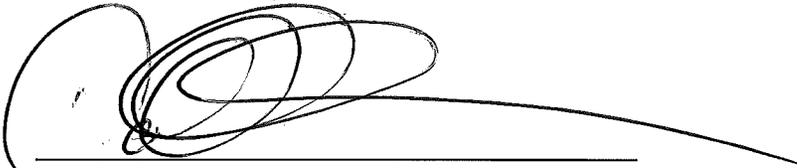


**LUC Docket No. A11-791
HG Kaua`i Joint Venture (HoKua Place)
LUC Determination As Accepting Authority
and
that an EIS is Warranted**

Staff Report

**Action
December 10, 2014**

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Daniel Orodener, Executive Officer

Submitted: December 8, 2014

TABLE OF CONTENTS

<u>Sections.</u>	<u>Page No.</u>
1. Filing History.....	3
2. Explanation of Hearing Process with Staff Analysis and Recommendation.....	4
3. Proposed Language for a Motion.....	7
4. FOR COMMISSIONERS REFERNCE: Comparison of EA and EIS Review Requirements	8

1. Filing History

On March 21, 2011, 3 Stooges, LLC (“Petitioner”) filed its Petition for District Boundary Amendment to amend the Agricultural and Rural Land Use District Boundaries to the Urban Land Use District (“Petition”) and Exhibits 1-14, for the proposed Kapa`a Highlands II subdivision (“Project”). The Petitioner requested the reclassification of approximately 97 acres of land from the Agricultural and Rural Districts to the Urban District situated on Tax Map Key (TMK) No. (4) 4-3-03: portion of 001 at Kapa`a, island of Kaua`i, Hawai`i.

On April 15, 2011, Likoolani Martin filed a Notice of Intent to Intervene. Mr. Martin cited concerns with cumulative impacts to agricultural lands, watersheds, marshlands, archaeological, historical and cultural properties, and all minerals, flora and fauna.

On April 18, 2011, the Sierra Club Kaua`i Group of the Hawai`i Chapter filed a Notice of Intent to Intervene.

On April 18, 2011, the Wailua-Kapa`a Neighborhood Association filed a Notice of Intent to Intervene.

On April 27, 2011, the LUC sent Petitioner a letter deeming the Petition defective for failure to meet the content requirements outlined in our, Section 15-15-50, Hawai`i Administrative Rules (HAR), for a properly filed petition. At that time staff identified additional information that was required.

On November 4, 2011, Petitioner filed a Petition for District Boundary Amendment and Exhibits 1-13.

On December 6, 2011, the LUC sent Petitioner a letter indicating the November 4, 2011 filing was not entirely responsive to the deficiencies identified in our April 27, 2011 letter. Staff suggested three areas that needed to be addressed; in particular what the legal basis for their belief that Chapter 343, Hawai`i Revised Statutes (HRS) was not triggered by the proposed project.

On December 15, 2011, Petitioner’s representative, Mr. Patrick J. Childs, Esq., responded with additional information in an attempt to address the LUC staff concerns. At this time Petitioner felt that no environmental compliance document was required under Chapter 343, HRS. They requested a meeting to discuss any further content requirements.

On December 28, 2011, LUC staff (Dan Orodener and Scott Derrickson) met with Mr. Patrick Childs (Petitioner legal representative), Greg Allen (Petitioner) and Peter Young (consultant for Petitioner). At this meeting staff identified several legal triggers requiring compliance with Chapter 343, HRS, and additionally the need for early consultation with potentially affected agencies and to conduct appropriate technical studies.

On March 5, 2012, Petitioner consultant Peter Young sent an electronic preliminary version of the Draft Environmental Assessment (DEA) cover-dated as February 2012 for the Kapa`a Highlands Phase II project.

On March 21, 2012, LUC sent a letter to Petitioner consultant Peter Young that provided comments on the preliminary DEA submitted electronically on March 5, 2012. At that time staff recommended additional consultation with appropriate State agencies (DOT, DLNR, and DOE); the need to conduct studies by experts to assess existing conditions, potential impacts, and mitigation measures; and, the need for the applicant to provide the necessary information and analysis for the accepting agency to make appropriate findings.

On October 29, 2014, Petitioner filed a Motion to Substitute Petitioner, Designate the Land Use Commission as Approving Agency for Environmental Impact Statement and Appearance of Counsel for Petitioner, Memorandum In Support of Motion, and Exhibit A.

On November 25, 2014, Office of Planning (OP) filed a Statement of No Objection to HG Kaua`i Joint Venture LLC’s Motion to Substitute Petitioner, Designate the Land Use Commission as Approving Agency for Environmental Impact Statement and Appearance of Counsel for Petitioner.

On December 2, 2014, the LUC mailed the Meeting Agenda notice for the December 10, 2014 meeting to be held in Lihue, Kaua`i to the Parties, the Statewide and Kaua`i mailing lists.

2. Explanation of Hearing Process with Staff Analysis and Recommendation

On March 21, 2011, 3 Stooges, LLC (“Petitioner”) filed its Petition for District Boundary Amendment to amend the Agricultural and Rural Land Use District Boundaries to the Urban Land Use District (“Petition”) and Exhibits 1-14, for the proposed Kapa`a Highlands Phase II subdivision (“Project”). One of the exhibits, Exhibit 14, was titled Chapter 343 HRS, Compliance – Environmental Assessment. The Petitioner requested the reclassification of approximately 97 acres of land from the Agricultural and Rural Districts to the Urban District situated on Tax Map Key (TMK) No. (4) 4-3-03: portion of 001 at Kapa`a, island of Kaua`i, Hawai`i (“Petition Area” or “Property”).

The Project (now to be known as “HoKua Place”) proposes a small commercial area, 683 multi-family units and 86 single-family lots/units, providing affordable housing on-site to conform with Kaua`i County ordinances, 14 acres of open space, and a 3-acre park.

On October 29, 2014, Petitioner filed a Motion to Substitute Petitioner, Designate the Land Use Commission as Approving Agency for Environmental Impact Statement and Appearance of Counsel for Petitioner, Memorandum In Support of Motion, and Exhibit A.

At its meeting on December 10, 2014, the Commission is scheduled to take action on the following:

1. Approving the request to Substitute Petitioners

This decision should be based on Section 15-15-71, HAR (LUC rules) that provides the Commission may order the substitution of parties upon a motion and good cause shown.

The current motion before the LUC requests a substitution of the original petitioner Three Stooges, LLC with HG Kaua`i Joint Venture, LLC (“HG Kaua`i”).

Staff Analysis and Recommendation

HG Kaua`i is the successor in interest to Three Stooges, LLC. HG Kaua`i acquired the Petition Area in a foreclosure sale on March 6, 2013. The Property was conveyed to HG Kaua`i on September 25, 2013 and recorded in the Bureau of Conveyances on September 27, 2013 (Petitioner’s Memorandum in Support of Motion, Exhibit A).

There is good cause to substitute HG Kauai as Petitioner, because HG Kauai is presently the owner of the Property with standing to prosecute this Petition pursuant to Section 205-4(a), HRS, and Section 15-15-46(3), HAR.

2. Determining whether the Commission will be the accepting agency for the EIS for the Project.

There is no “trigger” for Commission action pursuant to Chapter 343, HRS; meaning that a petition for a State land use district boundary amendment does not, by itself, require either an environmental assessment or impact statement, unless it involves the State Conservation District. However, an environmental assessment (“EA”) or environmental impact statement (“EIS”) will be required in this case because the Project will involve the use of State or County of Kaua`i lands; namely Kūhiō Bypass Road and Olohena Road (pursuant to Section 343-5 (a) (1), HRS and Section 11-200-6 (b) (1) (A), HAR). Petitioner is planning improvements involving these roadways that include project access and off-site infrastructure construction.

Staff Analysis and Recommendation

The “approving agency” is an agency that issues an approval prior to actual implementation of an action and that agrees to process the Hawai`i Environmental Policy Act (HEPA) review for the applicant’s proposed action.

The use of State or county lands or State or county funds is a trigger described under Section 343-5(a)(1), HRS and Section 11-200-6 (b) (1) (A), HAR.

In the Petition, Petitioner stated that “(F)iling of this Petition is the earliest practicable time to determine whether an EIS shall be required” (see pg. 3 of Petitioner’s Memorandum in Support of Motion). Such determination prior to any government approval is pursuant to *Sierra Club vs. Land Use Commission of the State of Hawai`i*, Civil No. 02-1-1759-07, First Circuit Court. The Commission must determine whether an environmental impact assessment (EA) or statement (EIS) for a Project is required, and if so, then review and approve the EA or EIS before conducting any hearings leading to a decision and order on a petition for reclassification. This is also why the LUC will not accept a petition as properly filed for processing until any Chapter 343, HRS compliance is complete.

As this Project triggers the requirement for HEPA review and the LUC petition is “the earliest practicable time” in the sequence of seeking governmental approvals for the Project; then the LUC is the appropriate agency to review and accept any Chapter 343, HRS compliance for this Project.

3. Determining whether Petitioner should proceed directly to preparing an environmental impact statement (EIS) preparation notice.

Routinely, in petitions for district boundary amendment involving reclassification of lands that trigger Chapter 343, HRS compliance; the Commission determines whether an EA is sufficient through its issuance of an Anticipated Finding of No Significant Impact (AFONSI) or that the Petitioner should instead prepare the more extensive environmental impact statement (“EIS”). However, in 2012 (Act 172, SLH 2012), the Legislature amended Section 343-5, HRS, with a new subsection (e) that allowed:

“....if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, the agency may authorize the applicant to choose not to prepare an environmental assessment and instead prepare an environmental preparation notice as provided by rules.”

The question before the LUC is whether to authorize the applicant/Petitioner to forgo preparation of an environmental assessment (EA) and instead proceed to producing an environmental impact statement preparation notice (EISPN) which will precede a draft EIS.

Staff Analysis and Recommendation

The State Department of Health, Office of Environmental Quality Control (OEQC) is the agency with the responsibility to oversee compliance with Chapter 343, HRS. OEQC has yet to promulgate specific rules to provide guidance to agencies deciding or being asked to decide whether an applicant should go directly to preparing an EIS rather than to first prepare an EA (OEQC rules last amended in 1996). Currently guidance comes directly from the statutory language quoted in the previous paragraph and defers to the “judgment and experience” of an agency; and from OEQC’s Citizens Guide (updated in October 2014).

OEQC has identified thirteen administrative criteria for significance for agencies in determining that an action may have a significant impact on the environment (Section 11-200-12, HAR). When an agency determines that an applicant may proceed directly to EIS preparation; OEQC recommends that the agency clearly identify what elements of the significance criteria influenced their decision.

The Petitioner (HG Kaua`i Joint Venture, LLC) has specifically stated that it "...believes an EIS is required for the Kapa`a Highlands Phase II because development...will require use of state or county lands or the use of state or county funds" (Petitioner's Memorandum in Support of Motion, pg. 3). The Project will involve the use of State or County of Kaua`i lands; namely Kūhiō Bypass Road and Olohena Road (pursuant to Section 343-5 (a) (1), HRS and Section 11-200-6 (b) (1) (A), HAR). Petitioner is planning improvements involving these roadways that include project access and off-site infrastructure construction.

Clearly there is a statutory trigger for requiring compliance with Chapter 343, HRS – the use of State or county lands or funds. In addition, based on staff experience, there are several OEQC significance criteria (from Section 11-200-12, HAR) met, as the Petition:

- A. Involves an irrevocable commitment to loss or destruction of a natural or cultural resource
 - For this proposed Project the impacts would likely be to agricultural lands, historic sites]
- D. Substantially affects the economic or social welfare of the community or State
 - For this proposed Project the impacts would likely be to provision of public services – roads, water, sewer, fire, police, education; affordable housing.
- F. Involves substantial secondary impacts, such as effects on public facilities
 - For this proposed Project the impacts would likely be to local and highway traffic and schools.

The size and scope of the proposed Project, in the judgment and experience of Commission staff, may have a significant impact on the environment. Therefore, pursuant to Chapter 343-5(e), HRS, the Commission should direct the applicant to proceed directly to a comprehensive EIS that starts with the preparation of an EIS preparation notice (EISPN).

3. Proposed Language for a Motion

Move to approve Petitioner's three-part motion as follows:

- 1) To allow the substitution of HG Kaua`i Joint Venture, LLC as the Petitioner of record, for good cause shown;
- 2) To identify the Land Use Commission as the "approving agency" to process and review applicant's proposed actions pursuant to Chapter 343, HRS, as the Petition to amend land use district boundaries represents the earliest practicable time to determine whether an environmental impact statement (EIS) shall be required; and,
- 3) Direct the Petitioner to proceed directly to the preparation of an environmental impact statement preparation notice (EISPN) because the Commission has reviewed the Petition and based on its judgment and experience, informs the applicant that under Chapter 343-5(e), HRS, the proposed action may have significant effects requiring the preparation of a full environmental impact statement. The proposed Project requires the use of State or county lands or funds (pursuant to Section 343-5(a)(1), HRS) and may have a significant impact on the environment as it may (i) involve an irrevocable commitment or loss or destruction of any natural or cultural resource; (ii) substantially affect the economic or social welfare of the community or State; and, (iii) involve substantial secondary impacts, such as effects on public facilities.

4. FOR COMMISSIONERS REFERENCE: Comparison of Environmental Assessment and Environmental Impact Statement Requirements

EA and EIS Comparisons

The action before the Commission is to determine whether, based on its judgment and experience, to determine that the proposed action will likely have a significant effect, and that an EIS will be required. The following comparisons between an EA and EIS are provided for your information. Table A provides a comparison of the time frames associated with the EA and EIS review processes. Table B compares the requirements for an EA and EIS.

In discussion with representatives for Petitioner, they have represented a concern that if they follow the EA path and impacts of their project are found to be significant, as they expect them to be; then they will have spent considerable time going through the EA review process and still have to go through the EIS review process. They asked to take advantage of the statutory change made by the Legislature in 2012 that allows an agency to authorize an applicant to go directly to preparing an EIS when its determined that a proposed action will likely have a significant effect.

In summary, both documents are required to provide similar disclosures with the following additional requirements for an EIS:

- Development alternatives;
- Relationship to land use plans, policies, and controls vs. listing of permits and approvals needed;
- Descriptions of short-term and long-term effects;
- Descriptions of irreversible and irretrievable commitment of resources;
- Discussion of unavoidable environmental effects;
- Summary of unresolved issues; and
- Various response and verification requirements.

Both documents provide discussion of the anticipated impacts and proposed mitigation measures for a proposed project. But, the EIS provides a more extensive disclosure of direct, indirect, and cumulative impacts through various technical studies that may be subject to two (2) public review periods. This distinction does not preclude the disclosure of various technical studies in the DEA if warranted by consultation comments and project scope.

EA Public Review Process	EIS Public Review Process
Early consultation – no specific time frame	Pre-consultation – no specific time frame
DEA comment period – 30 days	EISPN consultation period – 30 days
FEA preparation – no time frame	DEIS consultation period – 45 days
	FEIS preparation – no time frame
Litigation: Within 30 days after publishing of the FONSI.	Litigation: Within 120 days after action/approval for a project with applicable Chapter 343, HRS requirements that was not completed. Within 60 days after the publishing of the EISPN. Within 60 days after the acceptance of an FEIS.

Table B: Comparison of EA and EIS requirements, Chapter 343, HRS

EA Content Requirements	EIS Content Requirements
Agency submittal letter/anticipated determination.	Table of contents.
Identification of approving agency.	A summary of the FEIS.
Identification of agencies consulted.	A needs/purpose statement.
General description of the action's technical, economic, social, and environmental characteristics; time frame; and funding/source.	Project description (site and regional maps, statement of objectives, general description of technical/economic/social/environmental characteristics, use of public funds or lands, phasing/timing of action, summary technical data, and historic perspective).
Summary description of the effected environment, (suitable and adequate regional, location and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps).	Development alternatives including, no action, other alternatives such as different actions/locations/designs, and postponing action pending further studies.
Identification and summary of impacts.	Site and regional environmental settings.
Proposed mitigation measures.	Relationship to land use plans, policies, and controls.
Alternatives considered.	Discussion of indirect, direct, and cumulative impacts.
Discussion of findings and reasons supporting the agency anticipated determination.	Descriptions of short-term and long-term effect.
List of all required permits and approvals (Federal, State, and County).	Descriptions of irreversible and irretrievable commitment of resources.
Written comments and responses to the early consultation provisions.	Discussion of unavoidable environmental effects.
Discussion of findings and reasons supporting the agency determination.	Proposals for mitigative measures and/or actions.
Written comments and responses to the DEA public review comments.	Summary of unresolved issues.
	Listing of government agencies, organizations and individuals consulted in the FEIS preparation.
	Reproductions of all comments received and responses sent.
	Verbatim changes specified in the responses sent.
	Incorporation of substantive comments received on the DEIS.
	Formatting of the document to distinguish changes made in the DEIS.
	Signature of applicant on the FEIS to indicate documents were prepared under the signatory's direction.