what process is due under the particular circumstances." *Whittaker,* 674 F.Supp.2d at 694, quoting *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). "The Fourteenth Amendment does not protect against all deprivations of liberty [or property]. It protects only against deprivations of liberty [or property] accomplished without due process of law." *Baker v. McCollan,* 443 U.S. 137, 145, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). "The standard for determining what process is due in a given situation is rather flexible, since the due process inquiry eschews reliance on rigid mandates in favor of an approach which accounts for the factual circumstances of the particular situation at issue." *Tristani v. Richman,* 609 F.Supp.2d 423, 481 (W.D.Pa.2009).

The fact that developers did not receive the result they wanted at the LUC in no way affects the question of whether they received adequate process. *Sansotta v. Town of Nags Head*, 2013 WL 3827471, 3 (4th Cir. 2013) (citations omitted) ("Procedural due process simply ensures a fair process before the government may deprive a person of life, liberty, or property but does not require certain results").

Even if the LUC failed to follow the procedures required by state law that also does not mean that developers' constitutional rights were violated. *Vincent v. Yelich*, 718 F.3d 157, 169 (2nd Cir. 2013) (citations and punctuation omitted) ("As a general matter, federal constitutional standards rather than state law define the requirements of procedural due process. The fact that the State may have specified its own procedures that it may deem adequate for official action, does not settle what protection the federal due process clause requires."). *See Senra v. Town of Smithfield*, 715 F.3d 34, 40 (1st Cir. 2013):

> "[T]he federal Due Process Clause does not incorporate the particular procedural structures enacted by state or local governments." *Chmielinski,* 513 F.3d at 316 n. 5 (quoting *Torres–Rosado v. Rotger–Sabat,* 335 F.3d 1, 10 (1st Cir.2003)). Claims "involving state procedural guarantees that are above and beyond constitutional due process requirements, are not properly before us." *O'Neill v. Baker,* 210 F.3d 41, 49 n. 9 (1st Cir.2000). Such claims, "should be pursued, if at all, under [state] law." *Torres–Rosado,* 335 F.3d at 10; *cf. Loudermill,* 470 U.S. at 541, 105 S.Ct. 1487 (observing that "once it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in [a state] statute").

As to equal protection, first, no evidence of unequal treatment was presented to the LUC. Counsel merely argued that the LUC had acted differently in other dockets. Mere argument was insufficient to allow the LUC properly to evaluate the claims. Developers admit that the record before the LUC was inadequate to support such claims by belatedly and improperly including thousand of pages of records from the other dockets in their designation.

That designation is improper for the reasons stated above.

Second, the only findings relating to the alleged equal protection violation relate to LUC actions in 2005. Findings of Fact 9, 15, and 17, JEFS 007 at 1823 – 1826. Any constitutional claim accrued at that time, *Daniel v. County of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002), and is long since time barred.

Hawai'i's statute of limitations for personal injuries is two years. Haw. Rev. Stat. § 657-7 (1993). This would govern any claim based on the 2005 actions – whether the claim was pursued under state law or federal civil rights statutes. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Sain v. City of Bend*, 309 F.3d 1134, 1139 (9th Cir. 2002); *Pele Defense Fund v. Paty*, 73 Haw. 578, 597, 837 P.2d 1247, 1260 (1992); *Allen v. Iranon*, 99 F. Supp. 2d 1216, 1238 (D.Haw. 1999) ("In Hawaii, the statute of limitations for actions under Section 1983 is two years from the date of the violation."); *Limestone Development Corp. v. Village of Lemont*, 520 F.3d 797 (7th Cir. 2008) ("class of one" equal protection claim based on alleged disparate treatment of landowner regarding road maintenance and access barred by statute of limitations where challenged decisions took place more than two years prior to suit); *See also Misichia v. Pirie*, 60 F.3d 626 (9th Cir. Cir. 1995) ("If an adequate opportunity for review is available . . . a . . . party cannot obstruct the preclusive use of the state administrative decision simply by foregoing [the]

right to appeal.").

Third, equal protection claims typically involve governmental classifications that affect some group of citizens differently than others. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *See Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("'Equal protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable"). Plaintiffs in such cases generally allege that they have been arbitrarily classified as members of an identifiable group. *Personnel Administrator of Mass v. Feeney*, 442 U.S. 256, 279 (1979).

Here, developers rely on a *limited* extension of the typical equal protection claim, whereby a party does not allege class based discrimination but claims that he has been irrationally singled out as a so called "class of one". *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

In *Olech*, a property owner asked the village of Willowbrook to connect her property to the municipal water supply. Instead of conditioning the water connection on a 15-foot easement as required of all other property owners, the village conditioned Olech's water connection on a 33-foot easement. Because there was a *clear standard* against which departures could be measured *rather than a discretionary process involving subjective individualized determinations,*[16] the Supreme Court found that Olech had stated a valid equal protection claim:

> Our cases have recognized successful equal protection claims brought be a "class of one" where the Plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every

[16] The United States Supreme Court discussed the basis for the *Olech* decision in *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008), discussed *infra*, stating:

> What seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations – at least not with regard to easement length, however typical such determinations may be as a general zoning matter.

553 U.S. at 602-603.

> person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents".

Id., quoting *Sioux City Bridge Co. v. Dakota County*, 20 U.S. 441, 445 (1923).

"Generally, whether parties are similarly situated is a fact-intensive inquiry." "[C]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." In order to prevail on a class-of-one claim, a plaintiff must establish that:

> (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake.

Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2nd Cir. 2006).

The United States Supreme Court has recently explored the logic of *Olech's* "clear standard" requirement and severely curtailed the "class of one" equal protection claim. In *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008), the U.S. Supreme Court held that a "class of one" claim cannot be sustained where the challenged government actions by their nature involve discretionary decisionmaking based on an array of subjective, individualized assessments.

> There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be treated alike under like circumstances and conditions is not violated where one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.
>
> Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say

> that the officer has created a class of people that did not get speeding tickets, and a "class of one" that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself – the decision to ticket speeders under such circumstances. Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernable or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.

553 U.S. at 603-04.[17]

While *Engquist* applied this restriction in an employment law context, the broad language of the decision (and the Supreme Court's clarification of its reasoning in *Olech*) has led courts across the nation to reject "class of one" equal protection claims in a multitude of other governmental and regulatory contexts where the decisions are fundamentally discretionary in nature and based on a wide array of factors and circumstances. *See e.g. Las Lomos Land Co., LLC v. City of Los Angeles*, 99 Cal Rptr.3d 503, 177 Cal.App.4th 837 (2008) (development project approval characterized by complex urban planning considerations such as development entitlements, zoning, and plan details involved numerous discretionary policy decisions specific to a local community and a "class of one" equal protection claim could not be sustained, citing *Engquist*). *Siao-Pao v. Connolly*, 564 F.Supp.2d 232, 245 (S.D.N.Y. 2008) (*Engquist* analysis extended to parole decisionmaking process which involved numerous factors and discretion); *JDC Management, LLC v. Reich*, 644 F.Supp.2d 905 (W.D. Mich. 2009) (dismissing "class of one" equal protection claim of unsuccessful applicant for liquor license, noting that rationale in *Engquist strongly* suggests that the "class of one" theory is unavailable in contexts where

[17] A discretionary decision represents a choice of one among two or more rational alternatives. *See* 1 H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 162 (Tent. Ed. 1958) (defining discretion as "the power to choose between two or more courses of action each of which is thought as permissible").

government officials must make subjective discretionary decisions, e.g. in its role as sovereign and regulator); *Flowers v. City of Minneapolis, Minnesota,* No. 07-2705, 2009 WL 635243 at *4 (8th Cir. 2009) ("In light of *Engquist,* therefore, we conclude that while a police officer's investigative decisions remain subject to traditional class-based equal protection analysis, they may not be attacked in a class-of-one equal protection claim."); *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269 (11th Cir. 2008) ("We have little trouble applying the reasoning in *Engquist,* directed at a[sic] the government-employee relationship, to the circumstances in this case involving a government-contractor relationship.... Just as in the employee context, and in the absence of a restricting contract or statute, decisions involving government contractors require broad discretion that may rest 'on a wide array of factors that are difficult to articulate and quantify.' "); *United States v. Moore*, 543 F.3d 891, 901 (7th Cir. 3008) (applying *Engquist* to challenges to decisions of prosecutorial discretion and noting "a class-of-one equal protection challenge, at least where premised solely on arbitrariness/irrationality, is just as much a 'poor fit' in the prosecutorial discretion context as in the public employment context"); *Adams v. Meloy*, No. 07-3453, 2008 WL 2812603, at *2 (7th Cir. 2008) (citing *Engquist* and determining that "class of one" claim against parole board had no merit because, *inter alia,* "[t]he parole board's inherent discretion necessitates that some prisoners will receive more favorable treatment than others."); *Bissessur v. Indiana Univ. Bd. Of Trustees,* 2008 WL 4274451, at *9 (S.D. Ind. 2008) (applying *Engquist* to class-of-one claim challenging the school's decision to expel plaintiff and noting "[t]he Supreme Court's rationale in *Engquist* effectively forecloses his claim").

In *Olech*, there were clear standards to assess who was similarly situated (i.e. *everyone* who wanted a water connection to the municipal water supply), and what non-discretionary government action was expected (i.e. a 15-foot easement). Here, there are no "one size fits all" standards as to when "enough is enough" such that the LUC should exercise its discretion to revert a land use classification – it is an authority granted to the LUC to uphold the intent and spirit of Chapter 205 and assure compliance with representations that have been made. *Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai'i 296, 318, 97 P.3d 372, 394 (2004). Likewise, there are no "one size fits all" standards as to how the LUC should incorporate affordable housing requirements into their land use decisions. Developers each have a tailored list of conditions to adhere to, no two of which are identical. And which developments are similarly situated - Is it

those with projects of similar scope and size? Is it those in West Hawaii, where the need for on-site affordable housing was acute? Is it those with a similar history of broken promises and breaches of earlier conditions? Developers are challenging LUC actions that have a clear measure of discretion based on consideration of a multitude of factors.

Even if a "class of one" equal protection claim is cognizable, the inquiry does not end with the threshold requirement that there be non-discretionary, clear standards by which to assess the government action. Plaintiffs must still overcome the presumption of constitutionality by establishing that they are similarly situated and have been treated differently in a material way. *Olech*, 528 U.S. at 564. Similarly situated means "an extremely high degree of similarity". *Landmark Development Group, LLC v. Town of East Lyme*, 374 Fed. Appx. 58 (2d Cir. 2010); *RJB Properties Inc. v. Board of Education of City of Chicago*, 468 F.3d 1005 7th Cir. 2006) (Plaintiff was denied a contract with a municipal board and could not overcome "very significant burden" regarding similarity, where other companies who were awarded contracts had different type of past wrongdoing and misconduct); *Bell v. Duperrault*, 367 F.3d 703, 708 (7th Cir. 2004) (not similarly situated where other pier-extension applicants applied at different times, requested different types of piers, or sought pier extensions under different circumstances).

Developers failed to make this showing to either the LUC or the circuit court. The circuit court failed to make a single finding of fact that even relates to equal protection other than in 2005. The court's conclusions of law are unclear, wrong, and do not follow from its findings of fact.

Even if an equal protection claim is cognizable and appellants can establish that they were similarly situated and treated differently in a material way, disparate treatment by a government entity is still permissible so long as it bears a rational relationship to a legitimate state interest. *Patel v. Penman*, 103 F.3d 868, 875 (9th Cir. 1996). And, without more, selective enforcement of valid laws is insufficient to show that there was no rational basis for the action. *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 945 (9th Cir. 2004).

The rational basis test is extremely deferential and does not allow inquiry into the wisdom of government action. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). A court must reject an equal protection challenge to government action "if there is any reasonably conceivable state of facts that could provide a rational basis for the [difference in

treatment][citations omitted]". *Id.* Under the rational basis test, courts must presume the constitutionality of government action if it is at all plausible that there were legitimate reasons for the action. The plaintiff must show that the difference in treatment was so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational. *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991).

In the facts of this case, there are clear and compelling reasons why a meaningful, enforceable affordable housing requirement was required of appellants. First there was a shortage of affordable housing units in West Hawaii, such that offsite credits or in lieu payments would not be sufficient. Second, appellants affirmatively represented that they were willing to accept the affordable housing conditions with a deadline. Finally, imposing a deadline and reverting the land classification furthered the legitimate public interest in ensuring that LUC conditions are not simply ignored by developers.

Developers also failed to show – and there are no findings of fact that establish - that the reversion was malicious or vindictive. There is no dispute that appellants failed to uphold their commitments and promises, and there is no dispute that the LUC accommodated their requests for reductions in the affordable housing requirements.

V. CONCLUSION

The circuit court erred. Its ruling should be reversed and the LUC's decision and order reinstated.

DATED: Honolulu, Hawai'i, August 26, 2013.

/s/ William J. Wynhoff
WILLIAM J. WYNHOFF
Attorney for STATE OF HAWAI'I LAND USE COMMISSION

STATEMENT OF RELATED CASES

Bridge Aina Le‘a v. State of Hawai‘i Land Use Commission et al; 11-00414 SOM BMK on appeal as Appeal Nos. 12-15971 and 12-16076. This is Bridge’s lawsuit claiming civil rights violations and Fifth Amendment taking.

Mauna Lani Resort Association v. County of Hawaii et al; Civil No. 11-01-005K. Plaintiff claims and the court ruled that the EIS for the Aina Le‘a project was inadequate and “all development in the project is tolled.”

DATED: Honolulu, Hawai‘i, August 26, 2013.

/s/ William J. Wynhoff
WILLIAM J. WYNHOFF
Attorney for STATE OF HAWAI‘I LAND USE COMMISSION

APPENDIX 1

FILED

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

2012 JUN 15 AM 8:05

L. KITAOKA, CLERK
THIRD CIRCUIT COURT
STATE OF HAWAII

DW AINA LE`A DEVELOPMENT, LLC,  Co-Petitioner-Appellant,  vs.  BRIDGE AINA LE`A, LLC, Co-Petitioner-Appellee, vs. STATE OF HAWAI`I LAND USE COMMISSION; STATE OF HAWAII OFFICE OF PLANNING; COUNTY OF HAWAII PLANNING AGENCY, Appellees.	Civil No. 11-1-0112K (Agency Appeal) AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER REVERSING AND VACATING THE STATE OF HAWAII LAND USE COMMISSION'S FINAL ORDER
BRIDGE AINA LE`A, LLC,  Appellant,  vs.  STATE OF HAWAII LAND USE COMMISSION; STATE OF HAWAII OFFICE OF PLANNING; DW AINA LE`A DEVELOPMENT, LLC; COUNTY OF HAWAII, Appellees.	Civil No. 11-1-0969-05 (RAN) (Agency Appeal) Hearing Date: December 16, 2011 Time: 1:00 p.m. Judge: Hon. Elizabeth A. Strance

FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER REVERSING AND VACATING THE STATE OF HAWAII LAND USE COMMISSION'S FINAL ORDER

On December 16, 2011, this Court heard oral arguments on this consolidated administrative agency appeal filed pursuant to Hawaii Revised Statutes ("HRS") Chapter 91 by Appellants DW Aina Le`a Development, LLC ("DW") and Bridge Aina Le`a, LLC ("Bridge") of Appellee State of Hawai`i Land Use Commission's ("LUC") April 25, 2011 Order Adopting Proposed Findings of Fact, Conclusions of Law, and Decision and Order Reverting the Petition Area, As Amended As Commission's Final Decision ("Final Order"). At the oral arguments, DW was represented by Lorraine H. Akiba; Bridge was represented by Bruce D. Voss and Michael C. Carroll; the LUC was represented by William J. Wynhoff; Appellee County of Hawai`i Planning Department ("County") was represented by William V. Brilhante; and Appellee State of Hawai`i Office of State Planning ("Office of Planning") did not appear at the hearing.

The Court has duly and carefully reviewed and considered the briefs filed by the parties and the arguments made and the authorities cited therein, the Record on Appeal in both appeals, and oral arguments by the parties. Based thereon, the Court hereby makes and enters the following Findings of Fact, Conclusions of Law, and Order Reversing and Vacating the LUC's Final Order:

FINDINGS OF FACT

The Court makes the following Findings of Fact. If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such. The headings are used for organizational purposes only. The Court has considered the facts under the headings for all claims.

I. THE PROPERTY IS RECLASSIFICATED TO THE URBAN LAND USE DISTRICT

1. On January 17, 1989, the LUC reclassified approximately 1,060 acres of land situated at Waikoloa, South Kohala, County and State of Hawaii identified by Tax Map Key Nos. 6-8-01: portion of 25, portion of 36, portion of 37, portion of 38, portion of 39, portion of 40 (the "Property") from the State Agricultural land use district into the State Urban land use district (the "1989 Order"). ROA 266-313.

2. On July 9, 1991, the LUC issued its Amended Findings of Fact, Conclusions of Law, and Decision and Order (the "1991 Order"). ROA 601-65. The 1991 Order expressly found "upon a preponderance of the evidence," that (1) the proposed reclassification conforms with the objectives and policies set forth in the Hawaii State Plan Chapter 226, HRS; (2) the proposed project will provide diversified housing and employment opportunities; (3) the project conforms with implementing actions in the State Functional Plan and Education Functional Plan; (4) the proposed reclassification conforms to the State Land Use District Regulations for determining Urban District Boundaries; and (5) the reclassification conforms to the policies and objectives of the Coastal Zone Management Program Chapter 205A, HRS. ROA 644-50.[1]

3. The 1991 Order reclassified the Property subject to fifteen (15) conditions. ROA 0652-57. Condition 1 of the 1991 Order provided:

> Petitioner shall provide housing opportunities for low, low-moderate, and moderate income Hawaii residents by offering for sale at least thirty percent (30%) of the units at prices which families with an income range up to one hundred twenty percent (120%) of the County of Hawaii's median income can afford, and thirty percent (30%) of the units at prices which families with an income range of one hundred twenty to one hundred forty percent (120-140%) of the County of Hawaii's median income can afford, provided, however, in no event shall the gross number of affordable units be less than 1,000 units.

[1] The "Project," as that term is used in the LUC Orders, refers to the mixed-use residential and retail development, now commonly known as Aina Le`a, planned and approved for the Property.

This condition may be fulfilled through projects under such terms as may be mutually agreeable between the Petitioner and the Housing Finance and Development Corporation of the State of Hawaii. This condition may also be fulfilled, with the approval of the Housing Finance and Development Corporation, through construction of rental units to be made available at rents which families in the specified income ranges can afford.

This affordable housing requirement shall be implemented concurrently with the completion of the market units for the residential project. The determination of the median income, as that term is used in this condition, shall be based on median income figures that exist at the time that this condition must be implemented.

ROA 619, 652-53.

4. The 1991 Order did not contain any time limits for compliance for any of the fifteen (15) conditions. ROA 0652-57.

5. Instead, the 1991 Order provided for "anticipated" time periods, and there was no condition imposed by the LUC requiring the owner to meet its "anticipated" schedule, nor was there a deadline imposed for completion of construction. ROA 611-12.

6. In addition, the 1991 Order expressly found that: "The Property is not classified by the State Department of Agriculture's Agricultural Lands of Importance to the State of Hawaii classification system," and "The Land Study Bureau rated the soils of the Property as Class E (very poor)." ROA 608. The 1991 Order states that "[t]he Project will not impact existing agricultural activities since none exist on the Property . . . ." ROA 622-23.

7. The 1991 Order also recognized: "The Property is not suitable for agriculture and there are no agricultural activities on the site." ROA 650.

II. THE LUC AMENDS CONDITION 1 OF THE 1991 ORDER

8. On September 1, 2005, Bridge, successor in interest as owner of the Property, filed with the LUC a Motion to Amend Conditions 1 and 8 of the 1991 Order (the "2005 Motion to Amend"). ROA 1446-62d. Bridge requested that the affordable housing

condition, Condition 1, be amended to provide that the affordable housing be "consistent and coincide with County of Hawaii affordable housing requirements. The location and distribution of the affordable housing or other provision for affordable housing shall be under such terms as may be mutually agreeable between the Petitioner and the County of Hawaii." ROA 1448.

9. The LUC previously had granted substantively identical requests for at least seven other major projects. Records from the LUC dockets for these projects were included in the Record on Appeal, and are summarized below:

a. ROA 14362, Halekua Development Corp., A92-683 (60 percent requirement amended so petitioner shall provide affordable housing "to the satisfaction of the City & County of Honolulu");

b. ROA 9316-20, Haseko (Hawaii), Inc., A89-645 (60 percent requirement amended so petitioner shall provide affordable housing "to the satisfaction of the County of Hawaii");

c. ROA 10156-60, West Beach Estates, A90-655 (60 percent requirement amended so petitioner shall provide affordable housing "to the satisfaction of the City & County of Honolulu");

d. ROA 11118-25, Amfac/JMB Hawaii, Inc., A90-658 (60 percent requirement amended so petitioner shall provide affordable housing "to the satisfaction of the County of Maui");

e. ROA 11400-05, C. Brewer Properties, Inc., A92-680 (State H.F.D.C. requirement[2] amended so petitioner shall provide affordable housing "to the satisfaction of the County of Hawaii");

f. ROA 11906-40, Kukui'ula Development Corp., A 93-696 (State H.F.D.C. requirement amended so petitioner shall provide affordable housing "to the satisfaction of the County of Kauai"); and

g. ROA 10152-53, Mililani Town, Inc., A87-609 (50 percent affordable housing requirement amended so developer shall provide affordable housing "to the satisfaction of the City & County of Honolulu").

10. On June 15, 2005, the Office of Planning submitted its Testimony of the Office of Planning in Conditional Support of Bridge's 2005 Motion to Amend, which stated that "[t]he Office of Planning supports the ability of the Counties to determine the location, distribution, and type of affordable housing required with a development." ROA 1363-1368.

11. On September 28, 2005, the Office of Planning submitted Supplemental Testimony in support of Bridge's 2005 Motion to Amend. The Office of Planning's Supplemental Testimony stated, in part:

> 1. The Office of Planning has no objections to the Petitioner's proposed amendment to the affordable housing Condition 1 as follows:
>
> 'Petitioner shall provide affordable housing opportunities for residents of the state of Hawaii under such terms and conditions to the satisfaction of the County of Hawaii. The location and distribution of the affordable housing or other provision for affordable housing shall be under such terms as may be mutually agreeable between the Petitioner and the County of Hawaii.'

ROA 1495-1497.

[2] The State Housing Finance & Development Corp. Affordable Housing Guidelines at the time required 60 percent affordable housing.

12. The County was also in support of the amendment proposed by Bridge and the recommendations of the Office of Planning. ROA 1811, 1812.

13. The LUC's staff also stated in a staff report that Bridge's request to amend the LUC's affordable housing condition was "reasonable" and consistent with the "past position" of the LUC. ROA 5359.

14. On November 25, 2005, the LUC entered its Findings of Fact, Conclusions of Law, and Decision and Order Granting Petitioner's Motion to Amend Condition 1 and Denying Petitioner's Motion to Amend Condition 8 of the Amended Findings of Fact, Conclusions of Law, and Decision and Order Dated July 9, 1991 (the "2005 Order"). ROA 1819-36.

15. Despite the LUC's longstanding precedent, the support of State and County agencies, and the LUC's staff recommendations, in its 2005 Order, the LUC did not grant Bridge's request that affordable housing be "consistent and coincide" with County of Hawaii affordable housing requirements and administered by and through the County of Hawaii. Instead, the LUC ordered that Bridge build a minimum of 385 affordable housing units, and provide the LUC with certificates of occupancy for the entire Project's affordable housing units within five years. Id.

16. Pursuant to the 2005 Order, Condition No. 1 of the 1991 Order was amended to read as follows:

> 1. Petitioner shall provide housing opportunities for low, low-moderate, and moderate income residents of the State of Hawaii by offering at least twenty percent (20%) of the Project's residential units at prices determined to be affordable by the County of Hawaii Office of Housing and Community Development, provided, however, in no event shall the gross number of affordable housing units within the Petition Area be less than 385 units. The affordable housing units shall meet or exceed all applicable County of Hawaii

affordable housing standards, and shall be completed in substantial compliance with the representations made to the Commission.

1b. Petitioner shall obtain, and provide copies to the Commission, the certificates of occupancy for all of the Project's affordable housing units within five (5) years of November 17, 2005.

ROA 1830-31.

17. Based on the Record on Appeal, other than in this docket, the LUC has never before or since imposed a condition requiring a petitioner to obtain certificates of occupancy for all of a project's affordable housing units by a specified date. The LUC does not dispute this fact.

18. Following the 2005 Order, Bridge commenced with substantial work on the Project. The work included the construction of wells, roads, and other infrastructure. ROA 2726-2811, 3808-13.

19. Throughout 2006 and 2007, Bridge periodically appeared before the LUC to give updates on the Project and to explain the progress and compliance with all conditions of the 2005 Order. ROA 2410, 2710, 2824.

20. On October 11, 2007, the County informed Bridge that, based on Sierra Club v. Department of Transportation, 115 Hawaii 299, 167 P.3d 292 (2007) (commonly referred to as the "Superferry" case), decided by the Hawaii Supreme Court a few months earlier, an Environmental Impact Statement ("EIS") would now be required for the Project, thus causing an unforeseen delay in development. ROA 2882.

21. Bridge began the lengthy process of conducting the environmental assessment and progressed until the County Planning Department issued an Environmental Impact Statement Preparation Statement ("EISPN") defining the scope of the assessment required for the environmental assessment. ROA 2830-81.

III. THE LUC ENTERS AN ORDER TO SHOW CAUSE

22. On December 9, 2008, the LUC issued a written Order to Show Cause ("Order to Show Cause") based on an alleged failure "...to perform according to the conditions imposed and to the representations and commitments made to the [LUC] in obtaining reclassification of the Subject Area and in obtaining amendments to conditions of reclassification." ROA 2971-2976.

23. The Order to Show Cause alleged that Bridge failed "...to provide no fewer than 385 affordable housing units within the Petition Area that meet or exceed all applicable County of Hawaii affordable housing standards and substantially comply with representations made to the Commission." ROA 2973.

24. The Order to Show Cause specifically stated that "the Commission will conduct a hearing on this matter in accordance with the requirements of chapter 91, Hawaii Revised Statutes, and subchapters 7 and 9 of chapter 15-15-, Hawaii Administrative Rules." ROA 2974.

25. On December 31, 2008, the County submitted to the LUC a letter opposing the Order to Show Cause and reclassification of the Property's land use district boundary:

> The County of Hawaii (the "County") respectfully submits this letter in support of Bridge Aina Le`a LLC's request to maintain its Land Use Commission ("LUC") classification for the Aina Le`a project site in Waikoloa, Hawaii. The County's support is based on its determination that the Aina Le`a project is **appropriate and consistent with the County's General Plan.**

ROA 2887 (emphasis added).

IV. THE PROJECT IS ASSIGNED TO DW AINA LE`A DEVELOPMENT, LLC

26. On March 20, 2009, Bridge notified the LUC of its intent to assign the Project to DW, in phases. ROA 3026-93.

27. On April 28, 2009, the County issued final subdivision approval for the affordable housing portion of the Project, which consists of approximately sixty (60) acres. ROA 3237-38.

28. Also on April 28, 2009, the County submitted another letter to the LUC opposing the Order to Show Cause and the reclassification of the Property's land use district boundary:

> Given the potential benefits this project can bring to our community – a mauka-makai connector[]; a back-up water source for the greater South Kohala Coast; a **considerable number of affordable housing units**, including ILWU workforce housing component; and **job creation** within our construction industry – we believe that the public interest would be best served by allowing it to move forward.

ROA 3154 (emphasis added).

29. At an LUC meeting on April 30, 2009, the LUC refused to allow DW the opportunity to participate and refused to hear Bridge's evidence regarding the status of development and response to the Order to Show Cause. ROA 5332, 4/30/2009 Transcript of Proceedings ("Tr.") at 58-72. The LUC then by "voice vote" purported to amend the Property's land use district boundary from the Urban land use district to the Agricultural land use district. Id. at 90-91. The LUC's "voice vote" was never memorialized into a written order.

30. At the meeting, Bridge's counsel strongly objected to the voice vote process because it took place without allowing Bridge or DW the opportunity to present evidence, and violated Bridge and DW's due process rights. ROA 5332, 4/30/2009 Tr. at 69:11-17.

31. Following the April 30, 2009 hearing, DW continued planning and designing the Project's affordable housing, and by August 27, 2009, reported to the LUC that DW had spent $4.5 million in actual costs on the Project, not including the value of any time expended or attorneys' fees. ROA 3164-3355, ROA 5334, 8/27/2009, Tr. at 78-79.

V. THE LUC RESCINDS THE ORDER TO SHOW CAUSE SUBJECT TO A "CONDITION PRECEDENT"

32. On September 28, 2009, the LUC filed its Order Rescinding Order to Show Cause Upon Condition Precedent and Accepting DW Aina Le`a Development, LLC as Co-Petitioner ("2009 Order"). ROA 3898-3913. In its 2009 Order, the LUC found: "With DW Aina Le`a Development, LLC much progress has been made within the last four months. Both the affordable housing component and the anticipated construction jobs are desirable." ROA 3901-02 (emphasis added).

33. Under the 2009 Order, the LUC ordered the following:

> Rescind and vacate the Order to Show Cause adopted on April 30, 2009, provided that as a condition precedent, the Petitioner completes 16 affordable units by March 31, 2010. Further, that the County of Hawaii shall provide quarterly reports to the Land Use Commission in connection with the status of Petitioner's progress in complying with this condition.

ROA 3902. Quarterly reports were submitted by the County in December 2009, March 2010, June 2010, October 2010, and December 2010. ROA 3914-25; 3953-78; 4083-85; 4252-54; 4582-84.

34. The 2009 Order did not define the term "complete" as the LUC had done in the past with other terms in its orders. Although the LUC had the opportunity to do so, it failed to state its supposed intention that the term "complete" required certificates of occupancy.

35. The 2009 Order also accepted DW as Co-Petitioner in the docket. ROA 3902.

VI. THE LUC ENTERS AN ORDER FINDING FAILURE TO MEET CONDITION PRECEDENT FOR RESCINDING ORDER TO SHOW CAUSE

36. Following the 2009 Order, DW continued to actively proceed with preparation of plans and studies, including building plans and studies for the EIS. DW also continued work on infrastructure and proceeded forward with building the affordable housing townhomes for the Project. ROA 3927-35, 3952.

37. On March 31, 2010, the County submitted to the LUC its second progress report, in which the County reported that a site visit was conducted on March 3, 2010, and DW "has done substantial work on Phase I of this project which includes the improvements for the affordable housing area." ROA 3953-3978. The County report detailed the construction and other work completed on the Project. Id.

38. On June 10, 2010, DW submitted its quarterly report. ROA 4054-4075. DW reported that it had completed the first two townhome buildings with 8 affordable housing units each by March 31, 2010, in accordance with the LUC's new condition in the 2009 Order. "These buildings have completed exteriors and interiors. The electrical and plumbing for the units in these buildings is completed and ready to hook up. The units have cabinets and appliances installed." ROA 4055. DW reported that it had spent more than $19 million in proceeding with the Project as of June 2010. ROA 4056.

39. DW also reported that the following work had been completed:

a. Mass grading for the affordable housing townhouse sites has been completed;
b. Finish grading for 44 affordable housing foundation pads is complete (foundation slabs for 8 buildings (64 townhouse units) have been done);
c. The immediate access roadway has been graded;
d. Internal roadways have been graded;
e. The initial engineering for the roads and utilities has been completed;
f. The water supply tank sites and service corridors have been identified;

g. Improvements have been made to the existing water well and a 750,000 gallon collection reservoir for dust control during construction has been built;
h. The necessary utility easements have been identified and topographic maps have been completed (Installation of site utilities is in progress);
i. Plan Approval by the Planning Department for the affordable housing component was issued on November 30, 2009;
j. Groundbreaking for the affordable housing phase was held on September 22, 2009.

ROA 4060.

40. On June 24, 2010, the County submitted its third progress report to the LUC, again confirming that DW has "done substantial work on Phase I of this project which includes the improvements for the affordable housing area." ROA 4083-4085. The County detailed the work that had been completed, including completion of the framing, electrical and plumbing inspections for the first 16 townhouse units, which are located in two 8-unit buildings, and the final inspection for the two buildings. Id. at 4083. The County stated that the "16 townhouse units were completed by March 31, 2010." Id.

41. On July 1, 2010, an LUC meeting was conducted. At the meeting, DW's representatives detailed the extent of work done on the 60-acre affordable housing site in the last eleven months, which included construction of the utility and sewer lines by Goodfellow Brothers, Inc.; identification and staking of offsite easement corridors and wastewater treatment plant; completed construction of 16 townhouse units by Truestyle Pacific Builders, LLC; substantial and partial construction of an additional 72 townhouse units; and construction of pads for an additional 24 townhouse complexes. ROA 5336, 7/1/2010 Tr. at 35:4-36:5.

42. At the conclusion of the July 1, 2010 meeting, the LUC voted to keep the Order to Show Cause pending and "...enter a finding that the condition precedent requiring 16 affordable homes be complete by March 31, 2010 has not been met." ROA 5336, Trans. 7/1/2010 Tr. at 103:11-18.

43. At the July 1, 2010 meeting, the LUC did not define what it meant by "complete" in the 2009 Order.

44. On July 26, 2010, the LUC entered an Order Finding Failure To Meet Condition Precedent For Rescinding Order To Show Cause. ROA 4157-4163. The LUC recognized that "The County of Hawaii stated its position that it believes that DW has satisfied the requirements of the condition precedent by completing construction of 16 affordable units by March 31, 2010." However, the LUC ruled that "Sixteen affordable units have been constructed, but no certificates of occupancy have been obtained." (emphasis added).

45. Specifically, the LUC's order was as follows:

> 1. The Order to Show Cause in this Docket shall remain pending.
> 2. A hearing on the Order to Show Cause shall be scheduled on or after September 17, 2010.
> 3. The November 17, 2010 date for obtaining certificates of occupancy for 385 affordable homes established in the Amended Decision and Order dated November 25, 2005 is a deadline not a goal; and,
> 4. The condition precedent for the rescission of the Order to Show Cause set forth in the LUC's Order filed September 28, 2009, has not been met.

Id.

VII. DW FILES A MOTION TO AMEND CONDITIONS 1, 5, AND 7

46. On August 30, 2010, DW filed a Motion to Amend Conditions 1, 5, and 7 ("2010 Motion to Amend Conditions"). ROA 4169-89.

47. DW's 2010 Motion to Amend Conditions summarized all of the actions taken by DW on the Project in 2010, including 32 separate actions to move the Project forward. These actions included construction of two "town villas" buildings; completion of utility engineering for the Phase 1 town villa site; completion of the draft environmental impact statement and submission of the same to the County for review; and continuation of the Capital Asia program to raise construction funds from investors. ROA 4172-75.

48. On November 8, 2010, DW filed an Exhibit II to Motion to Amend Conditions 1, 5, and 7, which was a letter from the County accepting the Project's Final EIS, which was to be published in the next issue of The Environmental Notice. ROA 4256-58.

49. On November 12, 2010, Bridge filed a Motion Re: Order to Show Cause, identifying multiple violations of the relevant statutes and administrative rules by the LUC, including violations of HRS Chapters 91, 92, and 205, and Hawaii Administrative Rules ("HAR") Chapter 15, by issuing orders without considering HRS § 205-16 and § 205-17, failing to establish that there was no substantial commencement of use in violation of HRS § 205-4; and improperly holding a hearing on a two-year old Order to Show Cause in violation of the 365-day limit under HRS § 205-4 and HAR § 15-15-51(e). ROA 4283-84.

50. On November 16, 2010, DW filed a Joinder in Bridge's Motion Re: Order to Show Cause. ROA 4358-4363. DW reiterated that "[b]y July 2010, more than $20,000,000 had been expended for plans and construction work for the project." ROA 4359.

51. On November 18, 2010, the LUC held a hearing to hear further arguments regarding the Order to Show Cause. ROA 4390-4440. At the hearing, 20 members of the Big Island community testified in support of the Project, saying it would provide much needed housing, jobs, infrastructure, and other community benefits. ROA 5337, 11/18/2010 Tr. at 9-45.

52. Also at the hearing, Robert Wessels, Chief Executive Officer of DW, detailed how the long-pending Order to Show Cause had negatively impacted financing for the Project:

> Q. [By Bruce Voss]: And in your testimony previously you reported or talked about some lenders being concerned that you would be growing corn on this property rather than people. So I take it from that that the existing Order to Show Cause has, in fact, been a deterrent to lenders being willing to provide long-term construction or take-out financing?

A. [By Robert Wessels]: Yes, yes. As you can imagine in this type of economy the value of the asset that's used to secure a loan is very important. And with the entitlements that are there the value of the asset is one number. It's significantly lower if it was unentitled.

Q. The spectre, if you will, of the Order to Show Cause and the impacts it's had on financing, was that one of the factors that made it a challenge to complete 385 units by November 17, 2010?

A. It certainly was a factor. The economy, the fact that most of the banks were bankrupt was a big issue. And then the ones that did have money weren't interested in getting into anything that in any way had any controversy. So, yes, it had a factor.

ROA 5337, 11/18/2010 Tr. at 112:5-113:1.

53. At the conclusion of the November 18, 2010 hearing, and after hearing oral argument and testimony, the LUC deferred its ruling on the Order to Show Cause. ROA 5026.

54. On January 6, 2010, DW filed its Supplemental Memorandum in Support of its Motion to Amend Conditions 1, 5, and 7. ROA 4677-89.

VIII. THE LUC VOTES TO AMEND THE PROJECT'S LAND USE BOUNDARY TO THE AGRICULTURAL LAND USE DISTRICT

55. On January 20, 2011, the LUC held a hearing in Waikoloa, Hawaii, regarding the Order to Show Cause. ROA 5338, 1/20/2011 Tr.

56. At the end of the hearing, only five Commissioners voted in favor of a motion to amend the Property's land use district boundary from the Urban land use district to the Agricultural land use district, one vote short of the six affirmative votes required to effect any land use district boundary amendment under Hawaii law. Id. at 132-33. The LUC nonetheless took the position that its voice vote amended the Property's land use boundary, and refused to consider motions challenging the LUC's many procedural irregularities, claiming the motions were now "moot." Id. at 133-34.

57. At meetings on April 8, 2011 and April 21, 2011, more than 15 members of the public—including contractors, laborers, union leaders, and Big Island residents—urged the LUC to reconsider and allow the Project to move forward and succeed. ROA 5340, 4/8/2011 Tr. at 111-31; ROA 5341, 4/21/2011 Tr. at 38-53. LUC members responded by stating that Commissioners needed to impose "consequences" on Bridge and DW for failing to build all 385 affordable housing units by the deadline imposed by the LUC. ROA 5341, 4/21/2011, Tr. at 74:1-4.

58. Based on the vote from the January 20, 2011 hearing, on April 25, 2011, the LUC issued its Order Adopting Proposed Findings of Fact, Conclusions of Law, and Decision and Order Reverting the Petition Area, as Amended as Commission's Final Decision [April 25, 2011] ("Final Order").

59. The LUC also denied Bridge's Motion Re: Order to Show Cause as "moot" based on the Final Order without considering its merits, ROA 4943-4950, and denied DW's Motion to Amend Conditions 1, 5, and 7 without stating a reason. ROA 5244-5251.

CONCLUSIONS OF LAW

The Court makes the following Conclusions of Law. If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be determined as such. The headings are used for organizational purposes only. The Court has considered the conclusions under each heading for all claims.

I. JURISDICTION

1. The Court has personal jurisdiction over the parties.

2. The Court has subject matter jurisdiction pursuant to the Hawaii Administrative Procedures Act, HRS Chapter 91.

3. DW's and Bridge's appeals are timely. HRS § 91-14; McPherson v. Zoning Bd. Of Appeals, 67 Haw. 603, 606, 699 P.2d 26, 29 (1985).

4. Venue is proper in this Court.

II. STANDARD OF REVIEW

5. Pursuant to HRS § 91-14(g), this Court may remand, modify, or reverse the LUC's Final Order. HRS § 91-14 provides in part:

> g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

6. An agency's findings of fact are reviewable under the clearly erroneous standard to determine if the agency decision was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record. Ka Pa`akai O Ka`Aina v. Land Use Comm'n, 94 Hawaii 31, 41, 7 P.3d 1068, 1078 (2000) (citation omitted).

7. A circuit court should not "hesitate to overturn" Findings of Fact as clearly erroneous when the court is "left with a definite and firm conviction that a mistake has been

made." Curtis v. Bd. of Appeals, 90 Hawaii 384, 400, 978 P.2d 822, 838 (1999) (quoting Britt v. U.S. Auto. Ass'n, 86 Hawaii 511, 516, 950 P.2d 695, 700 (1998)).

8. An agency's conclusions of law are freely reviewable to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law. Ka Pa`akai O Ka`Aina, 94 Hawaii at 41, 7 P.3d at 1078 (citation omitted).

9. The interpretation of a statute is a question of law reviewable *de novo*. Id. (citation omitted).

III. THE LUC EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED HRS CHAPTER 205

10. The LUC was created by the Hawaii State Legislature in 1961. The LUC's purpose was to "preserve, protect, and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare." Pono v. Molokai Ranch, Ltd., 119 Hawaii 164, 188, 194 P.3d 1126, 1150 (App. 2008) (quoting legislative text of Act).

11. The enabling statute, HRS Chapter 205, granted the LUC authority to establish land use regulations for the major classes of uses and to establish the boundaries of the districts for these uses. Id. The responsibility of enforcing the land use classification districts adopted by the LUC was expressly delegated to the counties. Id. at 189, 194 P.3d at 1151; see also Lanai Co. v. Land Use Comm'n, 105 Hawaii 296, 318, 97 P.3d 372, 394 (2004).

12. HRS Chapter 205 expressly delegates the power to enforce land use conditions, and zoning, to the counties. See HRS § 205-5 ("Except as herein provided, the powers granted to counties under section 46-4 shall govern the zoning within the districts[.]"); HRS § 205-12 ("The appropriate officer or agency charged with the administration of county

zoning laws shall enforce within each county the use classification districts adopted by the [LUC] and the restrictions on use[.]"; HRS § 205-15 ("Except as specifically provided by this chapter and the rules adopted thereto, neither the authority for the administration of chapter 183C nor the authority vested in the counties under section 46-4 shall be affected.")

13. In Lanai Co., the Hawaii Supreme Court held: "The power to enforce LUC's conditions and orders . . . lies with the various counties. . . . [L]ooking to the express language of HRS § 205-12, it is clear and unambiguous that enforcement power resides with the appropriate officer or agency charged with the administration of county zoning laws, namely the counties, and not the LUC." Lanai Co., 105 Hawaii at 318, 97 P.3d at 394. The Hawaii Supreme Court noted: "If the legislature intended to grant the LUC enforcement powers, it could have expressly provided the LUC with such power." Id.

14. In this case, the LUC erred as a matter of fact and law in concluding that it possessed the authority to sanction Bridge and DW with reclassification of the Property to the Agricultural land use district without consideration of the factors required for land use district boundary changes pursuant to HRS §§ 205-16 and 205-17. In its actions in this case, the LUC lost sight of its mission. The LUC acted inconsistently with HRS Chapter 205 and case law, which require the LUC to maintain a broad focus on state-wide zoning while leaving enforcement details to the county.

15. The LUC's enforcement of Condition 1 (which imposed a development benchmark) without considering the factors required for land use boundary changes pursuant to HRS §§ 205-16 and -17, violated the LUC's authority under HRS Chapter 205, and infringed on the County's enforcement powers.

16. The challenge that the LUC faces when it chooses to impose construction benchmarks as conditions is that it must then consider any noncompliance with those benchmarks in a much broader context than the county would in evaluating components of a development.

17. The danger in the approach taken by the LUC in this case is that the more itemized and specific conditions it imposed, the more discretion it vested in itself, thereby creating more and more uncertainty in the process. To allow the LUC to impose and then to enforce detailed conditions that are traditionally delegated to the county would cause a two-tiered system of zoning in derogation of the mandates of HRS Chapter 205, and would cause Chapter 205 to essentially collapse upon itself.

18. While the Court does not find that the LUC may never impose specific dates or benchmarks or impose specific affordable-housing requirements because they are governmental functions, if the LUC is going to enforce these conditions, it must do so within a much broader context, and that context is found in HRS §§ 205-16 and -17. In this case, the LUC failed to adhere to this broader context.

19. Another reason the Court will not find that the LUC may never impose specific benchmarks is that, as the LUC argued, one of the stated purposes of imposition of conditions under HRS Chapter 205 is to hold petitioners to their word of representations. However, if the LUC is going to hold the developer to specific representations as part of a reclassification, it must look at this much larger picture, as it is statutorily mandated to do, and which it failed to do in this case.

20. Accordingly, the Court finds that the LUC violated and exceeded its authority under HRS Chapter 205.

IV. THE LUC VIOLATED HRS § 205-4(H)

21. HRS § 205-4(h) provides:

> No amendment of a land use district boundary shall be approved unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and part III of this chapter, and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17. Six affirmative votes of the commission shall be necessary for any boundary amendment under this section.

HRS § 205-4(h).

22. The Final Order is a land use district boundary amendment subject to HRS § 205-4(h) as the "reversion" from the Agricultural land use district to the Urban land use district amends the Property's land use district boundary.

23. The LUC violated HRS § 205-4(h) by failing to find upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of HRS § 205-2 and part III of HRS Chapter 205, and consistent with the policies and criteria established pursuant to HRS §§ 205-16 and 205-17.

24. The LUC further violated HRS § 205-4(h) by failing to obtain six affirmative votes to amend the land use district boundary.

25. At the January 20, 2011 meeting, only five commissioners of the LUC voted in favor of a motion amending the Property's land use district boundary based on the Order to Show Cause.

26. The LUC's January 20, 2011 Motion failed to pass and is invalid because it did not obtain six affirmative votes as required under HRS § 205-4(h).

27. Accordingly, the Court finds that the LUC violated HRS § 205-4(h).

V. THE LUC VIOLATED HRS § 205-16

28. All actions of the LUC, including any action taken on an Order to Show Cause, must conform to the Hawaii State Plan. HRS § 205-16 expressly provides that "No amendment to any land use district boundary ***nor any other action*** by the land use commission ***shall*** be adopted unless such amendment or other action conforms to the Hawaii state plan." (emphasis added.) See Town v. Land Use Comm'n, 55 Haw. 538, 544, 524 P.2d 84, 88 (1974) (interpreting the word "shall," as used in HRS § 205-4 regarding time limits for a boundary amendment, as mandatory).

29. As the statutory language applies to all actions of the LUC, the LUC was required to conform with the Hawaii State Plan even if the Final Order is not deemed a land use district boundary amendment within the meaning of HRS § 205-4(h).

30. In this case, the LUC's own prior Decisions and Orders for this Project in Docket A87-617 demonstrate the matters that the LUC was required to consider, and the findings that the LUC was required to make, in order to comply with HRS § 205-16. The 1989 and 1991 Decisions and Orders expressly stated that the "proposed reclassification conforms with the objectives and policies set forth in the Hawaii State Plan Chapter 226, HRS[.]" ROA 296, ¶ 123, and ROA 644, ¶ 165.

31. Further, the LUC previously found with regard to the Project:

> Petitioner's Project conforms with the State Plan's encouragement of housing development, especially affordable housing. Where housing conflicts with agricultural goals, the State Plan Priority Guidelines favor housing if the affected agricultural lands are marginal or nonessential. Besides diversified housing opportunities, the proposed Project will also provide diversified employment opportunities through the proposed commercial development, golf course, and public facilities.

ROA 296-297, ¶ 123, and ROA 644-645, ¶ 165 (emphasis added).

32. The LUC's 1989 and 1991 Decisions and Orders further recognized:

> The State Plan encourages decentralizing growth from Oahu to appropriate areas on the Neighbor Islands. The proposed Project conforms to this population objective by providing housing on one of the Neighborhood Islands. The project also conforms with other location guidelines set forth in the State Plan: adequate public facilities already exist or can be reasonably provided, the land has marginal agricultural value, the site is nearly contiguous to existing urban land, the site contains no critical environmental resources, and the site is not located on the shoreline or other scenic area.

ROA 298, ¶ 123; ROA 645, ¶ 165 (emphasis added).

33. The 1991 Order also recognized that "[t]he property is not suitable for agriculture and there are no agricultural activities on the site." ROA 650.

34. There are no findings of fact or conclusions of law in the Final Order, nor any evidence in the record, indicating that the LUC considered the Hawaii State Plan.

35. The LUC did not consider the evidence and testimony presented by the parties, the County, and the community of the importance of this Project to the Hawaii economy, and the importance of providing housing opportunities and economic opportunities in line with the goals and objectives of the Hawaii State Plan.

36. During the Order to Show Cause proceeding, both in their respective pleadings and oral argument, Bridge and DW repeatedly argued to the LUC that its proposed action was contrary to the Hawaii State Plan and violated HRS § 205-16. ROA 5338, 1/20/2011 Tr. at 61:7-14 ("Under [HRS] 205-16 all action by this Commission, that's what the statute says, all action by the Commission must conform to the Hawai`i State Plan without exception."); ROA 4295, Bridge's Motion Re: Order To Show Cause [11/12/10] ("every action of the Commission must comply with the Hawaii State Plan"). The LUC plainly disregarded the submissions during the contested case hearing, and disregarded these points as being "moot" after five commissioners voted to amend the Property's land use district boundaries on January 20, 2011. ROA 4947.

37. Accordingly, the Court finds that the LUC violated HRS § 205-16.

VI. THE LUC VIOLATED HRS § 205-17

38. Under HRS § 205-17, the LUC is required to specifically consider the following factors, among others:

> (1) The extent to which the proposed reclassification conforms to the applicable goals, objectives, and policies of the Hawaii state plan and relates to the applicable priority guidelines of the Hawaii state plan and the adopted functional plans;
>
> (2) The extent to which the proposed reclassification conforms to the applicable district standards;
>
> ...
>
> (B) Maintenance of valued cultural, historical, or natural resources;
>
> ...
>
> (E) Provision for employment opportunities and economic development; and
>
> (F) Provision for housing opportunities for all income groups, particularly the low, low-moderate, and gap groups;
>
> ...
>
> (5) The county general plan and all community, development, or community development plans adopted pursuant to the county general plan, as they relate to the land that is subject of the reclassification petition...

39. The LUC failed to consider any of the factors set forth in the statute and thereby violated HRS § 205-17.

40. The LUC previously has found, in the 1991 Order, that the land in the Project's Petition Area is unsuitable for agricultural use. See ROA 0300 ("Petitioner's proposed reclassification conforms to ... the Urban District Boundaries..."); ROA 0650 ("The Property is not suitable for agriculture and there are no agricultural activities on the site."). There was no

evidence submitted in the Order to Show Cause proceeding that the land in the Project's Petition Area is suitable for agricultural use.

41. There was no evidence submitted in the Order to Show Cause proceeding that the LUC's prior determination that the Property is not suitable for agricultural uses was incorrect.

42. In its Final Order, the LUC did not consider any of the factors set forth in HRS § 205-17.

43. The LUC must comply with HRS § 205-17 in order to amend the Property's land use district boundary from the Urban land use district to the Agricultural land use district.

44. Accordingly, the Court finds that the LUC violated HRS § 205-17.

VII. THE LUC VIOLATED HRS § 205-4(G) – FAILURE TO CONCLUDE THE OSC WITHIN 365 DAYS

45. Under HRS § 205-4(a), "any department or agency of the State … county … or any person with a property interest … may petition the land use commission for a change in the boundary of a district." Under HRS § 205-4(g), "Within a period of not more than three hundred sixty-five days after the proper filing of a petition … the [LUC] by filing findings of fact and conclusions of law shall act to approve the petition, deny the petition, or to modify the petition."

46. Under HAR § 15-15-51(e), "The hearing may be continued or reopened by the [LUC] when necessary … and the continued or re-opened hearing shall not extend beyond three hundred sixty-five days from the date the petition is deemed properly filed." HAR § 15-15-51(e).

47. The purpose of the 365-day statutory limitation is to expedite the state land use decision-making process. Conf. Com. Rep. No. 52 on S.B. No. 15 (Hawaii 1995). The Legislature imposed the 365-day limitation upon the LUC, recognizing that "[p]roblems arise where proceedings before the [LUC] are unduly lengthy which results in increased costs to the parties involved." SCRep. 2 on S.B. No. 15 (Hawaii 1995).

48. The Hawaii Supreme Court determined that statutory time limitations imposed on LUC actions are mandatory. See Town v. Land Use Comm'n, 55 Hawaii 538, 542, 524 P.2d 84, 87-88 (1974) (holding that similar time limitations contained in HRS §§ 205-3 and 205-4 and the applicable Land Use Regulations at that time were mandatory and not directory).

49. Here, the LUC's "petition" for purposes of changing the Property's land use district boundary pursuant to HRS § 205-4 (*i.e.*, the Order to Show Cause) was filed on December 9, 2008. However, findings of fact and conclusions of law concerning the LUC's Order to Show Cause were not filed by the LUC until April 25, 2011, approximately 863 days after the LUC issued the Order to Show Cause and far in excess of the 365-day maximum mandated by HRS § 205-4(g). There was no legal basis to keep the Order to Show Cause pending for such an extended period of time.

50. The unlawfully-extended Order to Show Cause placed DW in a difficult, if not impossible position, forcing DW to attempt to comply with the LUC's conditions while the Order to Show Cause remained looming over the Project far beyond the statutory period. As found above, the Order to Show Cause negatively impacted the Project's ability to obtain financing to construct the affordable housing units.

51. Any hearings conducted by the LUC after December 9, 2009 (*i.e.*, after more than 365 days) were in violation of HRS § 205-4(g) and HAR § 15-15-51(e). Accordingly,

the Final Order and the LUC's four hearings on the Order to Show Cause beyond the statutory 365-day limit, held on July 1, 2010, November 18, 2010, January 20, 2011, and April 8, 2011, violated the applicable statutes and must be reversed.

VIII. THE LUC VIOLATED HRS CHAPTERS 91 AND 205 AND HAR CHAPTER 15 BASED ON IMPROPER PROCEDURES

52. The Order to Show Cause proceeding was a contested case proceeding pursuant to HRS Chapter 91. Accordingly, the LUC must follow the procedures set forth in HRS Chapter 91. Alejado v. City & County of Honolulu, 89 Hawaii 221, 230, 971 P.2d 310, 319, 971 P.2d 310 (App. 1998).

53. The LUC also must comply with its governing statute, HRS Chapter 205, and its administrative rules, HAR Chapter 15, in conducting a contested case hearing under HRS Chapter 91. Coulter v. State, 116 Hawaii 181, 185, 172 P.3d 493, 497, 172 P.3d 493 (2007) (recognizing the rule that "government must follow the rules it sets out for itself" and that where the legislature has delegated the creation of guidelines for an agency to enact, a state agency is not "free to ignore the guidelines it has established"); Ramon-Sepulveda v. I.N.S., 743 F.2d 1307, 1310 (9th Cir. 1984) ("It is a well-known maxim that agencies must comply with their own regulations."); Sameena Inc. v. U.S. Air Force, 147 F.3d 1148, 1153 (9th Cir. 1998) ("Where a prescribed procedure is intended to protect the interests of a party before the agency, "even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.").

54. In this case, the LUC disregarded the requirements of HRS Chapters 91 and 205, and its administrative rules. Instead of following these statutes and rules, the LUC implemented a rolling and continuing Order to Show Cause procedure that not only extended far beyond the 365-day period required by HRS § 205-4(g), but also ignored the required procedures, and created new procedures that were not already established.

55. In the 2009 Order, the LUC attempted to keep the Order to Show Cause alive by rescinding and vacating the Order to Show Cause subject to a "condition precedent,

[that] the Petitioner **completes** 16 affordable units by March 31, 2010." ROA 3092 (emphasis added).

56. The 2009 Order is essentially a modification of conditions under HAR § 15-15-94.

57. HAR § 15-15-94 provides:

> (a) If a petitioner, pursuant to this subsection, desires to have a modification or deletion of a condition that was imposed by the commission, or imposed pursuant to section 15-15-90(e) or (f), or modification of the commission's order, the petitioner shall file a motion in accordance with section 15-15-70 and serve a copy to all parties to the boundary amendment proceeding in which the condition was imposed or in which the order was issued, and to any person that may have a property interest in the subject property as recorded in the county's real property tax records at the time that the motion is filed.
>
> (b) For good cause shown, the commission may act to modify or delete any of the conditions imposed or modify the commission's order.
>
> (c) **Any modification or deletion of conditions or modifications to the commission's order shall follow the procedures set forth in subchapter 11**.

HAR § 15-15-94 (emphasis added).

58. Thus, if the LUC wanted to amend its conditions as it did in this case, the LUC was required to comply with HAR § 15-15-94, and to follow the procedures set forth in HAR Chapter 15, Subchapter 11. The LUC failed to follow these procedures and therefore violated HAR § 15-15-94.

59. Further, when Bridge, DW, and the County submitted evidence that the first 16 affordable units were "completed" by March 31, 2010, and, therefore, complied with this new condition in the 2009 Order, the LUC took the position that "completed" meant that the Petitioner had obtained certificates of occupancy for these units, and reinstated the Order to Show Cause. ROA 4157-63.

60. The Court finds that the term "complete" as it was used by the LUC in the 2009 Order is ambiguous. The LUC asserts that "complete" means having a certificate of occupancy. DW, Bridge and the County all claim the affordable-housing requirements were "completed" pursuant to their understanding of that term.

61. The LUC had the opportunity to state its supposed intention regarding the term "complete," as it had done so in the past with other terms in its orders, but did not do so in this instance. Therefore, each party was left on its own devices to interpret the term "complete." The LUC, as the drafter of the condition, created the ambiguity.

62. The Court will interpret this provision against the LUC and find that DW had completed sixteen affordable housing units by March 31, 2010, in compliance with the 2009 Order. Therefore, the LUC was incorrect as a matter of law in reinstating the Order to Show Cause based on a failure of a condition precedent under the 2009 Order.

63. Accordingly, based on the LUC's improper attempt to amend the conditions and the LUC's unilateral interpretation of this condition, the LUC's decision reinstating the Order to Show Cause upon a finding a failure of a condition precedent was erroneous. The LUC improperly reinstated the Order to Show Cause and failed to follow any of the procedures necessary to initiate a new and lawful Order to Show Cause.

64. Accordingly, the Court finds that the LUC violated HRS Chapters 91 and 205 and its administrative rules in failing to follow the required procedures in conducting the contested case hearing.

IX. THE LUC VIOLATED BRIDGE'S AND DW'S DUE PROCESS RIGHTS

65. The Fourteenth Amendment to the United States Constitution and Article I, Section 5, of the Hawaii Constitution provide that no person shall be deprived of "life, liberty,

or property without due process of law[.]" U.S. Const. amend. XIV, § 1; Haw. Const. art. I, § 5. Under Hawaii law, due process is an important concern when landowners' property rights are affected by reversionary land use regulation consequences. Cf. Perry v. Planning Commission of Hawaii County, 62 Haw. 666, 682, 619 P.2d 95, 106 (1980) (In an analogous matter concerning special use permitting, "the language declared that a failure to comply with the condition could result in a reversion to a former use. Under such circumstances, due process for the permit holders is a relevant, if not a primary, consideration."). See also Scrutton v. Sacramento County, 275 Cal. App. 2d 412, 420 (Cal. App. 1969) ("Automatic reversion would violate the procedural directions of state law.").

66. Further, "disjointed, repetitive and unfair procedures" designed to deprive a developer of its rights can violate due process. Del Monte Dunes v. Monterey, 920 F.2d 1496, 1506 (9th Cir. 1990); see also Application of Terminal Transp., Inc., 54 Haw. 134, 139, 504 P.2d 1214, 1217 (1972) (reversing and remanding decision of Public Utilities Commission for failure to follow its own rules). See also Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (recognizing that procedural due process requires notice and an opportunity to be heard at a meaningful time and in a ***meaningful manner*** before governmental deprivation of a significant property interest); In re Herrick, 82 Hawaii 329, 349, 922 P.2d 942, 962 (1996) (recognizing a violation of substantive due process where the claimant proves that "the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.").

67. The LUC's conduct, as described herein and as set forth in the Record on Appeal and in the parties' briefs, constitutes a denial of procedural and substantive due process

of law under Article 1, Sections 5 and 20 of the Hawaii Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

68. The LUC violated Bridge and DW's due process rights based on: (1) its rolling and continuing Order to Show Cause that extended far beyond the time period allowed by law; (2) the LUC's conduct that was in derogation of the statute and rules established to protect Bridge and DW; and (3) the LUC's attempt to create a new procedure that was not already established.

69. The LUC denied Bridge and DW their rights to a meaningful opportunity to be heard. Moreover, the Final Order was by its terms arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

70. Accordingly, the Court finds that the LUC violated Bridge and DW's procedural and substantive due process rights.

X. THE LUC VIOLATED BRIDGE'S AND DW'S EQUAL PROTECTION RIGHTS

71. "The Equal Protection Clause protects persons from a state's intentional and arbitrary discrimination and strives to ensure that all persons similarly situated are treated alike." HRPT Properties Trust v. Lingle, 715 F. Supp. 2d 1115, 1141 (D. Hawaii 2010) (declaring Hawaii state statute unconstitutional). "Individuals that constitute a 'class of one' are protected by this clause." Id. (citing Lazy Y Ranch, Ltd. v. Behrens, 546 F.3d 580, 592 (9th Cir. 2008)). To succeed on a 'class of one' claim, Bridge and DW "must demonstrate that the Commissioners: (1) intentionally (2) treated [Bridge and DW] differently than other similarly situated property owners, (3) without a rational basis." Gerhart v. Lake County, Montana, 637 F.3d 1013, 1022 (9th Cir. 2011) (citing Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2008)). "Although [Bridge and DW] must show that the Commissioners' decision was

intentional, [they] need not show that the Commissioners were motivated by subjective ill will." Id.

72. The LUC intentionally treated Bridge, DW, and this Project differently, and less favorably, than other petitioners in cases involving facts and circumstances substantially similar to this case.

73. First, the LUC refused to amend the Project's affordable housing condition to permit Bridge and DW to build affordable housing in compliance with County requirements, as the LUC had done with at least seven other major project dockets as described above. Instead, for Bridge, DW, and this Project, the LUC for the first time purported to mandate completion of a specific number of affordable housing units by a specific date. Bridge, DW, and this Project constitute a "class of one" with respect to the affordable housing requirement imposed by the LUC in this case.

74. Second, in at least six other major project dockets that were made part of the Record on Appeal, the petitioners have failed to fulfill their representations to the LUC; have failed to meet their projected development timeframes; and have failed to build any housing units, much less any affordable housing units. In those six other major project dockets before the LUC, no construction whatsoever is ongoing. In at least three of those dockets, the petitioners have not complied with conditions imposed by the LUC. Yet, unlike this case, the LUC in those dockets has not taken any action to change those projects' land use district boundaries back to agricultural use. These projects include: (1) West Beach Estates, A90-655—ROA 9990-10041; (2) Y-O Limited Partnership (Kaloko Heights), A81-525—ROA 7122-42; (3) Halekua Development Corp. (Royal Kunia Phase II), A92-683—ROA 14261-14334; (4) Palauea Bay

Partners, A93-689—ROA 12415-45; (5) Lihue Plantation Co., Ltd., A94-703—ROA 13091-171; and (6) Haseko (Hawaii), Inc., A89-645—ROA 9113-9146.

75. Bridge and DW have shown that the LUC treated them in a materially, adversely different manner than other similarly situated developers, and that the LUC did so intentionally and without any rational basis for the differential treatment.

76. Accordingly, the Court finds that the actions of the LUC in its imposition and enforcement of the specific affordable housing requirement violates the equal protection rights of Bridge and DW under the Equal Protection Clause of the United States Constitution and the State of Hawaii Constitution.

XI. ZONING ESTOPPEL / VESTED RIGHTS

77. In reaching the decision on this appeal, the Court is not addressing the zoning estoppel or vested rights claims by Bridge and DW. The Court finds it unnecessary to address this issue because the procedures utilized by the LUC fell short of the necessary procedure and violated various constitutional and statutory provisions.

78. Furthermore, the Court has not been able to adequately evaluate those claims based on the evidence and record presented to the Court.

79. Accordingly, without ruling on the substance or merits of Bridge and DW's claims for zoning estoppel and vested rights, the Court finds that Bridge and DW are not entitled to a reversal of the LUC's Final Order based on the doctrines of zoning estoppel or vested rights.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED AND ADJUDGED:

A. The Final Order is reversed and vacated in its entirety.

B. The Court declares that the Final Order violates constitutional and statutory provisions, exceeds the LUC's authority and jurisdiction, was made upon unlawful procedures, was affected by other errors of law, was clearly erroneous in view of the reliable, probative, and substantive evidence on the whole record, and was arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

C. The Final Order, the 2008 Order to Show Cause and all other orders issued by the LUC that are inconsistent with this decision are hereby rescinded and voided.

DATED: Kealakekua, Hawaii, June 14, 2012.

JUDGE OF THE ABOVE-ENTITLED COURT

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FILED

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

2012 JUN 15 AM 8:05

L. KITAGAWA CLERK
THIRD CIRCUIT COURT
STATE OF HAWAII

DW AINA LE`A DEVELOPMENT, LLC,  Co-Petitioner-Appellant,  vs.  BRIDGE AINA LE`A, LLC, Co-Petitioner-Appellee, vs. STATE OF HAWAI`I LAND USE COMMISSION; STATE OF HAWAII OFFICE OF PLANNING; COUNTY OF HAWAII PLANNING AGENCY, Appellees.	Civil No. 11-1-0112K (Agency Appeal) AMENDED FINAL JUDGMENT
BRIDGE AINA LE`A, LLC,  Appellant,  vs.  STATE OF HAWAII LAND USE COMMISSION; STATE OF HAWAII OFFICE OF PLANNING; DW AINA LE`A DEVELOPMENT, LLC; COUNTY OF HAWAII, Appellees.	Civil No. 11-1-0969-05 (Agency Appeal)

AMENDED FINAL JUDGMENT

On December 16, 2011, this Court heard oral arguments on this consolidated administrative agency appeal filed pursuant to Hawaii Revised Statutes ("HRS") Chapter 91 by Appellants DW Aina Le`a Development, LLC ("DW") and Bridge Aina Le`a, LLC ("Bridge") of Appellee State of Hawai`i Land Use Commission's ("LUC") April 25, 2011 Order Adopting Proposed Findings of Fact, Conclusions of Law, and Decision and Order Reverting the Petition Area, As Amended As Commission's Final Decision ("Final Order"). At the oral arguments, DW was represented by Lorraine H. Akiba; Bridge was represented by Bruce D. Voss and Michael C. Carroll; the LUC was represented by William J. Wynhoff; Appellee County of Hawai`i Planning Department ("County") was represented by William V. Brilhante; and Appellee State of Hawai`i Office of State Planning ("Office of Planning") did not appear at the hearing.

The Court entered its AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER REVERSING AND VACATING THE STATE OF HAWAII LAND USE COMMISSION'S FINAL ORDER on June 15, 2012.

NOW THEREFORE IT IS HEREBY ORDERED AND ADJUDGED, pursuant to HRCP 72(k), that judgment be entered in favor of DW and Bridge and against the LUC.

There are no remaining claims, parties, or issues in this matter.

DATED: Kealakekua, Hawaii, JUN 15 2012.

JUDGE OF THE ABOVE-ENTITLED COURT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document will be served on the following persons by the JEFS system on the date it is filed:

Bruce D. Voss, Esq.
Matthew C. Shannon, Esq.

Peter J. Hamasaki, Esq.
Dayna H. Kamimura-Ching, Esq.

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Lincoln Ashida, Esq.
William Brilhante, Esq.

DATED: Honolulu, Hawai‘i, August 26, 2013.

/s/ William J. Wynhoff
WILLIAM J. WYNHOFF
Attorney for STATE OF HAWAI‘I LAND USE COMMISSION