Routh Bolomet- In Propria Persona- Lineal Heir to Lands Found in TMK (2)4-5-10 :005
P.O. Box 37371
Honolulu, Hawaii 96837
808-638-0121 OR
808-638-1910

BEFORE THE LAND USE COMMISSION OF THE STATE OF HAWAII

Docket No. A12-795

IN THE MATTER of the Petition of:

WEST MAUI LAND COMPANY, INC.)
A Hawaii Corporation, and Kahoma Residential LLC, a Hawaii Limited Liability Company

Proposed Reclassification: Agricultural to Urban For TMK (2) 4-5-10-005

INTERVENOR'S MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION

CERTIFICATE OF SERVICE

LEGALLY KNOWN AS & Displayed on TMK Map (2) 4-5-10:005 & 006 as KINGDOM of HAWAII Foreign Allodial Titles:

R.P 1840	L.C.AW. 424	AP.1 & 2	to Kanehoewaa
R.P 5666	L.C.Aw. 4760	AP.1	to Lelehu
R.P. 2651	L.C.AW. 11150	AP. 4	to Keone
R.P. 1839	L.C.AW. 3702	AP. 2	to D. Malo
R.P. 1180	L.C.AW. 312	AP. 1	to T.Keaweiw'i
R.P. 4475	L.C.AW. 7713	AP.25	to V. Kamamalu
R.P. 3455	L.C.AW. 9795-B	Ap.1	to Kaaua
R.P. 4388	L.C.AW. 8452	Ap.4	to A.Keohokalole

Other Properties Identified in V. Kamamalu's Ahupua'a o` Aki and /or Ahupua`a o` Moali`i :

Grant 1891, Ap. 7	to D. Baldwin
Grant 11073	to Pioneer Mill Company, Ltd.
Grant 2998	to W.Ap. Johnes

Being also a portion of Parcel 5-A Kahoma Stream Flood Control Project

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INTERVENOR'S MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION

Routh Bolomet, Intervener in the proposed reclassification of Agricultural District to Urban District, to amend the Land Use District Bou0.ndary of certain land situated at Lahaina, Island of Maui, State of Hawaii submits the following Memorandum in Opposition to Petitioner's Motion to Reconsider the Findings of Facts, Conclusions of Law, and Decision and Order served by the Land Use Commission of the State of Hawaii, Pursuant of HAR 15-15-70.

The basis for the Petitioner's Motion for Reconsideration is that six Findings of Facts are erroneous and not supported by the evidence in the record and two Conclusion of Law are clearly erroneous and not supported by the law and legislation has since been adopted following the conclusion of the evidentiary portion of this matter, but before adoption of the Decision and Order which makes certain findings of fact clearly erroneous.

I will address the arguments that pertain to the evidence and arguments I made, leaving the remaining arguments to be addressed by Intervener Michelle Lincoln in Her Memorandum in Opposition to the Petitioners Motion to Reconsider the Findings of Facts, Conclusion of Law and Decision and Orders served by the Land Use Commission of the State of Hawaii Pursuant to HAR 15-15- Response to Petitioners Motion for Reconsideration .

Response to Petitioners Motion for Reconsideration: Standard of Review

A. Findings of Facts and Conclusion of Law are supported and based on the following legal principles established by statute or reported court decisions:

When dealing with Allodial Titled Lands in Hawaii, Hawaiian Traditional, Cultural and Religious Rights and a Pro Se litigant, the LUC has additional considerations that must be applied to their decision making criteria.

In Ka Pa`akai O Ka `Aina v. Land Use Commission 94 Haw. 31, 7 P.3d 1068 (2000) the Hawai`i Supreme Court held that Article XII Section 7 of the Hawaii State Constitution obligates the Commission to protect the reasonable exercise of Native Hawaii Customary and traditional practices to the extent feasible when granting a petition for district boundary amendments. The Court established the following three prong test:

> In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian practices to the extent feasible, the LUC in its review of a petition for reclassification of district boundaries, must, at a minimum, make specific findings and conclusions as t the following: (1) the identity and scope of "valued cultural, historical, or natural resources", in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area: (2) the extent to which those resources- including traditional and customary native Hawaiian rights will be affected or impaired by the proposed action: and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exhist. [94 Hawaii at 47,7 P.3d at 1084].

In the PASH ruling, PUBLIC ACCESS SHORELINE HAWAII, v. HAWAI'I COUNTY PLANNING COMMISSION, and Nansay Hawaii, Inc., a Hawai'i corporation, Appellees-Appellants-Petitioners. No. 15460.. (CIV. NO. 90-293K) Aug. 31, 1995; the Supreme Court based its decision on laws that were 150 years old, as well as Hawaiian Judicial Precedence as it pertained to Allodial Titled Lands. Since these are Allodial Titled lands and the United States did not exist in Hawaii 150 years ago, it's apparent that the laws being used are those in the Kingdom of Hawaii Constitution and the Hawaiian Judicial Precedence that were also prior to the United States occupation of Hawaii.

As an intervener who has never participated in the Land Use Commission's proceeding and has not gone to law school I rely on the protection of my right to due process as allowed by the Hawaii State Constitution Article 1:

DUE PROCESS AND EQUAL PROTECTION Se**ction 5.** No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. [Ren and am Const Con 1978 and election Nov 7, 1978]

I also rely on the Land Use Commission's expertise to guide me through this process as dictated by the U.S. Supreme Court Ruling that protect Pro Se Litigants; which include:

Haines vs. Kerner, 404 U.S. 519-421: pro se litigants are held to less stringent pleadings standards than bar licensed attorneys. Regardless of the deficiencies in their pleadings, claims. *"Because an overwhelming number of pro se litigants know little or nothing about legal procedures, case law, statutory interpretation, or phrasing pleadings and motions, courts are required to construe pro se petitions liberally".* Haines v. Kerner (1972) 404 U.S. 519,520 (per curiam); accord Hughes v. Rowe (1980) 449 U.S. 5,15 (per curiam).

Anastassoff v. United States, 223 F.3d 898 (8th Cir. 2000): *litigants' constitutional rights are violated when courts depart from precedents where parties are similarly situated. Plaintiffs understand the Court can lose jurisdiction at any time should the Court fail to fulfill their duty as an Officer of the Court.*

The ruling of the court in this case held*; "Where a plaintiff pleads pro se in a suit for protection of civil rights, the court should endeavor to construe the Plaintiff's pleading without regard to technicalities."* In Walter Process Equipment v. Food Machinery 382 U.S. 172 (1965) it was held that in a "motion to dismiss", the material allegations of the complaint are taken as admitted."

The Petitioner insist that I incorrectly submitted evidence therefore it is not part of the record, however at no time were my errors pointed out or the opportunity to make right my errors if any of my evidence was entered incorrectly.

According to **Platsky v. C.I.A.** 953 F2d. 25; *the court errs if court dismisses the pro se litigant without instructions of how pleadings are deficient and how to repair pleadings.*

I in good faith believed that if I failed to submit written evidence and testimony from my two expert witnesses incorrectly, the Chair would instruct me on how to remedy my

mistakes as he is obligated to. Public Testimony was submitted that supported the Agricultural District zoning should remain agriculture according to the law as described in the Hawaii State Constitution and in the State Plan, the Important Agricultural Lands IAL, the County Wide Plans, the Maui General Plan and the West Maui Community Plan.

I was instructed that all my evidence had to be submitted by November 5, 2012 which was the close of the evidentiary portion of the hearings, yet, the Petitioner tries to sneak in two pieces of what he calls newly adopted legislation that is supposed to supersedes all other evidence that was submitted on time before the close of the evidentiary portion of the hearings. I believe the Petitioner is asking the Commissioners to give preferential treatment to the Petitioner, which of course we all know would be an abuse of discretion. Therefore these two pieces of legislation that has been adopted and supersedes the properly timely admitted evidence according to the Petitioner should be deemed erroneous by HRS 91-14(g). "A decision and order which relies upon clearly erroneous findings cannot be sustained on appeal", as the Petitioner points out to the Commission.

RESPONSE TO B: Findings 154, 158, 169, 171 and 172 Are Not Supported by Admitted Evidence.

The assertion that Kahu Michael Lee's testimony was not admitted into evidence and is not part of the record because I failed to submit evidence correctly is protected under Platsky v. C.I.A. Kahu Michael Lee submitted evidence in July 2012 and by August 1, 2012. Additional evidence was submitted in rebuttle to Rory Frampton's Evidence. And just as the Petitioner did before he introduced his experts testimony, he at times introduced additional evidence which the Chairperson allowed. If the Petitioner was granted these allowances, why would a Pro se litigant not also be granted this leniency?

Prior to Kahu Michael Lee's Testimony in November 2012, the additional evidence submitted which included more certificates of qualifications, genealogy, maps and

other supporting evidence that was used in his oral testimony; were submitted at least two months before Kahu Michael Lee's Sworn Testimony that lasted in excess of 2 hours at which time the Petitioner had enough time to voir dire, test and question Kahu Lee's submitted evidence and testimony. When the testimony was being given, the testimony was a visual explanation and expansion of all the documents submitted about Kahu Michael Lee's Cultural Practice and findings on the Petition Site and the areas that would be affected in his cultural practice by this proposed project. There was also in depth explanations of testimony submitted by Public Testifiers Clare Apana and Uncle Herman Naeole who also have cultural practices they participated on the actual petition site and the connecting lands which are affected by the activities that occur on the petition site.

On several occasions throughout the trial the Chair Person allowed the Petitioner to submit additional evidence after the time frame we were told we could no longer submit evidence. To this day I do not understand what the rules are that allowed this to happen, nor was an explanation offered as to how and why the Petitioner was allowed to submit additional evidence in after the deadline. At times it appeared that the Petitioner was given preferential treatment if anyone was since the Interveners did not know they could submit additional evidence until the very moment that the Petitioner was allowed to submit additional new evidence.

The Petitioner also asserts that Kahu Michael Lee should be held to the same 10 point guideline as the Petitioner's Cultural "experts", who testified he was not a Practitioner when asked to explain what "A kaku" means- a practice performed by a Cultural Practitioner, not necessarily by an "expert". 7/20/2012 Tr. Pg. 85 line 1-6. The Petitioner would have the Commissioners believe that Hawaiians are only allowed to pass their knowledge through a 10 point guideline so that the Western mind can grasp our practices. This process of guidelines and information uniformity are only for the Petitioner's "experts" to follow and organize their findings into, not a requirement for a

practitioner like Kahu Michael Lee whose practice is protected under the State Constitution Article XII section 7 . The confusion is that most of the time it is only the "Experts" that regurgitate the information gathered from "Practitioners". In this case the Commissioners were able to get their insights direct from the bird's mouth before regurgitation.

In short, Petitioner contends that Kahu Michael Lee's " cultural assessment" needed to meet guidelines set by the Environmental Council, when in fact those guidelines are for preparation of a Cultural Impact assessment. What Kahu Lee was providing, as far as my understanding goes, is the personal assessment of cultural properties in the region from the perspective of a knowledgeable cultural practitioner.

It was necessary to have this information because the CIA prepared by the petitioner did not include interviews with individuals who had specific knowledge about pre-contact cultural activities of the area. Kahu Lee does have this knowledge and his cultural perspective is a valuable part of the historical record . Even though he was not interviewed in the Cultural Impact Assesment, Kahu Lee has every right to offer an assessment of the cultural properties on the site as a knowledgeable cultural practitioner.

For example, in the CIA the individuals interviewed were not asked specific questions about activities they remembered from the portion of Kahoma stream where the project is located. Many of them referred to activities further mauka near Lahainaluna school or further makai near Mala wharf. Kahu Lee provided very specific information regarding the project site that should have been part of the Cultural Impact Assessment.

While the Petitioner concludes that Kimokea Kapalehua visited the site and determined that no cultural practices were going on there, when he was present on the few occasions, could he know if practices based upon prayer and other less "physical"

practices were going on in the area? On July 20, 2012 Tr. Pg. 84 line 15 – pg. 86 line 18, the Petitioner's Cultural Assessor "Kimo" Kimokea Kapalehua was cross examined by Kahu Michael Lee on Intervener Routh Bolomet's behalf. Kahu Michael Lee ask specifically about the Opeluhaalili's heiau, which Kimo answered he was not surprised to hear this heiau existed despite what he wrote in his written testimony and further answered that it wasn't unusual for new information to later come up. He also said he was not surprised to hear that Intervener Routh Bolomet was the 18th generation great granddaughter of Opeluhaalili or about a karst below the petition site because our history talks of a mo`o that swam throughout the karsts and water ways in Lahaina. To know specifically of all the cultural and religious practices that were and are practiced on this property, he would have to interview those who cared deeply about the land, and up to this moment in time he still has not interview or contacted Cultural Practitioner Kahu Michael Lee, Intervenor Lineal Descendent Cultural Practitioner Routh Bolomet or Cultural Practitioner Clare Apana, to name just a few of the Cultural Practitioners who do ceremonies and other cultural practices on the petition site.
I know for a fact that he was not present at any of the ceremonies we did on the property from June 2012 thru November 2012 when several ceremonies took place in a month as we called on upon our ancestors to guide us and to show us what we needed to see.

Furthermore, Petitioner states that, "None of the witnesses who engaged in the "libation" stone ceremony in June 2012 participated in a similar ceremony before the Petition was filed (***or even had been on the Petition Area before that time).*** I Intervener Routh Bolomet submitted in my late June/ early July 2012 exhibits my SHPD Burial Lineal Descendency and Registration forms filed on June 28, 2012 with the Oahu SHPD. On page 2 under section III Burial information I describe where the burial is located, which specifically states that it is near a sign I staked in the ground that reads; "No Right of Way without permission". This sign was staked in October 2011 two weeks after I learned that this property belonged to our family". From that day until November 2012 which was the last time I checked on the sign, it remained on my grandfather's property.

Uncle Herman Naeole testified on September 7, 2012 p. 132 line 11 thru 137 line 7 that he and his father used to farm on the lands in the Petition area, he spoke of what they used to catch from the spring and the algae that was in the stream that they would eat. He also talked about the Pueo which is his family's amakua and who guided his grandfather when he was lost and when it came to visit in the evening. So the statement that none of the neighbor's testified to the Kahoma Stream use as being for a traditional and customary practice who was a Native Hawaiian is **False!**

When Expert Archeaologist Dega submitted his findings by the industry accepted guidelines, despite following the guidelines, he failed to submit correct LCA's found in the Petition site and he failed to submit the letter from DLNR Keith Ahue, Chairperson and SHPD on October 19, 1994, to Mr. Jyo: Director of Engineering Dept. of the Army, **(exhibit 2b)** it states in paragraph 2 confirming: *"This complex, referred to as the Kahoma Stream Terrace System Complex, was located in the construction impact area of the flood control project."* (referring to TMK 4-5-09, 10, 11, and 15) the area bordering east of the Petition site, all of the Petition site, bordering West and Southwest of the Petition site.

The letter was in regards to the building of the road within the petition site that goes up no further than the by-pass being built currently. I, intervener Routh Bolomet, submitted into evidence on October 4, 2012, a copy of the Letter I submitted to Theresa Donaham of SHPD which contested the accuracy of the SHPD approved archaeological report submitted by Expert Archaeologist Dega for this Petition site. The letter I just referred to is part of the Theresa Donham letter evidence supporting my dispute. So while SHPD has offered an approval letter to form for the Petitioner's EIS requirements, the evidence submitted by me clearly shows that Expert Archaeologist Dega failed to include this important archaeological information that clearly states the Petition site is part of the Kahoma 36 Terrace Complex System which goes all the way down to the

train tracks, it also clearly shows the LCA's included as the LCA descriptions portion of the report is wrong.

Despite this, Petitioner's Expert Rory Frampton continues to vehemently defend that nothing of archaeological significance exist on the property that Cultural Practitioner Kahu Michael Lee testifies under oath to being on the Petition Site and where he did his cultural and religious practice. Mr. Frampton from his western perspective in regards to the iwi burials pointed out by Kahu Michael Lee contends that since he could not see iwi, no burials exist, this despite Kahu Michael Lee testimony of the Heiau on the property going back to 18 generations to my 18th great grandfather Opeluhaalili supported by submitted into evidence genealogical charts that prove this lineage exist, and historical writings that state the genealogical relationship and geographical relationship to the Petition site. Which leads us to conclude that there were other people there and when they died they were traditionally buried on the land where they lived. Not finding iwi does not prove iwi was not once laid to rest there. Having a signature supporting a document with incorrect information does not make a SHPD letter of approval valid, only a letter supporting correct information is valid. The incorrect information makes this letter null and void by any law and erroneous by the Petitioners own definition setforth in their Motion to Reconsider Decision and Order adopted January 14, 2013. Just as erroneous as the insistence that Cultural "Practitioner" Kahu Michael Lee by law cannot submit his testimony because it did not follow the format of a Cultural Assessment "Expert".

RESPONSE TO C. Findings 169, 171 and 172 Are Inconsistent With The Reliable, Probative and Substantial Evidence.

PASH- PUBLIC ACCESS SHORELINE HAWAII, v. HAWAI'I COUNTY PLANNING COMMISSION, and Nansay Hawaii, Inc., a Hawai'i corporation, Appellees-Appellants-Petitioners. No. 15460.. (CIV. NO. 90-293K) Aug. 31, 1995 ruled the following:

The court relied on the following laws which help define Native Hawaiian Rights today:

The Hawaii State Constitution Article XII section 7: The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua`a tenants who are descendents of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the State to regulate such rights.

Hawaii Revised Statute 7.1: where the landlords have obtained allodial titles to their lands, the native tenants on each of their lands, shall not be deprived of the right to take firewood, house timber, aho chord, thatch or ki leaf for their own private use...not... to sell for profit. The People shall also have the right to drink water, running water and have the right of way. The springs water and roads shall be free to all, on lands granted in fee simple; provide that this shall not be to wells and water courses, which individuals had made for their own use.

Hawaii Revised Statute 1-1: The common law of England; as ascertained by England and American decisions, is declared to be the common law of the State in all cases, except as....fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be the subject to criminal proceedings, except as provided by the written laws of the United States or of the State.

The Hawai`I Supreme Court's decision is not a new law, but a recognition of laws over 150 years old, traditional practices which pre-date these laws.

What PASH is according to the Hawaii Supreme Court:

- **Native Hawaiian rights can not be regulated out of existence by unreasonable or burdensome laws, permits or fees.**
- **The Hawai`I Supreme Court did not clearly define when a tradition must be established.**
- A Hawaiian Tradition should be determined by balancing the reasons for continuing it and the harm it poses.

- The Hawai`i Supreme court is counting on native Hawaiians to regulate themselves.
- **While there may have been disruptions to the continuous practice of a tradition or custom, the right to exercise that custom & tradition has not been lost.**

Yet despite this PASH ruling, the Petitioner is insistent that the Commission regulate out of existence by unreasonable or burdensome laws, permits or fees our cultural practice.

The Petitioner insist that the Commission impose that a traditional and customary practice must be performed and establish when a tradition must exist in order for an impact to affect a native Hawaiian.

To all of these statements the Hawaii Supreme Court disagrees!

What did the Hawai`i Supreme Court rule?

The state Supreme Court reversed the Hawai`I County Planning Commission's decision and determined that PASH had made a claim that deserved full consideration. The court said the state has an obligation to protect the tradition and customary rights of Native Hawaiians and it recognized that unique conditions are placed on the rights of the landowners in Hawai`i which limit the landowner's use of his or her land. In other words, **property ownership in Hawai`i is not the same as it is in the continental United States.** The Hawai`i Supreme Court ruled that land ownership in Hawai`i is not only based on the common law of England and America, but includes the traditional ideals of Hawaiian land tenure. **The decision recognized the traditional relationship native Hawaiians have with the land and the importance of maintaining that relationship.**

Other areas of the Hawaii Revised Statutes that protect our Native Hawaiian Rights are (Found in my August 1, 2012 Ex 8b)

§174C-101 Native Hawaiian water rights. (a) Provisions of this chapter shall not be construed to amend or modify

rights or entitlements to water as provided for by the Hawaiian Homes Commission Act, 1920, as amended, and by chapters 167 and 168, relating to the Molokai irrigation system. Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act.

(c) Traditional and customary rights of ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o`opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

(d) The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter. [L 1987, c 45, pt of §2; am L 1991, c 325, §8]

The Petitioner attempts to sell their interpretation of the criteria the Commission should used to accept and package Kahu Michael Lee's testimony and submitted evidence. However, it is through cases like Ka Pa`akai O Ka `Aina v. Land Use Commission 94 Haw. 31, 7 P.3d 1068 (2000) and PASH that the Hawai`i Supreme Court has made clear their interpretation of the laws thru their ruling and are the ultimate last word and the mandates that the Commission must follow, not the erroneous interpretation the Petitioner wants them to follow and enact. The Hawai`i Supreme Court's ruling in Ka Pa`akai O Ka `Aina and PASH are clear, and the mandate of the Commission is to apply and carry out this ruling in its entirety, as it has correctly done in their Decision and Order adopted on January 10, 2012.

RESPONSE TO D: Finding 190 is Clearly Erroneous: Addressed by Michele Licoln

RESPONSE TO E Conclusions 7 & 8 are clearly erroneous As for conclusion 7 & 8 regarding the community Plan, etc: I concur with Intervener Michele Lincoln's arguments submitted and setforth in her Memorandum in Opposition to Petitioners Motion for Reconsideration; and I also submit the following.

While it is true that the "Fast Track" 201-H affordable housing process does "exempt' project's from Community Plan amendment and change in zoning procedures, as I read the case cited by the Petitioner it appears to concern the Honolulu City Council granting an exemption to an ordinance, under a provision of the ordinance that allows such an exemption to be granted. The court determined that the exemption was not a legislative act, because it merely implemented an existing law.

The Petitioner is saying that the exemption granted under the 201-H actually acts as an amendment for the Community Plan and zoning ordinances, therefore, since the Council implemented the exemption required by 201-H, the "Petition Area is not subject to those provisions."

I rebut the Petitioner's argument in that the community plan expresses the will of the people and was adopted into law. Maui County charter and Maui County Code provides a process for amending the community plan; Just because the Kahoma project was granted an exemption from the Community Plan and zoning ordinance, does not mean that the West Maui community plan has been amended. That would require a legislative act under provisions of Maui County Code.

The Council implemented an existing law (201-H) that allows them to exempt projects where 51% of units are affordable from legislative review. They did not legislate or grant an amendment to the Community Plan

The exemption to the West Maui community plan for the project is contingent on its full approval as a qualified 201-H project. For example, if the 201-H petition is turned down by the LUC, the land is not "automatically" rezoned or given "urban" community plan status, since it would not qualify to be a 201-H project and its "exemption" would no longer be relevant unless it sought a community plan review. During that review, the additional information that was brought forth during the LUC hearing could be presented. The Council, freed from a mandated 45 day review period, could choose to make a different decision.

The LUC rules (ACT 26, 2008) specify that a project conform with "The county general plan and all community, development, or community development plans adapted pursuant to the county general plan, as they relate to the land that is the subject of the reclassification petition; and..."

In this case, the project does not "conform" with the Community Plan (which has never been amended) , rather it is overriding the decisions made during the Community Plan process. The LUC should recognize that fact. The project does conform with the Urban Growth Boundary of the new Maui island Plan (MIP) , but that is because the MIP review panels and council had no knowledge of the cultural importance of the area due to the landowner's consistent portrayal of the parcel as abandoned ag land with no other useful purpose than housing.

RESPONSE TO F: Adoption of New Laws Must Be Considered.

Finding 171 says "Reclassification of the Petition Area may have a significant impact on the Maintenance of valued cultural, historical or natural resources."

Petitioner in its Motion to Reconsider contends that it is "clearly erroneous" to find that the project might have an adverse impact on natural resources when petitioner is in compliance with County storm water regulations, specifically the November 28, 2012 rules included in the motion to reconsider. Petitioner presumes that the County's regulations are adequate to

protect storm water and ocean water quality and protected uses including propagation of fish and wildlife, recreation, protection of coral, limu, fisheries and other resources that are critical to cultural practices.

In fact, the regulations referred to are **minimum** design standards (emphasis added). Additional measures may be required to protect the natural resources and cultural practices that rely upon the resource. The petitioner assumes meeting these minimum standards will protect the resources based upon an opinion of an anonymous engineer who may or may not be qualified to determine the water quality and other natural resource impacts of implementing varying levels of wastewater treatment, storm water technology and pollutant loads. The Land Use Commission cannot make a determination at this time. The Hawaii Department of Health (DOH) reports to the Environmental Protection Agency and Congress in the 2012 Integrated Water Quality Report that the waters of Kahoma Stream, Mala Wharf, and the near shore ocean waters of the effluent mixing zone of the Lahaina Treatment Plant are reported to be impaired and not supporting legally protected uses. http://hawaii.gov/health/environmental/water/cleanwater/integrated%20draft%20report/IntegragedReport.pdf. The waters of Kahoma stream are impaired and do not meet the turbidity standard. The assessment of the primary potentially affected marine areas is summarized in Table 1 and shows numerous standards are not being attained, therefore the uses of the waters are considered impaired. Pursuant to Section 303(d) of the Clean Water Act (P.L. 97-117), impaired waters require a Total Maximum Daily Load (TMDL) be established to determine allowable pollutant loads that support the protected uses. DOH is reporting that uses are not adequately protected; that inadequate information exists to assess all criteria; that TMDL is required; that allowable pollutant loads have not be determined, and are not high on the priority list for completion. Therefore, at this time, neither the County nor the LUC can determine if the required wastewater treatment and storm water design criteria are adequate to protect the resource.

Scope of Assessment	Enterococcus	Total Nitrogen	Nitrite plus nitrate nitrogen	Total Phosphorus	Turbidity	Chlorophyll a	ammonia	Category/priority

Kahekili Beach Park (Kaanapali)	Attaining standards	attaining standards	Not attaining standards	attaining standards	Not attaining standards	attaining standards	Not attaining standards	2-attainment for one or more pollutant; 5-impaired, TMDL needed; priority Medium
Sheraton Kaanapali	Attaining standards	?	?	?	Not attaining standards	Not attaining standards	?	2-attainment for one pollutant; 3-not enough data, 5-impaired, TMDL needed; priority medium
Mala Wharf	Not attaining standards	?	?	Not attaining standards	Not attaining standards	Not attaining standards	?	3-not enough data, 5-impaired, TMDL needed; priority Medium
Mala Wharf west Maui coast	?	?	?	?	Not attaining standards	Not attaining standards	?	3-not enough data, 5-impaired, TMDL needed; priority Medium
Mala wharf	?	Not attaini	Not attaini	Attaining	Not attaini	Not attainin	Not attaini	2-attainment

area		ng standa rds	ng standa rds	standar ds	ng standa rds	g standar ds	ng standa rds	for one pollutant; 3-not enough data, 5-impaired, TMDL needed; priority low

The arguments set forth by the Petitioner are erroneous as it has not met the HAR 15-15-84 criteria and the two new adopted plans are outside of the evidentiary period for submitting new evidence as Michele Lincoln meticulously pointed out.

The Petitioner absurdly insinuates that the Commissioners who did not vote to for their Petition to reclassify Ag lands to Urban Lands did so for personal reasons and did not uphold their Oath to protect and defend the State and US Constitution which perhaps needs to be read again to show in fact how the courageous Commissioners that voted to deny the motion did in fact do so by "following" the law and their Constitutional mandates which states:

THE CONSTITUTION OF THE STATE OF HAWAII

ARTICLE XVI

GENERAL AND MISCELLANEOUS PROVISIONS

OATH OF OFFICE

Section 4. All eligible public officers, before entering upon the duties of their respective offices, shall take and subscribe to the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States, and the Constitution of the State of Hawaii, and that I will faithfully discharge my duties as ..... to best of my ability." As used in this section, "eligible public officers" means the governor, the lieutenant governor, the members of both houses of the legislature, the members of the board of education, the members of the national guard, State or county employees who possess police powers, district court judges, and all those whose appointment requires the consent

of the senate. [Ren and am Const Con 1978 and election Nov 7, 1978; am SB 1440 (1992) and election Nov 3, 1992]

In the Petitioner's Motion to Reconsider Conclusion it boldly states that, "Each Commissioner took an oath to uphold the laws of Hawaii. This requires each Commissioner to place their personal view of and prior experiences with Petitioner aside. Each Commissioner must apply the facts contained in the record to the law". Since both the Interveners and the Petitioner are in agreement that it is the Commissioners oath of office to uphold the Constitution of the United States and the State of Hawaii, then it should also be agreed that the Commissioners that voted to Deny the petition upheld their Oath by following articles in the Hawaii State Constitution, which are:

Article 1:

DUE PROCESS AND EQUAL PROTECTION Section 5. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. [Ren and am Const Con 1978 and election Nov 7, 1978]

in which Article 12 section 7 applies, Article 1

ARTICLE XI

CONSERVATION, CONTROL AND DEVELOPMENT OF RESOURCES

CONSERVATION AND DEVELOPMENT OF RESOURCES

Section 1. For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people. [Add Const Con 1978 and election Nov 7, 1978]

MANAGEMENT AND DISPOSITION OF NATURAL RESOURCES

Section 2. The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law; but land set aside for public use, other than for a reserve for conservation purposes, need not be placed under the jurisdiction of such a board or commission.

The mandatory provisions of this section shall not apply to the natural resources owned by or under the control of a political subdivision or a department or agency thereof. [Ren and am Const Con 1978 and election Nov 7, 1978]

AGRICULTURAL LANDS

Section 3. The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.

Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action. [Add Const Con 1978 and election Nov 7, 1978]

ARTICLE XI

CONSERVATION, CONTROL AND DEVELOPMENT OF RESOURCES

CONSERVATION AND DEVELOPMENT OF RESOURCES

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MARINE RESOURCES

Section 6. The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State, including the archipelagic waters of the State, and reserves to itself all such rights outside state boundaries not specifically limited by federal or international law.

All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same; provided that mariculture operations shall be established under guidelines enacted by the legislature, which shall protect the public's use and enjoyment of the reefs. The State may condemn such vested rights for public use. [Ren and am Const Con 1978 and election Nov 7, 1978]

WATER RESOURCES

Section 7. The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources. [Add Const Con 1978 and election Nov 7, 1978]

ENVIRONMENTAL RIGHTS

Section 9. Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. [Add Const Con 1978 and election Nov 7, 1978]

Article X11 Section TRADITIONAL AND CUSTOMARY RIGHTS

Section 7. The State reaffirms and shall 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. [Add Const Con 1978 and election Nov 7, 1978]

It appears to me that the Commissioners who did vote to DENY THE PETITION did so by following the law and upholding their oath.

The Supreme Court Rules are the law [fnl], and must be followed by litigants, attorneys, and all Circuit Judges and Appellant Court Justices. Compliance with SCR is not discretionary, but is mandatory [fnl]. *Theis*

"It is the duty of the court to always zealously guard the constitutional rights of citizens" *Tucker v. U.S., C.A. Iowa, 375 F. 2d 363, certiorari denied 88 S. Ct. 128, 389 U.S. 888, 19 L.ED,2d 189*

"Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law, and, when that is discerned, it is the **duty** of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." [Emphasis in original]. *Littleton v. Berbling*, 468 F.2d 389, 412 (7th Cir. 1972), citing *Osborn v. Bank of the United States,* 9 Wheat (22 U.S.) 738, 866, 6 L.Ed 204 (1824); *U.S. v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991).

"Where rights secured by Constitution are involved, there can be no rule making or legislation which would abrogate them." *Miranda v. State of Arizona* 86 S.Ct. 1602 (1966) "Where law or application of the law is

challenged on constitutional grounds, judiciary has authority, as well as duty, to explore constitutional ramifications of law." *City of Anderson v. Associated Furniture & Appliances, Inc.*, 423 N.E.2d 293

Foster v. Murphy 686 F.Supp.471, 474 (1988); O'Connor v. United States (1987) 669 F. Supp. 317,324. The court may substitute the appropriate statute for an omitted or incorrect statute if the facts arguably support a claim under the law.

No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution." See Downes V. Bidwell. 182 U.S. 244 (1901), Harlan dissenting.

The burden of proving by clear preponderance of the law falls on the shoulders of the Petitioner. I stand in agreement with Intervener Michele Lincoln in that even if the findings of facts and conclusion of law were eliminated and the entire issue of the Community Plan and the Commissions Constitutional obligations ignored, the Petitioner will still have failed to meet its burden.

The Petition does not meet the decision making criteria for land use reclassification and justifies the issued Decision and Order. The Petitioner does not meet the HAR 15-15-84 criteria in their Motion for Reconsideration of Decision and thus justifies the denial for reconsideration. The Decision and Order of the State Land Use Commission issued on January 14, 2013 shall remain and the reclassification of the Petition Area is **DENIED,** BEING THE SUBJECT OF THE Petition Docket A12-795 filed by West Maui Land Comapany and Kahoma Residential LLC.

DATED: HONOLULU, HAWAI`I, JANUARY 28, 2013

Routh Bolomet, INTERVENER Through Lineal Descendency

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing documents was duly served upon the following by US Postal Service:

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Dated, Honolulu, Hawai`i this day of January 28, 2013

Routh Bolomet

Pro Se Lineal Descendent of Foreign Allodial Titles found in TMK (2) 4-5-010:005 & 006