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BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

LAND USE COMMISSION
STATE OF HAWAII
2013 JUN -3 A 7:48

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' SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
(1) *INTERVENORS' MOTION TO CONCLUDE
CONTESTED CASE AT THE
EARLIEST PRACTICABLE TIME*, FILED
APRIL 16, 2013, AND (2) *INTERVENORS'
MEMORANDUM IN OPPOSITION TO
PIILANI PROMENADE SOUTH, LLC'S
MOTION TO STAY PHASE II OF THE ORDER
TO SHOW CAUSE PROCEEDING*, FILED
APRIL 16, 2013; CERTIFICATE OF SERVICE

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

**INTERVENORS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
(1) INTERVENORS' MOTION TO CONCLUDE CONTESTED CASE AT THE
EARLIEST PRACTICABLE TIME, FILED APRIL 16, 2013, AND
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SOUTH, LLC'S MOTION TO STAY PHASE II OF THE ORDER TO SHOW CAUSE
PROCEEDING, FILED APRIL 16, 2013**

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahale ("Intervenors"), through their attorney Tom Pierce, Esq., hereby submit their Supplemental Memorandum ("Supplement") in Support of: (1) *Intervenors' Motion to Conclude Contested Case at the Earliest Practicable Time*, filed April 16, 2013; and, (2) *Intervenors' Memorandum in Opposition to Piilani Promenade South, LLC's Motion to Stay Phase II of the Order to Show Cause Proceeding*, filed April 16, 2013.¹

I. REASON FOR SUPPLEMENT OF INTERVENORS' EARLIER MEMORANDUM

This Supplement provides the Commission with information relating to events that have occurred subsequent to Intervenors' filings made on April 16, 2013, as follows: This Supplement incorporates by reference *Intervenors' Memorandum in Opposition to Piilani Promenade South, LLC and Piilani Promenade North, LLC's Motion to Stay Phase II of the Order to Show Cause Proceeding*, filed April 8, 2013.

1. Legal counsel for PPN and PPS recently intimated that this Commission never intended to issue findings of fact ("FOF") and conclusions of law ("COL") after the conclusion of Phase One. However, the record belies PPN and PPS's representation, as summarized below.

2. The County of Maui's attorney, Michael Hopper, who sat through the Phase One Commission hearing, has recently testified before the Maui County Council explaining that the County may not surmise why the Commission voted the way it did because there was no written

¹ Intervenors standard abbreviations for the parties will apply, namely: Pi'ilani Promenade South, LLC ("PPS"), Pi'ilani Promenade North, LLC ("PPN"), and Honua'ula Partners, LLC ("HP"). In addition the Findings of Fact, Conclusions of Law, and Decision and Order filed February 10, 1995 will be referred to as the "1995 Order."

decision and order with respect to that vote. See **Appendix “A,”** attached hereto, which is a true and correct copy of a Maui News article, dated May 22, 2013, entitled “*Few Honua‘ula Conditions Met so Far.*” This fact shows how the public is being harmed by a delay in rendering FOF and COL, and otherwise not concluding the current contested case.

II. THE COMMISSION INTENDED TO, AND HAS AN OBLIGATION TO, ENTER FINDINGS AND CONCLUSIONS

The Commission’s Scheduling Order confirmed findings and conclusions would issue. On September 27, 2012, the Commission’s Chairperson issued a Scheduling Order in which this contested case was bifurcated into a Phase One and Phase Two. It was clearly stated by the Commission that it would be making *findings* and thereafter determining whether there had been a violation, *i.e.*, reaching *conclusions*. For example, the last paragraph of that Scheduling Order provides as follows with respect to Phase One: “[T]his Commission will first consider whether [PPS, PPN] and/or [HP] **has violated** the applicable conditions of the [1995 Order]; should this Commission **find** that [PPN, PPS and/or HP] has failed to perform according to the conditions imposed or the representations or commitments made, this Commission **will then determine** whether reversion or other designation is the appropriate remedy.” (Emphasis added).

The Commission ordered findings and conclusions upon conclusion of evidence of Phase One. Consistent with the Scheduling Order, *immediately* upon conclusion of the evidentiary portion of the hearing, the chair of the Commission ordered the parties to prepare proposed FOF and COL: “I’d like to direct the parties to draft your individual proposed Findings of Fact, Conclusions of Law, and Decision and Order based upon the record in this docket and served upon each other and the Commission.” Transcript of Proceedings held on November 16, 2012. The chair ordered the parties to file and serve their proposed FOF/COL/D&O by December 21, 2012, and objections thereto by January 4, 2013. Id.

The Commission voted only after receiving and reviewing the parties' proposed FOF/COL/D&O. After the parties submitted to the Commission their respective proposed FOF/COL/D&O and objections, the Commission held a hearing. The hearing occurred on February 7, 2013, where the Commission voted that PPN, PPS and HP had violated conditions 5, 15 and 17 of the 1995 Order. However, the Commission did not adopt the FOF/COL/D&O that day and the adoption has not been rescheduled.

III. THE PUBLIC IS BEING HARMED BY THE DELAY

Intervenors explained in their April 16, 2013 filings that a further delay of issuing findings, conclusions and a decision and order as to Phase One, and the failure to otherwise complete Phase Two in a timely manner would be prejudicial to Intervenors and harmful to the public. One such example has already transpired before the Maui County Council relating to County conditions on HP. The attached Maui News article states in pertinent part as follows:

“The council was led (in 2008) to believe that the Kaonoulu site would require less infrastructure investment, was ready to go and that workforce housing there would be an ideal fit,” Irene Bowie, executive director of the Maui Tomorrow Foundation, said Tuesday. “These claims no longer appear accurate.”

Debate as to whether or not residential apartments may be allowed under Kaonoulu’s “light industrial” zoning may be a reason the state found the project to be in violation of its land use conditions, county officials said, *though they do not know for sure.*

“Because there was no written decision in the order (from the state LUC), we don’t know a lot of specifics as to what the commission ordered,” said Deputy Corporation Counsel Michael Hopper.

(Emphasis added). See Appendix “A.”

IV. CONCLUSION

The law requires the Commission to complete this contested case. It can begin that process by issuing the FOF and COL and D&O for Phase One. It may continue that process by

scheduling the hearing for Phase Two and thereafter issuing a final decision in this contested case which is already over a year old.

THEREFORE, Intervenors hereby request as follows:

1. That a hearing be set at the earliest practicable time to render written findings, conclusions and a decision and order as to Phase One;
2. That the Commission schedule at the earliest practicable time a hearing for Phase Two;
3. That at the conclusion of Phase Two the Commission, as soon as practicable thereafter, file a final decision and order so that this contested case may be concluded as required by the Hawai'i Administrative Procedure Act.

DATED: Makawao, Maui, Hawaii, June 5, 2013.

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

U.S. identifies five men
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Pickel lanes mirrored ball
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The Maui News

Maui's Newspaper Since 1900

WEDNESDAY, May 22, 2013

75 CENTS

Few Honua'ula conditions met so far

By EILEEN CHAO, Staff Writer

While developers of the 670-acre Honua'ula golf community have made efforts to meet a number of the 30 conditions set by the Maui County Council when the project's zoning was approved in 2008, some community groups said on Tuesday that many critical conditions have still not been met.

As of the most recent report submitted by Honua'ula Partners LLC last month, five of the 30 conditions had been met, including securing approval for a sewage disposal analysis as well as a transportation management plan; working with state and county agencies to improve infrastructure and public facilities in the surrounding area; and submitting an annual compliance report to both the Department of Planning and the Maui County Council.

The council's Planning Committee, which normally files projects' annual reports without discussion, allowed public testimony on Honua'ula Partners' annual compliance report at its committee meeting Tuesday morning.

"This report is being heavily scrutinized by both us and the public," said Planning Committee Chairman Don Couch. "Normally, council will get the report and file communications immediately. It is unusual to have them come up and discuss it here, but I felt it was important to keep an eye on this project and see what is going on."

The three-phased project district development, formerly known as Wailea 670, is expected to include up to 1,150 housing units mauka of the Wailea Resort, an 18-hole golf course and clubhouse, retail and commercial components, a 12-mile network of trails and bike paths and a 40-acre preserve for native plants. The project's Phase I zoning application was approved by the County



The Maui News / MATTHEW THAYER photo

The 670-acre Honua'ula golf community development, formerly called Wailea 670, will about the Maui Meadows subdivision and match its upper elevation on the mountain. Where Piliari Highway dead ends in this photo taken Tuesday afternoon, will be one of the main entrances to the planned community above the Wailea resort's homes, condominiums, hotels and golf

Honua'ula

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Council in 2008; the Maui Planning Commission approved its final environmental impact statement last year.

But some community groups say that developers of the \$1.2 billion project have failed to meet a number of the other critical conditions set by the County Council, like the 250-unit affordable housing that would be built off-site in Kaonoulu and constructed first, before the market units at Honua'ula.

The Kaonoulu housing project was expected to commence construction "within two years, provided all necessary permits can be obtained within that time frame," according to the 2008 condition. However, no construction has taken place because the state Land Use Commission found in February that the project was in violation of the conditions placed on the housing development in 1995.

"The council was led (in 2008) to believe that the Kaonoulu site would require less infrastructure investment, was ready to go and that workforce housing there would be an ideal fit," Irene Bowie, executive director of the Maui Tomorrow Foundation, said Tuesday. "These claims no longer appear accurate."

Debate as to whether or not residential apartments may be allowed under Kaonoulu's "light industrial" zoning may be a reason the state found the proj-



The Maui News / MATTHEW THAYER photo

This photo of a wiliwili tree on the Honua'ula property was taken in 2007

ect to be in violation of its land use conditions, county officials said, though they do not know for sure.

"Because there was no written decision in the order (from the state LUC), we don't know a lot of specifics as to what the commission ordered," said Deputy Corporation Counsel Michael Hopper. He also noted that there have been apartments, like the Iao Parkside Condominiums, built in areas zoned for light industrial use.

Other community members were concerned about the uncertain future of a native dry-land forest located in the southern part of the project area that is home to a number of native plants, including the rare wiliwili tree.

"This is a very special treasure we have on Maui," said Laura Herrmann, who testified "as a community member."

"Ten thousand years ago, there was a lava flow in the area that created the kind of soil that protects wiliwili trees from predators like kiawe that often destroy the habitat," she said. "There is ample opportunity for research that can bring dollars to the state."

Honua'ula Partners, under Condition 27 of its county ordinance, is required to draft a habitat conservation plan for the

management of the area, and that would be approved by the state Department of Land and Natural Resources, the U.S. Fish and Wildlife Service and the U.S. Corps of Engineers, with a conservation easement "no less than 18 acres and no more than 130 acres."

The U.S. Fish and Wildlife Service recommended in a 2010 letter sent to the developers that "the entire 130-acre at the southern end of the project merits preservation."

However, the project's environmental impact statement, which was approved by the Maui Planning Commission last year, proposes only a 40-acre preserve. However, Honua'ula Partners has also designated an additional 350 acres off-site in East Maui, and the Kanaio and Auwahi areas, as conservation easements, according to the developer's owner representative Charlie Jencks.

"Everybody looks at the 130 acres as being an end-all solution to the problem, but that 130 acres is not premium habitat," Jencks said. "There is habitat elsewhere that provides a much greater public and environmental benefit."

Honua'ula Partners has submitted a draft plan to both state and federal agencies and ex-

pects a final approval from the state DLNR this summer, according to its compliance report.

"The latest proposal submitted to the Planning Department is 40 acres. We still do not have confirmation from all the agencies as to what that magic number is," said county planner Ann Cua. "This is one of the conditions that is holding up the project from going to the next step."

Cua said the next step is for Honua'ula Partners to submit an application to the Maui Planning Commission for Phase 2 of the project to be approved, which will not be granted until many of the conditions, like the habitat conservation plan, are met.

"It just takes one guy in one agency to say 'I'm not going to get through this today; I'm too busy,' and things get stalled," Jencks said. "It was a difficult approval. I started working on the project in 2001, and we didn't get zoning until 2008."

Asked about a construction timeline, Jencks said it is entirely dependent on how long it will take to secure the necessary permits, satisfy the conditions of approval and get project financing. However, he said he expects to start construction within the next 10 years.

■ Eileen Chao can be reached at echao@mauinews.com.

Lawsuit

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'protect the mission' ensures a safe environment for the children, elderly, and anyone else who attends the Salvation Army facility or for worship, recreational or social assistance."

He added that the commission takes careful precautions to reduce or eliminate the risk of abuse that might occur.

"We do not take lightly an allegation that might harm a child, want to be proactive in searching and discovering details that surround the case," Rasmussen said in the statement.

The Maui News contacted Tabata's immediate family through phone or email Tuesday.

Spencer, who said she doesn't like to call attention to herself, said she was speaking up to try to help others. "I don't want to leave emotional scars she carries," she said. "Her abuse have led to her losing her femininity, wearing revealing clothing, even carrying a purse."

"If one person can be protected and saved, it's worth everything coming from her," she said in an interview with Maui News on Tuesday, speaking with her attorney after the lawsuit was filed.

Oahu attorney Rosenberg said in a written statement that she is stepping forward, helping expose a horrible pattern of abuse. "Her bravery will inspire potential victims on Maui, to help them live these unspeakable acts."

Spencer's decision to tell her story to light up the community from seeing an obituary in Maui and learning that she moved to Maui and joined the Salvation Army was part of the Salvation Army's mission.

She said she believed Tabata was fired after she reported the abuse to the Salvation Army decades ago. She knew she was no longer at the Salvation Army site she had attended as a child.

Reading the obituary "brought it all back," Spencer reflected on the assault on Oahu and the harm Tabata might have harmed.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document shall be duly served upon the following parties as addressed below, via certified mail, return receipt requested and electronic mail, on June 5, 2013:

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DATED: Makawao, Maui, Hawaii, June 5, 2013.

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