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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition	)	DOCKET NO. A12-795
of:	)	
	)	PETITIONER'S REPLY TO
WEST MAUI LAND COMPANY, INC., a	)	INTERVENOR ROUTH BOLOMET'S
Hawaii corporation, and KAHOMA	)	RESPONSE AND OBJECTIONS TO
RESIDENTIAL LLC, a Hawaii	)	PETITIONER'S PROPOSED
limited liability company,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, DECISION
To Amend the Land Use District	)	AND ORDER; CERTIFICATE OF
Boundary of certain land	)	SERVICE
situated at Lahaina, Island of	)	
Maui, State of Hawaii,	)	
consisting of 16.7 acres from	)	
the agricultural district to	)	
the urban district, Tax Map Key	)	
No. (2) 4-5-010:005.	)	
_____	)	

2012 NOV 21 A 7:26  
LAND USE COMMISSION  
STATE OF HAWAII

PETITIONER'S REPLY TO INTERVENOR ROUTH  
BOLOMET'S RESPONSE AND OBJECTION TO PETITIONER'S  
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

Intervenor Routh Bolomet asserted 33 objections covering 145 proposed findings of fact submitted jointly by Petitioner and the County of Maui. Most of the objections concerned whether the Petition Area is suitable for agricultural use; the remaining objections were based on claims that the

archaeological assessment was deficient, that the Final Environmental Assessment was deficient, that the flora and fauna of the Petition Area would be impacted, that cultural practices would be impacted, that water had been diverted from the Petition Area, that surface water runoff from the Petition Area would adversely impact near shore waters, and that the Project would not provide for permanent employment. The objections, which generally repeat Intervenor Bolomet's arguments, do not raise grounds upon which the proposed findings of fact or conclusions of law should be rejected or modified.

A. Each of the Proposed Findings and Conclusions Are Proper.

Findings of fact must pass two basic tests: (a) are they sufficiently comprehensive and pertinent to the issues to form a basis for the decision; and (b) are they supported by the evidence. Shannon v. Murphy, 49 Haw. 661, 426 P.2d 816 (1967). The findings must be clear, specific, non-conclusory, and supportive of the ultimate finding. Application of Hawaii Elec. Light Co., Inc., 60 Haw. 625, 594 P.2d 612 (1979).

Each of the proposed findings of fact to which Intervenor Bolomet made objection is clear, specific and pertinent to the issues which this Commission must determine in reaching its decision. Moreover, each of the proposed findings is supported by evidence which was presented to this Commission and on which each of the parties had the opportunity to examine

or cross-examine witnesses. On this standard alone, the objections should be overruled.

B. Objections Based on The Ability to Farm the Petition Area are Invalid.

Intervenor Bolomet's objections 1-15, 20-23, 25 and 30 are based on the theme that the Petition Area could be farmed and is suitable for agricultural production. This argument, and the objections to the proposed findings, miss the mark.

If the test for reclassification was whether a property could be farmed, this Commission could never reclassify any lands as any property, including one that was entirely hardscaped, could be farmed if enough resources were committed to the project. Nor is the test whether the Petition Area ever was farmed in the past. Rather the test is whether the Petition Area is likely to be used for agriculture given existing conditions and existing uses of the surrounding lands.

Dr. Paul Singleton, an expert on agricultural production, testified that future use of the Petition Area for agriculture was unlikely given the size, shape, soil condition, and proximity to residential neighborhoods. (TR 8/23/12 at pp. 156-160). The Petition Area effectively is surrounded by urban uses. (Petitioner Ex. 23). The Petition Area makes up a very small portion of the lands classified as agricultural on Maui and there are many other agricultural lands available for use which present fewer impediments to farming. (Written Direct Testimony

("WDT") of Paul Singleton pp. 13 and 15). Additionally, the Hawaii State Plan promotes the use of marginal or non-essential agricultural land to meet the needs of low- and moderate-income and gap-group households. H. Rev. Stat. § 226-106. The Project proposed for the Petition Area will provide housing for low-, moderate-income and gap-group households on marginal agricultural lands. Based on the preliminary guidelines and unrebutted evidence,<sup>1</sup> objections 1-15, 20-25, 25 and 30 must be overruled.

C. Objections Based on Claimed Deficiencies of the Archaeological Assessment Are Invalid.

Intervenor Bolomet's objections 16, 17 and 19 are based on the theme that the Archaeological Assessment was invalid. Allegations of the existence of a heiau and human burials raised by Intervenor Bolomet in these proceedings were investigated; no evidence of either human burials or a heiau were found.

(Petitioner Ex. 41). The State of Hawaii Historic Preservation Division reviewed the Petition Area and determined three separate times that no further archaeological investigation was warranted or necessary. (Petitioner Ex. 7, 26 and 41). The Kahoma Stream Terrace Complex is not within the Petition Area but rather was

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<sup>1</sup>Intervenor Bolomet supports her objection (and argument) with the written correspondence of persons who did not provide testimony either as a witness in the proceeding or as a member of the public. Absent the waiver of the right of cross-examination by a party, it would be error for the Commission to consider such written correspondence. See, Desmond v. Administrative Director of the Courts, 91 Haw. 212, 982 P.2d 346 (1998); and Heard v. Foxshire Assoc. LLC, 15 Md.App. 695, 806 A.2d 348 (2001).

located where the Kahoma Stream Flood Control Debris Basin was constructed. (Petitioner Ex. 41). Argument, no matter how many times made, does not rise to the level of evidence. The evidence compels overruling objections 16, 17 and 19.

D. Objections Based on Claimed Deficiencies in the Final Environmental Assessment.

Intervenor Bolomet's objections 18 and 24 are based on an argument that the Final Environmental Assessment should be rejected. As with questions of title, there is a proper forum and a proper procedure to raise this type of objection. The present forum and method used is neither the proper forum nor the proper procedure. This proceeding is to determine whether a 16.7 acre parcel should be reclassified from agricultural to urban. This proceeding is not to determine whether an environmental assessment is adequate or to second guess the decision of another administrative agency that conducted a review of the environmental assessment. The objections, which do not go to the issues presented for determination by this Commission, must be overruled.

E. Objection Based on Impact on Flora/Fauna.

Intervenor Bolomet's objection 26 is based on an argument concerning the weight to place on the testimony of Robert Hobdy. Mr. Hobdy presented expert testimony on the flora and fauna that existed in the Petition Area. No other expert provided testimony about the flora or fauna in the Petition Area.

While anecdotal information about Hawaiian plants and the pueo was provided, none of those persons provided testimony concerning whether the Petition Area was the only source of habitat for the Hawaiian plants or the pueo. Mr. Hobby's testimony that the Hawaiian plants that existed within the Petition Area were prevalent in other areas and that the Petition Area was not habitat for the pueo stands unrebutted. The objection is not supported by the evidence.

F. Objection Based on Impact on Cultural Practices.

Intervenor Bolomet's objection 27 is based on arguments that cultural practices will be impacted by the reclassification. There is no evidence that any customarily and traditionally exercised rights of native Hawaiians took place on the Petition Area before June 2012. The Commission must make findings concerning use of the property for customarily and traditionally exercised rights of native Hawaiians. However, the persons making the claim must show a use that was customarily and traditionally practiced in the Petition Area. See, State v. Pratt, 127 Haw. 206, 227 P.3d 300 (2012) (claimant must establish that the application of a custom has continued in a particular area). The record is clear that there was no use of the Petition Area for customarily and traditionally exercised rights of native Hawaiians before the Petition was filed. While the Commission has and must protect uses that existed before a petition was

filed, there is no legal basis to protect a use that only sprang up on the Petition Area after the filing of the Petition. In this matter, the lack of prior use clearly establishes that the objections are invalid and must be overruled.

G. Objection Based on Diversion of Water.

Intervenor Bolomet's objection 28 is based on a claim that water is being diverted from the Petition Area in some fashion. Again, for the objection to be sustained, there must be some evidence in the record that water is being diverted from the Petition Area in some manner. No groundwater was encountered in the subsurface investigation of the Petition Area. Bedrock was encountered in most of the subsurface investigations conducted on the Petition Area. No springs were observed, either in the recent history or as reflected on historical maps that were received into the record. The Petition Area would never be described as lush or verdant. In the late 1980s, Kahoma Stream was realigned via the Kahoma Stream Flood Control Channel, a project sponsored by the U.S. Army Corps of Engineers. The record simply does not support the objection based on a diversion of water and as such, the objection must be overruled.

H. Objection Based on Quality of Surface Water Runoff.

Intervenor Bolomet's objection 29 is based on a claim that the project will result in an adverse effect on the quality of the surface water runoff which in turn will adversely affect

the water quality of the near shore waters. Again the evidence does not support this objection. The County of Maui is adopting rules that requires treatment of surface water runoff to mitigate impacts to water quality from storm water runoff. Petitioner will comply with those rules. The conceptual drainage system for the project was reviewed by civil engineers which determined that the drainage system would comply with the proposed rules. The substances about which Intervenor Bolomet expressed concern will be captured on site in the Project's detention basin. Simply put, the evidence before the Commission does not support the objection and as such the objection should be overruled.

I. Objection Based on Lack of Permanent Job Creation.

Intervenor Bolomet's objection 33 is based on an argument that no job opportunities will be created by the Project. The criteria that the Commission examines is not whether the Project will create permanent jobs but whether jobs will be created. The evidence is undisputed that the Project will add \$8 Million to Maui's economy by virtue of the labor alone. Additional value will be added by virtue of the purchase of materials for development and construction. These amounts are not insignificant. The objection, based on a misinterpretation of the criteria that the Commission applies, must be overruled.

J. Objections Based On All Other Objections.

Intervenor Bolomet's objections 31 and 32 are based on the other objections that she raised. The replies to the other objections are incorporated by reference. For the same reasons those objections are invalid and must be overruled, these two objections must be overruled.

K. Objections to Conclusions of Law.

Intervenor Bolomet's objections 1 to 9 to the conclusions of law are argument that Petitioner's position is wrong and therefore the conclusions of law are wrong. No statutory or case authority was cited to support the objections. Argument alone does not provide a basis to object to a conclusion of law. Provided the conclusion correctly states the law and applies the facts to the legal principle, the conclusion must be adopted. In this matter, no basis for the objections have been established and as such, the objections must be overruled.

L. Conclusion.

Findings of fact that are comprehensive and pertain to the issues to be decided are proper so long as they are supported by evidence in the record. Petitioner and County of Maui's findings meet that test. Intervenor Bolomet's objections are argument, most of which is based on matters that were not admitted into evidence in the record. Argument which is not

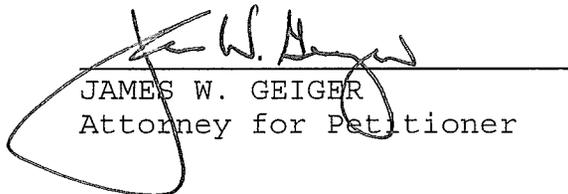
supported by the evidence in the record is not sufficient to support an objection to a proposed finding of fact.

Similarly, objections to conclusions of law must be based on a showing that the conclusion is a misstatement of the law or is a principle of law that would not be applicable to the matter. Intervenor Bolomet's objections were neither; instead the objections were more argument that Intervenor Bolomet's position was correct and Petitioner's position was incorrect. Such objections are not proper and must be rejected.

For all of these reasons, the objections of Intervenor Bolomet must be overruled in all respects.

NOV 20 2012

DATED: Kahului, Hawai'i, \_\_\_\_\_.

  
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CERTIFICATE OF SERVICE

I hereby certify that on the date hereof I caused a copy of the foregoing to be duly served by depositing same in the United States mail, postage prepaid, to the following at their last known address:

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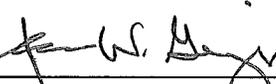
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NOV 20 2012

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