

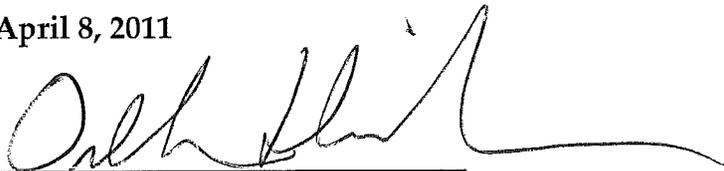
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**DOCKET NO. A09-782
TROPIC LAND LLC**

**ORAL ARGUMENT,
DELIBERATION, AND ACTION**

STAFF REPORT

MEETING
April 8, 2011

A handwritten signature in black ink, appearing to read 'Orlando Davidson', written over a horizontal line.

Orlando Davidson, Executive Officer

Submitted: March 31, 2011

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1. INTRODUCTION

Upon the closure of the evidentiary hearing on February 2, 2011, Chair Devens instructed the parties to file their proposed findings of fact, conclusions of law, and decision and orders with the Land Use Commission ("LUC") and serve copies upon the other parties no later than the close of business on February 24, 2011.¹ All comments and objections to the parties' respective proposals were to be filed with the LUC and served upon the other parties no later than the close of business on March 14, 2011. Responses to the comments and objections filed on March 14, 2011, were to be filed with the LUC and served upon the other parties no later than the close of business on March 21, 2011. The parties have since filed the following documents with the LUC:

Tropic Land LLC ("Petitioner")

- 1) Proposed Findings of Fact, Conclusions of Law and Decision and Order filed February 28, 2011;
- 2) Response to Office of Planning's and Intervenor's Proposed Findings of Facts, Conclusions of Law and Decision and Order filed March 14, 2011; and
- 3) Comments to Other Parties' Responses filed March 21, 2011.

Office of Planning ("OP")

- 1) Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed February 28, 2011;
- 2) Comments and Objections to Petitioner's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed March 14, 2011;
- 3) Comments and Objections to Intervenor's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed March 14, 2011;

¹ The parties agreed to defer the filing of their respective findings of fact, conclusions of law, and decision and orders until the close of business on February 28, 2011.

- 4) Reply to Petitioner's Response to Office of Planning's and Intervenor's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed March 21, 2011; and
- 5) Response to Intervenor's Response to Petitioner's and Office of Planning's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed March 23, 2011.²

Department of Planning and Permitting ("DPP")

- 1) Partial Joinder to Petitioner's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed March 14, 2011; and
- 2) Letter Correcting Partial Joinder to Petitioner's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed March 30, 2011.

The Concerned Elders of Waianae ("Intervenor")

- 1) Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed February 28, 2011;
- 2) Response to Petitioner's and Office of Planning's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed March 14, 2011; and
- 3) Comments on Petitioner's Response to Office of Planning's and Intervenor's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed March 21, 2011.

Upon review of the above pleadings, staff prepared the attached matrix for the LUC's reference that identifies the position of each party on the Petition and compares their proposed conditions as well as their respective positions to the other parties' proposals. The selected conditions listed involve the following major areas of concern initially identified by the parties:

² OP requested, without objection from the other parties, two additional days in which to file its response due to the illness of the planner assigned to this docket.

- Lualualei Naval Access Road
- Transportation Improvements
- Restrictions on Land Use
- Established Access Rights Protected
- Stormwater Management and Drainage
- Energy Conservation
- Notice of Change to Ownership Interests
- Annual Reports
- Release of Conditions

Staff has provided commentary regarding the LUC's past actions with respect to these areas of concern in four of the most recently approved dockets involving, in part, light industrial uses: A88-634/Alexander & Baldwin, Inc. (Maui Business Park Phase II); A03-739/A&B Properties, Inc. (Maui Business Park Phase II); A04-748/Consolidated Baseyards LLC; and A06-763/Kapolei Property Development, LLC (Kapolei Harborside Center).

In summarizing the salient proposals of the parties for each area of concern, staff utilized the following acronyms:

CCRs	Covenants, Conditions and Restrictions
D&O	Decision and Order
DOH	Department of Health
DOT	Department of Transportation
DPP	Department of Planning and Permitting
DTS	Department of Transportation Services
LEED	Leadership in Energy and Environmental Design
LNAR	Lualualei Naval Access Road
OP	Office of Planning
TIAR	Traffic Impact Analysis Report
USGBC	U.S. Green Building Council

2. COMPARISON OF CONDITIONS BY PARTY

See attached matrix.

3. AREAS OF GENERAL AGREEMENT

Both OP and DPP are in favor of Petitioner's proposed industrial park for light industrial uses. The Concerned Elders of Waianae are opposed to the development, and therefore have not proposed any conditions of approval. Petitioner, OP, and DPP are in general agreement (i.e., no objection) with respect to the proposed conditions on the following areas:

- Archaeological and Historic Preservation (Petitioner's and OP's conditions are similar but not identical; DPP supports Petitioner's condition)
- Previously Unidentified Burials and Archaeological/Historic Sites (Petitioner's and OP's conditions are similar but not identical; DPP supports Petitioner's condition)
- Air Quality Monitoring (OP has a non-substantive change)
- Pollution Prevention Best Management Practices (OP has a non-substantive change)
- Compliance with Representations to the Commission
- Notice of Imposition of Conditions
- Recordation of Conditions

In addition, Petitioner and OP are in general agreement on the proposed conditions on the following areas:³

- Civil Defense
- Compliance with HRS Section 205-3.5, Related to Agricultural Uses on Adjacent Land
- Solid Waste and Industrial Waste Management
- Water System Improvements
- Wastewater
- Water Conservation Measures

³ In its Partial Joinder and subsequent letter of correction, DPP stated that it supported Petitioner's originally proposed conditions on the first seven areas (DPP had a minor correction to the City agency referred to in the condition relating to solid waste). The conditions on the last two areas were proposed by OP only. On the same day DPP filed its Partial Joinder, Petitioner filed its response to OP's and Intervenor's Proposed Findings of Fact, Conclusions of Law, and Decision and Order in which Petitioner stated, among other things, that it had no objections to OP's proposed revisions to the conditions on these seven areas. As DPP's letter of correction does not address Petitioner's responses to OP's revisions, DPP's position on this matter as well as on the conditions on the last two areas is unclear.

- Infrastructure Deadline⁴
- Abandonment of Capped Wells
- Community Plan Amendment⁵

⁴ Although Petitioner does not object to OP's proposed condition, Petitioner does not believe a written report is necessary given that under its proposed annual report condition, Petitioner would be required to submit written annual progress reports to the Commission and under its proposed release of conditions condition Petitioner must request a release of conditions once they have been satisfied.

⁵ Although Petitioner does not object to OP's proposed condition, Petitioner believes imposing intermediate deadlines for particular approvals to be obtained as specified in the condition is unnecessary given that under the proposed infrastructure deadline condition, Petitioner would be required to obtain all approvals and construct its infrastructure within ten years.

4. AREAS OF CONCERN BY INTERVENOR

Intervenor opposes the reclassification of the Petition Area for the proposed development. Its arguments urging the LUC to deny the Petition include the following:

- The reclassification is not consistent with the Hawaii State Plan goals for economic growth, protected historic resources, and diversified agriculture.
- The reclassification is not consistent with the Waianae Sustainable Communities Plan.
- The reclassification is not consistent with the following Urban District standards:
 - The Petition Area is not near existing centers of trading and employment;
 - Public services are not sufficiently available;
 - The Petition Area is not reasonably free from flooding and unstable soil conditions;
 - The Petition Area is not appropriate for new urban concentrations; and
 - Reclassification of the Petition Area will contribute to scattered urban development.
- The reclassification adversely impacts areas of State concern, including valued cultural and historical resources, agricultural resources, and State funds and resources.
- Petitioner has not demonstrated its ability to complete the proposed development.
- The reclassification is not consistent with the goals and policies of the Coastal Zone Management Act, including those pertaining to historic resources, scenic and open space resources, and shoreline resources.

COMPARISON OF CONDITIONS BY PARTY

	PETITIONER	OFFICE OF PLANNING	DEPARTMENT OF PLANNING AND PERMITTING	THE CONCERNED ELDERS OF WAIANAE
POSITION ON PETITION	Supports reclassification of the Petition Area and proposes conditions accordingly.	Supports reclassification of the Petition Area and proposes conditions accordingly.	Supports reclassification of the Petition Area and proposes conditions accordingly.	Opposes reclassification of the Petition Area.
LUALUALEI NAVAL ACCESS ROAD (LNAR)	Proposes condition requiring Petitioner to enter into an agreement with the Navy granting Petitioner and Petitioner's buyers and lessees an easement to use LNAR for access to and from the Petition Area. Also requires condition to be incorporated into any Unilateral Agreement entered into by Petitioner as a condition to approval by the City of an ordinance rezoning the Petition Area. Does not oppose OP's condition insofar as obtaining the access agreement within 5 years of the D&O for a term of at least 30 years. Opposes that part of OP's condition requiring Petitioner to obtain the agreement prior to the filing of a zone change application inasmuch as requiring government approvals to be obtained sequentially may jeopardize completing project construction within 10 years.	Proposes condition requiring Petitioner to acquire and maintain access to the Petition Area from LNAR pursuant to a long-term agreement no less than 30 years with the Navy. Also requires the execution of the agreement prior to the filing of an application for a zone change for the Petition Area with the City and within 5 years of the date of the D&O.	Proposes condition requiring that prior to County zone change approval of the project, Petitioner acquire access rights to LNAR pursuant to a long-term agreement of no less than 30 years with the Navy. ¹	No condition proposed.
TRANSPORTATION IMPROVEMENTS/ HIGHWAYS	Proposes condition requiring Petitioner to contribute its fair share to the cost of implementing traffic improvements and mitigation measures to alleviate the impacts of the project on State highway facilities as recommended by the TIAR, and as accepted by the DOT and the DTS and any updated TIAR by DOT or DTS. Further specifies that traffic mitigation measures and improvements may include widening of southbound Farrington Highway at LNAR to provide a 350-foot-long left turn lane and widening of LNAR at Farrington Highway to provide double left turn lanes and an exclusive right turn lane. Also requires the incorporation of DOT approval of the improvements and mitigation measures as a condition in the Unilateral Agreement. Opposes OP's proposed condition arguing any improvements should be done to solve regional conditions, that its consultant testified current conditions warranted these improvements, that there is no reason for updated TIARs given the project's construction timetable, and that there is no need to study additional intersections.	Proposes condition requiring Petitioner to fully fund and complete all transportation improvements necessary to mitigate the impacts of the project on State highway facilities as recommended in the TIAR dated 1/29/10 approved by the DOT and any updated TIARs prepared for and accepted by DOT. Also requires Petitioner to update the TIAR for DOT's review and acceptance every 5 years from the effective date of the D&O, or prior to the start of each major phase of development as determined in consultation with DOT. Further requires the TIAR to include the LNAR/Farrington Highway intersection. Finally requires Petitioner to proceed with development only after DOT reviews and accepts the updated TIARs and the measures recommended to mitigate transportation impacts.	Proposes condition requiring Petitioner to contribute its fair share to the cost of implementing traffic improvements and mitigation measures to alleviate the impacts of the project on State highway facilities, as recommended by the TIAR for the project, and as accepted by the DOT and the City DTS, and any updated TIAR for the project by DOT or DTS. Also specifies that traffic mitigation measures and improvements may include widening of southbound Farrington Highway at LNAR to provide a 350-foot-long left turn lane and widening of LNAR at Farrington Highway to provide double left turn lanes and an exclusive right turn lane.	No condition proposed.

COMPARISON OF CONDITIONS BY PARTY

	PETITIONER	OFFICE OF PLANNING	DEPARTMENT OF PLANNING AND PERMITTING	THE CONCERNED ELDERS OF WAIANAE
ESTABLISHED ACCESS RIGHTS PROTECTED	Proposes condition requiring Petitioner to observe any legally established access rights of Native Hawaiians for legally recognized purposes. Notes that OP's proposed condition does not include the term "legally recognized purposes" in reference to what access rights would be observed.	Proposes condition requiring Petitioner to preserve any established access rights of Native Hawaiians who have customarily and traditionally used the Petition Area to exercise subsistence, cultural, and religious practices, or for access to other areas.	Supports Petitioner's proposed condition.	No condition proposed.
STORMWATER MANAGEMENT AND DRAINAGE	Proposes condition requiring Petitioner to fund the design and construction and cause to be maintained stormwater and drainage system improvements for the Petition Area. Also requires the CCRs for the project to impose low impact development features for stormwater capture and reuse in site design and development, to the extent practicable and allowed by the City, to prevent runoff from adversely affecting downstream properties and receiving streams and coastal waters, consistent with federal, State, and County laws, ordinances, and rules. Opposes OP's requirement that low impact development features be incorporated in design and construction of backbone infrastructure and included in the CCRs. Argues that it is unaware of any generally accepted definition of low impact development features that satisfy this requirement, noting that an ambiguous condition would be difficult to implement or enforce.	Proposes condition requiring Petitioner to fund the design and construction and cause to be maintained stormwater and drainage system improvements for the Petition Area and incorporate in the design and construction of backbone infrastructure low impact development features for stormwater capture and reuse, to the extent practicable and allowed by the City, to prevent runoff from adversely affecting downstream properties and facilities and receiving streams and coastal waters, consistent with federal, State, and City laws, ordinances, and rules. Also requires Petitioner to include in the CCRs for the project the requirement that low impact development features be incorporated in individual site design and development, to the extent practicable and allowed by the City.	Supports Petitioner's proposed condition.	No condition proposed.
ENERGY CONSERVATION/ RESOURCE AND ENERGY CONSERVATION MEASURES	Proposes condition requiring Petitioner to implement, to the extent feasible and practicable, and to encourage condominium unit owners at the project to implement energy conservation, renewable energy, sustainable design and environmental stewardship measures that are feasible and practicable, such as the use of solar heating and photovoltaic panels. Opposes OP's condition requiring that the project CCRs require buyers to construct improvements to LEED Silver standard of construction.	Proposes condition requiring Petitioner to incorporate into the project development agreements and CCRs a requirement that all development be designed to meet, at a minimum, a standard substantially similar to the USGBC's LEED, Silver level or higher under the LEED for Green Building Design and Construction Program, utilizing LEED for New Construction and/or LEED for Core and Shell checklists as applicable, or LEED Silver as applicable.	Supports Petitioner's proposed condition.	No condition proposed.

COMPARISON OF CONDITIONS BY PARTY

	PETITIONER	OFFICE OF PLANNING	DEPARTMENT OF PLANNING AND PERMITTING	THE CONCERNED ELDERS OF WAIANAE
RESTRICTIONS ON LAND USE	Proposes condition requiring Petitioner to include in a Declaration of CCRs or Declaration of Condominium Property Regime on the Petition Area a restriction precluding use of any portion of the Petition Area for landfill, golf course, housing development, strip club, hostess bar or night club, or a retail establishment as defined under applicable zoning codes, and a restriction precluding the sale of alcoholic beverages or pornography.	Proposes identical condition to Petitioner.	Recommends that the condition be deleted in its entirety based on the lack of justification for restricting land uses through CCRs.	No condition proposed.
NOTICE OF CHANGE TO OWNERSHIP INTERESTS²	Proposes condition mirroring the LUC's standard condition. Proposes additional language specifying that the condition shall not require notice of mortgage financing or of the offer for sale of condominium units in the project, and shall be satisfied by the giving of notice only, and shall not require approval by the LUC.	Proposes condition generally mirroring the LUC's standard condition with an amendment specifying that Petitioner give notice of altering the ownership interests in the Petition Area at any time prior to completion of development of the Petition Area. Proposes amended language mirroring Petitioner's additional language but specifying that the condition shall not require notice of mortgage financing or of the public offer for sale of condominium units in the project.	Supports Petitioner's proposed condition.	No condition proposed.
ANNUAL REPORTS³	Proposes condition generally mirroring the LUC's standard condition. Proposes additional language specifying that the annual report be due prior to or on the anniversary date of the LUC's approval of the Petition.	Proposes condition generally mirroring the LUC's standard condition and Petitioner's proposed condition but specifying that the annual report be due on or before the anniversary date of the D&O for the reclassification of the Petition Area.	Supports Petitioner's proposed condition.	No condition proposed.
RELEASE OF CONDITIONS⁴	Proposes condition differing from the LUC's standard condition by specifying that Petitioner shall seek from the LUC full or partial release of these conditions as to all or any portion of the Petition Area upon assurance acceptable to the LUC of satisfaction of these conditions.	Proposes condition generally mirroring the LUC's standard condition but adding Petitioner's successors and assigns as entities who may also satisfy the conditions and move to release them.	Supports Petitioner's proposed condition.	No condition proposed.

¹ Petitioner suggests an amendment to DPP's proposed condition which would require that as a condition to County zone change approval of the proposed project, Petitioner acquire access rights to LNAR pursuant to a long-term agreement of no less than 30 years with the Navy.

² The LUC's standard condition states: "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 Property, prior to development of the Property."

³ The LUC's standard condition states: "Petitioner shall timely provide without any prior notice, annual reports to the Commission, the Office of Planning, and the County of _____ Planning Department in connection with the status of the subject project and Petitioner's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission."

⁴ The LUC's standard condition states: "The Commission may fully or partially release the conditions provided herein 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."

STAFF COMMENTS

The four dockets reviewed by staff included: A88-624/Alexander & Baldwin, Inc.; A03-739/A&B Properties, Inc.; A04-748/Consolidated Baseyards LLC; and A06-763/Kapolei Development, LLC.

Access to Petition Area from Lualualei Naval Access Road

Condition is specific to the location of the Petition Area and therefore was not imposed in the other four dockets.

Highways

Both Docket Nos. A88-634/Alexander & Baldwin, Inc., and A03-739/A&B Properties, Inc., required Petitioner to revise or supplement its TIAR prior to obtaining County zoning. The DOT's written approval of the final TIAR was required before Petitioner is able to proceed with the development. The condition also required that the TIAR be revised or supplemented as may be requested and required by the DOT. The condition further required Petitioner to construct, implement, and/or contribute its fair share of the costs of those improvements or mitigation measures as recommended or required by the TIAR and as dictated by the actual proportion of light industrial and retail uses developed. Another condition required Petitioner to contribute its fair share of the cost of regional transportation improvements in the area, as such fair share is determined by the DOT based on appropriate transportation planning methodologies to establish a rational nexus. Docket No. A04-748/Consolidated Baseyards LLC included a condition requiring Petitioner to fund up to 50 percent of the cost for traffic signalization improvements specific to the development. The other 50 percent was to be borne by the developer in another docket (Spencer Homes, Inc.). Docket No. A06-763/Kapolei Property Development, LLC, required Petitioner to reach agreement with the DOT and DPP for the construction of traffic improvements specific to the development. Petitioner was also required to prepare a revised TIAR subject to the approval and acceptance by the DOT and DPP. Under the condition, Petitioner was required to implement traffic improvements and mitigation measures consistent with the revised TIAR. Petitioner was further required to contribute its fair share for regional transportation improvements.

Established Access Rights Protected

None of the four dockets included a condition pertaining to the protection of established access rights.

Stormwater Management and Drainage

Both Docket Nos. A88-634/Alexander & Baldwin, Inc., and A03-739/A&B Properties, Inc., included a condition requiring Petitioner to fund, design, and construct any drainage system improvements required to mitigate the additional runoff resulting from the project without creating adverse effects on adjacent and downstream properties. Also required the master drainage plan be constructed to mitigate the additional runoff resulting from the development. Docket No. A04-748/Consolidated Baseyards LLC included a condition requiring Petitioner to comply with drainage improvements as required by the appropriate State and County agencies. The condition also required to the extent possible that storm and surface water runoff be captured on the property, and that Petitioner be subject to and prepare CCRs for the property and each lot into which the property may be subdivided to contain spills and prevent materials associated with industrial uses attributable to the operations of the property, including petroleum products, chemicals, or other pollutants from leaching or draining into the ground or subsurface storm drain collection areas. The condition further required that the CCRs be subject to approval by the DOH and documented in the Pollution Prevention Plan. Finally, the condition required Petitioner to fund the design and construction of the centralized drainage system required as a result of the development to the satisfaction of appropriate State and County agencies. Docket No. A06-763/Kapolei Property Development, LLC, included a condition requiring Petitioner to prepare and submit a detailed drainage plan to the DPP and DOT for review and approval. Petitioner was also required to consider and incorporate the drainage requirements for other regional developments within the same watershed. Another condition required Petitioner to construct drainage improvements, including interim detention basins as may be necessary, as a result of the development, to the satisfaction of appropriate State and City agencies, including DOT, Harbors Division. All four dockets included a condition requiring the establishment/implementation of BMPs.

Energy Conservation

Both Docket Nos. A88-634/Alexander & Baldwin, Inc., and A03-739/A&B Properties, Inc., included a condition requiring Petitioner to implement energy conservation measures such as the use of solar energy and solar heating and incorporate such measures into the project. In Docket No. A04-748/Consolidated Baseyards LLC, Petitioner and its successors were required, where feasible, to implement energy conservation measures, such as the use of solar energy and solar heating, and incorporate such measures into the project. Docket No. A06-763/Kapolei Property Development, LLC, included a condition requiring Petitioner, to the extent possible, incorporate energy conservation and sustainable design measures, such as the standards and guidelines promulgated by the Building Industry Association of Hawaii, the USGBC, the Hawaii Commercial Building Guidelines for Energy Efficiency, the Guidelines for Sustainable Building Design in Hawaii, and the applicable City building codes, as amended, into the design and construction of the Project and the structures within the Petition Area.

Restrictions on Land Use

Both Docket Nos. A88-634/Alexander & Baldwin, Inc., and A03-739/A&B Properties, Inc., included a condition to ensure that no less than 50 percent of the development shall be for non-retail, light industrial purposes.

Notice of Change to Ownership Interests

The Commission's standard condition was imposed in all four dockets.

Annual Reports

The Commission's standard condition was imposed in all four dockets.

Release of Conditions

The Commission's standard condition was imposed in all four dockets.