THE NEWSLETTER OF THE REAL PROPERTY & FINANCIAL SERVICES SECTION OF THE HAWAII STATE BAR ASSOCIATION

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FROM THE CHAIR

December 2012

Aloha Section Members:

Where did 2012 go? It really is hard to believe that we've already reached the last few weeks of what has been a very busy year for the Real Property and Financial Services Section. Through the hard work of many people both inside and outside of the Section, we were able to present eight free brown bag lunch sessions and two formal seminars this year. Countless hours were volunteered by Section board members and speakers in arranging, preparing and presenting these programs to provide affordable (usually free!) and high quality continuing legal education opportunities for our members.

Topics presented by our Section members in the brown bag sessions were civil unions (Lorrin Hirano), new residential purchase contract forms (Alan Kido and Nathan Aipa), and leveraging technology in your real estate practice (Wes Chang and Jennifer Chiu). Our formal seminars included a 2012 Legislative Update (David Rair and Lisa Ayabe) and Land Court Practice (Lorrin Hirano and Charlie Pear, co-chairs).

We collaborated with other Bar Sections by co-sponsoring programs with the Business and International Law Sections (Chinese investments in Hawaii), and the Litigation, Collection and Business Law Sections (forensic document examination). We feel it's valuable to meet and gain different perspectives from fellow Bar members who work outside of our usual area of practice.

We also reached out to the business community and were very fortunate to have a number of excellent presentations from non-attorney real estate professionals, including a forecast of the 2012 commercial real estate market (Colliers International), ALTA surveys (Jim Thompson) and real estate escrows (Title Guaranty). Again, we think it's beneficial to expand and develop relationships that extend beyond the circle of our Section.

These sessions were all well-attended by our Section members, both in person and via telephone conference call. Many, many thanks to all of our outstanding speakers!

The RPFSS Board members listed at the end of this newsletter met monthly to plan these programs and carry out the business of the Section. Their dedication and willingness to serve the Section is very much appreciated.

Next year, our Section will be in the very capable hands of Mark Ito as the 2013 Chair. If you are called upon to help in some way, please don't hesitate in accepting. Based on my own experience this year, I can assure you that it will be a worthwhile and enjoyable endeavor. Thank you very much for the opportunity and privilege to serve as your Chair this year.

Aloha,
Kyle T. Sakumoto

In this Issue:

The LUC's Ruling on 'Aina Le'a: Retracted Land Use Classifications and Conditional Zoning Law in Hawai'i by **Andrew V. Nelson**, a 2012 graduate of the William S. Richardson School of Law and currently an associate at Cades Schutte. Andrew was the recipient of our 2011 Real Property and Financial Services Section Award, which is one of two awards presented each year by the RPFSS. Congratulations to Andrew!

"Save the Date":

Wednesday, December 12, 2012, noon to 1:30 p.m. – Annual Meeting of the Real Property and Financial Services Section at the Pacific Club. Speakers: Cameron Black (Hawaii State Energy Office) and Gerry Sumida of Carlsmith Ball on issues relating to renewable energy, including financing and development matters.

The LUC's Ruling on 'Aina Le'a: Retracted Land Use Classifications and Conditional Zoning Law in Hawai'i

Andrew V. Nelson[1]

ABSTRACT:[2]

While regulatory controls, such as those employed by the Hawai'i State Land Use Commission (LUC), are critical to protect Hawai'i's environment and ensure orderly growth, this note argues that the LUC's retraction of 'Aina Le'a's urban classification should be subject to the same requirements as the district boundary amendment (DBA) process. Because the LUC acted in a quasi-judicial, as opposed to legislative, capacity, it was subject to the full statutory and administrative requirements regulating the DBA process, with which it failed to comply. The LUC's ruling increases uncertainty in the already risky field of land development in Hawai'i, impeding the construction of direly needed new affordable housing units and work for the construction industry. In order to remedy the negative impacts of its ruling–not just with respect to the 'Aina Le'a project, but also to pending and future projects–the LUC must comply with the statutory and administrative requirements controlling DBAs when considering the reversion of a project's urban classification.

Please note that this article was originally written in the Spring of 2011. On June 14, 2012, Judge Strance of the Third Circuit Court, State of Hawai'i ruled in relevant part that the LUC's April 2011 Order reverting the project area to agricultural violated Hawai'i Revised Statutes Sections 205-4(h) and 205-16, which require, respectively, six affirmative votes to amend a district boundary and conformity with the Hawai'i State Plan. This note, consistent with the court's ruling, argues that the LUC failed to comply with the statutory and administrative rules governing DBAs and that its reversion of the 'Aina Le'a project should be reversed.

I. INTRODUCTION

There is nothing unusual about the sight of a row of neat two-story townhomes framed by the majestic summit of Mauna Kea; one can find this sort of structure in many towns on the Island of Hawai'i. What is striking about the townhomes above Waikoloa, in a planned-development called 'Aina Le'a, is that while they are structurally complete, they boast not a single resident. The story of how this came to pass and why it will persist into the near future begins over twenty years—and two failed developments—ago. The Hawai'i State Land Use Commission (LUC) has, since 1987, been at the center of the controversy surrounding the development of the parcel.[3] On January 20, 2011, the LUC voted to retract 'Aina Le'a's urban land use classification and return it to agricultural.[4] Following the decision of the LUC, there is a distinct possibility that 'Aina Le'a will become the third failed attempt to develop the 1,060-acre parcel.[5]

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[1] J.D., *summa cum laude*, William S. Richardson School of Law, University of Hawai'i at Manoa, 2012. I would like to thank Professors David L. Callies and Dina Shek for their guidance and support during the writing process.

[2] *Editor's note*: This article does not constitute the views or opinions of the RPFSS.

[3] *See* Andrew Gomes, *More Time Sought to Build Big Isle Homes*, STAR ADVERTISER, Sept. 14, 2010, http://www.staradvertiser.com/business/20100914_More_time_sought_to_build_Big_Isle_homes.html.

[4] Transcript of Hearing at 123-24, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).

[5] *See* Andrew Gomes, *Big Isle Land Project Loses Approval*, STAR ADVERTISER, Jan. 22, 2011, http://www.staradvertiser.com/business/20110122_Big_Isle_land_project_loses_approval.html (discussing the previous attempts at development of the subject property). *See also infra* part II for a detailed history of the project.

Hawai'i Revised Statutes (H.R.S.) Chapter 205 specifies that the LUC must review all petitions for urban land use classification for any residential or commercial project larger than fifteen acres.[6] The nine voting members, each appointed by the Governor and confirmed by the State Senate,[7] consider a myriad of criteria in determining whether to grant a land use reclassification.[8] A central purpose of LUC review is to provide a statewide perspective in evaluating and planning for future growth in the state.[9] Whether one sees the LUC's role in the Hawai'i planning process as a duplicative layer in an already too complex regulatory scheme, or as an important protection against rapacious developers, its influence is undeniable.

The initial attempt to develop the 'Aina Le'a parcel began in November 1987, when its owner, Signal Puako Corp., filed a district boundary amendment (DBA) petition to the LUC.[10] Although the LUC conditionally granted the project an urban land use designation, it remained largely undeveloped.[11] In 1999, the current owner, Bridge Capital (Bridge), purchased the property and, in 2005, sought to amend the LUC's previous approval.[12] In November 2005, the LUC issued the requested approval subject to the construction of 385 affordable housing units within a five-year deadline.[13] In January 2011, the LUC voted, by a five-to-three margin, to rescind 'Aina Le'a's urban classification after it failed to meet its April 2010 deadline for the construction of the affordable housing units.[14]

The developers blamed the delay on the requirement to obtain an accepted environmental impact statement (EIS).[15] In addition to its construction of forty affordable housing units, the developer had, by January 2011, also made significant progress in other phases of the project, including obtaining permits to install a wastewater treatment plant and making roadway improvements.[16] Despite the consistent support of the Hawai'i County Planning Department and the Hawai'i County Council's issuance of the appropriate zoning,[17] the LUC decided that the parcel should be returned to an agricultural classification. In addition to clouding the future viability of the project, the LUC's reversion of the property also caused the developer's lender to freeze the distribution of construction funds.[18]

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[6] *See* HAW. REV. STAT. § 205-3.1 (2010). The LUC considers all requests for reclassification of parcels larger than fifteen acres. Section 205-4 grants the counties discretion to review projects that are less than fifteen acres. HAW. REV. STAT. § 205-4 (2010).
[7] HAW. REV. STAT. § 26-34(a) (2010).
[8] *See infra* part II.A. (detailing the criteria that the LUC employs in considering district boundary amendments).
[9] *See* HAW. REV. STAT. § 205-17(3) (2010).
[10] *See* Gomes, *More Time Sought*, *supra* note 2.
[11] *See id*.
[12] Statement of Co-Petitioner at 2, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Sept. 8, 2011).
[13] Findings of Fact, Conclusions of Law, and Decision and Order at 5, 11, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Nov. 25, 2005).
[14] Transcript of Hearing at 133, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[15] *Id*. at 53. From 2006 until 2008 the developers attempted to avoid submitting an EIS in connection with its subdivision application to the County of Hawai'i. An EIS is

> an informational document prepared in compliance with the rules adopted under [S]ection 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic and social welfare of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

HAW. REV. STAT. § 343-2 (2010). However, Hawai'i County ultimately required that Bridge obtain an EIS in light of the Hawai'i Supreme Court's holding in Sierra Club v. Dep't of Transportation, 115 Haw. 299, 167 P.3d 292 (2007) (considering the circumstances in which an EIS is required). Bridge contended that the delay in filing the EIS slowed progress on the construction of the affordable housing units and resulted in its inability to meet the LUC's original November 2008 deadline. Statement of Co-Petitioner at 10-11, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Sept. 8, 2011). Bridge filed an EIS with the County of Hawai'i Department of Planning in 2008. *Id*. The EIS was accepted in October 2010. *Id.*
[16] Transcript of Hearing at 102, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[17] *Id*. at 132-33.
[18] *See* Transcript of Hearing at 84-85, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).

While regulatory controls, such as those employed by the LUC, are critical to protect Hawai'i's environment and ensure orderly growth, this note argues that the LUC's revocation of 'Aina Le'a's urban classification is subject to the same administrative rules and statutory requirements that govern the DBA process.[19] The LUC failed to satisfy those requirements; the most egregious violation was its failure to obtain the required minimum of six votes to amend a state land use classification.[20] The LUC's ruling increases the uncertainty of the already risky field of land development in Hawai'i to the detriment of those directly and indirectly employed in the development and construction industries and the supply of affordable housing units.[21]

Part II of this note provides an extensive overview of LUC DBA review, including a summary of the relevant statutory and administrative provisions. Part III describes the LUC's review of the 'Aina Le'a project in detail, and outlines the developer's plans, entitlements, and steps taken in reliance on those entitlements. Part IV focuses on the LUC's January 20, 2011 hearing, considers the legal and policy implications of the LUC's ruling, and argues that the LUC's holding is inconsistent with its legal obligations. Part V comments on the aftermath of the LUC's ruling and is divided into two sections: (1) the impact of the ruling on development in the state, and (2) what the LUC should do to solve the conditional zoning reversion issue.

II. BACKGROUND: THE LAW AND POLICY OF LAND USE COMMISSION PROJECT REVIEW

"It's unfortunate that [reclassification is] a sledge hammer, but that's the only thing we got. . . . [I]f we're going to have conditions [that] nobody has to live up to, then why do we have a Commission at all?"
- Thomas Contrades, Vice-Chair, Land Use Commission[22]

"I think we all have to carefully consider reversion in the context of what's going on financially and in the business environment in this state. . . . I don't believe that reverting this land is going to help . . . in any fashion."
- Charles Jencks, Member, Land Use Commission[23]

The LUC has alternately been described as either central to the implementation of Hawai'i's unique statewide zoning program or as a burdensome, time-consuming, costly and repetitive bureaucracy.[24] The LUC's review of the 'Aina Le'a project demonstrates the oppositional nature of many of its project reviews. The State Office of Planning took an unusually strong stance against the project and argued that the failure to meet the LUC's affordable housing condition necessitated reclassification.[25] The developer responded by urging the LUC that a reversion would be

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[19] *See infra* text accompanying note 112.
[20] HAW. REV. STAT. 205-4(h) (2010).
[21] *See* Dan Davidson, Op-Ed., *Developers Already Are Paying*, HONOLULU ADVERTISER, Jun. 25, 2002, at A8 (note that the author, who was formerly Executive Officer of the LUCand Executive Director of the Land Use Research Foundation of Hawai'i, a land development advocacy group, wrote this article while working in the latter capacity). *But see* Blake D. McElheny, Op-Ed., *Land-Use Law Helps Prevent Unnecessary Urbanization*, HONOLULU STAR BULLETIN, Oct. 14, 2003, at A12; Richard Borreca, *The Role of the Land Use Commission*, Honolulu Star Bulletin, Jan. 14, 1998, at A16.
[22] Transcript of Hearing at 127, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[23] *Id*. at 120.
[24] *See supra* text accompanying note 20.
[25] Office of Planning, Motion for Order to Show Cause, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Dec. 23, 2010). The State Office of Planning provides the LUC with recommendations and research support. DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII 28 (2nd Ed. 2010). The State Office of Planning Director's testimony at a July 1, 2010 hearing demonstrates the Office's heated opposition to the project. The Director stated:

> Typically, I'm a good loser . . . but this one stuck with me. . . . What [the Department] suggests is [that the LUC vote to] revert. We [should] get a bona fide landowner, a bona fide petitioner, a bona fide developer to come back, make a bona fide proposal and move forward in a way that we can all feel comfortable with.

Statement of Co-Petitioner at 17, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Sept. 8, 2011). The reasoning of the Planning Director runs counter to the statutory requirement that "[n]o amendment to any land use district boundary nor any other action by the land use commission shall be adopted unless such amendment or other action conforms to the Hawaii state plan." HAW. REV. STAT. § 205-16 (2010).

inconsistent with the Hawai'i state plan, county general and development plans, and the support of local residents.[26] Before considering the intricacies of the statutes and administrative rules governing the LUC, the following sections present an overview of its function and purpose.

A. Land USE Commission Review in a Planning and Development Context

Zoning regulation in the United States originated in 1916 and in the following years spread rapidly across the country.[27] Zoning began as a regulatory mechanism to remedy urban blight in New York City.[28] The Hawai'i State Legislature adopted zoning by statute in 1957[29] and added a state planning system in 1961.[30] The Legislature implemented statewide zoning due to a perceived "lack of adequate controls [that] had caused the development of Hawai'i's limited and valuable land for short-term gain . . . while resulting in long-term loss to the income and growth potential of our State's economy."[31] Hawai'i remains the only state that employs comprehensive statewide land use controls.[32] The Hawai'i State Legislature created statewide zoning, in part, to encourage orderly development throughout the state, to promote uniformity in project review between the islands, and to account for the influence of concentrated land ownership.[33]

H.R.S. Chapter 205 vests the LUC with the authority to establish initial district boundaries and make amendments to the four use districts: urban, rural, agricultural, and conservation.[34] Currently, approximately 48 percent of the land in the state is classified as conservation, 47 percent agricultural, 5 percent urban, and .3 percent rural.[35] The urban district permits a range of uses, including residential, commercial, and industrial.[36] Only in the urban district do the state's four counties have complete discretion in regulating the use of land with separate zoning controls.[37] The rural district allows for small farms and residential lots of greater than a half-acre in size.[38] Permitted

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According to Section 205-16, the focus of the DBA petition must be on the state plan and related planning documents, as opposed to the landowner.

[26] Transcript of Hearing at 61, 65-66, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).

[27] CLIFFORD. L. WEAVER & RICHARD F. BABCOCK, CITY ZONING: THE ONCE AND FUTURE FRONTIER 13-14 (1979).

[28] *Id*. The early enthusiasm for zoning is apparent in the passage below:

> Urban America was in something of a crisis in the early 1920[]s. Like a patient who could endure his fever until he suddenly learned that there was now a new remedy for it and who was then impatient to be cured, urban America was now sure that it would perish if it did not have zoning. . . . Zoning was the heaven-sent nostrum for sick cities, the wonder drug of the planners, the balm sought by lending institutions and householders alike. City after city worked itself into a state of acute apprehension until it could adopt a zoning ordinance.

Charles L. Siemon, *Conditional Zoning in Illinois: Beast or Beauty?*, 15 N. ILL. U. L. REV. 585, 601 (1995) (quoting MEL SCOTT, AMERICAN CITY PLANNING SINCE 1890 35-36 (1969)).

[29] *See* HAW. REV. STAT. § 46-4 (2010).

[30] *See* HAW. REV. STAT. § 205 (2010).

[31] *See, About the Land Use Commission: Purpose of the Commission*, STATE OF HAW. LAND USE COMM'N, http://luc.state.hi.us/about.htm#PURPOSE%20OF%20THE%20LAW (last visited Apr. 22, 2012).

[32] CALLIES, *supra* note 24, at 28. For a detailed analysis of state land use controls *see* G. Kem Lowry, Jr., *Evaluating State Land Use Control: Perspectives and Hawai'i Case Study*, 18 URB. LAW ANN. 85 (1980) (finding that statewide zoning has been effective at reducing arbitrary decision making by County reviewing agencies, but that the LUC is less effective in considering small-scale projects).

[33] S. STAND. COMM. REP. 580, 1st Leg., Gen. Sess. (1961), *reprinted in* 1961 HAW. SEN. J. 883, 883.

[34] HAW. REV. STAT. 205-2(a) (2010).

[35] State of Hawai'i, Department of Business, Economic Development & Tourism, *State of Hawai'i Data Book 2008* at table 6.04. *See id*. at table 6.03 (providing a yearly breakdown of the land use classification throughout the state; the urban classification has increased by 41 percent since 1969).

[36] *See* DAVID KIMO FRANKEL, PROTECTING PARADISE: A CITIZEN'S GUIDE TO LAND & WATER USE CONTROLS IN HAWAI'I 7 (1997); STATE OF HAW. LAND USE COMM'N, *supra* note 30.

[37] CALLIES, *supra* note 24, at 22. For instance, land designated urban by the LUC may be zoned multi-family residential, commercial, or industrial by the county zoning authority. *Id*.

[38] *See* FRANKEL, *supra* note 35, at 6-7; STATE OF HAW. LAND USE COMM'N, *supra* note 30.

uses in the agricultural district include the cultivation of crops, livestock, and aquaculture.[39] The conservation district is the most restrictive classification and prohibits almost any structural development.[40] In contrast to the other three districts, the specific permitted uses on conservation lands are governed by rules created at the state level.[41]

Measured together, agricultural and conservation lands comprise almost 95 percent of the total land area in Hawai'i.[42] Landowners and developers desiring to put land to more intensive uses, such as residential or commercial subdivisions, must petition the LUC to reclassify the land into the urban classification.[43] Once the LUC has accepted a petition for review, it is required to hold a public hearing on the island on which the relevant parcel is located within 180 days.[44] The LUC is also subject to administrative rules[45] it adopted in compliance with H.R.S. Chapters 91, 92, and 205.[46]

The administrative rules governing the LUC contain detailed procedural requirements relating to notice, intervention in the petition for DBA, filing of exhibits, and prehearing conferences.[47] In *Town v. Land Use Comm'n*, the Hawai'i Supreme Court held that the LUC operates in a "contested case" format when considering DBA petitions.[48] Contested case hearings are considered quasi-judicial and non-legislative in nature.[49] This distinction is significant, because it denies LUC decisions the deferential standard of judicial review and presumption of validity afforded to legislative acts.[50] The LUC is also subject to H.R.S. Chapter 92, commonly known as the "Sunshine Law," requiring that all contact between a petitioner and reviewing authority be public.[51] H.R.S. Section 92-6(b) explicitly states that the Sunshine Law "shall apply to require open deliberation of the adjudicatory functions of the [LUC]."[52] The LUC must also comply with post-hearing procedures, including the production of a proposed Decision and Order, contestation of the proposed Decision and Order, and the listing of mandatory conditions.[53] The LUC Rules are central to the function of the Commission and ensure that it fulfills its duties to both the public at large and the petitioners seeking to reclassify their land.

In reviewing a DBA petition, the LUC considers an array of criteria that are defined by statute and its own administrative rules.[54] H.R.S. Section 205-17 mandates that the LUC shall consider conformity with the goals, objectives, and policies of the Hawai'i state plan.[55] Before moving to the other important criteria the LUC must consider in reviewing a DBA petition, the next section will address the complicated yet critical issue of planning in Hawai'i.

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[39] *See* FRANKEL, *supra* note 35, at 6; STATE OF HAW. LAND USE COMM'N, *supra* note 30.
[40] *See* FRANKEL, *supra* note 35, at 5; STATE OF HAW. LAND USE COMM'N, *supra* note 30.
[41] *See* STATE OF HAW. LAND USE COMM'N, *supra* note 30.
[42] *Id*.
[43] *See* HAW. REV. STAT. 205-2(a) (2010) (the LUC reviews all projects over fifteen acres in size).
[44] HAW. CODE R. § 15-15-51 (LexisNexis 2012).
[45] HAW. CODE R. § 15-15 (LexisNexis 2012).
[46] H.R.S. Chapter 91 regulates administrative procedures for the administrative and executive agencies of the State. HAW REV. STAT. § 91 (2010). Chapter 92 concerns the related issue of public agency meetings and records. Chapter 205 governs the LUC.
[47] HAW. CODE R. § 15-15-51 to 15-15-62 (LexisNexis 2012). The LUC Rules are codified at Hawai'i Administrative Rules, Title 15, Chapter 15.
[48] 55 Haw. 538, 524 P.2d 84 (1976).
[49] HAW. CODE R. § 15-15-34 (LexisNexis 2012).
[50] *See* Fasano v. Bd. of Cnty. Comm'rs, 507 P.2d 23, 26 (Or. 1973), *overruled on other grounds by* Neuberger v. Portland, 607 P.2d 722 (Or. 1980).
[51] HAW. REV. STAT. § 92 (2010).
[52] HAW. REV. STAT. § 92-6(b) (2010).
[53] HAW. CODE R. §§ 15-15-80 to 15-15-84 (LexisNexis 2012).
[54] HAW. REV. STAT. § 205-17 (2010); HAW. CODE R. 15-15-18 (LexisNexis 2012).
[55] HAW. REV. STAT. § 205-17.

Like Hawai'i's dual zoning system, planning in the state is also tiered.[56] Hawai'i land use planning involves four plans: the state plan, state functional plans, county general plan, and county development plans.[57] Hawai'i is the only state to give its state plan the effect of law.[58] Whereas the state plan is a policy document in most states, it establishes legal requirements in Hawai'i.[59] The state plan serves the dual function of implementing the "overall goals, objectives, and policies of statewide land use"[60] and creates a statewide planning system to coordinate land use regulation at the state and county levels.[61] The state functional plans address twelve major land use policy issues, including housing, agriculture, and transportation, and contain "objectives, policies, and implementing actions to address those priority issues."[62] The county general and development plans "further define the overall theme, goals, objectives, policies, and priority guidelines" of the state plan.[63] The county general plan includes target population and growth patterns, and addresses the unique conditions and challenges of each county.[64] The development plans provide "relatively detailed schemes for implementing and accomplishing the development objectives and policies of the general plan within the several parts of the city."[65] Professional planners at the state and county levels prepare each of these documents by taking in to account not only technical data, but also thousands of hours of community meetings and hearings.[66] The four principal planning documents are central to the LUC's analysis of DBA petitions.

In addition to requirements related to planning, H.R.S. Section 205-17 also specifies that the LUC must take in to account conformity with the standards of the district requested–most often urban.[67] Section 205-17 requires that the LUC consider: impact upon cultural, environmental, and historical resources; preservation of natural resources relevant to Hawai'i's economy; commitment of state funds; employment and housing opportunities.[68] The LUC rules also contain a detailed list of eight criteria that it must consider in evaluating a petition to amend a boundary amendment to urban.[69] The criteria include "city-like" population density, proximity to employment and infrastructure, topography, contiguity with existing urban lands, and conformity with state and county general plans.[70] The LUC must also make explicit findings regarding the impact of a proposed DBA on the exercise of the traditional and customary rights of Native Hawaiians.[71] The LUC approves most DBA petitions for an urban

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[56] Charles C. Goodin, *The Honolulu Development Plans: An Analysis of Land Use Implications for Oahu*, 6 U. HAW. L. REV. 33, 43 (1984).
[57] *Id.* at 41. The county development plans are also referred to as county community plans.
[58] Kent M. Kieth, *The Hawai'i State Plan Revisited*, 7 U. HAW. L. REV. 29, 30 (1985). *See also* CALLIES, *supra* note 23, at 23. In support of adopting a State Plan, State Senator Wong reasoned that

> [t]here is a need for us to plan comprehensively for Hawaii's future rather than reacting to brush fires[,] which oftentime become roaring forest fires. We need to establish an orderly process whereby the Legislature[,] in exercising its constitutional responsibility[,] will act as the chief policy-making body in the State. The Hawaii State Plan is a bold step in this direction. It balances well the interest of State and the County governments as well as being sensitive to the needs of the residents and people of Hawaii.

H.B. 2173-78, 9th Hawaii Leg., Reg. Sess., 1978 SEN J. 668 (statement of Senator Wong).
[59] *See* HAW. REV. STAT. § 205-17 (2010).
[60] *Id.* § 226-51 (2010).
[61] *Id.* § 226-53.
[62] *Id.* § 226-55(b).
[63] *Id.* § 226-58(a).
[64] *Id.* § 226-52.
[65] REVISED CHARTER OF THE CITY AND COUNTY OF HONOLULU, HAWAII § 5-409 (1998).
[66] *See Projects & Initiatives*, OFFICE OF PLANNING–STATE OF HAWAII, http://hawaii.gov/dbedt/op/projects.htm (last visited Apr. 22, 2012); *See Countywide Policy Plan*, COUNTY OF MAUI, HAWAI'I, http://co.maui.hi.us/index.aspx?NID=420 (last visited Apr. 22, 2012).
[67] HAW. REV. STAT. § 205-17 (2010).
[68] *Id.*
[69] HAW. CODE R. § 15-15-18 (LexisNexis 2012).
[70] *Id.*
[71] *See* Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 40, 7 P.3d 1068, 1077 (2000).

classification, which is perhaps surprising given the Commission's rigorous review standards; its approvals, however, are almost always subject to conditions with which the developer must comply.[72]

Before analyzing the LUC's conditional zoning authority, the ramifications of political, social, and economic influences on land development and planning must be acknowledged. The purpose of the field of planning is to "set forth [in an objective and impartial fashion] a desired direction and patterns of future growth and development."[73] In the early nineteen seventies one Hawai'i developer boldly stated that "[w]e used politics [as a] vehicle to create reforms and laws [and] to change the regulations . . . and business principles so [that] we had our own power structure."[74] Although developers and landowners may no longer discuss their political connections so openly, there undoubtedly remains a connection between politics and land development in Hawai'i.[75]

Land development in Hawai'i frequently sparks disagreement between developers and non-governmental organizations (NGOs) that focus on the protection of environmental and Native Hawaiian rights.[76] The high stakes and tension between the interests of the two parties creates a potent incentive for abuse of Hawai'i's land use regulatory scheme.[77] In addition to legally suspect attempts to secure the favor of politicians and other decision makers, developers also pursue legitimate means of leveraging political capital.[78] For instance, 'Aina Le'a's developers have promised to construct affordable housing and utilized the resulting support of potential homeowners to obtain the necessary project approvals.[79] Indeed, DW 'Aina Le'a's website features a form that allows the public to send a message of support to the Hawai'i State Legislature.[80] Perhaps in response to these messages, members of the Hawai'i State House of Representatives introduced a resolution in support of the project and the affordable housing and jobs it would create.[81] Although non-binding on the LUC, the resolution demonstrates the complicated interplay between development and politics in Hawai'i.[82]

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[72] CALLIES, *supra* note 24, at 29 (citing Comment of Dan Davidson, Chief Exec. Officer, Land Use Comm'n (Nov. 10, 2008)).
[73] 6 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 37.02.
[74] NOEL J. KENT, HAWAII: ISLANDS UNDER THE INFLUENCE 150 (1983) (citing *Men and Women of Hawaii*, ECONOMIC SALON, Sept. 1972, at 12).
[75] *See, e.g., GOP Hits Garcia on Conflict of Interest*, HONOLULU STAR-ADVERTISER, Apr. 3, 2011, *available at* http://www.staradvertiser.com/news/20110403_GOP_hits_Garcia_on_conflict_of_interest.html.
[76] *See* Melody K. MacKenzie, *Ke Ala Pono, The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 HAW. L. REV. (forthcoming October 2012); David L. Callies et al., *The Moon Court, Land Use, and Property: A Survey of Hawaii Case Law 1993 to 2010*, 33 HAW. L. REV. (forthcoming October 2012).
[77] *See* KENT, *supra* note 73.
[78] *See GOP Hits Garcia*, *supra* note 74.
[79] *See* Transcript of Hearing at 11-43, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011). Fifteen people testified in favor of the project. The testifiers each offered either the construction of affordable housing or the creation of jobs as rationale for supporting the development. *See also* Interview with William Frampton, Planner and Partner, Frampton & Ward, Land Use Consulting and Development, in Honolulu, H.I. (April 2, 2011) (stating that many developers and consultants contact community members to support their projects at public hearings).
[80] THE VILLAGES OF 'AINA LE'A, http://www.ainalea.com/support-dw.htm (last visited Apr. 22, 2012).
[81] *See* H.R. Res. 204, 2011 Leg., 26th Sess. (Haw. 2011). Speaker of the House Calvin Say and Cindy Evans, a Representative of North Kona and South Kohala, introduced House Resolution 204. *Id.* The Resolution focuses on the benefits of the project, including infrastructural improvements, consistency with the state, general, development, and community plans, and the creation of jobs, affordable housing units, and economic stimulation. *Id.* Representative Evans stated that she supported the resolution because

> [the LUC's] action has clouded the relationship between [the] County and State. The Hawaii County general plan and the South Kohala community development plan designate[] the subject property as urban expansion. The Land Use Commission has reverted the land to agriculture[,] which does not coincide with the land use planning designation for the subject lands. The urban designation was the highest and best use of the land.

E-mail from Cindy Evans, Representative, Hawai'i State House, to author (April 24, 2011, 12:04 HST) (on file with author). State Representative Evans also indicated that she was investigating whether the LUC had "unfairly singled out" the 'Aina Le'a project. *Id.*
[82] *See id.* The House Resolution goes beyond general support for the project and specifies that the developer has "completed the construction of sixteen affordable units, meeting the County of Hawaii's building inspection standards." *Id.* The LUC reached the opposite conclusion,

Citizen groups commonly employ both Hawai'i's complex land use regulatory scheme and political pressure to legitimately challenge land developments and to accomplish other worthwhile goals.[83] One commentator, however, has noted the potential for NGOs to misuse the environmental review process to "buy time and delay unwelcome development" by contesting projects being heard before administrative agencies on meritless bases.[84] Therefore, administrative agencies like the LUC must employ the relevant procedural safeguards, as specified in the LUC rules and H.R.S. Section 205, to protect against the potential for abuse of the project review process.[85]

B. THE Land Use Commission's Conditional Zoning Authority

The LUC may condition approval of a DBA petition in order to ensure compliance with the developer's representations to the Commission and to meet the abovementioned criteria, including housing and education, under which it reviews projects.[86] The LUC typically conditions its approval of DBAs by requiring developers to provide a combination of infrastructure, impact fees, land dedications, and affordable housing.[87] A leading zoning treatise defines this technique, called conditional zoning, as "[a] zoning amendment which permits a use of particular property in a zoning district subject to restrictions other than those applicable to all land similarly classified."[88] Conditional zoning was initially met with judicial skepticism due to its inherent flexibility.[89] Courts, however, have generally accepted the validity of conditional zoning where the jurisdiction in which the regulatory agency is acting has a comprehensive plan in place, finding that a planning predicate "reduces the likelihood that the zoning of a particular parcel in conformity therewith is not arbitrary or unrelated to the public interest."[90] Given Hawai'i's significant commitment to planning, it is extremely unlikely that a Hawai'i court would invalidate the use of conditional zoning.

In evaluating the legitimacy of conditional zoning, courts have also focused on whether the conditions are agreed upon unilaterally or bilaterally.[91] Courts have generally disapproved of the latter as "an illegal bargaining away of the zoning power, and because it [is] violat[ive of the basic tenet that requires] uniform land use regulations within zoning districts."[92] It is also unlikely that a Hawai'i court would strike down an LUC condition on this basis, because petitioners are responsible for unilaterally executing the conditions imposed by the Commission.[93] Conditional zoning is the chief mechanism whereby the LUC can obtain guarantees from developers to provide exactions for the benefit of the public, however, it is also the subject of much criticism.

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finding that the units were not complete, because the developer had yet to finish infrastructural improvements. *See* Transcript of Hearing at 87-88, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011). *See also infra* Part III.B.

[83] *See* Denise E. Antolini, *The Moon Court's Environmental Review Jurisprudence: Opening the Courthouse Doors for Beneficial Public Participation*, 33 HAW. L. REV. (forthcoming October 2012).

[84] *See* Emily E. Klatt, *Traffic, Turtles, and Public Controversy: The Hawaii Environmental Policy Act and Supplemental Environmental Review*, at 23 (May 2010) (unpublished manuscript) (on file with author).

[85] *See supra* text accompanying notes 45 and 46.

[86] HAW. REV. STAT. 205-4(g) (2010).

[87] CALLIES, *supra* note 24, at 29 (citing Comment of Dan Davidson, Chief Exec. Officer, Land Use Comm'n (Nov. 10, 2008)).

[88] 1 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 9.20 (5th ed. 2008).

[89] Siemon, *supra* note 27, at 593-94.

[90] Wilson v. Cnty. of McHenry, 416 N.E.2d 426, 429-30 (Ill. App. Ct. 1981). *See also* South of Sunnyside Neighborhood League v. Bd. of Comm'rs of Clackamas Cnty., 569 P.2d 1063 (Or. 1977); Willamette Univ. v. Land Conservation and Dev. Comm'n, 608 P.2d 1178 (Co. App. 1980).
Zoning is an exercise of the police power. In order to satisfy the substantive due process clause, "land use controls must advance legitimate governmental interests that serve the public health, safety, morals, and general welfare." DANIEL R. MANDELKER, LAND USE LAW § 2.39 (6th ed. 2006). Judicial scrutiny of the exercise of the police power is typically under an "arbitrary and capricious" standard. *Id.*

[91] MANDELKER, LAND USE LAW, § 6.62.

[92] *Id.*

[93] HAW. REV. STAT. 205-4(g) (2010).

Many commentators have criticized the use of conditions or exactions by the LUC at the DBA stage.[94] The first critique is that because the LUC is tasked with evaluating broad land use categories, as opposed to the relatively specific county zoning controls, it is not the appropriate forum to apply project specific conditions.[95] LUC conditions, such as mandatory affordable or workforce housing requirements, are also criticized on constitutional grounds as violating the *Nollan/Dolan* test.[96] Under the test, land exactions must bear a rational and proportional nexus between the development and the condition imposed–a requirement that affordable housing conditions are only tenuously able to meet.[97] Notwithstanding these critiques, the LUC is vested with the authority to conditionally approve DBAs and, since its inception, has secured commitments from developers to provide public improvements.[98]

H.R.S. Section 205-4(g) permits the LUC to add conditions to an approved petition, and requires that the conditions be recorded at the Bureau of Conveyances, thereby ensuring that successors in interest are also bound by them.[99] Significant as much for its operative provisions as for what it omits, Section 205-4(g) specifies 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."[100] The section authorizes the LUC to issue an order to show cause, but does not describe the procedure by which the Commission can revert a land use classification–most commonly from urban to agricultural.[101] Unfortunately, while Section 205-4(g)'s legislative history clearly supports the LUC's authority to downzone a conditionally approved project, it does not clarify the process that the LUC must follow in ordering a reversion.[102]

The LUC has only reverted one other project from urban to a less intensive land use classification.[103] That project, Lanai Resort Partners, is somewhat instructive with respect to the procedural requirements that the LUC must follow in issuing a reversion.[104] The LUC conditionally approved the 180-acre resort project's DBA petition for an urban classification.[105] The landowner, however, subsequently violated its commitment to use a specified well as its water source.[106] The Commission issued an order to show cause and held that the developer failed to prove why the project should not be reverted.[107] As discussed in Part III.A., the LUC deemed its five-to-three vote in favor of the order to show cause as sufficient to revert the 'Aina Le'a property to an agricultural classification.[108] In the LUC's review of Lanai Resort Partners, however, the Chairperson noted that "we would all agree that what we've addressed is very unique . . . [A]lthough we believe we have sufficient rules to move forward, we're not very clear in terms of

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[94] *See, e.g.*, Jay Fidell, *Labyrinthine Land-Use Laws Suffocating Isle Economy*, HONOLULU STAR-ADVERTISER, Mar. 1, 2011, *available at* http://www.staradvertiser.com/columnists/techview/20110301_Labyrinthine_land-use_laws_suffocating_isle_economy.html.; Don Clegg, Op-Ed., *Infrastructure–Who Pays? City Development Approval Can Be A Shell Game*, HONOLULU STAR BULLETIN, August 4, 2002, at D1, D6.
[95] *See* DANIEL R. MANDELKER, LAND USE LAW § 9.22 (6th ed. 2006).
[96] *See* David L. Callies, *Impact Fees, Exactions and Paying for Growth in Hawaii*, 11 U. HAW. L. REV. 295, 300-02 (1989).
[97] *Id.* Hawai'i courts have yet to consider this issue. Courts in other jurisdictions, however, have upheld affordable housing conditions. *See* DANIEL R. MANDELKER, LAND USE LAW § 7.26 (6th ed. 2006).
[98] *See* HAW. REV. STAT. § 205-4(g) (2010).
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] S.B. 3028, 15th Hawaii Leg., Reg. Sess., 1990 HOUSE J. 1265. The House Committee on Planning, Energy and Environmental Protection added the order to show cause provision, but did not indicate how that procedure relates to the DBA petition's conditional approval. *Id.*
[103] *See infra* note 152.
[104] Findings of Fact, Conclusions of Law, and Decision and Order, Lanai Resort Partners, No. A89-647 (Haw. Land Use Comm'n May 17, 1996).
[105] *Id.* at 1-2.
[106] *Id.* at 4-5.
[107] *Id.* at 2-3.
[108] *See infra* note 151.

how those rules should be applied to address the . . . reversion classification."[109] The Chairperson was clear, however, that an additional hearing was required to consider whether the project should be reverted in the context of the overall DBA petition.[110] Although the LUC's procedure for reverting the Lanai Resort Partners project is not binding, it is instructive as to how the Commission handled its only previous reversion.

In contrast to other aspects of conditional zoning, most notably the constitutionality of exactions,[111] there is a dearth of case law considering the legal requirements of a downzoning or reversionary action. This issue is a matter of first impression in Hawai'i jurisprudence. Despite the rarity with which the issue of reversion has been considered, it is extremely relevant given the lengthy and complicated project review process in Hawai'i. Having contextualized the LUC's role in the implementation of statewide zoning and its conditional zoning prerogative, Part III of this note will provide background on the LUC's review of 'Aina Le'a's petition.

III. THE LAND USE COMMISSION'S REVOCATION OF 'AINA LE'A'S URBAN CLASSIFICATION

Before analyzing the legal and policy implications of the LUC's revocation of 'Aina Le'a's urban classification, it is necessary to understand the project's background and the events leading to the Commission's decision. The LUC's decision was based largely on the developer's multiple failures to satisfy the Commission's affordable housing condition.[112] This note argues that the statutes and administrative rules that govern DBAs also apply to the reversion of land use classifications, and that the LUC failed to comply with those requirements.[113] The LUC's ability to revoke a non-complying landowner's land use classification is a critical power of the Commission, however, it must comply with the law in the exercise of that authority. This part provides context to the project history, the developer's plans, and the LUC's review of the project.

A. 'AINA Le'a PROJECT History: a Twenty-Plus Year Saga

Perched between the Waikoloa Resort Area and the Waikoloa Village on the Kohala Coast of the Island of Hawai'i sits the 'Aina Le'a development. The project area spans approximately 1,060 acres of predominantly lava-covered land.[114] Efforts to develop the subject project date to 1987, when Signal Puako Corp. (Signal) filed a petition for a DBA seeking to reclassify the property from agricultural to urban.[115] Signal proposed to develop a large residential community, including 2,760 housing units, in a mix of single-family homes, low-rise apartments, and townhomes.[116] The LUC considered Signal's petition, and on January 17, 1989 issued its Findings of Fact, Conclusions of Law and Decision and Order (Decision and Order) reclassifying the property for urban use subject to the condition that sixty percent of the units be offered as affordable housing.[117] Due in part to the recession of the

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[109] Transcript of Hearing at 75, Lanai Resort Partners, No. A89-647 (Haw. Land Use Comm'n Feb. 1, 1996).
[110] *Id.* at 75-76.
[111] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1986); Dolan v. City of Tigard, 512 U.S. 374 (1994). A Westlaw search revealed over six hundred cases considering regulatory exactions.
[112] Transcript of Hearing at 116-32, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[113] The applicable statutes and administrative rules include: Haw. Rev. Stat. §§ 91 (Hawaii Administrative Procedures Act), 92 (Sunshine Law), 205-4 (DBAs), 205-16 (project review criteria), 205-17 (conformity to state plan); Haw. Code R. §§ 15-15-18 (urban classification standards), 15-15-51 to 15-15-62 (LUC hearing procedures), 15-15-80 to 15-15-84 (LUC post-hearing procedures).
[114] Transcript of Hearing at 52, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[115] Statement of Co-Petitioner at 2, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Sept. 8, 2011).
[116] *Id.*
[117] *Id.* The condition did not specify a timeframe for the provision of the affordable housing units.
The price at which a unit can be offered as affordable housing, also referred to as workforce housing, is defined by the U.S. Department of Housing and Urban Development (HUD). "The target groups are defined as percentages (usually 80-140 percent) of the median income" of the municipality as determined by HUD. *Frequently Asked Questions About Affordable Housing Projects Processed Under Section 201H-38*, HAWAII REVISED STATUTES, DEPARTMENT OF PLANNING AND PERMITTING, CITY AND COUNTY OF HONOLULU, (last visited Apr. 22, 2012), http://honoluludpp.org/downloadpdf/zoning/FAQsHRS_Sec210H38.pdf. For a detailed consideration of affordable housing requirements in

early 1990s, Signal did not begin the planned development and, on May 4, 1990, sold its interest in the subject parcel to Puako Hawai'i Properties (PHP) a wholly owned subsidiary of the Japanese business conglomerate Nansay Corporation (Nansay).[118]

PHP created a new master plan that included 1,550 luxury single-family and multi-family homes clustered around a championship golf course.[119] In pursuit of the new plan, PHP made a motion to amend the Decision and Order, which the LUC approved on July 9, 1991.[120] Although the 1991 Decision and Order preserved the sixty percent affordable housing requirement, it added the condition that "in no event shall the gross number of affordable units be less than 1,000 units."[121] Over the next six years PHP constructed 109 offsite affordable housing units in partnership with the Hawai'i Housing Finance and Development Corporation (HHFDC).[122] Despite PHP's efforts to develop the site and comply with the conditions imposed by the LUC, its parent company, Nansay, experienced financial difficulties, resulting in the sale of the parcel. Bridge, formerly Bridge Puako, LLC, purchased the property in 1999.[123]

B. The Land Use Commission's Review of Bridge and 'Aina Lea's Revised Project Plan

Bridge sought to redesign the project and in 2005 submitted a motion to amend the 1991 Decision and Order.[124] Bridge's project design included 1,924 residential units, a 25-acre commercial parcel, a school site, parks, and open spaces.[125] In its motion to amend, Bridge requested that the LUC delete the former affordable housing requirement, which included sixty percent of the total units and at least one thousand units total, and stipulate that "[t]he location and distribution" of affordable housing requirements be determined by the County of Hawai'i.[126] This request was not unprecedented. The LUC had, between 1996 and 2003, approved such an arrangement for six separate projects.[127] The Commission, however, rejected Bridge's request and issued a Decision and Order stipulating that "in no event shall the gross number of affordable housing units within the Petition Area be less than 385 units. . . . Petitioner shall obtain, and provide copies to the Commission, the certificates of occupancy for all of the Project's affordable housing units within five (5) years of November 17, 2005."[128]

In the three years following the 2005 Decision and Order, Bridge commenced development of the project.[129] Bridge completed site preparation and other infrastructural work and obtained the required grading, water, and wastewater permits from county and state agencies.[130] In order to facilitate the affordable housing component of the project, Bridge submitted a subdivision and project district application for the affordable housing component of the project to the County of Hawai'i.[131] The developer, however, did not seek an EIS until Hawai'i County required it to

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the context of the county rezoning process *see* Joseph A. Dane, *Maui's Residential Workforce Housing Policy: Finding the Boundaries of Inclusionary Zoning*, 30 HAW. L. REV. 447 (2008).

[118] Statement of Co-Petitioner at 3-4, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Sept. 8, 2011).

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* The HHFDC is a state agency that "has the power to develop fee simple . . . property and to construct dwelling units on such property. It also has the power to sell, lease or rent, or cause to be leased or rented at the lowest possible price to qualified residents." CALLIES, *supra* note 24, at 182-84. In order to comply with affordable housing requirements, developers can make contributions or form partnerships with the HHFDC to facilitate the development of affordable housing. *Id.*

[123] Transcript of Hearing at 41-42, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).

[124] *Id.* at 74-75.

[125] Statement of Co-Petitioner at 6-7, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Sept. 8, 2011).

[126] *Id.*

[127] *Id.* at 5-6.

[128] *Id.* at 7.

[129] *Id.*

[130] *Id.* at 7-10.

[131] *Id.* *See* Hawai'i County Code §§ 25-6-40 to 25-6-49 (2010).

following the Hawai'i Supreme Court's ruling in *Sierra Club v. Dep't of Transportation*.[132] This resulted in a nearly two-year delay in subdivision permitting.[133]

In December 2008, the LUC issued an order to show cause compelling Bridge to demonstrate at a public hearing "whether [it] has failed to perform according to the representations and commitments made in seeking the land use reclassification and in obtaining amendments to conditions of reclassification."[134] At the April 30, 2009 hearing, LUC Vice-Chair Thomas Contrades, dissatisfied with Bridge's lack of progress on the affordable housing condition, made a motion to revert the property to agricultural land use classification.[135] The commissioners unanimously adopted the motion.[136]

Bridge responded by filing a Motion to stay the reversion of the property on April 30, 2009.[137] In support of its motion, Bridge presented a site plan for the affordable housing units, a schedule for its development, and various agreements with engineering consultants and a construction firm.[138] The LUC considered Bridge's motion on September 28, 2009 and, by a vote of 6-3, rescinded its previous order, finding that "much progress has been made within the last four months. Both the affordable housing component and the anticipated construction jobs are desirable."[139] The LUC conditioned its rescission of the April 30, 2009 Decision and Order with the requirement that the developers complete twenty-six affordable housing units by March 31, 2010.[140]

Following the September 2009 LUC decision, DW 'Aina Le'a, Bridge's development partner and successor in interest, partially completed the construction of sixteen affordable housing units,[141] mass grading for all the affordable housing townhouse sites, an access roadway, and additional permitting requirements.[142] DW 'Aina Le'a, however, failed to meet the Commission's March 31, 2010 deadline to finish twenty-six of the affordable housing units.[143] In response, the Commission, on July 26, 2010, entered an order finding failure to meet a condition precedent for rescinding the order to show cause.[144] The Commission found that "[t]he November 17, 2010 date for obtaining certificates of occupancy for 385 affordable homes established in the Amended Decision and Order dated November 25, 2005 is a deadline and not a goal."[145] On December 23, 2010, the State Office of Planning filed a Motion for Issuance of an Order to Show Cause against Bridge and DW 'Aina Le'a and recommended that the property be reverted to agricultural.[146] The LUC held a public hearing on January 20, 2011 to consider the Office of Planning's motion.[147]

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[132] *See Sierra Club*, 115 Haw. 299, 167 P.3d 292 (2007); *see also supra* note 14.
[133] Transcript of Hearing at 88-90, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[134] Statement of Co-Petitioner at 7-9, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Sept. 8, 2011).
[135] Transcript of Hearing at 123, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[136] Statement of Co-Petitioner at 11-12, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Sept. 8, 2011).
[137] *Id.* at 12.
[138] *Id.* at 12-13.
[139] *Id.* at 14.
[140] *Id.* Bridge argued that the approximately one-year deadline to complete construction of affordable housing units was unprecedented. Research did not reveal a comparable deadline. There are at least nine other large development projects that have been approved for ten years, but have yet to fulfill its affordable housing condition. *Id.* at 18.
[141] *Id.* at 14.
[142] *Id.*
[143] Transcript of Hearing at 123, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[144] Reply of Co-Petitioner at 7, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 13, 2011).
[145] *Id.*
[146] Motion of Office of Planning, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Dec. 23, 2010). The State Office of Planning serves as an advisor to the LUC. *See* STATE OF HAW. LAND USE COMM'N, *supra* note 30.
[147] Transcript of Hearing at 1, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).

The meeting began with public testimony; fifteen people testified in favor of the project, and six opposed "allowing more time to the proposed project [to meet the LUC's conditions]."[148] After the close of public testimony, the Commission began deliberation of the Office of Planning's Motion.[149] Three of the commissioners expressed frustration at the developer's "repeated[] fail[ure] to honor the promises and representation over the years[,] despite the amendments that the Commission had made in response to Petitioner's motion."[150] A commissioner moved to revert the project area to an agricultural classification.[151] The commissioners then voted on the motion to revert the 'Aina Le'a parcel and the motion "passed" five-to-three with one commissioner excused.[152] With that vote 'Aina Le'a became the first project of a comparable size to be reverted to an agricultural classification.[153] This unprecedented decision raises a number of critical issues, relating to land development conditions and administrative agency authority.[154] The remainder of this note will focus on the particular issue of the requirements with which the LUC must comply in order to revert state land use classifications.

IV. THE LAW AND POLICY IMPLICATIONS OF THE LAND USE COMMISSION'S RULING

The LUC's January 20, 2011 decision to revert the 'Aina Le'a project is the first time the Commission has taken such drastic action against a project of its size.[155] Given the infrequency with which the LUC reverts conditionally zoned projects and the severity of the result,[156] it was especially critical that the Commission create a viable precedent for the action. While 'Aina Le'a presented an opportunity to establish both the legitimacy and process by which the LUC may revert a project, the Commission likely misconstrued its own authority. Because Hawai'i courts have yet to consider this issue,[157] this part will consider the holdings of other jurisdictions and then suggest how the reversion issue should be treated in Hawai'i.

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[148] *Id*. at 6. *See also supra* text accompanying note 78 (discussing testimony in favor of the project). Supporters of the project each expressed his or her desire for affordable housing and job opportunities. Those in opposition to the project pointed to distrust of the developer, incompatibility with the neighboring communities, and the lack of long-term water sustainability. *See* Transcript of Hearing at 6-44, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).

[149] *Id*. at 116-37.

[150] *Id*. at 115-18.

[151] *Id* at 121.

[152] *Id* at 133.

[153] The LUC has considered state land use classification reversion for two prior projects. Those projects are Lanai Resort Partners, Docket No. A89-647 and Hawaii Ka'u Aina, Docket No. A88-630. *See supra* Part IV.A. for additional discussion of both.

[154] *See* Michelle DaRosa, Comment, *When Are Affordable Housing Exactions an Unconstitutional Taking?*, 43 WILLAMETTE L. REV. 453 (2007) (applying *Nollan* and *Dolan* analysis to affordable housing conditions); Michael Floryan, Comment, *Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices*, 37 PEPP. L. REV. 1039 (2010) (considering affordable housing conditions in conjunction with land development); Callies, *Impact Fees*, *supra* note 95 (evaluating the constitutionality of impact fees on land development); Siemon, *supra* note 27 (considering the discretion of administrative regulatory agencies in implementing local land use controls).

[155] *See* Findings of Fact, Conclusions of Law, and Decision and Order, Lanai Resort Partners, No. A89-647 (Haw. Land Use Comm'n May 17, 1996); Findings of Fact, Conclusions of Law, and Decision and Order, Hawaii Ka'u Aina, No. A88-630 (Haw. Land Use Comm'n Dec. 5, 2002). In Lanai Resort the LUC reverted a project for the first time. The developer planned to construct a resort on a 138 acre property, but failed to comply with a condition specifying the source of water for the project. In Ka'u the LUC considered a reversion of the property, but decided against it. The motion to revert the Ka'u project was quickly dismissed by the LUC and, as such, is not particularly instructive.

[156] *See supra* text accompanying note 152.

[157] *See* Andrew Gomes, *State Again Turns Down Housing Project*, STAR ADVERTISER, Apr. 22, 2011, http://www.staradvertiser.com/business/businessnews/20110422_State_again_turns_down_housing_project.html. Litigation over the LUC's reversion of the project's land use classification is very likely. Following the most recent LUC hearing, held on April 21, 2011, the developer stated that "DW 'Aina Le'a Development LLC will pursue all legal remedies available to protect its rights, to continue development of The Villages of 'Aina Le'a, and to fulfill its commitment to the community." *Id.* The developer was unsuccessful in its motion to strike the January 20, 2011 LUC decision to revert the project. *Id.*

A. Judicial Construction of Reversionary Actions Based on Conditional Zoning

The nature of the Commission's action–whether it acted in a legislative or quasi-judicial capacity–is central to the determination of the standards with which the LUC must comply in reverting a conditional urban classification.[158] In contrast to legislative actions, agencies operating in a quasi-judicial capacity are always subject to the Hawai'i Administrative Procedures Act (HAPA), which requires compliance with all applicable constitutional, statutory, and administrative provisions.[159] The distinction between legislative and quasi-judicial actions is also important because the former is subject to a deferential review on appeal,[160] while the latter is not entitled to a presumption of validity.[161] Therefore, the LUC's decision to revert the land use classification of a parcel on the basis of noncompliance with a condition is much more likely to survive judicial scrutiny if it is held to constitute a legislative, as opposed to quasi-judicial decision.

This note argues that the LUC acts in a quasi-judicial function in ordering a reversion, because (1) the action is project specific, entailing consideration of defined review criteria in the context of the individual application; and (2) the Commission makes the subject action in a "contested case" hearing. The scope of the acting agency's decision is one of the principal factors in determining whether an action is legislative or quasi-judicial.[162]

In *Save Sunset Beach Coal.*, the Hawai'i Supreme Court considered the distinction between legislative and quasi-judicial actions. The Court discussed the reasoning in *Fasano*, in which the Supreme Court of Oregon held that

> [a]n action is legislative when it affects a large area consisting of many parcels of property in disparate ownership. . . . Conversely, [an] action is considered quasi-judicial when it applies a general rule to a specific interest, such as a zoning change affecting a single piece of property, a variance, or a conditional use permit.[163]

The proposed 'Aina Le'a project is over a thousand acres in size and entails the construction of an entire village. Despite the project's large size, the LUC's reversion of the project's land use classification was still a determination with respect to a "specific piece of property."[164] Testimony by a Hawai'i County Deputy Corporation

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[158] CALLIES, *supra* note 24, at 29 ("The LUC has threatened to return land classified urban to its former agricultural classification for failure of the landowner-developer to commence development in a timely manner. Whether it may legally do so depends largely upon how one views the nature of the boundary amendments.").

[159] *See* Neighborhood Bd. No. 24 v. State Land Use Comm'n, 64 Haw. 265, 270-71, 639 P.2d 1097, 1101-02 (1982). HAPA is codified at HAW. REV. STAT. § 91. *See also Fasano v. Brd. of Cnty. Comm'rs*, 507 P.2d 23, 26 (Or. 1973) ("It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.").

[160] *See Save Sunset Beach Coal.*, 102 Haw. at 468, 78 P.3d at 5 (holding that "a legislative act . . . is accorded deference on appeal."). The opponents of a legislative act must demonstrate that it was "arbitrary, unreasonable or invalid." *Id.* (citing Lum Yip Kee v. City and Cnty. of Honolulu, 70 Haw. 179, 187, 767 P.2d 815, 820 (1989)). *See also* JUERGENSMEYER & ROBERTS, LAND USE PLANNING AND DEVELOPMENT 191 ("Most states treat all zoning changes, whether general or site-specific, as legislative acts and accord them a presumption of validity.").

[161] JUERGENSMEYER & ROBERTS, *supra* note 159, at 188.

[162] *Fasano*, 507 P.2d at 26. *See also* Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion*, 23 B.C. ENVTL. AFF. L. REV. 301, 314 (1996); JUERGENSMEYER & ROBERTS, *supra* note 159, at 188 (describing *Fasano* as the lodestar case advancing this theory).

[163] *Save Sunset Beach Coal.*, 102 Haw. at 473, 78 P.3d at 9. *See Fasano*, 507 P.2d at 26

> [o]rdinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.

[164] *Fasano*, 507 P.2d at 26.

Counsel underscores the specificity of the LUC's consideration: "[i]f the Commission were to . . . reclassify this land as agriculture, that classification would be inconsistent with the environmental conditions currently present for the entirety of *this parcel* of land."[165] The parcel-specific nature of the LUC's reversion of the 'Aina Le'a project supports the view that the Commission acted in a quasi-judicial capacity. One commentator noted that *Fasano* "provide[s] [a] useful model[] for courts that seek to avoid the confusions, temptations, and entanglements of the presumption of validity."[166] The Hawai'i Supreme Court, however, ultimately declined to apply *Fasano*'s reasoning with respect to the Honolulu City Council,[167] but it may find scope-of-review analysis appropriate with respect to the LUC.[168]

Contrary to *Fasano*'s reasoning, Hawai'i courts have held regulatory agency review on a parcel-specific level to be a legislative, as opposed to a quasi-judicial action.[169] Indeed, in *Save Sunset Beach Coal.*, the Hawai'i Supreme Court held that all rezoning actions at the county level are legislative acts.[170] The Court's analysis substitutes *Fasano*'s focus on the scope of agency review for the character of the agency itself. The court concluded that zoning is a legislative action, because the Honolulu City Council is a legislative body.[171] Under *Save Sunset Beach Coal.*'s analysis the LUC's reversion of a conditional grant of land use classification is also quasi-judicial in nature, because the LUC operates in a contested case format.[172]

In contrast to the county councils, the LUC is an administrative body that, as established in *Town*, operates in a contested case format.[173] In *Town*, the Hawai'i Supreme Court specified that because the LUC functions in a contested case format,

> [it] must conform to the requirements of HAPA when acting in either a rule making capacity (quasi-legislative), or in the adjudication of a contested case (quasi-judicial). . . . It logically follows that the process for boundary amendment is not rule making or quasi-legislative, but is adjudicative of legal rights of property interests in that it calls for the interpretation of facts applied to rules that have already been promulgated by the legislature.[174]

Although the passage above refers to the "process for boundary amendment," its reasoning strongly supports the conclusion that the LUC's reversion of a conditionally zoned land use classification is a quasi-judicial action. The LUC's determination of whether to revert 'Aina Le'a's urban classification was, as defined in *Town*, "adjudicative of legal rights of property interests" and "call[ed] for the interpretation of facts applied to rules that have already been promulgated by the legislature."[175] The holding in *Town* supports the interpretation of the LUC's action to revert as quasi-judicial. The LUC's reversion of 'Aina Le'a's land use classification was very likely a quasi-judicial action,

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[165] Transcript of Hearing at 67, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011) (emphasis added).
[166] Hopperton, *supra* note 161, at 322.
[167] *Save Sunset Beach Coal.*, 102 Haw. at 473, 78 P.3d at 9.
[168] *See* Hopperton, *supra* note 161, at 322-326 (noting advantages of the *Fasano* approach in determining the judicial standard of review).
[169] *See, e.g., Save Sunset Beach Coal.*, 102 Haw. at 468, 78 P.3d at 4 (finding that "the rezoning by . . . County of Honolulu (the City) of 765 acres of land . . . was a legislative act and thus is accorded deference on judicial appeal.").
[170] *Id.* One commentator has recently observed that "the vast majority of state courts treat[] all land use decisions adopted by local legislative bodies as legislative and well within the traditional presumption of deference." Carlos A. Ball, *Exactions and Burden Distribution in Takings Law*, 47 WM AND MARY L. REV. 1513, 1563 n.233 (2006). The rationale for this approach is that *Fasano*'s focus on the scope of review is problematic because all land use reviews ultimately must apply to individual parcels. *Id.* at 1563.
[171] *Id.*
[172] *See* Town v. Land Use Comm'n, 55 Haw. 538, 545, 524 P.2d 84, 89 (1974).
[173] *Id.*
[174] *Id.* at 547-48, 524 P.2d at 90-91.
[175] *Id.*

under this interpretation the Commission was bound by the statutory and administrative rules applicable to DBA review.

B. The Statutory and Administrative Rules Governing LUC Reversion of Land Use Classifications

HAPA specifies that administrative agencies acting in quasi-judicial capacities must comply with the constitutional, statutory, and administrative regulations governing its activities.[176] Although Hawai'i courts have yet to consider this issue, the case law of other jurisdictions supports the view that reversionary zoning actions must comply with constitutional, statutory, and administrative regulations.[177] In a 1969 California Court of Appeals case, the local zoning board approved a zoning change subject to the condition that the zoning designation would automatically revert to agricultural should the landowner fail to pave a roadway fronting the subject property.[178] In response to that condition, the court held that "the reversion would amount to a second rezoning" in violation of the procedural requirements of state law, specifically those related to notice, public hearings, and "planning commission inquiry."[179] The court further specified that "[e]ven if procedural directions were followed, the reversion would violate substantive limitations upon the supervisors' legislative power. The board has power to rezone an individual parcel when changed community conditions have rendered the former classification unsuitable and the new one is consistent with the public interest."[180] In 1972, the Hawai'i State Attorney General considered the LUC's reversionary authority in a published opinion.[181] The Attorney General found the reasoning in *Scrutton* to be persuasive and noted that an automatic reversion by the LUC would likely be struck down by Hawai'i courts on both procedural and substantive grounds.[182]

An Ohio State Court of Appeals case also struck down the zoning board's automatic reversion condition, but did so on public policy grounds.[183] In that case, the court held that automatic reversions based on conditional zoning are "a deviation from a basic zoning plan resulting in nonuniform application of the zoning law and inconsistencies within a zoning classification."[184] The LUC's reversion of the 'Aina Le'a project to agricultural presents a similar issue of zoning inconsistency, because the project site is suited for urban, as opposed to agricultural, use.[185] The court in *Hausmann & Johnson, Inc.* based its holding on a common law interpretation of zoning and planning requirements.[186] As will be discussed below, Hawai'i courts are unlikely to resolve this issue according to common law zoning and planning considerations, because adherence to planning documents is required by state statute.[187]

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[176] *See* HAW. CODE R. 15-15 (LexisNexis 2012).
[177] *See* Scrutton v. Cnty. of Sacramento, 79 Cal. Rptr. 872 (Ct. App. 1969); Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code Appeals, 320 N.E.2d 685 (Ohio App. 1974).
[178] *Scrutton*, 79 Cal. Rptr. at 872-79.
[179] *Id.* at 878 ("Plaintiff has a valid objection to the reversion feature of the proposed rezoning. In effect, the proposed contract declares that the landowner's breach of covenant will be met by automatic reversion from the multiple residential to the original agricultural classification or by reversion through action of the board of supervisors. The reversion would amount to a second rezoning. Automatic reversion would violate the procedural directions of state law, which demand that rezoning be accomplished through notice, hearings and planning commission inquiry"). *See also* Nolan M. Kennedy, Jr., *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HASTINGS L.J. 825 (1972).
[180] *Scrutton*, 79 Cal. Rptr. at 878.
[181] Op. Haw. Atty. Gen. 72-8 (1972). The Department of the Attorney General publishes non-binding opinions to clarify the Department's position on legal issues for the convenience of the State and county governments, agencies, and the general public. *Id.*
[182] Op. Haw. Atty. Gen. 72-8, at 6 (1972) ("we believe that sanctions for failure to observe conditions on rezoning generally may be imposed and enforced but down-zoning may not be [enforceable.]").
[183] *Hausmann & Johnson, Inc.*, 320 N.E.2d 685, 689.
[184] *Id.* at 690.
[185] *See supra* text accompanying note 24.
[186] *Hausmann & Johnson, Inc.*, 320 N.E.2d 685, 688-90.
[187] HAW. REV. STAT. § 205-16.

One of the only cases upholding automatic reverter clauses in conditionally approved zoning changes, *Goffinet v. Cnty. of Christian*, has been roundly criticized.[188] In *Goffinet*, the court equates special use permits–which the LUC is specifically authorized to issue by H.R.S. Section 205-6 and which may be terminated for violation of permit conditions–with zoning amendments.[189] The court held that

> when a finding is made by the enforcing officer that the restrictions imposed by a special use permit or the conditions placed upon a rezoning amendment, which we find to be indistinguishable, were not complied with, no other interpretation can be given but that the special use and conditional zoning would terminate and the property would again have the prior zoning classification.[190]

In Hawai'i, even though the special use permit[191] and DBA processes are both heard by the LUC, each has separate governing substantive and procedural rules.[192] Hawai'i Courts are extremely unlikely to conflate the special use permit and DBA processes, because of the statutory distinction between these two types of permits.[193]

Applying the principle established in *Scrutton* to the LUC's reversion of a conditional land use classification, the Commission must comply with the procedural and substantive requirements of the statutory and administrative rules applicable to DBAs. The LUC failed to satisfy the requirements of a number of critical statutory and administrative rules governing DBAs. The Commission's most glaring error was the five-to-three vote on which the reversion was based.[194] H.R.S. Section 205-4(h) stipulates that "[s]ix affirmative votes of the Commission shall be necessary for any boundary amendment under this section."[195] The LUC also failed to give proper notice, in contravention of LUC Rule Section 15-15-51(d)(4), on the issue of reversion prior to its January 20, 2011 hearing.[196] Further, the LUC's reversionary action did not fulfill the requirements of HAPA, which mandates compliance with all statutory and administrative rules in contested case hearings.[197] The LUC's January 20, 2011 decision to revert the urban land use classification for the 'Aina Le'a project exposes the Commission to litigation and impinges on procedural safeguards afforded to the developer by statute and administrative rules.

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[188] *See* Siemon, *supra* note 27; Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. REV. 957, 989 n.167 (1987). *But see* Colwell v. Howard Cnty., 354 A.2d 210, 214 (Md. Ct. Spec. App. 1976) (holding an automatic reverter ordinance valid according to reasoning similar to *Goffinet*).
[189] *Goffinet*, 357 N.E.2d 442, 449 (Ill. 1976).
[190] *Id.*
[191] HAW. REV. STAT. § 205-6 (2010). A special use permit allows for "certain unusual and reasonable uses" that would not be permissible as of right in a given zoning or land use classification. *Id.* The LUC analyzes the following criteria to determine whether a use is unusual and reasonable:

> (1) The use is not contrary to the objectives of the LUC statute and administrative rules (which are not explicitly stated in the statute); (2) the use would not "adversely affect" surrounding property; (3) the use would not "unreasonably burden public agencies" to provide infrastructure such as roads and sewage systems; (4) whether "unusual conditions, trends, and needs have arisen since district boundaries and rules were established"; and (5) whether the land in question is "unsuited for the uses permitted within the district."

Callies, *supra* note 24, at 25 (citing HAW. CODE R. § 15-15-95 (LexisNexis 2010)). The special permit functions as an exception to the restrictions of the standard land use classification. *Id.*
[192] *See* HAW. REV. STAT. § 205-6 (2010) (requirements for special use permit); HAW. CODE R. § 15-15-95 (LexisNexis 2012) (special use permit criteria); HAW. REV. STAT. § 205-4 (2010) (requirements for DBA); and HAW. CODE R. § 15-15-17 to 15-15-22 (LexisNexis 2012) (DBA criteria).
[193] *See supra* text accompanying notes 190 and 191.
[194] Transcript of Hearing at 135, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[195] HAW. REV. STAT. 205-4(h) (2010).
[196] *See* Transcript of Hearing at 68-70, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011) (Deputy Attorney General Bryan Yee acknowledging possible defects in notice). *See also* text accompanying note 111.
[197] HAW. REV. STAT. § 91-14 (2010).

The Commission's decision also violated the substantive requirements of H.R.S. Sections 205-16 and 205-17(2) and LUC Rule Section 15-15-18, which specify that the LUC must decide DBAs in conformance with the state plan, and in consideration of county general and development plans.[198] Both the county general and development plans stated that the project site was suitable for urban use.[199] A comment by a Hawai'i County planner captures the contradiction between the decision to revert and the relevant planning documents. At the LUC's July 1, 2010 hearing, the planner stated that "we still believe that whether it's DW 'Aina Le'a or someone else, that this is an appropriate area for urban classification[,] because the land is not suitable for agriculture. It doesn't have the resources that put it into other classifications."[200] Members of the LUC also recognized that the subject parcel was not suitable for commercial agriculture.[201] Despite the developer's inability to meet deadlines imposed by the LUC, the Commission must comply with the state plan, and consider the county general and development plans.

However, even if the LUC's reversion of the subject project violated substantive and procedural requirements, the reversionary action may be within its discretion as an administrative agency.[202] The Hawai'i Supreme Court has held that "judicial deference to agency expertise is a guiding precept where the interpretation and application of broad and ambiguous statutory language by an administrative tribunal are the subject of review."[203] But in some situations, Hawai'i courts have held the traditional deference to administrative agency review to be inapplicable.[204] One of these exceptions arises "when the agency's reading of the statute contravenes the legislature's manifest purpose" and is likely applicable here.[205] As discussed above, the LUC failed to comply with the legislative intent of H.R.S. Sections 205-16 and 205-17(2), which requires that the Commission's DBA determinations conform to the state plan, and consider the county general and development plans.[206] Hawai'i courts would be unlikely to grant the LUC deference with respect to this substantive error. In contrast, the courts are more likely to review the possible procedural violations under a deferential standard, because of H.R.S. Section 205-4(g)'s lack of clarity regarding the applicable procedural requirements.[207]

By reverting 'Aina Le'a's land use classification from urban to agricultural despite overwhelming evidence that the land was not suited for the latter use, the LUC failed to comply with the controlling substantive safeguards and relevant planning documents. This outcome is contrary to the legislative intent underlying the Hawai'i state Plan.[208] The LUC must revisit its January 20, 2011 reversion of 'Aina Le'a's conditional urban land use classification in order to comply with the statutory and administrative requirements governing petitions for DBAs.

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[198] HAW. REV. STAT. §§ 205-16, 205-17 (2010). The operative provisions of the state plan that are at issue here are HAW. REV. STAT. §§ 226-6, 226-7 (2010). HAW. CODE R. § 15-15-18 (LexisNexis 2012).
[199] Transcript of Hearing at 67-68, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[200] *Id.* at 98.
[201] *Id.* at 64-68.
[202] Interview with M. Casey Leigh, former member, LUC, current Associate Dean and Professor, William S. Richardson School of Law, in Honolulu, Haw. (Apr. 4, 2011) [hereinafter Leigh Interview]. The former LUC Commissioner and current Assistant Professor of Administrative and Environmental law noted that the State would likely argue that the LUC's action was within its broad discretion as an administrative agency.
[203] *In re Water Use Permit Applications*, 94 Haw. 97, 145, 9 P.3d 409, 457 (2000).
[204] *See, e.g., State v. Dillingham Corp.*, 60 Haw. 393, 409, 591 P.2d 1049, 1059 (1979).
[205] *See In re Water Use Permit Applications*, 94 Haw. at 145, 9 P.3d at 457 ("The rule of judicial deference, however, does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose."); Camara v. Agsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984) ("To be granted deference, . . . the agency's decision must be consistent with the legislative purpose.").
[206] HAW. REV. STAT. 205-16. The provisions of the state plan that are at issue here are HAW. REV. STAT. §§ 226-6, 226-7 (2010). *See also* HAW. CODE R. § 15-15-18 (LexisNexis 2012).
[207] *See supra* Part II.B.
[208] *See supra* text accompanying note 57.

V. THE AFTERMATH OF THE LAND USE COMMISSION'S RULING

As the previous parts described, the LUC's January 20, 2011 ruling was flawed in its approach to the revocation of 'Aina Le'a's conditionally approved urban land use classification. This part explores how the LUC's decision adds to the uncertainty of the development industry in Hawai'i, which could have perilous effects on the state's economy. This part suggests that the LUC could cure the defects of the subject decision by complying with the statutory and administrative rules governing DBAs.

A. Development in Hawai'i After the LUC's January 20, 2011 Decision

The LUC's decision to revert the 'Aina Le'a parcel to an agricultural classification has the practical effect of terminating the project, because the developer will be unable to obtain permits for residential and commercial uses. Despite the developer's proclamation that "[w]e haven't stopped construction. . . . We're moving forward,"[209] the project will be unable to proceed without the required urban classification. Unless the LUC corrects its January 20, 2011 decision, there will certainly be litigation over the reversion of 'Aina Le'a's urban classification.[210] The uncertainty surrounding the LUC's exercise of reversionary actions will likely have a significant chilling effect on development in Hawai'i, hampering the construction of much needed affordable housing and other projects.

The lengthy LUC review of the 'Aina Le'a project is not particularly unique. Examples of development projects that span over ten years are common in Hawai'i.[211] The LUC docket currently has approximately nine projects that were granted a conditional urban land use classification at least ten years ago, but have yet to be developed.[212] At the January 20, 2011 hearing Commissioner Jencks noted his familiarity with "a number of projects . . . that have had [DBAs] for going on 20 years. . . . It [is] extremely difficult to finance and to plan, to phase, . . . and to create value in projects like this. There isn't any money in the marketplace today."[213] The Hawai'i Legislature recognized this problem and expressed its intent to promote certainty and predictability in the development process:

> [t]he lack of certainty in the development approval process can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning. Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public.[214]

Even if the LUC does not revert a particular project's urban land use classification, the uncertainty in the wake of the Commission's decision and the possibility of revocation will make financing significantly more difficult to obtain for developments subject to LUC review.[215] The experience of the developers of 'Aina Le'a is instructive.

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[209] *See* Gomes, *More Time Sought*, *supra* note 2.
[210] The developer contends that it has spent over twenty million dollars in the planning and construction of the project. It is unlikely to abandon an investment of that magnitude. In response to the LUC's reversion, DW 'Aina Le'a has stated that it will pursue all legal remedies available. *See* Gomes, *State Again Turns Down Housing Project*, *supra* note 156.
[211] *See* Klatt, *supra* note 83 (describing the multi-decade efforts required to develop Ko Olina, Disney's Aulani Resort, and the central Oahu community of Mililani).
[212] *See* Reply of Co-Petitioner at 5, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 13, 2011).
[213] Transcript of Hearing at 117, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[214] HAW. REV. STAT. § 46-121 (2010).
[215] *See* Transcript of Hearing at 123-24, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011) (Commissioner Jencks noting the difficulty of securing financing given current market conditions).

The developer had obtained financing prior to the LUC's December 2008 Order to Show Cause, but its lender subsequently refused to disburse the funds due to the increased uncertainty of the project.[216]

The LUC's reversion of 'Aina Le'a's urban classification is also injurious to the integrity of the state's planning system. The objectives and guidelines of the Hawai'i state plan indicate that the 'Aina Le'a parcel should be classified urban.[217] In addition, the Hawai'i County General Plan designates the project area for urban use.[218] Even the former Director of the State Office of Planning, who recommended that the LUC revert the project to an agricultural designation, conceded that "I know this is the only major project goin' [sic] on there. I know this is a good place for a project to happen."[219] The LUC reverted the 'Aina Le'a parcel to agricultural despite the uniform urban designation the property received in the Hawai'i state plan and County of Hawai'i general and development plans. This result is to the detriment of land use planning's role in ensuring orderly growth and is in contravention of H.R.S. Sections 205-16 and 205-17(2) and LUC Rule Section 15-15-18.

This note, however, does not suggest that the LUC should be without the prerogative to revert a conditionally approved project. The LUC's ability to enforce the conditions it places on project approval in a timely manner is a powerful countervailing public policy rationale for a broad interpretation of that authority.[220] Notwithstanding this point, the LUC must still comply with the statutory and administrative rules that apply to reversionary actions.[221] Compelling policy considerations also support these statutes and rules.[222] For instance, the requirement that DBAs conform to the state plan promotes comprehensive long-range planning.[223] Although the LUC should be able to revert a conditionally approved project, it must also satisfy the applicable statutory and administrative rules.

A. Moving Towards a Solution to the Conditional Zoning Reversion Issue

In the future, when considering the reversion of a conditionally approved project, the LUC must observe the statutory and administrative requirements governing the DBA process. In particular, the Commission should satisfy the notice and voting requirements specified in H.R.S. Chapter 205 and the LUC Rules.[224] The Commission must also comply with the Hawai'i state plan and should grant greater deference to local planning designations.[225] The LUC's authority to revert an urban land use classification for non-compliance with a condition is critical to its ability to ensure that developers contribute to the public welfare by providing infrastructural improvements, affordable housing, and impact fees.[226] The LUC invited judicial scrutiny of this prerogative by failing to comply with the regulations controlling the DBA process. In order to remedy the negative impacts of its ruling–not just with respect

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[216] Transcript of Hearing at 84-85, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011). As of March 10, 2011 the developer was still in the process of securing financing from its lender. Transcript of Hearing, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Mar. 10, 2011).
[217] *See supra* text accompanying note 197.
[218] Transcript of Hearing at 67-68, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 20, 2011).
[219] Reply of Co-Petitioner at 17, DW 'Aina Le'a, No. A87-617 (Haw. Land Use Comm'n Jan. 13, 2011) (citing State Planner Abbey Mayer's statement at the July 1, 2010 hearing).
[220] Leigh Interview (Professor Leigh stated that administrative agencies should be given the flexibility to handle complex and changing development issues).
[221] *See supra* Part IV.B.
[222] *See, e.g.,* HAW. CODE R. § 15-15-01 (LexisNexis 2012) ("This chapter shall be liberally construed to preserve, protect, and encourage the development and preservation of lands in the State for those uses to which they are best suited in the interest of public health and welfare of the people of the State of Hawaii."). *Id.*
[223] *See supra* text accompanying note 57.
[224] *See supra* text accompanying note 112.
[225] *See supra* text accompanying note 112.
[226] *See* Callies, *Impact Fees, supra* note 95 (discussing the inability of State and local governments to pay for required infrastructure).

to the ʻAina Leʻa project, but also to pending and future projects–the LUC should retract its decision and comply with the statutory and administrative requirements applicable to DBAs.

VI. CONCLUSION

The rarity with which the LUC has reverted conditionally approved land use classifications should not be mistaken for irrelevance. Rather, the LUC's reversion of ʻAina Leʻa's urban classification should serve as a warning to Hawaiʻi's Legislature: the lack of clarity in H.R.S. 205-4(g) allowed the LUC to interpret its reversionary authority in a manner contrary to the procedural and substantive safeguards established to govern changes to land use classifications.[227] The potential negative effect of the decision is particularly dire when considered in the context of Hawaiʻi's $1.2 billion budget deficit and its persistent unmet need for affordable housing.[228] The proposed House Resolution discussed above suggests both project-specific support and political interest in examining the LUC's authority to revert conditionally approved land use classifications.[229]

The LUC's ability to revert projects that fail to comply with its conditions is particularly important, because it is the Commission's principal enforcement mechanism. The LUC's prerogative, however, is not without bounds; it must comply with the statutory and administrative rules governing DBAs. By adhering to the proper regulations, the LUC would send developers the message that it is serious about enforcing the conditions it imposes on land use reclassifications and bring a degree of stability and order to an otherwise uncertain and risky industry. The LUC could take a first step in the right direction by reconsidering its January 20, 2011 decision to revert ʻAina Leʻa's land use classification from urban to agricultural.

[227] *See supra* note 112 (listing the relevant statutes and administrative rules).
[228] *See* Mark Niesse, *Hawaii's Budget Outlook Gets Slightly Worse*, YAHOO! NEWS, Mar. 12, 2010, http://finance.yahoo.com/news/Hawaiis-budget-outlook-gets-apf-550469851.html?x=0&.v=1; Andrew Gomes, *Affordable Housing*, HONOLULU ADVERTISER, June 10, 2007, http://the.honoluluadvertiser.com/article/2007/Jun/10/ln/FP706100380.html/?print=on.
[229] *See* E-mail from Cindy Evans, Representative, Hawaiʻi State House, to author (April 24, 2011, 12:04 HST) (on file with author).

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