CAAP-13-0000091

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

DW AINA LE'A DEVELOPMENT, LLC, Co-Petitioner-Appellant/Appellee, vs. BRIDGE AINA LE'A, LLC, Co-Petitioner-Appellant/Appellee,	)	Civil No. 11-1-0112K (Agency Appeal) (Kona) APPEAL FROM: (1) SECOND AMENDED FINAL JUDGMENT FILED FEBRUARY 8, 2013

[CAPTION CONTINUED ON NEXT PAGE]

APPELLEE DW AINA LE'A DEVELOPMENT, LLC'S ANSWERING BRIEF

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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/Appellees.

BRIDGE AINA LE'A, LLC,

Appellant/Appellee,

vs.

STATE OF HAWAI'I LAND USE COMMISSION,

Appellee/Appellant,

and

STATE OF HAWAI'I OFFICE OF PLANNING and COUNTY OF HAWAI'I,

Appellees/Appellees,

and

DW AINA LE'A DEVELOPMENT, LLC,

Appellee/Appellee.

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(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

HON. ELIZABETH A. STRANCE
HON. RHONDA A. NISHIMURA

Civil No. 11-1-0969-05 (RAN)
(Agency Appeal)

CAAP-13-0000091

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

DW AINA LE'A DEVELOPMENT, LLC, Co-Petitioner-Appellant/Appellee, vs. BRIDGE AINA LE'A, LLC, Co-Petitioner-Appellant/Appellee, and STATE OF HAWAI'I LAND USE COMMISSION, Appellee/Appellant, and STATE OF HAWAI'I OFFICE OF STATE PLANNING; COUNTY OF HAWAI'I PLANNING DEPARTMENT, Appellees/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 HON. ELIZABETH A. STRANCE HON. RHONDA A. NISHIMURA
BRIDGE AINA LE'A, LLC, Appellant/Appellee, vs. STATE OF HAWAI'I LAND USE COMMISSION, Appellee/Appellant,	Civil No. 11-1-0969-05 (RAN) (Agency Appeal)

and

STATE OF HAWAI'I OFFICE OF PLANNING and COUNTY OF HAWAI'I,

Appellees/Appellees,

and

DW AINA LE'A DEVELOPMENT, LLC,

Appellee/Appellee.

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APPELLEE DW AINA LE'A DEVELOPMENT, LLC'S ANSWERING BRIEF

Co-Petitioner-Appellant/Appellee DW AINA LE'A DEVELOPMENT, LLC ("DW"), by and through its counsel, McCorriston Miller Mukai MacKinnon LLP, hereby respectfully submits its Answering Brief in response to Appellee/Appellant STATE OF HAWAI'I LAND USE COMMISSION's ("LUC") Opening Brief ("OB"), filed August 26, 2013.

This case involves a residential development project situated on approximately 1,060 acres of barren lava rock on the island of Hawai'i (the "Property"). The Property was determined to be unsuitable for agricultural purposes, and, thus was appropriately reclassified from the Agricultural to Urban land use district. Twenty years later, after DW expended millions of dollars in planning, designing, and building the infrastructure and homes for the development, the LUC reclassified the Property from Urban back to Agricultural. The LUC incorrectly asserts that Hawai'i Revised Statutes ("HRS") § 205-4(g)[1] provides it with the unfettered authority to automatically "revert" the land use classification of the Property as punishment because DW and Co-Petitioner-Appellant/Appellee BRIDGE AINA LE'A, LLC ("Bridge") allegedly failed to satisfy one of its conditions. The reclassification from Urban to Agricultural occurred without any determination or even evidence that the Urban nature of the Property had changed and that Agricultural land use was more appropriate, or that any harm or injury had resulted from the putative reason for reclassification, *i.e.*, the alleged delay in completing affordable housing. In so doing, the LUC ignored the applicable criteria for determining the proper classification of land under HRS chapter 205, singled out DW and Bridge for adverse and arbitrary treatment, and ignored the requirements of both HRS chapter 205 and the Hawai'i and Federal constitutions.

In light of this unprecedented action, the circuit court appropriately reversed the LUC's 2011 Order, and concluded, in relevant part, that the LUC failed to follow the proper procedures under HRS chapter 205 when it "reverted" the Property's land use classification and that the LUC violated DW's constitutional rights to due process and equal protection.

I. STATEMENT OF THE CASE

A. Land Use Commission Proceedings

[1] HRS § 205-4(g) provides, in relevant part: "The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification."

1. The Property is Reclassified to the State Urban Land Use District

On January 17, 1989, the LUC reclassified the Property from the State Agricultural land use district into the State Urban land use district ("1989 Order"), to permit the development of a residential community consisting of 1,924 dwelling units, along with support facilities and recreational amenities (the "Project"). Judiciary Electronic Filing System Record on Appeal ("JROA") 9:368-415.[2] It is undisputed that the Property is barren lava land located in Waikoloa, Hawai'i, which cannot be used for agricultural purposes. The Property was properly designated for urban expansion in the County of Hawaii's General Plan. JROA 9:1995-97, 2003.

On July 9, 1991, the LUC amended the 1989 Order to reflect a successor developer's revised development plan ("1991 Order"). JROA 9:1990-2054. The LUC found upon a preponderance of the evidence that the proposed reclassification provided diversified housing and employment opportunities, and conformed with: the objectives and policies set forth in the Hawai'i State Plan; implementing actions in the State Functional Plan and Education Functional Plan; and the State Land Use District Regulations for Determining Urban District Boundaries. JROA 9:2033-39. The LUC also found that "[t]he property is not suitable for agriculture and there are no agricultural activities on the site." JROA 9:2039. The 1991 Order reclassified the Property subject to several conditions, including Condition 1, which required the developer to offer for sale as affordable housing at least 60% of the units. JROA 9:2008, 2041-42. The 1991 Order did not contain time limits for compliance with the Condition 1, but rather contained "anticipated" time periods for completion of the Project. JROA 9:2000-01. Significantly, the LUC did not impose any conditions requiring the developer to meet its "anticipated" schedule. JROA 9:2000-01.

2. The LUC Amends Condition 1 of the 1991 Order

On September 1, 2005, Bridge filed with the LUC a motion to amend, *inter alia*, Condition 1 of the 1991 Order ("2005 Motion to Amend") to reduce the affordable housing units from 60% to 20%. JROA 9:2843-59. Bridge requested the reduction to be "consistent and coincide with County of Hawaii affordable housing requirements."[3] JROA 9:2845.

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[2] Except where otherwise noted, citations to the Record on Appeal consist of the docket number in Case No. CAAP-13-0000091 in the Judiciary Electronic Filing System and then the page number(s) in the pdf viewer.

[3] In at least seven dockets prior to the 2005 Motion to Amend, the LUC required those petitioners to provide affordable housing in compliance with applicable County requirements.

The LUC met and subsequently entered its Findings of Fact, Conclusions of Law, and Decision and Order Granting the 2005 Motion to Amend ("2005 Order") as to Condition 1 of the 1991 Order, which the LUC amended to reduce the percentage of affordable housing units from 60% to 20%, and to provide that "in no event shall the gross number of affordable housing units within the Petition Area be less than 385 units." JROA 11:378-79.

Throughout 2006 and 2007, Bridge periodically appeared before the LUC to explain the Project's progress and compliance with all conditions of the 2005 Order. JROA 11:958, 1256, 1370; 7:1826. On October 11, 2007, the County informed Bridge that an Environmental Impact Statement ("EIS") was required given the Hawai'i Supreme Court's decision in Sierra Club v. Department of Transportation, 115 Hawai'i 299, 167 P.3d 292 (2007). JROA 11:1428. Bridge then began the lengthy process of conducting the EIS.

3. The LUC's Order to Show Cause

On December 9, 2008, the LUC entered a written Order to Show Cause ("OSC") for Bridge's alleged failure to satisfy the LUC's conditions by providing 385 affordable housing. JROA 11:1519-20. The OSC, citing HRS § 205-4, stated that "absent substantial commencement of use of the land in accordance with such representations, the [LUC] shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification[.]" JROA 11:1520-21 (emphasis added). Notably, the OSC also stated that the LUC would "conduct a hearing on this matter in accordance with the requirements of chapter 91, [HRS], and subchapters 7 and 9 of chapter 15-15-, Hawaii Administrative Rules [("HAR")]." JROA 11:1521. Subchapters 7 and 9 apply to boundary amendments. The County opposed the OSC and the proposed reclassification. JROA 11:1433.

On February 9, 2009, DW entered into a purchase agreement with Bridge, which gave DW the right to develop the Project. JROA 11:1716-40. DW then developed a plan to complete the permitting required to start development of the Project, including construction of the initial infrastructure and construction of affordable housing units, which would be the first units

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JROA 11:2768-69. In addition, the LUC stated in a staff report that Bridge's request to amend the LUC's affordable housing condition to be consistent and coincide with county affordable housing requirements was "reasonable" and consistent with the "past position" of the LUC. JROA 15:1954. The State Office of Planning ("OP") also submitted testimony in support of the 2005 Motion to Amend and the provision that the location and distribution of affordable housing shall be under terms agreeable between the petitioner and the County. JROA 9:2896.

developed for the Project. JROA 11:1716-40; 7:816-17.

On April 28, 2009, the County issued final subdivision approval for the affordable housing portion of the Project. JROA 11:1782. The County also submitted another letter opposing the OSC and the proposed reclassification. JROA 11:1699.

At an April 30, 2009 "continued" hearing on the OSC, the County testified as follows: "The County's position has not changed. The County feels that the current urban district designation is appropriate and that the public interest would be best served by allowing Petitioner to maintain its current classification." Transcript ("Tr.") 4/30/09, JROA 15:580 (emphases added). The LUC precluded DW from speaking at the hearing. Tr. 4/30/09, JROA 15:632-34. The LUC also did not allow Bridge to complete the presentation of its case, including the presentation of evidence of DW's ability to satisfy the conditions. Tr. 4/30/09, JROA 15:619-22. Instead, the LUC abruptly ended the hearing and terminated the presentation of evidence. Tr. 4/30/09, JROA 15:640-41. The LUC, over strong objection, purported to adopt a motion by "voice vote" determining that Bridge was not in compliance with certain conditions for reclassification. JROA 13:855; Tr. 4/30/09, JROA 15:619. The LUC voted to amend the land use district boundaries by reclassifying the Property from Urban use to Agricultural use; however, no written order on the LUC's "voice vote" was entered by the LUC. Tr. 4/30/09, JROA 15:640. The LUC's oral motion amending the Project's land use boundaries did not specify exactly which condition(s) Bridge and DW failed to satisfy, nor did it make a finding that its motion was supported by a preponderance of the evidence. Tr. 4/30/09, JROA 15:640.

DW submitted a written petition to the LUC to be made a co-petitioner with Bridge. JROA 11:1709-1832. DW provided the LUC with information regarding DW's principals, plans to develop the affordable housing, financing commitments, and construction contracts. JROA 11:1716-41. The petition notified the LUC that reclassification of the Property from Urban to Agricultural would make it impossible for DW to proceed with its plans to develop the Project, including the 385 affordable housing units. JROA 11:1713. DW stated that the development of the Project is predicated on the Property remaining Urban. JROA 11:1713. DW supplemented its petition with additional material showing its progress. JROA 11:1834-900.

On May 28, 2009, DW filed a Motion to Stay Entry of Decision and Order on the Land Use Commission's Action on April 30, 2009, Pending Consideration of Evidence Presented in DW's petition to be a co-petitioner with Bridge ("Motion to Stay"). JROA 11:1906-09.

At a June 5, 2009 meeting, the LUC took DW's petition to be a co-petitioner under advisement; granted DW's Motion to Stay; and scheduled a one-day hearing for the submission of additional evidence regarding the OSC. Tr. 6/5/09, JROA 15:756, 763. The LUC also required Bridge to designate DW as Bridge's agent to present testimony and evidence to the LUC, preventing Bridge from also presenting testimony and evidence. Tr. 6/5/09, JROA 15:758.

The LUC then requested a status report on how DW and Bridge would comply with the existing conditions of the 1991 Order. JROA 11:2141-44. DW submitted a detailed status report on July 30, 2009.[4] JROA 11:2148-55. Bridge also submitted a detailed itemization of the millions of dollars it had spent on engineering, planning and architecture, on-site grading, conducting environmental studies, obtaining permits, and drilling and outfitting wells for the Project. JROA 11:2224-27.

On August 19, 2009, Bridge filed a motion to rescind the OSC ("Motion to Rescind"). JROA 11:2344-60. The basis of Bridge's Motion to Rescind was that reversion was not appropriate because DW and Bridge had achieved "substantial commencement of the use of the land" in accordance with HRS § 205-4. JROA 11:2353 (emphasis added). Bridge detailed how it and DW had performed or were in the process of performing all six "conditions, representations, or commitments" cited in the OSC. See JROA 11:2353-54.

At an August 27, 2009 hearing, DW informed the LUC that reclassification of the subject Property from Urban to Agricultural would "throw[] away everything that we all have worked [for]." Tr. 8/27/09, JROA 15:852. DW provided testimony that included discussion of the construction schedules, the construction contract for infrastructure, and ongoing performance under that contract. Tr. 8/27/09, JROA 15:838-39. The LUC also was advised that payment of the purchase price for the Phase 1 land was conditioned on the LUC's rescission of its April 30, 2009 vote to reclassify the Property to Agricultural. JROA 11:2226. DW testified that it had expended $4.5 million in actual costs on the Project, not including the value of time spent on the Project. JROA 11:2384. The testimony also established that infrastructure work started two weeks before the hearing. Tr. 8/27/09, JROA 15:889-90. With respect to timing, DW stated:

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[4] In its status report, DW indicated that its "goal" for Phase 1 was to obtain occupancy permits for the affordable housing units by November 2010. JROA 11:2148. DW also advised the LUC that implementation of development could be affected by factors beyond DW's control, such as the residential real estate market. JROA 11:2154. DW did not state that it would have certificates of occupancy by March 31, 2010. See JROA 11:2148-55.

> [W]e believe that we can meet this timeframe. . . . But I would like an open door policy to this Commission if we run into a problem, like any development you could on unanticipated basis, we run into any problems, we would like the ability to come back to this Commission, explain it; if we need to ask for some relief or assistance in getting through it.

Tr. 8/27/09, JROA 15:852 (emphases added).

4. The LUC Rescinds the Order to Show Cause

On September 28, 2009, the LUC filed its order rescinding the OSC ("2009 Order"). JROA 11:2443-57. In its 2009 Order, the LUC found, *inter alia*, that: "With DW . . . much progress has been made within the last four months. Both the affordable housing component and the anticipated construction jobs are desirable." JROA 11:2446 (emphasis added). In its 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.

JROA 11:2447 (emphasis added). The LUC did not define the term "complete" in the 2009 Order. JROA 11:2541.

In reliance on the 2009 Order, DW paid for the Phase 1 land and continued to actively proceed with preparation of plans and studies. By December 15, 2009, DW had performed significant work on the Project. See JROA 7:1411-12. DW submitted a detailed Status Report to the LUC, which highlighted the work that had been completed and the work that was in progress, including its completion of the 16 affordable housing units. JROA 11:2598-619.

5. The LUC Reinstates the Order to Show Cause

The LUC ordered that a status conference be held on July 1, 2010. The agenda for the meeting included an action item, but did not identify what action the LUC contemplated taking at the meeting. JROA 11:2657. At the July 1, 2010 meeting, DW and its EIS consultant presented information on the status of the Project, including an explanation of the circumstances that were delaying completion of the EIS process. JROA 11:2702. DW notified the LUC that it expected great difficulty in completing the affordable housing units by November 2010 under Condition 1 and that it would be filing a motion seeking to amend that Condition. JROA 11:2703. The LUC also heard evidence in support of the Project from multiple individuals. JROA 13:859. DW

detailed the extent of work done on the affordable housing site in eleven months, including construction of utility and sewer lines, identification and staking of easement corridors and a wastewater treatment plant, construction of 16 townhouses, substantial and partial construction of an additional 72 townhouses, and construction of pads for an additional 24 townhouse complexes. Tr. 7/1/10, JROA 15:1212-13. Thereafter, the LUC voted to keep the OSC pending and enter a finding that the 16 affordable homes had not been completed by March 31, 2010. Tr. 7/1/10, JROA 15:1280-82.

On July 26, 2010, the LUC entered an Order Finding Failure To Meet Condition Precedent For Rescinding Order To Show Cause. JROA 11:2700-09. 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." JROA 11:2701. However, the LUC ruled that "Sixteen affordable units have been constructed, but no certificates of occupancy have been obtained." JROA 11:2702. The LUC also declared, without any discussion, that building 385 affordable houses by November 17, 2010 was now a "deadline and not a goal[.]" JROA 11:2702.

DW then filed a Motion to Amend Conditions 1, 5, and 7 ("DW's Motion to Amend"), JROA 11:2713-32, which summarized the significant work undertaken and completed by DW on the Project in 2010, including the construction of two "town villas" buildings, completion of utility engineering for Phase 1 town villa site, completion of the draft EIS, submission of the draft EIS to the County for review, and continuation of work with investors. JROA 11:2716-19.

On November 12, 2010, Bridge filed a Motion Re: Order to Show Cause, identifying the LUC's violations of HRS chapters 91, 92, and 205, and HAR chapter 15, by issuing orders without considering the decision making criteria under HRS § 205-17; failing to establish that there was no substantial commencement of the use of the land in violation of HRS § 205-4; and improperly holding a hearing on a two-year-old OSC in violation of the 365-day limit under HAR § 15-15-51(e). JROA 13:115-17. DW joined in Bridge's Motion, and reiterated that by July 2010, more than $20 million had been expended on the Project. JROA 13:190-93.

On November 18, 2010, the LUC held a hearing to hear further argument on the OSC. JROA 13:222-32; Tr. 11/18/10, JROA 15:1309. The LUC's presiding officer stated at the beginning of the hearing that no action would be taken on the OSC or on any of the motions, and that the LUC would allow the parties to submit additional evidence and make further argument.

JROA 13:223. At the hearing, Robert Wessels, Chief Executive Officer of DW, detailed how the long pending OSC was negatively affecting financing for the Project. Tr. 11/18/10, JROA 15:1420-21. In addition, the LUC heard public testimony supporting the Project. Tr. 11/18/10, JROA 15:1320, 1317-53. The LUC deferred its ruling on the OSC. Tr. 11/18/10, JROA 15:1469.

6. The LUC Votes to Arbitrarily Reclassify the Property's Land Use Boundaries to Agricultural

On January 20, 2011, the LUC held another hearing on the OSC. JROA 13:865. At the conclusion of the hearing, an oral motion was made to find that DW failed to show cause why the Property should not revert to its prior land use classification ("Reclassification Motion"). Tr. 1/20/11, JROA 15:1591. The LUC voted five to three to amend the State's land use district boundaries by reclassifying the Property from Urban to Agricultural. Tr. 1/20/11, JROA 15:1602-03.

The LUC also by oral motion denied Bridge's Motion re: Order to Show Cause as being "moot" after the Reclassification Motion was approved. Tr. 1/20/11, JROA 15:1603-04. The LUC never substantively ruled on the issues raised in Bridge's Motion re: Order to Show Cause before voting on the Reclassification Motion. Counsel for DW declined to withdraw DW's Motion to Amend, and the LUC deferred action on DW's Motion to Amend to "the next appropriate agenda." Tr. 1/20/11, JROA 15:1604; :1606-07.

On March 10, 2011, the LUC met to consider its own Proposed Findings of Fact, Conclusions of Law, and Decision and Order Reverting the Petition Area ("LUC's Proposed Order"). JROA 13:704-27; Tr. 3/10/11, JROA 15:1609. Drafts of the Proposed Order were circulated to the LUC Commissioners prior to the March 10, 2011 meeting, but were not provided to DW or the other parties. At the meeting, the Commissioners made changes to the LUC's Proposed Order without input from any of the parties. Tr. 3/10/11, JROA 15:1613-21. After changes were made, the LUC voted in favor of adopting the LUC's Proposed Order as so revised. Tr. 3/10/11, JROA 15:1632-33. One of the six votes in favor of adopting the Proposed Order was Commissioner Teves, see Tr. 3/10/11, JROA 15:1633, who was not present at the January 20, 2011 meeting, and therefore, did not vote in favor of the Reclassification Motion.

At the time of the LUC's decision, DW had spent in excess of $26 million on construction and infrastructure for the Project. See JROA 7:153. The majority of the

expenditures (approximately $21.5 million) occurred after, and in reliance on, the LUC's rescission of the OSC. See JROA 7:153.

7. The LUC Adopts its Final Order

At an April 8, 2011 meeting, the LUC considered the following: (1) DW's Motion to Reconsider and Defer Entry of Final Findings of Fact, Conclusions of Law, and Decision and Order; (2) adoption of the Proposed Order; and (3) DW's Motion to Amend Conditions 1, 5, and 7. JROA 13:957. All public testimony presented to the LUC was in favor of the Project. JROA 13:958-59. The LUC deferred all three matters to the next meeting. Tr. 4/8/11, JROA 15:1818.

At an April 21, 2011 meeting, the LUC again considered the three matters, Tr. 4/21/11, JROA 15:1820, 1855-915, and again heard public testimony in favor of the Project. JROA 13:998-99. The County Planning Director testified, *inter alia*, that the Property was appropriate for urban designation and development. Tr. 4/21/11, JROA 15:1873-74.

Commissioner Kanuha from Hawai'i island moved, in relevant part, that Conditions 1(b) and 1(c) of the existing 2005 Order should be deleted in their entirety, which would result in the elimination of, *inter alia*, the requirement that DW provide certificates of occupancy for 385 affordable housing units by November 17, 2010. JROA 13:1000; Tr. 4/21/11, JROA 15:1878. Commissioner Kanuha, based on his review of LUC files, identified six other dockets from 1996 through 2008 in which the LUC had deferred to the respective counties to enforce the affordable housing conditions imposed by the LUC. Tr. 4/21/11, JROA 15:1883-84. Commissioner Jencks agreed, stating that the counties, and not the LUC, should deal with the issues of zoning compliance and the completion of the affordable housing development. JROA 13:1000; Tr. 4/21/11, JROA 15:1890. Commissioner Heller and Chairperson Devens responded that the LUC should be able to enforce its orders. JROA 13:1000-01; Tr. 4/21/11, JROA 15:1891-95. The LUC then voted, and Commissioner Kanuha's motion failed by a vote of three to five. JROA 13:1001; Tr. 4/21/11, JROA 15:1895.

The LUC then denied DW's Motion to Reconsider, and adopted its Proposed Order as a final decision and order, subject to certain revisions. Tr. 4/21/11, JROA 15:1895, 1897, 1914-15. On April 25, 2011, the LUC entered the Order Adopting Proposed Findings of Fact, Conclusions of Law, and Decision and Order Reverting the Petition Area, as Amended as Commission's Final Decision in Docket No. A87-617 ("2011 Order"). JROA 13:1005-28.

B. Circuit Court Appeal

On May 24, 2011, DW filed a First Amended Notice of Appeal and First Amended Statement of the Case with the Circuit Court of the Third Circuit and argued that the LUC erred in reclassifying the Property because: (1) the LUC failed to comply with numerous provisions of the HRS and HAR; (2) DW had vested rights to proceed with the development of the Property, and the LUC should be estopped from reclassifying the Property from Urban to Agricultural; (3) the LUC improperly treated DW differently from other similarly situated petitioners, thereby violating DW's equal protection rights; (4) the LUC violated DW's procedural and substantive due process rights; and (5) the LUC deprived DW of all economically beneficial use of its land, thereby affecting a taking of DW's property without just compensation. JROA 7:88-89. On May 27, 2011, DW filed a Motion for Entry of Order to Stay the LUC's 2011 Order, which Bridge joined. JROA 7:124-59, 442-57.

The LUC filed its Response to DW's First Amended Statement of the Case on June 14, 2011. JROA 7:423-39. The LUC filed its Memorandum in Opposition to DW's Motion for Entry of Order to Stay. JROA 7:511-26. On June 21, 2011, DW filed a Reply Memorandum in Support of its Motion for Entry of Order to Stay ("Reply Memorandum"). JROA 7:731-43. Attached to the Reply Memorandum was a declaration of DW's Robert Wessels, who stated that the LUC Commissioners had inspected the townhomes and "there is no question that they were finished with temporary connections to sewer and water. Some of the Commissioners used the bathrooms, which had running water and were connected to a septic tank. They conducted their meeting in a unit with the lights and fans running." JROA 7:816-17.

On July 20, 2011, the LUC filed a Motion to Strike Portion of Designation of Record on Appeal ("LUC Motion to Strike"). JROA 7:890-94. The LUC specifically asserted that the circuit court should strike the "extra-record material" from the six additional dockets designated by DW because those dockets were not considered by the LUC when it made its decision. JROA 7:892-93. DW opposed the LUC Motion to Strike, because the six additional dockets demonstrate that the LUC violated DW's equal protection rights by improperly treating DW differently than other similarly situated petitioners, and were part of the record, and because there was no undue burden on the LUC given that the same record on appeal was already certified in Bridge's separate appeal in the First Circuit. JROA 7:1073-76. On November 2, 2011, the circuit court entered its order denying the LUC Motion to Strike. JROA 7:1258-61.

The parties filed their briefs before the circuit court.[5] See JROA 7:1262-353; 1354-419; 1559-610; 1619-42; 1648-81. The circuit court held a hearing on December 16, 2011. See JROA 55:1-112. On June 15, 2012, the circuit court filed Amended Findings of Fact and Conclusions of Law, and Order Reversing and Vacating the State of Hawaii Land Use Commission's Final Order ("Amended Order"). JROA 7:1819-54. The circuit court determined, *inter alia*, that the 2011 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." JROA 7:1854. The circuit court filed its Second Amended Final Judgment on February 8, 2013. JROA 7:1887-89.

The LUC filed a notice of appeal to this court on February 14, 2013, JROA 7:1890-92, and its OB on August 26, 2013. In the OB, the LUC argues that the circuit court erred in: (1) determining that the LUC's "reversion" had to comply with the requirements in HRS chapter 205 applicable to a change in land use classification; (2) considering matters in other LUC dockets; and (3) determining that the LUC and individual LUC commissioners violated the equal protection and due process rights of DW and Bridge.

II. APPLICABLE STANDARDS

DW does not dispute the standard articulated in the OB.

III. ARGUMENT

A. The Circuit Court Did Not Err in Concluding that the LUC's Vote to "Revert" the Property to an Agricultural District Boundary Constituted a Reclassification of the Land Within the Meaning of HRS § 205-4

In its Amended Order, the circuit court determined that the LUC's 2011 Order was "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." JROA 7:1840. The LUC contends that the circuit court erred in equating

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[5] On October 20, 2011, the parties entered into a stipulation to transfer venue of Bridge's appeal from the First Circuit to the Third Circuit. JROA 7:1874-76. On January 8, 2013, the circuit court filed an order granting a motion to consolidate Bridge's appeal in Civil No. 11-1-0969-5 with DW's appeal in Civil No. 11-1-0112K. JROA 7:1879-81. The parties also stipulated to a partial dismissal as to all claims against the OP, Hawai'i County, and the Hawai'i County Planning Department. JROA 7:1882-84.

"the reclassification process, [HRS § 205-4(a)], with reversion pursuant to [HRS § 205-4(g)]." OB at 17. In support of its contention, the LUC asserts that: (1) the plain language of HRS § 205-4(g) specifically authorizes the LUC to impose conditions and enforce those conditions through its power to "revert"; and (2) the Supreme Court's decision in Lanai Co., Inc. v. Land Use Commission ("Lanai"), 105 Hawai'i 296, 97 P.3d 372 (2004), "recognized and upheld" the LUC's power and authority to "revert."[6] OB at 17-24. As discussed below, the LUC's arguments are without merit because the circuit court did not err, as a matter of law, in determining that in exercising its authority under HRS § 205-4(g), the LUC must comport with the statutory requirements of an amendment to a land use boundary district under HRS § 205-4.

> The court's construction of statutes must be guided by the following rules:
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> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.
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> . . . .
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> When a statute contains an ambiguity: the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining legislative intent, such as legislative history, or the reason and spirit of the law. Therefore, we may look to the statute as a whole and its legislative history for guidance in construing the language in question.

First Ins. Co. of Hawaii, Ltd. v. A&B Props., 126 Hawai'i 406, 414-15, 271, P.3d 1165, 1173-74 (2012) (citations omitted).

1. HRS § 205-4 Provides a Process by which All Boundary Amendments, Even if Styled as a "Reversion," Must Abide

The plain language of HRS § 205-4 requires the LUC to follow the same procedures in conducting a reversionary boundary amendment as it would for all other boundary amendments. HRS § 205-4, entitled "Amendments to district boundaries involving land areas greater than fifteen acres," provides in pertinent part:

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[6] Significantly, the LUC never argues that if this was indeed a boundary amendment, its actions would have complied with the necessary requirements. Accordingly, such argument "may be deemed waived." See Hawai'i Rules of Appellate Procedure ("HRAP") Rule 28(b)(7).

(a) Any department or agency of the State . . . may petition the land use commission for a change in the boundary of a district. This section applies to all petitions for changes in district boundaries of . . . lands greater than fifteen acres in the agricultural, rural, and urban districts, except as provided in section 201H-38.

. . . .

(g) Within a period of not more than three hundred sixty-five days after the proper filing of a petition, unless otherwise ordered by a court, or unless a time extension, which shall not exceed ninety days, is established by a two-thirds vote of the members of the commission, the commission, by filing findings of fact and conclusions of law, shall act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change. The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification. Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances.

(h) 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.

. . . .

(Emphases added).

Under the plain language of HRS § 205-4, the Legislature provided the LUC with the authority to amend district boundaries, also referred to as the process of reclassification. See Lanai, 105 Hawai'i at 317 n.48, 97 P.3d at 393 n.48 (noting that "[t]he reclassification of land is apparently also referred to as a 'boundary change'"). Any approval of an amendment of a district boundary must be, *inter alia*, reasonable by a preponderance of the evidence and in conformity with the County and State plans. HRS § 205-4(h). The reclassification of the property must also be acted upon within 365 days and with the approval of six commissioners. HRS §§ 205-4(g) and (h).

HRS § 205-4(g) allows the LUC to provide a condition that it can issue an "order to show cause" as to why the property should not revert to its prior classification or be changed to a more appropriate classification when the petitioner does not "substantial[ly] commence[] use of the

land[.]" The order to show cause thus serves as the LUC's petition for the reversionary boundary amendment or a change to a more appropriate classification.[7] After the LUC files a petition in the form of an order to show cause, it must then follow the mandates of HRS § 205-4(h), namely that "[n]o amendment of a land use district boundary" shall be made without "[s]ix affirmative votes" and without findings by a preponderance of the evidence of the various enumerated factors. The statutory language is plain and unambiguous, *i.e.*, the LUC's act of reversion must comport with the same procedures and considerations as all other boundary amendments. It is this Court's "sole duty [] to give effect to [the statute's] plain and obvious meaning." First Insurance, 126 Hawai'i at 414, 271 P.3d at 1173.

Contrary to the LUC's assertions, the plain language of HRS § 205-4(g) does not authorize the LUC to automatically reclassify property as punishment for any violation of an LUC condition. Indeed, there is nothing in HRS § 205-4(g), that grants the LUC the authority to change a state land use classification by a process different from that which is required in HRS §§ 205-4(a)-(h). Because the statute, by its very language, is silent on the issue, judicial approval of the LUC's asserted power to automatically reclassify would impermissibly encroach upon the powers of the Legislature. See State v. Klie, 116 Hawai'i 519, 525, 174 P.3d 358, 364 (2007) ("We cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. We do not legislate or make laws.").

In addition, the plain language of HRS § 205-4(g) only authorizes the LUC to issue an order to show cause if the petitioner has not "substantial[ly] commence[d] use of the land[.]" The LUC, in arguing that they have the authority to automatically revert a land use classification for any violation of its orders, effectively reads out the "substantial commencement" provision of HRS § 205-4(g). See Coon v. City & Cnty. of Honolulu, 98 Hawai'i 233, 259, 47 P.3d 348, 374

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[7] The phrase "or be changed to a more appropriate classification" in HRS § 205-4(g) mandates following the procedural requirements of and considering the criteria in HRS chapter 205 to determine what is a "more appropriate classification." Indeed, it would lead to an absurd result and vitiate the need for the detailed requirements for boundary amendments if the LUC could automatically change a land use classification to "a more appropriate classification" at any time and for any violation of its conditions without having to consider the criteria contained in HRS chapter 205 for reclassification. See Frank v. Hawai'i Planing Mill Found., 88 Hawai'i 140, 144, 963 P.2d 349, 353 (1998) ("[T]his court is bound to construe statutes so as to avoid absurd results."). Because HRS § 205-4(g) places the aforementioned phrase in the disjunctive with the reversion phrase at issue in this case, it follows that the LUC's action to revert must also comport with the requirements of HRS chapter 205.

(2002) ("It is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and . . . 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 words of the statute." (citation omitted)).

Furthermore, it would also be wholly unreasonable to interpret the reversion provision in HRS § 205-4(g) to provide the LUC with the unfettered authority to automatically amend the district boundary without following the procedures for all other boundary amendments because such interpretation would lead to absurd results. See Alvarado v. Kiewit Pac. Co., 92 Hawai'i 515, 517, 993 P.2d 549, 551 (2000) ("[T]his court is bound to construe statutes so as to avoid absurd results. A rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable[,] impracticable . . . inconsistent, contradictory, and illogical[.]" (citations and quotation marks omitted)). For example, in this case, the LUC changed the land use classification of the Property back to Agricultural twenty years after the Property was classified as Urban, despite substantial commencement of development and expenditure of significant resources, and despite the fact that the LUC previously determined that the Property was not suitable for agricultural use.

Therefore, the plain language of HRS § 205-4 mandates that the process that must be followed and the criteria that must be considered when the LUC conducts a reversionary boundary amendment is the same as must be followed for all other boundary amendments.

2. Even if an Ambiguity Existed, the Statutory Scheme and Legislative History of HRS Chapter 205 Shows an Intent to Preclude the LUC from Automatically Reverting a Land Use Classification

Assuming *arguendo* that there is an ambiguity as to what procedures the LUC must follow to "revert" a land use classification, the Court may look at the statutory scheme and the legislative history to determine the legislative intent. See First Insurance, 126 Hawai'i at 415, 271 P.3d at 1174. Here, the statutory scheme and legislative history of HRS chapter 205 indicate that the LUC's power to "revert" a land use classification is not automatic and must follow the same procedures and consider the same criteria as any other petition for a boundary amendment.

The Legislature created the LUC in 1961 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 Hawai'i 164, 188, 194 P.3d 1126, 1150 (App. 2008) (quoting 1961 Haw. Sess. Laws Act 187, § 1 at 299). In its report, the House Committee on

County and Lands provided that "[a] coordinated, balanced approach not only within each county but an overall balance of statewide land needs for economic growth is essential[.] . . . The powers of the counties to make and change detailed zoning within the major land use areas established by the state will not be changed but should in fact be strengthened by the supporting state power." Id. at 188-89, 194 P.3d at 1150-51 (citing House Stand. Comm. Rep. No. 395, in 1961 House J. at 855-56); see also Sen. Stand. Comm. Rep. No. 580, in 1961 Sen. J. at 883 (noting that statewide zoning was created, *inter alia*, to encourage orderly development within the state and to promote uniformity in project review between the counties).

The Legislature envisioned a two-tiered system in which the LUC and the respective county would work in concert to ensure compliance with the law:

> HRS chapter 205 establishes a two-tiered, land-use-regulatory system in which all land in the State of Hawai'i is classified by the LUC into one of four districts or zones: urban, rural, agricultural, and conservation. . . . Once lands are classified by the State, the respective counties are empowered to enact zoning ordinances to regulate the use of classified lands within their counties, but "only according to the dictates of HRS § 46-4" and "subject to limitations within HRS chapter 205."
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> Pursuant to HRS § 205-12 (1993), the legislature has delegated enforcement of the restrictions and conditions relating to land-use-classification districts in a county to the county official charged with administering the zoning laws for that county[.]

Pono, 119 Hawai'i at 189-190, 194 P.3d at 1151-52 (citations omitted) (emphasis in original).

Thus, the LUC is empowered to impose land use classifications for all developments across the entire State, whereas the counties are responsible for regulating the use of those lands. To effectuate its responsibility, the LUC must consider a variety of criteria as defined by statute and its administrative rules. See, e.g., HRS §§ 205-16 & -17; HAR § 15-15-18. HRS § 205-16 requires that "No amendment to any land use district nor any other action by the LUC shall be adopted unless such amendment or other action conforms to the Hawaii State Plan." (Emphases added). HRS § 205-17 requires the LUC, when making its determination to amend a boundary district, to consider conformity with the goals, objectives, and policies of the Hawai'i State Plan and whether the property conforms with the standards of the requested district.

In contrast to the LUC's broad power, the Legislature provided the counties with the responsibility of enforcing the land use classification districts adopted by the LUC. HRS § 205-12 (requiring that the "appropriate officer or agency charged with the administration of county

zoning laws shall enforce . . . the use classification districts adopted by the [LUC] and the restriction on use and . . . shall report to the commission all violations" (emphasis added)); see also Lanai, 105 Hawai'i at 318, 97 P.3d at 394 ("The power to enforce the LUC's conditions and orders, however, lies with the various counties."). In Lanai, the LUC, after determining that a developer had violated a condition of an LUC order, sought to enforce the condition. 105 Hawai'i at 302, 97 P.3d at 378. On appeal, the Supreme Court determined that although the LUC was authorized to impose conditions "for the purpose of 'upholding the intent and spirit' of HRS Chapter 205[,]" it did not have the power to enforce these conditions. Id. at 318, 97 P.3d at 394. The Court further stated that "[i]f the legislature intended to grant the LUC enforcement powers, it could have expressly provided the LUC with such power. . . . By omitting any such reference, it is apparent the legislature did not intend to grant such enforcement powers to the LUC."[8] Id. Thus, the Supreme Court has reaffirmed the county's power to enforce all conditions set by the LUC.[9]

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[8] The LUC points to one sentence from Lanai to support its contention that the LUC has authority to revert the land for the violation of its conditions. See OB at 18-19 (arguing that the LUC has the express statutory authority to "down-zone land for the violation of such conditions" (quoting Lanai, 105 Hawai'i at 318, 97 P.3d at 394)). The sentence, however, is not binding precedent and is merely dictum, and was not determinative of the holding. In the very next paragraph, the Lanai Court, citing HRS § 205-12, states that "[t]he power to enforce the LUC's conditions and orders, however, lies with the various counties." Id. at 318, 97 P.3d at 394 (emphasis added). The LUC's attempt to create a statutory conflict between HRS §§ 205-4(g) and -12 regarding enforcement authority is unpersuasive given that HRS § 205-4(g) is silent on the power to enforce, whereas HRS § 205-12 specifically provides the counties the power to enforce LUC conditions. To the extent that there is any conflict, the more specific statute controls over the more general one. Kinkaid v. Bd. of Review of City and Cnty. of Honolulu, 106 Hawai'i 318, 323, 104 P.3d 905, 910 (2004) ("When faced with a plainly irreconcilable conflict between a general and a specific statute concerning the same subject matter, this court invariably favors the specific." (Citation and quotation marks omitted)). Thus, Lanai reaffirms the county's authority to enforce the LUC's conditions and does not, contrary to the LUC's argument, authorize the LUC to enforce its conditions.

Attorney General Opinion No. 70-22, 1970 Haw. AG LEXIS 21 (1970) similarly concluded that, notwithstanding the counties' duty to report violations to the LUC, the counties, and not the LUC, have authority to enforce conditions.

[9] While the LUC in this case disagreed with the County's determination that DW satisfied the LUC's conditions, such disagreement does not allow the LUC to override the County's enforcement authority as set forth in HRS § 205-12. Indeed, the untenable position that would be faced by DW if the LUC's action is affirmed – having properly permitted affordable housing constructed on land in the agricultural land use district – because the LUC chose to disregard the

The Legislature also provided the counties with broad zoning authority to promote orderly development in accordance with State and County long term plans: "The [zoning] powers granted herein shall be liberally construed in favor of the county exercising them[.]" HRS § 46-4(a) (emphasis added).

The structure of Hawaii's land use law suggests an intent to divide authority over land use regulation between the counties and the State. The statutory framework suggests, as the circuit court concluded, that the LUC should concern its decisions to broader statewide goals and objectives, and not with enforcing violations of conditions, particularly when the counties have the power to take action to ensure compliance. When situated within this larger framework, reversion is only intended for situations where "substantial commencement" has not occurred and not for punishing violations of LUC conditions. The statutory scheme also imposes requirements on both the LUC and counties that suggest a high level of coordination. It would be inconsistent with the highly structured statutory scheme and the intent of coordination for the LUC to have the power to automatically trump the county's determination that LUC conditions were satisfied, through its power to "revert." The framework, thus, suggests that the LUC follow the same procedures for a reversionary action as it would for every other boundary amendment. The legislative history supports this proposition.

In 1990, the Legislature amended HRS chapter 205 by adding the reversion provision of HRS § 205-4(g). 1990 Haw. Sess. L. Act 261, § 1. The language was added to "clarif[y] the Commission's authority to impose a specific condition to downzone property in the event that the petitioner does not develop the property in a timely manner." Sen. Stand. Comm. Rep. No. 2116, in 1990 Sen. J. at 915. In addition, the Legislature intended the reversion provision to apply predominantly to vacant lands and speculative developments: "Vacant land with the appropriate state and county land use designations is often subjected to undesirable private land speculation and uncertain development schedules." Id. Thus, the legislative history establishes that the Legislature was attempting to address a narrow issue. Id. The legislative history does not suggest that the Legislature was providing the LUC with a different process for amending a land use classification or with the unfettered authority to amend the district boundary as punishment anytime an enumerated condition is not met. Therefore, the statutory scheme and

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County's determination illustrates the necessity of having enforcement vested in the County, which issues the final approvals for the Project.

legislative history suggest an intent by the Legislature for the LUC to follow the same procedures it would for any other boundary amendment when it "reverts" a property's land use classification.

Applying the foregoing to the instant case, the LUC exceeded its authority in reclassifying the Property without following the detailed procedures and considering the applicable criteria for a boundary amendment. It is undisputed that in the 1991 Order, the LUC determined that the Property was "not suitable for agriculture and there [were] no agricultural activities on the site." JROA 9:2039; see also JROA 7:1821; see Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 227, 140 P.3d 985, 1007 (2006) ("Generally, a court finding that is not challenged on appeal is binding upon the court."). Again, the purpose of the LUC is to encourage development "for those uses to which they are best suited for the public welfare." Pono, 119 Hawai'i at 188, 194 P.3d at 1150 (emphasis added). In granting the change in the land use classification, the LUC determined that the Property was best suited for Urban and not Agricultural use. Furthermore, because the Property had been classified as Urban, any changes to the land use classification, even if styled as a "reversion," must comport with the requirements of HRS chapter 205. The 2011 Order in this case unmistakably amended the "land use district boundaries" of the Property from Urban to Agricultural. See JROA 13:1020. Although the LUC styled its 2011 Order to say that the Property is "reverted" to the agricultural district, the effect and legal substance of its action is still an amendment to the land use boundary district.[10] See Hurston v. Dir., Office of Workers Comp. Programs, 989 F.2d 1547, 1549 (9th Cir. 1993) ("[I]f it walks like a duck, if it sounds like a duck, it's a duck[.]").

Accordingly, the circuit court did not err in concluding that the LUC's reversion of the Property to agricultural use constituted a reclassification of the land within the meaning of HRS

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[10] Moreover, subchapters 7 and 9 of HAR chapter 15-15 are the rules applicable to actions seeking boundary amendments, and provide detailed procedural requirements relating to notice, intervention, filing of exhibits and pre- and post-hearing procedures. See, e.g., HAR §§ 15-15-51 to –76; HAR §§ 15-15-80 to -84. Subchapters 7 and 9 of HAR chapter 15-15 do not provide a mechanism for "reversion" different than a "boundary amendment." Thus, the procedures set forth in HRS §§ 205-4 (a)-(h) are applicable to the LUC's power to amend the district boundaries through reversion. The LUC appeared to concede that a "reversion" should be treated the same as any other boundary amendment in its OSC, when it specifically indicated, "[T]he Commission will conduct a hearing on this matter in accordance with the requirements of chapter 91, [HRS], and subchapters 7 and 9 of chapter 15-15-, [HAR]." JROA 11:1521.

§ 205-4.[11] As the LUC does not even attempt to argue that it complied with the requirements for reclassification, the circuit court's determination should be affirmed

B. The Circuit Court Did Not Err in Finding the LUC was Obligated, but Failed to Consider the Hawai'i State Plan in Reclassifying the Property

The circuit court held that the LUC violated HRS § 205-16, which requires that any boundary amendment or "any other action" by the LUC conform to the Hawai'i state plan. JROA 7:1841 (COL 28). The circuit court specifically determined that HRS § 205-16 is applicable even if the "reversion" is not deemed to be a boundary amendment because it applies to all actions of the LUC. JROA 7:1841 (COL 29). In the OB, the LUC attempts to dismiss the circuit court's finding by arguing that the LUC did not have to comply with HRS § 205-16 "because reversion is not reclassification." OB at 23. However, as noted above, the circuit court specifically concluded that HRS § 205-16 is applicable to all actions by the LUC, and would apply even if the "reversion" was not a boundary amendment. JROA 7:1841 (COL 29). The

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[11] However, even if this Honorable Court determines that a reversion action is not a boundary amendment, the LUC is not free to act in an arbitrary manner when determining an order to show cause; rather the LUC's decision must be based upon consideration of legitimate land use criteria. This point was recognized years ago in Attorney General Opinion No. 72-8, 1972 Haw. AG LEXIS 8 (1972), where the Attorney General considered, *inter alia*, the question of whether the LUC could impose sanctions for the failure to observe conditions. In Opinion No. 72-8, the Attorney General concluded that Scrutton v. County of Sacramento, 79 Cal. Rptr. 872 (Cal. Ct. App. 1969), indicated that the sanction of "down-zoning" cannot be enforced where such sanction would work "as a forfeiture rather than a legislative decision on land use." Op. No. 72-8, at 6 (citation omitted) (emphasis added).

In Scrutton, one of the conditions imposed was that any failure on the part of the petitioner to comply with all of the conditions imposed by the county would cause an automatic reversion of the plaintiff's property to agricultural zoning. The court ruled that this condition was invalid. 79 Cal. Rptr. at 878-79. Thus, Opinion No. 72-8 recognized that "down-zoning" or reversion, cannot be imposed as a sanction where it would constitute a forfeiture, rather than a "legislative decision on land use," and that there must be a "substantial relation to the public health, safety, morals and general welfare." In other words, regardless of whether a reversion is technically a boundary amendment, the decision to revert must be based on applicable land use criteria and substantially related to considerations of public health, safety, morals and general welfare. Thus, whether the LUC's action on the order to show cause is technically a boundary amendment or some other procedure, as discussed in Opinion No. 78-2, the LUC's determination must be based upon consideration of the applicable land use criteria – which are specified in HRS chapter 205. Again, in this case, the record demonstrates that the LUC's decision was not based upon consideration of the land use criteria set forth HRS chapter 205, but, rather, was based on the LUC's determination to impose "consequences" upon DW and Bridge in the form of forfeiture. See JROA 15:1016 (finding that "[i]t is important to the integrity of the State land use process that Petitioners comply with the conditions imposed by the [LUC]").

LUC simply ignores, without any rationale or explanation, the plain language of HRS § 205-16. Nor does the LUC even attempt to argue that the LUC complied with the requirements HRS § 205-16, as it indisputably did not. Thus, even if this Court determines that a "reversion is not reclassification," the plain language of HRS § 205-16 mandates that all actions by the LUC conform to the Hawai'i State Plan. As the circuit court found, and as the LUC concedes by its silence, the LUC plainly failed to do so.

C. The Circuit Court Correctly Found that the LUC Employed Unlawful Procedures in Enforcing the Order to Show Cause

In Conclusions of Law 52-64, the circuit court found that the reclassification proceedings failed to comply with HRS chapters 91 and 205, and HAR chapter 15. See JROA 7:1847-49 (COL 52-64). The LUC concedes that it did not comply with the 365 day limit, but argues that the 365 day requirement does not apply "because reversion is not reclassification." OB at 23. As discussed supra in Part III.A, the LUC's position is unavailing.

In addition to the LUC's failure to meet the 365 day requirement, the circuit court found that the 2009 Order, which rescinded and vacated the OSC subject to the "condition precedent" that 16 affordable units be completed by March 31, 2010, was a modification of conditions that only could be effected in accordance with subchapter 11 of HAR chapter 15. See JROA 7:1848 (COL 57-58); HAR § 15-15-94(c). The circuit court further found that the LUC failed to comply with said rules, and accordingly, it was error for the LUC to revert or reclassify the Property on the basis of the improperly-adopted condition. See JROA 7:1849 (COL 63-64). The LUC failed to provide any argument in opposition to these conclusions, and has thus waived such arguments. See HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.").

In any event, the circuit court also found, as did the County, that DW and Bridge complied with the requirement that the 16 affordable units be completed by March 31, 2010. See JROA 7:1849 (COL 60-62). Thus, even if the LUC had the authority to reclassify the Property without going through the procedures of a boundary amendment, and even if the 2009 Order imposing the completion requirement was properly adopted, neither of which is the case, DW and Bridge complied with the completion requirement and accordingly, the reclassification was improper. As the circuit court found, the necessary predicate for moving forward with the OSC, *i.e.*, non-compliance with the LUC's condition, did not exist because the 16 affordable units were completed by the March 31, 2010 deadline. See JROA 7:1849 (COL 62).

The LUC attempts to skirt the issue of DW's compliance by calling it "an irrelevant red herring" and arguing that compliance with the 2009 Order is irrelevant because the LUC could have reclassified the Property in 2009. OB at 23-24. The implication of the LUC's argument is that, if the LUC could have reclassified the Property in 2009, then thereafter the LUC could have done whatever it wanted without regard to its later actions, representations, orders, or the reliance by DW and Bridge upon them. Plainly, the LUC is not vested with such arbitrary authority, but, as the circuit court noted, is constrained by the restraints of statute and regulations. See JROA 7:1849 (COL 63-64). Indeed, it is ironic that the purported basis for the LUC's reclassification of the Property is DW's and Bridge's alleged failure to comply with their representations to the LUC, but the LUC is now arguing that, because it allegedly could have reclassified the Property in 2009, it cannot be required to comply with any of its subsequent conditions or orders.

The LUC also attempts, without any citation to the record, to argue that the circuit court's conclusion that the 16 affordable units were completed by the deadline was erroneous. OB at 23-24. Being completely bereft of any cited support in the record, the LUC's attempt to rebut the circuit court's conclusion that DW and Bridge completed the 16 affordable units in accordance with the 2009 Order should be rejected by this Honorable Court.[12]

D. The Circuit Court Did Not Err in Allowing Supplementation of the Record with Other Dockets Before the LUC

Although the LUC argues that "[d]espite the clear mandate of [HRS § 91-9(e)], the circuit courts refused to strike" other LUC dockets, see OB at 25, the circuit court did not err in allowing supplementation of the record with documents from other dockets before the LUC.

The circuit court's review of the LUC's actions must be "confined to the record," HRS § 91-14(f), which includes "[a]ll pleadings, motions, intermediate rules; . . . [e]vidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed[,]" see HRS §§ 91-9(e)(1)-(2) (emphasis added). In its September 8, 2010 Statement of Position, Bridge cited seven LUC dockets in which the LUC removed its affordable housing requirement and assigned responsibility to the respective counties to implement the affordable housing conditions for those projects. JROA 11:2768-69. The additional LUC dockets also were brought

[12] If, as the LUC now argues, it believes that affordable housing is "so urgently needed," see OB at 24, it is completely counterproductive to reclassify the Property to Agricultural use and thereby prohibit the further development of affordable housing.

to the attention of the LUC during its April 21, 2011 meeting. Indeed, Commissioner Kanuha cited to these dockets in his lengthy remarks to his fellow commissioners, and also used those docket references to make a motion, which the LUC voted to deny. See Tr. 4/21/11, JROA 15:1877-78, 1882-84. The LUC also expressly considered the dockets in its 2011 Order: "None of the cases cited by Co-Petitioner Bridge involve facts and circumstances similar to this case." JROA 13:1015. The additional dockets are, thus, part of the record. See HRS §§ 91-9(e)(1)-(2).

Accordingly, the circuit court did not err in allowing supplementation of the record with additional LUC dockets.

E. The Circuit Court Did Not Err in Determining that the LUC Violated DW's Constitutional Rights to Due Process

In its Amended Order, the circuit court concluded that the LUC violated 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 the 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." JROA 7:1851. As discussed below, the circuit court did not err in determining that the LUC violated DW's due process rights.[13]

The Federal and State constitutions 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. Due process is an important concern when landowners' property rights are affected by reversionary land regulation consequences. Cf. Perry v. Planning Comm'n, 62 Haw. 666, 682, 619 P.2d 95, 106 (1980) (holding, in an analogous matter concerning special use permitting, that "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, 79 Cal. Rptr. at 878 ("Automatic reversion would violate the procedural directions of state law.").

1. The LUC's Reversionary Boundary Amendment of the Property Violated DW's Constitutional Right to Procedural Due Process

Procedural due process requires notice and an opportunity to be heard at a meaningful

[13] The LUC's initial argument that the circuit court could not review its decision for violations of the constitution is meritless because HRS § 91-14(g)(1) unambiguously authorizes the circuit court to "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 order are . . . [i]n violation of constitutional or statutory provisions[.]"

time and in a meaningful manner before governmental deprivation of a significant property interest. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Slupecki v. Admin. Dir. of the Courts, 110 Hawai'i 407, 413, 133 P.3d 1199, 1205 (2006). The standard by which an appellate court can review whether specific procedures used by a governmental entity violated a due process right has been articulated as follows:

> [The] identification of the specific dictates of due process generally requires consideration of three distinct factors: [1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334-35; Slupecki, 110 Hawai'i at 413, 133 P.3d at 1205.

In this case, the LUC's reclassification of the Property violated DW's right to procedural due process. First, the private interest at stake, *i.e.*, the economic use of the Property, is significantly curtailed by the LUC's action because the reclassification effectively deprives DW of all economically beneficial use of the Property.[14] In addition, DW substantially relied on the Urban classification when it purchased the Property. JROA 7:153.

Second, the risk of erroneous deprivation of DW's interest is great because the LUC approved the reclassification after utilizing a process that was never before used and was inconsistent with the statutory mandates for boundary amendments as articulated in HRS § 205-4 and subchapter 7 of HAR § 15-15. See supra Part III.A. In this case, the LUC filed its OSC on December 9, 2008. JROA 11:1519-20. At the April 30, 2009 meeting and without notice to DW, the LUC adopted a motion to revert the land use classification by "voice vote." Tr. 4/30/09, JROA 15:640-41. DW requested an opportunity to present its case, which was promptly denied by the LUC. Tr. 4/30/09, JROA 15:632-34. Over DW's objections, the LUC then proceeded with the vote. Tr. 4/30/09, JROA 15:640-41. On September 28, 2009, the LUC rescinded its OSC subject to a condition that DW "completes" 16 affordable housing units by March 31, 2010. JROA 11:2447. The LUC never defined "complete" in the 2009 Order. JROA 11:2447. DW thereafter completed the 16 affordable housing units by the deadline. Nevertheless, the LUC "reinstated" the OSC on January 20, 2011 (violating HRS § 205-4(g) for

[14] In its 1991 Order, the LUC determined that "[t]he Property is not suitable for agriculture and there are no agriculture activities on the site." JROA 9:2038-39.

failing to complete the process within 365 days and violating HRS § 205-4(h) for failing to obtain six affirmative votes), and filed the 2011 Order on April 25, 2011, reclassifying the Property to an agricultural classification. JROA 13:1005-28. This unfair and disjointed procedure used by the LUC to reclassify the Property has no basis in the statutes or the LUC's administrative rules. See Slupecki, 110 Hawai'i at 413, 133 P.3d at 1205 (holding that the risk of erroneous deprivation was "great" when there was "no apparent procedure established by the [governmental entity] for determining a default was appropriately entered"); Del Monte Dunes v. Monterey, 920 F.2d 1496, 1506 (9th Cir. 1990) (holding that "disjointed, repetitive and unfair procedures" designed to deprive a developer of its rights can violate due process). In addition, and as previously articulated, the LUC approved the reclassification without proper consideration of the areas of statewide concern enumerated in HRS § 205-17, without consideration of the Hawai'i State Plan as required by HRS § 205-16 for all LUC actions, and in excess of the LUC's statutory authority. Thus, there has been an erroneous deprivation of DW's property. See Application of Terminal Transp., Inc., 54 Haw. 134, 139, 504 P.2d 1214, 1217 (1972) (reversing and remanding an agency's decision for failure to follow its own rules).

Finally, an evaluation of the LUC's stated interest, *i.e.*, ensuring that developers comply with its conditions, when balanced, is outweighed by DW's constitutionally protected property and due process rights. In Kernan v. Tanaka, 75 Haw. 1, 29, 856 P.2d 1207, 1221 (1993), the Supreme Court held that a license revocation program, which the petitioner argued provided insufficient procedural protection for individuals, allowed the State to achieve its goal of public safety without overburdening individuals or the justice system. Unlike Kernan, however, the LUC's interest here is not justifiably furthered by the unprecedented procedure it employed and punitive measures that it ultimately took. There is no stability in our land use law if the LUC can, on its own whim, create processes different from those detailed in the governing statute, see HRS § 205-4, and bypass key protections afforded in these statutes. Moreover, ensuring compliance with the LUC's conditions is the responsibility of the respective counties. See, e.g., HRS § 205-12. Indeed, the arbitrary and punitive nature of the LUC's action is demonstrated by the fact the public policy goal of the condition it purportedly was enforcing, *i.e.*, the development of affordable housing, would be completely frustrated by the reclassification of the Property to agricultural use. The LUC's interest, if any, in meting out arbitrary punishment plainly is outweighed by DW's property and due process rights.

When balanced under the Mathews framework, the enumerated factors weigh heavily against the LUC. Accordingly, the LUC violated DW's procedural due process rights.

2. The LUC's Reclassification was Arbitrary and Capricious and Thus, Violated DW's Constitutional Right to Substantive Due Process

"Due process includes a substantive component that guards against arbitrary and capricious government action." In re Herrick, 82 Hawai'i 329, 349, 922 P.2d 942, 962 (1996) (emphasis added). "[A]n aggrieved person must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Id. (citing Dodd v. Hood River Cnty., 59 F.3d 852, 864 (9th Cir. 1995)). In this case, the LUC violated DW's substantive due process rights because its reclassification of the Property was arbitrary and unreasonable, with no substantial relation to the public health, safety, morals, or general welfare. Id.

First, the LUC's reclassification was not reasonable because DW had substantially complied with the terms of the 2009 Order by completing the required 16 affordable housing units before the March 31, 2010 deadline. JROA 11:2447. Although the LUC took the position that "complete" within the 2009 Order meant that DW needed to obtain certificates of occupancy, there is nothing in the 2009 Order that required DW to obtain certificates of occupancy for each unit in order for those units to be "complete." Indeed, any ambiguity in the definition of a term is resolved against the drafter – in this case, the LUC. Cf. Koga Eng'g & Constr., Inc. v. State, 122 Hawai'i 60, 72 n.20, 222 P.3d 979, 991 n.20 (2010) ("[A]mbiguities in a government contract are normally resolved against the drafter." (citation omitted)). Moreover, the County explicitly agreed, and the circuit court expressly determined, that the units were "complete" by the deadline imposed by the LUC. See JROA 13:414 (noting that "16 townhouse units were completed by March 31, 2010"). Thus, the LUC's action was unreasonable.

Second, the LUC's action was not substantially related to valid State concerns, such as public health, safety, morals, or general welfare. To the contrary, the LUC's actions effectively halted DW's progress and commitment to providing much needed affordable housing and additional amenities to the people of Hawai'i island. Numerous individuals testified throughout the entire process about the need for this development and the affordable housing units and jobs that it would bring to the community. See generally JROA 13:859; Tr. 11/18/10, JROA 15:1317-53; Tr. 4/8/11, JROA 15:1748-65.

Finally, the LUC's decision was premised on its arbitrary desire to punish Bridge and DW by improperly asserting its authority even though: (1) the County found no violation and wanted the Project to move forward; (2) the Project was in conformance with the State and County plans, public interest, and reasonable investment-backed expectations; and (3) there was no finding by the LUC of any injury or harm as a result of the alleged non-compliance with the LUC's deadline. The LUC's arbitrary action was based upon contemplation of its own self-worth, and not a legitimate government interest.[15] The LUC's decision was arbitrary.

The LUC, citing Marsh v. County of San Diego, 680 F.3d 1148, 1154 (9th Cir. 2012), argues that "no finding of fact supports a conclusion that the LUC's action 'shocks the conscience' and 'offends the community's sense of fair play and decency.'" OB at 25-26. The standard articulated in Marsh, however, appears to apply only to substantive due process claims under the Fourteenth Amendment of the federal constitution in certain federal circuits and in narrow contexts.[16] Even assuming that the Marsh standard was applicable, the LUC's action in "reverting" the land use classification can be reasonably characterized as conscience shocking and offensive to the community's sense of fair play and decency. In this case, the LUC is trying to deny DW all economically beneficial use of the Property (after DW had substantially commenced development) simply because it wanted to punish Bridge and make an example out of the Project for future developments. Moreover, and as discussed further infra, the LUC's action was unprecedented insomuch as no other developer prior to this Project or since has ever

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[15] Chairman Devens stated, "at what point do we start looking at ourselves to weigh the credibility and integrity of the Commission as a whole . . . ?" Tr. 4/21/11, JROA 15:1893-94. Commissioner Heller stated, "If we're just going to leave everything up to the counties, we might as well just all go home and forget about having a Land Use Commission." Tr. 4/21/11, JROA 15:1892. Just prior to the vote, Commissioner Contrades stated, "If we don't vote on this and don't revert it back, then why have a Commission? What powers do we have? That's one of the only powers we have." Tr. 4/21/11, JROA 15:1913-14. He continued, "We are here to [revert] . . . I'm sorry for those who feel this is jobs that they coulda had or coulda, woulda, shoulda, but not." Tr. 4/21/11, JROA 15:1914.

[16] Indeed, the "arbitrary and unreasonable" standard adopted in Herrick has not been modified in Hawai'i to require a showing that the government's actions "shocked the conscience." See State v. Mallan, 86 Hawai'i 440, 452, 950 P.2d 178, 190 (1998) (citing Herrick, 82 Hawai'i at 349, 922 P.2d at 962). Other jurisdictions have also upheld an "arbitrary and unreasonable" standard in land use contexts. See, e.g., Doherty v. City of Chicago, 75 F.3d 318, 325 (7th Cir. 1996) (noting that there was the "potential for a substantive due process claim in the context of land-use decisions that are arbitrary and unreasonable, bearing no substantial relationship to the public health, safety or welfare" (emphasis added)).

been required to meet such a stringent affordable housing requirement to retain their urban land use classification. Also, no other developer has ever been subjected to a reversionary boundary amendment after that developer has substantially commenced construction. The LUC's actions – more appropriately characterized as a concerted effort to punish Bridge and kill this Project – shock the conscience and offend the community's sense of fair play and decency.

The LUC, therefore, applied its regulatory process to DW in a manner that violated DW's substantive due process rights. In conclusion, the circuit court did not err in determining that the LUC violated DW's due process rights.

F. The Circuit Court Did Not Err in Determining that the LUC Violated DW's Equal Protection Rights in Treating DW Differently From Others Similarly Situated

In its Amended Order, the circuit court concluded that "the actions of the LUC in its imposition and enforcement of the specific affordable housing requirement violate[d] the equal protection rights of Bridge and DW" insomuch as 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." JROA 7:1853. The LUC argues that: (1) it was not presented with any evidence of unequal treatment;[17] (2) the equal protections claims were time barred;[18] (3) the "class of one" theory used by the circuit court to reach its conclusion was improper; and (4) in any event, the LUC had a legitimate state interest to ensure that its conditions were not "simply ignored by developers." OB at 28-34. The LUC's arguments are wholly without merit.

The Fourteenth Amendment to the United States Constitution and Article I, section 5, of

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[17] The LUC ignores the fact that at the April 21, 2011 meeting, it considered various dockets through a motion made by Commissioner Kanuha and denied the motion by a vote of five to three. JROA 13:1001. The LUC also ignores its own Findings of Fact No. 56 in its 2011 Order, which provides, "None of the cases cited by Co-Petitioner Bridge involve facts and circumstances similar to this case." JROA 13:1015.

[18] Contrary to the LUC's arguments, see OB at 28, DW's equal protection claim is not barred by the two-year statute of limitations under HRS § 657-7 because this appeal is to determine, *inter alia*, whether the LUC's 2011 Order was made in "in violation of constitutional . . . provisions" and should therefore be reversed. HRS § 91-14(g)(1). HRS § 657-7 does not apply to administrative appeals under HRS chapter 91. Moreover, even if the two-year statute of limitation applied, the limitations period would not have begun until the cause of action accrued, *i.e.*, when the claimant suffered harm. See Yamaguchi v. Queen's Med. Ctr., 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982). Here, DW suffered the harm on April 25, 2011 when the LUC amended the Property's land use district boundaries, and timely filed its action with the circuit court on May 24, 2011, within the two-year limitation period. See JROA 13:1005-28.

the Hawai'i Constitution prohibit the State from denying persons "equal protections of the laws." The U.S. District Court for the District of Hawai'i has stated:

> 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. 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.

HRPT Props. Trust v. Lingle, 715 F. Supp. 2d 1115, 1141 (D. Haw. 2010) (citations omitted); see also State v. Freitas, 61 Haw. 262, 271-72, 602 P.2d 914, 922 (1979) ("The Equal Protection Clause mandates that all persons similarly situated shall be treated alike, both in the privileges conferred and in the liabilities imposed.").

Therefore, to establish an equal protection claim under the "class of one" theory, the plaintiff must show that the government entity intentionally, and without a rational basis, treated the plaintiff differently from others similarly situated. See Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Although Hawai'i has yet to adopt the "class of one" theory, the United States Supreme Court has upheld its validity. In Olech, a municipality imposed a condition on the plaintiff landowner that required a 33-foot easement in order to connect the plaintiff's property to the municipal water supply. Id. at 563. Other landowners that sought to connect their property to the municipal water supply were only required to provide a 15-foot easement. Id. The U.S. Supreme Court determined that the discrepancy between the conditions imposed was sufficient to establish Olech's equal protection claim. Id. at 565.

The Ninth Circuit more recently reaffirmed the validity of the "class of one" theory within the land use context in Gerhart v. Lake County, 637 F.3d 1013 (9th Cir. 2011).[19] There, the petitioner claimed that the county violated his constitutional right to equal protection when it

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[19] The LUC argues that the "class of one" equal protection claim is barred by Engquist v. Oregon Department of Agriculture, 553 U.S. 591, 601 (2008). OB at 29-32. Engquist, however, holds that a public employee could not assert a "class of one" claim against his employer. 553 U.S. at 594 ("[A] 'class-of-one' theory of equal protection has no place in the public employment context."). The holding in Engquist has not been expressly extended to the land use or property context. Thus, the Ninth Circuit's use and affirmation of Olech in Gerhart is valid.

denied him an access road permit, yet it allowed, without consequences, ten other property owners on his block to build unpermitted access roads. Id. at 1014-15, 1021-22. The trial court granted summary judgment to the county, concluding that the petitioner could not establish a constitutional violation under the "class of one" theory. Id. On appeal, the Ninth Circuit vacated the trial court's order and reaffirmed the "class of one" theory. Id. at 1021-24. Thus, contrary to the LUC's assertions, the "class of one" theory is valid and applicable in this case.

1. DW Suffered Disparate Treatment Compared with Other Similarly Situated Petitioners

Again, to succeed on a "class of one" claim, DW must show that the LUC intentionally treated DW differently than other similarly situated landowners, without a rational basis. See Gerhart, 637 F.3d at 1022. Like the municipality in Olech, the LUC in this case treated DW differently from others similarly situated when it: (1) imposed an extremely rigid affordable housing condition requiring all units to be completed by a specific date (Condition 1 in the LUC's 2005 Order), instead of allowing the County to define the requirements of the condition; and (2) reverted the land use classification of the Property for DW's failure to meet the unwavering "deadline" imposed by the LUC under Condition 1.

In 2005, Bridge requested that Condition 1 be amended to provide that the affordable housing be "consistent and coincide with County of Hawai'i 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." JROA 9:2845. This was, as Commissioner Kanuha indicated, the standard practice of the LUC and counties for years. Tr. 4/21/11, JROA 15:1886-87 ("There's ample documentation that affordable housing conditions have been passed down to the county in a rather generic form particularly because . . . each county has a housing component to them.").

Indeed, the LUC had approved substantively identical requests for at least seven other major projects. See Record on Appeal ("ROA") at 14362;[20] 9316-20; 10156-60; 11118-25; 11400-05; 11906-40; 10152-53; see also JROA 7:1415 (listing dockets in which the LUC did not

[20] The other LUC dockets are contained on a compact disc, which the appellate clerk received on August 6, 2013. See JROA 72:3 ("NOTE: Transmitted Imaged Documents on one (1) CD of the Administrative Appeal Record 1FCC1-1 FCC 15332 filed in 3CC-Kona on 08/02/13. (Rev'd via USPS on 08/06/13)"). The record citation for the additional LUC dockets is to the bates number stamped on the document.

impose any requirement that all of the project's affordable housing units be constructed by a specific deadline). In most dockets, the respective counties are responsible for determining the terms of the affordable housing requirement and work with the land owner to encourage development. In the instant docket, the LUC imposed, and refused to amend, the unusually strict and unwavering affordable housing condition of requiring DW to complete 385 affordable housing units by November 17, 2010. See Tr. 7/1/10, JROA 15:1280-82. The record demonstrates that DW was treated differently from other similarly situated petitioners.

While numerous other similarly-situated petitioners have experienced similar or even worse delays, the LUC has not enforced reversionary consequences upon those petitioners. In fact, to DW's knowledge, the LUC has never enforced reversionary consequences upon any other petitioner. Indeed, an LUC commissioner stated that reversion constitutes extremely draconian punishment: "I think it's a little bit unfortunate that kind of the only tool we have in our tool box is a sledge hammer." Tr. 1/20/11, JROA 15:1593. In other LUC dockets, the LUC did not move to reclassify the land to agricultural use even where developers developed less than DW.[21] These dockets demonstrate that the LUC selectively imposed severe reversionary consequences upon DW whereas it did not do so for similarly-situated petitioners, constituting disparate treatment of DW.

2. The LUC's Disparate Treatment of DW was Intentional

The LUC's disparate treatment of DW was intentional. To satisfy this prong, DW need not show the government officials' "subjective bad feelings towards [it,]" but must show that "the Commissioners intended to treat [it] differently from other applicants." Gerhart, 637 F.3d at 1022. At the time of the reversion, the LUC had before it remarks from Commissioner Kanuha that its action to revert was unprecedented given the numerous other instances where the LUC has failed to impose such a harsh consequence. See Tr. 4/21/11, JROA 15:1877-78, 1882-84. In addition, an LUC Staff Report indicated that allowing Bridge to amend Condition 1 to negotiate

[21] See ROA at 14362-433 (allowing the amendment of the affordable housing requirement based on developer representations that it would build additional homes, yet no homes were built); 12415-45 (reclassifying land based on developer representations it would build 650 homes within five years of county approval, yet no homes were built); 13419-29, 13538-64 (amending the affordable housing requirement based on developer's various representations, yet no homes were built); 7535-40 (extending the land use classification based on developer's representations that it would reach an affordable housing agreement with the county, yet no affordable housing agreement was made and no homes were built).

affordable housing considerations with the County was reasonable and consistent with past practices.[22] JROA 15:1954. Here, the record demonstrates that the LUC's selective enforcement of the law against DW was intentional, motivated by animus, and prejudiced DW.

3. There was No Rational Basis for Singling Out DW

Within the specific context of "class of one" claims, courts have recognized that "the rational basis prong . . . turns on whether there is a rational basis for the distinction, rather than the underlying government action." Gerhart, 637 F.3d at 1023 (emphasis in original). Specifically, the rational basis prong "requires that the court determine whether the [LUC] had a rational basis for singling out [DW]." Id. In this case, the LUC asserts that the "clear and compelling reasons" for the detailed affordable housing requirement was that there was a "shortage of affordable housing units in West Hawaii" and because "appellants affirmatively represented that they were willing to accept the affordable housing conditions with a deadline." OB at 34. The LUC further argues that its reversionary boundary amendment ensured that "LUC conditions are not simply ignored by developers."[23] OB at 34. Contrary to the LUC's contentions, there was no rational basis for singling out DW.

The LUC's argument that it needed to impose the rigid affordable housing condition on DW because of the shortage of affordable housing units in West Hawai'i ignores the multitude of

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[22] Although not necessary to show intent, there have also been instances of animosity towards Bridge and this Project by LUC Commissioners, which have prejudiced DW. For example, Chairman Piltz expressed his disdain, stating, "it's too bad some of the people that were involved in this Project prior to [] Wessels coming online gave us a lot of bull." Tr. 7/1/10, JROA 15:1273. Notwithstanding Wessels' statement that the November 17, 2010 deadline would be extremely difficult to meet, and Chairman Piltz's firm conviction that Wessels was doing his "utmost best," Piltz affirmed the unreasonably strict deadline, saying "But you've heard the feeling [towards Bridge and the Project] and we will just look towards that date." Tr. 7/1/10, JROA 15:1274. Animus was also evident when Abbey Mayer, Director of the OP, offered unsolicited comments on the Project, while not doing so on similarly-situated projects, and publicly testified that the Project should be killed so that the Project can be transferred to another developer. Referring to the vote to rescind the OSC, Mayer stated, "typically I'm a good loser. If I make an argument and it doesn't fly I cut my losses. But this one stuck with me." Tr. 7/1/10, JROA 15:1278.

[23] The LUC failed to make any findings of fact or conclusions of law regarding a rational basis for its actions, and, instead, now provides inappropriate post hoc justifications for its reversionary boundary amendment. See HRS § 91-9(e) (delineating the record for purposes of an agency's decision); cf. Kepo'o v. Kane, 106 Hawai'i 270, 294 n.42, 103 P.3d 939, 963 n.42 (2005) (holding that the environmental review process should be implemented at the earliest time to avoid "post hoc rationalization to support action already taken").

similar developments in which the LUC has never imposed such rigid conditions. More specifically, even after the LUC's 2005 Order granting Condition 1, the LUC continued to grant counties the authority to oversee affordable housing compliance for other projects, including one major residential project near the development in this case. In Waikoloa Mauka, LLC, a project that is within miles of the development here, the LUC imposed a less stringent affordable housing provision: "Petitioner shall provide affordable housing opportunities for residents in the State of Hawai'i in accordance with applicable affordable housing requirements of [Hawai'i] County[.]" See JROA 15:2565. This provision, when compared to Condition 1 of the 2005 Order, demonstrates that the LUC's rationale that it needed to provide stringent affordable housing provisions to induce affordable housing development in West Hawai'i was pretext.[24]

Next, the LUC's argument that it could treat DW differently from other petitioners because DW represented that it was willing to accept the rigid affordable housing condition and to ensure that LUC conditions were not ignored, sidesteps the issue at hand. As previously indicated, other developers have made representations to the LUC about the progress on their developments and have failed to fulfill those representations, yet have never been subjected to a reversionary boundary amendment. See supra note 21.

Contrary to the LUC's arguments, its decision to treat DW differently by denying the Motion to Amend and reclassifying the Property's land use classification was instead based upon contemplation of its own self-importance, and not a legitimate government interest. The LUC has only targeted this Project and its developers with reclassification. Thus, the LUC had no rational basis for intentionally treating DW differently than comparable projects before it.

Accordingly, and as the circuit court correctly recognized in its Amended Order, the LUC violated DW's equal protection rights because it selectively implemented an unusually strict affordable housing condition on DW, selectively enforced reversionary consequences upon DW, and the disparate treatment was intentional, and did not serve a legitimate government interest.

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[24] Moreover, the pretextual nature of the LUC's proffered rationale is evident from the fact that DW is building affordable housing on the Property before any market-priced housing, and that reclassifying the Property to the agricultural land use classification would only ensure that no further affordable housing can be built on the Property. If the LUC truly was concerned about affordable housing, it would have permitted DW to continue to development the affordable housing on the Property. The fact that the LUC's action will prevent further development of affordable housing on the Property further demonstrates that the real motivation for the LUC's action is to punish Bridge and DW.

G. The LUC Effected a Taking of DW's Property Without Just Compensation, in Violation of the Hawai'i and U.S. Constitutions

In briefs filed before the circuit court, DW and the LUC addressed the issue of whether the LUC's action was an unconstitutional taking. JROA 7:1407-09, 1607, 1671. The circuit court never addressed the issue in its Amended Order, presumably on the basis that the issue was mooted by the circuit court's reversal of the LUC's action. Nevertheless, the LUC's reclassification of the Property constituted an unconstitutional uncompensated regulatory taking.

1. The LUC Effected a Complete Regulatory Taking

Under the Fifth Amendment to the United States Constitution, property cannot be "taken" by the government without "just compensation." Article I, section 20 of the Hawai'i Constitution contains substantially similar language. A complete regulatory taking occurs when a "regulation denies all economically beneficial or productive use of land." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); see also Public Access Shoreline Hawai'i v. Hawai'i Cnty. Planning Comm'n, 79 Hawai'i 425, 451-52, 903 P.2d 1246, 2372-73 (1995). In Lucas, the landowner had purchased two residential lots but was subsequently barred from constructing homes on the lots due to legislation, later enacted, that designated the land as "critical areas." Id. at 1006-08. The U.S. Supreme Court determined that the legislative regulation constituted a full regulatory taking because it had effectively deprived the landowner of all economically beneficial or productive use of the land. See id. at 1031-32.

Here, DW was deprived of all economically beneficial or productive use of the Property when the LUC reclassified it from Urban to Agricultural, thereby prohibiting the development of residential homes as contemplated by DW. The extremely poor soil quality renders the Property nearly devoid of any economically beneficial or productive use under the Agricultural land use classification. See JROA 9:2038-39 ("The Property is not suitable for agriculture and there are no agriculture activities on the site."). The record demonstrates that the LUC's reclassification of the Property constituted a complete regulatory taking, requiring just compensation.

2. In the Alternative, the LUC Effected a Partial Regulatory Taking

A partial regulatory taking occurs when the effect of the regulation does not constitute a full Lucas-type taking, but is sufficient to require just compensation under the Fifth Amendment. To determine whether a regulation constitutes a partial taking, courts consider the following factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the

regulation has interfered with reasonable investment-backed expectations; and (3) the character of the governmental action. Penn. Cent. Transp. Co. v. N.Y., 438 U.S. 104 (1978). In Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), the U.S. Supreme Court determined that a regulation will constitute a taking when either it does not substantially advance a legitimate state interest or it denies the owner all economically beneficial or productive use of the land.

The LUC's reclassification of the property is, at minimum, a partial regulatory taking. First, the reclassification has significant economic impact on DW, as it has expended substantial sums in reliance on the State Urban classification. JROA 7:153 (¶¶ 7, 11-12). Second, the reclassification has interfered with the Project's distinct investment-backed expectations because DW's investors funded the project with the expectation that the land would remain classified as Urban. JROA 7:154 (¶¶ 16, 19). Third, the character of the LUC's action did not serve a public purpose other than to make a statement that it wields authority to enforce land use conditions, despite the County's express statutory authority to do so under HRS § 205-12. See JROA 13:1016 (¶ 65). Moreover, the LUC's arbitrary decision does not advance any legitimate public interests. In fact, the public interests set forth in the record recognize that the Property would be best served as urban zoned land for the benefit of local residents and satisfy public goals such as economic development, employment and affordable housing. The "taking" by the LUC is draconian and arbitrary, and deprives DW of economically viable use of the Property.

Therefore, the record demonstrates that the LUC's reclassification of the Property was at least a partial regulatory taking, requiring just compensation.

IV. CONCLUSION

For the foregoing reasons, DW respectfully urges this Honorable Court to affirm the circuit court's Amended Order reversing the LUC's 2011Order.

DATED: Honolulu, Hawai'i, November 6, 2013.

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CAAP-13-0000091

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

DW AINA LE'A DEVELOPMENT, LLC, Co-Petitioner-Appellant/Appellee, vs. BRIDGE AINA LE'A, LLC, Co-Petitioner-Appellant/Appellee, and STATE OF HAWAI'I LAND USE COMMISSION, Appellee/Appellant, and STATE OF HAWAI'I OFFICE OF STATE PLANNING; COUNTY OF HAWAI'I PLANNING DEPARTMENT, Appellees/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 HON. ELIZABETH A. STRANCE HON. RHONDA A. NISHIMURA
BRIDGE AINA LE'A, LLC, Appellant/Appellee, vs. STATE OF HAWAI'I LAND USE COMMISSION, Appellee/Appellant, and STATE OF HAWAI'I OFFICE OF PLANNING and COUNTY OF HAWAI'I,	Civil No. 11-1-0969-05 (RAN) (Agency Appeal)

Appellees/Appellees,

and

DW AINA LE'A DEVELOPMENT, LLC,

Appellee/Appellee.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this date, a copy of the foregoing document was duly served upon the following individuals via electronic court filing [JEFS system]:

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