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LAND USE COMMISSION  
STATE OF HAWAII

2015 AUG 27 P 2:42

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAI'I

In the Matter of the Petition of	)	DOCKET NO. A89-643
	)	
McCLEAN HONOKOHAU PROPERTIES,	)	OFFICE OF PLANNING'S RESPONSE
a Hawaii Limited Partnership	)	IN PARTIAL SUPPORT OF
	)	PETITIONER'S MOTION TO RELEASE,
To Amend the Land Use District Boundary	)	DISCHARGE AND DELETE ALL
to Reclassify Approximately 89.527 acres of	)	CONDITIONS IN THE LAND USE
land in the Conservation and the	)	COMMISSION'S FINDINGS OF FACT,
Agricultural Districts to the Urban District at	)	CONCLUSIONS OF LAW, AND
Honokohau, North Kona, Hawai'i, Tax Map	)	DECISION AND ORDER, ENTERED
Key Nos: (3) 7-4-08: 26 and 49.	)	APRIL 16, 1991; EXHIBITS "1-9";
	)	
		CERTIFICATE OF SERVICE

**OFFICE OF PLANNING'S RESPONSE IN PARTIAL SUPPORT OF  
PETITIONER'S MOTION TO RELEASE, DISCHARGE AND DELETE ALL  
CONDITIONS IN THE LAND USE COMMISSION'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND DECISION AND ORDER, ENTERED APRIL 16, 1991**

The Petitioner filed its Motion to Release, Discharge and Delete All Conditions in the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order, entered April 16, 1991 (the "Motion") on December 23, 2014. The Office of Planning ("OP") has no objection to releasing Conditions 5, 10, and 14. OP defers to the County of Hawai'i as to whether Conditions 4, 7, and 9 should be released. OP objects to the release of Conditions 1, 2, 3, 6, 8, 11, 12, 13, 15, and 16.

## I. INTRODUCTION

On April 16, 1991, the Land Use Commission (“LUC”) approved the reclassification of approximately 89.527 acres of land in two increments: 1) approximately 45.5 acres of land for Increment I, and 2) approximately 44 acres of land for increment II. See Findings of Fact 16 and 17 of the Findings of Fact, Conclusions of Law, and Decision and Order dated April 16, 1991 (“Decision and Order”). See OP Exhibit 1.

On June 27, 2002, the LUC approved the reclassification of Increment II. In its order, the LUC imposed one additional condition on Increment I which is not addressed in the Motion. See OP Exhibit 2.

On December 23, 2014, Petitioner filed the present Motion. OP had multiple discussions with Petitioner on its Motion, raising issues, asking for more information, and sharing the information obtained from other governmental agencies regarding the Motion.

On August 24, 2015, Petitioner filed its First Supplemental Memorandum and Exhibits of McClean Honokohau Properties in Support of Motion to Release Conditions in the Land Use Commission’s Findings of Fact, Conclusions of Law, and Decision and Order, Entered April 16, 1991 (“Supplemental Memorandum”).

## II. ARGUMENT

OP’s specific positions for each of the sixteen (16) conditions are as follows:

### A. Condition 1.

1. Petitioner shall ensure that a buffer area along the boundary of the Property be constructed to maintain the visual integrity from the Queen Kaahumanu Highway. Petitioner shall further ensure that the proposed light industrial uses be screened from passing motorists, the Kaloko-Honokohau National Historic Park, and the adjacent Kealakehe lands, by landscaping improvements along the petition area’s western, northern and southern boundaries. Petitioner shall prepare a plan for a buffer along the southern with the Kealakehe lands, which shall be submitted to

and approved by the Housing Finance Development Corporation. Petitioner shall properly maintain the approved landscaping improvements.

OP objects to releasing this condition.

Condition 1 requires the following: (1) a buffer to maintain the visual integrity from the Queen Kaahumanu Highway; (2) landscaping which screens any proposed light industrial uses from passing motorists, the Kaloko-Honokohau National Park, and the adjacent Kealakehe lands; (3) a plan for the buffer approved by the Housing Finance Development Corporation; and (4) a requirement to properly maintain the approved landscaping improvements.

On January 13, 2015, the Hawaii Housing Finance and Development Corporation (HHFDC) submitted a letter to the Office of Planning stating that their property was sold to the Department of Hawaiian Home Lands (“DHHL”) on December 30, 2004. See OP Exhibit 3. On February 24, 2015, DHHL submitted a letter recommending that this condition remain “because it assigns the long-term responsibility of maintaining landscape improvements to McClean Honokohau Properties . . . and because landscaping is an ongoing effort that requires funding and management.” See OP Exhibit 4. The National Park Service (“NPS”) objected to the release of Condition 1 because there was no demonstration that Increment I is screened from the view of Kaloko Honokohau National Park or that the Petitioner has and is maintaining the landscaping. See OP Exhibit 5.

In its original Motion, Petitioner argued that it had prepared plans that were approved by the Housing Finance and Development Corporation, but did not address the other requirements of Condition 1. In its Supplemental Memorandum, Petitioner submitted copies certain general zoning requirements relating to setbacks and landscaping (Petitioner’s Exhibit 7) and the zoning approval for the Petition Area (Petitioner’s Exhibit 6).

OP does not view the general zoning requirements as an adequate substitute for Condition 1 because these general zoning requirements do not require that the light industrial uses be screened from passing motorists, the Kaloko-Honokohau Park, or the adjacent Kealakehe Lands, do not require the maintenance of the visual integrity from Queen Kaahumanu Highway, and do not require that the landscaping be maintained.

Petitioner has also submitted the County of Hawai'i's Zoning Ordinance No. 99-89 (the "ordinance"), that rezoned the Petition Area. Conditions D and E of the Ordinance require a comprehensive landscaping/buffer plan which includes a visual analysis from the Queen Kaahumanu Highway, landscaping improvements, and provisions for maintenance, and approval from HFDC for that plan. Although the Ordinance requires a plan, the criteria for the plan do not mirror the LUC conditions. Furthermore, the Ordinance does not clearly impose a requirement to comply with the plan or impose a continuing obligation to maintain the landscaping in the plan. Consequently, the Ordinance is an insufficient substitute for Condition 1.

Given further DHHL's and NPS's recommendation to retain Condition 1 and OP's concerns regarding the Ordinance, OP recommends that Condition 1 be retained.

B. Condition 2.

2. Petitioner shall participate in the funding and construction of local and regional transportation improvements on a pro-rata basis as determined by the State Department of Transportation.

OP objects to releasing this condition.

Condition 2 requires the Petitioner to participate in the funding and construction of certain transportation improvements as determined by the State Department of Transportation ("DOT"). In its original Motion, Petitioner argued that Condition 2 should be released because it entered into an agreement with the Department of Transportation dated February 28, 2001 which

detailed certain traffic improvements to be done by Petitioner in satisfaction of Petitioner's obligations under Condition 2.

The State Department of Transportation ("DOT") submitted comments dated February 4, 2015 opposing the release of Condition 2 because the transportation improvements have not been completed. See OP Exhibit 6. According to DOT, Road G, while constructed, has not been formally accepted by the County of Hawai'i. Also, the Main Street from Kalakehe Parkway to the Petitioner's North boundary line has not been constructed.

In its Supplemental Memorandum, Petitioner argues that Road G will be dedicated to the County in the future, and Main Street will be constructed in connection with Increment II. But this merely demonstrates that Petitioner has not yet fully complied with Condition 2.

Furthermore, the LUC's June 27, 2002 decision to reclassify Increment II does not contain an analogous DOT condition. If condition 2 is deleted, therefore, there will be no LUC condition requiring the construction of Main Street improvements. Consequently, Condition 2 has not been completed and Petitioner's obligations under Condition 2 should not be discharged.

Petitioner also argues that Paragraph K of Ordinance 99-89 makes the Condition 2 unnecessary. Paragraph K states as follows:

As required by the State Land Use Commission's Decision and Order, the applicant shall participate in the funding and construction of local and regional transportation improvements on a pro rata basis as determined by the State Department of Transportation. A letter of compliance with this condition shall be submitted prior to issuance of Final Subdivision Approval or a certificate of occupancy for any portion of this development, whichever occurs first.

First, Paragraph K requires a letter of compliance from the State DOT prior to the certificate of occupancy for any portion of the Petition Area. OP is unaware of any letter of

compliance from the State DOT, even though Increment I is clearly occupied. Second, Paragraph K by its own terms requires the applicant to provide funding for transportation improvements “as required by the State Land Use Commission’s Decision and Order.” If the LUC deletes Condition 2, it will no longer be requiring funding for transportation improvements. At the least, this creates an ambiguity by which future landowners may argue that Paragraph K is no longer enforceable because the LUC deleted the requirement for transportation improvements and Paragraph K only requires transportation improvements as required by the LUC. Consequently, Paragraph K as currently phrased is not a sufficient substitute for Condition 2.

Given DOT’s objections to the release of Condition 2, the clear fact that Condition 2 has not been fully performed, and concerns about the adequacy of the Ordinance, OP recommends that Condition 2 be retained.

C. Condition 3.

3. Petitioner shall prepare a drainage and erosion control plan and shall fund and construct the necessary drainage improvements to control drainage within the Property and to maintain ocean water quality to the satisfaction of the State Department of Health.

OP objects to releasing this condition.

Condition 3 requires Petitioner to (1) prepare a drainage plan; (2) prepare an erosion plan, (3) fund and construct the necessary drainage improvements and controls; (4) maintain ocean water quality; and (5) do so to the satisfaction of the State Department of Health.

The NPS and the Department of Land and Natural Resources, Division of Aquatic Resources submitted comments opposing the release of Condition 3. See OP Exhibits 5 and 7, respectively.

The NPS commented that this condition should be retained because industrial uses have a strong potential to impact coastal areas. The NPS included the following to address Conditions 3, 6 and 12. See OP Exhibit 5.

The NPS would like to emphasis [sic] the significance of the Conditions 3, 6, and 12 to the protection of the natural and cultural resources within the Park. The project is located directly upslope from the Park. The groundwater-dependent resources and coastal resources in the Park would be directly impacted by contaminants and pollutants entering the groundwater under Petitioner's Project site. Our concern is heightened by the fact that the site is close to the coast and the Park, and the site is located where groundwater is relatively close to the surface.

NPS is specifically concerned that Petitioner has not demonstrated that the existing drainage improvements will maintain ocean water quality, and that the existing drainage system will actually act as a conduit for contaminants and pollutants to flow off the project site during storm events.

The Department of Health provided comments that the Petition area is within the critical wastewater disposal area. Any interim wastewater systems for the development may also have to address effects to any public trust, Native Hawaiian resources and the exercise of traditional cultural practices.

In its original motion, Petitioner asserts that it has prepared a plan for drainage and erosion control which was approved by the County of Hawai'i and the State Department of Health. The motion, however, contained no evidence of any approval from DOH of any drainage and erosion control plan or the construction of necessary drainage improvements and controls.

In its Supplemental Memorandum, Petitioner submitted a drainage site plan prepared in conjunction with an Underground Injection Control Application to construct an injection well.

The application for a UIC permit to construct an injection well was approved. But although an injection well is certainly a part of a drainage plan, UIC permits are issued for the purpose of protecting underground sources of drinking water. HAR § 11-23-01. They are not issued for the purpose of protecting ocean water quality. Consequently, the approval of the UIC application is not an approval of proposed mitigations to protect the quality of the ocean water as required by Condition 3. Furthermore, erosion control measures were not submitted as part of the UIC permit. Finally, we are unaware of any approval from the Department of Health, or evidence that any approved erosion and drainage improvements were correctly constructed.

Petitioner also argues that Paragraph I of Ordinance 99-89 makes Condition 3 unnecessary. Like Paragraph K, Paragraph I of Ordinance 99-89 is based upon the existence of a requirement by the LUC. Consequently, OP has concerns that Paragraph I as currently phrased is not a sufficient substitute for Condition 3.

Given the value of the nearby ocean resources, the possible risks associated with non-point source pollution, and the lack of sufficient proof by Petitioner that DOH has approved a drainage and erosion control plan to protect ocean water quality, OP cannot support the release of this condition at this time.

D. Condition 4.

4. Petitioner shall contribute its pro rata share of the cost to develop and distribute water to Petitioner's proposed project, together with other public and private property owners in the area.

OP defers to the County of Hawai'i regarding the release of this condition.

E. Condition 5.

5. Petitioner shall fund and construct the necessary waste-water disposal improvements on the subject property for eventual hook-up to a municipal sewer system as determined by the State Department of Health.

OP has no objections to releasing this condition.

In its Supplemental Memorandum, Petitioner submitted a letter from the Department of Health which states that the Petition Area is located within the critical wastewater disposal area; however, the Petitioner has completed construction of an 8-inch dry sewer line for the future connection to the Kealakehe Wastewater Treatment Plant. See OP Exhibit 5. The Department of Land and Natural Resources has indicated some concern regarding releasing this condition, but they defer to the Department of Health. See OP Exhibit 7.

F. Condition 6.

6. Petitioner shall coordinate with the County of Hawai'i and the State Department of Health to establish appropriate systems to contain spill and prevent material associated with light industrial uses, such as petroleum products, chemicals, solvents or other pollutants, from leaching into the storm drainage systems and adversely affecting the groundwater and coastal waters.

OP objects to releasing this condition.

In its original Motion, Petitioner states that it has satisfied this requirement through licensing agreements and covenants with individual tenants to eliminate the risk of spills and pollution. A review of the licensing agreements and covenants shows a general requirement that tenants establish appropriate systems to contain spills and prevent pollution, a prohibition against violating any Environmental Laws, and a requirement to indemnify the Petitioner for any such violation. See Petitioners Exhibit 3.

NPS stated that Condition 6 is necessary to protect the important natural and cultural resources within the National Park which is located directly upslope from the Petition Area. NPS is concerned that the licensing agreements and covenants do not establish the necessary systems and controls to prevent pollutants and contaminants from reaching the groundwater and

coastal waters along the Kona coast, including the waters within the National Park. See OP Exhibit 5.

Comments from the Department of Land and Natural Resources, Division of Aquatic Resources also indicated concern regarding the release of this condition without an explicit DOH confirmation that this Condition was satisfied. See OP Exhibit 7.

Comments from the Department of Hawaiian Home Lands (DHHL) also indicate that they have serious concerns regarding industrial land uses occurring adjacent to their lands. The porous volcanic soils in the area could allow spills to leak through contaminating groundwater and coastal waters. Thus, DHHL recommends that the condition remain in place to protect groundwater and coastal water resources. See OP Exhibit 4.

OP is also concerned that licensing agreements and covenants can be revised, and must be enforced by the land owner. They are, therefore, imperfect methods of preventing pollution and an inadequate substitute for condition 6. The record also does not indicate whether Petitioner is actively reviewing the proposed mitigation measures of the tenants to ensure that pollutants do not leach into the storm drainage systems or adversely affect the ground water and coastal waters, or whether these restrictions will remain and be enforced by the land owner if the condition were to be violated. Furthermore, there is no indication that Petitioner has worked with the Department of Health to formulate a pollution prevention plan that is binding on the property in perpetuity.

Given the importance of this Condition to important and valued natural and cultural resources, the concerns by NPS, DHHL, and DLNR, and the lack of proof of adequate enforcement and implementation of the licensing agreements and covenants now and in the future, OP objects to the release of this condition.

G. Condition 7.

7. Petitioner shall fund its pro rata share for electrical facilities as determined by the Hawaii Electric Light Company (HELCO).

OP defers to the County Planning Department.

H. Condition 8.

8. Petitioner shall immediately stop work on the impacted area and contact the State Historic Preservation Office should any archaeological resources such as artifacts, shell, bone, or charcoal deposits, human burial, rock or coral alignments, paving or walls be encountered during the project's development.

OP objects to releasing this condition.

Condition 8 requires Petitioner to stop work and contact the State Historic Preservation Office if any archaeological resources are discovered during the project's development. This is a standard condition imposed because archaeological resources, including burials, are sometimes discovered during construction.

In its original Motion and Supplemental Memorandum, Petitioner argues that an archaeological inventory was completed for the Petition Area, and no further archaeological resources have been uncovered.

Condition 8, however, is specifically applicable to the period after the archaeological inventory is completed. An archaeological inventory survey sets forth a landowner's best effort to identify archaeological resources within a Petition Area. But archaeological resources are sometimes missed in these surveys. Condition 8 is intended to apply to those situations where archaeological resources are found which were not previously identified. Furthermore, much of the Petition Area has no large scale permanent structures, and thus, would be easily converted to other uses. Such other uses could require earth moving and excavation which can uncover

unidentified archaeological resources. Consequently, there is an ongoing and continuing need for Condition 8.

In its Supplemental Memorandum, Petitioner argues that Paragraph M of Ordinance 99-89 and Section 10-10(b)(1) of the Hawai'i County Code make Condition 8 unnecessary. But Paragraph M requires notification of the Planning Department if archaeological resources are encountered, not the State Historic Preservation Division ("SHPD"). Because Paragraph M does not require notification of SHPD, Paragraph M is not a sufficient substitute for Condition 8. Section 10-10(b)(1)(C) is even less applicable, simply requiring the identification of archaeological sites prior to grading permits. But Condition 8 applies to inadvertent discoveries, i.e. those archaeological resources that were not previously identified.

The Supplemental Memorandum also includes a photograph. In our discussions with Petitioner, OP indicated that it could consider releasing Condition 8 if Petitioner could demonstrate that every part of Increment I had been excavated to a depth or not less than twenty feet. The likelihood of unidentified archaeological resources being found in this situation is fairly low and OP was willing to further consult with SHPD if Petitioner could make this demonstration. The Supplemental Memorandum contains a single photograph of a part of Increment I. See Petitioner's Exhibit 10. The photograph does not prove that every part of Increment I had been excavated to a depth of not less than twenty feet. Consequently, Petitioner's Exhibit 10 is insufficient to demonstrate that Condition 8 is no longer needed.

Given the ongoing and continuing need for Condition 8, OP objects to the release of this Condition.

I. Condition 9.

9. Petitioner shall provide its pro rata share for police, fire, park, and solid waste disposal as may be required by and to the satisfaction of the County of Hawai'i.

The Office of Planning defers to the County of Hawai'i.

J. Condition 10.

10. The Petitioner shall participate in an air quality monitoring program as specified by the State Department of Health.

OP has no objection to releasing this condition. Petitioner's Exhibit 5, a letter from the Department of Health indicates that the Petitioner has completed an air quality study establishing the current conditions of the area. In addition, the State Department of Health Clean Air Branch has indicated that the Petitioner has fulfilled this requirement. See OP Exhibit 12.

K. Condition 11.

11. The Petitioner shall implement effective soil erosion and dust control measures during all phases of the development.

OP objects to the release of condition 11.

The DHHL indicates that as adjacent land owners, the condition should remain in place. The DOH indicates that this condition could be released if all construction has been completed, and no new operations or activities that could cause fugitive dust is planned. Since it is not clear whether all construction is completed, the condition should remain in place. See OP Exhibit 10 and 12.

L. Condition 12.

12. Petitioner shall develop and maintain on-site facilities to insure that nearshore, offshore, and deep ocean waters remain in pristine condition. Petitioner shall also participate in a water quality monitoring system as may be required by the State Department of Health.

OP objects to releasing this condition.

The DHHL has concerns regarding industrial activities adjacent to their property, and recommends that this condition remain in place. See OP Exhibit 9.

In its original Motion, Petitioner argues that it participated in a pollution prevention forum in 2002. The record, however, does not demonstrate whether Petitioner has participated in a water quality monitoring system. Furthermore, the issue of water quality monitoring is a current controversy in this region, and future participation in water quality monitoring may be required.

In its Supplemental Memorandum, Petitioner cites to Finding of Fact 42 which relates that Petitioner's consultant opined that the project would only impact Honokohau Small Boat Harbor and the anchialine ponds in the Maliu and Kealakehe areas, and that there was little likelihood of significant environmental impact on the nearshore marine waters or anchialine ponds in this area as long as facilities to handle and collect industrial waste are properly maintained and the area is ultimately hooked into a municipal sewage system. Petitioner also cites to Finding of Fact 83 in which the LUC concluded that the proposed development is not anticipated to adversely affect the ocean or shoreline.

First, despite these Findings of Fact, the LUC still imposed Condition 12. So, these Findings of Fact should not affect whether Condition 12 should be retained. Second, we note that there is no evidence that Increment I has been hooked up to the municipal sewage system, and as discussed below whether industrial waste is properly handled and collected on an ongoing basis is dependent upon the particular tenants who happen to operate in Increment I at any given time. The interrelationship between land activities and nearshore, offshore and deep ocean waters is complex, and industrial activities in the Petition area could reasonably impact nearshore, offshore and deep ocean waters. Thus, this condition has not been satisfied, and should be retained.

M. Condition 13.

13. Petitioner shall develop the Property in substantial compliance with representations made to the Commission in obtaining the reclassification of the Property. Failure to so develop may result in reclassification of the property to its former land use classification.

OP recommends that this condition be retained. The Petition area could be redeveloped with other uses.

N. Condition 14.

14. Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interest in the subject property covered by the approved petition, prior to development of the Property.

The Office of Planning has no objection to the deletion of this condition.

O. Condition 15.

15. Petitioner shall provide annual reports to the Commission, the Office of State Planning and the County of Hawai'i Planning Department in connection with the status of the subject project and the Petitioner's progress in complying with the conditions imposed.

The Office of Planning objects to the release of this condition. Based upon the Office of Planning's recommendation to retain other conditions, annual reports will still be required to track the Petitioner's compliance.

P. Condition 16.

16. The Land Use Commission may fully or partially release these conditions as to all or any portion of the Property upon timely motion and upon the provision of adequate assurance of satisfaction of these conditions by Petitioner.

The Office of Planning objects to the release of this condition. Based upon OP's recommendation to retain a variety of other conditions, this condition is still required and should not be released.

**III. CONCLUSION**

For all the aforementioned reasons, OP recommends that Conditions 5, 10, and 14 be deleted, defers to the County of Hawai'i on Conditions 4, 7, and 9, and recommends that Conditions 1, 2, 3, 6, 8, 11, 12, 13, 15, and 16 be retained.

DATED: Honolulu, Hawai'i, this 27<sup>th</sup> day of August, 2015.

OFFICE OF PLANNING  
STATE OF HAWAI'I

*Per*   
\_\_\_\_\_  
LEO R. ASUNCION  
Acting Director

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of )  
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 Key Nos: (3) 7-4-08: 26 and 49. )  
 )

**CERTIFICATE OF SERVICE**

I hereby certify that due service of a copy of the **OFFICE OF PLANNING'S  
RESPONSE TO PETITIONER'S MOTION TO RELEASE, DISCHARGE AND DELETE  
ALL CONDITIONS IN THE LAND USE COMMISSION'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND DECISION AND ORDER, ENTERED APRIL 16, 1991**  
was made by depositing the same with the U. S. mail, postage prepaid, on August 27, 2015  
addressed to:

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DATED: Honolulu, Hawai'i, August 27, 2015.

*Leo R. Asuncion*  
\_\_\_\_\_  
for LEO R. ASUNCION  
Acting Director of Office of Planning