

DAVID KIMO FRANKEL
Chair, Sierra Club, Hawai'i Chapter
P.O. Box 1185
Volcano, HI 96785
Telephone: (808) 985-8822
frankel@lava.net

LAND USE COMMISSION
STATE OF HAWAII

2000 AUG -3 P 1:13

BEFORE THE LAND USE COMMISSION OF THE STATE OF HAWAII

IN THE MATTER OF)
)
)
)
To issue a declaratory order that the)
construction of a hotel, 125 houses)
and a golf course on 660 acres in the)
agricultural district require a)
boundary amendment.)

Docket No. DR 00-23

PETITION FOR A DECLARATORY
ORDER; EXHIBIT; CERTIFICATE
OF SERVICE

PETITION FOR A DECLARATORY ORDER

The Sierra Club and David Kimo Frankel, as an individual and as a member of the Sierra Club, as interested persons, file this Petition for a Declaratory Order from the State Land Use Commission, pursuant to HRS §91-8 and HAR § 15-15-98 *et.seq.* of the State Land Use Commission Rules.

I. IDENTIFICATION OF PETITIONERS & PETITIONERS' INTERESTS

The Sierra Club is a California non-profit corporation, registered to do business in the State of Hawai'i, with its principal place of business in Hawaii at 800 S. Beretania St, Suite 260, Honolulu, HI 96813 (phone: 538-6616). The Sierra Club is a national conservation organization comprised of approximately 610,000 members, with state chapters and groups focusing on local issues. The Sierra Club's Hawai'i Chapter represents over 3700 members who live in the state of Hawai'i. The Sierra Club's Moku Loa Group represents over 500 members who live on the

island of Hawai`i. The general purposes of the Sierra Club, Hawai`i Chapter and Moku Loa Group include: educating the public about Hawaii's natural resources through hikes; exploring Hawaii's wild places and natural resources; restoring and preserving ecosystems through hands-on service trips; protecting open space through lobbying and litigation; ensuring sound planning through proper application of Hawaii's environmental laws; protecting the integrity of the state's Land Use Law and the Land Use Commission. The Sierra Club Moku Loa Group has led over a half dozen hikes along Ka`awaloa Road down to the Cook Monument. Sierra Club members hike, kayak, paddle canoes, snorkel, whale watch and fish in and/or near Kealakekua Bay and the Keopuka area. The Sierra Club and its members have educational, cultural, recreational, aesthetic, scientific and environmental interests that would be directly and indirectly affected by development adjacent to or near Kealakekua Bay.

David Kimo Frankel is the Chair of the Hawai`i Chapter of the Sierra Club. His mailing address is P.O. Box 1185 Volcano, HI 96785 (phone: 985-8822). He has hiked on public trails that traverse the area and snorkeled in the area as well. He has worked to protect agricultural land and open space from being developed inappropriately; defended the Land Use Commission from attack at the Legislature; and promoted more public involvement in land use decisionmaking. He has aesthetic, recreational, environmental and professional interests in ensuring that the agricultural land near Kealakekua Bay is not developed into a hotel and luxury housing development.

II. ISSUE

Does the construction of a hotel and 125 luxury houses scattered around a golf course on 660 acres in the agricultural district require a boundary amendment or can they all be built without Land Use Commission review and approval?

III. FACTS

Pacific Star, LLC, an Arizona limited liability corporation, proposes to build a gated community comprised of 125 luxury houses, an 18-hole private golf course, a clubhouse, and a hotel on 660 acres in the State Agricultural District. The house lots are built on land that Pacific Star identifies as very poorly suited for agricultural use. According to Pacific Star, ninety percent of the project area consists of lava lands with little or no natural soils. Electrical and communication lines within the project will be placed underground. The lots, according to Pacific Star, are expected to appeal to second home buyers. Although the zoning of the area requires a minimum lot size of five acres, Pacific Star is applying for a county Planned Unit Development, in order to cluster 28 one acre lots near the shoreline, and 75 two acre lots on the slopes with the views. These 112 house lots comprising 225 acres would provide financial support to 13 five-acre farms. Pacific Star proposes to build a 100 unit hotel, with a lobby, administration offices, kitchen facilities, bungalow buildings, dining room, pool, spa and tennis courts. Pacific Star is calling the hotel a "members' hale" with accommodations for "project residents, golf club members, and guests." A pavilion "will be designed to complement the style used in the golf clubhouse and each would share a common garden area set between the golf clubhouse and main pavilion." Pacific Star intends to apply for a special permit from the county for the 13.5-acre hotel. All components of the project are being proposed as a part of a "master planned community."

The Keopuka Lands project is located directly adjacent to the Kealakekua Bay State Historical Park, which features Captain Cook Monument and a Marine Life Conservation District. The endangered humpback whale, green sea turtle (listed as a species "threatened" with extinction) and spinner dolphin pass through the class AA pristine waters fronting the project.

Native shorebirds, hawks and owl as well as over a dozen indigenous plant species are found in the project area. The area is identified in the county general plan as an example of the natural beauty in the Kona districts.

The project is located partly within the Kealakekua Bay Archaeological and Historic District, which is on the National Register of Historic Places. Kealakekua is the home of Lono, the God of Agriculture and the inventor of the Makahiki Festival. Ka`awaloa, which borders Keopuka proper -- and part of which is included in the project area -- was the home of ali`i. It is where Captain Cook was killed.

IV. STATUTORY PROVISIONS AND RULES AT ISSUE

HRS § 205-4.5(c), with respect to permissible uses in the agricultural district, states:

(c) Within the agricultural district all lands, with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

HRS § 205-5(b), with respect to permissible uses in the agricultural district, states

(b) Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance. Other uses may be allowed by special permits issued pursuant to this chapter. . . .

HRS § 205-2(d), with respect to permissible uses in the agricultural district:

(d) Agricultural districts shall include activities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, aquaculture, and game and fish propagation; aquaculture, which means the production of aquatic plant and animal life for food and fiber within ponds and other bodies of water; wind generated energy production for public, private, and commercial use; bona fide agricultural services and uses which support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, whether or not conducted on the same premises as the agricultural activities to which they are accessory, including but not limited to farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises; wind machines and wind farms; small-scale meteorological, air quality,

noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land, provided that such facilities shall not be used as or equipped for use as living quarters or dwellings; agricultural parks; and open area recreational facilities, including golf courses and golf driving ranges; provided that they are not located within agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B. These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

HRS § 205-4.5(a)(4), with respect to farm dwellings states:

(4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry; Farm dwelling as used in this paragraph means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;

HRS § 205-3.1(a), with respect to boundary amendments, states:

(a) District boundary amendments involving land areas greater than fifteen acres shall be processed by the land use commission pursuant to section 205-4.

HRS 205-6(d), with respect to special permits, states:

(d) Special permits for land the area of which is greater than fifteen acres shall be subject to approval by the land use commission. The land use commission may impose additional restriction as may be necessary or appropriate in granting such approval, including the adherence to representations made by the applicant.

Hawaii Land Use Commission Rules, HAR § 15-15-03 includes the following definitions:

"Accessory building or use" means a subordinate building or use which is incidental to and customary with a permitted use of the land.

"Farm dwelling" means a single-family dwelling located on and used in connection with a farm or where agricultural activity provides income to the family occupying the dwelling.

Hawaii Land Use Commission Rules, HAR § 15-15-23, with respect to permissible uses generally, states:

Except as otherwise provided in this chapter, the following land and building uses are compatible and permitted within the following land use districts, except when

applicable county ordinances or regulations are more restrictive. Except as otherwise provided in this chapter, uses not expressly permitted are prohibited.

Hawaii Land Use Commission Rules, HAR § 15-15-25(b), with respect to permissible uses in the agricultural district, states:

(b) Permissible uses within the agricultural district land classified by the land study bureau's detailed land classification as overall (master) productivity rating class of C, D, E, and U shall be those uses permitted in A and B lands as set forth in section 205-4.5, HRS, and also those uses set forth in section 205-2(d).

HRS § 205-15, with respect to conflict of laws, states:

Except as specifically provided by this chapter and the rules adopted thereto, neither the authority for the administration of chapter 183C nor the authority vested in the counties under section 46-4 shall be affected.

V. STATEMENT OF THE CONTROVERSY INVOLVED

Pacific Star believes that it does not need to apply for a boundary amendment in order to build a hotel and 125 luxury houses surrounding an 18-hole private golf course on land classified by the LUC as agricultural. While it intends to apply to the county for a special use permit for the hotel, it identifies the hotel project area as less than 15 acres, thereby avoiding LUC review.

Petitioners believe that the urban nature of this project requires that Pacific Star submit a boundary amendment petition to the Land Use Commission. Furthermore, petitioners contend that the hotel ("members hale") is inextricably linked to the remaining 660-acre project since the only people who can stay at the 100-unit hotel are "Project residents, golf club members, and guests." As a master planned project, pieces of it cannot be separated out in order to limit the size of the project to less than 15 acres.

VI. PETITIONERS' POSITION & MEMORANDUM OF AUTHORITIES

The Hawai'i State Constitution, the plain language of HRS Chapter 205 (The Land Use Law), the legislative intent, the legislative history, the Land Use Commission's rules and orders,

Supreme Court and Intermediate Court of Appeals decisions and public policy make it abundantly clear that an urbanization project entailing a hotel, 125 luxury houses and a golf course are not permissible in the agricultural district.

A. THE LEGISLATURE INTENDED TO PROHIBIT URBANIZATION PROJECTS IN THE AGRICULTURAL DISTRICT THROUGH PASSAGE OF THE LAND USE LAW.

The Hawai'i State Constitution Article 11 Section 3 mandates: "The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands."

HRS Chapter 205's language and its legislative history demonstrate that the Legislature intended to prohibit major urban uses and subdivisions on land classified as "agricultural."

1. LANGUAGE

HRS Chapter 205 makes it abundantly clear that urban type uses are not allowed in the agricultural district. The type of uses is narrowly identified. Only those uses identified in HRS § 205-2(d) and HRS § 205-4.5 are allowed in the agricultural district, HRS § 205-4.5(c), HRS § 205-5(b).

HRS § 205-2(d) states:

(d) Agricultural districts shall include activities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, aquaculture, and game and fish propagation; aquaculture, which means the production of aquatic plant and animal life for food and fiber within ponds and other bodies of water; wind generated energy production for public, private, and commercial use; bona fide agricultural services and uses which support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, whether or not conducted on the same premises as the agricultural activities to which they are accessory, including but not limited to farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises; wind machines and wind farms; small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land, provided that such facilities shall not be used

as or equipped for use as living quarters or dwellings; agricultural parks; and open are recreational facilities, including golf courses and golf driving ranges; provided that they are not located within agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B. These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

The list of uses identified in HRS § 205-4.5(a)(4), is even more limited than the uses specified in HRS § 205-2(d), but it does include a definition of farm dwellings:

(4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry; Farm dwelling as used in this paragraph means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;

The proper procedure for developing in the agricultural district, is to apply for a boundary amendment pursuant to HRS § 205-3.1.

2. THE LEGISLATIVE HISTORY OF THE LAND USE LAW REFLECTS THE LEGISLATURE'S INTENT THAT HOUSING DEVELOPMENTS ARE PROHIBITTED IN THE AGRICULTURAL DISTRICT

HRS Chapter 205 serves to protect agricultural lands, prevent scattered urban development, reduce infrastructure costs, protect natural resources and encourage urban growth in urban areas. 1961 House Journal 855; 1961 Sess. Laws 299; See also, HRS § 226-104. As the Hawai'i Supreme Court recently noted:

In sum, the overarching purpose of the state land use law is to "protect and conserve" natural resources and foster "intelligent," "effective," and "orderly" land allocation and development. See 1961 Haw. Sess. L. Act 187 § 1 at 299 ("[I]n order to preserve, protect and encourage the development of lands in the State for those uses to which they are best suited for the public welfare . . . , the power to zone should be exercised by the State.") See also Pearl Ridge Estates Community Ass'n v. Lear Siegler, Inc., 65 Haw. 133, 144 n.9, 648 P.2d 702, 709 n.9 (Nakamura, J., concurring)("Thus, conservation lands must be reserved if practicable, agricultural lands should be protected, and urban lands should be developed in orderly fashion.")

Curtis v. Board of Appeals, County of Hawai'i, 90 Haw. 384, 396 (1999), 978 P. 2d 822, 834.

The court has long observed that the emphasis of the Land Use Law is on controlling growth and protecting resources:

By enacting HRS ch. 205 in 1961, the legislature intended, inter alia, to “[s]tage the allocation of land for development in an orderly plan,” H.Stand.Comm.Rep. No. 395, 1st Haw.Leg., 2d Sess., reprinted House Journal 855-56, and to redress the problem of “inadequate controls [which] have caused many of Hawaii’s limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in long-term loss to the income and growth potential of our economy. Act 187, 1961 Haw.Sess. Laws 299.

Neighborhood Board v. State Land Use Commission, 64 Haw. 265, 272-3, 639 P.2d 1097

(1982). In passing the Land Use Law, the Senate noted:

The purpose of this bill is to preserve and protect land best suited for cultivation, forestry and other agricultural purposes and to facilitate sound and economical urban development in order to promote the economy and general welfare of the state, and to insure the efficient expenditure of public funds. . . .

The state must protect its valuable land resources. There is a special need to protect agricultural land from urban encroachment, to prevent scattered and premature development, to limit land speculation of urban areas, and to protect the unique natural assets of the state.

The state’s highly productive agricultural lands are jeopardized by normal economic laws which encourage land owners to place their own particular pieces of land to the most profitable current use for which they can find a market. Long term agricultural leases are expiring annually. Because of the pressure for urbanization the land owners are reluctant to continue long term renewals of such leases, and the lessee is therefore discouraged to develop the land to its maximum agricultural production. If exclusive agricultural zones are not established to preserve and protect prime agricultural lands from infringement by non-agricultural uses, the possibility of land speculation through inflated or artificial land prices may jeopardize the existence of major agricultural companies or activities. The most effective protection of prime agricultural lands, preservation of open space and direction of for urban growth, is through state zoning.

S. Stand.Comm.Rep. No.937, 1961 Senate Journal 883.

HRS Chapter 205 was enacted in an effort to manage growth on islands of limited resources:

Scattered subdivisions with expensive, yet reduced public services; the shifting of prime agricultural lands into non-revenue producing residential uses when other lands are available that could serve adequately urban needs . . . these are evidences of the need for public concern and action.

Act 187, 1961 Haw Sess. Laws 299.

Since the passage of the Land Use Law, it has been amended several times. These amendments reflect the Legislature's intent that housing development and other urban uses not be placed in the agricultural district.

In 1976, the Legislature amended the Land Use Law to clarify that urban type residential subdivisions are not authorized on agricultural land.

The purpose of the agricultural district classification is to control the uses of the land for agricultural purposes. This purpose is being frustrated by the development of urban type residential communities in the guise of agricultural subdivisions. To discourage abuse of this purpose, the bill, as amended, more clearly defines the uses permitted within the agricultural district. Except for such uses permitted under special use permits in Section 205-6, and for nonconforming uses permitted in Section 205-8, uses not permitted by this bill shall be prohibited.

S.Stan.Comm. Rep. No. 662-76, 1976 Haw.Leg. Sess., Senate J. 1177; See HRS 205-4.5.

(Although the bill applied only to lands classified A or B, the Land Use Commission later adopted rules that restricted the type of permissible uses on lands rated C, D, E and U to only those uses identified in this bill as well as those identified in HRS 205-2, Hawaii Land Use Commission Rules, HAR § 15-15-25(b).)

In 1985, the Legislature amended the Land Use Law to allow golf courses on non-prime land without a permit. As observed in the UH Law Review:

Ostensibly, by enumerating golf courses specifically as a permitted use on non-prime agricultural lands, the Act gave golf courses priority over other uses of land such as housing development, which are required to go through the permit process. Such priority was hotly debated. An exchange between Senators James Aki and Benjamin Cayetano exemplifies the controversy:

[Senator Cayetano:] I've always wondered why the Democratic Party chose the jackass as symbol while the Republicans chose the elephant, and after

listening to the debate today, I've come to the conclusion that with the jackass it's easier to kick yourself in the ass. That's what we're doing by passing this bill. . . . [T]hat's what we're doing when we elevate golf courses, a game in which one spends hours hitting a little white ball, when we elevate that to the level of priority that we don't even give housing[.] . . . [W]ho is this bill for?;

[Senator Aki:] This bill is for all of us, for all of Hawaii, for economic development, for jobs.

. . . .

[Senator Cayetano:] Well, Mr. President [referring to the Senate President moderating the exchange]. I think I asked [Senator Aki] this question in the caucus, behind closed doors . . . when I asked, and I asked expressly and let me quote myself verbatim: "Who is this bill for" and the answer was "some developer in my district."

I find all of this incredible. . . . [T]his bill . . . will now raise the development of golf courses to a level of priority which is higher than housing and maybe it's on the level of geothermal energy.

Debate on House Bill No. 1063, 1985 Haw. Leg. Sess., Senate J 697-98.

13 UH Law Review (1991 pp. 215-216 at footnote 57).

The Legislature's 1985 action demonstrates that although golf courses do not need a permit in the agricultural district, it did not similarly allow subdivisions to be built on agricultural land.

B. THIS AGENCY'S RULES AND ORDERS PROHIBIT URBANIZATION PROJECTS IN THE AGRICULTURAL DISTRICT.

The Land Use Commission's rules provide that all uses not expressly permitted in the agricultural district are prohibited, HAR § 15-15-23. The only uses allowed in the agricultural district are those set forth in HRS § 205-4.5 and HRS § 205-2(d), HAR § 15-15-25(b).

This commission has itself recognized that residential dwellings that are unrelated to agriculture are not permitted in the agricultural district. The commission has concluded that:

Chapter 205, Hawaii Revised Statutes, does not authorize residential dwellings as a permissible use within an agricultural use district, unless the dwelling is related to an agricultural activity or is a "farm dwelling."

In the matter of Godfrey, Dec. 6, 1994 Declaratory Order (p. 17). In ruling that the Land Use Law and the Commission's rules do not allow overnight camps on State Land Use Agricultural District lands, the Commission held:

HRS Chapter 205 does not expressly or by any implication allow agricultural district lands to be used to accommodate overnight camps or dwellings where there is no apparent evidence of any activity for uses related to farming or animal husbandry.

In the matter of Pono, May 7, 1997 (p. 14).

C. THE COURTS HAVE CONDEMNED PLOYS TO CIRCUMVENT THE LAND USE LAW

The Hawai'i Supreme Court has stressed the importance of preventing "ad hoc infusions of major urban uses into agricultural districts." Neighborhood Board v. State Land Use Commission, 65 Haw 265, 273 (1982). In that case, the Supreme Court vacated a special permit to build an amusement park on 103 acres in the agricultural district. The court found that the urban enterprise in the agricultural district would "frustrate the objectives and effectiveness of Hawaii's land use scheme." Id. at 272.

Similarly, in Curtis v. Board of Appeals, County of Hawai'i, 90 Haw. 384, 396 (1999), the Supreme Court looked to the "reason and spirit" of the state land use law to determine that allowing cellular towers in the agricultural district as a permissible use "unreasonably expands the intended scope of this term [utility lines] and frustrates the state land use law's objectives of protection and rational development."

The Intermediate Court of Appeals similarly demonstrated displeasure with attempts to circumvent the Land Use Law.

Although the enforcement of the State of Hawaii's land use laws is not before us in this case, we are extremely troubled by WRE's apparent use of the restrictive covenants to privately rezone land that is classified agricultural use and thereby create large estates for the wealthy, who have no intention of maintaining the land for agricultural purposes.

Angel Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 431 at fn 3, 876 P.2d 1320 (1994).

D. A GATED COMMUNITY OF 125 LUXURY HOUSES SURROUNDING A GOLF COURSE, TOGETHER WITH A HOTEL ARE NOT PERMISSABLE USES IN THE AGRICULTURAL DISTRICT.

Given the scope and nature of this project, it is hard to imagine what creative loophole is being crafted to justify it in the agricultural district. A gated community of 125 luxury houses surrounding a golf course together with a hotel is certainly as intrusive an urban use as an amusement park. Neighborhood Board v. State Land Use Commission, 65 Haw 265, 273 (1982).

Perhaps Pacific Star is attempting to rely on the lengthy phrase found in HRS 205-2(c), which reads:

bona fide agricultural services and uses which support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, whether or not conducted on the same premises as the agricultural activities to which they are accessory, including but not limited to farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises

Read carefully, this phrase provides a three-part test for certain kinds of accessory activities in the agricultural district. The three elements are the use or service:

- 1) is bona fide agricultural;
- 2) supports the agricultural activities of the fee or leasehold owner of the property; and
- 3) is accessory to cultivation of crops, orchards, forage, forestry, farming activities, animal husbandry, aquaculture, game and fish propagation, or wind generated energy production -- including, but not limited to, farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities,

vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises.

Pacific Star proposes that the 225 acres slated for 112 one and two acre house lots will provide financial support for 13 five-acre lots, comprising 75 acres. In so doing it seems to suggest that the luxury houses will be supporting the agricultural component of the project, and therefore are allowed under the law.

The luxury houses in and of themselves are not bona fide agricultural services or uses, however. No tortured construction of this phrase can suggest that luxury housing is a bona fide agricultural use. Providing some sort of financial support to the 13 farms on 75 acres does not make the remaining 112 houses on 225 acres a "bona fide agricultural service." To suggest so would make a complete mockery of the Legislature's intent in passing the Land Use Law to prevent scattered urban development, to limit land speculation, and to protect the unique natural assets of the state. Sanctioning such a scheme "unreasonably expands the intended scope of this term and frustrates the state land use law's basic objectives of protection and rational development." Curtis v. Board of Appeals, County of Hawai'i, 90 Haw. 384, 396 (1999).

Nor is it fair to suggest that these luxury houses are "accessory" to agriculture. Employee housing, farm buildings, mills, storage facilities, processing facilities, equipment storage areas and roadside stands are all part and parcel of providing agricultural services. They are clearly accessory uses, necessary for the viability of agriculture. Farms need mills, storage facilities etc. Farms, however, don't need luxury housing.

As the Land Use Commission's own rules recognize "'accessory building or use' means a subordinate building or use which is incidental to and customary with a permitted use of the land," HAR § 15-15-03. The 112 one and two acre houselots for luxury houses scattered over

225 acres are clearly not subordinate to the 13 farms on 75 acres. Nor are they incidental and customary to a permitted use of the land.

Finally, Pacific Star cannot claim that the 112 houses are slated for farm dwellings. While 13 of the lots are slated for agriculture, none of the remaining 112 are. In fact, Pacific Star asserts that ninety percent of the project area consists of lava lands with little or no natural soils. The house lots are built on land that Pacific Star identifies as very poorly suited for agricultural use. The lots, for which electrical and communication lines within the project will be placed underground are, according to Pacific Star, expected to appeal to second home buyers.

These houses are not farmhouses or related to agriculture in any meaningful way.

E. THE HOTEL MAY NOT BE SEGMENTED FROM THE REMAINDER OF THE MASTER PLANNED DEVELOPMENT PROJECT IN ORDER TO OBTAIN A SPECIAL PERMIT FROM THE COUNTY AND AVOID LUC REVIEW.

In expressing its intention to apply for a special permit (15 acres or less) from the county, Pacific Star attempts to segment its proposed development into pieces. Such segmentation would allow Pacific Star to avoid LUC review. Segmentation of the project for the purposes of obtaining a special permit should not be tolerated.

The law relating to environmental impact statements is instructive. Environmental Impact Statement Rules provide:

A group of actions proposed by an agency or an applicant shall be treated as a single action when:

- (1) The component actions are phases or increments of a larger undertaking;
- (2) An individual project is a necessary precedent for a larger project;
- (3) An individual project represents a commitment to a larger project; or
- (4) The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of actions as a whole.

Hawaii Administrative Rules 11-200-7. The rationale is clear:

[T]here are situations in which an agency is required to consider several related actions in a single EIS. Not to require this would permit dividing a project into multiple "actions," each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.

Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985). The approval process here should likewise allow the decision-maker to examine all the interrelated components of the project.

Pacific Star goes to great pains to describe its project as a "master planned community." It does so, in part, so that it can obtain the benefits of the county Planned Unit Development Ordinance. The purpose of the ordinance is to "encourage comprehensive site planning." Hawaii County Code 25-6-1. This ordinance provides, in part,

The development of a harmonious, integrated whole justifies exemptions, if required, to the normal requirements of this [zoning] chapter, and the contemplated arrangements or use make it desirable to apply regulations and requirements differing from those ordinarily applicable under the district regulations.

Hawaii County Code 25-6-3(6).

Pacific Star's master planned development's components are interrelated, connected and interdependent. Pacific Star's "members hale" will include a 100 unit hotel, with a lobby, administration offices, kitchen facilities, bungalow buildings, dining room, pool, spa and tennis courts. The "members' hale" provides "accommodations for project residents, golf club members, and guests." A pavilion "will be designed to complement the style used in the golf clubhouse and each would share a common garden area set between the golf clubhouse and main pavilion."

Because use of the "members hale" is limited to people who live in the houses within the development and members of the golf course (and their guests), the "members hale" cannot be designated as a stand-alone project. It is inextricably linked both to the golf course and the 125

house lots. It is part of the master planned community. It therefore may not be considered a separate action requiring only county approval.

F. ALLOWING THE DEVELOPER TO CIRCUMVENT LAND USE COMMISSION REVIEW WOULD UNDERMINE THE AUTHORITY OF THE LUC

Allowing this type of development to avoid Land Use Commission review and approval would establish a precedent that would ultimately undermine the value and effectiveness of the Land Use Law and the Commission. Instead of submitting reclassification petitions to the Commission, developers would creatively justify how each subdivision finances a minor agricultural component. The authority of the LUC would be completely undercut. The state would relinquish its ability to protect cultural sites and natural resources. It would be unable to minimize public infrastructure costs. The price of agricultural land would increase as the speculative value of these lands increases dramatically. Small farmers would be unable to afford to rent or buy agricultural land. Large landowners will be even less likely to enter into long-term and affordable leases to farmers as they perceive that these lands can be put to more profitable residential uses. Development would not longer be concentrated in urban clusters, but instead be sprawled out through out the islands. These new subdivisions would soon demand their fare share of urban services from state and county governments: schools, libraries, roads, police and fire protection and parks.

VII. CONCLUSION

Based upon the foregoing, Petitioners respectfully request that this Commission enter the following declaratory order:

A. Luxury housing developments and hotels are not permissible uses on agricultural land.

B. Pacific Star must apply for a district boundary amendment to develop its master planned community at Keopuka because of the urban-like nature, size and scope of the development.

C. The county may not grant a special permit for the "members hale" because the "members hale" is connected to, interrelated and interdependent on the activities and development on the remaining over six hundred acres.

Dated: Volcano, Hawai'i

3 August 2000



David Kimo Frankel
Sierra Club, Hawai'i Chapter Chair

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Sierra Club's petition was served upon the following by U.S.

Postal Service certified mail:


Pacific Star, LLC
c/o William L. Moore Planning
159 Hala'i Street
Hilo, HI 96720

Ms. Virginia Goldstein
County Planning Department
25 Aupuni St. Room 109
Hilo, HI 96720-8742

and that a copy of the Sierra Club's petition was served by hand to:

Office of Planning
235 S. Beretania
State Office Tower
Honolulu, HI 96813

Dated, Volcano, Hawai'i this day of 3 August 2000



David Kimo Frankel
Chair Sierra Club, Hawai'i Chapter