



LAND USE COMMISSION
STATE OF HAWAII

2019 OCT -7 P 12:12

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the matter of the Motion of
U of N BENCORP

To Amend the Agricultural Land Use
District to the Urban Land Use District
for approximately 62 acres, Tax Map Key
Nos.: (3) 7-5-010: 085 and 7-5-017: 006
situated at Wai`aha 1st, North Kona,
County and State of Hawai`i

) DOCKET NO. A02-737

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ORDER TO GRANTING UNITED
NATION OF KONA'S MOTION TO
CONTINUE HEARING ON ORDER
TO SHOW CAUSE; EXHIBIT "A";
CERTIFICATE OF SERVICE

**ORDER TO GRANTING UNITED NATION OF KONA'S MOTION TO CONTINUE
HEARING ON ORDER TO SHOW CAUSE; EXHIBIT "A";**

AND

CERTIFICATE OF SERVICE



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This is to certify that this is a true and correct
copy of the document on file in the office of the
State Land Use Commission, Honolulu, Hawai`i

10/7/19 by

Executive Officer



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ORDER GRANTING UNITED NATION OF KONA'S MOTION TO
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PROCEDURAL BACKGROUND

1. On December 30, 2002, The University of Nation Bencorp ("Petitioner" or "Bencorp") filed a Petition for Land Use District Boundary Amendment ("Petition") to reclassify approximately 62 acres of land from the State Land Use Agricultural District to the State Land Use Urban District in the Wai'aha, North Kona District, Island of Hawai'i, identified as Tax Map Keys ("TMKs"): (3) 7-5-010: 085 and 7-5-017: 006 (collectively "Petition Area").

2. Bencorp proposed three separate developments: Hualalai Village, the Cultural Center, and the Educational Facility. Hualalai Village, a 400-unit condominium complex to be developed in four stages, with Phase I, not being part of Petition Area; and, included in the



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PROCEDURAL BACKGROUND

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Petition Area were Phase II, III and IV of the Hualalai Village project comprise of 297 units. The Cultural Center was to include a designed landscaped park focusing upon the historical relationship of the native Hawaiian culture with Christianity and the establishment of Hawai'i's multicultural mix. An Educational Facility, was to be a part of the adjacent University.

3. On February 21, 2003, the Commission conducted a field trip to the Petition Area.
4. On February 21, 2003, Petitioner filed Exhibit 5, the archaeological inventory survey and Exhibit 15, addendum to its Final Traffic Impact Analysis Report.
5. On August 8, 2003, The Commission issued its Finding of Facts, Conclusion of Law, and Decision and Order ("D&O") and granted the Petition subject to 19 conditions.
6. On September 6, 2006, an annual report covering 2004-2006 was filed. No annual reports were filed in 2004 or 2005.
7. On December 21, 2006, Petitioner filed a Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order and Motion to Change Petitioner's Name.
8. On March 1, 2007, The Commission held a meeting to consider Petitioner's Motion to Change Name and Amend Findings of Facts, Conclusions of Law, and Decision and Order. At the hearing several areas were identified where insufficient information had been provided by Petitioner. No decision was rendered pending Petitioner returning to LUC with additional information.
9. At the time of the filing of the Petition, Petition Area was owned by Bencorp. The original Petitioner, Bencorp changed the corporate name to AEKO Hawai'i, in 2006; AEKO Hawai'i transferred the land by deed to Ka'Ohana Wai'aha (KOW) in 2011, and KOW subsequently transferred the land by deed in 2018 to the University of the Nations, Kona, Inc. ("UNK").

10. On February 4, 2019, UNK, as successor Petitioner, filed a Motion to Substitute Petitioner and Withdraw Land Use Commission Approvals and Revert Land Use District Boundary Classification to Agricultural.

11. On March 15, 2019, Petitioner withdrew its Motion to Substitute Petitioner and Withdraw Land Use Commission Approvals and Revert Land Use District Boundary Classification to Agricultural District.

12. On March 18, 2019, The Commission mailed a notice and agenda of its March 27-28, 2019 meetings to the Parties, and the Statewide and Hawai'i County mailing lists.

13. On March 28, 2019, The Commission held a hearing in Kailua- Kona, Hawai'i to hear from Petitioner regarding progress on the development and to determine whether Petitioner was in compliance with the conditions of the 2003 Decision and Order. Representing the Petitioner were Julie Anjo, Esq., and Allen Anjo, Anthony Ching, Planning Consultant, and Paul Childers, Chief Operating Officer from the UNK. Representing the County of Hawai'i Planning Department ("County") were Ronald Kim Esq., Deputy Corporation Counsel and Duane Kanuha, Deputy Planning Director. Representing the State Office of Planning ("OP") was Dawn Takeuchi Apuna, Esq., Deputy Attorney General.

14. On March 28, 2019, The Commission received an annual report covering 2008-2019, an Archaeological Data Recovery at Ten Sites, Preservation Plan 2013, Letter Accepting Preservation Plan 2014, Board Minutes, and copy of a Power Point Presentation.

15. On March 28, 2019, at the hearing, Petitioner provided background information and some history of their project and how it was attempting to reestablish itself and fulfill its mission.

16. Petitioner acknowledged it had not met various conditions (Affordable Housing; Drainage Improvements; Public School Facilities; Water Resources; Wastewater Facilities;

Archaeology; Cultural, Historical, Customary and Traditional Rights and Resources; Soil Erosion and Dust Control; Transportation; Traffic; Cultural Center; Civil Defense; Solid Waste; Compliance with Representation to the Commission; Notice of Change of Ownership; Annual Reports; and Release of the Conditions Imposed by the Commission) and provided explanations for why they had failed to comply with conditions of the D&O.

17. The County testified that the Petitioner has not sought rezoning of the Project that would allow development to occur.

18. OP identified that Finding of Fact 64 of the 2003 Decision and Order stated the development timeframe for the proposed residential development and the commencement for the educational facility and cultural center.

19. After hearing from the parties, the Commission voted to set an Order to Show Cause (“OSC”) hearing as to why the Petition Area should not revert to its former Agricultural Land Use classification or be changed to a more appropriate classification, as there was reason to believe that Petitioner had failed to perform according to the conditions imposed in the docket and to the representations and commitments made by its predecessor Bencorp.

20. On March 29, 2019, the Commission’s OSC was filed and served upon Petitioner pursuant to HRS§ 205-4 (g) and HAR §15-15-93(b).

21. On April 5, 2019, The Commission mailed a letter to all parties regarding the deadlines by which to file witness lists, exhibit lists, and all exhibits as well as rebuttal exhibit lists, and all rebuttal exhibits prior to a scheduled May 22, 2019 meeting.

22. On April 5, 2019, Notice of the OSC hearing was published in the *Honolulu Star-Advertiser*, *Maui News*, *Hawai‘i Tribune- Herald*, *West Hawai‘i Today*, and *The Garden Island*; and *Star-Advertiser.com* website.

23. On April 8, 2019, Petitioner sent a request letter for granting Petitioner adequate time to respond to the Order to Show Cause.
24. On April 26, 2019, OP filed its Statement of Position.
25. On April 26, 2019, Petitioner filed a witness list, an exhibit list and exhibits.
26. On May 1, 2019, Steven Lim filed Notice of Representation of Counsel for the Petitioner, and Exhibits 1, 2a, 2b, 3a and 3b.
27. On May 3, 2019, Petitioner filed Rebuttal list of Exhibits and Exhibits 19-28B; and, a Rebuttal list of Witnesses.
28. On May 8, 2019, Petitioner filed a Motion to Rescind Order to Show Cause or to Continue Hearing on Order to Show Cause (“Motion to Rescind”) and a Memorandum in Support of Motion.
29. On May 13, 2019, the LUC meeting notice and agenda for its May 22-23, 2019 meeting was sent to the Parties and the Statewide and County of Hawai‘i mailing lists.
30. On May 15, 2019, OP filed a Response to Petitioner’s Motion to Rescind Order to Show Cause or Continue Hearing on Order to Show Cause; Exhibit “A”; Certificate of service. (“OP’s Response”).
31. On May 17, 2019, Petitioner filed Notice of Appearance of Counsel for Julie Anjo and Allen Anjo as Co- counsel.
32. On May 17, 2019, Petitioner filed a First Supplemental List of Exhibits; Declaration of Derek B. Simon; Exhibits 29-33; and Certificate of Service.
33. On May 17, 2019, Petitioner filed a Stipulation Extending Time for U of N, Kona, Inc. to file supplemental exhibits; Exhibit A; and Certificate of Service.
34. On May 20, 2019, The County filed its Statement of Position.

35. On May 20, 2019, Petitioner filed a Joint Stipulation to Stay Hearing on OSC and Reservation of Rights ("Stipulation") by Petitioner, OP, and the County. The parties stipulated to the following, Petitioner be allowed to conduct certain activities on the Project that would not be considered to constitute substantial commencement; to stay the hearing on the OSC for one (1) year to allow Petitioner to prepare and file its Amended Motion to Amend finding of Facts, Conclusion of Law, and Decision and Order (The "Amended Motion to Amend") with conditions; and, Petitioner shall submit a written six-month status report to the Commission and the Parties no later than November 30, 2019.

36. On May 22, 2019, the Commission held the OSC hearing in Kailua-Kona, Hawai'i. Julie Anjo and Allen Anjo Esq., (co- counselor, General Counsel for Petitioner), Derek Simon, Esq. and Kathy Garson, Esq. (co-counselor, Carlsmith -Ball) appeared on behalf of the Petitioner. Dawn Takeuchi Apuna, Esq., appeared on behalf of OP; and, Duane Kanuha, Deputy Director and Ronald Kim, Esq. appeared on behalf of the County. At the hearing Ms. Garson provided oral argument on the Motion to Rescind or Continue Order to Show Cause. The County stated that it did not have a position on the Motion to Rescind. Ms. Takeuchi Apuna clarified the position of OP that they didn't support the Motion to Rescind but would not object to the one-year stay in the proceedings.

37. The Petitioner requested, and the Commission allowed, Petitioner's exhibits, Joint Stipulation with OP and the County, Petitioner's Statement of Position and Rebuttal to Statement of Position of the Office of Planning and Exhibits 18-28b, to be admitted as part of the record. Additionally, Petitioner asked that the Commission take notice of errors in their pleadings which made reference to May 1-2, 2007 hearing date on Petitioner's 2006 Motion to Amend and also a reference to two days of hearing on March 1-2, 2007. The correct date for a single day of hearing on Petitioner's 2006 Motion to Amend should be March 1, 2007.

FINDINGS OF FACT

38. On May 22, 2019, after presenting argument on their Motion to Rescind and hearing the positions of the County and OP; Petitioner requested to withdraw the Motion to Rescind.

39. On May 22, 2019, OP joined the Stipulation to Continue Order to Show Cause for a year and the County also supported the Stipulation to Continue the OSC.

40. Petitioner provided oral argument on the Motion to Continue the OSC hearings, explained the reasons why Petitioner had not complied with conditions of its approval, and expressed Petitioner's genuine interest to develop the Petition Area.

41. Petitioner stated the following had occurred since the 2006 Motion to Amend: its financial position was severely impacted during the recession; it underwent necessary internal reorganization; it was defrauded out of millions of dollars; and, it was forced to fight out-of-state litigation with tens of millions of dollars at stake. These events affected their ability to return to the Commission for further hearing and action on the 2006 Motion to Amend.

42. Petitioner agreed that neither the Commission or its staff were responsible for the 2006 Motion to Amend not going forward.

43. Petitioner stated it was committed to development of the Petition Area under a revised Project Plan.

44. Petitioner requested time to prepare additional studies and update previous assessments such as TIAR, Cultural Impact Assessment and any other required assessments consistent with a new plan for developing the Property before filing an Amended Motion to Amend or filing a new Motion to Amend.

45. Petitioner rehabilitated a 128 two-bedroom affordable housing project outside of the Petition Area and is seeking affordable housing credits with the County of Hawai'i. The County acknowledged Petitioner might get some credit pursuant under the County Code.

46. Even though the Petitioner was not under any legal obligation to do so, it engaged in developing an affordable housing project and is seeking credit from the County for affordable housing.

47. Petitioner represented it is willing to further develop the Property and to provide affordable housing for people to live and work, to provide a solution to the homelessness crisis.

48. Petitioner expressed a reasonable way forward for development of the Petition Area, identified actions and the personnel needed to undertake the development.

49. Petitioner stipulated and agreed that from the date of the Order to Show Cause going forward, that it will not argue or claim that it has substantially commenced use of the land as that term or phrase is used in the Bridge `Aina Le`a case.

50. Petitioner has stipulated and agreed not to argue that anything done between the time of the issuance of the OSC and the hearing on the OSC constitutes substantial commencement.

51. A Motion was made and seconded to Grant the Motion to Stay the OSC for a year, subject to the conditions, as stated in the joint party stipulation, that Petitioner shall refrain from commencing any construction or development activities, except for those identified in the stipulation, during the Stay of the OSC, and must return to the Commission by November 30, 2019 for a status hearing. There being a vote tally of 7 ayes and 1 excused, this motion passed.¹

¹ There are currently eight sitting members on the Commission. The Kaua'i seat is presently vacant.

CONCLUSIONS OF LAW

1. The Commission has the authority to issue an Order to Show Cause 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 and served upon the party bound by the condition and order to show cause why property should not revert to its former land use classification or to be changed to a more appropriate classification pursuant to HRS§ 205-4(g) and HAR § 15-15-93(b).

2. The Land Use 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.” HRS § 205-4(g).

3. There is no requirement that a condition including the term “substantial commencement” must be included in an order for the Commission to initiate an Order to Show Cause.

4. HAR §§15-15-50(c) and 15-15-78(a) establish a ten-year deadline for completion of district boundary amendment projects, unless incremental districting has been approved or waived.

5. Petitioner has failed to meet its representations on timely completion of the project and failed to meet the deadlines inherent in and pursuant to HAR §§15-15-50(c)(20) and 15-15-78(a).

6. The Commission finds and concludes that it had the authority to issue the ORDER TO SHOW CAUSE in this matter and to take action with respect to the ORDER TO SHOW CAUSE.

7. An order to show cause proceeding by the Commission is a contested case. A “contested case” is defined “as a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” [HRS §91-1]

8. Pursuant to HAR §15-15-93(c), “[t]he commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7 (“Agency Hearing and Post Hearing Procedures”), where applicable.”

9. As a general rule, ‘good cause’ means a substantial reason; one that affords a legal excuse.” State v. Estencion, 63 Haw. 264, 267, 625, P.2d 1040, 1042 (1981). “Good cause” is also dependent upon the specific circumstances of an individual case. A finding of “good cause” is left to the discretion of the decision-making body to determine.

10. The Commission has authority to render a decision on the Motion when the Motion is made to the Commission pursuant to HAR §15-15-70.

11. HAR Chapter 15-15, with respect to motions before the Commission, does not contain a section with a specified time frame for disposition.

DECISION AND ORDER

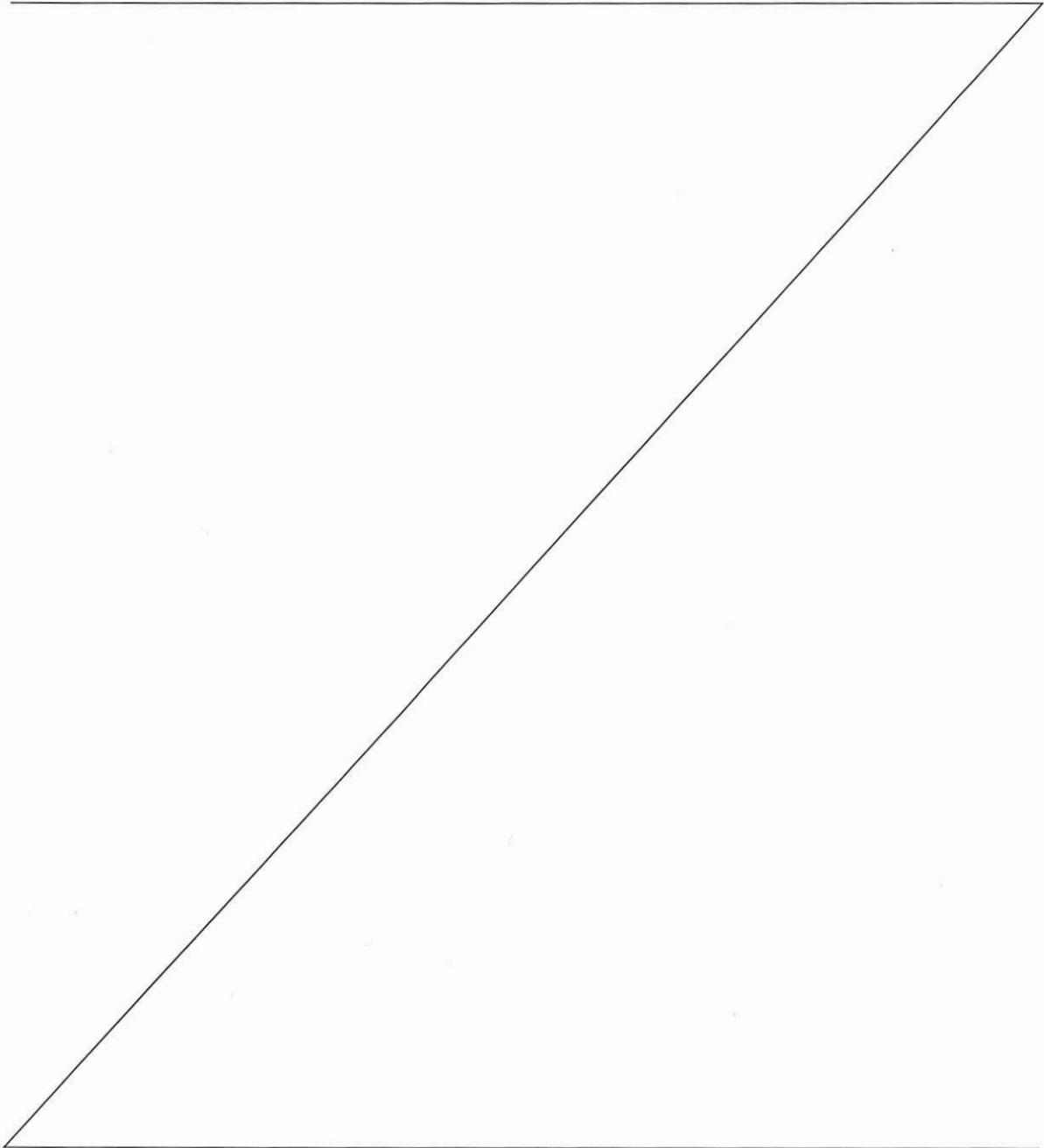
The Commission having duly considered the written briefs, pleadings, statements and testimony, and oral arguments by the parties and the public in the proceedings, and a motion having been made and seconded at a hearing on May 22, 2019, in Kona, Hawai`i, and the motion

having received the affirmative votes required by HAR §15-15-13, and there being good cause shown for the Motion for continuance of the Order to Show Cause:

HEREBY ORDERS that a Motion to Continue the hearings on the Order to Show Cause with the following conditions, be GRANTED,

- 1) The Order to Show Cause hearing be extended, by a time period not to exceed one year, to allow Petitioner an opportunity to either file an amendment to their December 21, 2006 motion to amend ("2006 Motion to Amend") or to withdraw their 2006 Motion to Amend and file a new motion to amend the conditions of the August 8, 2003 Decision and Order ("2003 Decision and Order").
- 2) Petitioner shall not conduct any development activities, including but not limited to, construction, grading, or performing any ground-disturbing activities within the Petition Area during the pendency of the OSC proceedings.
- 3) Substantial commencement has not occurred and the Petitioner will not argue that substantial commencement has occurred during the extension of the Order to Show Cause hearing based on Petitioner's work on any of the five activities identified in the May 20, 2019 Joint Stipulation to Stay Hearing signed by Petitioner, the State Office of Planning, and the County of Hawai'i.
- 4) Petitioner will not argue that the Commission has only 365 days in which to take action on the Order to Show Cause.
- 5) Petitioner shall come before the Commission within six (6) months of this Decision and Order to present a status report with specific plans for moving the project forward. If at that time the Petitioner has not shown or made significant progress on its plans for

financing and developing the Petition Area or the Commission feels that the Petitioner will not meet the one-year deadline for filing an amendment to the 2006 Motion to Amend or the 2003 Decision and Order then the OSC proceedings will be reinstated.



ADOPTION OF ORDER

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

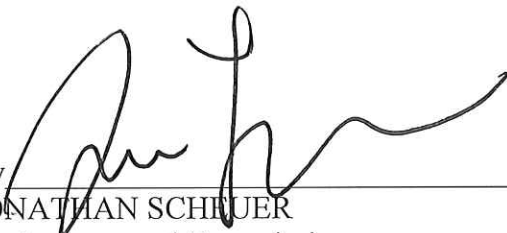
Done at Honolulu, Hawai'i, 7th, day of October, 2019, per motion on May 22, 2019.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAI'I

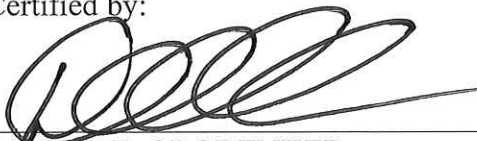
Randall S. Aishiyama
Deputy Attorney General

By 
JONATHAN SCHUER
Chairperson and Commissioner

Filed and effective on:

October 7, 2019

Certified by:


DANIEL E. ORODENKER
Executive Officer



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CERTIFICATE OF SERVICE

I hereby certify that a certified copy of the ORDER TO GRANTING UNITED NATION
OF KONA'S MOTION TO CONTINUE HEARING ON ORDER TO SHOW CAUSE;
EXHIBIT "A";, was served upon the following by depositing the same in the U. S. Postal
Service by registered or certified mail as noted:

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 Deputy Attorney General
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 Attorney for State Office of Planning

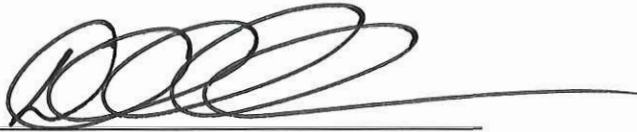
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Dated: Honolulu, Hawai'i, October 7, 2019



DANIEL E. ORODENKER
Executive Officer