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LAND USE COMMISSION  
STATE OF HAWAII  
2012 DEC 24 A 8:10

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

**In the Matter of the Petition of**

KAONOULU RANCH

To Amend the Agricultural Land Use  
District Boundary into the Urban  
Land Use District for  
approximately 88 acres at  
Kaonoulu, Makawao-Wailuku,  
Maui, Hawaii

DOCKET NO. A94-706

INTERVENORS' PROPOSED FINDINGS OF  
FACT FOR PHASE ONE; **Exh. 1.** (INDEX OF  
REFERENCES TO THE RECORD); **Exh. 2.**  
(POINTS AND AUTHORITIES IN SUPPORT  
OF CONCLUSIONS OF LAW 2 AND 3)

**Filed by:** Maui Tomorrow Foundation, Inc.,  
South Maui Citizens for Responsible Growth  
and Daniel Kanahele

INTERVENORS' PROPOSED FINDINGS OF FACT FOR PHASE ONE

EXHIBIT 1:  
INDEX OF REFERENCES TO THE RECORD IN SUPPORT OF  
INTERVENORS' PROPOSED FINDINGS OF FACT

EXHIBIT 2:  
POINTS AND AUTHORITIES IN SUPPORT OF  
INTERVENORS' PROPOSED CONCLUSIONS OF LAW 2 AND 3

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahele (“Intervenors”), through their attorney Tom Pierce, Esq., hereby submit their Proposed Findings of Fact for Phase One. This is supported by the attached Exhibit 1, Index of References to the Record in Support of Intervenors’ Proposed Findings of Fact, and Exhibit 2, Points and Authorities in Support of Intervenors’ Proposed Conclusions of Law 2 and 3.

DATED: Makawao, Hawaii, December 17, 2012.

A handwritten signature in black ink, appearing to read "Tom Pierce", written in a cursive style.

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TOM PIERCE  
Attorney for Maui Tomorrow  
Foundation, Inc., South Maui Citizens  
for Responsible Growth, and Daniel Kanahele

## INTERVENORS' FINDINGS OF FACT

1. In 1994, Kaonoulu Ranch filed a Petition for a Land Use District Boundary Amendment ("Petition") to reclassify 88 acres of land ("Property") from Agricultural use to Urban Use. In the Petition, Kaonoulu Ranch represented that it would develop the Property into a 123 lot commercial and light industrial park named "Kaonoulu Industrial Park." Improved lots were to be sold in fee simple or leased on a long-term basis. Lot sizes were represented to range from 14,000 to 54,000 square feet. Commercial uses within the industrial park were represented to be secondary and ancillary to primary light industrial uses. Conversely, Kaonoulu Ranch did not represent that it would develop the Property into housing or retail shopping centers uses.

2. The Petition was heard before the Land Use Commission ("Commission") on November 1, 1994. At the hearing, consistent with the representations made in the Petition, Kaonoulu Ranch made the same representations as those set forth above. Again, Commercial uses within the industrial park were represented to be secondary and ancillary to primary light industrial uses. Kaonoulu Ranch did not represent that it would develop the property into housing or retail shopping center uses.

3. An order entitled "Findings of Fact, Conclusions of Law, Decision and Order" ("D&O") was entered herein on February 10, 1995. The D&O was recorded against the Property and runs with the land.

4. As stated in the D&O, the Commission found that Kaonoulu Ranch would develop the Property "as the Kaonoulu Industrial Park, a 123 lot commercial and light industrial subdivision. Improved lots are proposed to be sold in fee

simple or leased on a long-term basis. The size of the lots will range from approximately 14,000 square feet to 54,000 square feet.”

5. In compliance with D&O Condition 1 and congruent with the representations and commitments made by Kaonoulu Ranch to the Commission, Kaonoulu Ranch contemporaneously sought and obtained amendment of the Kihei-Makena Community Plan. On March 6, 1998, Maui County adopted an updated Kihei-Makena Community Plan by Ordinance No. 2641 containing a Land Use Map identifying the Property as “LI,” defined in the plan as “. . . warehousing, light assembly, service and craft-type industrial operations.” The text of the community plan states that the Property is to be used for light industrial services with limited retail and commercial activities allowed to the extent they are “accessory or provide service to the predominate light industrial use.”

6. In compliance with D&O Condition 1 and congruent with the representations and commitments made to the Commission, Kaonoulu Ranch contemporaneously sought and obtained M-1 light industrial zoning for the Property pursuant to Maui County Ordinance No. 2772.

7. Maui Industrial Partners (“MIP”) acquired title to the Property from Kaonoulu Ranch on May 12, 2005.

8. In 2007, Honua’ula Partners, LLC, (“HP”) secured rezoning from the County of Maui for another development owned by it known as “Wailea 670” or “Honua’ula.” Condition 5 of that rezoning requires Honua’ula to construct 250 workforce housing units on its 13.129 acre parcel described in the rezoning ordinance as “Kaonoulu

Light Industrial Subdivision.” Charles Jencks was the owner’s agent for both MIP and HP when this occurred and was acting on their behalf.

9. MIP obtained a large lot subdivision for the Property from the County of Maui on August 14, 2009, creating, among other things, four large parcels of land. One of these parcels consisting of 13.129 acres was transferred to HP by deed recorded August 20, 2009; another parcel consisting of 30.152 acres was transferred to Piilani Promenade North, LLC (“PPN”) by deed recorded September 16, 2010; and the two remaining large lots consisting of 18.519 acres and 19.539 acres were transferred to Piilani Promenade South, LLC (“PPS”) by deed recorded September 16, 2010. The aforementioned transfers and deeds were all encumbered and conditioned by, and are subject to, the D&O.

10. HP now intends to develop its 13.129 acre parcel into 250 workforce housing units; PPN intends to develop its parcel into an approximate 300,000 square foot retail outlet shopping mall; and PPS intends to develop its parcel into an approximate 400,000 retail shopping center. PPN and PPS intend to lease space in their retail shopping centers, not sell lots in fee simple. HP intends to both sell and lease apartments constructed on its parcel.

11. HP, PPN and PPS have begun to develop their properties in accordance with the development intent described in Finding of Fact 10 above. Without limitation:

a. In 2007 HP obtained rezoning from the County of Maui for another parcel of land owned by it that is conditioned on construction of 250 workforce housing units on the Property and has applied for and obtained a Final Environmental

Impact Statement for Wailea 670, including reference to construction of 250 workforce housing units off-site in the Property subject to the D&O.

b. In 2012 PPN and PPS obtained mass grading permits from the County of Maui in furtherance of development of the two retail shopping centers. Additionally, PPN and PPS are actively marketing retail shopping center space in their projects.

12. The D&O has not been amended since its issuance in 1995. HP, PPN and PPS do not intend to seek amendment of the D&O.

13. Substantial and material differences exist between what was represented by Kaonoulu Ranch to the Commission and the projects now proposed by HP, PPN and PPS. These differences include, without limitation:

- a. Project names: “Kaonoulu Industrial Park” vs. “Honua’ula;” “Maui Outlets” and “Pi’ilani Promenade;”
- b. Lot numbers: 123 lots vs. 4 large lots;
- c. Lot sizes: 14,000 – 54,000 square feet vs. 1,000 to 150,000 square feet (the shopping centers) and 13.152 acres (250 workforce housing units);
- d. Property ownership: sales in fee simple and long-term leases to locally-owned small businesses vs. retail space owned by out-of-state owners and leased to national, state-wide and local retail tenants, and residential apartment sales and leases;
- e. Use: light industrial uses vs. retail shopping center uses and 250 workforce housing units.

14. Substantial and material differences in impacts exist between the Project represented to the Commission by Kaonoulu Ranch compared to the developments now proposed by HP, PPN and PPS. These impacts include, but are not limited to:

a. Different traffic impacts:

(1) 700 additional PM vehicular trips per day for an industrial park compared to 2,900 additional PM vehicular trips for the retail shopping centers (even without housing uses considered);

(2) Higher truck activity; and

(3) Unaccounted traffic from 250 workforce housing units.

b. Different economic impacts:

(1) Different types of jobs: craft-type v. retail sales; more full time employment v. significant part-time employment; better paying jobs and employee benefits v. low wages and limited employee benefits;

(2) Property ownership opportunities v. retail space leaseholds;

(3) More beneficial economic multiplier from a light industrial park v. less beneficial economic multiplier from retail shopping centers with some big-box stores and housing uses and no multiplier from housing;

(4) Different types of businesses: light industrial businesses v. housing and retail businesses;

(5) Creation of South Maui jobs v. cannibalization of existing South Maui retail shopping center lessees and customers.

- c. Different school impacts.
- d. Different scenic and visual impacts.
- e. Different community planning impacts.

15. In 1994-1995 the Commission considered and assessed impacts posed by Kaonoulu Ranch's proposed commercial and light industrial park development. It did not consider and assess impacts arising from a 250 unit workforce housing development and/or two retail shopping centers consisting of approximately 700,000 square feet of leasehold space.

16. The projects now proposed by HP, PPN and PPS do not contain plans for a frontage road parallel to Pi'ilani Highway or connector roads as ordered in D&O Condition 5. HP, PPN and PPN represent that they will not comply with this condition, nor will they seek amendment of the D&O to address noncompliance.

17. MIP did not file Annual Reports with the Commission for calendar years 2006, 2007, 2008 and 2009 (10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Annual Reports) as required by D&O Condition 17. Annual Reports filed in 2010 (14<sup>th</sup>) and 2011 (15<sup>th</sup>) are incomplete, inadequate and are actually misleading regarding HP's, PPN's and PPS's development intent and plans.

18. Based on a finding of reasonable cause to believe that HP, PPN and PPS "have failed to perform according to the conditions imposed or to the commitments or representations made to the Commission in obtaining the reclassification



of the Petition Area,” by order dated September 17, 2012, the Commission directed HP, PPN and PPS to show cause why the Property “should not revert to its former land use classification or be changed to a more appropriate classification.”

19. As noted in a Scheduling Order, dated September 27, 2012, the Commission, at a September 6, 2012 hearing, bifurcated the show cause proceeding into two phases, with the first phase confined to adducing evidence as to whether PPS, PPN and HP have “failed to perform according to the conditions imposed or the representations or commitments made.” The Commission has not adduced evidence from the parties with respect to the second phase relating to “whether revision or other designation is the appropriate remedy.”

#### CONCLUSIONS OF LAW

1. HP, PPN and PPS are successors in interest to Kaonoulu Ranch and are bound by the D&O. Representations and commitments made to the Commission by Kaonoulu Ranch are deemed representations and commitments made by HP, PPN and PPS.

2. The D&O is *res judicata* with respect to HP, PPN, PPS, the County of Maui and the State of Hawaii Office of Planning.

3. HP, PPN and PPS bear the burden of proving that they are in substantial compliance with the conditions contained in the D&O and with the representations and commitments made to the Commission by Kaonoulu Ranch.

4. HP, PPN and PPS have taken affirmative steps (overt acts) to develop their respective parcels of Property inconsistent with the conditions contained in

the D&O and with the representations and commitments made to the Commission by Kaonoulu Ranch.

5. HP's 250 unit workforce housing project is substantially different from the commitments and/or representations made to the Commission by Kaonoulu Ranch.

6. PPN's Maui Outlets' large/lot, large/scale retail shopping center is substantially different from the commitments and/or representations made to the Commission by Kaonoulu Ranch.

7. PPS's Pi'ilani Promenade Shopping Center's large-lot, large-scale retail shopping center is substantially different from the commitments and/or representations made to the Commission by Kaonoulu Ranch.

8. Individually and collectively, HP, PPN and PPS are in violation of D&O Conditions 5, 15 and 17.



**INDEX OF REFERENCES TO THE RECORD IN SUPPORT OF  
INTERVENORS' PROPOSED FINDINGS OF FACT**

**FF1. Representations Made in the Petition:**

In 1994, in accordance with HRS 205 et seq. and administrative rules adopted there under, Kaonoulu Ranch ("Ranch") filed a Petition for a Land Use District Boundary Amendment ("Petition") to reclassify an 88 acre parcel of land ("Property") from Agricultural District to Urban District. The Petition describes development of a 123 lot commercial and light industrial park. It makes no representation that the proposed development would include a housing project or retail shopping centers of the type now proposed by HP, PPN and PPS. [Intervenors' Exhibit 1.] Although residential use for the Property was initially considered by the Ranch, the concept was rejected in favor of a light industrial park. [1994 RT 100:9-24.]

a. In paragraph VIII of the Petition, under the heading "Reclassification Sought and Proposed Use of the Property," the Ranch represented:

"The Petitioner proposes the reclassification of the Property's approximately 88 acres from the State Agricultural District to the State Urban District. The Petitioner proposes to develop the Kaonoulu Industrial Park, a 123-lot commercial and light industrial subdivision, within the Property. Improved lots are proposed to be sold in fee simple or leased on a long-term basis. The size of the lots will range from approximately 14,000 square feet to 54,000 square feet." [Intervenors' Exhibit 1, p. 4.]

b. In paragraph IX of the Petition under the heading "Description of Surrounding Areas, the Ranch represented:"

"The project is intended to satisfy the existing needs of South Maui and anticipated future growth of the area. The Property

presents a convenient location for future commercial and light industrial development. It is located along Piilani Highway, a two-lane, two-way State arterial highway. From its northern terminus with North/South Kihei Road, Piilani Highway extends to the Wailea-Makena region.” [Intervenors’ Exhibit 1, p. 4.]

c. In paragraph X of the Petition under the heading “Market Assessment,” the Ranch represented:

“In general, the proposed project will provide new employment opportunities for Maui residents. Moreover, currently there is a shortage of commercial and light industrial space for businesses servicing the Kihei-Makena region.” [Intervenors’ Exhibit 1, p. 6.]

d. Paragraph X of the Petition incorporates by reference an Exhibit 5 entitled “Market Feasibility Study and Economic Report.” The purpose of the market study component (“Market Study” hereafter) of the report is stated to be to determine the market feasibility of developing the Property “into a light industrial subdivision containing approximately 122 lots.” [Intervenors’ Exhibit 1, Market Study p. 1.] The Market Study does not assess the need for housing or assess the commercial market beyond industrial use. [Intervenors’ Exhibit 1, Market Study in its entirety.]

e. The Market Study concludes that given the light industrial park development proposed by Kaonoulu Ranch, the most appropriate zoning for the Property is M-1. A copy of permitted uses in a M-1 light industrial zone was attached. [Intervenors’ Exhibit 1, Market Study p. 4.]

f. Under the heading “Neighborhood Conditions and Needs” the Market Study noted:

“The focal point of South Maui appears to be in the vicinity of Lipoa Street from Piilani Highway to Kihei Road within half a mile radius from its midpoint. The concentration of activities and development planned for that area are extensive which would require supporting services to be close by. [Intervenors’ Exhibit 1, Market Study p. 4.]

“The proposed Kaonoulu Industrial Park is ideally located to provide such support conveniently for existing requirements in Wailea and Makena; to existing businesses along South Kihei Road; and to support the community for proposed developments planned by the government and private industry.” [Intervenors’ Exhibit 1, Market Study p. 4.]

- g. Under the heading “Comparative Analysis” the Market

Study notes:

“South Maui having only 24 acres of light industrial property must rely heavily on goods and services to be delivered from Wailuku-Kahului area. This would result in higher cost for goods and services for South Maui residents and businesses, increase in traffic and many other inconveniences for both providers and receivers of these goods and services.” [Intervenors’ Exhibit 1, Market Study p. 5.]

- h. Under the heading “Projected Absorption” the Market

Study notes:

“Although the neighboring 24 acres of light industrial development is not fully completed and has a high vacancy rate, it is anticipated that the Kaonoulu Industrial Park will be readily absorbed as it is developed. There is always a need for leasehold and turnkey business spaces throughout the community. There is a need for fee simple properties as well. Currently there are [sic] no inventories of fee simple properties in South Maui available for these specific uses (light industrial).” [Intervenors Exhibit 1, Market Study pp. 5-6.]

- i. Under the heading “Conclusion” the Market Study notes:

“The projected increase of residents in the area will also depend on the job opportunities in the vicinity; availability of services (i.e. automotive repair; auto body and fender repair; health

services; warehousing and storage facilities; contractors/sub-contractors for home repair and improvements; wholesale distributors; etc.) and ease of transportation. Services relocating and/or branching out to the South Maui area would alleviate having residents driving into Wailuku-Kahului for such services, thereby, reducing the need for more or wider highways.”  
[Intervenors’ Exhibit 1, Market Study p. 7.]

j. Under the heading “Recommendations” the Market Study

notes:

“In keeping with the needs of the consumer, it is recommended that the marketing strategy of the developer emphasize a balance of lot sizes which will include affordability of small, independent businesses; lots for medium size businesses and; lots for large businesses, which will complement each other.”  
[Intervenors’ Exhibit 1, Market Study p. 8.]

k. The Market Feasibility Study also contained an “Economic Report.” The overview to the report states:

“. . . the Kaonoulu light-industrial project will provide a site for light-industrial activities where virtually none have hitherto existed. Under these circumstances external costs will be minimal and external benefits greater than had substantial light industrial development already been present.

“Because the Kihei area will serve as a commercial and industrial hub for development along the southwestern coast from Maalaea to Makena, the Kaonoulu site will emerge as a regional focal point for the distribution activity as well as light industrial activities which as automotive repair.” [Intervenors’ Exhibit 1, Economic Report p. 1.]

l. The Economic Report notes the following under the heading “Multiplier effects:”

“In turn, by siting a light industrial development at Kaonoulu, in proximity to the Research & Technology Park and existing commercial and industrial establishments, on Piilani

Highway and the prospective terminus of the proposed Upcountry highway, the potential for sales and employment multiplier impacts from business establishment formation at Kaonoulu on the greater Kihei area is great.” [Intervenors’ Exhibit 1, Economic Study p. 7.]

Footnote 8 to this section of the report states: “Generally, industries with greater backward and forward-linkages to other industries have the greatest impact on other industries and, as a result, have the highest input-output multipliers associated with them.” [Intervenors’ Exhibit 1, Economic Study p. 7.]

m. Paragraph XII of the Petition incorporates a “Project Assessment Report, Kaonoulu Industrial Park” as Exhibit 6. In Chapter 1, under the caption “Proposed Request,” the project proposed by the Ranch is described as:

“Kaonoulu Industrial Park, a commercial and light industrial subdivision, is proposed within the Petition Area. See Figure 2. Improved lots are proposed to be sold in fee simple to interested purchasers. Conceptual plans include 123 lots ranging in size from approximately 14,000 square feet to 54,000 square feet.” [Intervenors’ Exhibit 1, Project Assessment p. 1.]

n. Figure 2 is the only visual representation of the proposed layout of the 123 lot Project. [Piilani Exhibit 1; also see Piilani Exhibit 5, p. 1, “Preliminary Landscape Master Plan, Kaonoulu Industrial Park”.]

o. Also in Chapter 1 of the “Project Assessment Report, Kaonoulu Industrial Park,” under the subheading “Reason for Reclassification,” the following is stated:

“The proposed reclassification is being sought in order to develop a commercial and light industrial subdivision. Light industrial space in the South Maui region is generally very sparse. The supply is limited to a 24 acre light industrial complex abutting the northern boundary of the Petition Area and approximately two (2) acres of light industrial zoned land adjacent to Maalaea Boat



Harbor. Thus residents and businesses must rely heavily on goods and services being delivered from the Wailuku-Kahului area. This results in higher cost for goods and services, increases in traffic and other inconveniences for both providers and receivers of these goods and services.” [Intervenors’ Exhibit 1, Project Assessment p 1.]

p. Throughout the body of the “Project Assessment Report, Kaonoulu Industrial Park” repeated references are made to “distribution activity” and “light industrial uses.” For instance: “The Kaonoulu Industrial Park site will emerge as a regional focal point for distribution activity as well as light industrial activities.” [Intervenor’s Exhibit 1, p.50.]

q. The “Project Assessment Report, Kaonoulu Industrial Park” states that the Project will conform to the proposed changes in the Kihei-Makena Community Plan update:

“Maui County Council action on the proposed changes to the community plan is pending. The proposed project would conform with the proposed Light Industrial designation for the Petition Area. Light industrial uses include warehousing, light assembly, service and craft-type operations.” [Intervenors’ Exhibit 1, p. 57.]

r. The “Project Assessment Report, Kaonoulu Industrial Park” contains no mention or assessment of residential uses or large-lot/large-scale retail shopping center uses of the type proposed by HP, PPN and PPS. [See, e.g., Intervenors’ Exhibit 1 in its entirety.]

s. Appendix B to the Petition entitled “Traffic Impact Analysis Report,” authored by Julian Ng, dated March 1994, describes the project assessed under the heading “Proposed Project” as “. . . an industrial park intended to

satisfy the needs of South Maui and the expected growth of the area.” [Office of Planning Exhibit 6.]

t. Introductory remarks to the “Traffic Impact Analysis Report” state:

“Kaonoulu Ranch has proposed an 88-acre industrial park in Kihei . . . . This report summarizes a traffic impact analysis conducted to determine the potential impact of the industrial park . . . .”

“Because the project is expected to provide industrial space in support of resort, residential, and other development in the South Maui area, regional traffic impacts would be positive in that travel into and out of the South Maui area would be lessened.”

“For an industrial park, the greatest traffic impact would occur during weekday peak commuting periods.” [Office of Planning Exhibit 6, p. 1.]

u. The “Traffic Impact Analysis Report” does not analyze traffic impacts expected from HP’s workforce housing project or impacts expected of either PPN’s retail outlet shopping mall or PPS’s retail shopping center [See, e.g., Office of Planning Exhibit 6 in its entirety] and is predicated on vehicle trips generated by the Institute of Transportation Engineers Industrial Park land use code. [Office of Planning Exhibit 10.]

v. In Paragraph XIII of the Petition under the heading “Conformity to the Hawaii State Plan, the Ranch represented:”

“Comment: Currently there is a shortage of commercial and light industrial space for businesses servicing the Kihei-Makena region. The proposed project within the Property provides commercial and light industrial business and employment opportunities to better serve the existing population.”

“Comment: The project is proposed as a commercial and light industrial park which would provide needed business services

in the region. The project will provide additional job choice in an area with predominantly resort and service-oriented employment opportunities. In the long term, Kihei will serve as a commercial and industrial hub for development along the southwestern coast from Maalaea to Makena. The Kaonoulu Industrial Park site will emerge as a regional focal point for distribution activity as well as light industrial activities.”

“Comment: The project is proposed as an industrial park which would be sold in fee simple to purchasers. Users are anticipated to primarily be light industrial and commercial uses oriented to serve the Kihei-Makena community.” [Intervenors’ Exhibit 1, pp. 9 – 12.]

w. In paragraph XIV of the Petition under the heading

“Conformity with State Functional Plans the Ranch represented:”

“The Property is contiguous to existing urban areas. An existing light industrial area already in the State Urban District abuts the Property to the north. Moreover, the proposed project serves to provide commercial and light industrial space in the Kihei-Makena region where there currently is limited space available.” [Intervenors’ Exhibit 1, p. 13.]

x. In paragraph XV of the Petition under the heading

“Conformity to County Plans,” the Ranch Represented:

“Comment: The proposed project will provide commercial and light industrial space which is needed to service the Kihei-Makena region. There is currently a limited supply of light industrial properties in Kihei.” [Intervenors’ Exhibit 1, p. 14.]

“The proposed project would conform with the proposed Light Industrial designation for the Property. Light industrial uses include warehousing, light assembly, and service and craft-type industrial operations.” [Intervenors’ Exhibit 1, p. 16.]

y. The Petition was verified under oath by Henry Rice.

[Intervenors’ Exhibit 1, p. 19.]

z. Also see the testimony of Martin Luna, 11/1/12 RT 201:11-203:15, to the effect that Kaonoulu Ranch petitioned the Commission for a 123 lot commercial and light industrial park and not for housing and/or retail shopping centers.

**FF2. Representations Made at the November 1, 1994 Hearing:**

All representations made by the Ranch at the November 1, 1994, hearing referenced development of a 123-lot commercial and light industrial subdivision named Kaonoulu Industrial Park. The Ranch made no representations that a housing development was contemplated or intended, or that large-lot, large-scale retail shopping center complexes were contemplated or intended.

a. Thomas Witten, the first witness called by the Ranch in support of the Petition, testified to landscape treatment and roadway streetscapes for development of a light industrial park. His testimony makes no mention of housing and/or retail shopping center uses.

“The proposed development includes the approximate 88 acres and the conceptual planning as shown involves approximately 123 lots ranging in size from about 14,000 square feet to a little over an acre.” [RT 1994 17:18-21.]

“Recognizing in an industrial park you’re going to have buildings of some mass that the aesthetics were of critical concern to the petitioner.” [1994 RT 19:7-9.]

“And we have looked at various landscape treatments to try to create a unified treatment within the park and to create an aesthetic that would sort of, I guess, mitigate some of the scale and intensity of industrial uses.” [1994 RT 20:4-8.]

b. Warren Unemori, the second witness called by the Ranch in support of the Petition, described the Project as industrial. His testimony makes no mention of housing uses and/or large-lot/large-scale retail shopping center uses:

“Q. Now, the range of size of lots for the project?

“A. The lots range from about 12,000 square feet to close to an acre.

“Q. What was the reason for the difference in lot sizes?

“A. Well, this is still a conceptual plan. But being that it’s an industrial project we felt that most of the lots would have warehouses on them. And warehouses tend to take a lot of space.” [1994 RT 25:13-21.]

Upon questioning by Mr. Zakian, legal counsel for Maui County,

“Q. First of all, Mr. Unemori, with regard to the drainage infrastructure considerations, it’s proposed by the applicant that this project will ultimately be developed as a commercial, light industrial type of subdivision?

“A. Yes.” [1994 RT 33:10-14.]

Upon questioning by Commissioner Matson,

“Q. I do have a concern about the drainage only because in an industrial area you usually have spills. . . . [1994 RT 44:21-23.]

c. Julian Ng, the third witness called by the Ranch, testified that he was asked to assess traffic impact arising from “the project.” His testimony makes no mention of housing uses and/or retail shopping center uses:

“Q. Mr. Ng, you were approached by the petitioner here to perform some services for the project?

“A. Yes. I was. I was asked to conduct a traffic impact analysis in which I looked at traffic conditions in the vicinity of the project, estimated traffic volumes due to the project and analyzed future conditions within and without the project.” [1994 RT 51:2-8.]

Upon questioning by Mr. Zatkin,

“Q. This project is coming for amendment in order to create a commercial, light industrial subdivision. In the context of your review of the long range street plan and this particular project, what type of vehicles did you consider would be exiting, egressing from this particular subdivision?

A. The type of vehicles would include passenger cars because of employee trips, pickup trucks, larger trucks, some very large trucks as well.” [1994 RT 62:4-11.]

d. Eric Fredericksen, the fourth witness called by the Ranch in support of the Petition, testified regarding an archaeological survey of the Property. His testimony makes no reference to the proposed use of the Property. [1994 RT 71:8 – 77:2.]

e. Lloyd Sodetani, the fifth witness called by the Ranch in support of the Petition, testified that he was retained to determine “whether there was a need for a light industrial park or light industrial properties in the South Maui area.” [1994 RT 78:1-10.] He stated there was such a need based in part on interest expressed in the project by potential users. His testimony makes no representation that the proposed Kaonoulu Industrial Park would include housing and/or large-lot/large-scale retail shopping complexes.

“A. Most of the inquiries that we have had so far have been from businesses located here on Maui that want to expand or want to relocate into South Maui areas. Many of the businesses that have expressed interest in this particular location or in the South Maui area are classified within that light industrial category; wholesaling, warehousing, things of that nature.” [1994 RT 80:21 – 81:2.]

When questioned about the types of probable commercial activity expected in the Project, he responded:

“Q. The application also mentions some commercial activity besides the light industrial?”

“A. Yes. Typically in any light industrial subdivision it’s expected to have some commercial activities. Normally these activities are provided to support the primary occupants there which would be light industrial services. For example, it would be ideal to have some food service to support employees or personnel who are employed in that vicinity, perhaps a small branch of a bank would be ideal to be co-located in an area like that as well. And these types of services would be provided primarily for those individuals who are employed in that proximity.” [1994 RT 81:16 - 82:4.]

f. At the conclusion of Mr. Sodetani's direct testimony, Commissioner Kajioka inquired on his own initiative about uses permitted in M-1 light industrial zones:

"Q. Commissioner Kajioka: Lloyd, it appears in terms of permitted uses within a light industrial it appears to be pretty broad. B1, B2, B3 districts permitted uses. I am also kind of surprised how it seems to contradict one other aspect of the ordinance. Even apartment houses are permitted use in light industrial.

"A. Right.

"Q. In other words, we could have a preponderance of retail and service type establishments in this.

"A. That's a possibility but I would say that the light industrial entities would probably be more likely to be located in a project like this rather than the commercial entities described."  
[1994 RT 105:22 – 106:11.]

g. Testimony regarding M-1 activities permissible in M-1 light industrial zoning was neither solicited nor endorsed by the Ranch.

h. Milton Arakawa, the sixth witness called by the Ranch in support of the Petition and author of the "Project Assessment Report Kaonoulu Industrial Park" referenced in paragraph 1, subparagraphs m - r above, made no reference to housing projects and/or large-lot/large scale retail shopping centers.

i. Henry Rice, the seventh and last witness called by the Ranch in support of the Petition, represented that the Ranch was committed to development of the Project as represented to the Commission. He made no suggestion or representation that housing projects or large-lot/large-scale retail shopping centers would be developed.

“Q. (By Mr. Luna): Mr. Rice, I just had one or two final questions. I guess concern on maybe others in the room would be that the ranch would not be directly involved if a sale does take place with a developer. Can you make a commitment that the ranch will still be involved to make sure that all these conditions that may be imposed will be carried out?

“A. The ranch would absolutely make that commitment. It’s to our advantage that we keep the integrity of the park as we have been talking about with respect to the integrity of the properties we have around it for some generation after me, I presume.” [1994 RT 128:22 -129:9.]

j. After the conclusion of the Ranch’s case, Mr. Zakian, attorney for the County of Maui, called Charles Jencks, then Deputy Director of Public Works for the County of Maui, and Brian Miskae, Planning Director for the County of Maui, to testify. Neither witness testified on behalf of the Ranch and no questions were asked of these witnesses by the Ranch. [1994 RT 131 et seq. and 137 et seq.]

**FF3.** Intervenors’ Exhibit 29.

**FF4.** D&O Finding of Fact 21. Also see, e.g., D&O Findings of Fact 96-98.

**FF5.** Intervenors’ Exhibit 9; Honua’ula Exhibit 12; Piilani Exhibit 34.

**FF6.** Piilani Exhibits 8 and 9.

**FF7.** Intervenors’ Exhibit 29.

**FF8.** Piilani Exhibit 3; testimony of Charles Jencks, 11/2/12 RT 157:19-159:15; 160:24 – 161:13; 11/15/12 RT 9:12-18.

**FF9.** Piilani Exhibits 17 and 18; Intervenors’ Exhibits 19 and 29.

**FF10.** Honua’ula Exhibit 12; Piilani Exhibit 34; Testimony of Charles Jencks 11/15/12 RT 33:1-35:9.

**FF11. a.** Honua’ula Exhibit 12;

**b.** Piilani Exhibit 21.



**FF12.** Honua'ula Exhibit 12; Piilani Exhibit 34; testimony of Charles Jencks, RT 11/15/12 53:22-54:13; 155:2-156:15; 160:7-17; 161:25-162:18; 167:11-25.

**FF13.** In fact, no one testified that the Project proposed by Kaonoulu Ranch is substantially the same as the housing and retail shopping center projects now proposed.

Testimony of Rodney Funakoshi, 11/16/12 RT 45:3-9:

“A. In OP’s opinion this is clearly a different Project from what was initially proposed. In configuration of use what was primarily a light industrial small-lot subdivision as represented to the Commission, has become a predominantly large-scale commercial development with a new residential component not previously considered.”

Testimony of Michael Foley, 11/16/12 RT 102:5-15:

“Q. (By Mr. Pierce): Okay. Do you find them substantially similar, Mr. Foley?

“A. No. I find that the currently proposed retail shopping center to be substantially different than the industrial park proposed in 1994.

“Q. What’s your opinion with respect to the proposed 250 housing units?

“A. Well, that also, it wasn’t thoroughly discussed or considered by the Land Use Commission in 1994.”

Testimony of Richard Mayer, 11/16/12 RT 160:22-161:5:

“Q. (By Mr. Pierce): Do you feel that the representations made back in 1995 are reflective of what you see here with the new proposed uses?

“A. I do not. I think it’s an entirely different Project both in terms of the housing as well as the large amount of retail. This does not represent, I think, the impacts on traffic, on drainage, and other issues are entirely different. I think it’s a very different project.”

Even HP’s, PPN’s and PPS’s witnesses testified that the Project proposed by Kaonoulu Ranch is different from currently proposed housing and retail shopping center uses:

Testimony of Phillip Rowell, 11/2/12 RT 109:9-16:

“Vice Chair Heller: Would it be fair to say that from a traffic engineer’s point a project consisting of 123 lots sold for primarily commercial and light industrial use is substantially different from a project –

“The Witness: Yes.

“Vice Chair Heller: --broken into four lots and used for retail?

“The Witness: Yes.”

Testimony of Thomas Holliday, 11/2/12, RT 138:7-8;

“Q. [By Mr. Souki] It’s a different Project, right?

“A. [Mr. Holliday] Yeah.”

And Charles Jencks testified at great length that projects necessarily change over time (see, e.g., 11/15/12 RT 66:23-67:3):

“A. . . . So who knows where that project would be today if Mr. Rice continued on that logical continuum of processing. The point is it’s going to have to change. All these projects are going to have to change over time.”

Bottom line, there is *no evidence* before the Commission that the housing and retail shopping center projects now proposed by HP, PPN and PPS are substantially similar to the Project represented by Kaonoulu Ranch to the Commission in 1994-1995.

See, e.g.:

a. Intervenors’ Exhibits 1 and 19; Honua’ula Exhibit 12; Piilani Exhibit 21.

b. Intervenors’ Exhibit 1; 1994 RT 18:18-23; D&O FF 21; Honua’ula Exhibit 12; Piilani Exhibit 34.

c. Intervenors’ Exhibits 1 and 19; 1994 RT 18:18-23; Honua’ula Exhibit 12; Piilani Exhibit 34.

d. Intervenors’ Exhibits 1 (Market Study pp. 5-6) and 19; Honua’ula Exhibit 12; Piilani Exhibit 34.

e. Intervenors’ Exhibit 1; 1994 RT 86:1-8; Honua’ula Exhibit 12; Piilani Exhibit 34.

**FF14. a.** (1) Office of Planning Exhibit 10, pp. 2-3; 1994 RT 51:2-8; Testimony of Phillip Rowell, RT 11/2/12 109:9-17:

“Q. Vice Chair Heller: Would it be fair to say that from a traffic engineer’s point a project consisting of 123 lots sold for primarily commercial and light industrial use is substantially different from a project - -

“A. The Witness: Yes.

“Vice Chair Heller: -- broken into four lots and used for retail?

“The Witness: Yes.”

(2) Office of Planning Exhibit 19, p. 3; 1994 RT 64:4-11;

(3) Office of Planning Exhibit 10.

**b.** (1) Testimony of Richard Mayer, 11/16/12 RT 145:3-18; 146:11-21; 149:8-17; 151:16-154:16;

(2) Testimony of Richard Mayer, 11/16/12 RT 146:22-147:21; 148:3-149:13; Intervenors’ Exhibits 1 (Market Study pp. 5-6) and 19; Piilani Exhibit 34;

(3) Testimony of Richard Mayer, 11/16/12 RT 145:19-146:21; Intervenors’ Exhibit 1 (Economic Study p. 7);

(4) Intervenors’ Exhibit 1, Market and Economic Studies; Honua’ula Exhibit 12; Piilani Exhibit 34; testimony of Richard Mayer, 11/16/12 RT 149:8-17; 154:21-156:10;

(5) Intervenors’ Exhibit 1, Market and Economic Studies; testimony of Richard Mayer, 11/16/12 RT 166:13-167:9.

**c.** Office of Planning Exhibits 10 and 13; D&O FF 62.

**d.** Piilani Exhibits 1, 5 and 34.

**e.** Intervenors’ Exhibit 9; Honua’ula Exhibit 12; Piilani Exhibit 34; Testimony of Richard Mayer 11/16/12 RT 156:11-158:16;

**FF15.** Intervenors’ Exhibit 1 in its entirety; 1994 RT in its entirety; D&O FF 21, 96-98.

**FF16.** Honua’ula Exhibit 12; Piilani Exhibit 34; testimony of Charles Jencks, 11/15/12 RT 79:17-19:

“Q. [By Mr. Yee] Are you intending to construct a frontage road along Pi’ilani Highway?

“A. [By Mr. Jencks] No.”

**FF17.** Testimony of Charles Jencks, 11/15/12 RT 50:21-53:3; compare Intervenors' Exhibits 4 and 5 to Honua'ula Exhibit 12 and Piilani Exhibit 34.

**FF18.** 11/1/12 RT 6:1-3; 7:9-10; Commission's Order to Show Cause, dated September 17, 2012.

**FF19.** Commission's Scheduling Order, dated September 27, 2012.



**POINTS AND AUTHORITIES IN SUPPORT OF INTERVENORS’  
CONCLUSIONS OF LAW 2 AND 3**

**I. CONCLUSION OF LAW #2  
The D&O is *Res Judicata* in These Proceedings**

The policy of law underlying the principle of *res judicata*, or “claim preclusion,” applies equally to administrative agency adjudications as it does to judicial decisions. *See* Richard J. Pierce, Jr., *Administrative Law Treatise* (5<sup>th</sup> ed.) (2010) Vol. II, § 13.2.

The doctrine of *res judicata* provides that “[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court against the same parties or their privies concerning the same subject matter, and precludes the relitigation not only of issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.” *Ellis v. Crockett*, 51 Haw. 45, 55 (1969).

Applying *res judicata* to the D&O has the following effect:

1. The findings of fact and conclusions of law set forth in the D&O define the representations and commitments made to the Commission by the Petitioner and its successors in interest, thereby precluding HP, PPN, PPS and the County of Maui from arguing 18 years later that the D&O allows development of the Property consistent with any and all uses identified in County of Maui’s M-1 light industrial zones. Indeed, the D&O makes no reference to M-1 light industrial zoning while specifically defining the approved Project in Findings of Fact 21, and 96-98, among others.

2. HP, PPN, PPS and the County of Maui are precluded from arguing that the D&O is so vague as to be unenforceable, thereby permitting, according to their argument, any use allowed under M-1 light industrial zone. Claims of vaguery, which Intervenors reject as being without foundation, could and should have been raised by the parties in 1994-1995. The parties are barred from raising this contention now.

3. In any event, the adoption of findings of fact and conclusions of law by the Commission in 1995 operates to reject, by operation of law, any other possible findings and conclusions. *Outdoor Circle v. Harold K. L. Castle Trust Estate* 4 Haw. App. 633, 644 (1983) (“By choosing some findings, it impliedly rejects all others . . . .”). Similarly here, HP, PPN, PPS and the County of Maui may not now supplement the facts and law established by the Commission in the D&O.

## II. CONCLUSION OF LAW #3

### The Burden of Proof Rests With HP, PPN and PPS

#### A. HAR 15-15-93

HAR § 15-15-93 states that once a moving party has made a *prima facie* showing of a failure to perform a condition contained in a Commission order, the burden shifts to a petitioner to show cause why the property subject to an order should not revert to a former classification:

- Initially, any party or interested person may file a motion with the Commission “requesting an issuance of an order to show cause *upon a showing* that there has been a failure to perform a condition, representation, or commitment on the part of the petitioner.” (HAR § 15-15-93(a); emphasis added).
- Once this initial burden is met, the Commission must issue an order to show cause, thereby shifting the burden of (1) producing

evidence and (2) convincing the Commission that the petitioner is in fact in compliance with the order.

## **B. Civil Contempt Analogy**

The burden-shifting process in civil contempt proceedings is analogous and instructive:

“[C]ivil contempt proceeding[s are] brought to enforce a court order that requires [a party] to act in some defined manner.” *Mercer*, 908 F.2d at 768. A petitioner “must [first] establish . . . that the alleged contemnor violated [a] court’s earlier order.” *United States v. Roberts*, 858 F.2d 698, 700 (11th Cir.1988) (citation omitted). Once this prima facie showing of a violation is made, *the burden then shifts to the alleged contemnor “to produce evidence explaining his noncompliance” at a “show cause” hearing.* *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir.1991); *see Mercer*, 908 F.2d at 768; *Roberts*, 858 F.2d at 701.

*Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998) (ellipses material and emphasis added, brackets in original). *Cf. F.T.C. v. Leshin*, 618 F.3d 1221, 1232 (11th Cir. 2010); *Thomas v. Blue Cross & Blue Shield Ass’n*, 594 F.3d 814, 821 (11th Cir. 2010); *Reynolds v. Alabama Dept. of Transp.*, 10 F. Supp. 2d 1263, 1273 (M.D. Ala. 1998).

Like civil contempt proceedings, HAR § 15-15-93 provides for “*enforcement* of conditions, representations, or commitments” made to the Commission. The power to enforce judgments, orders, and writs lies at the heart of the administration of justice. (*In re Doe*, 96 Hawaii 73, 79, 26 P.3d 562, 568 (2001); emphasis added.)

## **C. Administrative Procedure Act**

The Hawaii Administrative Procedure Act (“HAPA”), Hawaii Revised Statutes (“HRS”) Chapter 91, HRS § 91-10(5) provides that, “Except as otherwise provided by law, *the party initiating the proceeding* shall have the burden of proof,



including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.” (Emphasis added).

The instant proceeding was initiated by Kaonoulu Ranch in 1994. The 2012 Show Cause Order identifies the landowners as the “successors-in-interest to original Petitioner Ka’ono’ulu Ranch for all purposes under the Decision and Order filed February 10, 1995.” Under HAPA, therefore, the landowners, as successors in interest, are deemed to have initiated this proceeding and, under HRS § 91-10(5), the burden of proof, including the burden of producing evidence as well as the burden of persuasion, rests with them, “except as otherwise provided by law.” One such exception places the burden on a movant seeking an order to show cause. However, once that burden is met, as was done here, HAR § 15-15-93(b) indicates that the burden returns to the petitioner (*i.e.*, the landowners).

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LAND USE COMMISSION  
STATE OF HAWAII  
2012 DEC 24 A 8 11

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

**In the Matter of the Petition of**

KAONOULU RANCH

To Amend the Agricultural Land Use  
District Boundary into the Urban  
Land Use District for  
approximately 88 acres at  
Kaonoulu, Makawao-Wailuku,  
Maui, Hawaii

DOCKET NO. A94-706

CERTIFICATE OF SERVICE

[RE: INTERVENORS' PROPOSED  
FINDINGS OF FACT FOR PHASE ONE; **Exh.**  
**1.** (INDEX OF REFERENCES TO THE  
RECORD); **Exh. 2.** (POINTS AND  
AUTHORITIES IN SUPPORT OF  
CONCLUSIONS OF LAW 2 AND 3)]

**Filed by:** Maui Tomorrow Foundation, Inc.,  
South Maui Citizens for Responsible Growth  
and Daniel Kanahele

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of Intervenor's Proposed Findings of Fact for Phase One; Exh. 1. (Index of References to the Record); Exh.2. (Points and Authorities in Support of Conclusions of Law 2 and 3) has been duly served upon the following at their addresses of record via United States Mail, postage prepaid on December 21, 2012:

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