



BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Petition Of) DOCKET NO. A10-788
)
Hawai`i Housing Finance and) ORDER RE WAIVER OF
Development Corporation (HHFDC) and) COMMISSION RULES AND
Forest City Hawai`i Kona, LLC) INTERVENOR'S ORAL MOTION
)
To Amend The Agricultural Land Use)
District Boundary Into The Urban Land)
Use District For Approximately 271.837)
Acres Of Land At Keahuolū, North)
Kona, Island of Hawai`i, Tax Map Key)
(TMK) Nos.: (3) 7-4-021:020 (por.), (3))
7-4-021:024, (3) 7-4-021:025, (3) 7-4-)
021:026, and (3) 7-4-021:027)
_____)

ORDER RE WAIVER OF COMMISSION RULES AND INTERVENOR'S ORAL

MOTION

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.

November 8, 2010

by

Executive Officer



BEFORE THE LAND USE COMMISSION

STATE OF HAWAI'I

In the Matter of the Petition of

Hawai'i Housing Finance and Development Corporation and Forest City Hawai'i Kona, LLC

To Amend The Agricultural Land Use District Boundary Into The Urban Land Use District For Approximately 271,837 Acres Of Land At Keahuolu, North Kona, Island of Hawai'i, Tax Map Key (TMK) Nos.: (3) 7-4-021:020(por.), (3) 7-4-021:024, (3) 7-4-021:025, (3) 7-4-021:026, and (3) 7-4-021:027

DOCKET NO. A10-788

ORDER RE WAIVER OF COMMISSION RULES AND INTERVENOR'S ORAL MOTION; CERTIFICATE OF SERVICE

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LAND USE COMMISSION
STATE OF HAWAII

ORDER RE WAIVER OF COMMISSION RULES AND INTERVENOR'S ORAL MOTION

At the meeting of the Land Use Commission ("Commission") on October 21, 2010, in Waikoloa, Hawai'i, Intervenor Queen Liliu'okalani Trust ("QLT") made an oral motion that the Commission find the petition for district boundary amendment ("Petition") in Docket No. A10-788 filed by co-petitioners Hawai'i Housing Finance and Development Corporation ("HHFDC") and Forest City Hawai'i Kona, LLC ("Forest City") (the co-petitioners will be collectively referred to as "Petitioner") is defective because: (1) it is contrary to the intent of the parties involved in the acquisition of the property that comprises the Petition Area described in the Petition, and (2) the Petitioner's

Notice of Intent to File Petition ("Notice of Intent") failed to satisfy the requirements of the Commission's rule and state law.

The Commission heard arguments from Benjamin Kudo, Esq., representing movant QLT; Jennifer A. Benck, Esq., representing Forest City; Deputy Attorney General Craig Iha, representing HHFDC; and Deputy Attorney General Bryan Yee, representing the State Office of Planning ("OP"). The County of Hawai'i Planning Department ("County"), represented by Deputy Corporation Counsel Laureen Martin, took no position on the oral motion. Oral argument was limited to the issue of the Notice of Intent. QLT, Forest City, HHFDC and OP agreed that the Commission should take judicial notice of pleadings filed in Commission Docket No. DR10-39, which involves the same issue. *See, also*, § 15-15-63(j), Hawaii Administrative Rules ("HAR"). The Commission finds as follows:

1. On January 21, 2010, in Docket No. A10-785, a related docket, Petitioner filed a Notice of Intent to File a Land Use District Boundary Amendment Petition ("Notice of Intent") with the Commission pursuant to HAR § 15-15-97(b).

2. The Notice of Intent in Docket No. A10-785 was published in *The Honolulu Advertiser* and in *West Hawaii Today* on January 21, 2010.

3. Copies of the Notice of Intent were mailed to the Director of OP, the County, the then-anticipated intervenor, QLT, all persons with a property interest in the Petition Area, and all persons on the Commission's mailing lists on January 21, 2010.

4. On March 16, 2010, a Notice of Hearing was published in the *Honolulu Star-Bulletin*, *West Hawaii Today*, *The Maui News*, *The Garden Island*, and the *Hawaii*

Tribune Herald, and copies were sent to OP, the County, QLT and all persons listed on the Commissions state and county mailing lists.

5. On March 22, 2010, Petitioner filed a Petition for District Boundary Amendment in Docket No. A10-785.

6. On March 31, 2010, QLT filed a Petition for Intervention in Docket No. A10-785. No other petitions for intervention were received by the Commission.

7. Subsequent to the filing of the petition for district boundary amendment in Docket No. A10-785, OP expressed concerns that the archaeological inventory survey that had been approved by the State Historic Preservation Division ("SHPD") in 1993, might no longer be sufficient.

8. On April 8, 2010, the Commission allowed the Petitioner to withdraw the Petition filed in Docket A10-785 without prejudice, which would allow Petitioner to re-file its petition upon completion of additional archaeological survey work.

9. On July 7, 2010, Petitioner filed a Notice of Intent in this Docket, No. A10-788.

10. The Notice of Intent in this Docket, No. A10-788 was published in *The Honolulu Star Advertiser* and *West Hawaii Today* on July 7, 2010.

11. Copies of the Notice of Intent in this Docket were mailed to OP, the County, QLT, and all persons with a property interest in the Petition Area, and all persons on the Commission's mailing lists on July 7, 2010.

12. On August 30, 2010, a Notice of Hearing was published in *The Honolulu Star Advertiser* and *West Hawaii Today*.

13. On September 7, 2010, Petition filed a Petition for District Boundary Amendment in this Docket, A10-788 ("Petition"). The Petition is substantially similar to and includes the same Petition Area as the petition in Docket No. A10-785.

14. On September 14, 2010, QLT filed an Application to Intervene in Docket No. A10-788. No other petitions for intervention were received by the Commission.

15. On September 21, 2010 a Notice of Hearing was published in *The Honolulu Star Advertiser*, *West Hawaii Today*, *Hawaii Tribune Herald*, *The Maui News* and *The Garden Island*.

16. The Petition was deemed a proper filing as of September 22, 2010 by letter from the Executive Officer of the Commission dated September 22, 2010.

17. On October 7, 2010, QLT was granted intervenor status by the Commission.

18. On October 11, 2010, QLT filed a Petition for Declaratory Order ("Declaratory Petitioner"), designated by QLT as in Docket No. A10-788, but designated by the Commission staff as Docket No. DR10-29.

19. On October 21, 2010, the Commission deferred action on the Declaratory Petition.

20. On October 21, 2010, the hearing on the Petition was scheduled to commence at Waikoloa, Hawaii. All of the parties were present. QLT made an oral motion that the Petition be found defective.

21. QLT argued that because HHFDC is a governmental agency, the publication requirements set forth in HRS § 1-28-5¹ apply to publication of the Notice of

¹ HRS § 1-28.5 provides in pertinent part:

Intent. The State Procurement Office has determined that to satisfy the requirements of HRS § 1-28.5(a) for statewide publication, a notice must be filed in: the Honolulu Star-Advertiser, The Garden Island, The Maui News, West Hawaii Today and Hawaii Tribune Herald. QLT further argued that because the Notice of Intent did not satisfy the requirements of HRS § 1-28.5, the Notice of Intent was defective and due process rights of individuals who might have wanted to participate in this docket but did not because they did not get notice, could have been violated.

22. Forest City argued that QLT had actual notice of the docket and is participating as a party and, therefore, suffered no harm. Forest City further argued that the requirement to file a Notice of Intent in HAR § 15-15-97 is not a jurisdictional requirement and does not trigger any rights, such as rights to intervene or rights to a hearing.

23. HHFDC argued that the Land Use Law, HRS chapter 205, and HRS chapter 201H do not set forth requirements for a Notice of Intent. The notice of intent is created solely by the Commission by rule for 201H affordable housing dockets. For district boundary amendment proceedings, HRS § 205-4 requires that notice of hearing be given in compliance with HRS § 91-9. Notice of hearing for this docket was published in the *Honolulu Star-Advertiser*, *The Garden Island*, *The Maui News*, *West*

(a) Notwithstanding any other statute, law, charter provision, ordinance, or rule to the contrary, whenever a government agency is required to give public notice or to publish notice, the notice shall be given only as follows:

- (1) For statewide publication:
 - (A) In an daily or weekly publication of statewide circulation; or
 - (B) By publication in separate daily or weekly publications whose combined circulation is statewide; and
- (2) For countywide publication, by publication in a daily or weekly publication in the affected county.

Hawaii Today and *Hawaii Tribune Herald* on September 21, 2010. The notice of hearing for this docket satisfied the requirements of HRS § 1-28.5.

24. OP argued that there are insufficient grounds to believe the petition is defective. OP argued that HRS § 1-28.5 does not apply to the Notice of Intent. Further, because there were two notices, there was no discernible prejudice to the public, and it would serve the good cause of justice in general if the Commission decided to waive the rule requirements for the Notice of Intent in this proceeding.

25. QLT responded that it is bad public policy for an agency to waive a rule after a violation has occurred.

26. In response to questioning by the Commission, QLT stated that based upon what it knew it was not substantially prejudiced.

27. There is not sufficient evidence to conclude that the manner in which the Notice of Intent was published caused prejudice to anyone.

Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

The Commission's conclusions of law:

1. The Commission's rule, § 15-15-97, Hawai'i Administrative Rules ("HAR") is applicable to petitions for district boundary amendments filed for affordable housing projects under Hawai'i Revised Statutes ("HRS") § 201H-38. Under HRS § 201H-38, the Commission must decide on the petition within forty-five days.

2. HAR § 15-15-97 provides in relevant part:

(a) Petitions for housing projects under section [201H-38], HRS shall be processed according to the procedures provided in this section.

(b) Not less than sixty days prior to the filing of a petition, the petitioner shall:

- (1) File an original and fifteen copies of a notice of intent to file a petition with the commission according to a format approved by the commission;
- (2) Publish the notice of intent at least once in a newspaper of general circulation in the State as well as in a county newspaper in which the subject property is situated. The notice of intent shall include:
 - (A) The name and address of the petitioner and the petitioner's property interest in the subject property;
 - (B) Proposed reclassification;
 - (C) Tax map key;
 - (D) Acreage;
 - (E) Existing land use;
 - (F) Brief description of the proposed development or use;
 - (G) The date that the petitioner shall file its petition with the commission; and
 - (H) Inform the public of the rights of interested persons under section 205-4(e), HRS;

* * *

(f) Petitions which fail to comply with the requirements set forth in subsections (b) and (e) shall be deemed defective and the date of filing of the petition shall be as of the date the defect is cured.

(h) Notice of the hearing shall be published to the extent provided by law.

3. The requirement to file and publish a Notice of Intent arises solely through the Commission's administrative rule, and is not required by either statute or the federal or state constitutions.

4. HRS § 1-28.5 does not itself require public notice. It sets forth how mandatory public notices are to be published. There must be a separate requirement for publication before HRS § 1-28.5 applies.

5. HAR § 15-15-34(b) authorizes the Commission to waive or suspend any of its administrative rules for good cause, provided the rule is not jurisdictional.

6. HAR § 15-15-97 is not a jurisdictional requirement.

7. Good cause exists in this instance to waive the requirement to publish the Notice of Intent.

After oral argument and questions by the Commission, a motion was made as follows: To the extent that there may have been any failure on the part of Petitioner to comply with the Commission's rule governing publication of the Notice of Intent to File, there is good cause to waive the rule, as it is not jurisdictional, there has been no showing of actual or apparent harm, and that the intent of the rule and actual practice have been substantially met.

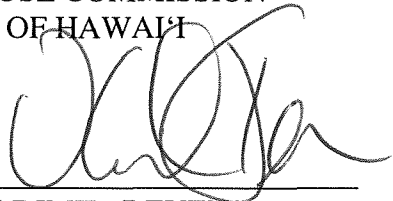
The motion having been made and duly seconded, and the motion having received the votes required by HAR § 15-15-13, the motion passed. Based upon the action of the Commission, **IT IS HEREBY ORDERED** that to the extent there may have been any failure on the part of Petitioner to comply with the Commission's rule governing

publication of the Notice of Intent to File, said rule is WAIVED.

Based upon the action of the Commission in waiving the Commission's rule regarding publication of the Notice of Intent to File, QLT's oral motion to find the petition defective for failure to satisfy the requirements of the Commission's rule and state law is HEREBY DENIED.

DATED: Kona, Hawai'i, November 5, 2010.

LAND USE COMMISSION
STATE OF HAWAII

By 
VLADIMIR. DEVENS
Chairperson and Commissioner

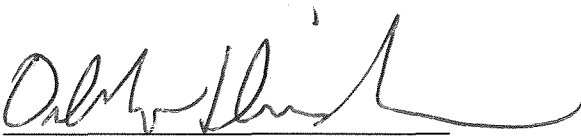
APPROVED AS TO FORM:


Deputy Attorney General

Filed and effective on:

November 5, 2010

Certified by:


ORLANDO DAVIDSON
Executive Officer



BEFORE THE LAND USE COMMISSION

STATE OF HAWAI'I

In the Matter of the Petition of

Hawai'i Housing Finance and Development Corporation and Forest City Hawai'i Kona, LLC

To Amend The Agricultural Land Use District Boundary Into The Urban Land Use District For Approximately 271,837 Acres Of Land At Keahuolu, North Kona, Island of Hawai'i, Tax Map Key (TMK) Nos.: (3) 7-4-021:020(por.), (3) 7-4-021:024, (3) 7-4-021:025, (3) 7-4-021:026, and (3) 7-4-021:027

DOCKET NO. A10-788

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a certified copy of the foregoing ORDER was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

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A10-788 HHFDC and Forest City Hawai'i Kona, LLC; Order re Waiver of Commission Rules and Intervenor's Oral Motion; Certificate of Service

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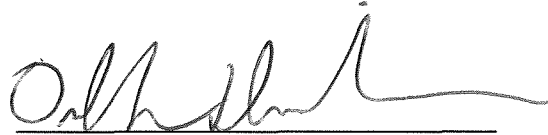
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Dated: Honolulu, Hawai'i, November 8, 2010.

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

ORLANDO DAVIDSON
Executive Officer