

Michele Lincoln
452 Aki Street
Lahaina, HI 96761
(808) 667-6652 home
(808) 385-3157 cel
lincolnmichele@yahoo.com

LAND USE COMMISSION
STATE OF HAWAII
2013 FEB 11 A 8:35

BEFORE THE LAND USE COMMISSION
OF THE
STATE OF HAWAII

In the Matter of the Application of)	DOCKET NO: A12-795
)	
West Maui Land Co. Inc. and)	INTERVENER'S RESPONSE TO STATE
Kahoma Residential LLC)	OFFICE OF PLANNING'S JOINDER IN
33 Lono Avenue)	PETITIONER'S MOTION TO RECONSIDER
Kahului, HI 96732;)	DECISION AND ORDER
TMK (2) 4-5-10:005)	ADOPTED JANUARY 14,2013;
Proposed Reclassification: Agriculture to)	LETTER AND REVISED PAGE 8
Urban)	CERTIFICATE OF SERVICE

INTERVENER'S RESPONSE TO STATE OFFICE OF PLANNING'S JOINDER IN
PETITIONER'S MOTION FOR RECONSIDERATION

Michele Lincoln, Intervener in the proposed reclassification of Agriculture District to Urban District, to amend the Land Use District Boundary of certain land situated at Lahaina, Island of Maui, State of Hawaii submits the following Response in Opposition to OP's Joinder in Petitioner's Motion to Reconsider the Findings of Fact, Conclusions of Law, and Decision and Order served by the Land Use Commission of the State of Hawaii, Pursuant of HAR 15-15-70.

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, pro se litigants are entitled to the opportunity to submit evidence in support of their claims.

Platsky v. C.I.A. 953 F.2d. 25; the court errs if court dismisses the pro se litigant without instructions of how pleadings are deficient and how to repair pleadings.

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."

I.ARGUMENT

The Office of Planning lists 6 points that state "we believe the record demonstrates that the Petition meets the Commission's decision making criteria" the Intervener objects to their arguments and responds as follows:

- The Office of Planning's contention is that the Petition conforms to the Hawaii State Plan relating to housing and development therefore the Petition should be approved. However, in light of the overwhelming evidence provided to the Commission their decision after clear preponderance concluded that FOF 185 "There are other lands adjoining Lahaina which can be used, and have been designated, for urban growth in the future."
- The Petition area has the components of a commercially viable agriculture district, the evidence provided only proved the lack of the Petitioner's ability to do so. Also, HRS 205-2 supports Agriculture Districts to include Open Area Recreational Facilities and Agriculture Parks. The West Maui Community Plan designated the Petition Area as Open Space which is lawful and is supported by the

Agriculture District Statutes.

· The Petition has impacts on identified areas of State concern and require mitigated conditions to be imposed. The admission of the Office of Planning that the Petition falls short of the decision making criteria of the Land Use Commission and needs conditions is justification for denial. It is the Commissions prerogative to provide conditions or deny a Petition as they see fit based on the overall evidence and upon clear preponderance. The Commission denied the Petition for Reclassification and the Office of Planning may not like it but the Commission must uphold the Hawaii Revised Statutes and Hawaii Administrative Rules as they see fit. The Land Use Commission was established for this very purpose to ensure that the “Life of the Land is perpetuated In Righteousness” and that an appointed commission would look at the overall evidence and provide a decision that encompasses all the factors. The Commission is one more safeguard to ensure good governance and protect against any perceived corruption or collusion that may occur.

· The Petition is not in conformance with the West Maui Community Plan and the County of Maui’s General Plan 2030 does not supersede that Ordinance. The fact that the project is exempt from obtaining a community plan amendment from the County does not imply that the State Land Use Commission must exempt them. The Petition Area is over 15 acres which makes it a State Land Use Commission matter. The fact that the County gave the Petitioner approval to proceed with conditions is not a decision making criteria standard for the commission only another piece of evidence for them to consider.

· The Petitioner indicated the project would be completed with Petitioner’s funds and conventional financing. The Petitioner did not provide the sufficient evidence to substantiate that claim thus the denial is justified by the decision making criteria set forth that the commissioners must adhere to.

· The Petition Area has not been in use for intensive agriculture use for two years or even the last two decades as a matter of choice by the Petitioner. The Office of Planning would suggest that the Land

Use Commission set a precedent that would allow for the lack of use and neglect of Agriculture land to manipulate criteria for agriculture districts to be rezoned to urban use.

A. Petition is Not in Conformance with the General Plan

The adoption of the Maui Island Plan does not affect the West Maui Community Plan. As the Petitioner acknowledges, "the Maui Island Plan, together with the Countywide Policy Plan and the Community Plans are the General Plan. MCC 2.80B.030B" While the Petitioner attempts to persuade through argument that somehow the Maui Island Plan somehow repeals the current West Maui Community Plan because the land is within the growth boundaries, this is contradicted by the express language of the Maui Island Plan. At footnote 42, it states "The distinct boundaries of the parks and open space, specific location of the recreational uses, and the precise amenities will be further defined during the West Maui Community Plan Update and the project review and approval process."

There is no basis for the Petitioner to claim that the County Council intended to repeal the current West Maui Community Plan designations or requirements when the Maui Island Plan itself contemplates that the open space and recreational uses of the area will be defined during the next Community Plan update.

The Office of Planning would have the commission believe that the Maui Island Plan by including the Petition Area within the Plan's urban growth boundary somehow endorses this Petition. That would be a false assumption as the West Maui Community Plan is still lawful and the Petition Area is designated as Open Space. The Petitioner was aware of the Open Space designation when the land was acquired. Urban growth includes Open Space Recreational Areas as well as Parks and Greenways. The revised West Maui Community Plan Update has not been adopted thus the Commission must rely on the current Law which designates the Petition Area as Open Space. The West Maui Community Plan specifically identifies this Area in its Land Use Goal #6 "INTEGRATE STREAM CHANNELS, GULCHES, AND OTHER AREAS DEEMED UNSUITABLE FOR DEVELOPMENT IN THE

REGIONS OPEN SPACE SYSTEM FOR THE PURPOSE OF SAFETY, OPEN SPACE RELIEF, GREENWAYS FOR PUBLIC USE AND VISUAL SEPARATION. EXISTING DEVELOPMENT OF THESE STREAM CHANNELS, GULCHES AND OTHER AREAS SHALL BE MAINTAINED AND SHALL NOT BE EXPANDED. DRAINAGE CHANNELS AND SILTATION BASINS SHOULD NOT BE CONSIDERED FOR BUILDING SITES, BUT USED, RATHER FOR PUBLIC OPEN SPACE. THE FOLLOWING MAJOR STREAMS AND GULCHES, AS NAMED ON THE UNITED STATES GEOLOGIC SURVEY TOPOGRAPHIC MAPS ARE TO BE KEPT AS OPEN SPACE: A. KAHOMA STREAM.”

Accordingly, the basis for the Petition’s denial is still supported by the evidence and the unlawful new evidence does not negate these facts. Therefore, this **justifies the denial** of the Petitioner’s Motion for Reconsideration.

B. FOF 190.

The Office of Planning would suggest that the Commission would have to “establish a new general requirement for land use petitions”. The Intervener suggests the enforcement of the current criteria which is HAR 15-15-50 (8). The Petitioner did not provide the Commission with the verified financial condition of its financial capability and a clear description of the manner in which the Petitioner proposes to finance the development. The precedent established in regards to an unaudited financial statement is not law but only the past interpretation thereof. Therefore, this Commission may start enforcing the criteria which is clearly established and not require any additional rule-making. The Commission in its upholding of the current financial criteria may determine applications for future petitions to provide verified financial statements and ensure that the projects presented are financially reasonable and viable. The Office of Planning should be in full support of the Land Use Commission upholding this law or follow procedures for rule-making and change the current State Land Use Criteria HAR 15-15-50(8).

Contrary to Office of Planning's claims regarding FOF 190, the Land Use Commission is not engaged in rule-making. Each of the cases it cites refers to administrative agencies (insurance commissioner and city tax assessor) engaging in regulatory conduct that involved administrative discretion. In those cases, the administrative agency was found to have committed to particular policy choices in enacting its discretion which constituted a rule under HRS 91-1. Strangely, it cites to Foster Village Community Assn. which itself noted that actions in the contested case process that involve "a determination only of her past and present liability" are "not applicable" to the rule-making provisions of HRS 91-3.

Additionally, as noted in *NLRB v. Wyman-Gordon Co.*, 394 US 759, 765-766 (1969) in interpreting the federal Administrative Procedure Act, which has much more rigorous requirements for rule-making, the U.S. Supreme Court stated: " Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. They generally provide a guide to action that the agency may be expected to take in future case. Subject to the qualified role of state decision in the administrative process, they may serve as precedents. But this is far from saying... that commands, decisions, or policies announced in adjudication are 'rules' in the sense that they must, without more, be obeyed by the affected public." The Office of Planning attempts to argue that the policy of having "approved petitions in the past without proof that the financial statements had been audited" is a rule that the Commission must follow in all future cases. This would be a false assumption. The Commission is JUSTIFIED IN THE DENIAL of the Petition for Reclassification and JUSTIFIES THE DENIAL of the Motion for Reconsideration.

Third, the Commission did determine the Petition was complete pursuant to 15-15-50(f) but that does not mean that the statement describing its financial condition is sufficient to grant approval. It is in the same way that a petitioner submitting a statement addressing Hawaiian customary and traditional rights

does not foreclose the Commission from receiving evidence or making findings denying approval. 15-15-50(e) and (f) completeness does not replace the Commission's judgment in a contested case proceeding. Intervener Lincoln did question the lack of financial statements from the partner developer which accounts for ten of the 68 lots. The Petitioner had the opportunity to present more financial evidence as the evidentiary portion was not completed until Oct. 5, 2012 and the questions regarding the financial capability was on Sept. 6, 2012 in the cross examination of Heidi Bigelow. It is the Petitioner's burden of proof and the lack of evidence from the Petitioner is not the responsibility of the Commission. The Petition was complete and it did not meet the criteria for land use reclassification. Again, it is not the Commission's responsibility to provide the burden of proof under the Hawaii Administrative Rules only to enforce the rules.

C. FOF 170

The Office of Planning does not take into consideration the following statues and ordinances that the State Land Use Commission must adhere to. The Hawaii State Plan 226-14 states the need to coordinate and improve facility systems prior to development to ensure the facility can be supported within resource capabilities. The HRS 226-15 addresses the provision of developed sewage facilities for planned growth and the County Council's Resolution does not prohibit the Land Use Commission from enforcing this rule. The Hawaii State Plan is complemented by the Countywide Policy Plan that states the improvement and management of infrastructure systems. The same could be said of the HRS 226-21 on Education and that the Commission is to ensure the provision of adequate facilities to meet the community's needs, the record shows the Lahaina Schools are over-capacity. The West Maui Community Plan B. "IDENTIFICATION OF MAJOR PROBLEMS AND OPPORTUNITIES IN THE REGION #1 LAND USE CONTROLS AND COMMUNITY PLAN IMPLEMENTATION. THE INTEGRITY OF THE COMMUNITY PLAN AND THE EXISTING LAND USE CONTROLS MUST BE PRESERVED AND ENHANCED IN ORDER TO ENSURE SENSIBLE LEVELS OF

DEVELOPMENT AND GROWTH IN THE REGION...PROJECTS HAVE BEEN PERMITTED THAT WERE INCONSISTANT WITH THE COMMUNITY PLAN AND AGRICULTURALLY DESIGNATED LANDS ARE BEING USED FOR OTHER THAN AGRICULTURAL PURPOSES. OTHER SPECIFIC PROBLEM AREAS INCLUDE THE INCONSISTENCY OF ZONING AND THAT DEVELOPMENT HAS PRECEDED INFRASTRUCTURAL IMPROVEMENTS.

INFRASTRUCTURE: INADEQUATE INFRASTRUCTURE AND THE FAILURE OF EXISTING INFRASTRUCTURAL SYSTEMS ARE SEEN AS MAJOR PROBLEMS FOR THE REGION. INFRASTRUCTURAL IMPROVEMENTS NEED TO BE CONSTRUCTED PRIOR TO THE ISSUANCE OF BUILDING PERMITS IN ORDER TO PREVENT LAG TIME NEEDED FOR INFRASTRUCTURE TO CATCH UP WITH DEVELOPMENT.” These are the criteria of the State Land Use Commission in regards to infrastructure. The Office of Planning makes the unwarranted claim that by denying the petition because of concerns regarding the lack of wastewater capacity in Lahaina that all petitions for geographic areas served by the LWRF should be similarly denied. This sweeping claim seems to be the precise type of rule-making, the Office of Planning claims the Commission cannot do. Further, the Commission cannot forecast the state of things when another petition in the Lahaina and Kaanapali districts might be submitted or if the next petition in this area will be part of the Lahaina Wastewater Reclamation Facility. It is precisely why adjudication through a contested case process must hew to the facts of the case and why it is not considered rule-making. Foster Village Community Assn. The Commission operates under the confines of the statues and the criteria established for land use reclassification. The fact that this decision could affect pending or future cases is not a Land Use Commission criteria. If, however, it does reflect in other departments or agencies to follow the law, then justice is served and the people are protected. The State Office of Planning and the Maui County Planning Department may want to consider the improvements of the Lahaina Wastewater Reclamation Facility, the construction of portables at the Lahaina Schools, the

additional water meters and any other infrastructural related concerns necessary for development approvals rather than cast blame on the Commission for upholding the land reclassification criteria. The lack of adequate infrastructure is JUSTIFICATION FOR DENIAL and to DENY THE MOTION FOR RECONSIDERATION.

D. COL 7

The Office of Planning does not take into consideration the ordinance that is the West Maui Community Plan (1996) that designates this agriculture land as Open Space which is further supported by the standards for the State Agricultural Districts pursuant to HRS 205-2 that includes open area recreational facilities and HAR 15-15-19. There was substantial evidence that the area is and has been used for open area recreation. It was discussed at length in the 1995 West Maui Community Plan Committee Meeting and also mentioned in the footnote to the new Maui Island Plan that indicates that further community discussion will occur during the next revision to the West Maui Community Plan. Finally, while the Office of Planning attempts to negate the purpose of non-agricultural use in an agricultural district, each of the examples listed have a clear function in furtherance of agricultural use. Each allow for concurrent and/or future use of agricultural land in a way that removing these lands that are subject to permitted non-agricultural use would permanently destroy. The Open Area Recreational Facilities under the standard for State Agriculture as well as Urban Designation in the new Maui Island Plan that allows for recreational areas and the Open Space designation in the West Maui Community Plan meet the State Land Commission criteria **and justifies the DENIAL of the reclassification and the denial of the Petitioner's Motion for Reconsideration.**

E. Failure to Resolve Factual Disputes

The burden for approval is on the petitioner.”[T]he party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion.” HRS 91-

10(5) If the Petitioner fails to persuade the Commission of key factual point, then the Petitioner has failed to meet his burden and the Petition should be **denied**. If the evidence does not tend to support factual findings in support of the petition, findings stating that are reasonably clear upon the Commission's preponderance. Just because the Office of Planning does not agree with the decision of the Commission it cannot assume that the Commission did not "weigh the evidence and then provide its honest and best factual determinations with reasonable clarity and precision". The burden to prove to the Commission that the petition should be granted does not lie with interveners who are helping to establish a complete record or on the Commission. This **justifies the denial** of the reclassification and **the denial of the Petitioner's Motion for Reconsideration**.

F. Mitigation Through Conditions

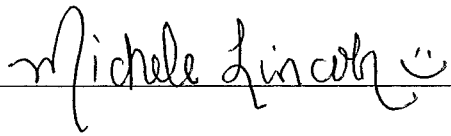
The Office of Planning concedes that "the Commission has the **option** of imposing appropriate conditions to mitigate any outstanding concerns". That is an admission that the Proposed Petition does not comply with the State Land Use Decision Making Criteria and would need conditions. It also is **justification for the denial** of the reclassification which is in the Commissions' prerogative.

CONCLUSION

For these reasons the Intervener asks the Commission to uphold its prior decision to keep the Petition Area in the Agriculture District and deny the Petitioner's Motion for Reconsideration. However, if the Commission grants the Petitioner the Motion for Reconsideration the Intervener respectfully requests the Commission to allow for additional evidence to be introduced by the Interveners as the Petitioner has unlawfully added exhibits and testimony. The Interveners would only introduce additional exhibits that have relevance to previous evidence or testimony and update the Commission in the same manner that the Petitioner unlawfully saw fit to do, as it is not mandated in the Land Use Commission Administrative Rules. The Petitioner has not met the HAR 15-15-84 criteria in there 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 Company and Kahoma Residential LLC.

DATED: Lahaina, Maui, Hawai'i, this 8th day of February, 2013.



A handwritten signature in cursive script, reading "Michele Lincoln", is written over a horizontal line. The signature includes a small smiley face at the end.

MICHELE LINCOLN, Intervener

Feb. 8, 2013

Dear Commissioners,

In January, I sent a fax to you of this "revised" version of page 8 for my Memorandum in Opposition to Petitioner's Motion for Reconsideration. I had not signed and dated my memorandum so am sending you the original and 15 copies now with my Response to the State Office of Planning. I have enclosed a copy to all the other parties as well and apologize for any inconvenience this may have caused.

Sincerely,

A handwritten signature in black ink that reads "Michele Lincoln" followed by a small smiley face. The signature is written in a cursive, flowing style.

Michele Lincoln, Intervener

Chapter 205-2 clearly calls for the Land Use Commission to "give consideration to the master plan or general plan of the county."

This fast track process calls for the commission to decide on boundary amendments pursuant to Chapter 205-4 and 205-4 calls for the commission NOT to amend a land use district boundary unless there is a finding by a clear preponderance of the evidence that it is not violate section 205-2 which calls for consideration of the general plan.

It is the burden of the Petitioner to prove by a clear preponderance. Even if the findings of facts and conclusions of law were eliminated and the entire issue of the Community Plan and the Commission's 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 has not met the HAR 15-15-84 criteria in there 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 Company and Kahoma Residential LLC.

DATED: Lahaina, Maui, Hawai'i, this 23rd day of January, 2013.

A handwritten signature in black ink that reads "Michele Lincoln" with a small smiley face at the end. The signature is written over a horizontal line.

MICHELE LINCOLN, Intervener

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document(s) was duly served upon upon the following by U.S. Postal Service:

James W. Geiger
Mancini Welch & Geiger
305 E. Wakea, Suite 200
Kahului HI 96732

Jesse Souki, Director Office of Planning
235 South Beretania, Rm 600
Honolulu HI 96813

Bryan C. Yee Esq. Deputy Attorney General
425 Queen Street
Honolulu, HI 96813

William Spence, Director Department of Planning
County of Maui
250 South High Street
Wailuku, HI 96793

James Giroux, Esq. Dept. of Corporation Council
County of Maui
200 South High Street
Wailuku, HI 96793

State Land Use Commission
P.O. Box 2359
Honolulu, HI 96804-2359

Routh Bolomet
PO Box 37371
Honolulu, HI 96837

Dated: Feb 8, 2013 Michele Lincoln 