

ORIGINAL

**OFFICE OF PLANNING**

Leiopapa a Kamehameha, Room 600  
235 S. Beretania Street  
Honolulu, Hawai'i 96813

LAND USE COMMISSION  
STATE OF HAWAII

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Telephone: (808) 587-2846  
Facsimile: (808) 587-2824

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition	)	DOCKET NO. A94-706
	)	
of	)	THE OFFICE OF PLANNING'S
	)	COMMENTS AND OBJECTIONS TO
KAONOULU RANCH	)	PETITIONERS' PROPOSED FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW AND
To Amend the Agricultural Land Use District	)	DECISION AND ORDER;
Boundary into the Urban Land Use District	)	
for approximately 88 acres at Kaonoulu,	)	CERTIFICATE OF SERVICE
Makawao-Wailuku, Maui, Hawaii.	)	
	)	

**THE OFFICE OF PLANNING'S COMMENTS AND OBJECTIONS TO  
PETITIONERS' PROPOSED FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND DECISION AND ORDER**

The Office of Planning ("OP") objects to Petitioners Piilani Promenade South, LLC, Piilani Promenade North, LLC, and Honua'ula Partners, LLC's (collectively referred to as "Petitioners") proposed Findings of Fact, Conclusions of Law and Decision and Order, and recommends that the Land Use Commission ("LUC" or "Commission") issue a determination that Petitioners have failed to perform according to the conditions imposed or the representations or commitments made, and order a further hearing as to whether reversion or other designation is the appropriate remedy. <sup>1</sup>

<sup>1</sup> OP notes that Petitioners respond to arguments by Intervenor regarding zoning and the Community Plan. FoF 79-102. Consistency with County zoning is not relevant to the analysis of whether the Petitioners have

**I. LEGAL BACKGROUND**

In 1995, the LUC issued its Findings of Fact, Conclusions of Law, and Decision and Order (“1995 Decision and Order”) redistricting the Petition Area from agricultural to urban. The 1995 Order set forth two conditions relevant to this discussion: Condition 5 stated in relevant part as follows:

Condition No. 5. “. . . Petitioner shall provide for a frontage road parallel to Pi’ilani Highway and other connector roads within the Petition area, in coordination with other developments in the area with the review and approval of the State Department of Transportation and the County of Maui.”

Condition 15 stated as follows:

Condition No. 15. “Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. Failure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification.”

**II. ARGUMENT**

**A. Failure to Construct a Light Industrial Park as Represented.**

There is no dispute that Petitioners are constructing a retail mall, with additional plans for residential housing. There will be an electrical substation to service the Petition Area, and Petitioners made a commitment to include a home improvement center. The parties also agree that the Petitioners originally represented that the Petition Area would be used for a commercial and light industrial park.

Petitioners argue that they never agreed to limit the amount of retail or commercial uses, and the LUC did not impose a limitation on the amount of retail use. (FOF 24 and 33, 57-66.) First, the violation is not only that the Petition Area contains retail and commercial uses. The violation is also that the Petition Area contains no substantive or non-ancillary light industrial

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complied with the State LUC’s 1995 Decision and Order. In addition, OP does not assert a violation based upon compliance with the Community Plan and takes no position on the issue of consistency.

uses as that term was used in the 1995 Decision and Order. Light industrial uses were described as including “warehousing, light assembly, and service and craft-type industrial operations.” See FOF 32 of the 1995 Decision and Order. There is no warehousing, light assembly, and service and craft-type industrial operations proposed for the Petition Area. The electrical substation is merely an ancillary utility use required for the mall, and the home improvement center is a big-box retail outlet like Home Depot. The overriding characteristic of this big box outlet is retail, not light industrial. (Tr. 11/15/12, 99:20 – 100:13; and 11/16/12, 45: 22-24.) So, there are no substantive or non-ancillary light industrial uses proposed for the Petition Area.

Second, the focus of Petitioner’s proposal in 1994 was on light industrial uses, with the flexibility to include an unspecified number of commercial lots. (Tr. 8/24/12, 45:25 – 46: 2.) This was reflected in the name of the project, Kaonoulu Light Industrial Park (FOF 21 of the 1995 Decision and Order). The market study assumed that large lot retail stores would occupy no more than approximately 20% of the Petition Area. See Petitioners’ Exhibit 3. The Traffic Impact Analysis Report assumed that all traffic would be from light industrial uses. See OP Exhibits 6 and 10. Any commercial activity was represented to be for establishments like a hair dresser, restaurant, okazuya or bank branch, supplemental to the light industrial activity. (Tr. 11/1/94 at 106:14-24, and 107:7-25). Whether considered from a planning, traffic or marketing perspective, the original proposed project is substantially different than the current planned project.

The Petitioners do not specifically address the substantial change in lot configuration from approximately 123 to seven (7) lots of which there are only four (4) large lots for occupation, and the change from fee sales to leases. As noted in OP’s Proposed Findings of Fact, Conclusions of Law, and Decision and Order, the proposal to subdivide and then sell the

lots within the Petition Area was a significant factor in mitigating the LUC's concerns regarding the possible growth of retail rather than light industrial use within the Petition Area.

(Tr. 11/1/94 at 106:14-24, and 107:7-25).

Furthermore, residential use is distinct from both retail and light industrial uses. (Tr. 11/15/12, 204: 16-19). Consequently, the proposed residential use is not consistent with either a commercial or a light industrial park. The fact that the LUC was aware that zoning allowed for apartment housing does not mean that the LUC allowed such use. The LUC legitimately and reasonably relied upon Petitioner's representations that residential use had been eliminated from the Project. (Tr. 11/1/94 at 100:9-18).

B. Enforceability of Condition 15.

Petitioners argue that although they submitted a proposed plan, the LUC cannot rely upon the representations in the plan absent a specific prohibition. (FOF 25-28, 34.) If this argument holds true, Petitioners could unilaterally change uses or even abandon the plan presented to the LUC without violating the LUC's requirement to substantially comply with representations.

No plan is ever unchanging. But for good reason, the LUC requires Petitioners to specifically describe the proposed use and number of lots, lot size, number of units, densities, selling price, intended market, and the impacts from the proposed use. (Hawaii Administrative Rules ("HAR") § 15-15-50(c)(6), (7) and (10).) The analysis of these uses and impacts then allows the LUC to apply the criteria set forth in Hawaii Revised Statutes ("HRS") § 205-16 and 205-17. When changes to the character, size, and nature of these uses are significant, the Petitioners are no longer in "substantial compliance" with their representations and have the responsibility to file for a motion to amend. This would allow the LUC to examine the new or modified uses and any change in impacts in order to determine either that the original basis for

the decision has not changed or that new or different conditions need to be imposed to ensure that the statutory criteria are still being met.

Any major changes in use require an analysis of the associated impacts. Residential uses and commercial uses have significantly different impacts from light industrial uses. For example, the LUC might examine whether potable water and sewage requirements are higher with residential rather than warehousing. Any sustainability measures to reduce the impacts may be different. A light industrial area may have different impacts on stormwater runoff than a residential development. Residential uses are more sensitive to close proximity to other uses and to changes in noise, air and water quality. Because Petitioners have refused to file a motion to amend, the LUC is left without a means to conduct the appropriate analysis to determine whether the change in proposed use will have different impacts and whether different conditions should be imposed.

Petitioners argue that specific prohibitions were not imposed. But developers requesting district boundary amendments generally oppose specific restrictions, preferring the flexibility provided by the general condition to substantially comply with their representations. This has been acceptable to OP and the LUC.

Furthermore, the LUC lacks the resources or information to identify specific prohibitions on all unacceptable uses. The LUC accepts the proposed use set out by the Petitioners, and evaluates the petition based on those representations. If the LUC cannot rely upon those representations, then the LUC also cannot rely upon the Petitioners' analysis of the impacts, which is based upon the proposed use.

C. Irrelevant Arguments.

1. The Passage of Time.

Petitioners argue that the passage of time makes changes in use more likely. (FOF 31.) But Petitioners must represent that the development will be substantially completed within 10 years, including any time necessary to obtain further entitlements. HAR § 15-15-50(c)(19). In this case, Petitioners estimated near 100 percent occupancy within nine or ten years (Tr. 11/1/94 at 88:9-12), and full buildout by 2010 (Tr. 11/1/94 at 54:3-4). Petitioners' failure to comply with their statement that the petition area will be developed within 10 years is not a basis for allowing wholesale changes in use.

2. Proposed Improvements.

Petitioners describe some of the improvements that will occur with the Piilani Promenade and Honuaua Apartment construction. (FOF 117-127, 139-142, 174-182.) These improvements are relevant to determine whether a motion to amend should be granted, and might be relevant to a determination of whether the Petition Area should be reverted to its original agricultural classification. On a motion to amend, Petitioners would be required to provide a complete analysis of all impacts caused and mitigations required by the new project, and not selectively highlight certain improvements. Whether the impacts from the current project are being adequately mitigated, however, cannot be determined in the context of Phase I of the Order to Show Cause proceeding which only looks at whether the Petitioners will violate the 1995 Decision and Order.

3. Marketability of a Light Industrial Subdivision.

Petitioners argue that a light industrial subdivision is not supported by current market trends, contrary to the initial market feasibility of 1994. If true, this is an issue which should be addressed in a motion to amend.

D. Violation of Condition 5.

All parties agree that a frontage road is not going to be constructed. Petitioners argue that Condition 5 does not require a frontage road if not requested by both DOT and County based upon a statement made by Petitioners' counsel. Statements by Petitioner's attorney should not be used to reach a tortured interpretation of a clear condition. Petitioner's attorney is not an unbiased observer, and attorney statements are not made under oath or admissible as evidence. Furthermore, in this case, the language is clear. Condition 5 requires the construction of a frontage road to be approved by DOT and County, not a frontage road only if approved by DOT and the County. Petitioners point to nothing in the documentary evidence, testimony under oath, or LUC discussion to support an interpretation contrary to the clear language of Condition 5. OP agrees that this Condition should be amended. But this requires a motion to amend. If amended, OP would want the opportunity to examine whether any other mitigation should be required, such as a parallel road through the petition area similar to the planned parallel road makai of Queen Kaahumanu Highway in Kona.

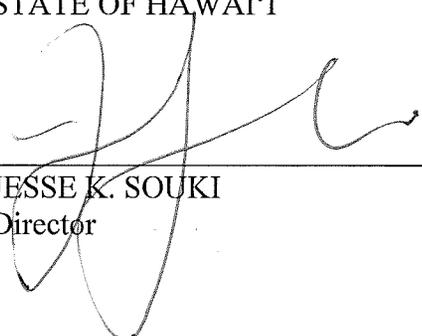
**III. CONCLUSION**

The proposed residential use and the failure to construct a frontage road are clear violations of the 1995 Decision and Order. There is also no significant disagreement that the

current Project with predominantly retail uses is substantially different than the light industrial plan proposed by the Petitioners in 1994. The fundamental disagreement is whether the LUC may rely upon the representations made about the proposed use. The LUC must be able to rely upon Petitioners' representations pursuant to Condition 15. Accordingly, the Petitioners' currently proposed development is a clear violation of Conditions 5 and 15 of the 1995 Decision and Order, and Petitioners should file a motion to amend.

DATED: Honolulu, Hawai'i, this 4<sup>th</sup> day of January 2013.

OFFICE OF PLANNING  
STATE OF HAWAI'I



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JESSE K. SOUKI  
Director

Docket No. A94-706

**CERTIFICATE OF SERVICE**

LAND USE COMMISSION  
STATE OF HAWAII

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

TOM PIERCE, ESQ.  
P.O. Box 798  
Makawao, Hawaii 96768

MCCORRISTON MILLER MUKAI MACKINNON LLP  
JONATHAN H. STEINER, ESQ.  
JOEL KAM, ESQ.  
P.O. Box 2800  
Honolulu, Hawaii 96803-2800

WILLIAM SPENCE, DIRECTOR  
PLANNING DEPARTMENT  
COUNTY OF MAUI  
250 South High Street  
Wailuku, Maui, Hawaii 96793

CORPORATION COUNSEL  
COUNTY OF MAUI  
JANE ELIZABETH LOVELL, ESQ.  
200 South High Street  
Wailuku, Maui, Hawaii 96793

DATED: Honolulu, Hawai'i, this 4th day of January, 2013.



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JESSE K. SOUKI  
Director  
Office of Planning

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