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LAND USE COMMISSION
STATE OF HAWAII

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

In the Matter of the Petition of)	DOCKET NO. A12-795
)	
WEST MAUI LAND COMPANY, INC., a)	OFFICE OF PLANNING'S JOINDER IN
Hawai'i Corporation, and KAHOMA)	PETITIONER'S MOTION TO
RESIDENTIAL LLC, a Hawai'i Limited)	RECONSIDER DECISION AND ORDER
Liability Company,)	ADOPTED JANUARY 14, 2013;
)	CERTIFICATE OF SERVICE
To Amend the Agricultural Land Use District)	
Boundary into the Urban Land Use District)	
for Approximately 16.7 Acres of Land at)	
Lahaina, Island of Maui, State of Hawai'i,)	
Tax Map Key No.: (2) 4-5-010: 005)	
)	

**OFFICE OF PLANNING'S JOINDER IN PETITIONER'S
MOTION TO RECONSIDER DECISION AND ORDER ADOPTED JANUARY 14, 2013**

The Office of Planning ("OP") respectfully joins in Petitioner's Motion to Reconsider Decision and Order Adopted January 14, 2013 ("Motion for Reconsideration"), and asks the Commission to reconsider its prior decision and reclassify the Petition Area to the State Land Use Urban District.

In the alternative, if the Commission decides to deny Petitioner's Motion for Reconsideration, OP requests that: (1) Findings of Fact ("FOF") 170, 186, 187, and 190 and

Conclusion of Law (“COL”) 7 be deleted; and (2) the Commission substantiate FOF 169, 170, 171, and 172 with specific factual findings.¹

I. ARGUMENT

The Petition Area is a small 16.7-acre parcel surrounded by urban uses and proposed for a housing project that will be 100 percent affordable housing. We believe the record demonstrates that the Petition meets the Commission’s decision-making criteria under Hawai‘i Revised Statutes (“HRS”) § 205-17 and Hawai‘i Administrative Rules (“HAR”) § 15-15-77, as follows:

- The Petition conforms to goals, policies, and priority guidelines in the Hawai‘i State Plan related to housing and physical growth and development, because it provides affordable housing in proximity to urban areas with existing urban services and facilities;
- The Petition conforms to applicable Urban District standards for similar reasons, and is no longer suitable for inclusion in the Agricultural District because commercial agricultural production is unlikely for the Petition Area due to its lot configuration and being surrounded by urban uses;
- Petition impacts on identified areas of State concern can be mitigated through conditions imposed on the Petition to address foreseeable impacts on school facilities, surface and coastal water quality and ecosystems, and any archaeological, historic, or cultural resources;

¹ FOF 109 in “Procedural Matters,” lists pleadings filed by the parties on November 14, 2012. OP filed its “Office of Planning’s Response to Intervenors’ Proposed Findings of Fact, Conclusions of Law, and Decision and Orders” with the Commission on November 14, 2012. The FOF should be amended to correct this omission.

- The Petition now conforms to the County of Maui’s General Plan 2030, Maui Island Plan, as the Petition Area lies within the urban growth boundary of the adopted Maui Island Plan, and the project is exempt from obtaining a community plan amendment or zone change;
- Petitioner has indicated that the project will be completed with Petitioner’s funds and conventional financing; and
- The Petition Area has not been used for intensive agricultural use for over two years, and the property has been largely uncultivated for the last two decades.

The Commission’s Findings of Fact, Conclusions of Law, and Decision and Order filed on January 14, 2013 (“2013 Decision and Order”) relied upon several key findings in denying the Petition in this case. These findings include FOF 158, 169, 170-172, 186, 187, and 190, and COL 7 and 8. In accordance with HAR § 15-15-84(b), OP objects to these findings and conclusions as they do not comport with points of law, rule, or fact that were either overlooked or misunderstood, as discussed below.

A. **FOF 186 and 187 and COL 8, Conformance with County of Maui General Plan 2030**

FOF 186 and 187 and COL 8 relating to the Project’s alleged lack of conformance with the County of Maui’s General Plan are now factually incorrect after the Maui County Council adopted on December 28, 2012, the recommendation of the Draft Maui Island Plan to include the Petition Area within the Plan’s urban growth boundary. The Commission heard testimony that the Petition Area was included within the urban growth boundary and that the Council was to take action on the Draft Maui Island Plan in the very near future. Therefore, OP joins in the arguments made by Petitioner on this matter in its Motion for Reconsideration. Furthermore,

even if these findings were technically correct, the County of Maui certified the project as an HRS § 201H-38 affordable housing project and exempted it from the requirement to obtain an amendment or conform to the County of Maui's community plans and zoning.

Accordingly, FOF 186 and 187 and COL 8 are not bases for justifying denial of the Petition.

B. FOF 190, Unaudited Financial Statements and Financial Capacity

OP objects to FOF 190, which concludes that the Commission cannot make a determination that the Petitioner has the financial capacity to carry out the project based upon unaudited financial statements. The 2013 Decision and Order sets forth no particular facts as to why an unaudited financial statement is unacceptable in this particular case. Accordingly, the 2013 Decision and Order establishes a new general requirement for land use petitions.

First, the requirement for an audited financial statement is not an individualized finding, but rather a rule that implements a new Commission requirement affecting the private rights of all future applicants. See HRS § 91-1 (definition of "rule"). With this case, the Commission has in effect determined that audited financial statements are needed as a pre-condition for reviewing and approving a petition—a determination apparently applicable to all future petitioners as there are no alleged facts to distinguish this case from any other, past or present. As such, it is a rule of general applicability determining the private rights of a class of people. In order to adopt such a rule, the Commission must follow procedures for HRS Chapter 91 rulemaking. See e.g., Vega v. National Union Fire Ins. Co. of Pittsburgh, PA., Inc., 67 Hawaii 148 (1984) ("A 'rule' for purposes of the chapter includes 'each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy.'") quoting HRS § 91-1(4), In the Matter of the Tax Appeal of Hawaii Prince Hotel Waikiki Corp., 89 Hawaii 381, 392

(1999) (the City's unwritten methodology for determining imparted value was a rule). See also Foster Village Community Ass'n v. Hess, 4 Haw. App. 463, 473-477 (1983) (a discussion on the difference between rule-making and adjudication).

Second, the Commission has approved petitions in the past without proof that the financial statements had been audited. See In the Matter of the Petition of Shopoff Group, LP, Docket No. A06-0770 (Petitioner's Exhibit 19 is a cash basis Financial Statement, without any indication of a third party audit); In the Matter of the Petition of Waikoloa Mauka, LLC, Docket No. A06-767 (Petitioner's Exhibit 55 is a two-page unaudited compilation of the financial statement); and In the Matter of the Petition of Castle and Cooke Homes Hawai'i, Inc., Docket No. A07-775 and In the Matter of the Petition of Castle and Cooke Homes Hawai'i, Inc., Docket No. A11-793 (Petitioner's Exhibit 5 and Petitioner's Exhibit 6, respectively, are unaudited financial statements).

Third, the Commission determined that the Petition was complete pursuant to HAR § 15-15-50(f). If the Commission has now decided that it is unable to determine whether the Petitioner has the financial capacity to carry out the project based on unaudited financial statements, it should have raised this issue in its examination of the Petition's completeness and in the hearings. Finally, the uniform application of this rule to all new cases could disrupt the readiness of some of the cases currently pending before the Commission. See e.g. In the Matter of the Petition of Waiko Industrial Investment, LLC, Docket No. A12-796, Petitioner's Exhibit 6, Current Balance Sheet and Income Statement as of December 31, 2011 (no indication of independent audit review).

Accordingly, FOF 109 is not a basis for justifying denial of the Petition.

C. FOF 170, Lahaina Wastewater Reclamation Facility

OP has specific concerns with FOF 170 relating to the adequacy of the Lahaina Wastewater Reclamation Facility (“LWRF”). If the Commission bases denial of the Petition in part on concerns over the LWRF, the Commission will be indicating that all petitions for geographic areas served by the LWRF should be similarly denied. The evidence does not support such a sweeping conclusion. Furthermore, as evidenced in Petitioner’s Exhibit 11, the County Council resolution approving the HRS § 201H-38 affordable housing application requires that, should the LWRF not have the capacity to service the project that the Petitioner will be required to pay a fair-share contribution to fund improvements to accommodate the additional flow.

Accordingly, FOF 170 is not a basis for justifying denial of the Petition.

D. COL 7, Open Area Recreational Facility as Standard for Agricultural District

OP strongly objects to COL 7, which states that the Petition Area includes lands with open area recreational facilities, and therefore meets the standards for the State Agricultural District pursuant to HAR § 15-15-19 and HRS § 205-2(d).

First, there is no evidence to demonstrate that the Petition Area has or is an open area recreational facility. Although the Petition Area is designated Open Space by the West Maui Community Plan, there are no recreational facilities within the Petition Area, which is uneven, overgrown, and undeveloped. Accordingly, there is no factual basis for COL 7.

Second, an open area recreational facility is merely one of several non-agricultural uses permitted in the Agricultural District under HRS § 205-2(d)(13)—others include wind farms, wind machines, solar energy facilities, and meteorological stations. The purpose of the

Agricultural District is to protect and promote use of land with a high capacity for agricultural production, grazing or other agricultural uses, which lands are surrounded by or contiguous to agricultural uses. Concluding that the presence of an open area recreational facility—a non-agricultural use—is reason for determining the Petition Area meets the standards for the Agricultural District conflicts with and marginalizes the policy intent for the Agricultural District.

Accordingly, COL 7 is not a basis for justifying denial of the Petition.

E. Failure to Resolve Factual Disputes

FOF 158, 169, 170, and 172 merely state that certain issues are unresolved or that there is conflicting evidence. The Commission, however, cannot justify a denial simply because the facts are in dispute. The Commission must weigh the evidence and then provide its honest and best factual determinations with reasonable clarity and precision. See In re Hawaiian Telephone Co., 54 Haw. 663, 668 (1973) (“[T]he agency must make its findings reasonably clear. The parties and the court should not be left to guess with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise findings of the agency,” quoting In re Termination Transportation, Inc., 54 Haw. 134, 139 (1972).)

Accordingly, these paragraphs are insufficient to justify denial of the petition.

FOF 171 is a conclusory paragraph, which similarly requires specific factual findings to justify its conclusion. The determinations made in these findings are not substantiated by the record in this case.

Accordingly, FOF 158, 169, 170, 171, and 172 are not bases for justifying denial of the Petition.

F. Mitigation Through Conditions

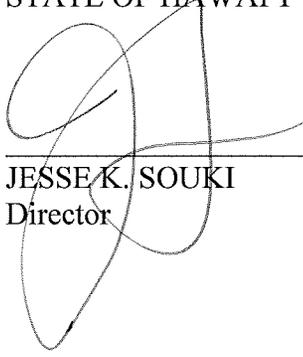
The Commission has the option of imposing appropriate conditions to mitigate any outstanding concerns. For example, with respect to the heiau and libation stone, assuming the Commission found that these were present in the Petition Area, there is no finding as to why a condition would not be sufficient to mitigate the impacts to native Hawaiian cultural practices. In other cases where the parties have all agreed that there are archaeological and cultural features worth preserving, the Commission has approved petitions with the condition that Petitioner provide archaeological monitoring in the development of the project and/or craft and implement a preservation plan to the satisfaction of the State Historic Preservation Division (“SHPD”).

II. CONCLUSION

For these reasons, OP joins in Petitioner’s Motion for Reconsideration, and asks the Commission to reconsider its prior decision, reclassify the Petition Area to the State Land Use Urban District, and issue a new Findings of Fact, Conclusions of Law, and Decision and Order with appropriate conditions to mitigate foreseeable impacts.

DATED: Honolulu, Hawai‘i, this 29th day of January, 2013.

OFFICE OF PLANNING
STATE OF HAWAI‘I



JESSE K. SOUKI
Director

Docket No. A12-795

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular mail.

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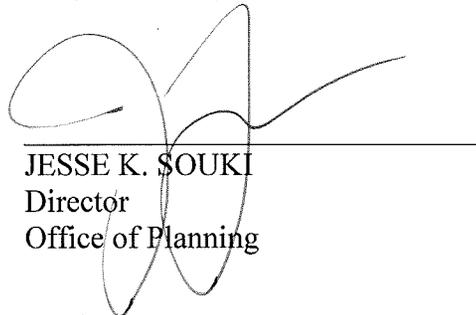
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DATED: Honolulu, Hawai'i, this 29th day of January, 2013.



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