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LAND USE COMMISSION  
STATE OF HAWAII

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 MEMORANDUM IN
Kahoma Residential LLC	)	OPPOSITION TO PETITIONER'S
33 Lono Avenue	)	MOTION FOR RECONSIDERATION
Kahului, HI 96732;	)	LETTER REGARDING FINAL FOF, COL, D&O
TMK (2) 4-5-10:005	)	CERTIFICATE OF SERVICE
Proposed Reclassification: Agriculture to	)	
Urban	)	

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INTERVENER'S MEMORANDUM IN OPPOSITION TO 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 Memorandum in Opposition to 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.

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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 F2d. 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."

The Rule for Reconsideration, 15-15-84(b) states: "The motion for reconsideration shall state specifically what points of law or fact the commission has overlooked or misunderstood together with brief arguments on the points raised."

The Petitioner has not done that. The Petitioner has not explained where the Commission has overlooked or misunderstood the Findings of Fact or Conclusion of Law but rather would have the Commission reconsider its previous arguments by rehashing its arguments. The Petitioner is improperly submitting additional evidence into the record. The evidentiary portion of the proceedings was closed on October 5, 2012, #104 of the Procedural Matters in the Findings of Fact. The HAR 15-15-76 Re-application by the petitioner for boundary amendment is the recourse the Petitioner has to "submit significant new data or additional reasons which substantially strengthen the Petitioner's position". The Hawaii Administrative Rules Title 15, Chapter 15 are the rules that the Land Use Commission must uphold and clearly the Petitioner's

Motion to Reconsider does not meet the criteria herein. Therefore, this does **justify the denial** of the Petitioner's Motion for Reconsideration.

#### A. Standard of Review

The Petitioner simply seeks to have a second bite at the apple with this motion for reconsideration. It attempts to re-argue how the commission should view the evidence and that certain evidence should be ignored entirely. HAR 15-15-63 Evidence "Neither the commission nor a hearings officer is bound by the common law rules relating to the admission or rejection of evidence."

The courts decline to consider weight of evidence to ascertain whether it weighs in favor of administrative findings, or to review agency's findings of fact by passing upon credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing in its own specialized field. *Mahiai v. Suwa*, 69 Haw. 349(1987)

An agency's findings of fact are reviewable to determine whether they are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Potter v. Hawaii Newspaper Agency* 89 Haw. 411, (1999)

None of the findings that the Petitioner contests are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. The Decision and Order adopted on January 14, 2013 was the result of the Land Use Commission having heard and examined the testimony, evidence and argument of counsel and the parties present during the hearings,

along with pleadings filed. The lack of support that the “decision and order was based on erroneous conclusions” does **justify the denial** of the Petitioner’s Motion for Reconsideration.

B. Findings 154, 158, 169, 171 and 172 Are Supported by the Record

HAR 15-15-63 (j) protects the amended testimony of Michael Lee which was competent, relevant and material. There is no requirement in the Land Use Commission rules that Michael Lee's testimony conform to any particular format or requirement because his testimony is otherwise competent, relevant and material. The Petitioner had the opportunity to cross examine the witness Michael Lee on October 5, 2012. The Petitioner was entitled to argue to the Commission regarding the weight of his testimony then but is now attempting to do that in this motion for reconsideration. Nevertheless, the findings are supported by the record and this **justifies the denial** of the Motion for Reconsideration by the Petitioner.

C. Findings 169, 171 and 172 Are Supported by the Record

The Petitioner objections to Findings 169 and 172 are simply an attempt to re-argue its view of the evidence. It acknowledges the record includes evidence of cultural practices on the land, but then uses other evidence to contradict the finding. There is a substantial basis in the record to support the findings. The Petitioner is simply attempting to re-argue the evidence hoping for a motion to reconsider and an overturn of the Decision and Order. However, it does not meet the criteria of the Hawaii Administrative Rules so **justifies the denial** of the Petitioner’s Motion for Reconsideration.

D. Finding 190 is clearly **not** erroneous.

HAR 15-15-50 (8) "A statement describing the financial condition together with a current balance sheet and income statement, and a clear description of the manner in which the petitioner proposes to finance the proposed use or development." The Commission need not rely upon financial or mathematical experts to determine that the Petitioner has failed to meet its burden to prove it is in the appropriate financial condition to do the project. The Petitioner's statement that they show a net worth of \$2.5 million and "audited or not that is a substantial sum of money". If it is not verified by an audit then it is only opinion and not fact. The Petitioner testified that they would need to secure a loan, as the \$2.5 million is not adequate to create a subdivision with the required infrastructure. The Petitioner did not provide any evidence as to the ability to secure the loan necessary to complete the Project. Nor did they produce any projected cost analysis so in relationship to that, it is not "a substantial sum of money". The partner developer did not show any financial statement at all or ability to carry out their financial commitments. Therefore, the Petitioner failed to meet the decision making criteria and this finding is **not** "clearly erroneous". The lack of evidence of necessary economic ability to carry out the representations and commitments relating to the proposed development **justifies the denial** for the Motion for Reconsideration.

E. Conclusions 7 and 8 are proper

Although the Petitioner attempts to refuse recognition that portions of the Petition Area has been used as an Open Space recreational facility, does not make the legal conclusions clearly erroneous. Reasonable commissioners are entitled to make reasonable conclusions from the

substantial evidence. The petitioner's denials of the recreational uses of the land do not constitute evidence but argument since there is no evidentiary support for such claims. The Petitioner's description of "vacant and fallow" does not controvert the substantial evidence of Open Space recreational use by the neighbors. Intervener's witness Jane Imai, has resided in the neighborhood for the last 80 years, testified to the past and present recreational use of the Petition Area. The Petitioner's CIA has an interview with a consultant that had memories of playing in the stream on the Petition Area. The finding that recreational use has existed and currently does exist is clearly **not** erroneous and is **justification to deny** the Motion for Reconsideration.

With respect to Conclusion 8, Petitioner misstates the law.

First, the Maui County Charter requires that "every legislative act of the council shall be by ordinance unless otherwise provided for herein. Other acts of the council may be by resolution." (Section 4-1) A resolution is not an ordinance and does not have the force and effect of law.

Nevertheless, even if the resolution was considered a law, the resolution by the Maui County Council acceding to this fast track process did not repeal the West Maui Community Plan. The U.S. Supreme Court itself ruled in 2008 in *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2008) that "[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest."

The only thing that is clear is that the Chapter 201H exempts projects from every land use law it could be subject to. Nevertheless, the Land Use Commission has a Constitutional obligation to

consider environmental laws, including the West Maui Community Plan, with respect to its Constitutional obligations to protect and preserve the environment. Chapter 201H cannot and does not waive that obligation and the Council's accession to the fast track development process does not relieve the Land Use Commission of its obligations under the Constitution.

Additionally, Rory Frampton's claimed "planning law" expertise is simply legal argument from a non-lawyer. His claims are merely argument and do not constitute evidence-in-itself.

#### F. The Adoption of New Laws Must **NOT** Be Considered

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 Hawaii Administrative Rules have the procedure for introducing new evidence and it is not with the Motion for Reconsideration. The Motion for Reconsideration shall state specifically what points of law or fact the commission overlooked or misunderstood together with brief arguments on the points raised. Period!

However, in the event of the proper recourse of the Petitioner to re-apply for a boundary amendment the Commission may want to take this into consideration. The adoption of the Maui Island Plan does not affect the West Maui Community Plan. The Petition Area is designated Open Space by the West Maui Community Plan and this **justifies the denial** of the Petitioner's Motion for Reconsideration.

#### G. Conclusion

The Petitioner has provided no new evidence or argument that supports a setting aside of the decision and order already entered. Petitioner simply recycles old arguments and distorts the adoption of the Maui Island Plan for its own purposes. The Petitioner takes liberty in introducing new evidence as it is not mandated in the Hawaii Administrative Rules for a Motion for Reconsideration.

The Petitioner's further insinuation that the Commissioners were somehow biased in their decision not to approve the Petition (p 16) is offensive and not supported by the recorded. If the Petitioner feels there is a basis for disqualification, it should come out with its evidence and ask for it directly instead of making inappropriate innuendo regarding the integrity of the commissioners.

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 23<sup>rd</sup> day of January, 2013.



MICHELE LINCOLN, Intervener

Dear Commissioners,

I do not know if it matters but just to note that #90 the spelling of witnesses are Jane Imai not Amai and Cynthia Catugal not Catagal.

Also, #107 the substitute court reporters name is Cammie Gillett not Smith and just to note that Intervener Lincoln still questioned the accuracy of the transcripts at the December 6, 2012 meeting.

Regarding #120 "On the north of the Petition Area is the Kahoma Stream Flood Control Channel" and includes the Kahoma Retention Basin and Retaining Wall for the Flood Control Channel.

The Certificate of Service has an incorrect address and spelling for Michele Lincoln whose address does not include "Davies Pacific Center".

The Intervener does not expect any corrections by an issuance of a new Decision and Order because of the above mentioned items. However, if the LUC should issue any further orders then the spelling could be corrected at that time. Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in black ink that reads "Michele Lincoln" with a small smiley face at the end.

Michele Lincoln

**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:

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Dated: Jan 23, 2013 Michele Lincoln 

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