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THIRD CIRCUIT COURT
STATE OF HAWAII

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) 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

EXHIBIT A

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. This case is remanded to the LUC to immediately: (i) rescind and void the Final Order; (ii) rescind and void the 2008 Order to Show Cause; and (iii) rescind and void all other orders issued by the LUC that are inconsistent with this decision.

DATED: Kealakekua, Hawaii, MAR 0 6 2012.

/s/ Elizabeth A. Strance (seal)
JUDGE OF THE ABOVE-ENTITLED COURT