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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 COMMENTS AND
for approximately 88 acres at Kaonoulu,	)	OBJECTIONS TO PETITIONERS'
Makawao-Wailuku, Maui, Hawai'i	)	PROPOSED FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW AND
	)	DECISIONS AND ORDER; CERTIFICATE
	)	OF SERVICE
	)	
	)	
	)	

PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S RESPONSE TO STATE OFFICE OF PLANNING'S COMMENTS AND OBJECTIONS TO PETITIONERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECISIONS AND ORDER

I. INTRODUCTION:

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 to the State Office of Planning's ("SOP") Comments and Objections to Petitioners' Proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed herein on January 4, 2013 (hereinafter "SOP's Objections"). SOP's Objections attempt to rewrite the language of Condition 15 of the 1995 Decision and Order to require the landowner to develop substantially the same project presented as a conceptual plan in the Petition. However, that is **not** what Condition 15 or HRS § 205-4 requires. To the contrary, both Condition 15 and HRS § 205-4 provide for development of the land in substantial compliance with the representations made to the Commission. Had the Original Petitioner made specific representations to the Commission that the plan presented in the Petition was definite as opposed to conceptual, or that it would limit the amount of retail uses, that it would include a specific amount of warehousing or light manufacturing or other non B-1, B-2, and B-3 light industrial M-1 uses, then this would be a different case. In this case, however, the Original Petitioner made specific representations (1) that the plan presented in the Petition was only conceptual and that the market would ultimately determine its final nature, (2) that the project would and could include a substantial amount of retail, (3) that it intended to sell a portion of the land to investors who would develop improvements for multitenant uses, (4) that the success of the project depended on obtaining popular and internationally recognized outlets; and (5) that the

number of lots and sizes and proposed were "only one conceptual alternative which meets current market conditions," and would need reassessment as the market changed.

The evidence presented to the Commission in the Order to Show Cause hearings clearly demonstrated that in considering the Petition, the Commission was aware of the conceptual nature of the proposed plan, and that a predominance of retail or apartment use in the project was a possibility. Specific questions from the Commission were posed about this possibility, and in response to those inquiries the Original Petitioner never made any representation about limiting or precluding those uses in the project. To the contrary, the Original Petitioner consistently represented that the market would ultimately determine the nature of the project within the confines of County zoning requirements.

II. DISCUSSION:

A. SOP Has Not Objected to Any of Piilani's Specific Proposed FOF

SOP's Objections contain a generalized disagreement regarding the import and significance of what was represented to the Commission, and the effect thereof. SOP does not, however, dispute any of the factual assertions, or Piilani's Proposed FOF. HAR section 15-15-63(a) provides in pertinent part that "no sanction shall be imposed . . . except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence." (Emphasis added). Here, SOP has not provided citations to any evidence whatsoever, let alone "reliable, probative, and substantial evidence," to refute any of Piilani's Proposed FOF. Piilani submits that all of Piilani's Proposed FOF should be adopted by the Commission.

B. Condition 15 Has Not Been Violated

Fundamentally, SOP's and Intervenors' objections to the Piilani Promenade project and the Affordable Housing project are based not upon conflicts with the Original Petitioner's actual representations, but rather upon imaginary restrictions that SOP and Intervenors attempt to imply from a mere conceptual plan. SOP and Intervenors can point to no actual representations in the record which prohibit either the Piilani Promenade project or the Affordable Housing project. In contrast, Piilani has cited numerous express representations made by the Original Petitioner regarding (1) the permitted uses, which included both retail and apartment uses; (2) examples of independent, non-ancillary proposed retail uses; (3) admissions by the Original Petitioner's witnesses that a preponderance of retail and commercial uses was possible, and that there is no way you could stop those uses; (4) that the proposed project was only one conceptual alternative; and (5) that the market would ultimate determine the tenant mix. Certainly the Original Petitioner's actual statements must trump what SOP and Intervenors seek to imply from the conceptual plan.

1. The Original Petitioner never represented that light industrial uses would be primary, or that commercial uses would be merely ancillary.

Like SOP's Proposed Findings of Fact, SOP's Objections are based upon the faulty premise that the focus of the Original Petitioner's proposal was on light industrial uses with flexibility to include an unspecified number of "ancillary" commercial lots. See SOP Objections at 3. SOP's premise is simply false. The Petition places no greater emphasis or focus on light industrial uses as compared to commercial uses. To the contrary, the Petition consistently and uniformly describes the proposed project as a "commercial **and** light industrial" subdivision. See Intervenors' Exhibit I-2 at 1, 6 (¶21), 9 (¶¶ 36 & 37) and 24 (¶¶96 & 97) (emphasis added).

Furthermore, SOP cannot point to a single instance in the record where the Original Petitioner represented that the "primary" use of the Petition Area would be light industrial, or that commercial uses would be "ancillary" to light industrial uses. Indeed, the only representations in the record that are even remotely analogous to this issue were made by the Original Petitioner's market expert, Lloyd Sodetani, who testified that, in his experience, one would expect to find establishments such as a bank, restaurant or a hair dresser within a light industrial subdivision. This statement was given in response to Commissioner Kajioka's question recognizing that not only would retail and apartment uses be allowed under the desired zoning for the Petition Area, but also that there was "no way you can stop them." See Piilani Exhibit 6, November 1, 1994 Transcript at 105:23 – 106:13. Mr. Sodetani agreed that retail and apartment uses were permissible and possible in the Petition Area and, significantly, never represented that the Original Petitioner intended to preclude or limit these or any other uses. Instead, Mr. Sodetani stated only that the market would determine the ultimate mix of uses. Id. at 106:14-15.

2. The Market Study did not assume that retail uses would be limited to 20% of the Petition Area.

SOP mischaracterizes the Market Study in SOP's Objections by contending that it assumed large lot retail stores would occupy no more than approximately 20% of the Petition Area. See SOP's Objections at 3. SOP's contention is patently false; the Market Study did not limit the amount of retail to 20% of the Petition Area. Rather, the Market Study spoke of the expectation of three different types of lot purchasers or occupants. See Piilani Exhibit 3 at 6. The first category (requiring minimum lot sizes) was expected to include small business owner/occupants "who have a great desire to remain independent and self-reliant." The Market Study makes no representations, however, as to whether such owner/occupants would be

engaged in retail, commercial, or light industrial uses, other than providing the list of uses permitted in the County's M-1 zoning in the "Permitted Uses" section. The second category is "the owner occupant/investor" who was expected to occupy only a portion of the property and lease the balance to another establishment. Again, however, the Market Study makes no representations about the types of uses such owner occupant/investors might engage in and therefore retail and other commercial uses are possible. Finally, the Market Study identifies the third category of occupants as "long term lessees" expressly including typical retail businesses (e.g., sportswear, furniture sales, and discount retailers). While the Market study does discuss these three categories in terms of lot sizes, and speaks of certain ideal percentages to best market the project, Mr. Sodetani goes on later to expressly represent that the "estimates of lot sizes, quantity and value are provided for planning purposes only. It is only one conceptual alternative which meets current market conditions with considerations for economic social and physical variables." Id. at 8.

3. Piilani's Proposed FOL and COL adequately address changes from the Original Petitioner's conceptual plan.

SOP erroneously asserts that Piilani's Proposed FOF and COL do not specifically address an allegedly substantial change in the number of lots and sizes. See SOP Objections at 3. To the contrary, this topic was addressed at length in the hearings and in Piilani's Proposed FOF and COL. Piilani has clearly demonstrated that the 123-lot site plan was consistently described and presented by the Original Petitioner as merely a "conceptual" plan. See Piilani Exhibit 1; Piilani Proposed FOF 26-34 and the authorities cited therein. The Original Petitioner's landscape architect Tom Witten consistently testified as to a "conceptual" plan, and "proposed" project and landscaping plan. See November 1, 1994 Transcript at 17:17, 18:4, 18:18-19. Moreover, the

Original Petitioner specifically represented to the Commission that the size and quantity of lots was provided for planning purposes only, and was subject to change. See Piilani Exhibit 3 at 8.

SOP also characterizes the Piilani Promenade project as effectuating a "change" from fee sales to leases, see SOP's Objections at 3, which misstates the record. SOP can identify no representation by the Original Petitioner to sell all of the Petition Area in fee simple to the exclusion of leases. To the contrary, the Market Study clearly represented that the original concept was for portions of the Petition Area to be sold to investors "to develop the improvements for multi tenant use and have a long term lease with the occupants." See Piilani Exhibit 3 at 6. Indeed, the assumptions upon which the Market Study were expressly based include the assumption that the land would be available either for purchase in fee simple, or for long term lease, and that units on the land would be either sold or leased. See Piilani Exhibit 3 at 1.

4. SOP's contention that the Original Petitioner's plan to sell some of the proposed lots in fee simple mitigated Commission concerns about the possible growth of retail uses is speculative and unreasonable.

Furthermore, SOP's contention that selling lots in fee simple "was a significant factor in mitigating the LUC's concerns regarding possible growth of retail rather than light industrial use" is pure speculation, unsupported by the citation of testimony in SOP's Objections, and in conflict with the weight of the evidence. As discussed above, the Original Petitioner made no representations that the lots intended for sale in fee simple would be devoted to primarily light industrial as opposed to retail or other commercial uses. The discussion of lot sizes and the manner of ownership contained in the Market Study contains no representations that the fee simple lots would be devoted to light industrial uses or would stem the proliferation of retail or other commercial uses. Accordingly, SOP's contention that the selling of lots in fee simple

mitigated an alleged concern about the unchecked growth of retail uses is unreasonable because there was no basis for the Commission to believe that fee simple lots would in fact stem the proliferation of retail or other commercial uses.

It seems plainly obvious that if in 1994/5 the Commission had had a serious concern about the possibility of the predominance of retail and other commercial uses on the Petition Area, the Commission could have and should have imposed a specific condition addressing that concern in the 1995 Decision and Order, as has been done 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. Likewise, the absence of a specific condition suggests either that the possible predominance of retail uses on the Petition Area was simply not a serious concern, or even if it was, that the Commission decided to defer to the County whether or not to impose a limitation. See Piilani's Proposed FOFs 64-65 and the authorities cited therein. Indeed, the 1995 Decision and Order expressly recognizes that the County intended to seek such a limitation. See Intervenors' Exhibit I-2 at 9, ¶34.

The SOPs argument that an amendment is necessary for the Commission to consider the impacts of the proposed developments is misguided. The mitigation of impacts of developments have been and continue to be addressed at the County level, through zoning conditions, and in the subdivision process. For example, as a condition to obtaining subdivision approval, the County has required approximately $22 million in on and off site infrastructure improvements, including, *inter alia*, provision and dedication of a 1 million gallon water tank, sewer system revisions, storm drainage system revisions, electrical improvements, landscaping, and significant roadway improvement. See Piilani Exhibit 18. It simply is not the case that the Commission needs to reconsider development impacts at this level of detail. The Commission in its 1995

Decision and Order recognized the need to defer to and rely upon the expertise of state and county agencies for mitigation of these potential impacts. See Intervenors' Exhibit I-2, Conditions 2 and 3 (requiring cooperation with and contribution to State Department of Health and Maui County Department of Public Works and Waste Management); Condition 4 (requiring cooperation with State and County Civil Defense agencies); Condition 5 (requiring cooperation and coordination with State Department of Transportation and County of Maui re traffic and roadway improvements); Condition 6 (requiring cooperation with appropriate State and County agencies re potable and non-potable water); Condition 7 (requiring cooperation with State Department of Health re air quality monitoring); Condition 8 (requiring cooperation with and contribution to appropriate State and County agencies re drainage improvements); and Conditions 9 and 10 (requiring cooperation with and verification from State Historic Preservation District re burial and other historic and archeological issues).

5. Restrictions or prohibitions that are not expressly stated in the Decision and Order may not be enforced.

SOP and Intervenors implore the Commission to impose a restriction on the use of the Petition Area which is simply not expressed in the 1995 Decision and Order. The Hawaii Supreme Court, however, has expressly held that the Commission may not do this. In Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai`i 296, 97 P.3d 372 (2004), the Hawaii Supreme Court admonished the Commission for attempting to construe an order to include terms which are not expressed therein. The Court stated:

> **The LUC cannot now enforce a construction of Condition 10 that was not expressly adopted**. This court has mandated that, in issuing a decision, an "agency must make its findings reasonably clear. The parties and the court should not be left to guess, with respect to any material question of fact, or any group of minor matters that may have cumulative significance, the precise finding of the agency." . . . . Parties subject to an administrative decision

> **must have fair warning** of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies. . . . . **In this light, the 1991 Order cannot be construed to mean what the LUC may have intended but did not express.**

Id. at 314, 97 P.3d at 390 (emphasis added, citations omitted). Significantly, the Court also recognized that the petitioner's representations in the proceedings do not trump what is specifically expressed in the decision and order notwithstanding the presence of a general condition like Condition 15. The Court stated:

> As related above, there was evidence that [the petitioner] represented that it would not use any water from the high level aquifer. While such evidence existed, the ultimate order of the LUC did not incorporate the representations into a condition.

Id. at 313, P.3d at 389 (emphasis added). Instead, what controlled were the specific conditions expressed in the decision and order:

> An administrative agency, such as the LUC, has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed. . . . . (reasoning that the "enforcer of the act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated"). The plain language of Condition No. 10 did not give fair notice, or adequately express any intent on the LUC's part that LCI be precluded from using all water from the high level aquifer.

Id. at 314, P.3d at 390 (citations omitted) (emphasis added).

In this case, there is no evidence that Original Petitioner ever represented that the Petition Area would only be used for light industrial and not for retail or commercial or apartment uses. To the contrary, as discussed, *supra*, the Original Petitioner consistently represented that retail development and apartment uses were permitted and possible. Furthermore, although SOP urges the Commission to restrict retail and apartment uses, SOP itself has admitted that even it cannot determine the scope of the restriction. See Testimony of Rodney Funakoshi, Transcript of 11/16/12 at 48:8-20 and 66:20 – 67:6. If SOP cannot do it, neither can any landowner.

Accordingly, the interpretation of Condition 15 urged by SOP and Intervenors must be rejected because it would be impossible for any landowner to determine what the Commission meant by that condition with ascertainable certainty.

6. The Commission should not impose specific use restrictions, but if it does, they must be expressed with particularity.

SOP urges the Commission to interpret Condition 15 in a way that would prohibit uses expressly allowed under County zoning. However, it is neither the Commission's function nor purpose to impose such specific restrictions. Under HRS Chapter 205, the Commission's only function is to decide whether property is appropriately urban, rural, agricultural or conservation. See HRS § 205-2(a). Whether specific activities or uses of property are permissible in the urban district is for the counties, exclusively, to decide.

> "(b) Urban districts shall include activities or uses as provided by ordinances or regulations of the county within which the urban district is situated."

Id. at § 205-2(b). And,

> "The zoning power granted herein shall be exercised by ordinance which may relate to:
>
> (1) The areas within which agriculture, forestry, industry, trade, and business may be conducted;
>
> (2) The areas in which residential uses may be regulated or prohibited;
>
> . . .
>
> (11) Minimum and maximum lot sizes; and
>
> (12) Other regulations the boards or city council find necessary and proper to permit and encourage the orderly development of land resources within their jurisdictions."

HRS § 46-4(a) (emphasis added). The Attorney General of the State of Hawaii has opined that the Commission lacks the authority to prescribe minimum lot sizes based on the delegation of

this power to the counties. See Op. Att'y Gen. No. 62-33 (1962). Likewise, the Commission lacks the authority to prescribe specific uses within the urban district since this power also has been delegated to the counties. Accordingly, the Commission should refrain from interpreting Condition 15 in a way that would infringe upon the County's exclusive jurisdiction to determine the appropriate uses for the Petition Area.

If, notwithstanding the above, the Commission believes it has the authority to prescribe specific uses, such restrictions or prohibitions must be stated with particularity in the decision and order. The reason for this is both legal and practical. First, the Hawaii Supreme Court requires the Commission to state with "ascertainable certainty" what is meant by the conditions imposed. See Lanai, 105 Haw. at 314. Accordingly, any condition as significant as a use restriction must be expressly stated in the decision and order.

Second, as a practical matter, a use restriction must be expressed in order for the landowner to comply with it and for the agency having jurisdiction over enforcement (in this case, the Maui Planning Department) to apply it. Otherwise, uncertainty could undermine the development process and the efficient and responsible use of resources. The Hawai'i Legislature recognized this problem as early as 1985, and expressed its intent to promote certainty and predictability in the development process:

> "[t]he lack of certainty in the development approval process can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning. Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public."

HRS § 46-121.

Finally, SOP argues that the Commission lacks the resources or information to identify specific prohibitions of all unacceptable uses. See SOP's Objection at 5. This is yet another

reason why the Commission should refrain from attempting to prescribe specific uses and leave that decision to the counties. Moreover, the argument rings particularly hollow in this case, where the Commission clearly and expressly recognized that apartment or a predominance of retail use was a possibility. As discussed previously, Commission Kajioka and Lloyd Sodetani engaged in a specific exchange about these uses, at the conclusion of which Commissioner Kajioka expressly stated that there is no way to preclude these types of uses. Against this background, it is disingenuous for SOP to argue that Piilani is somehow exploiting the Commission's practical inability to address every use. The Commission's limited resources were never a factor. The possibility of the very uses now proposed for the Petition Area were disclosed to the Commission in 1994, and the Commission asked specific questions about them. The Commission recognized the possibility yet did not impose any specific condition to preclude that possibility from becoming a reality.

C. Condition 5 Has Not Been Violated

SOP (and Intervenors) asserts that Condition 5 clearly requires the construction of a frontage road, regardless whether such a road is allowed by the State Department of Transportation ("SDOT"). This is not what Condition 5 says. The applicable language of Condition 5 is that "Petitioner shall provide for a frontage road parallel to Piilani 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." See Intervenors' Exhibit I-2 (emphasis added). Petitioner respectfully submits that this language requires a frontage road only if approved by the SDOT and the County of Maui.

1. Absurd interpretations of Condition 5 must be rejected.

There are two possible interpretations of the relevant provision of Condition 5. The first is that propounded by SOP and Intervenors, i.e., that a frontage road must be provided, regardless whether the SDOT allows it. The alternative interpretation is that a frontage road is required only if the SDOT allows it. To the extent that the true meaning is unclear, Condition 5 is "ambiguous."

Under Hawaii law and the law of many other jurisdictions, including the United States Supreme Court, it is impermissible to construe ambiguous statutes, rules and contractual provisions in a manner that promotes an absurdity. Indeed, the Hawaii Legislature enacted a specific statute that requires absurd interpretations of ambiguous laws to be rejected.

> "Where the words of a law are ambiguous . . . [e]very construction which leads to an absurdity shall be rejected."

HRS § 1-15. Hawaii courts have consistently recognized and applied the rule against absurd interpretations. See also Beneficial Haw., Inc. v. Kida, 96 Hawai'i 289, 309 (2001) (interpreting, and rejecting "a hyperliteral construction of [HRS § 454-8 that] would yield an absurd result"); Williams v. Hawaii Med. Serv. Ass'n, 71 Haw. 545, 550, 798 P.2d 442, 445 (1990) (A general rule of statutory construction is that "[c]ourts will not construe rules in a manner which produces an absurd result.") (citing Mahiai, 69 Haw. 350, 358, 742 P.2d 359, 367 (1987)); Azarte v. Ashcroft, 394 F.3d 1278, 1288 (9th Cir. 2005) ("Another traditional canon of statutory construction that necessitates tolling the voluntary departure period is that we must avoid interpretations that would produce absurd results.") (citing United States v. Wilson, 503 U.S. 329, 334 (1992)); Allstate Ins. Co. v. Hirose, 77 Hawai'i 362, 371 (1994) ("Statutes should be interpreted according to the intent, meaning, and purpose of the overall statutory scheme and not in a manner that would lead to absurd and unjust results.")

The same rule of construction also applies to the interpretation of agency rules and regulations, as well as contracts. In Carl Corp. v. Dep't of Educ., 85 Hawai'i 431, 455, 946 P.2d 1, 25 (1997), the appellant challenged the respondent's evaluation of bids for a new computer automation system. The Hawai'i Supreme Court vacated and reversed the hearings officer's remand for agency reevaluation, holding that the hearings officer's interpretation of the administrative rule demanding rescission led to an absurd result.

Likewise, if a contractual provision is capable of more than one interpretation, the absurd interpretation must be rejected. "The contract must be read as the average person would read it; it should be given a 'practical and reasonable rather than a literal interpretation', and not a 'strained or forced construction' leading to absurd results." Eurick v. Pemco Ins. Co., 738 P.2d 251, 252 (Wash. 1987). See also Lifemark Hospitals, Inc. v. Liljeberg Enters., 304 F.3d 410, 443 (5th Cir. 2002) ("'Louisiana courts will not interpret a contract in a way that leads to unreasonable consequences or inequitable or absurd results even when the words used in the contract are fairly explicit.'") (quoting Tex. E. Transmission Corp. v. Amerada Hess Corp., 145 F.3d 737, 742 (5th Cir. 1998)). Furthermore, this rule of construction has been in effect for over a century. "If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected." Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634, 638 (1877).

2. The interpretation of Condition 5 urged by SOP and Intervenors is absurd, and must be rejected.

In this case, SOP and Intervenors would have the Commission read Condition 5 as requiring the landowner to provide for a frontage road, *even if* the SDOT did not allow for such a road. That leads to an absurdity. Without the approval and consent of the SDOT (and the County of Maui), neither Piilani nor any landowner can install a frontage road. Interpreting

Condition 5 to require the landowner to provide for a frontage road, despite the impossibility of doing so if the SDOT does not agree, renders compliance with the condition impossible – an absurd result. Clearly, the Commission could not have intended to mandate an action which another governmental agency refuses to allow, thus rendering compliance impossible. Thus, the more sensible interpretation of Condition 5 is that it only requires the provision of a frontage road if approved by the SDOT and the County of Maui.

Moreover, the record in this case supports this more sensible interpretation. In particular, in the 1994/5 hearings, the attorney for the Original Petitioner, Martin Luna, emphasized the Original Petitioner's understanding that Condition 5 would be read to require a frontage road only if the SDOT and the County of Maui approved:

> And we also understand that the condition would be with the approval of the Department of Transportation, Highways, and the County of Maui, so that if the type of roadway that's being proposed to limit the excess on Honoapiilani Highway is approved by both of these agencies, then we would be – certainly be required to put that type of road in. If it's not approved by the agencies, then the reverse would apply which would be that we would be able to plan the subdivision in the matter that we had presented to the Commission.

See Transcript of Hearing on February 2, 1995, filed with the Commission on February 7, 1995, at 16:2-12. No one objected nor advocated for any alternative meaning. On this point, SOP complains that "[s]tatements by Petitioner's attorney should not be used to reach a tortured interpretation of a clear condition." SOP Objection at 7. However, the interpretation expressed by the Original Petitioner is hardly "tortured." To the contrary, it is the only interpretation that avoids an absurdity, as required by well-established and long-standing rules of statutory construction and contractual interpretation expressly adopted in Hawaii.

3. No amendment of Condition 5 is necessary.

Finally, SOP argues that the landowner should seek to amend Condition 5, in which case SOP would have the opportunity to "examine whether any other mitigation should be required, such as a parallel road through the petition area." See SOP's Objections at 7. For the reasons stated, *supra*, no amendment is necessary.

Moreover, whether SOP itself may desire to revisit traffic issues for its own reasons is beside the point. The SDOT, or the applicable County agencies, are responsible for assessing traffic impacts, and determining, within the framework of a larger overall plan, how best to mitigate traffic. As noted by SOP's witness Ken Tatsuguchi, who testified for the SDOT: "Based on my experience mitigation measures are usually not identified in the land use, at the land use phase." See Testimony of Ken Tatsuguchi, November 2, 2012 Transcript at 18:7-9 (emphasis added). That certainly has proven true in this case. Following the 1995 Decision and Order, the SDOT determined to locate the future Kihei-Makena Upcountry Highway such that it bisected the Petition Area. This was never contemplated or mandated by the Commission, but happened as part of the zoning and subdivision process, and as a result of the landowner working with the SDOT and other agencies. SOP's implication that the Commission should reassess and provide SOP the opportunity to reanalyze traffic issues, assumes that the SDOT either cannot or will not do its job. This is simply not the case. As stated by Ken Tatsuguchi in the written testimony of the SDOT, "[a]ppropriate local accesses from the development to the State Highway System are currently being addressed in the TIAR without frontage roads." See State

Office of Planning Exhibit 10 at 4.[1] Accordingly, there is no need for the Commission to reassess traffic issues which the SDOT is already addressing.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in the other submissions of Piilani, the Commission should reject the SOP and Intervenors' Proposed FOF and COL, and adopt the FOF and COL proposed by Piilani, finding no violation of the 1995 Decision and Order.

Dated: Honolulu, Hawai'i, January 11, 2013.

CLIFFORD J. MILLER
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Attorneys for
Piilani Promenade South, LLC and
Piilani Promenade North, LLC

[1] Moreover, because Piilani does not own the land to the North or to the South of the Subject Property, providing for such a condition would create yet another impossibility. See Written Testimony of Phillip Rowell, Piilani Exhibit 46 at 3, ¶ 2.A.2.

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 11, 2013.

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