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BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

2012 NOV 21 A 7:25
LAND USE COMMISSION
STATE OF HAWAII

In the Matter of the Petition)	DOCKET NO. A12-795
of:)	
)	PETITIONER'S REPLY TO
WEST MAUI LAND COMPANY, INC., a)	INTERVENOR MICHELE LINCOLN'S
Hawaii corporation, and KAHOMA)	OBJECTIONS TO PETITIONER'S
RESIDENTIAL LLC, a Hawaii)	PROPOSED FINDINGS OF FACT,
limited liability company,)	CONCLUSIONS OF LAW AND
)	DECISION AND ORDER;
To Amend the Land Use District)	CERTIFICATE OF SERVICE
Boundary of certain land)	
situated at Lahaina, Island of)	
Maui, State of Hawaii,)	
consisting of 16.7 acres from)	
the agricultural district to)	
the urban district, Tax Map Key)	
No. (2) 4-5-010:005.)	
)	
)	
)	

PETITIONER'S REPLY TO INTERVENOR MICHELE LINCOLN'S
OBJECTIONS TO PETITIONER'S PROPOSED FINDINGS
OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER

Intervenor Michele Lincoln asserted 28 objections covering 106 proposed findings of fact submitted jointly by Petitioner and the County of Maui. Ten of the objections concern topics which were the subject of objections by Intervenor Routh Bolomet. Petitioner's reply to those objections raised by

Intervenor Routh Bolomet are incorporated by reference and will not be restated. As with Intervenor Bolomet, Intervenor Michele Lincoln's objections generally repeat arguments and do not raise grounds upon which the proposed findings of fact or conclusions of law should be rejected or modified.

A. The Proposed Findings of Fact and Conclusions of Law are Proper.

There are two basic tests which findings must pass:

(a) are they sufficiently comprehensive and pertinent to the issues to form a basis for the decision; and (b) are they supported by the evidence. Shannon v. Murphy, 49 Haw. 661, 426 P.2d 816 (1967). The proposed findings to which Intervenor Lincoln made objection are clear, specific and pertinent to the issues which this Commission must determine in reaching its decision and each are supported by evidence presented to the Commission and upon which each of the parties had an opportunity to examine or cross examine witnesses. On this standard alone, the objections should be overruled.

B. Objections Based on the Ability to Farm the Petition Area.

Intervenor Lincoln's objections 2, 3, 4 and 5 are based on the theme that the Petition Area could be farmed and is suitable for agricultural production. For the same reasons identified in Petitioner's reply to Intervenor Bolomet's response and objections which are incorporated by reference, the objection

should be overruled. See, Petitioner's Reply to Intervenor Routh Bolomet's Response and Objections to Petitioner's Proposed Findings of Fact, Conclusions of Law, Decision and Order ("Reply to Bolomet"), § B at pp. 2-3.

C. Objections Based on Claimed Deficiencies of the Archaeological Assessment.

Intervenor Lincoln's objections 15 and 16 are based on the theme that the archaeological assessment was invalid. For the reasons identified in Petitioner's Reply to Bolomet which are incorporated by reference, such objections must be overruled. See, Reply to Bolomet at § C at p. 3.

D. Objection Based on Claimed Deficiency in Final Environmental Assessment.

Intervenor Lincoln's objection 8 is based on an argument that the Final Environmental Assessment should be rejected by the Commission. For the reasons set forth in Petitioner's Reply to Bolomet, which is incorporated by reference, the objection must be overruled. See, Petitioner's Reply to Bolomet at § D at p. 4.

E. Objections Based on Impact on Flora/Fauna.

Intervenor Lincoln's objections 22 and 23 are based on an argument concerning the weight to place on the testimony of Robert Hobdy. For the reasons stated in Petitioner's Reply to Bolomet, which are incorporated by reference, the objections must

be overruled. See, Petitioner's Reply to Bolomet at § E at pp. 4-5.

F. Objection Based on Quality of Surface Water Run Off.

Intervenor Lincoln's objection 24 is based on a claim that the project will result in an adverse affect on the quality of surface water runoff. For the reasons stated in Petitioner's Reply to Bolomet, which are incorporated by reference, the objection should be overruled. See, Petitioner's Reply to Bolomet at § H at pp. 6-7.

G. Objection Based on Lack of Permanent Job Creation.

Intervenor Lincoln's objection 27 is based on an argument that no job opportunities will be created by the Project. For the reasons stated in Petitioner's Reply to Bolomet, which are incorporated by reference, the objection should be overruled. See, Petitioner's Reply to Bolomet at § I at p. 7.

H. Objection Based on Flood Zone X Designation.

Intervenor Lincoln's objection 1 is based on an argument that building structures in the Petition Area will place those structures at risk. The argument is based upon two false premises: (1) that the weir at the head of the Kahoma Stream Flood Control Channel debris basin will fail catastrophically and (2) that the concrete channel below the weir is of insufficient size to carry the flows.

These premises have no basis under the facts presented. It is undisputed that the structure is inspected annually. (TR 9/7/12 at pp. 38-40). It is undisputed that the capacity of the channel at its mouth is more than six times the largest measured flow of the stream. (TR 10/4/12 at pp. 159-160). It is undisputed that FEMA in 2009 re-evaluated the area for flood risk. (Tanaka WDT at pp. 4-5). Even if the structure design to hold water in the detention basin were to become plugged as asserted by Intervenor Lincoln, there is over 15' of free board which is 50' wide so that the waters would overflow through that square opening and into the channel. (Petitioner Ex. 41). Given the inspection, the physical construction and the undisputed testimony, the premises upon which this objection are based are invalid. The objection should be overruled.

I. Objections for Which No Relief is Requested.

Intervenor Lincoln's objections 4, 6, 8, 10, 13, 15, 18 and 21 appear to be incomplete. Intervenor Lincoln refers to a proposed finding of fact, makes argument concerning a proposed finding of fact, but does not request that the proposed finding be deleted or otherwise modified. Having failed to state purpose of the objection, the Commission should overrule each of these objections.

If, alternatively, Intervenor Lincoln objects because the proposed findings are inconsistent with her view of the

Petition, then such objections are not valid. Either way, the objection should be overruled.

J. Objection Based on Traffic Impact.

Intervenor Lincoln's objection 7 concerns the impact of the project on traffic on existing highways, streets and roads. The traffic safety engineer provided testimony that there would be no significant impact on existing highways, streets and roads. (Niiya WDT at p. 6). He confirmed that opinion during his oral testimony. (TR 8/23/12 at p. 35). No traffic engineer testified to the contrary. There is no competent evidence before this Commission on which it can find that proposed finding 238 should be rejected. As such, this objection must be overruled.

K. Objections to Determinations of State Office of Planning.

Intervenor Lincoln's objection 10 concerns proposed findings regarding the State Office of Planning's review of the Project. Section 226-53, H. Rev. Stat., sets forth the duties of the Office of Planning. Among the duties, the Office of Planning must provide recommendations to the Land Use Commission concerning State Functional plans, must review regulatory activities proposed by the Land Use Commission, and must provide technical assistance to the Commission as needed. Id. As such, determinations made by the State Office of Planning comply with its statutory duties.

As the State Office of Planning advised in its Objections to Intervenor Lincoln's Proposed Findings of Fact and Conclusions of Law, that it performs its duties by weighing different and sometimes competing interests. In performing its duties in this docket, the Office of Planning stated: "the Project satisfies a number of objectives and policies and a number of priority guidelines, and is consistent with the overall theme and goals of HRS Chapter 226." Response to Intervenor's Proposed Findings of Fact, Conclusions of Law and Decision and Order at p. 3. On this basis, this objection must be overruled.

L. Objections Based on Local Planning Matters.

Intervenor Lincoln's objections 11, 14, 17, 19, 20, 21 and 25 all are based upon disagreement with local or regional determinations. The Commission is tasked with review and decision concerning matters of statewide concern. The Commission is not tasked with, nor does it review determinations made by local authorities for local and regional planning. Each of the objections to the proposed findings deal with a dissatisfaction of Intervenor Lincoln to a local determination. Dissatisfaction alone does not translate into a basis upon which the Commission can reject a finding of fact concerning a local or regional planning determination. As such, each of these objections must be overruled.

M. Objections Based on Affordability of Housing.

Intervenor Lincoln's objections 12 and 13 are based on a claim that the project is in some fashion not affordable. The issue facing this Commission is not validity of HUD guidelines or whether one might personally agree or disagree with whether a house at a set price is or is not affordable. The issue facing the Commission is whether this project will provide housing to low-, moderate-income and gap-group populations. The testimony is undisputed that this project will provide such housing. Any other argument or objections to the standards is invalid. The objections must be overruled.

N. Objection Concerning Educational Impact Fee.

Intervenor Lincoln's objection 18 argues that the school impact fee would be inadequate. As acknowledged by the Department of Education and the Office of Planning, an agreement was reached between Petitioner and the Department of Education which requires payment of \$392,904 in impact fees from this Project. Certainly this Commission cannot substitute its judgment for the Department of Education as to what is an appropriate impact fee for this Project. Disagreement with the Department of Education's determination is not a basis to reject a proper finding of fact. This objection must be overruled.

O. Objection Concerning Wastewater Capacity.

Intervenor Lincoln's objection 26 claims that the Lahaina Wastewater Reclamation Facility has insufficient capacity. The evidence before the Commission is that there is sufficient wastewater treatment capacity for this Project. (TR 8/23/12 at p. 199). The witness offered in opposition acknowledged that the County is meeting existing permits, claimed that the County of Maui was in violation of a consent decree which she admitted she had never read. (TR 10/4/12 at pp. 147 and 166). The objection is not based upon evidence within the record and accordingly must be overruled.

P. Objection to the Financial Ability of Petitioner.

Intervenor Lincoln's objection 28 is based on a claim that Petitioner does not have the financial ability to carry out the representations. Intervenor Lincoln offers no information from the record to show that there is a lack of financial ability. Moreover, the objection is based upon speculation as to costs which are unlikely to be encountered.

No evidence exists that the infrastructure costs will be greater than any other residential development. The soils engineer provided a report and testimony stating that the soils were suitable for residential development. (Petitioner Ex. 7 and Biegel WDT at p. 8). Argument that a proposed finding is invalid must be based upon something in the record. Argument based on

supposition or personal experience is not based upon the record. This objection is ill founded and must be overruled.

Q. Objection to Conclusion.

Intervenor Lincoln's objection 9 claimed that ultimate findings of fact which are based upon other findings of fact are improper. It is a usual practice to base ultimate findings of fact on other findings. An objection that findings based upon other findings of fact reflects a basic misunderstanding of how proper findings of fact and conclusions of law must be prepared and presented. This objection must be overruled.

R. Conclusion.

Findings of fact that are comprehensive and pertain to issues to be decided are proper if they are supported by the evidence in the record. Petitioner and County of Maui's Joint Proposed Findings meet that test. Intervenor Lincoln's objections are arguments, most of which are based upon personal beliefs as opposed to evidence within the record. Argument not supported by evidence in the record is not sufficient to support an objection to a proposed finding of fact. For these reasons, the objections of Intervenor Lincoln must be overruled in all respects.

NOV 20 2012

DATED: Kahului, Hawai'i, _____.



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CERTIFICATE OF SERVICE

I hereby certify that on the date hereof I caused a copy of the foregoing to be duly served by depositing same in the United States mail, postage prepaid, to the following at their last known address:

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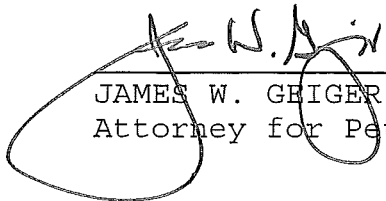
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NOV 20 2012

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