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D.R. HORTON – SCHULER HOMES, LLC,

a Delaware limited liability company,

d.b.a. D.R. HORTON-SCHULER DIVISION

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of

D.R. HORTON – SCHULER HOMES, LLC, a
Delaware limited liability company, d.b.a. D.R.
HORTON-SCHULER DIVISION

To Amend the Agricultural Land Use District
Boundaries into the Urban Land Use District for
Approximately 1,553.844 Acres in Ewa District,
Island of Oahu, Tax Map Key Nos. (1) 9-1-
017:004 (por.), 059 and 072; (1) 9-1-018:001
and 004

DOCKET NO. A06-771

2011 MAY 18 A 10: 52

LAND USE COMMISSION
STATE OF HAWAII

**D.R. HORTON – SCHULER HOMES, LLC’S
MOTION FOR LEAVE TO FILE ITS SECOND AMENDED PETITION
TO CURE THE DEFICIENCY OF ITS FIRST AMENDED PETITION**

MEMORANDUM IN SUPPORT OF MOTION

AND

CERTIFICATE OF SERVICE

BEFORE THE LAND USE COMMISSION

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In the Matter of the Petition of

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LLC’S MOTION FOR LEAVE TO FILE
ITS SECOND AMENDED PETITION
TO CURE THE DEFICIENCY OF ITS
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**D.R. HORTON – SCHULER HOMES, LLC’S
MOTION FOR LEAVE TO FILE ITS SECOND AMENDED PETITION
TO CURE THE DEFICIENCY OF ITS FIRST AMENDED PETITION**

COMES NOW, D.R. HORTON – SCHULER HOMES, LLC, a Delaware limited liability company, d.b.a. D.R. HORTON-SCHULER DIVISION, whose principal place of business is 650 Iwilei Road, Suite 209, Honolulu, Hawaii 96817 (“**Petitioner**”), by and through its attorneys, the law firm of IMANAKA KUDO & FUJIMOTO, a limited liability law company, and hereby respectfully requests that the State of Hawaii Land Use Commission (“**Commission**”) grant Petitioner’s motion for leave to file its second amended petition under Hawaii Administrative Rules (“**HAR**”) to cure the deficiency of its Petition for Land Use District Boundary Amendment, which was filed with the Commission on January 24, 2007, and amended on September 19, 2008.

This motion is made pursuant to Hawaii Revised Statutes (“**HRS**”) Chapter 205, and HAR §§ 15-15-34(b), 15-15-41, 15-15-43, 15-15-50(c), and 15-15-70, and other authorities and arguments stated in the attached Memorandum in Support of Motion, and the pleadings and files herein.

Petitioner requests a hearing on this motion.

DATED: Honolulu, Hawaii, May 18, 2011.

Of Counsel:
IMANAKA KUDO & FUJIMOTO
A Limited Liability Law Company



BENJAMIN A. KUDO
NAOMI U. KUWAYE
YUKO FUNAKI

Attorneys for Petitioner

D.R. HORTON – SCHULER HOMES, LLC,
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MEMORANDUM IN SUPPORT OF
MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

In this motion Petitioner seeks leave of the State of Hawaii Land Use Commission (“**Commission**”), to file an amended pleading to cure the deficiency of its Petition for Land Use District Boundary Amendment filed on January 24, 2007, which was amended on September 19, 2008, and deemed deficient by the Commission on September 30, 2009.

II. RELEVANT FACTS

On January 24, 2007, Petitioner filed with the Commission its petition to reclassify approximately 1,553.844 acres of land in the Ewa District, Island of Oahu, from the Agricultural District to the Urban District in Commission Docket No. A06-771, and filed its Amended Petition for Land Use District Boundary Amendment on September 19, 2008 (collectively referred to as “**First Amended Petition**”).

On August 26, 2008, the Commission accepted Petitioner’s Final Environmental Impact Statement as generally satisfying the criteria and procedures under HAR § 11-200-23.

On September 19, 2008, the Commission deemed the First Amended Petition as a proper filing and accepted it for processing. See Letter from Orlando Davidson, Executive Officer, State of Hawaii Land Use Commission, to Naomi U. Kuwaye, attorney for Petitioner (September 26, 2008).

On February 13, 2009, the Commission granted Friends of Makakilo's ("FoM") Petition to Intervene with its participation limited to traffic, education, open space, agricultural lands, and sociological issues. The Commission also granted Haseko (Ewa) Inc.'s Petition for Intervention the same day with its participation limited to regional drainage issues.

On March 19, 2009, the Commission commenced its evidentiary hearing for this docket.

On August 5, 2009, FoM filed its MOTION TO DENY THE PETITION; OR IN THE ALTERNATIVE TO DECLARE THE PETITION DEFICIENT, ALLOWING THE PETITIONER TO CURE THE DEFECTS, INCLUDING AMENDING THE EIS, WITH WITH [SIC] THE DATE OF FILING CHANGED TO THE DATE THE COMMISSION DETERMINES THAT THE DEFECTS ARE CURED ("FoM's MOTION").

On August 28, 2009, FoM's MOTION came on for hearing before the Commission prior to the Petitioner's completion of its case, and on September 30, 2009, the Commission issued its ORDER GRANTING IN PART AND DENYING IN PART INTERVENOR FRIENDS OF MAKAKILO'S MOTION TO DENY THE PETITION; OR IN THE ALTERNATIVE TO DECLARE THE PETITION DEFICIENT, ALLOWING THE PETITIONER TO CURE THE DEFECTS, INCLUDING AMENDING THE EIS, WITH WITH [SIC] THE DATE OF FILING CHANGED TO THE DATE THE COMMISSION DETERMINES THAT THE DEFECTS ARE CURED ("COMMISSION ORDER").

The COMMISSION ORDER determined as follows:

. . . the [First Amended] Petition is defective or deficient in that it fails to either (1) represent that development of the Petition Area will be accomplished before ten years after the date of Commission approval or (2) even though full urban development cannot substantially be completed within such ten-year period,

the [First Amended] Petition does not include a schedule for development of the total of the project in increments together with a map identifying the location of each increment, each such increment to be completed within no more than a ten-year period, and GRANTS Intervenor's Motion to declare the Petition deficient. The date of filing of the Petition shall be as of the date the Commission determines that the defects are cured. The Intervenor's Motion to deny the Petition is DENIED.

COMMISSION ORDER at 4 (emphasis added).

Petitioner seeks to cure the deficiency of its First Amended Petition by submitting an amended pleading (“**Second Amended Petition**”) that provides the Commission and parties with “a schedule for development of the total of the project in increments together with a map identifying the location of each increment, each such increment to be completed within no more than a ten-year period...” *Id.*

III. RELEVANT LAWS

As with the COMMISSION ORDER, HAR § 15-15-41, the Commission rule for defective filings, provides that a petitioner with a defective or deficient petition will be given a chance to “cure” such defect or deficiency as follows:

...Notwithstanding the provisions of sections 15-15-50(e) and 15-15-50(f), the commission may entertain motions by the parties addressing alleged deficiencies of the petition. If the petition is in fact defective, the date of filing shall be as of the date the commission determines that the defects are cured.

HAR § 15-15-41 (emphasis added).

However, under HAR § 15-15-43, petitioners are precluded from filing amended pleadings “after forty-five days prior to the date of the [Commission] hearing” has passed, unless good cause is shown and approval of the Commission is obtained, as follows:

...No amended pleading shall be filed after forty-five days prior to the date of the hearing and no responses shall be filed after thirty days prior to the hearing date, unless a stipulation is reached by all parties, or good cause is shown and approval of the chairperson, presiding officer, or the chairperson's designee is obtained.

HAR § 15-15-43 (emphasis added).

IV. DISCUSSION

Under HAR § 15-15-43, petitioners are precluded from filing amended pleadings “after forty-five days prior to the date of the [Commission] hearing” has passed, unless there is “good cause” to do so and approval of the Commission is obtained. “Good cause” exists in the instant case for Petitioner to file its Second Amended Petition after “forty-five days prior to the date of the [Commission] hearing” has passed: the COMMISSION ORDER and HAR § 15-15-41 provide that the deficiency of the First Amended Petition may be “cured”; the only way for Petitioner to “cure” the deficiency of its First Amended Petition is to file an amended pleading; and there will be no prejudice to the other parties.

A. COMMISSION ORDER AND HAR § 15-15-41 PROVIDE THAT PETITIONER MAY “CURE” THE DEFICIENCY OF ITS FIRST AMENDED PETITION BY SUBMITTING AN AMENDED PLEADING.

Petitioner’s First Amended Petition was deemed deficient because it failed to include a schedule for development of the total of the project in ten-year increments, together with a map identifying the location of each increment. COMMISSION ORDER at 4; *see also* HAR § 15-15-50(c)(19). The COMMISSION ORDER also set forth that “[t]he date of filing of the Petition shall be as of the date the Commission determines that the defects are cured.” *Id.* Therefore, the proceeding for this docket will not reopen until Petitioner “cures” the deficiency. COMMISSION ORDER at 4; *see also* HAR § 15-15-41.

In order to “cure” the deficiency of its First Amended Petition, Petitioner is required to file an amended pleading that includes the aforementioned development schedule and corresponding map. Accordingly, both the COMMISSION ORDER and HAR § 15-15-41 provide that Petitioner may “cure” the deficiency of its First Amended Petition by filing an amended pleading that includes such information.

B. THE TIMING OF FOM'S MOTION BEING FILED AFTER COMMENCEMENT OF THE HEARING FOR THE INSTANT DOCKET, AND THE COMMISSION'S PARTIAL GRANT THEREOF WAS BEYOND PETITIONER'S CONTROL, AND PETITIONER HAS NO OTHER OPTION TO "CURE" THE DEFICIENCY OF ITS FIRST AMENDED PETITION BUT BY FILING AN AMENDED PLEADING.

As a general rule, "good cause" means "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law," that is "beyond the movant's control." *Miller v. Tanaka*, 80 Hawai'i 358, 360, 910 P.2d 129, 131 (Hawai'i App., 1995); *Enos v. Pacific Transfer & Warehouse, Inc.*, 80 Hawai'i 345, 351, 910 P.2d 116, 112 (1996); *see also State v. Estencion*, 63 Haw. 264, 267, 625 P.2d 1040, 1042 (1981).

Passage of time is beyond anyone's control. The Commission hearing for this docket commenced on March 19, 2009, after the First Amended Petition had been deemed proper upon the Executive Officer's review thereof.

The *timing* of FOM'S MOTION, which was filed *after* the commencement of the hearing, and the Commission's partial grant thereof, which determined that the First Amended Petition was deficient, was *not* something Petitioner could have controlled. Moreover, as aforementioned, Petitioner has no other way to "cure" the deficiency of its First Amended Petition besides filing an amended pleading.

As such, there is a "substantial reason" that is "beyond the [Petitioner's] control," "that affords a legal excuse" for Petitioner to file an amended pleading after passage of the forty-fifth day prior to the date of the Commission hearing.

C. PETITIONER'S FILING OF ITS SECOND AMENDED PETITION WILL NOT PREJUDICE OTHER PARTIES; HOWEVER, THE COMMISSION'S DENIAL THEREOF WILL SIGNIFICANTLY PREJUDICE PETITIONER.

No party will be prejudiced by Petitioner's filing of its Second Amended Petition. The proceeding for this docket has stopped as of September 30, 2009, when the Commission determined that the First Amended Petition was deficient. The docket will not re-open until the

Commission deems that such deficiency is cured. The parties will have ample time to prepare for the hearing, which will not start until at least sixty days have passed from the date the Commission deems the deficiency of the First Amended Petition is “cured.” *See* COMMISSION ORDER at 4; HAR § 15-15-51(a). (Indeed, the hearing for the First Amended Petition did not commence until six months after it was initially deemed complete.)

The information set forth in the Second Amended Petition is relevant and material to the proceeding, as it will assist the other parties and the Commission in further understanding the project, and the Commission in determining the outcome of this petition. It will not be unduly repetitious, since no other material filed by Petitioner includes such information.

On the other hand, Petitioner will be significantly prejudiced if the Commission does not allow it to file its amended pleading. As aforementioned, Petitioner has no other option but to file an amended pleading in order to “cure” its First Amended Petition’s deficiency. Without the Commission’s approval, Petitioner will be precluded from proceeding with its entitlement process.

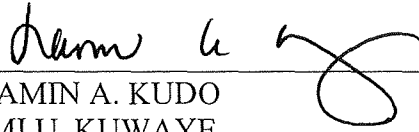
Based on the foregoing, Petitioner believes that there is good cause for the filing of its Second Amended Petition after passage of the forty-fifth day prior to the date of the hearing.

V. CONCLUSION

Based upon the foregoing, Petitioner respectfully submits this Motion for the Commission’s review and appropriate action.

DATED: Honolulu, Hawaii, May 18, 2011.

Of Counsel:
IMANAKA KUDO & FUJIMOTO
A Limited Liability Law Company

A handwritten signature in black ink, appearing to read "Benjamin A. Kudo", written over a horizontal line.

BENJAMIN A. KUDO
NAOMI U. KUWAYE
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Attorneys for Petitioner

D.R. HORTON – SCHULER HOMES, LLC,
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in Ewa District, Island of Oahu, Tax Map
Key Nos. (1) 9-1-017:004 (por.), 059 and
072; (1) 9-1-018:001 and 004

DOCKET NO. A06-771

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that the foregoing D.R. HORTON – SCHULER HOMES, LLC’S
MOTION FOR LEAVE TO FILE ITS SECOND AMENDED PETITION TO CURE THE
DEFICIENCY OF ITS FIRST AMENDED PETITION; MEMORANDUM IN SUPPORT OF
MOTION; and CERTIFICATE OF SERVICE was duly served by certified mail or personally
served to each of the following persons on the 18th day of May, 2011, addressed as follows:

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CERTIFIED MAIL

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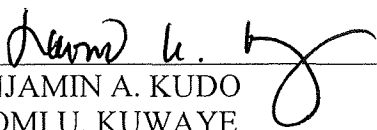
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MORIHARA LAU & FONG, LLP
Attn: Yvonne Y. Izu, Esq.
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CERTIFIED MAIL

DATED: Honolulu, Hawaii, May 18, 2011.

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