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LAND USE COMMISSION  
STATE OF HAWAII  
2013 JAN -4 P 3:07

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A-94-706
	)	
KAONOULU RANCH	)	PIILANI PROMENADE SOUTH, LLC
	)	AND PIILANI PROMENADE NORTH,
To Amend the Agricultural Land Use District	)	LLC'S RESPONSE TO OFFICE OF
Boundary into the Urban Land Use District	)	PLANNING'S PROPOSED FINDINGS OF
for approximately 88 acres at Kaonoulu,	)	FACT AND CONCLUSIONS OF LAW
Makawao-Wailuku, Maui, Hawai'i	)	AND DECISIONS AND ORDER ON
	)	PETITIONERS' FAILURE TO PERFORM
	)	ACCORDING TO CONDITIONS
	)	IMPOSED ON THE PETITION;
	)	CERTIFICATE OF SERVICE
	)	
	)	

PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S  
RESPONSE TO STATE OFFICE OF PLANNING'S PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND DECISIONS AND ORDER ON PETITIONERS' FAILURE  
TO PERFORM ACCORDING TO CONDITIONS IMPOSED ON THE PETITION

COME NOW Piilani Promenade South, LLC ("PPS") and Piilani Promenade North, LLC ("PPN") (collectively "Piilani"), by and through their attorneys, McCorriston Miller Mukai MacKinnon LLP, and respond as follows to the State Office of Planning's Proposed Findings of Fact, Conclusions of Law, and Decision and Order on Petitioners' Failure to Perform According to Conditions Imposed on the Petition, filed herein on December 21, 2012 (hereinafter "SOP's Proposal"). As a preliminary matter, Piilani objects to the title of the SOP's Proposal, which should reflect that the Findings of Fact ("FOF") and Conclusions of Law ("COL") should be on the Order to Show Cause, not on any alleged failure to perform.

**SOP's Proposed FINDINGS OF FACT**

SOP Proposed FOF 1: While Piilani does not object to this FOF, it respectfully submits that Piilani's proposed FOF 13 more accurately and completely sets forth this fact in more detail.

SOP Proposed FOF 2: Piilani objects to the inclusion of the language "to develop a 123-lot commercial and light industrial subdivision" in SOP's proposed FOF 2. The 1995 Decision and Order speaks for itself. Piilani submits that Piilani's proposed FOF 77 is more factually accurate.

SOP Proposed FOF 3: Piilani agrees that Condition Nos. 5 and 15 are the only two relevant to this Order to Show Cause proceeding, but submits that the FOF should include the entirety of Condition 5.

SOP proposed FOF 4-8: Piilani does not object to these proposed FOFs, but submits that Piilani's proposed FOFs 1-9 present a more complete and accurate description of this procedural background.

SOP proposed FOF 9 & 10: Piilani objects to these proposed FOF as irrelevant for the purpose of this Order to Show Cause.

SOP Proposed FOF 11: No objection.

SOP Proposed FOF 12: Piilani objects to this proposed FOF as an oversimplification of what was presented to the Land Use Commission (“the Commission”). The 123-lot subdivision map presented to the Commission was labeled a “conceptual plan.” The exhibits to the Petition, including the Market Feasibility Study and Economic Report and the Project Assessment Reports, made clear representations to the Commission that the permitted uses on the Subject Property could include retail uses, and that the amount of retail tenants and number of lots and configuration were subject to change, depending on the market conditions existing at that time. See Piilani’s proposed FOF 19 through 52, and the evidence cited therein.

SOP Proposed FOF 13: Piilani objects to SOP’s proposed FOF 13 as overly simplified and misleading and not based on any evidence in the record. While the project presented to the Commission was named “Kaono’ulu Industrial Park,” Piilani objects to the claim that name reflects a focus on light industrial, and there was no evidence presented or elicited to this effect. Rather, the name simply reflected the intended zoning, which at the time allowed both retail and light industrial uses. Piilani also objects to the characterization that the Petition focused on light industrial uses. To the contrary, the Market Feasibility Report attached to the Petition contained a section entitled “Permitted Uses,” which listed the uses allowed in the County’s M-1, B-1, B-2 and B-3 zoning districts. In addition, the Marketing Report specifically stated that the success of the project “will be dependent on the success of obtaining popular and internationally recognized outlets to occupy the larger parcel,” which clearly does not signal or present a focus on “light industrial uses.” See Piilani Exhibit 3 at 7 and Exhibit 4 at 33. Moreover, throughout the

Petition, the Petitioner referred to the proposed use as “commercial and light industrial,” without limitation on the amount of commercial use permitted in the project.

SOP proposed FOF 14: Piilani objects to this as incomplete and misleading. While the Original Petitioners’ consultants did address certain issues related to the possibility of light industrial uses, they also addressed and made clear the likelihood of significant retail uses.

SOP proposed FOF 15: Piilani objects to the characterization of the cited testimony – it is incomplete and misleading. The citation to Tr.11/1/94 at 88:9-12 was testimony by Lloyd Sodetani, who did the market analysis. Mr. Sodetani testified that near 100 percent occupancy could be achieved “if everything is approved and market and sales occur as anticipated.” The citation to Tr. 11/1/94 at 54:3-4 was a citation to the testimony of Julian Ng, who testified that his TIAR assumed full development by 2010. Evidence was presented that obtaining the necessary change in zoning and subdivision approvals took until 2009. See Piilani Exhibit 18; Testimony of Charles Jencks, November 15, 2012 Transcript at 10:1-6.

SOP Proposed FOF 16: Piilani objects to this proposed FOF for a number of reasons. First, it improperly combines what Piilani plans to develop with what separate owner Honua’ula Partners, LLC (“Honua’ula”) intends to develop. Piilani and Honua’ula are separate owners, pursuing separate projects. Whether either Piilani or Honua’ula has violated the Commission’s 1995 Decision and Order should be evaluated separately, or, at the least, addressed in separate Findings of Fact and separate Conclusions of Law. The second sentence of SOP Proposed FOF 16 improperly identifies the Piilani Promenade as a “mall,” when in fact evidence indicates that it is an open air shopping complex, not an enclosed mall. In addition, that sentence misinterprets the Preliminary Site Plan attached as Appendix A to the Traffic Impact Analysis Report, by understating the amount of leasable area and parking.

SOP Proposed FOF 17: Piilani objects to proposed FOF 17 as misleading. Charles Jencks testified that back in 2005 when his client first acquired the property, they had inquiries from a home improvement center type of tenant. While the commitment to dedicate the 125,000 square feet to this type of use occurred at the hearing before the Commission, Mr. Jencks testified that the possibility of a home improvement center had been discussed with the current owners from as early as his initial discussions when they acquired the Piilani Parcels. See November 15, 2012 Transcript (“TR3”) at 71:22 – 72:17.

SOP Proposed FOF 18: Piilani Objects as this statement is not supported by the evidenced cited. The citation to Mr. Jencks’ testimony at 11/15/12, 38:2-8 only established that the home improvement center would supply both the retail sector and contractors, plumbers, or other materialmen. The citation to Mr. Jencks’ testimony at 11/15/12, 70: 7-9 only established that the size of the home improvement center, 125,000 square feet, was typical for a “big box home improvement center.” The further testimony of Mr. Jencks, cited at 11/15/12 99:20 – 100:13, simply involved questions from Intervenors’ counsel that Home Depot and Lowes advertise as retailers. This does not diminish the fact that a home improvement center provides a service that combines both light industrial and retail functions. While SOP Planning Program Administrator Rodney Funakoshi opined that “a Home Depot-type operation is primarily commercial/retail in nature,” his testimony must be weighed against that of William Spence, the Maui County Director of Planning Director, who testified that he would consider a home improvement type of use which would supply materials to contractors, builders, and the general public to be a light industrial use. Testimony of William Spence, TR3 at 199:23–200:17 and at 203:21–204:6. Mr. Spence is responsible for enforcement of the zoning for the County of Maui, and as such, his interpretation of the Maui Zoning Code carries greater weight than that of Mr.

Funakoshi, who represents the State Office of Planning, an entity which is not responsible for enforcement or interpretation of zoning.

SOP Proposed FOF 19: No objection.

SOP Proposed FOF 20: Piilani objects to this proposed FOF as completely unsupported by any evidence and incorrect. The proposed FOF contains no citation to the record. Neither the State Office of Planning nor any other party put on any evidence to this effect, and if they had, Piilani would have refuted that evidence, as the anticipated MECO station was planned before the proposed Piilani Promenade project was envisioned, and was requested by MECO as part of the revised preliminary map, to serve not only the project, but also the areas mauka of the project. See Testimony of Charles Jencks, November 15, 2012 Transcript at 29:5 – 30:12.

SOP Proposed FOF 21: Piilani objects to this proposed FOF as inaccurate. Piilani has committed to a significant light industrial type use, such as a home improvement center, as well as dedicating land for a MECO substation, both of which are considered light industrial. Moreover, the proposed FOF asserts that the term “light industrial” was used to denote a certain meaning in the 1995 Decision and Order, when in fact, the 1995 Decision and Order contains no definition or other description of what is meant by “light industrial.” Notably, SOP’s Proposed FOF 21 contains no citation to any evidence.

SOP Proposed FOF 22: Piilani objects to this proposed FOF as misleading. While the original conceptual plan was for a commercial and light industrial subdivision, the Market Study and the Project Assessment Report both made clear that retail commercial uses were an important and integral part of the project. See Piilani Exhibit 3 at 6- 7 and Piilani Exhibit 4 at 31-33. Moreover, the citation to the testimony of Ann Cua taken on August 24, 2012 is both improper and taken out of context. Ann Cua spoke not at the evidentiary hearing as a witness on

the Order to Show Cause, but rather, as a member of the public who testified first for her allotted three minutes at the hearing on the Motion for Order to Show Cause. She was then cross-examined by Bryan Yee for the State Office of Planning. While she did agree, when asked if the “primary focus was on light industrial,” this was during a line of questioning where she first testified that the Petitioner proposed some light industrial with some additional commercial, and that the Petitioner had made clear that the amount of the commercial was not determined and would have to be looked at later based upon the market. See Public Testimony of Ann Cua, August 24, 2012 Transcript at 45:16-24:

Q: In this case the Petitioner proposed light industrial with some additional commercial.

A: Yes.

Q: And the amount of commercial that Petitioner made clear wasn't determined and would have to be looked at later based upon the market.

A: Right. They indicated the market would pretty much dictate how the project would be built out.

SOP Proposed FOF 23: Piilani objects to this proposed FOF. The SOP cites no authority in support of this FOF. To the contrary, the Market Study submitted by the Original Petitioner specifically included in the assumptions that the land at issue could be either sold in fee simple, or available for long term lease. See Piilani Exhibit 3 at 1. While the Market Study indicated a need at that time for fee simple properties, it also indicated that one important category of potential tenants were “long term lessees,” and that investors would “purchase the land, develop improvements for multitenant use and have a long term lease with the occupants.” See Piilani Exhibit 3 at 6. No representation was made that the Original Petitioner would limit the amount of land leased or sold, nor was any such limit placed in the 1994 Decision and Order. To the contrary, the 1995 Decision and Order contains a Finding of Fact that improved lots “are

proposed to be sold in fee simple or leased on a long-term basis.” See Intervenor’s Exhibit I-2 at 6 ¶ 21 & at 24 ¶ 96.

SOP Proposed FOF 24: No objection.

SOP Proposed FOF 25 & 26: Partial objection. While Mr. Sodevani testified that it was more likely that light industrial tenants would be located on the project, he also made clear that the market would determine the tenants mix. See Piilani Exhibit 6 at 106:4 – 107:3 (“But again I think that market will dictate who would go in there and who would not.”) Mr. Sodevani made no representations that the Original Petitioner would attempt to limit what would be driven by the market.

SOP Proposed FOF 27: Again, this proposed FOF contains no citation to any authority that an alleged proposal to sell vacant lots addressed the Commission’s alleged concerns about a predominance of commercial space. To the contrary, to the extent that the Commission had a concern about the amount of retail versus commercial use, the Commission either determined that they would leave imposing such a limit to the Maui County Council (which limit the Planning Directors testified he would seek), or determined that the ultimate proportion of uses would be determined by the market. See Piilani’s Proposed FOFs 64-65 and the authorities cited therein. That the County of Maui would seek this limitation is specifically referenced in the 1995 Decision and Order. See Intervenor’s Exhibit I-2 at 9, ¶34. Had the Commission had a concern about the predominance of commercial space, they could and should have included an express limitation, as they have in other District Boundary Amendment orders. See Maui County Exhibit 1 At 10; Maui County Exhibit 3; Testimony of William Spence, TR3 at 179:11 – 180:11.

SOP Proposed FOF 28: Piilani objects as misleading and irrelevant. While the 1995 Decision and Order does state that “Project would conform with the proposed Light Industrial designation of the Property,” the SOP offers no proposed FOF that the proposed Piilani Promenade project or the Honua’ula affordable housing project violates or otherwise does not conform to the such a designation, or that such conformance would limit the allowed uses. Further, the Commission’s reference to light industrial uses including “warehousing, light assembly, and service and craft-type industrial operations” was simply a reference to the language of the Community Plan, and not an independent determination intending to establish or limit the definition of “light industrial” uses. Moreover, it is beyond the Land Use Commission’s jurisdiction and would be improper for the Commission to determine or enforce either Community Plans or zoning designations. See HRS § 205-5 & 205-12; Lanai Co., Inc. v. Land Use Comm’n, 105 Hawai’i 296, 318-19, 97 P.3d 372, 394-95 (2004); Kuleana Ku’ikahi, LLC v. State, Land Use Com’n, Slip Copy, 2012 WL 1510188, \*3 -\*4 (Hawai’i App. April 27, 2012). The State Office of Planning admitted that this was not an issue for the Commission to address. See Testimony of Rodney Funakoshi, November 16, 2012 Transcript at 66:3-19.

SOP Proposed FOF 29: Piilani objects. The conditions imposed by the 1995 Decision and Order reflect the fact that light industrial activities would be one permitted use on the Subject Property. There is no indication or evidence that such conditions reflect that the project would be “primarily” industrial. In the 1995 Decision and order, there is no verbiage that states that the use would be primarily either commercial or industrial. To the contrary, in each instance, the uses are described as both light industrial and commercial. See Intervenors’ Exhibit I-2 at 1, 6 (¶¶21), 9 (¶¶ 36 & 37) and 24 (¶¶96 & 97).

SOP Proposed FOF 30: Piilani objects to this proposed FOF as unsupported speculation. The conditions in the 1995 Decision and Order addressed all of the areas stated in this proposed FOF, in the context of a development that would contain both commercial and light industrial uses. The conditions as written can be properly applied to either commercial or light industrial use, or any combination thereof. The Market Study included a section on permitted uses that referenced a list of uses including retail and apartment uses. The Commission was specifically aware, as admitted by SOP, that both apartment and predominantly retail uses were possible. When asked, the SOP was unable to identify any condition which the Commission likely would have included if the project had been presented as being primarily a retail shopping center. See Testimony of Rodney Funakoshi, November 16, 2012 Transcript at 68:15 – 22.

SOP Proposed FOF 31: Piilani objects as this misrepresents the contents of the Market Study and Economic Report. As testified to at length, the Market Study made clear that success of marketing the project would depend on finding anchor tenants which were popular and internationally recognized outlets, and that discount retailers, fast food outlets, furniture and appliance outlets, and sporting goods stores, as one would expect in a shopping complex, were examples of one category of the types of tenants that were expected. See Piilani Exhibit 3 at 6-7.

SOP Proposed FOF 32: Piilani does not object, but notes that there exists no indication or evidence that this quote denotes light industrial versus retail uses. The only testimony related to this language was when Martin Luna was cross examined by the State Office of Planning, and responded that this appeared to be a reference to commercial activities, and sales of goods. See Testimony of Martin Luna, November 1, 2012 Transcript at 185:2-23.

SOP Proposed FOF 33: No objection.

SOP Proposed FOF 34 – 37: Piilani objects to these proposed FOFs as essentially irrelevant. Piilani does not dispute that the proposed Piilani Promenade and the affordable housing are different from the initial concept, which was a 123-lot light industrial subdivision, however, that difference does not violate the 1995 Decision and Order, and is not what is at issue before the Commission. Condition 15 requires the project be developed in substantial compliance with representations made to the Commission. As noted and evidenced herein, it was specifically represented that all of the proposed uses in the Piilani Promenade and the affordable housing proposal were represented and known to the Commission.

SOP Proposed FOF 38: Piilani objects to this selective citation of Ann Cua’s testimony as irrelevant, argumentative and misleading. There exists no evidence that the use of the terms “light industrial, commercial, and residential” in the 1995 Decision and Order were being used “academically,” which was the context testified to by Ms. Cua in response to the SOP’s cross examination. What was presented to the Commission in 1994 in the Petition was evidence as to what uses were permitted under the Maui County M-1 Zoning, which included not only light industrial, but also retail, and apartment. Testimony before the Commission in 1994, as cited in Piilani’s proposed FOF 54-63, made it abundantly clear that the Commission was well aware of the fact that apartment and retail were both permitted uses in the M-1 zoning, and that the Original Petitioner specifically represented that these were permitted uses. No further restrictions were imposed. Ms. Cua’s testimony also makes this point clearly in a number of places. See e.g. Testimony of Ann Cua, August 24, 2012 Transcript at 40:5-23.

SOP Proposed FOFs 39 - 41: Piilani objects to these proposed FOF, as they are argumentative, non-factual, ambiguous, and constitute conclusions of law, for which no support is provided. Piilani agrees that a condition requiring Petitioners to substantially comply with

their representations is a standard condition in Commission decisions, but the meaning of such a condition depends on the other conditions included in the order and the representations made to the Commission. Moreover, an investigation of the record herein demonstrates that the Piilani Promenade and the affordable housing projects are within the proposed uses represented to the Commission.

SOP Proposed FOF 42: Piilani objects. Mr. Jencks testified that, once the State Office of Planning took the position that Piilani should have filed a motion to amend, Piilani determined no such motion was necessary, because it concluded that the proposed development was not in violation of any condition. This proposed FOF is also irrelevant, as the purpose of this proceeding is to determine whether there has been a violation of the 1995 Decision and Order. If the proposed project does not violate the 1995 Decision and Order, there would be no need to move to amend. In addition, in those instances previously cited by the State Office of Planning as examples of changed projects where the landowner sought to amend the original decision and order, there were specific conditions which the landowner was seeking to change. At the hearing on the Motion for Order to Show Cause on August 24, 2012, the SOP cited Docket A99-728 Subdockets A, B and C as example of where the landowners returned to the Commission on a Motion to Amend. In Subdocket A, as reflected in the Commission's Order dated August 13, 2007, the specific conditions of the original order were replaced. In Subdocket B (Salvation Army/Kroc Center) in the Motion for Order Amending the Findings of Fact, Conclusions of Law, and Decision and Order, which was filed in Docket No. A99-728 with the Commission on April 28, 2009, the land owner specifically sought deletion of Conditions 1, 3, 6, 8, 13, 16, 17, 19, and 21, as well as modification of Conditions 5, 12, and 20. In Subdocket A (West O'ahu Campus), in the Motion for Order Amending the Findings of Fact, Conclusions of Law, and

Decision and Order, filed with the Commission in Docket No. A99-728 on or about March 28, 2012, , the land owner specifically sought deletion of Conditions 3, and 8, as well as modification of Conditions 1, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 21, 22, 23, 25, and 26. Rodney Funakoshi further cited the Princeville Corporation as an example. Therein, the landowners specifically sought relief from a condition which restricted the project solely to development as a golf course, in order to allow the landowner to develop first a tennis complex, and subsequently, housing.

SOP Proposed FOF 43: Piilani objects to this proposed FOF as misleading. While the name of the Project was changed in 2005 from Kaono'ula Industrial Park to Kaono'ula Marketplace, this did not necessarily reflect a change in the nature of the project, as commercial and apartment uses were always potential permitted uses.

SOP Proposed FOF 44: Piilani objects, as this proposed FOF incorrectly assumes the 1995 Decision and Order needs to be amended to allow the proposed uses, and that Piilani chose, nonetheless, not to do so. Moreover, it assumes that in 2005, then owner Maui Industrial Partners, who at that time was in the subdivision application process, could have envisioned what the market conditions would be like in 2012, when the Piilani Promenade project would be ready for development. As testified to by Mr. Jencks, in September of 2008, Lehman Brothers filed bankruptcy, which lead to a collapse of the global economy, and directly affecting development potential in Hawaii. Maui Industrial Partners could not have known in 2005 that the market would support the retail shopping complex which Piilani is prepared to invest in today. See Testimony of Charles Jencks, 11/15/12 Transcript at 66:11-25.

SOP Proposed FOF 45: Piilani objects for the same reason it objects to SOP Proposed FOF 23. The Petition and material submitted made it clear that the landowner could either sell or

lease land, which fact is reflect in the 1995 Decision and Order. See Piilani Exhibit 3 at 6  
Intervenors Exhibit I-2 at 6 ¶ 21 & at 24 ¶ 96. In addition, the 123-lot was only a conceptual  
plan, which would need to evolve based on market conditions. See Piilani's Proposed FOF 25-  
32 and the authorities cited therein. Finally, even if the Subject Property had been subdivided  
into 123 lots, any owner of those lots could have consolidated the parcels, using an expedited  
process. See Testimony of Charles Jencks, November 15, 2012 Transcript at 62:6-23. The State  
Office of Planning's own witness Rodney Funakoshi testified that it was reasonable to expect  
that someone who was going to develop the land for multi-tenant use, as represented in the  
Market Study, would probably consolidate some of the 123 lots. See Testimony of Rodney  
Funakoshi, November 16, 2012 Transcript at 56:21 – 57:6. Mr. Funakoshi also testified that the  
State Office of Planning had no position on the specific number of commercial lots which would  
be allowed under the Decision and Order, but did admit that an unspecified number were  
contemplated. See Testimony of Rodney Funakoshi, November 16, 2012 Transcript at 66:20 –  
67:6.

SOP Proposed FOF 46: Piilani objects to the implication contained in this proposed  
FOF. The fact that the four lot subdivision approved by the County of Maui differed from the  
conceptual plan submitted to the Commission or with the zoning application is a function of the  
change in the market over time, which by then had gone through at least two economic cycles.  
See Testimony of Charles Jencks, November 15, 2012 Transcript at 65:19 – 66:7.

SOP Proposed FOF 47: No objection. However, Piilani notes that the Commission was  
aware in 1994 of the fact that trip generation counts in the original TIAR were based on light  
industrial use, and that the possibility of retail use would create more traffic. See Piilani Exhibit  
6 at 108:1-11. Moreover, testimony established that regardless of what project was ultimately

developed on the Subject Property, an updated TIAR would have been required, and said updated TIAR would have addressed traffic impacts and mitigation measures. See Testimony of Ken Tatsuguchi, November 2, 2012 Transcript at 18:1-16. This is specifically addressed in Condition 5 of the 1995 Decision and Order, which requires the landowner to work with the State Department of Transportation. See Intervenors' Exhibit I-2 at 27.

SOP proposed FOF 48: Piilani objects to this proposed FOF as ambiguous. The original LUC Petition disclosed the possibility of apartment uses within the Petition Area. See Piilani Exhibit 3, Market Feasibility Study and Economic Report, at numbered p. 14.

SOP proposed FOF 49: Piilani objects to this proposed FOF as misleading. SOP representative Rodney Funakoshi admitted under cross-examination that the "concerns of placing residential units so close to an industrial park" referred to in this FOF related not to the apartment uses now proposed for the Petition Area, but for single-family residential abutting other light-industrial uses:

Q Mr. Witten answered Mr. Kajioka's question, "I'm not specifically aware where and if there's single-family abutting that. Later the other planner may be able to respond more specifically. If we do about a single-family residential use, I think some consideration should be given to what the allowable land uses are and if additional landscaping may be desirable.

So would you agree, Mr. Funakoshi, that the concern about residential uses abutting light industrial is a concern about single-family residential abutting light industrial and not apartment abutting light industrial based on this exchange?

A That's true. Single-family is referenced here. But in general any residential abutting light is a concern.

Q Well, the proposed zoning that was, the zoning that was being proposed by the original Petitioner was light industrial, correct?

A I'm sorry? The...

Q In 1994 the Project, the Petitioner anticipated applying for a change in zone for the property to light industrial, is that correct?

A Yes. Yes.

Q And apartment use is a specific and at the time was a specifically approved use in light industrial, correct?

A Yes.

Testimony of Rodney Funakoshi, 11/16/12 Transcript at 74:11 – 75:14.

SOP proposed FOF 50: Piilani objects to this proposed FOF as completely unsupported by any evidence in the record. This proposed FOF is pure speculation, and contains no citation to the record. Indeed, under cross examination, SOP representative Rodney Funakoshi admitted that it is impossible to know what the LUC would have done in 1995 or whether its analysis would have been different if apartment uses had been included in the original petitioner's conceptual plan:

Q Do you recall her [referring to DOE representative Heidi Meeker] testimony that unlike in 1994 the DOE now has the authority to impose impact fees on its own through statute?

A Yes.

Q Do you recall her testimony that the current impact fee required by statute for a residential project in this area would be a multi-family residential project in this area, that is an apartment project, would be \$2,451 per unit. Do you recall that?

A Generally.

Q And do you recall her testimony that the developer would be required under that statute to obtain an agreement from the DOE regarding the impact fee before it could proceed with the Project?

A Yes.

Q So based on the fact that this is something that the developer now has to require, what's the difference between the current situation and what would have been the likely condition imposed in 1994?

A Unknown because that was not proposed in 1994.

Testimony of Rodney Funakoshi, 11/16/12 Transcript at 79:9 – 80:5 (emphasis added).

SOP proposed FOF 51: No objection. Piilani notes, however, that in 2007 the Hawaii State Legislature passed Act 245 which allowed the DOE to collect impact fees in areas that are designated as a School Impact District by the Board of Education (BOE). See Written Testimony of Heidi Meeker; see also Testimony of Heidi Meeker, TR2 at 46:19-25. The DOE expects to collect impact fee from the Affordable Housing Project, as Act 245 applies to the Subject Property and requires that all residential developers or builders seeking a building permit within a school impact fee district pay the DOE school impact fees. See Written Testimony of Heidi Meeker; see also Testimony of Heidi Meeker, TR2 at 57:3-12.

SOP proposed FOF 52: Piilani objects to this proposed FOF as vague, ambiguous, and indecipherable in terms of what is meant by the phrase “[f]rom a planning perspective.” Furthermore the portion of the record cited by the SOP (quoted below) does not support this FOF:

[Cross examination of William Spence by Bryan Yee]

Q        Would an apartment use be a light industrial use in the same context as you would answer Mr. Steiner’s question.

A        No it would not.

SOP proposed FOF 53: No objection.

SOP proposed FOF 54: Piilani objects to this proposed FOF as misleading, inaccurate, and directly contrary to testimony given by SOP representative Rodney Funakoshi. Under cross examination, Mr. Funakoshi admitted that the land uses approved for the Petition Area were not changed by the Wailea 670 zoning ordinance, and that this statement in both his written and oral testimony was in fact a misstatement.

Q Right before the last paragraph on that page you say "Consequently Petitioners were aware as early area as 2008 that the county had changed the land use for the Petition Area to include residential units." Do you see that?

A Yes.

Q And I believe you also testified earlier to the same effect, correct?

A Yes. Yes.

Q Now, what do you mean that the county had changed the land use? Exactly what are you referring to there?

A Well, maybe that's somewhat of a misstatement. Not so much that the county had changed the land use but that the land use -- well, essentially it kind of legitimized the different land use than was originally envisioned for that property.

Q You're referring the condition in the Waiale 670 Project District Ordinance that required the affordable housing on this property, is that right?

A Yes.

Q But the county actually didn't change anything. There was no change in the zoning, for example, in 2008, correct?

A True.

Q Because the zoning was changed in 1999, correct?

A Yes.

Testimony of Rodney Funakoshi, 11/16/12 Transcript at 76:9 – 77:12 (emphasis added).

SOP proposed FOF 55 and 56: Piilani objects to these proposed FOFs as inaccurate and misleading. The TIAR done by Phillip Rowell for the Piilani Promenade project included analysis not only of the retail development, but also included the 250 affordable housing units as part of the future projects which are considered and factored into the traffic counts. See Testimony of Phillip Rowell, November 2, 2012 Transcript at 77:21 – 79:4. The current TIAR (Piilani Exhibit 24) at pages 69 – 73 addresses this, and in Figure 31 to that report, specifically shows a traffic count for vehicles going in and out of the future Honua'ula affordable housing

project on “drive C”. See Piilani Exhibit 24 at 71. While the Department of Transportation witness Ken Tatsuguchi testified that the TIAR’s traffic counts do not include the 250 affordable housing units, he was incorrect, as was demonstrated by the testimony of the author of the current TIAR, Phillip Rowell.

SOP proposed FOF 57: No objection.

SOP proposed FOF 58: Piilani clarifies and notes that two separate grading and grubbing permits were obtained by Piilani on April 11, 2012 and on April 18, 2012. See Piilani Exhibits 21 and 22.

SOP proposed FOF 59: Piilani does not object to this proposed FOF as to the proposed Piilani Promenade project. Piilani recognizes, however, that Honua’ula has previously argued that a determination as to whether Honua’ula is in violation of the 1995 Decision and Order with respect to its desire to construct an affordable housing project on a portion of the Petition Area is neither ripe nor timely.

SOP proposed FOF 60: Piilani objects to this proposed FOF, which is actually a conclusion of law, for all the reasons set forth herein and in Piilani’s Proposed FOFs and COLs and the authorities cited therein.

SOP proposed FOF 61: Piilani objects to this proposed FOF, which is actually a conclusion of law, for all the reasons set forth herein and in Piilani’s Proposed FOFs and COLs and the authorities cited therein.

SOP Proposed FOF 62: No objection.

SOP Proposed FOF 63: Piilani objects to this proposed FOF as misleading and taken out of context. Conditions 5 provides “Petitioner shall provide for a frontage road parallel to Piilani Highway and other connector roads with 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.” See Intervenors’ Exhibit I-2 at 27 (emphasis added). At the hearing when this condition was adopted, it was with the understanding, expressed at the hearing where the conditions was proposed and adopted, that the frontage road would only be required if approved by the State Department of Transportation. See Transcript of Hearing on February 2, 1995, filed with the Commission on February 7, 1995 at 15:19 – 16:17.

SOP Proposed FOF 64: No objection.

SOP Proposed FOF 65: Piilani objects to the assertion, which contains a conclusion of law, that Condition 5 requires the provision of a frontage road, even if such road is deemed improvident or dangerous by the State Department of Transportation.

SOP Proposed FOF 66: No objection.

SOP Proposed FOF 67: Piilani objects. While Piilani agrees that no request for an amendment to Condition 5 has been filed by Piilani, no such amendment is necessary, as Condition 5 only requires the construction of a frontage road if approved by the State Department of Transportation. The remainder of SOP Proposed FOF 67 is irrelevant and should be stricken.

SOP Proposed FOF 68: Piilani objects to this proposed FOF, which is actually a conclusion of law, for all the reasons set forth herein and in Piilani’s Proposed FOFs 162-207 and the authorities cited therein.

### **CONCLUSIONS OF LAW**

SOP Proposed COL 1: Piilani does not object to this statement generally, except to the extent it incorporates by reference other proposed FOFs and COLs, to which Piilani incorporates by reference its responses thereto.

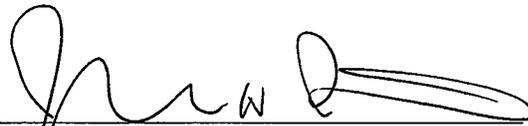
SOP Proposed COL 2: No objection.

SOP Proposed COL 3: Piilani objects, as the facts demonstrate that the propose Piilani Promenade and Honua'ula affordable housing developments are well within the permitted uses of the Subject Property which the Original Petition represented to the Commission, and it was made clear to the Commission that what was ultimately developed would be dependent on the market.

SOP Proposed COL 4: Piilani objects, as the State Department of Transportation has concluded that such a road is unnecessary, not feasible, could cause traffic operation and safety issues, and is only required if authorized by the State Department of Transportation. It would be improper for the Commission to find a violation based on the determination of Piilani not to include a frontage road, when the State Department of Transportation would never approve such a road, due to such a road being dangerous and creating traffic problems.

Piilani further objects to SOP's proposed Order, and requests that the Commission instead adopt Piilani's proposed order finding no violation of the 1995 Decision and Order, and vacating the Order to Show Cause entered in this docket on September 10, 2012.

Dated: Honolulu, Hawai'i, January 4, 2013.



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Piilani Promenade North, LLC

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A-94-706
	)	
KAONOULU RANCH	)	CERTIFICATE OF SERVICE
	)	
To Amend the Agricultural Land Use District	)	
Boundary into the Urban Land Use District	)	
for approximately 88 acres at Kaonoulu,	)	
Makawao-Wailuku, Maui, Hawai'i	)	
_____	)	

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this date, a true and correct copy of the foregoing document was duly served upon the following party via U.S. Mail and electronic mail, addressed as follows:

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Dated: Honolulu, Hawai'i, January 4, 2013.



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