

DOCKET NO. A89-643  
**McCCLEAN HONOKŌHAU  
PROPERTIES**

**Motion to Release Conditions**

STAFF REPORT

**HEARING**  
**September 10, 2015**

*Daniel Orodener*

**Daniel Orodenker, Executive Officer**  
**Submitted: September 5, 2015**

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## MOTIONS

Any party may make motions before, during, or after the close of a hearing. This motion is a post decision and order motion to delete conditions in the existing decision and order (Docket A89-643). It is not uncommon for motions like this to be made once conditions have been satisfied.

According to LUC administrative rules, “...if a motion requires consideration of facts not appearing of record, it shall be supported by affidavits or declarations.” (§15-15-70(c), Hawai'i Administrative Rules (HAR)). The current motion is asking to delete conditions of approval based on facts that have occurred since the original docket record was closed.

Under LUC rule §15-15-94(b), HAR

*“...for good cause shown, the commission may act to modify or delete any of the conditions imposed or modify the commission's order.”*

In Black's Law Dictionary (abridged 5<sup>th</sup> Edition), "good cause" is defined as “... a substantial reason...legally sufficient ground or reason...(p)hrase depends upon circumstances of individual case, and finding of its existence lies largely in discretion of officer or court to which decision is committed...production of documents...necessary to establishment of the movant's claim...”

The Commission generally looks for authoritative proof demonstrating that a condition has been completed and/or complied with. This normally takes the form of a letter or affidavit from a government agency attesting to a condition having been fulfilled and when. For example, if a condition requires the funding and construction of a State roadway; then a letter from the State Department of Transportation (DOT) indicating that the roadway had been satisfactorily completed would be sufficient evidence of compliance with the condition. The Commission should therefore be looking for factual evidence that a condition has been fully complied with prior to supporting deletion of the condition.

The Commission has discretion based on the facts presented in the motion to consider other factors as well. Such factors as: whether the need for the condition still exists; if an alternate method for ensuring compliance exists that protects the public trust; or, if compliance with the condition would create an undue hardship.

## **DOCKET BACKGROUND**

On April 16, 1991, the LUC approved the reclassification of approximately 89.527 acres of land in two increments: Increment I of roughly 45.5 acres (at that time) and Increment II of roughly 44 acres (at a later time contingent on progress on Increment I). The development is for a light industrial park subject to 16 conditions. Approval of Increment II would be based upon a prima facie showing that Petitioner had made substantial completion of the onsite and offsite improvements within Increment I.

On June 27, 2002, the LUC approved the reclassification of Increment II for light industrial and commercial activities subject to 15 conditions. These 15 conditions are applicable only to Increment II; with the exception of Condition 1(b) that also applies to Increment I. Condition 1(b) reads: “Increment II, together with Increment I, shall be required to connect to the WWTP, when such connection is available.”

## **CURRENT MOTION**

On December 23, 2014, Petitioner filed Petitioner’s Motion to Release, Discharge and Delete All Conditions in the Land Use Commission’s Findings of Fact, Conclusions of Law, and Decision and Order, Entered April 16, 1991 (“Motion”); Memorandum in Support of Motion; Verification of James S. McClean; and Exhibits 1 to 5.

On February 18, 2015, Petitioner requested, by e-mail, an extension in scheduling a hearing date until April 8, 2015. LUC staff responded by e-mail that the April date was not suitable and suggested alternative dates of May 13 or 28, 2015. Petitioner confirmed by e-mail that May 28, 2015 was a viable hearing date.

Petitioner advised by e-mail that a new hearing date would be scheduled for September 10, 2015, to allow Petitioner additional time to supplement its filing and work with the Office of Planning and County of Hawai`i Planning Department on unresolved issues.

On August 24, 2015, Petitioner filed Petitioner's First Supplemental Memorandum and Exhibits of McClean Honokōhau Properties in Support of Motion to Release, Discharge and Delete All Conditions in the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order, Entered April 16, 1991 ("Supplemental Memorandum"); Memorandum in Support of Motion; Verification of James S. McClean; and Exhibits 6 to 20.

On August 27, 2015, the State Office of Planning ("OP") filed OP's Response in Partial Support of Petitioner's Motion to Release, Discharge and Delete All Conditions in the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order, Entered April 16, 1991; and Exhibits 1-9.

On August 31, 2015, the County of Hawai`i, Department of Planning ("County") filed the Department of Planning's Response to Petitioner's Motion to Release, Discharge and Delete All Conditions in the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order, Entered April 16, 1991.

On September 1, 2015, the LUC mailed a meeting notice and agenda to all the Parties, and the Statewide and Hawai`i Island mailing lists.

On September 3, 2015, Petitioner submitted its Second Supplemental Memorandum of McClean Honokōhau Properties in Support of Motion to Release, Discharge and Delete All Conditions in the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order, Entered April 16, 1991 ("Second Supplemental Memorandum").

The attached matrix addresses each of the existing conditions on Increment I and the parties' positions with references to exhibits supporting those positions.

## **SUMMARY OF PARTIES' POSITION**

**Petitioner** requests all conditions for Increment I be removed (Motion and Supplementary Memorandum). Petitioner suggests in its Second Supplementary Memorandum to transfer the requirement to construct Main Street from Condition 2 (from Increment I) into a new condition on Increment II. Petitioner believes that it has completed requirements of conditions or that existing County conditions in its Change of Zone Ordinance (County of Hawai'i Ordinance 99-89; Petitioner's Exhibit 6) are equivalent and sufficient to enforce and implement the intent of LUC conditions.

**Office of Planning (OP)** has no objections to releasing Conditions 5, 10, and 14. OP defers to the County regarding the release of Conditions 4, 7, and 9. OP objects to release of any of the remaining conditions primarily as the action required by the condition is not complete or has not been authoritatively shown to have been complied with or completed. And, that conditions contained in the County's Change of Zone Ordinance 99-89 are not equivalent to the LUC conditions and insufficient.

**The County of Hawai'i (County)** has no objections to releasing Conditions 3 through 14. The County objects to release of Conditions 1 and 2; defers to the LUC on Condition 15; and would support release of Condition 16 only if the LUC releases all conditions. The County's position on many of the conditions is that existing Federal, State, or County laws or ordinances regulate the compliance required.

## **STAFF RECOMMENDATIONS**

Staff recommends release of the following conditions: **Conditions 4, 5, 7, 9, and 10.**

### DISCUSSION

- **Condition 4** - Petitioner has stated that it has contributed its fair share to water development and distribution consisting of both monetary payments and installation of 12 inch water line. The County has confirmed that its Department of Water Supply has received the required pro-rata share for water improvements. Therefore, Petitioner has provided sufficient authoritative evidence of compliance with condition.
- **Condition 5** - Petitioner has constructed 8 inch sewer lines for future hookup to County's Kealakehe Wastewater Treatment Plant (WTP). DOH has confirmed completion of the dry sewer lines and coordination of interim use of Individual Wastewater Systems (IWS). Therefore, Petitioner has provided sufficient authoritative evidence of compliance with condition.
- **Condition 7** - Petitioner stated that they have paid HELCO for all electrical facilities. The County stated that this condition is self-regulating. Although Petitioner has not provided any evidence for having met this condition; OP, County and LUC staff agree that this condition can be released.
- **Condition 9** - Petitioner stated that there has been no request by the County for pro rata share for police, fire, park, or solid waste disposal. OP defers to County. County confirms that these pro rata requirements only apply to residential development. LUC staff recommends release of this condition, with concurrence of County, as not applicable to this industrial development.

- **Condition 10** - Petitioner provided a letter from the DOT determining that requirements of the condition had been met. OP and County concur. Therefore, Petitioner has provided sufficient authoritative evidence of compliance with condition.

Staff recommends retaining the following conditions: **Conditions 1 through 3, 6, 8, and 11 through 16.**

### DISCUSSION

In general it should be recognized that existing county ordinances are not a substitute for LUC conditions and do not, by themselves, warrant release of the conditions especially where there are public trust doctrine implications. Some affirmative evidence of satisfaction of the condition is required. There is particular concern when failure to comply with a condition could result in irreparable harm to watersheds, the environment or cultural resources.

- **Condition 1** - Petitioner has provided a letter from HFDC acknowledging review and acceptance of Petitioner's landscape and irrigation plans. In addition, Petitioner has cited conditions within the County's zoning ordinance for the project. The conditions requires specific ongoing actions to maintain approved landscaping. OP states that the language within the County's ordinance does not mirror the LUC condition and that landscaping is an ongoing commitment to funding and maintenance. County can't locate a copy of the approved Landscaping Plan approved in March 1996 and Petitioner has not submitted a copy. Absent evidence of some type of mechanism for ongoing funding and maintenance there cannot be compliance. Petitioner has not provided sufficient authoritative evidence of compliance with condition. Therefore, condition should be retained.

- **Condition 2** - Petitioner provided a letter of agreement with DOT setting out the required transportation infrastructure improvements to comply with this condition. OP and DOT have stated that these agreed upon improvements have not been fully completed. The County confirms that one completed roadway still needs to be accepted and dedicated by the County and that Main Street has not yet been constructed. Petitioner has provided evidence of only partial compliance with this condition. Therefore, condition should be retained.
- **Condition 3** - Petitioner stated that an erosion and drainage control plan was submitted to and approved by the County and DOH; and that improvements have been installed. OP indicates that Petitioner has presented no evidence of DOH approval of mitigation measures or their construction. Also, OP believes that the County's Ordinance (Condition I) depends on the LUC condition but is not a substitute for it. The County believes existing State and County regulations address these issues and the County Ordinance requires compliance with them. If this condition is not complied with prior to project completion irreparable harm could occur to nearshore environments and neighboring property. Petitioner has not provided sufficient authoritative evidence of compliance with condition. Therefore, condition should be retained.
- **Condition 6** - Petitioner has provided a copy of its License Agreement and Covenants and Restrictions (CC&Rs) for its industrial development. Petitioner has provided these as evidence of compliance. OP, in consultation with DLNR, DHHL, and the National Parks Service, believe that this condition is necessary to protect public trust resources and Petitioner's submittal does not provide adequate proof of implementation or enforcement. The County believes existing State NPDES requirements, County ordinances, in combination with Petitioner's CC&Rs are adequate. The License provisions and CC&Rs are private agreements subject to change without review by DOH or County agencies; these do not establish an appropriate system to contain and prevent pollutant spills that could adversely affect groundwater and coastal waters. As with condition 3, irreparable

harm to watersheds, the environment and near shore resources could be adversely effected if this condition is not complied with. Given the industrial nature of the project the potential for significant harm to public resources exists. A private right to sue for violation of CC&Rs may protect the petitioner but cannot ensure protection of the public trust. Petitioner has not provided sufficient authoritative evidence of compliance with condition. Therefore, condition should be retained.

- **Condition 8** - Petitioner provided a letter from DLNR, State Historic Preservation Division (SHPD) indicating the archaeological mitigation project was completed and the historic preservation review process is concluded. Further, Petitioner believes that the County Ordinance provides the County with jurisdiction over archaeological resources. OP states that this condition is intended to address archaeological resources not previously identified during development and as development proceeds. OP also states that the County Ordinance does not require notification of SHPD and is not a sufficient substitute for the condition. The County believes its Ordinance addresses this issue. The Project is not completely built out and may undergo redevelopment as tenants move in and out; the obligation is ongoing and continuing. Failure to adhere to this condition could threaten irreparable harm to resources within the public trust doctrine. Petitioner has not provided sufficient authoritative evidence of compliance with condition. Therefore, condition should be retained.

- **Condition 11** - Petitioner has provided a copy of its License Agreement and Covenants and Restrictions (CC&Rs) for its industrial development. Petitioner has provided these as evidence of compliance. OP has consulted with DHHL (adjacent landowner) and DOH. DHHL has concerns about potential impacts from renovation and new uses in Increment I and future development of Increment II; DOH would release condition if all construction was complete. The County believes existing DOH regulations as administered through the County adequately addresses the LUC condition. The concern with this condition is the same Conditions 6 and 8. The condition applies to both Increment I and Increment II. Peti-

tioner has not provided sufficient authoritative evidence of compliance with condition; or documentation showing all construction has been completed. Therefore, condition should be retained.

- **Condition 12** - Petitioner stated that it had participated in a 2002 pollution prevention forum and that none of its activities would impact water quality. OP consulted with DHHL; concerns have been raised about potential impacts to nearby residential properties. In addition, OP noted a lack of documentation by Petitioner for participating in any water quality monitoring program. The County acknowledges that its Ordinance does not contain language replicating the LUC condition; however, they believe they can rely on existing DOH and County regulations. Ocean water quality is a big and ongoing concern in this region as well as a public trust resource. Concerns are the same as those with regard to the above conditions 6,8 & 11. Petitioner has not provided sufficient authoritative evidence of compliance with condition. Therefore, condition should be retained.

Conditions 13 through 16 represent LUC Standard conditions. These should be retained until such time as all other conditions have been complied with. The following conditions provide the LUC with ability to track annual progress, to insure development is consistent with reasons for reclassifying the property, and a process by which Petitioner can remove conditions as they are completed.

- **Condition 13 - To develop the property in substantial compliance with representations**
- **Condition 14 - Notice of intent to sell, lease, or alter property interests prior to development of property**
- **Condition 15 - Provision of annual reports on progress in complying with conditions**
- **Condition 16 - Allows full or partial release of conditions upon timely motion and provision of adequate assurance of satisfaction of conditions by Petitioner.**

In sum, the petitioner has not shown sufficient evidence for release of all of the conditions. Release of conditions 4,5,7,9 and 10 can be justified. Release of the remaining conditions is not supported by the evidence contained in the pleadings and should be retained to ensure public resources are adequately protected.