



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In The Matter Of The Petition Of)	DOCKET NO. A10-786
)	
LOWALU TOWN, LLC, AND)	FINDINGS OF FACT,
LOWALU EKOLU, LLC)	CONCLUSIONS OF LAW, AND
)	DECISION AND ORDER
To Amend The Agricultural Land Use)	DENYING THE ACCEPTANCE
District Boundary Into The Rural And)	OF A FINAL ENVIRONMENTAL
Urban Land Use Districts For)	IMPACT STATEMENT; AND
Approximately 320 Acres Of Land At)	CERTIFICATE OF SERVICE
Olowalu, Island Of Maui, State Of)	
Hawai'i, Tax Map Key: 4-8-003:)	
Portions Of 84, 98 Through 118, and)	
124)	
_____)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
DENYING THE ACCEPTANCE OF A
FINAL ENVIRONMENTAL IMPACT STATEMENT

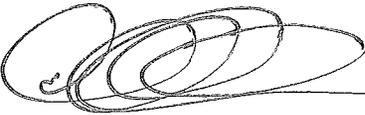
AND

CERTIFICATE OF SERVICE

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THE DOCUMENT ON FILE IN THE OFFICE OF THE STATE LAND USE
COMMISSION, HONOLULU, HAWAII.

12/ 11 /15

DATE

by  _____

EXECUTIVE OFFICER



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 STATE OF HAWAII
 LAND USE COMMISSION
 DATE 12-10-15 TIME 12:35 PM
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
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The State of Hawai'i Land Use Commission ("LUC"), having examined the proposed Final Environmental Impact Statement ("FEIS") filed by Olowalu Town, LLC, and Olowalu Ekolu, LLC (collectively "Petitioners"), on October 26, 2015, and upon consideration of the matters discussed therein, at its meeting on December 7, 2015, in Kahului, Maui, Hawai'i, hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

1. On May 13, 2010, Petitioners filed a Petition For District Boundary Amendment ("Petition") to reclassify approximately 320 acres of land at Olowalu, Island of Maui, State of Hawai'i, identified as portions of Tax Map Key ("TMK"): 4-8-003: 84, 98 through 118, and 124 (collectively "Petition Area") from the State Land Use Agricultural District to the State Land Use Rural and Urban Districts for the Olowalu Town Master Plan ("Project").¹

2. An Environmental Assessment/Environmental Impact Statement Preparation Notice ("EA/EISPN") was included with the Petition pursuant to Hawai'i Revised Statutes ("HRS") §§343-5(a)(1), (a)(2), (a)(6), and (a)(9)(A) and Hawai'i Administrative Rules ("HAR") §§11-200-6(b)(1)(A), (1)(B), and (2)(A).²

3. On June 4, 2010, and by a written Order filed June 22, 2010, the LUC (i) agreed to be the accepting authority pursuant to HRS chapter 343; and (ii) determined that the proposed action may have a significant effect on the environment to warrant the preparation of an Environmental Impact Statement ("EIS").

¹ In the Petition, approximately 175 acres of land were proposed to be reclassified to the State Land Use Urban District and approximately 145 acres of land were proposed to be reclassified to the State Land Use Rural District. The FEIS now states that the Petition Area consists of approximately 434 acres, an increase of approximately 114 acres since the filing of the Petition. Approximately 266 acres of land are proposed to be reclassified to the State Land Use Urban District and approximately 168 acres of land are proposed to be reclassified to the State Land Use Rural District.

² The Project involves the use of lands within the State Land Use Conservation District; however, these lands are not proposed to be reclassified to the State Land Use Urban District.

4. The State of Hawai'i Office of Environmental Quality Control ("OEQC") published notice of the availability of the EA/EISPN in its July 8, 2010, issue of *The Environmental Notice*, which began a 30-day public comment period that ended on August 9, 2010.

5. Upon receipt of the comments, Petitioner prepared a Draft EIS ("DEIS"). The OEQC published notice of the availability of the DEIS in its March 8, 2012, issue of *The Environmental Notice*, which began a 45-day public comment period that ended on April 23, 2012.

6. The following reviewers provided written comments on the DEIS:

Federal

National Oceanic and Atmospheric Administration, National Marine Fisheries Service

State of Hawai'i

LUC

Office of Planning ("OP")

Department of Defense, Office of the Director of Civil Defense

Department of Education

Department of Accounting and General Services

Department of Health, Clean Water Branch, Environmental

Planning Office, Indoor and Radiological Health Branch, and Wastewater Branch

Department of Human Services

Department of Labor and Industrial Relations

Department of Transportation

Department of Land and Natural Resources, Land Division and Office of Conservation and Coastal Lands

County of Maui

Department of Planning ("DP")

Department of Housing and Human Concerns

Police Department

Department of Fire and Public Safety, Fire Prevention Bureau

Department of Water Supply

Department of Environmental Management

Utility

Maui Electric Company

Individuals/Organizations

Anna C. Potts and Jason A. Potts

Jan Ehrenkrook

Victoria and Walton Huffman

Wallace H. Fujii

Michael W. Foley

Randy Ragon

Dick Mayer

Pauline Feine

Robin Newbold, Maui Nui Marine Resource Council

Irene Bowie, Maui Tomorrow

Donald E. Lehman, West Maui Taxpayers Association

Kyle Juk, Surfrider Foundation, Maui Chapter

Sam Miguel, Citizens for Truth and Justice, Maui County.

7. On October 26, 2015, Petitioners filed the proposed FEIS with the LUC.

8. On November 17, 2015, Petitioners filed a letter apprising the LUC that the last page of a comment letter from Irene Bowie, Maui Tomorrow, on the DEIS was inadvertently omitted in the proposed FEIS.

9. On November 17, 2015, OP filed written comments recommending that the LUC not accept the proposed FEIS at this time due to (i) the extensive revisions made to the Traffic Impact Analysis Report (“TIAR”) since the publication of the DEIS that the public did not have an opportunity to review; (ii) the absence of archaeological studies, including the inventory survey, a Preliminary Preservation and Mitigation plan, and other studies for the entire Olowalu area as well as the most current preservation and mitigation plans for the makai and mauka areas of the Petition Area in the FEIS; and (iii) the unsatisfactory response of Petitioners to OP’s comments on the DEIS regarding the delineation of the 150-foot shoreline setback line relative to Petitioners’ land use plan.

10. On November 18, 2015, the LUC met at the Maui Arts & Cultural Center, McCoy Studio Theater in Kahului, Maui, Hawai`i, to consider acceptance of Petitioners’ proposed FEIS.³ Jennifer A. Lim, Esq.; Onaona P. Thoene, Esq.; Bill Frampton; and David Ward appeared on behalf of Petitioners. Also present were Michael Hopper, Esq.; William Spence; and Danny Dias on behalf of the DP and Bryan C. Yee, Esq., and Rodney Funakoshi on behalf of OP. At the meeting, Petitioners filed a written request to extend the 30-day acceptance period for the FEIS by an additional 15

³ The LUC’s agenda had stated that the meeting would be at the Maui Arts & Cultural Center, Haynes Meeting Room. However, the location was changed to a more expansive room within the same facility to accommodate the large numbers of the public who were present.

days ("Motion"), pursuant to HAR §11-200-23(d).⁴ The LUC then received oral and/or written testimony from members of the public on the acceptance of Petitioners' FEIS.⁵ Following the completion of the public witness portion of the November 18 and 19, 2015, proceeding, the LUC continued the meeting to November 19, 2015.⁶

11. On November 19, 2015, and by Order filed on November 30, 2015, the LUC granted Petitioners' Motion.⁷

12. By letter dated November 20, 2015, the LUC informed the OEQC that it had extended the 30-day acceptance period for Petitioners' FEIS by an additional 15 days pursuant to HAR §11-200-23(d).

⁴ Chair Edmund Aczon stated that the LUC would consider Petitioners' Motion following the completion of public testimony on November 18, 2015.

⁵ Prior to this meeting, the LUC received written testimony from several hundred individuals. Copies of these testimonies as well as those provided at the meeting are on file at the LUC's office at 235 South Beretania Street, Room 406, in Honolulu, Hawai'i.

During the public witness testimony portion of the proceeding, Commissioner Kent Hiranaga disclosed that he served on the County of Maui Planning Commission when the Maui Island Plan was being reviewed, and that part of the review included the Project.

⁶ At the meeting, the LUC raised concerns about the representations that were made before the County of Maui Planning Commission during the update of the Maui Island Plan regarding (1) Petitioners' plans for the lands makai of Honoapi'ilani Highway; (2) the amount of storm runoff that is retained onsite; and (3) Petitioners' plans for the Lower Honoapi'ilani Highway located north and south of the Project. The LUC also raised concerns for Petitioners to consider regarding traditional and cultural practices, including but not limited to fishing; impacts on water resources and the nearshore environment; impacts to the transportation infrastructure from brushfires in the area; the placement of the proposed wastewater treatment plant and its potential impacts on surfing spots; and the number of brown water incidents at Olowalu.

⁷ The acceptance period for the FEIS was extended from November 25, 2015, to December 10, 2015.
Docket No. A10-786 Olowalu Town, LLC, and Olowalu Ekolu, LLC

13. By letter dated November 24, 2015, the DP filed written comments expressing concern that Petitioners' responses to the DP's comments on the DEIS as they related to the scope of the TIAR were insufficient and further requesting clarification as to whether the 1,500-unit count within the Project presented to the public, the various boards and commissions, and the Maui County Council included the potential accessory dwellings and, if not, whether the FEIS accounted for this total potential amount of units within the Project.

14. On December 4, 2015, Petitioners filed a written response to questions raised by the LUC at the November 19, 2015, meeting on Petitioners' Motion.

15. On December 7, 2015, the LUC resumed its consideration of Petitioners' FEIS at the Maui Arts & Cultural Center, McCoy Studio Theater in Kahului, Maui, Hawai'i. Jennifer A. Lim, Esq.; Onaona P. Thoene, Esq.; Bill Frampton; and David Ward appeared on behalf of Petitioners. Richelle Thompson, Esq., and William Spence appeared on behalf of the DP, and Bryan C. Yee, Esq.; Rodney Funakoshi; and Lorene Maki appeared on behalf of OP. At the meeting, Petitioners filed a written response to the November 24, 2015, comments of the DP. As part of Petitioners' presentation on their proposed FEIS, Michael Munekiyo, Tanya L. Lee-Greig, Craig C. Lekven, Mark M. Matsuda, Tom Nance, Steven Dollar, Roger D. Dyar, and Bill Frampton appeared before the LUC to address, among other things, the specific

concerns raised by the LUC during its deliberations on Petitioners' Motion on November 19, 2015.

16. Petitioners' consultant, Michael Munekiyo, confirmed that they conducted no survey of existing recreational users of the coastline, and that there is no such survey included in the FEIS.

17. Petitioners' consultant, Tom Nance, confirmed that his study, Appendix D to the FEIS, did not include consideration or study of the sufficiency of drinking and non-drinking water for cultural or other uses, but, rather, only made determinations of the sufficiency of water for the Project.

18. Petitioners' consultant, Tanya L. Lee-Greig, confirmed that the archaeological inventory surveys ("AIS") referenced in the FEIS were prepared before the State Historical Preservation Division ("SHPD") adopted its current rules regarding the form and content of such surveys. She further confirmed that during her field survey, additional sites were uncovered, and that these sites are not included in an AIS, nor have they been reviewed and approved by the SHPD. She also confirmed that she recommended that further fieldwork and an AIS be conducted.

19. Tanya L. Lee-Greig also confirmed that the FEIS noted that consulted traditional and customary practitioners John and Rose –Marie Duey indicated

the need to have sufficient water for the cultivation of lo`i kalo and mauka to makai flows in Olowalu Stream.

20. Petitioners' traffic consultant, Roger D. Dyar, was questioned about the statements in the DEIS' Preliminary TIAR relating to the sufficiency of the document, in particular, that it did not address peak hour traffic flows, among other things.

21. Petitioners' TIAR, Appendix P-1 to the FEIS, was substantially different from the Preliminary TIAR in the DEIS and was not available for comment by the public until November 8, 2015, when the OEQC published the notice of the availability of the FEIS in its November 8, 2015, edition of *The Environmental Notice*.

22. Neither the Preliminary TIAR in the DEIS nor the TIAR in the FEIS, nor the FEIS itself considered the DP's comments that the area of study be expanded to include the stretch of Honoapi`ilani Highway between Mā`alaea and Puamana so that impacts and mitigation for traffic may be more fully evaluated beyond the vicinity of the Project.

23. Petitioners' consultant, Mark M. Matsuda, was not able to point to where in the FEIS or his studies it was discussed where drainage would flow or retention/detention basins would be placed and what impacts those locations would have on cultural resources.

24. Petitioners stated that the realigned Honoapi`ilani Highway was to be initially a two-lane road, then a four-lane roadway but did not give timing or cost estimates sufficient to make a determination of the impacts and adequacy of mitigation of the development on traffic. The FEIS only provided estimated costs of \$18 million for the realigned two-lane highway.

25. Abraham Ahi, among other public testifiers, testified that recreational users of Olowalu, including those who surf and fish, were not interviewed to determine the impacts of the Project on recreational and traditional and customary practices.

26. Several members of the public testified that Olowalu is significant in Hawaiian history and culture.

27. Petitioners testified that the Olowalu Cultural Preserve is not part of the Petition Area.

28. Petitioners did not clearly state where in the FEIS measures were identified to ensure that traditional and customary cultural practices on the Petition Area will be preserved and protected. Rather, Petitioners' consultant, Tanya L. Lee-Greig, testified that the developer would work in the future course of development with practitioners to determine how this would be done. Ka Pa`akai O Ka `Aina v. Land Use Commission, 94 Hawai`i 31, 7 P.3d 1068 (2000).

29. Petitioners, the DP, and OP thereafter provided their respective arguments on the acceptability of the FEIS. The DP reiterated its concerns about the traffic impacts from the Project, but noted that it did not take a position on the acceptability of the proposed FEIS. OP recommended that the proposed FEIS not be accepted and further expressed concerns that the public did not have an opportunity to fully review the TIAR and the Cultural Impact Assessment ("CIA") in the proposed FEIS as these documents contained substantive information that was not provided previously in the DEIS. OP also noted, among other things, that the previous archaeological inventory surveys referenced in the FEIS were old and prepared prior to the adoption of the SHPD's current administrative rules and standards. The LUC thereafter received oral and/or written testimony from members of the public on the matter.⁸

30. After due deliberation at the LUC's meeting on December 7, 2015, a motion was made and seconded to deny the acceptance of Petitioners' proposed FEIS as it does not meet the requirements of HRS chapter 343 and HAR chapter 11-200. There being a vote tally of 6 ayes, 1 nay, and 1 excused,⁹ the motion carried.

⁸ Copies of the written testimonies provided at the meeting as well as those received prior to this meeting are on file at the LUC's office.

⁹ There are currently eight sitting commissioners on the LUC. The one remaining seat is vacant.

RULINGS ON PROPOSED FINDINGS OF FACT

Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

1. "'Acceptance' means a formal determination of acceptability that the document required to be filed pursuant to chapter 343, HRS, fulfills the definitions and requirements of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement." HAR §11-200-2

2. "[N]either HRS chapter 343 nor the administrative rules of chapter 11-200 indicate the level of detail or specificity that should be included in any given subject. The statute and rules were designed to give latitude to the accepting agency as to the content of each EIS. Thus, what is required in one EIS may not be required in another, based upon the circumstances presented by the particular project.

Accordingly, the standard to consider the sufficiency of an EIS under the "rule of reason" is that

an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.” Price v. Obayashi Hawaii Corp., 81 Hawai`i 171, 183, 914 P.2d 1364, 1376 (1996) quoting Life of the Land v. Ariyoshi, 59 Haw. 156, at 164-65, 577 P.2d at 1121 (1978)

3. HAR §11-200-18 specifies the content requirements for FEISs. An FEIS shall consist of (i) the DEIS revised to incorporate substantive comments received during the consultation and review process; (ii) reproductions of all letters received containing substantive questions, comments, or recommendations and, as applicable, summaries of any scoping meetings held; (iii) a list of persons, organizations, and public agencies commenting on the DEIS; (iv) the responses of Petitioners to each substantive question, comment, or recommendation received in the review and consultation process; and (v) the text of the FEIS shall be written in a format which allows the reader to easily distinguish changes made to the text of the DEIS.

4. HAR §11-200-23 specifies the criteria for the acceptability of an FEIS. These criteria include: (i) the procedures for assessment, consultation process, review, and the preparation and submission of the FEIS have all been completed satisfactorily as specified in HAR chapter 11-200; (ii) the content requirements described in HAR chapter 11-200 have been satisfied; and (iii) comments submitted during the review process have received responses satisfactory to the accepting authority, or approving agency, and have been incorporated in the FEIS.

5. The proposed FEIS does not meet requirements of HRS chapter 343 and HAR chapter 11-200 in at least the following ways:

- (i) It is unclear if the relocated Honoapiʻilani Highway will consist of two lanes or four lanes, or how the four-lane improvement would be paid for or how much it would cost. Petitioners' TIAR is based on a widened road;
- (ii) There is ambiguity regarding the sufficiency of the proposed stormwater retention measures and their ability to prevent harm to resources;
- (iii) There was no survey conducted of existing recreational uses, and therefore there is no way to determine if the proposed mitigation measures will be sufficient;

- (iv) There was no analysis on the existing public trust demands for water from the Olowalu Stream, including but not limited to the cultivation of kalo and mauka to makai flow, or for the satisfaction of any appurtenant rights of kuleana lands, and therefore there is no way to determine if there is sufficient ditch water for the Project;
- (v) There is no ability to identify the sufficiency of mitigation measures to protect known cultural sites because they are not located on maps in relation to the Project;
- (vi) A number of cultural practitioners were never contacted in the preparation of the CIA, and therefore their practices were not identified. Under Article XII, Section 7, of the Hawai'i State Constitution, the LUC is obligated to protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights;

- (vii) The TIAR and CIA were revised substantially since the publication of the DEIS, and therefore the public did not have an opportunity to fully review them;
- (viii) There is no AIS of the newly discovered and previously unrecorded sites and cultural material that have been found on the Petition Area;
- (ix) The proposed FEIS relied on older surveys and reports that were prepared prior to the adoption of the current rules and standards of the SHPD;
- (x) The scope of the TIAR is insufficient as it did not take into account traffic impacts and mitigation measures to Honoapi`ilani Highway between Mā`alaea and Puamana;
- (xi) The FEIS failed to include the last page of a comment letter from Irene Bowie, Maui Tomorrow, on the DEIS; and
- (xii) Petitioners' responses to the comments submitted during the review process for the DEIS are not satisfactory to the LUC.

6. Pursuant to HRS chapter 343 and HAR chapter 11-200, and a motion having been made and seconded at a meeting on December 7, 2015, in Kahului, Maui, Hawai`i, and the motion having received the affirmative votes required by HAR

§15-15-13, and there being good cause for the motion, the LUC concludes that Petitioners' proposed FEIS does not meet the criteria and procedures governing the acceptance of an FEIS under HAR §11-200-23.

DECISION AND ORDER

IT IS HEREBY ORDERED that the proposed FEIS filed by Petitioners in Docket No. A10-786/Olowalu Town, LLC, and Olowalu Ekolu, LLC, is NOT ACCEPTED pursuant to HRS chapter 343 and HAR chapter 11-200.

This Decision and Order may be appealed to the Environmental Council in accordance with HRS §343-5 and HAR §11-200-24.

ADOPTION OF ORDER

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

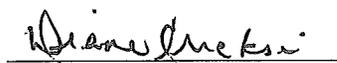

KAHULUI

Done at ~~Honolulu~~, Hawai'i, this 10th, day of December, 2015, per motion on December 7th, 2015.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAII



Deputy Attorney General

By 

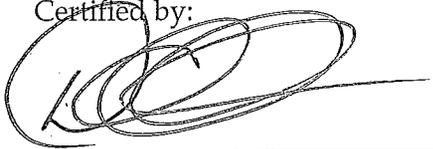
EDMUND ACZON

Chairperson and Commissioner

Filed and effective on:

12/10/15

Certified by:



DANIEL ORODENKER

Executive Officer



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CERTIFICATE OF SERVICE

I hereby certify that due service of the within document was made by depositing the same with the United States Mail, postage prepaid, or by hand delivery, on December 11, 2015, addressed to:

LEO R. ASUNCION, JR., AICP
Acting Director
Office of Planning
State of Hawaii
235 South Beretania Street, 6th Floor
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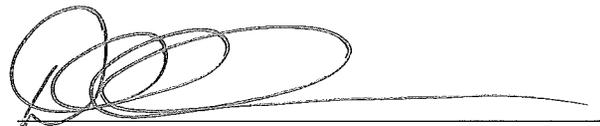
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DATED: Honolulu, Hawai'i, December 11, 2015.



DANIEL ORODENKER
Executive Officer
State Land Use Commission