CAAP -13-0000091

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI‘I

DW AINA LE'A DEVELOPMENT, LLC,

Co-Petitioner-Appellant/Appellee,

vs.

BRIDGE AINA LE'A, LLC,

Co-Petitioner-Appellant/Appellee,

and

STATE OF HAWAI‘I LAND USE COMMISSION,

Appellee/Appellant,

and

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

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

APPEAL FROM:

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

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

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

CIRCUIT COURT OF THE THIRD CIRCUIT,

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

APPELLANT STATE OF HAWAI'I LAND USE COMMISSION'S CONSOLIDATED REPLY BRIEF

CERTIFICATE OF SERVICE

DAVID M. LOUIE 2162
Attorney General of Hawai'i

RUSSELL A. SUZUKI 2084
WILLIAM J. WYNHOFF 2558
DIANE ERICKSON 1589
Deputy Attorneys General
465 S. King Street, Suite 300
Honolulu, Hawai'i 96813
Tel. No. (808) 587-2995

Attorneys for Land Use Commission,
State of Hawai'i

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

State Cases

State Statutes

APPELLANT STATE OF HAWAI'I LAND USE COMMISSION'S CONSOLIDATED REPLY BRIEF

I. DEVELOPERS DO NOT CHALLENGE ANY OF THE LUC'S FINDINGS OF FACT

Developers'[1] answering briefs pay lip service to the proper standard of review as articulated in Haw. Rev. Stat. § 91–14(g), but ignore that standard when it suits their purposes. It is critically important to note that developers do not challenge a single one of the LUC's findings of fact. These findings are binding for purposes of the appeal. "Findings of fact that are unchallenged on appeal are the operative facts of a case." Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 239, 982 P.2d 853, 868 (1999).

The only proper issue on appeal is therefore the pure legal issue of whether the LUC can ever exercise its statutory power to revert a property to its former land use classification. Developers' sporadic efforts to claim that the LUC can sometimes revert but just not in this case are improper and futile as further discussed below.

II. THERE ARE TWO DIFFERENT WAYS THAT A DISTRICT BOUNDARY CAN BE CHANGED – RECLASSIFICATION AND REVERSION

Haw. Rev. Stat. § 205-4(a) (Cum. Supp. 2012) provides that state and county agencies and "any person with a property interest in the land sought to be reclassified may petition the land use commission for a change in the boundary of a district."

Haw. Rev. Stat. § 205-4(g) (2001) provides:

> (g) Within a period of not more than three hundred sixty-five days after the proper filing of a petition, unless otherwise ordered by a court, or unless a time extension, which shall not exceed ninety days, is established by a two-thirds vote of the members of the commission, the commission, by filing findings of fact and conclusions of law, shall act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change. The commission may provide by condition that absent substantial commencement of use

[1] Bridge Aina Le'a, LLC ("Bridge") and DW Aina Le'a Development LLC ("DW") are collectively referred to as "developers."

> of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former classification or be changed to a more appropriate classification. Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances.

The underlined language was added in 1990, decades after passage of the original law creating the LUC in 1963. Act 261, 1990 Hawai‘i Session Laws 563. The legislature added it specifically to "clarif[y] the Commission's authority to impose a specific condition to downzone property in the event that the petitioner does not develop the property in a timely manner." SCRep No. 2116 on S.B. No. 3028, 1990 Senate Journal 915. The legislature was concerned that "Vacant land with the appropriate state and county land use designations is often subjected to undesirable private land speculation and uncertain development schedules."

Because developers have not challenged a single one of the LUC's findings of fact, the key and threshold issue is purely one of law - whether the LUC's original consideration of a petition to change classification is different from its later determination of whether to "revert" for failure to fulfill conditions and live up to representations.

The LUC argued in its opening brief that the plain language of the statute shows the two are different. The LUC also pointed out that the Supreme Court has recognized and upheld its power to revert and (at least implicitly) recognized the difference between acting on a petition and reverting. *Lanai Co., Inc. v. Land Use Com'n*, 105 Hawai'i 296, 318, 97 P.3d 372, 394 (2004).

See also Kaniakapupu v. Land Use Com'n, 111 Haw. 124, 139 P.3d 712 (2006). In that case Aha Hui Malama O Kaniakapupu ("Hui") filed a:

> "Motion for an Order to Show Cause Regarding Enforcement of Conditions, Representations, or Commitments" (motion for an order to show cause) pursuant to Hawai‘i Administrative Rules (HAR) §§ 15-15-70 and 15-15-93. The Hui sought to have the LUC issue an order to show cause as to why the classification of the Midkiff/Myers Parcel should not be reverted to conservation district.

111 Hawai‘i at 127, 139 P.3d at 715. The LUC denied the motion and did not issue the OSC. The Hui appealed, claiming that the LUC's ruling on the OSC itself constituted a contested case

hearing. The Supreme Court upheld dismissal of the appeal on the basis that denial of the motion to issue an OSC was not a contested case hearing. However, the Court specifically noted that if the motion for an OSC had been granted, then a contested case hearing on the OSC would have been required. 111 Haw. at 134, 139 P.3d at 722. None of these rulings would make sense if the LUC did not have authority to consider reversion in the first place.

Developers make various arguments in support of their claim of equivalency.[2] Bridge argues that the OSC referred to the LUC's rules relating to petitions. By doing so, Bridge says, the LUC "admitted" the two processes are equivalent. Bridge AB at 13. The argument is without merit. HAR § 15-15, subchapter 11 relates to imposing and enforcing conditions. HAR § 15-15-93 applies. Subsection b of the rule provides for exactly what happened in this case:

> (b) Whenever the commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, 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.

And HAR § 15-15-93(c) and (d) specifically require that such a proceeding be conducted pursuant to the provisions of subchapters 7 and 9 where applicable:

> (c) The commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7, where applicable. Any procedure in an order to show cause hearing may be modified or waived by stipulation of the parties and informal disposition may be made in any case by stipulation, agreed settlement, consent order, or default.
>
> (d) Post hearing procedures shall conform to subchapter 7 or subchapter 9. Decisions and orders shall be issued in accordance with subchapter 7 or subchapter 9.

By referencing those subchapters, the LUC was simply following its own rules.

Bridge also argues "the Commission's own maps exemplify that the Property's land use boundaries were amended from urban to agriculture." In fact all the maps show is the undisputed

[2] Bridge devotes less than three pages of its answering brief (12-14) to the issue.

fact that at the end of the day property formerly in the urban district was back in the agricultural district (until the circuit court's ruling). But there are two different roads to that same destination. One road is an "amendment to district boundaries" by petition via section 205-4(a). The other road is to revert via section 205-4(g). The LUC's maps show the destination, not the road. Exactly as the circuit court originally ruled:

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

JEFS 007 at 1155.

DW argues the statutory scheme suggests only the counties can enforce. DW "supports" this argument by citing and underlining language in section 205-4(a): "this section applies to <u>all petitions for changes in district boundaries</u>." DW AB at 13 (emphasis in original). This language does not support the argument. On the contrary, it constitutes an important clue that the processes are distinct - clearly our case does <u>not</u> involve a petition to change a boundary. Instead the LUC considered an order to show cause. DW elides over the point, baldly stating, "The order to show cause thus serves as the LUC's petition for reversionary boundary amendment or a change to a more appropriate classification." DW AB at 13. But that claim falls flat. The legislature used two different terms and must have done so because it meant two different things.

The poverty of DW's argument is shown when it is reduced to arguing in fn. 7 that it would be absurd if the LUC could "automatically" change land use classification for a violation of a condition. The process is far from automatic as illustrated by this case. The LUC has never said, implied, or acted as if the process was automatic. DW, like Bridge (and like the circuit court for that matter) ignores the LUC's findings as to lack of substantial commencement. It is far from absurd to give the LUC a mechanism to enforce promises made to it and conditions imposed. DW itself admits (as we show in the next paragraph) that the plain language of the statute supports the LUC. "[W]here the statutory language is plain and unambiguous, [the Court's] sole duty is to give effect to its plain and obvious meaning." *Fratinardo v. Employees' Retirement System of State of Hawaii*, 129 Hawai'i 107, 112, 295 P.3d 977, 982 (Haw.App. 2013) (citation omitted).

As noted, DW concedes the critical point in this case. At page 14 it admits "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[.]'" Exactly! The LUC has never argued that "they [sic] have authority to automatically revert a land use classification for any violation," DW AB at 14, or "unfettered authority to amend the district boundary as punishment." *Id.* at 15. The LUC did not "effectively read out the 'substantial commencement' portion" of the statute. *Id.*

Similarly, Bridge concedes at pages 22-24 of its brief that the LUC can sometimes exercise its power to revert – just not in this case. According to Bridge, "the Circuit Court did not rule that the Commission may never impose development conditions or specific affordable housing benchmarks. Instead, the Circuit Court ruled that the Commission 'must look at th[e] larger picture' under the purpose of HRS Chapter 205 that leaves specific, regulatory authority to the counties and their professional planning departments." (Bridge does not explain how these two ideas can be reconciled - the LUC may sometimes revert but regulatory authority is left to the counties.)

Bridge also argues "the Commission failed to establish that Bridge and DW did not make substantial commencement of the use of the land." Bridge AB at 18. In the first place, Bridge again misquotes the actual language of the statute. Section 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 revert to its former land use classification or be changed to a more appropriate classification.

Sixteen incomplete and unusable units are NOT substantial commencement in accordance with developers' promise to have 365 units ready for folks to live in them by November 10, 2010.[3]

[3] Bridge's record references do not support the claims made as to status as of January 20, 2011. Bridge AB at 19. JEFS 13 at 414-416 is a letter dated December 23, 2010. JEFS 11 at 2598-2619 is a letter dated June 10, 2010. Neither document makes any reference to "substantial construction of an additional 72 townhouses." Bridge's reference to building permits and foundation pads for 432 units may or may not include some of the 365 affordable units. Its Appendix B includes a picture of the sixteen units that lack electricity, water, sewer, and certificates of occupancy and a picture of "started construction on 40 additional town homes" that may or may not be affordable units. The LUC's unchallenged finding refers to "approximately

But more importantly, developers' belated argument that the LUC can revert some projects – just not this one – fails because developers do not challenge the LUC's findings. These findings go into great detail as to the decades that the LUC waited for its conditions to be met, the leeway given to a series of developers, and the exhaustive process afforded the developers.

Specifically as to substantial commencement, the LUC found that the developments did not meet that requirement. Those findings, numbers 55-64, may be found at JEFS 007 at 58-64. Finding 61 specifically states:

> 61. Petitioners have not substantially commenced use of the Petition Area in conformance with the representations made in 2005 or in conformance with the applicable representations and conditions as of January 20, 2011. Furthermore, Petitioners have failed to substantially comply with representations made to the Commission.

JEFS 007 at 58.

These findings went unchallenged below and are not challenged on this appeal. This is not some mere technicality that can or should be overlooked now that developers belatedly change their argument. On the contrary, developers chose to ignore inconvenient findings rather than forthrightly challenge them precisely because they cannot meet the standards of review imposed by Haw. Rev. Stat. § 91-14(g) (1993). Developers do not even try to show that any of the findings are "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Id.*

Instead, Bridge's argues that "the evidence in the record clearly supports the Circuit Court's ruling that 'the LUC erred as a matter of fact and law' when it subverted the County of Hawaii's authority to enforce the land use conditions." This completely misses the point of judicial review. It was not the circuit court's job to weigh the evidence and decide what it would do if it was the decision maker. Clearly the circuit court liked the project and thought the project should proceed.[4] But in making its own independent assessment of the evidence, it was the

---

40 dwelling units in various stages of vertical construction." LUC FOF 57, JEFS 7 at 58.

[4]Although the same court was later forced to halt the project because developers fail to comply with Haw. Rev. Stat. chapter 343. *See Mauna Lani Resort Association v. County of Hawaii et al; Civil No. 11-01-005K.*

circuit court - not the LUC - that "lost sight of its mission." Bridge AB at 23. The court was required to determine whether the LUC's factual determinations were "Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." It did not do so. Instead it simply substituted its own judgment for that of the LUC.

III. OTHER PROCEDURALS ISSUES ARE NOT APPLICABLE TO REVERSION

The fact that a petition to change the boundaries and a reversion are not the same immediately moots developers' other procedural points, all of which developers woodenly repeat without acknowledging that the points rely wholly on resolution of the threshold issue discussed above.

- Section 205-4(g) requires the LUC to act "within a period of not more than three hundred sixty-five days after the filing of a petition." Similarly HAR § 15-15-51(e) provides that the hearing "shall not extend beyond three hundred sixty-five days from the date the petition is deemed properly filed." The "petition" referred to is the "petition for a change in the boundary of a district" in section 205-4(a). No such petition was filed here. Please note that Bridge changes the underlined language in its discussion, claiming that "a hearing on proposed action to amend land use district boundaries cannot exceed three 365 days from the date the order to show cause is filed." Bridge AB at 17.

  Developers ignore the point made in the opening brief (page 23) that the OSC in *Lanai Co.* "was issued on October 13, 1993 (105 Haw. at 302, 97 P.3d at 378) but not resolved until May 17, 1996. 105 Haw. at 303, 97 P.3d at 379. That interim of 947 days was, of course, far more than 365 days and even more than the "approximately 863 days," Bridge AB at 18, that the LUC took to resolve the OSC in this case.
- Section 205-4(h) imposes various requirements for "an amendment of a land use district boundary." For the same reasons as noted above, this language refers to an "amendment to district boundaries" by petition via section 205-4(a) – not to reverting pursuant to section 205-4(g)
- Sections 205-16 and 205-17 apply to the petition process, not the reversion process

IV. THE RECORD ON APPEAL DOES NOT INCLUDE CHERRY PICKED PORTIONS OF OTHER DOCKETS

Bridge designated documents from 16 or 17 (depending on how its ambiguous

designation is interpreted) extra record dockets. JEFS 007 at 986. Some 9917 pages from these dockets were made part of the "record" over the LUC's objections. JEFS 072.

Developers' answering briefs refer to three places in the record that other dockets were mentioned: two memoranda filed by Bridge – JEFS 011 at 2768–69 and JEFS 013 at 574-77 – and two transcripts – JEFS 015 at 1883-85.

Significantly, there are considerable discrepancies as to exactly what dockets were referenced before the LUC. The six dockets mentioned in Bridge's memorandum at JEFS 013 at 574-77 are not the same as the seven referred to in its memorandum at JEFS 011 at 2768–69. And still different dockets are referred to in the transcript at JEFS 015 at 1883 Moreover, Bridge's AB (at 21-22) notes that these references total 12 dockets. Bridge AB at 21-22. Bridge does not acknowledge that it designated 16 or 17 other dockets and does not mention any basis whatsoever to include the additional four or five.

In any event, the important point is that all of the references in this docket to the other dockets are fleeting at best. There is virtually no discussion of them beyond the bare reference. Nothing in this docket evinces any effort to show that the projects are the same in any meaningful way. No one had the opportunity to explain why they are different. No documents from the other dockets were brought to the attention of the Commissioners. None are attached to the pleadings, the LUC was not asked to take notice of the dockets, and no documents were otherwise made part of the record in this case.

Developers argue that under section 91-9(e) the record includes "Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed." The LUC agrees. But simply mentioning the case number of another docket does not make thousands of pages from those dockets "evidence" that was "considered" - much less received. Nor were those thousands of documents noticed – officially or otherwise.

Bridge's second argument (Bridge AB at 22) is that "the Designated Dockets are key to Bridge's Equal Protection" claim. That is undoubtedly true. Indeed it is tautological – there cannot be an equal protection claim unless someone is treated differently from someone else.

But just because the evidence is key is the exact reason that Bridge was required to bring it to the attention of the LUC, in other words to make it "evidence received or considered." For the same reasons the evidence was key for the circuit court and this Court, it was key for the

LUC. But the LUC did not have the evidence.

Appeal is not the time to cure problems with the record. When a party fails to adduce evidence that is "key" to its claim, then the claim simply fails – as it did here. When the party appeals – as developers appealed to the circuit court – they do not prevail on the failed claim by adding items not considered by the body appealed from. *See Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 233-34, 140 P.3d 985, 1013-14 (2006) (finding that circuit court erred in making findings in administrative appeal where findings not supported by any evidence submitted at the hearing and citing numerous cases).

Hawai`i courts have consistently held that a court's review of an administrative agency's decision is limited to issues properly raised in the record of the administrative proceedings. *See, e.g., Kilauea Neighborhood Ass'n v. Land Use Comm'n*, 7 Haw. App. 227, 236, 751 P.2d 1031, 1037 (1988) ("Judicial review of an agency decision is confined to the record of the agency proceedings."); *HOH Corp. v. Motor Vehicle Indus. Licensing Bd., Dep't of Commerce & Consumer Affairs*, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (Judicial review of an agency determination must be "confined to issues properly raised in the record of the administrative proceedings below.").

Imagine for a moment that this was an appeal from a trial court's findings and conclusions. A party lost, and then on appeal asked this Court to supplement the record with nearly 10,000 pages of documents that are "key" to its claims but not put into evidence below. Of course that would not happen. There is no reason it can or should happen here.

V. DEVELOPERS WERE NOT DEPRIVED OF CONSTITUTIONAL RIGHTS

As pointed out in the opening brief, the LUC afforded developers literally years of hearings. Their own attorneys admitted that they had a full and fair opportunity to present their case. Developers continue to urge the same basic point they made in the circuit court – the LUC was wrong as to the requirements of chapter 205 and this automatically means they were deprived of due process.

This is wrong for two reasons. First, the LUC was not wrong as to the requirements of chapter 205. Second, even if the LUC did not correctly interpret chapter 205 that does not mean developers were deprived of due process in a constitutional sense. Developers do not even address this second point.

As to equal protection, the claim falls automatically when the courts' review is limited to the proper record. There is no evidence whatsoever in the record – not a shred – as to any aspect of the other supposedly comparable dockets. Counsel argued those dockets were the same. The LUC disagreed. Without so much as mentioning the LUC's findings on the point and without citing to any evidence, the circuit court simply announced that the LUC had violated developers' equal protection rights in 2005 when the conditions were imposed (at developers' request).

The circuit court is clearly right that any equal protection violation could only have occurred then.[5] Developers' claim that the cause of action accrued in 2011 is wrong on the law and anyway posits a violation that the circuit court did not find.

Similarly Bridge's final argument that the 2005 condition is unconstitutional under *Nollan* and *Dolan* is time barred – not to mention it is a condition that Bridge itself requested.

Finally, the issue of whether the LUC's action effects a taking was not properly before the circuit court and is not before this Court. DW admits that the circuit court did not address the issue. Moreover, as noted in the opening brief, Bridge already has a taking and constitutional rights case pending in the federal courts against both individual Commissioners and the LUC. DW chose not to join Bridge's case or file its own. DW cannot inject the issue into this matter for the first time on appeal.

VI. CONCLUSION

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

DATED: Honolulu, Hawai'i, December 10, 2013.

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

[5] Of course the court erred in finding any violation without evidence, wrong to ignore the fact that developers asked for the condition, wrong to substitute her own facts for those found by the LUC, and wrong to ignore the statute of limitations issue.

CERTIFICATE OF SERVICE

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

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

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

Bryan C. Yee, Esq.

Lincoln Ashida, Esq.
William Brilhante, Esq.

DATED: Honolulu, Hawai‘i, December 10, 2013.

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