CAAP NO. 13-0000091

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

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 PLANNING DEPARTMENT, Appellees.	) 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, CIRCUIT COURT OF THE FIRST CIRCUIT)) HONORABLE ELIZABETH A. STRANCE) HONORABLE RHONDA A. NISHIMURA)
BRIDGE AINA LE`A, LLC, Appellant/Appellee, vs.	) Civil No. 11-1-0969-05 (RAN)) (Agency Appeal))

STATE OF HAWAI`I LAND USE COMMISSION,	)
Appellee/Appellant,	)
and	)
STATE OF HAWAI`I OFFICE OF PLANNING and COUNTY OF HAWAI`I,	)
Appellees,	)
and	)
DW AINA LE`A DEVELOPMENT, LLC;,	)
Appellee/Appellant.	)

APPELLEE BRIDGE AINA LE`A, LLC'S ANSWERING BRIEF

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CERTIFICATE OF SERVICE

Of Counsel:

BAY LUNG ROSE & HOLMA

BRUCE D. VOSS 6532-0
Attorney at Law
A Law Corporation
MICHAEL C. CARROLL 7583-0
Attorney at Law
A Law Corporation
MATTHEW C. SHANNON 9043-0
1099 Alakea Street, 16th Floor
Honolulu, Hawaii 96813
Telephone: (808) 523-9000
Facsimile: (808) 533-4184

Attorneys for Appellee
BRIDGE AINA LE`A, LLC

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APPELLEE BRIDGE AINA LE`A, LLC'S ANSWERING BRIEF

I. INTRODUCTION

For the first time in its 50-year history, the State of Hawaii Land Use Commission ("Commission") changed the land use district boundaries of a property from urban use to agricultural use while affordable housing was being constructed on the Property.[1] In the administrative appeal, the Circuit Court ruled that the Commission violated almost every applicable statute, administrative rule, and constitutional provision governing the Commission's amendment of land use district boundaries. After an exhaustive examination of the record, the Circuit Court correctly found that the Commission "lost sight of its mission" when it killed this Project,[2] and that the Commission "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." The Circuit Court concluded that the Commission's conduct was "clearly erroneous" and therefore reversed and vacated the Commission's Final Order based on the following:

- The Commission exceeded its statutory authority and violated HRS Chapter 205;
- The Commission violated HRS § 205-4(h);
- The Commission violated HRS § 205-16;
- The Commission violated HRS § 205-17;
- The Commission violated HRS 205-4(g)—failure to conclude the order to show cause within 365 days;
- The Commission violated HRS Chapters 91 and 205 and HAR Chapter 15 based on improper procedures;
- The Commission violated Bridge's due process rights; and
- The Commission violated Bridge's equal protection rights.

[1] "The Property" refers to the 1,060 acres of land at Waikoloa, South Kohala, which was the Petition Area in Commission Docket A87-617.

[2] "The Project" refers to the mixed-use residential and retail development, commonly known as Aina Le`a, planned and approved for the Property.

See JEFS 7 at 1898,[3] attached hereto as Appendix ("Appx.") A at 19-35.[4] **Any one** of these conclusions of law on its own is sufficient to uphold the Circuit Court's ruling. Therefore, if this Court affirms the Circuit Court's ruling on just one of these bases, then the Commission's entire decision and order amending the Property to agriculture use ("Final Order") must be reversed and vacated. JEFS 13 at 1005. For the reasons stated below, this Court should affirm the Circuit Court's reversal of the Commission's unprecedented, unlawful, and unwise action.

II. STATEMENT OF THE CASE

A. Property Reclassified From Agriculture to Urban Use

On January 17, 1989, the Commission reclassified the Property from the agricultural land use district into the urban land use district. JEFS 9 at 368. On July 9, 1991, the Commission issued its Amended Findings of Fact, Conclusions of Law, and Decision and Order (the "1991 Order"). JEFS 9 at 1990. The 1991 Order expressly found "upon a preponderance of the evidence," among other things, that (1) the proposed reclassification conforms with the objectives and policies set forth in the Hawaii State Plan Chapter 226, HRS; and (2) the project will provide diversified housing and employment opportunities. JEFS 9 at 2034.

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.
>
> 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.

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[3] Citations to the record on appeal and transcripts are noted as the volume number on the JEFS filing system, followed by the .pdf page number of each file.

[4] The Circuit Court's order reversing the Commission's Final Order is attached as Appendix A for this Court's convenience.

> 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.

JEFS 9 at 2041-42. The 1991 Order did not contain any time limits for compliance for any of the fifteen (15) conditions. Id. at 2041-46. Instead, the 1991 Order provided for "anticipated" time periods, and there was no condition imposed by the Commission requiring the owner to meet its "anticipated" schedule, nor was there a deadline imposed for completion of construction. Id. at 2001. In addition, the 1991 Order expressly found that: (i) "The Property is not classified by the State Department of Agriculture's Agricultural Lands of Importance to the State of Hawaii classification system," id. at 1997, (ii) "The Land Study Bureau rated the soils of the Property as Class E (very poor)," id., (iii) "[t]he Project will not impact existing agricultural activities since none exist on the Property[,]" id. at 2001, and (iv) "[t]he Property is not suitable for agriculture and there are no agricultural activities on the site." Id. at 2039.

B. Commission Amends 1991 Order

On September 1, 2005, Bridge, successor in interest as owner of the Property, filed a Motion to Amend Conditions 1 and 8 of the 1991 Order (the "2005 Motion to Amend"). JEFS 9 at 2843. 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." Id. at 2845 (emphasis added).

The Commission previously had granted substantively identical requests for at least seven other major projects. Key documents from these project dockets are included in the record on appeal, and are summarized below:

- Halekua Development Corp., A92-683 (60 percent requirement amended "to the satisfaction of the City & County of Honolulu") [JEFS 72 at 14425[5]];

- Haseko (Hawaii), Inc., A89-645 (60 percent requirement amended "to the satisfaction of the County of Hawaii") [JEFS 72 at 9319];

[5] JEFS volume 72 references the contents of a CD provided by the parties to the Circuit Court, which was then transmitted and included in the record on appeal. See JEFS 72 at 13.

- West Beach Estates, A90-655 (60 percent requirement amended "to the satisfaction of the City & County of Honolulu") [JEFS 72 at 10159];

- Amfac/JMB Hawaii, Inc., A90-658 (60 percent requirement amended "to the satisfaction of the County of Maui") [JEFS 72 at 11123-24];

- C. Brewer Properties, Inc., A92-680 (60 percent State H.F.D.C. requirement amended "as determined by the County of Hawaii") [JEFS 72 at 11400];

- Kukui`ula Development Corp., A 93-696 (State H.F.D.C. requirement amended "to the satisfaction of the County of Kauai") [JEFS 72 at 11931]; and

- Mililani Town, Inc., A87-609 (50 percent requirement amended "to the satisfaction of the City & County of Honolulu") [JEFS 72 at 10159].

The State of Hawaii Office of Planning and County of Hawaii supported Bridge's 2005 Motion to Amend and "the ability of the Counties to determine the location, distribution, and type of affordable housing required with a development." JEFS 9 at 2763; 11 at 359. In fact, the Commission's own staff report admitted that Bridge's request to amend the affordable housing condition was "reasonable" and consistent with the "past position" of the Commission "to defer to the counties to satisfy the affordable housing requirements." JEFS 15 at 1954.

On November 25, 2005, the Commission entered its decision and order dated July 9, 1991 (the "2005 Order"). JEFS 11 at 367-84. However, despite overwhelming support for the 2005 Motion to Amend, the Commission did not grant Bridge's request that affordable housing be "consistent and coincide" with County of Hawaii requirements and administered by and through the County of Hawaii. Instead, the 2005 Order amended the 1991 Order 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.

JEFS 11 at 378-79.

The Commission 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 Commission does not dispute this fact**.

Following the 2005 Order, Bridge commenced with substantial work on the Project to fulfill the Commission's draconian requirements. The work included the construction of wells, roads, and other infrastructure. JEFS 11 at 1272-1357, 2353. Throughout 2006 and 2007, Bridge appeared before the Commission to explain the progress of the Project and compliance with the 2005 Order. Id. at 958, 1256, 1370. However, Bridge **never** unequivocally represented that the Project would be completed by a specific deadline or pursuant to rigid schedule. Instead, Bridge repeatedly emphasized "anticipated" and flexible timeframes and for completion of the Project based on normal contingencies in the construction industry. For example, Bridge stated the following at a Commission meeting in 2005:

> "**If** everything went well, **if** all the permits, **if** everything, weather permitting, we signed a contract within 30 days, the closest we could get to a super pad site for the affordable housing would be two years. My three years gives us some cushion to get to the point of final grading to where we can actually start the foundation pouring of the affordable homes…"

JEFS 13 at 1978 (emphasis added). In fact, the Commission's findings admitted that various contingencies and risks could affect the Project's development timeline and delay construction of the affordable housing units. See, e.g., JEFS 9 at 2000-01;[6] JEFS 13 at 1008.[7]

In October 2007, one such unexpected contingency occurred. 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 would now be required for the Project, thus causing an unforeseen delay in development. JEFS 11 at 1428. This was an entirely unexpected development, but Bridge began the lengthy process of conducting the environmental assessment. JEFS 11 at 1376-1427.

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[6] "Petitioner **anticipates** that it will take approximately one year, or until 1992 to obtain necessary governmental approvals. It is **anticipated** that: …it would take six years to complete construction within the Property."

[7] "…it was reasonable to obtain certificates of occupancy within five years of the date of the 2005 Order, '**taking into account possible delays for permitting and other contingencies.**'" (emphasis added).

C. Commission Enters An Order to Show Cause

On December 9, 2008, the Commission 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 [Commission] in obtaining reclassification of the Subject Area and in obtaining amendments to conditions of reclassification." JEFS 11 at 1518-23. 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." Id. at 1521. The County of Hawaii strongly opposed the Order to Show Cause and reclassification of the Property's land use district boundary. See JEFS 11 at 1699.[8]

On March 20, 2009, Bridge notified the Commission of its intent to assign the Project to DW, in phases. JEFS 11 at 1574. However, the Commission refused to allow DW to participate in the next hearing and refused to hear Bridge's evidence regarding the status of development and response to the Order to Show Cause. JEFS 15 at 608-22. Without any notice, the Commission then by "voice vote" purported to amend the Property's land use district boundary from urban to the agricultural district, without giving the parties an opportunity to present evidence. Id. at 640-41. Shockingly, Commissioner Lezy admitted that the Commission's action went beyond the facts of the Project and instead was intended to send a message to other developers: "This is somewhat beyond just the matter that's before us. This has to do with the integrity of the land use process in the State of Hawaii." JEFS 15 at 617. At the hearing, Bridge's counsel vehemently objected to the Commission's action. JEFS 15 at 619. Despite the improper "voice vote" purportedly reclassifying the Property, DW continued planning and designing the Project's affordable housing, and by August 27, 2009, had spent $4.5 million in actual costs on the Project, not including the value of any time expended or attorneys' fees. JEFS 15 at 888.

D. The Commission Rescinds the Order To Show Cause Subject to "Condition Precedent"

On September 28, 2009, the Commission filed its Order Rescinding Order to Show Cause Upon Condition Precedent and Accepting DW Aina Le`a Development, LLC as Co-Petitioner ("2009 Order"). JEFS 11 at 2443-57. In its 2009 Order, the Commission admitted:

[8] The County of Hawaii stressed the Project's benefits of "affordable housing units" and "job creation. JEFS 11 at 1699. Further, on April 28, 2009, the County issued final subdivision approval for the sixty (60) acre affordable housing portion of the Project. Id. at 1782.

"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**." Id. at 2446-47 (emphasis added).

Under the 2009 Order, the Commission 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.

JEFS 11 at 2447 (emphasis added). The 2009 Order did not define the term "complete," nor did it specify that it understood "complete" to mean obtaining certificates of occupancy from the County of Hawaii. Id. However, the 2009 Order put the burden on the County of Hawaii to "provide quarterly reports" to the Commission "in connection" with the status of Petitioner's progress. Id. Following the 2009 Order, DW continued the planning and construction of the Project, specifically building the affordable housing townhomes. JEFS 11 at 2471-79.

On March 31, 2010, the County submitted a progress report detailing the progress of construction and stating DW "has done substantial work on Phase I of this project which includes the improvements for the affordable housing area." JEFS 11 at 2497.

On June 10, 2010, DW informed the Commission that it had completed the first two townhome buildings with 16 total affordable housing units each by March 31, 2010, in full compliance with 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." JEFS 11 at 2598-2619. The pictures DW submitted to the Commission clearly show that construction of the 16 units was complete. See 11 JEFS 4069-75, attached hereto as Appx. B.[9] In total, DW had spent more than $19 million on the Project as of June 2010. JEFS 11 at 2613.

DW also reported that the following work had been completed: (i) Mass grading for the affordable housing townhouse sites has been completed; (ii) Finish grading for 44 affordable housing foundation pads is complete (foundation slabs for 8 buildings (64 townhouse units) have been done); (iii) The immediate access roadway has been graded; (iv) Internal roadways have been

[9] Appendix B includes the original color copies of the photographs attached to DW's June 10, 2010 status report. These photographs clearly show that the 16 affordable units were completed.

graded; (v) The initial engineering for the roads and utilities has been completed; (vi) The water supply tank sites and service corridors have been identified; (vii) Improvements have been made to the existing water well and a 750,000 gallon collection reservoir for dust control during construction has been built; (viii) The necessary utility easements have been identified and topographic maps have been completed (Installation of site utilities is in progress); (ix) Plan Approval by the Planning Department for the affordable housing component was issued on November 30, 2009; and (x) Groundbreaking for the affordable housing phase was held on September 22, 2009. JEFS 11 at 2605-06.

The County of Hawaii submitted further reports and testimony confirming DW's progress and the completion of the 16 affordable units by March 31, 2010. Id. at 2627-29. On July 1, 2010, at a Commission meeting, DW detailed the extent of work done on the 60-acre affordable housing site in the last eleven months, which included: (1) completed construction of 16 townhouse units; (2) substantial and partial construction of an additional 72 townhouse units; and (3) construction of pads for an additional 24 townhouse complexes. JEFS 15 at 1212-13. Despite that construction—and contrary to the progress reports submitted by the County of Hawaii— at the conclusion of the July 1, 2010 meeting, the Commission 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." JEFS 15 at 1280. Bridge and DW were stunned.

Despite more than $20 million invested into the Project, as well as the construction of the 16 affordable housing units, the Commission still sought to reclassify the Property to agriculture use. On July 26, 2010, the Commission entered an Order Finding Failure To Meet Condition Precedent For Rescinding Order To Show Cause. JEFS 11 at 2700. This order admitted 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." Id. at 2703.[10] However, despite the County's determination that the 16 affordable units were "complete," the Commission ruled 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.

[10] The County of Hawaii's determination was especially important because the 2009 Order tasked the County with reporting on Petitioners' compliance with the affordable housing condition.

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.

On August 30, 2010, DW filed a Motion to Amend Conditions 1, 5, and 7. JEFS 11 at 2713. 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). JEFS 13 at 116-17. On November 16, 2010, DW filed a Joinder in Bridge's Motion Re: Order to Show Cause, reiterating that "[b]y July 2010, more than $20,000,000 had been expended for plans and construction work for the project." Id. at 191. At the Commission's November 18, 2010 meeting, 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. JEFS 15 at 1317-53. Also at the hearing, Robert Wessels, Chief Executive Officer of DW, detailed how the Commission's long-pending Order to Show Cause had negatively impacted financing for the Project. JEFS 15 at 1420-21. The Commission deferred ruling on the Order to Show Cause.

E. The Final Order Reclassifies the Property from Urban to Agriculture Use

On January 20, 2011, the Commission held a further hearing in Waikoloa, Hawaii, regarding the Order to Show Cause. JEFS 15 at 1471. 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 urban to agricultural, one vote short of the six affirmative votes required to effect any land use district boundary amendment under HRS 205-4(h). Id. at 1603-05. The Commission nonetheless took the position that its vote amended the Property's land use boundary. Id.[11]

[11] At the meeting, Commissioner Kanuha recognized that enforcement of the conditions should be designated to the counties: "The statute and our rules are pretty clear. Once it goes into the Urban District it's the full call of the County. And it's a home rule deal." JEFS 15 at 1600.

The Commission held further hearings to adopt the vote as a final order. The public **pleaded** with the Commission to allow the Project to move forward and succeed. JEFS 15 at 1747-65, 1857-73. There was no significant public opposition to the Project. However, the Commission insisted it needed to impose "consequences" on Bridge and DW for failing to build all 385 affordable housing units by the "deadline" (despite the fact that 16 units had been constructed in compliance with the Commission's 2009 Order). JEFS 15 at 1893.

On April 25, 2011, the Commission issued its Final Order, which was based on the earlier "voice vote." JEFS 13 at 1005. The Commission also denied Bridge's Motion Re: Order to Show Cause as "moot" without ever considering its merits, JEFS 13 at 781, and denied DW's pending Motion to Amend Conditions **without ever stating a reason**. JEFS 13 at 1084.

Bridge and DW timely appealed the Final Order, and the agency appeals were eventually consolidated in the Circuit Court of the Third Circuit, Honorable Elizabeth A. Strance presiding.[12] On December 16, 2011, the Circuit Court heard oral arguments on the consolidated agency appeal. See JEFS 55 at 1. On June 15, 2012, the Circuit Court entered its second amended order reversing and vacating the Final Order. See JEFS 7 at 1887; see also JEFS 7 at 1898, Appx. A. The Commission timely appealed.

III. SUMMARY OF THE ARGUMENT

This Court must affirm the Circuit Court's order for the following reasons:

1. The Commission's Final Order failed to comply with the procedural and substantive requirements of a boundary amendment under HRS § 205-4(a);

2. The Final Order does not consider or conform to the Hawaii State Plan, in plain violation of HRS § 205-16;

3. The Final Order violated HRS § 205-4(g) because the Order to Show Cause was pending for more than 365 days, and the Commission never found that Bridge failed to make "substantial commencement of use of the [Property];"

4. The Commission willfully failed and refused to consider the factors and criteria required by HRS § 205-4(h);

[12] The Commission incorrectly relies on the Circuit Court's ruling on DW's motion to stay the Final Order. See Opening Brief, pg. 3. However, the ruling on DW's motion to stay is not relevant to these proceedings, not subject to this appeal, and was decided before the Circuit Court fully heard the merits of Bridge's and DW's administrative appeals. Accordingly, this Court should ignore any references or citations to the motion to stay.

5. The Commission violated HRS § 205-17 by failing to consider the specified factors for all "land use commission decision-making criteria";

6. The Circuit Court properly ordered that the agency record on appeal include key documents from similarly situated project dockets that were treated differently than Bridge in its docket;

7. The Final Order purports to enforce conditions imposed by the Commission, in plain violation of the County of Hawaii's statutory authority under HRS §§ 205-12, 205-15, and 46-4.

8. The Commission violated Bridge's Due Process rights under the U.S. and Hawaii State Constitutions, because Bridge was denied a meaningful right to be heard and was subjected to "disjointed, repetitive, and unfair procedures."

9. The Commission violated the Equal Protection Clause of the U.S. and Hawaii State Constitutions, by intentionally discriminating against Bridge and the Project, as shown by the evidence in numerous other project dockets included in the record; and

10. Condition 1 of the 2005 Order was an unconstitutional land development condition.

IV. 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 Hawaii 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:
>
> (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-Haw., LLC v. Rainbow Dialysis, LLC, 130 Haw. 95, 102-103, 306 P.3d 140, 147, 148 (2013).

V. ARGUMENT

A. The Final Order Was A Boundary Amendment

The Commission spends most of its brief arguing that a boundary amendment "reclassification" pursuant to HRS § 205-4(a) has different requirements than a so-called "reversion" pursuant to § 205-4(g). The Commission's assertion is classic Orwellian doublespeak: it vehemently argues that Commission action amending the Project's boundary is somehow not a boundary amendment. But regardless of the Commission's verbal tap dancing, it is not disputed that a "reclassification" and "reversion" accomplish the same result: they both change land use district boundaries from one classification to another.

The Circuit Court properly ruled that the Commission's action was a boundary amendment reclassification governed by HRS § 205-4(a). Calling the Commission's action a "reversion" does not change the legal substance or effect of the action. Indeed, the Commission's Final Order amends the "land use classification" of the Property by changing the entire "Petition Area of approximately 1,060 acres" to the agricultural district and amending the "1989 Order" to "include the reversion of the Petition Area to its former land use classification." See JEFS 13 at 1020. The Property was classified as urban, and the Commission's Final Order changed it to agriculture. Id. Therefore, the Commission's Final Order, by its express language, amends, or changes, the Property's land use district boundaries.

In fact, the plain language of the Commission's governing statute supports the Circuit Court's finding that the Commission's action was a "reclassification." In interpreting a statute, the Court's foremost obligation is to "'ascertain and give effect to the intention of the legislature, which is obtained primarily from the language contained in the statute itself." Alejado v. City & County of Honolulu, 89 Hawaii 221, 231, 971 P.2d 310, 320 (App. 1998) (citing Mendes v. Hawaii Ins. Guar. Ass'n, 87 Hawaii 14, 17, 950 P.2d 1214, 1217 (1998)). HRS Chapter 205 only describes **one process** for changing a property's land use classification. The Commission here

simply ignored those standards under the guise of "setting an example" or imposing "consequences."

Further, the Commission's prior admissions and its own maps confirm that its Final Order effects a "boundary amendment" within the meaning of HRS Chapter 205.

First, the Commission is bound by its own Order to Show Cause, which incorporated the substantive and procedural requirements of a land use reclassification. The Order to Show Cause specifically invoked subchapters -7 and -9 of the Commission's administrative rules, the same rules applicable to reclassifying properties and amending land use boundaries. The Order to Show Cause provided:

> Accordingly, 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.

JEFS 11 at 1521. HAR § 15-15-, subchapter 7, the very same guidelines invoked by the Order to Show Cause, governs hearing procedures for boundary amendment petitions.[13] HAR § 15-15- subchapters 7 and 11 contain no other procedures for co-called "reversions." As such, the **Commission admitted it was bound by the boundary amendment procedures in HAR § 15-15-subchapter 7**.

The Commission now claims, in direct contravention of its own Order to Show Cause, that it has unfettered authority under HRS Chapter 205 to "revert" the land use classification of a property, without regard for any statutory or procedural safeguards. See Opening Brief, pg. 23. Indeed, the Commission claims it can "revert" a land use classification even after the land is fully developed; can ignore what is the most suitable use for the land; can ignore the Hawaii State Plan; can disregard any and all procedural or substantive requirements imposed on the Commission; and can change a land use classification to simply enforce "consequences" on a developer or bring in another more favored developer for the project. Of course, the Commission never actually specifies what the procedural requirements of a "reversion" are—because there are none. In the end, the Commission cannot escape its own admission that the Order to Show Cause was to be conducted in accordance with the procedural and substantive requirements of a boundary amendment.

[13] HAR § 15-15-93(c) and (d) state that the "commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7, where applicable," and post hearing procedures "shall conform to subchapters 7 or subchapter 9."

Second, the Commission's own maps exemplify that the Property's land use boundaries were amended from urban to agriculture. The Commission maintains classification maps pursuant to HRS Chapter 205 showing the district boundaries approved by the Commission. See HRS § 205-14 ("Upon the adoption of district boundaries, certified copies of the classification maps showing the district boundaries shall be filed with the department of taxation."). Prior to the Final Order, the land use district boundary maps for the island of Hawaii showed the boundaries of the Property in pink, designating urban use. See JEFS 13 at 841-42. The Final Order amended and reclassified the boundaries on its maps to show the Property in white, designated as agricultural use. Id. There is no special coding or color for a "reversion."

In sum, the Commission's purported distinction between a "reclassification" and a "reversion" does not pass the proverbial "duck test": i.e., "if it walks like a duck, if it sounds like a duck, it's a duck[.]" Hurston v. Director, Office of Workers Compensation Programs, 989 F.2d 1547, 1549 (9th Cir. 1993) (stating that while "we should not necessarily be bound to the principle 'if it walks like a duck, if it sounds like a duck, it's a duck,' if it appears to be a pier, if it is built like a pier and adjoins navigable waters, it's a pier."). The Commission's action amended the Property's land use boundaries, regardless of the label the Commission slaps on it.

B. The Commission Violated HRS § 205-16 and Failed to Conform To The Hawaii State Plan

The Circuit Court correctly ruled that the Commission violated HRS § 205-16 because the Commission's Final Order on its face did not comply with 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). The statute's plain meaning is clear: HRS § 205-16 mandates **every action of the Commission must conform to the Hawaii State Plan**. This mandate applies to any action by the Commission, by whatever name or label. Even assuming *arguendo* the Commission's action was a "reversion" and not subject to the reclassification requirements under HRS § 205-4(a), the Final Order was undoubtedly "any other action" by the Commission pursuant to HRS § 205-16. Therefore, the Commission's Final Order, by whatever name, must consider and conform to the Hawaii State Plan.

The Commission's Final Order and underlying record glaringly lack any attempt by the Commission to comply with the Hawaii State Plan. The Hawaii State Plan is codified under HRS Chapter 226, and its stated function is to "improve the planning process in this state, to increase the effectiveness of government and private actions, to improve coordination among different agencies and levels of government, to provide for wise use of Hawaii's resources and to guide the future development of the state." HRS § 226-1. The Hawaii State Plan includes the following directives to State land use agencies in making land use determinations:

1. The State goal to achieve a "strong, viable economy, characterized by stability, diversity, and growth." HRS § 226-4(1).

2. The policy of the State to manage "population growth statewide in a manner that provides increased opportunities for Hawaii's people" and encourage "an increase in economic activities and employment opportunities on the neighbor islands consistent with community needs and desires." HRS § 226-5(b).

3. The State objective in "[s]timulat[ing] the development and expansion of economic activities" and to "[f]oster[ing] a business climate in Hawaii … that is conducive to the expansion of existing enterprises and the creation and attraction of new business and industry." HRS § 226-6.

4. The State objective to "[e]ffectively accommodate the housing needs of Hawaii's people", "[s]timulate and promote feasible approaches that increase housing choices for low-income, moderate-income, and gap-group households" and "[f]acilitate the use of available vacant, developable, and underutilized urban land for housing." HRS § 226-19.

5. The State priority guidelines to effect desired statewide growth, including exploring the possibility of "making available urban land … to encourage the provision of housing to support selective economic and population growth on the neighbor islands." HRS § 226-104(a)(5).

See also HRS § 226-52(b)(2)(D) ("Land use decisions made by state agencies shall be in conformance with the overall theme, goals, objectives, and policies, and shall utilize as guidelines the priority guidelines contained within this chapter, and the state functional plans approved pursuant to this chapter."). There is **nothing** in the Hawaii State Plan that permits the Commission to use land use proceedings as a way to impose "consequences" on disfavored developers. Such retaliatory action is in fact contrary to the stated purpose of the Hawaii State Plan, which is to "… provide for wise use of Hawaii's resources and to guide the future development of the state." HRS § 226-1.

The shortcomings of the Commission's Final Order are especially obvious when it is compared to the Commission's 1991 Order for the Project, which expressly found that:

- "the proposed reclassification conforms with the objectives and policies set forth in the Hawaii State plan Chapter 226, HRS,"
- the "Project conforms with the State Plan's encouragement of housing development, especially affordable housing,"
- the "Project conforms [to the State Plan's] population objective by providing housing on one of the Neighborhood Islands;
- "the land has marginal agricultural value,"
- "the site in nearly contiguous to existing urban land," and
- "[t]he property is not suitable for agriculture and there are no agriculture activities on the site."

Compare JEFS 9 at 601 with JEFS 13 at 1005.

By comparison, the Commission's Final Order at issue on this appeal does not include **any testimony or other evidence** that supports the goals, objectives, and policies of the Hawaii State Plan. Nor does it contain any findings of fact that dispute the findings made by the Commission itself in the 1991 Order. Instead, the record contains ample evidence presented by the parties, the County of Hawaii, and the community, of the importance of this Project to the Hawaii economy, and the importance of the Project providing housing opportunities and economic opportunities consistent with the goals and objectives of the Hawaii State Plan. See, e.g., JEFS 11 at 1699;[14] 13 at 237-409;[15] 13 at 635;[16] 15 at 1873-75;[17] 15 at 1274.[18]

Because the Final Order itself is completely silent as to the Hawaii State Plan, there is no way for this Court to track the Commission's belated justification. See Kilauea Neighborhood

[14] Letter from William P. Kenoi, Mayor of the County of Hawaii, stating support for the Project and citing the Project's numerous benefits to the community.

[15] Petition signed by more than 500 people supporting the Project and opposing reclassifying the Project to agriculture district.

[16] Letter from Representative Cindy Evans supporting the Project.

[17] Testimony of the County of Hawaii Planning Director citing the Project's progress.

[18] Statement of County of Hawaii attorney that "[t]o take this Project back from an urban to an agricultural use is creating a big hole in the whole General Plan of the County's use of this area."

Ass'n v. Land Use Comm'n of State of Hawaii, 7 Haw. App. 227, 230, 751 P.2d 1031, 1034 (App.1988) ("An agency's findings must be sufficient to allow the reviewing court to track the steps by which the agency reached its decision."). The Commission did not even *try* to conform to the Hawaii State Plan, and the Commission's Opening Brief does not even argue, or attempt to claim, that it complied with the Hawaii State Plan. The Commission's silence is deafening. It is undisputed the Commission violated HRS 205-16, therefore the Circuit Court's ruling must be upheld.

C. The Commission Violated HRS § 205-4(g)

The Commission also violated multiple portions of HRS § 205-4(g), **which is the very same subsection that contains the Commission's alleged authority to "revert" the Property**. The Commission cannot justify its action based upon HRS § 205-4(g), and then willfully disregard other portions of that very same subsection. Therefore, even if HRS § 205-4(g) did create a separate basis for the Commission to "revert" the Property (as the Commission now claims), the Commission still violated at least two other requirements for such a reclassification under § 205-4(g).

1. The Order to Show Cause Proceeding Lasted More Than 365 Days

The Commission's Final Order must be reversed because the Order to Show Cause was pending for more than 365 days. The Circuit Court properly found that HRS § 205-4(g) and HAR § 15-15-51(e) provide that a hearing on proposed action to amend land use district boundaries cannot exceed three 365 days from the date the order to show cause is filed. This timeline in the statute and rules is mandatory and included to give certainty to land use proceedings and to avoid reclassification requests from being stalled indefinitely. Town, 55 Haw. at 544, 524 P.2d at 88 (holding that time period under HRS § 205-4(b) is mandatory and stating that interested parties to the hearing "should not be placed in a state of limbo at the discretion of the applicant or the [Commission], and the time limitations prescribed by HRS § 205-4 and LUC Regulation 2.35 insures the protection of both the applicant and the adjoining landowners at both extremes"). The Commission's does **not** dispute that the lengthy Order to Show Cause proceedings cast an indefinite black cloud over the Project and significantly impacted the Project's financing. See JEFS 15 at 1420.

The Order to Show Cause was entered by the Commission on December 9, 2008. JEFS 11 at 1518. The Final Order, which purportedly reclassified the Project's land use boundaries

from Urban District to Agricultural District, was entered by the Commission on April 25, 2011. JEFS 13 at 1005. The Order to Show Cause was pending for approximately 863 days, far in excess of the 365 day maximum mandated by HRS § 205-4(g) and HAR § 15-15-51(e). Therefore, the Final Order and its purported reclassification of the Project from urban district to agricultural district is invalid.

The Commission argues that the Order to Show Cause was not constrained by the 365 day limit under 205-4(g) because "reversion is not a reclassification." However, the Order Show Cause specifically admits 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**." JEFS 11 at 1521 (emphasis added). The Commission therefore **admitted it would comply with HAR § 15-15-51(e)**, which limits a hearing to no more than 365 days. The Order to Show Cause proceeding was pending for 863 days, more than twice the 365-day maximum. Since the Commission expressly stated what rules governed its procedure, it cannot now change its position after the fact. See Tortorello v. Tortorello, 112 Hawaii 219, 224, 145 P.3d 762, 767 (App. 2006) ("Litigants cannot successfully assume such inconsistent positions.") (citation omitted).

2. The Commission Failed to Establish That Bridge and DW Did Not Make Substantial Commencement of the Use of the Land

The record is clear that DW constructed the Project's first 16 affordable housing units by March 2010. See, e.g., JEFS 13 at 414-16; 11 at 2598-99; Appx. B. HRS § 205-4(g) requires the Commission to show a lack of substantial commencement of the use of the Project land as a condition precedent to any "reclassification" for failure to comply with alleged representations.

Here, the record shows beyond any doubt that Bridge and DW have commenced substantial use of the land. Bridge and DW have spent tens of millions of dollars on development of the Project—substantial infrastructure has been constructed, substantial public improvement projects completed and dedicated to the County, mass-excavation has occurred, and **buildings have been fully constructed**. See JEFS 13 at 414-16;[19] 11 at 2598. In fact, the underlying record shows that substantial commencement of the use of the land had occurred well before the Commission's Order to Show Cause was issued. JEFS 11 at 1292-1355. Further, by January 20, 2011, despite

[19] Letter from County of Hawaii Planning Director stating that "16 townhouse units were completed by March 31, 2010."

having a pending Order to Show Cause encumbering the property, Bridge and DW went forward with substantial work developing the Property, including: (1) construction of two townhouse buildings containing 16 units; (2) substantial construction of an additional 72 townhouses; (3) completion of townhouse foundation pads for a total of 432 units; (4) obtaining building permits for all 432 townhouse units; (5) grading of access road from Queen Kaahumanu Highway; (6) construction of the utility and sewer lines by Goodfellow Brothers, Inc.; (7) identification and staking of offsite easement corridors and a wastewater treatment plant; (8) and purchase and delivery of a modular wastewater treatment plant; (9) acceptance of the Final EIS by the County of Hawaii; and (10) purchase and delivery of a modular wastewater treatment plant. JEFS 13 at 414-16; JEFS 11 at 2598-2619. **The pictures of the completed buildings do not lie.** See Appx. B.

The Commission does not dispute that Bridge and DW have made substantial commencement of the use of the Property for the Project. Instead, the Commission argues that the "substantial commencement" requirement does not apply to its Final Order because it was a "reversion" under HRS § 205-4(g). However, this argument is severely flawed. Even assuming *arguendo* that the Commission has the right to "revert" the Property's land use designation under 205-4(g), the Commission would still need to comply with the other portions of 205-4(g), which **on its face requires finding an absence of "substantial commencement of the use of the land in accordance with such representations" as a condition precedent for such Commission action.** The Commission never made that finding prior to its Final Order, because it knew it could not credibly make such a finding. Any action taken in the Final Order under the guise of § 205-4(g) (including the so-called "reversion") is therefore invalid as a matter of law.

D. The Commission Violated HRS § 205-4(h)

HRS §205-4 governs amendments (or changes) to district boundaries involving land areas greater than fifteen acres. 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 (emphasis added); see also HAR § 15-15-77(a) (reciting these requirements as the decision-making criteria for boundary amendments). The Commission's Final Order makes no such

findings required by HRS § 205-4(h), and that by itself is a basis to uphold the Circuit Court's ruling.

Under the plain language of the statute, HRS § 205-4(h) applies to **all** "amendment[s] of a land use district boundary," regardless of how the amendment was presented to or approved by the Commission. The legislature could have limited the effect of HRS § 205-4(h) by specifically limiting the application of HRS 205-4 to petitions for boundary amendments or reclassification. The Legislature did not do so. See Camara v. Agsalud, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984) ("cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that **no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute**") (emphasis added).

Given that the Legislature deliberately chose not to limit HRS § 205-4(h) to "petitions" or "reclassifications" of boundary amendments, HRS §§ 205-2 and 205-4(h) necessarily must apply to **all** Commission actions which amend a property's land use district boundaries—**including** this action to amend the Property's land use district boundaries from the urban district to the agricultural district, via an Order to Show Cause.

Under HRS § 205-4, the Commission must specifically consider the factors listed in HRS § 205-17 when amending or changing a property's land use classification.[20] See Appx. C. The Circuit Court correctly held that the Commission failed to consider the factors set forth in HRS § 205-17.

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[20] **§205-17 Land use commission decision-making criteria.** In its review of any petition for reclassification of district boundaries pursuant to this chapter, the commission shall specifically consider the following:

(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 representations and commitments made by the petitioner in securing a boundary change.

The Commission made extensive findings in its 1991 Order that the Property was appropriately designated for urban use, and agricultural use was inappropriate: "**The Property is not suitable for agriculture and there are no agricultural activities on the site**." JEFS 9 at 2093 (emphasis added). Here, however, the Commission's Final Order made no findings whatsoever that would warrant reversal of the Commission's previous findings in the 1991 Order pursuant to HRS 205-17. Specifically, the Final Order: **(1)** did not find by a clear preponderance of the evidence that the proposed agricultural use boundary was reasonable (because the Commission knew that barren lava rock is not suitable for agriculture activities); and **(2)** did not evaluate whether the reclassification was consistent with the policies and criteria that the Commission was required to consider under HRS § 205-17. See, e.g., HRS § 205-17(3) (Commission must consider promoting "housing opportunities for all income groups, particularly, low, low-moderate, and gap groups."). The Commission's blatant disregard for § 205-17—particularly in light of the Commission's prior findings—warrants reversal of its Final Order.

E. The Circuit Court Properly Considered the Record Designated by Bridge

The Commission argues that the Circuit Court erred by allowing Bridge to supplement the administrative appeal record with key documents from similarly situated projects that the Commission treated differently ("Designated Dockets"). See Opening Brief, pp. 24-25. The Commission's argument fails for two simple reasons: (1) Bridge repeatedly cited to the Designated Dockets in the Order to Show Cause before the Commission and thus they became part of the record below; and (2) the Designated Dockets are critical to show that the Commission violated Bridge's constitutional rights, which is a basis for reversal of an agency decision under HRS § 91-14(g).

First, the Designated Dockets were repeatedly cited in the Order to Show Cause proceedings below. See, e.g., JEFS 15 at 1532. HRS § 91-9(e) provides that the record may consist of "Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed." In three filings with the Commission, Bridge cited to and incorporated Commission action (or inaction) from the following Designated Dockets: (1) Y-O Limied Partnership (Kaloko Heights Project), A81-525; (2) Kuilima Resort Expansion Area, A85-595; (3) Kohanaiki Project**,** A86-599; (4) Haseko (Hawaii), Inc., A89-645; (5) West Beach Estates, A90-655 (6) Halekua Development Corp. (Royal Kunia Phase II)**,** A92-683; (7) Palauea Bay Partners (Honua`ula), A93-689; and (8) Lihue Plantation Co., Ltd. (Wailani), A94-703, with regard to

Bridge's Equal Protection claims. JEFS 13 at 574-77. Further, Commissioner Kanuha then cited numerous other dockets where the Commission had amended affordable housing conditions to be consistent with the county affordable housing requirements (as requested by Bridge in its 2005 Motion to Amend): (1) Waikaloa Mauka, LLC, A06-767; (2) The Shopoff Group, L.P., A06-770; (3) Kaupulehu Developments, A93-701; and (4) Forest City Hawaii Kona LLC, A10-788. JEFS 15 at 1882-85. These dockets were all cited during hearings, as well as in written submissions. They were evidence received and were cited by a Commissioner during hearing. Therefore, they are considered part of the record for purposes of the administrative appeal.

Second, the Designated Dockets are key to Bridge's equal protection claim, which is a basis to overturn an agency decision under Hawaii law. HRS § 91-14(g) permits a Court to reverse an agency decision for "violation of constitutional provisions," or "made upon unlawful procedure." Therefore, under § 91-14(a), Bridge has a right to be heard on the constitutional claims that form the foundation for Bridge's administrative appeal. Bridge's administrative appeal alleges fourteen (14) separate Counts requesting reversal of the Final Order, and asserts constitutional violations including denial of equal protection of law and violation of Bridge's due process. JEFS 7 at 913-15. The Designated Dockets unequivocally show that the Commission treated Bridge differently than similarly situated petitioners who have amended their affordable housing requirements and/or not completed (or, in many cases, even started) their affordable housing construction. Any judicial finding that the Commission violated the equal protection clause, due process, or any other constitutional protection would warrant reversal of the Final Order. Therefore, the Circuit Court's order allowing use of the Designated Dockets must be upheld.

F. The Commission Exceeded Its Authority to Enforce Land Use Conditions

The Circuit Court properly ruled that the Commission lost sight of its legislative purpose in attempting to punish Bridge. The Commission was established 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). The enforcement of the Commission's decisions and conditions were delegated to the counties. Id. at 189, 194 P.3d at 1151. The Commission was **never** intended to be a police power, with unchecked authority to "revert" land use classifications whenever a developer got on the Commission's bad side. The Commission essentially wants the power to be judge, jury, and executioner. The results speak for themselves.

After reviewing the underlying record, the Circuit Court gave a harsh assessment of the Commission's actions. The Circuit Court found:

- The Commission "lost sight of its mission."
- "To allow the LUC to impose and then to enforce conditions that are traditionally delegated to the county…would cause Chapter 205 to essentially collapse upon itself."
- "While the Court does not find that the LUC may never impose specific dates or benchmarks… 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."
- "Accordingly, the Court finds that the LUC violated and exceeded its authority under HRS Chapter 205."

The Commission attempts to distinguish the holding of Lanai Co., Inc. v. Land Use Comm'n, trying to show that the Commission has the authority to enact development conditions, police compliance with those conditions, and then enforce those conditions by "reverting" projects that do not comply with such conditions. Opening Brief, pp. 18-19 (citing Lanai Co., Inc. v. Land Use Comm'n, 105 Hawaii 296, 318, 97 P.3d 372, 394 (2004)). The Commission is missing the forest for the trees. The Commission relies on dicta in a series of footnotes in Lanai Co. rather than look at the overall holding of the case. Opening Brief, pp. 21-22. Lanai Co. holds the Commission did not have the authority under HRS Chapter 205 to issue a cease and desist order because such authority was delegated to the counties. 105 Hawaii at 318, 97 P.3d at 394. The Circuit Court correctly interpreted and applied that holding: HRS Chapter 205 expressly delegates the power to enforce land use conditions, and zoning, to the counties. See 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 land use commission and the restriction on use[.]"); see also HRS § 205-5 ("the powers granted to counties under section 46-4 shall govern the zoning within the districts, other than in conservation districts"). The county is in a better position to monitor progress and to enforce any conditions based on its supervision with respect to zoning, use permits, and building permits—all "within the framework of a long-range, comprehensive general plan prepared . . . to guide the overall future development of the county." HRS § 46-4(a).

To be clear, the Circuit Court did not rule that the Commission may never impose development conditions or specific affordable housing benchmarks. Instead, the Circuit Court ruled that the Commission "must look at th[e] larger picture" under the purpose of HRS Chapter 205 that

leaves specific, regulatory authority to the counties and their professional planning departments. Lanai Co., 105 Hawai`i at 318, 97 P.3d at 394 ("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.").

Further, the evidence in the record clearly supports the Circuit Court's ruling that "the LUC erred as a matter of fact and law" when it subverted the County of Hawaii's authority to enforce the land use conditions. The County of Hawaii was already asserting land use enforcement authority over the Project: the Commission does not dispute that the Property was zoned for the Project by the County, and the County granted subdivision approval and building permits for the Project's affordable housing. JEFS 11 at 1782. The County of Hawaii reported to the Commission that Bridge and DW obtained entitlements and permits for the Project, contributing to public amenities, constructed the necessary infrastructure, and built the affordable housing units within timeframes acceptable to the County of Hawaii. See JEFS 13 at 414-16. Despite the County's satisfaction with the Project's compliance at the county level, the Commission directly contradicted the County's authority and land use enforcement responsibility when it issued the Commission's Final Order. The Circuit Court's ruling thus was in accord not only with Lanai Co. but the entire structure and purpose of HRS Chapter 205.

G. The Commission Violated Bridge's Constitutional Rights

1. The Commission Violated Bridge's Due Process Rights

The Circuit Court properly ruled that the Commission violated Bridge's procedural and substantive due process rights under Article 1, Sections 5 and 20 of the Hawaii Constitution and the Fifth and Fourteenth Amendments of the Constitution of the United States. The Commission argues that it was "inappropriate" for the Circuit Court to find that the Commission violated Bridge's constitutional rights. However, the Circuit Court had full authority under HRS § 91-14 to reverse the Final Order due to violations of "constitutional or statutory provisions" and "unlawful procedure." The Circuit Court, like this Court, had the benefit of the entire record before the Commission, as well as written briefing and oral arguments. Further, the Commission never disputed the Circuit Court's authority below to reverse the Commission's Final Order for constitutional violations, therefore the Commission cannot raise that claim for the first time on appeal. See County of Hawaii v. UniDev, LLC, 129 Haw. 378, 387 301 P.3d 588, 597 (2013)

(citing State v. Moses, 102 Haw. 449, 456, 77 P.3d 940, 947 (2003)) ("It is axiomatic that where a party fails to raise an argument before the courts below, that argument may be deemed waived for purposes of appeal.").

It is well established under Hawaii law that "due process principles protect a property owner from having his or her vested property rights interfered with..." Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals, 86 Hawai`i 343, 353-354, 949 P.2d 183, 193-194 (Ct. App. 1997) (internal citation omitted); see also Harris v. County of Riverside, 904 F.2d 497, 501 (9th Cir. 1990) (holding that procedural due process violation was separate and distinct from taking claim). Here, the Circuit Court properly ruled that the Commission violated Bridge's due process rights.

First, the Commission violated Bridge's substantive due process rights. The Commission's conduct—from the first "voice vote" purportedly reclassifying the property all the way to the Commission's Final Order, issued without even considering Bridge and DW's pending motions— "shock[ed] the conscience" and "offend[ed] the community's sense of fair play and decency." See Marsh v. County of San Diego, 680 F.3d 1148, 1154 (9th Circ. 2012). The Commission tries to ignore that this was the first time in its history where it sought to punish a developer by reclassifying property after some of the project's buildings were already constructed. Bridge and DW invested more than $30 million building infrastructure and the 16 affordable housing units demanded by the Commission. Then, through a series of votes that did not even comply with the Commission's own governing statutes and administrative rules, all of that work was taken away, leaving a giant hole in the middle of the County's general plan for urban expansion. Moreover, in an effort to impose "consequences" against Bridge, the Commission reclassified the Property to the agriculture district, even though there was **not one shred of evidence that the Property was suitable for agricultural use.** JEFS 9 at 2039. If these actions do not "shock the conscience," then nothing will.

Second, the Commission violated Bridge's procedural due process rights through the use of "disjointed, repetitive and unfair procedures." 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). The Commission effectively concedes this violation, by not even bothering to argue that the so-called "reversion" complied with the procedural requirements of HRS

§§ 205-4(a), 205-4(g), HRS Chapter 91, and HAR 15-15-7 and -9. The Commission flatly admits that they did not follow any of those procedural standards. See Opening Brief, pg. 23 ("Once that is understood, the circuit court's procedural issues are quickly resolved.").

The Circuit Court correctly found that the Commission forced Bridge to comply with constantly-changing conditions and procedural requirements, which deprived Bridge of a "fair process" regarding a real estate development worth tens of millions of dollars. Appx. A at 31-33. For example, the Circuit Court found that that term "complete" in the 2009 Order was ambiguous, yet the Commission found that the fully constructed units that were built to the satisfaction of the County were not "complete." The Commission created the 16 unit condition, and then still killed the Project after the units were constructed. Now, the Commission has the audacity, after $30 million and years of work, to claim that "…the status of the 16 units is an irrelevant red herring." Opening Brief, pg. 24. The Commission's position is shocking, and only underscores the Commission's unrelenting intent to impose "consequences" on Bridge, rather than following the law.

Further, the Circuit Court properly ruled that Bridge's procedural due process rights were violated by, among others things: (i) the continuing Order to Show Cause that extended more than twice the time period allowed by law; (ii) the Commission's "voice vote" that purported to amend the Property's land use boundary back in March 2009, and left a dark cloud over the Property, JEFS 15 at 640; (iii) the Commission's position that its January 20, 2011 vote to amend the Property's land use boundary was valid even though only five Commissioners voted in favor of reclassification, JEFS 15 at 1603; and (iv) the Commission's denial of Bridge Motion Re: Order to Show Cause as "moot" without considering the merits. JEFS 13 at 781. Therefore, based on its thorough review of the record, the Circuit Court properly ruled that the Commission's "Final Order was by its terms arbitrary and unreasonable," and "violated Bridge and DWs procedural and substantive due process rights." Appx. A at 33.

2. The Commission Violated Bridge's Equal Protection Rights

"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. When a state action does not implicate a fundamental right or a suspect classification, the

plaintiff can establish a 'class of one' claim by demonstrating that it alone 'has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment'. The class of one theory is unusual, as a plaintiff need not show that a defendant discriminated against a group with whom the plaintiff shares similar characteristics, but rather that a defendant harbors animus against the plaintiff in particular and has treated the plaintiff arbitrarily." 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 "must demonstrate that the Commissioners: (1) intentionally (2) treated [Bridge] 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)).

The Commission wrongly claims that the equal protection claim should fail because the record was improperly expanded. As described above, those project dockets were properly included in the record on appeal because they were cited multiple times in the underlying record, and they are necessary for Bridge to prove its constitutional violations claims under HRS § 91-14(g).

Next, the Commission argues that the statute of limitations has expired because Bridge's equal protection "relate to LUC actions in 2005." However, Bridge is not seeking just compensation or damages under 42 U.S.C. § 1983 in this forum. Instead, Bridge is using the Commission's constitutional violations as bases for reversal of the Final Order under HRS § 91-14(g). As such, the litany of cases cited by the Commission are inapposite. Moreover, even if a two year statute of limitation did apply, it would not begin to run until the cause of action accrued, which was when the Final Order was entered on April 25, 2011. See HRS § 657-7; see also Yamaguchi v. Queen's Medical Center, 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982). In fact, Bridge's Motion Re: Order to Show Cause, which sought dismissal of the Order to Show Cause based on the Commission's procedural and statutory violations, was pending up until the day the Final Order was entered before the Commission dismissed it as "moot."

The Commission also essentially argues that no "class of one" claim under the equal protection clause can exist because no two real estate developments are exactly alike. This Court can plainly see that the Commission is trying to hide from the fact that it has never taken this draconian, punitive action before in its entire history. Moreover, the Designated Dockets unequivocally show that the Commission has a repeated pattern of (1) refusing to "revert" large

project dockets that have not been developed as promised, and (2) granting motions to amend affordable housing conditions to defer to county requirements.

For example, Bridge cited the following projects, among others, during the agency proceedings:[21]

- Y-O Limied Partnership (Kaloko Heights Project), A81-525—Reclassified to urban use in 1982, the Big Island's Kaloko Heights project proposes 1,400 homes on 410 acres, similar in size and scope to Aina Le`a. Since 2002, nothing has happened on the Kaloko Heights project. No marketing plan was developed, no affordable housing agreement was reached, no infrastructure was constructed, no affordable homes were built, nothing. Despite the lack of any construction on the Kaloko Heights property, the Commission has not moved to reclassify the land to agricultural use.

- Lihue Plantation Co., Ltd. (Wailani), A94-703—Reclassified to urban use in 1996, Kauai's Wailani project proposes a mixed-use project on 542 acres in Lihue and Hanamaulu, including as many as 1,800 homes, similar in size and scope to Aina Le`a. The project's affordable housing condition was amended in 2006, at the request of the petitioners. Despite the lack of any construction, the Commission has not moved to reclassify the land to agricultural use.

- Palauea Bay Partners (Honua`ula), A93-689—Reclassified to urban use in 1994, Maui's Honua`ula project proposes to build 1,400 homes on 670 acres, similar in size and scope to Aina Le`a. The petitioner originally represented that 650 residential units would be completed within five years of county zoning approval. Like Aina Le`a, the project has encountered significant legal and financing challenges. No houses have been built in the project, and the Commission has not moved to reclassify the land to agricultural use.

- Kuilima Resort Expansion Area, A85-595—Reclassified to urban use in 1986, the petitioner originally represented the Kuilima Resort Expansion Area would include 1,000 resort condominiums and three hotels, to be built within 10 years. More than 20 years after the reclassification, a citizens group filed a Motion for Order to Show Cause, contending the developer had failed to fulfill its representations and commitments because nothing had been built on the land. The Commission denied the motion for Order to Show Cause, and despite the lack of any construction or affordable housing, the Commission has not moved to reclassify the land for agricultural use.

In addition, Commissioner Kanuha cited on the record numerous other project dockets that support Bridge's equal protection claim. JEFS 15 at 1882-85. These project dockets were all granted the same relief requested by Bridge in its 2005 Motion to Amend the affordable

[21] See Appx. A, pp. 34-35, for the list of dockets relied upon by the Circuit Court in ruling that the Commission violated Bridge's constitutional rights. Also, the record reflects that the Commission admitted that Bridge's request to amend the affordable housing condition was "reasonable" and consistent with the "past position" of the Commission. JEFS 15 at 1954.

housing requirements to be consistent with the County of Hawaii: (1) Waikaloa Mauka, LLC, A06-767; (2) The Shopoff Group, L.P., A06-770; (3) Kaupulehu Developments, A93-701; and (4) Forest City Hawaii Kona LLC, A10-788. The Commission clearly treated Bridge differently than these similarly situated developers. See Olech, 528 U.S. at 564 (allowing "class of one" claim in context of land use regulation).

Last, the Commission fails to provide a rational basis why it treated Bridge differently than other similarly situated developers. See Gerhart, 637 F.3d at 1022. The Commission does not cite any evidence in the record to distinguish the Project from the other dockets cited by Bridge that were treated differently. See Opening Brief, pg. 33-34. The Commission does not explain why Bridge and the Project were singled out with an Order to Show Cause when other large developments, some of which are also in West Hawaii, were not reclassified despite not having complied with any construction deadlines. The pictures of the constructed buildings do not lie. See Appx. B. The Commission cannot dispute that Bridge received drastically different treatment than almost identically situated developers. Therefore, the Circuit Court correctly ruled that the Commission violated Bridge's equal protection rights.

3. Condition 1 of the 2005 Order is an unconstitutional land development condition

The Commission's Final Order was based upon an alleged violation of "Condition 1 of the 2005 Order." JEFS 13 at 1015. However, "Condition 1 of the 2005 Order" was on its face an unconstitutional land development condition and cannot be the basis for reclassifying the Property from urban to agriculture use.

The U.S. Supreme Court has dictated heightened scrutiny of land development conditions, under Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994). The Hawaii Supreme Court has adopted the Nollan/Dolan scrutiny in determining whether land development conditions are constitutional. See Public Access Shoreline Hawaii v. County of Hawaii Planning Commission, 79 Haw. 425, 452, 903 p.2d 1246, 1273 (1995) ("[C]onditions may be placed on development without effecting a "taking" **so long as the conditions bear an "essential nexus" to legitimate state interests and are "roughly proportional" to the impact of the proposed development**.") (citing Dolan v. City of Tigard, 512 U.S. 374 (1994) (emphasis added)). Further, the U.S. Supreme Court just recently ruled that the Nolan/Dollan nexus and proportionality requirements apply not only to physical takings of property, but also to "extortionate demands" for monetary of or financial exactions from a property owner.

See Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013) (holding that "so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of Nollan and Dolan.").[22]

The Commission's boundary amendment is the "wrong place, wrong time" to impose a development condition requiring a specific number of affordable houses be built by a specific time, as the Commission did in Condition 1 of its 2005 Order. The 2005 Order contained **no findings whatsoever** on the impacts allegedly created by the Project to justify requiring completion of 385 affordable houses by November 17, 2010. JEFS 11 at 367-381. While the Commission is entitled to consider the factors set forth in HRS Chapter 205 in deciding whether a particular property may be suitable for urban use, the Commission lacks the authority under Nollan/Dolan to unilaterally impose land development conditions without any nexus or proportionality.

Condition 1 of the 2005 Order is fatally flawed, lacking any stated nexus or credible proportionality to the actual development itself. Cf. Building Industry Ass'n of Central California v. City of Patterson, 171 Cal. App. 4th 886, 90 Cal. Rptr. 3d 63 (App. 2009) (striking down $20,946- per-unit affordable housing impact fee because court could find no reasonable connection between the proposed residential development and a fee to produce affordable housing).[23] Accordingly, the Commission cannot use the affordable housing requirements in the 2005 Order as a basis to amend the Property's land use district boundary.

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[22] The U.S. Supreme specifically recognized the central concern raised by Bridge in this case—the need to protect landowners at the mercy of land use regulators who could impose draconian conditions on land use permits:

> The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of Nollan and Dolan: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

Koontz, 133 S. Ct. at 2600.

[23] The Patterson court applied a less strict "reasonable relationship" test; as noted above, the Hawaii Supreme Court has stated that Hawaii applies the heightened Nollan/Dolan scrutiny to land development conditions. But even under a lower level of scrutiny, the Patterson court found nothing in the record that demonstrated or implied that the mandated affordable housing fee was reasonably related to the need for affordable housing generated by the particular project in question. Patterson, 171 Cal. App. 4th at 73, 90 Cal. Rptr. 3d at 898-99.

VI. CONCLUSION

Based on the above, Bridge respectfully requests that this Court affirm the Circuit Court's reversal of the Final Order.

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/s/ Matthew C. Shannon
BRUCE D. VOSS
MICHAEL C. CARROLL
MATTHEW C. SHANNON

Attorneys for Appellee
Bridge Aina Le`a, LLC