



LAND USE COMMISSION
STATE OF HAWAII

2017 JUL 27 A 8:11


BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In The Matter Of The Petition Of)	DOCKET NO. A94-706
)	
KA'ONO'ULU RANCH)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW, AND
To Amend The Agricultural Land Use)	DECISION AND ORDER
District Boundary Into The Urban Land)	DENYING THE ACCEPTANCE
Use District For Approximately 88)	OF A FINAL ENVIRONMENTAL
Acres Of Land At Ka'ono'ulu,)	IMPACT STATEMENT; AND
Makawao-Wailuku, Maui, Hawai'i,)	CERTIFICATE OF SERVICE
Tax Map Key: 3-9-01: 16, 169, And)	
170 Through 174)	
_____)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
DENYING THE ACCEPTANCE OF A
FINAL ENVIRONMENTAL IMPACT STATEMENT
AND
CERTIFICATE OF SERVICE

This is to certify that this is a true and correct
copy of the document on file in the office of the
State Land Use Commission, Honolulu, Hawai'i

11/27/17 by _____



Executive Officer



LAND USE COMMISSION
STATE OF HAWAII

2017 JUL 27 A 8:10

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Petition Of)	DOCKET NO. A94-706
)	
KA'ONO'ULU RANCH)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW, AND
To Amend The Agricultural Land Use)	DECISION AND ORDER
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Tax Map Key: 3-9-01: 16, 169, And)	
170 Through 174)	
_____)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
DENYING THE ACCEPTANCE OF A
FINAL ENVIRONMENTAL IMPACT STATEMENT

The State of Hawai'i Land Use Commission ("Commission"), having examined the proposed Final Environmental Impact Statement ("FEIS") filed by Pi'ilani Promenade North, LLC, and Pi'ilani Promenade South, LLC (collectively "Pi'ilani"), on June 27, 2017, and upon consideration of the matters discussed therein, and having heard from the parties, at its meeting on July 20, 2017, in Kahului, Maui, Hawai'i, hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

1. By Order Granting Pi'ilani Promenade South, LLC, and Pi'ilani Promenade North, LLC's, Motion to Stay Phase II of the Order to Show Cause Proceeding dated July 12, 2013, the Commission stayed its proceeding in the above-entitled docket to determine whether the reversion of the Petition Area to its former land use classification or to a more appropriate classification is the appropriate remedy.¹

2. The Commission conditioned the stay on both Pi'ilani and Honua'ula refraining from commencing any construction or development activities on their respective parcels within the Petition Area during the stay.² The Commission further conditioned the stay on Pi'ilani filing a Motion for Order Amending the Findings of Fact, Conclusions of Law, and Decision and Order ("Motion for Order Amending the D&O") filed February 10, 1995, to reflect the changes in the development of the Petition Area from the uses originally proposed by Ka'ono'ulu Ranch and

¹ The Commission previously determined under Phase I of the Order to Show Cause proceeding that Pi'ilani and Honua'ula Partners, LLC ("Honua'ula"), violated Condition Numbers 5, 15, and 17 of this Commission's Findings of Fact, Conclusions of Law, and Decision and Order ("D&O") filed February 10, 1995. Ka'ono'ulu Ranch, the original Petitioner and Pi'ilani's and Honua'ula's predecessor, had proposed to develop the Petition Area as the Ka'ono'ulu Industrial Park, consisting of a 123-lot commercial and light industrial subdivision. In 2005, Ka'ono'ulu Ranch sold the Petition Area to Maui Industrial Partners, LLC, who, in turn, sold approximately 13 acres of the Petition Area to Honua'ula and the remaining approximately 75 acres of the Petition Area to Pi'ilani.

² Honua'ula had represented that it will not commence any construction on its parcel while a stay of the Order to Show Cause proceeding was in effect, or unless and until Honua'ula provided this Commission with adequate notice to do otherwise and the Commission grants said request.

requesting, among other things, the bifurcation of this docket to cover its parcels not later than December 31, 2013.

3. On August 14, 2013, Pi`ilani filed an Environmental Impact Statement Preparation Notice ("EISPN") with the Commission to proceed directly to the preparation of an EIS pursuant to Hawai`i Revised Statutes ("HRS") §343-5(e). The EIS is intended to disclose the potential impacts of the proposed action in support of Pi`ilani's Motion for Order Amending the D&O that was filed with this Commission on December 31, 2013.

4. Pi`ilani proposes the development of light industrial, business/commercial, and multi-family uses on approximately 75 acres of land in North Kihei, Maui, Hawai`i ("Project"). The Project will include associated onsite and offsite water, sewer, roads, drainage, and electrical improvements. Amenities will include bicycle and pedestrian pathways and landscaping.

5. The Project is subject to the environmental review process as it proposes to use State land for roadway widening purposes, pursuant to HRS §343-5(a)(1) and Hawai`i Administrative Rules ("HAR") §11-200-6(b)(1)(A).

6. On September 5, 2013, and by a written Order filed September 10, 2013, the Commission (i) agreed to be the accepting authority pursuant to HRS chapter 343; and (ii) determined that the Project may have a significant effect upon the environment to warrant the preparation of an EIS.

7. The State of Hawai'i Office of Environmental Quality Control ("OEQC") published notice of the availability of the EISPN in its September 23, 2013, issue of *The Environmental Notice*, which began a 30-day public comment period that ended on October 23, 2013.

8. Upon receipt of the comments, Pi'ilani prepared a Draft EIS ("DEIS"). The OEQC published notice of the availability of the DEIS in its August 23, 2014, issue of *The Environmental Notice*, which began a 45-day public comment period that ended on October 7, 2014.

9. The following reviewers provided written comments on the DEIS:

Federal

U.S. Department of the Interior, United States Geological Survey

State of Hawai'i

Commission

Department of Accounting and General Services

Office of Planning ("OP")

Department of Education

Department of Health ("DOH"), Environmental Planning Office

DOH, Clean Air Branch

DOH, Clean Water Branch

DOH, Maui District Health Office

DOH, Safe Drinking Water Branch

DOH, Wastewater Branch

Department of Land and Natural Resources ("DLNR"), Land Division

DLNR, Engineering Division

DLNR, Commission on Water Resource Management

DLNR, State Historic Preservation Office

Department of Transportation

County of Maui

Department of Housing and Human Concerns
Department of Parks and Recreation
Department of Planning ("DP")
Department of Public Works
Department of Water Supply

Organizations/Individuals

Kihei Community Association
Maui Chamber of Commerce
Maui Tomorrow Foundation
South Maui Citizens for Responsible Growth
Zandra Amaral Crouse
Paula Baldwin
Kellie Cruz
Daniel Kanahale
Elden Liu
Desiree Lopes
Joan Martin
Dick Mayer
David Reader
Sharon Rose
Millie Septimo
Gylian Solay

10. On June 27, 2017, Pi`ilani filed the proposed FEIS with the Commission.
11. On July 8, 2017, the OEQC published availability of the proposed FEIS in *The Environmental Notice*.
12. On July 14, 2017, OP filed written comments recommending that the Commission accept the FEIS based on its belief that Pi`ilani responded satisfactorily

to OP's concerns, and that the draft FEIS adequately addresses the anticipated Project impacts.

13. On July 17, 2017, the DP filed written comments recommending that the Commission accept the FEIS based on its opinion that the proposed FEIS adequately addresses the content requirements as set forth in HAR §§11-200-18 and 11-200-23.

14. On July 19, 2017, the Commission met at the Maui Arts & Cultural Center, Morgado Meeting Room, in Kahului, Maui, Hawai'i, to consider acceptance of Pi'ilani's proposed FEIS. Randall Sakumoto, Esq., and Lisa Cataldo, Esq., appeared on behalf of Pi'ilani. Also present were Curtis Tabata, Esq., on behalf of Honua'ula; Michael Hopper, Esq., and William Spence on behalf of the DP; and Dawn Takeuchi-Apuna, Esq., and Rodney Funakoshi on behalf of OP.³ At the meeting, the Commission received written and/or oral public testimony from Joan Martin, Mario Cardone, Mike Moran, Linda Berry, Rob Weltman, Charlene Schulenburg, Gary Passon, Mike Foley, Amber Coutsos (read testimony of Pamela Tumpap), Robin Knox, Basil Oshiro, Ronald Vaught, Vernon Kalanikau, Chantal Lonergan, Tom Kook, Michelle Del Rosario, Gene Zarro, Cody Nemet Tuivaiti, Donnie Becker, Jay Kringsman, Robert Aldrich, David

³ Prior to the receipt of public testimony, Commissioner Ohigashi disclosed that he knew Clare Apana, Intervenor Daniel Kanahale, and Albert Perez through his business and social interactions on Maui. There were no objections by the parties to Commissioner Ohigashi's participation in this proceeding.

Hewahewa, Tom Blackburn-Rodriguez,⁴ Kaena Elaban, Ke`eaumoku Kapu, Matt Cerny, Jill Engledow, Allison Miller, K. Hewahewa, Mark Sheehan, Maui County councilmember Kelly King, Hannibal Starbuck, Jon Jon Tabon, Rose Reilly, Heali`i Ka`uhane, Kapono Makahanaloa-Antonez, Deborah Mader, Albert Perez, Christopher Delaunay, and Henry Rice. Following the completion of public testimony, the Commission recessed the meeting to July 20, 2017.

15. On July 20, 2017, the Commission reconvened the meeting. Intervenor offered four witnesses as part of its presentation on the proposed FEIS: Mark Hyde, David Kanahale, Dick Mayer, and Lucienne De Naie. The DP continued with William Spence as its witness. Dawn Takeuchi-Apuna, counsel for OP, then presented OP's position on the acceptance of Pi'ilani's proposed FEIS. Curtis Tabata, Esq., followed with Honua`ula's position on the matter. Finally, Pi'ilani offered five witnesses as part of its presentation: Jordan Hart, Darren Unemori, Juanita Wolfgramm, Erik Fredericksen, and Tom Holliday.

16. The FEIS does not include a thorough discussion and Pi'ilani presented no testimony to enable the Commission to determine the cumulative impacts of the Project and other developments in the area on the economy, police and fire protection services, schools, solid waste, civil defense, utilities, and medical facilities.

⁴ Mr. Blackburn-Rodriguez provided a large number of postcards in support of the Project to the Commission.

17. The FEIS does not include a thorough discussion and Pi`ilani presented no testimony to enable the Commission to determine the secondary impacts of the Project, particularly in regard to the potential impacts from future developments mauka of Pi`ilani Highway brought about by the construction of the Kihei Upcountry Highway ("KUH").

18. Pi`ilani's planning consultant, Jordan Hart, confirmed that while the FEIS stated that "The issuance of water meters for the Project by the DWS carries the implicit approval by the DWS of Piilani Promenade's use of the Iao Aquifer System for drinking water," (Volume 1, p. 16) there was no evidentiary basis that he was aware of in the FEIS for that statement.

19. While Appendix L of the FEIS stated that the drinking water source for the Project would come from the `Iao and Waihe`e Aquifers (Volume 3, Appendix L, p. 3-1), the main body of the FEIS asserted that the water would come from currently unallocated source in the `Iao Aquifer. Pi`ilani's planning consultant, Jordan Hart, confirmed that there was no way to assess the impact of water withdrawal on a source if the source was not known.

20. The FEIS does not include an analysis and Pi`ilani presented no testimony to enable the Commission to determine the effect of the Project on the Kihei-Mākena Community Plan.

21. The FEIS is vague because it lacks specificity as to what will actually be developed on the site. Without sufficient information on the Project, it is unclear what impact the Project will have on existing and planned retail developments, including the Kihei Downtown project.

22. Several members of the public whose families have lineal and cultural connection to the land testified that there are cultural resources on the Project site as well as ongoing cultural practices being exercised on the land, including, but not limited to, the use of physical features on the Project site for land navigation and to reference celestial phenomena; the gathering of medicinal plants, such as *uhaloa* (*Waltheria indica*); the observation of weather patterns and avifauna; and religious ceremonies. There was also testimony that the Project would adversely impact these cultural practices. Several of these individuals were not contacted or interviewed for the Cultural Impact Assessment ("CIA") or the Supplemental CIA ("SCIA"). The testimony of these witnesses directly contradicts the findings of the CIA and particularly the SCIA, which concluded that there are no specific valued cultural, historical, or natural resources within the Project site, nor are there any traditional and customary Native Hawaiian rights being exercised within the Project site, and that the exercise of Native Hawaiian rights, or any ethnic group, related to numerous traditional cultural practices, including procurement of marine resources, gathering, access,

cultivation, the use of traditional plans, and the use of trails, will not be adversely impacted by the Project.

23. The FEIS does not include an analysis and Pi`ilani presented no testimony to enable the Commission to determine the traffic impact of the Project in comparison to the 123-lot commercial and light industrial subdivision originally planned for the Petition Area.

24. Pi`ilani's civil engineering consultant, Darren Unemori, confirmed that no cumulative analysis was done of the drainage impacts from the adjacent Honua`ula workforce housing project.

25. Pi`ilani presented no testimony indicating that the FEIS addresses all of the environmental impacts from the development of the entire approximately 88-acre Petition Area in compliance with the Commission's Order to Show Cause proceeding, which covered all 88 acres of the Petition Area. Both Pi`ilani and Honua`ula continue to be bound by the Commission's decision in that matter for the purposes of the HRS chapter 343 environmental review process.

26. After due deliberation at the Commission's meeting on July 20, 2017, a motion was made and seconded to deny the acceptance of Pi`ilani's proposed FEIS as it does not meet the requirements of HRS chapter 343 and HAR chapter 11-200, because (1) the FEIS does not contain a thorough discussion as required by HAR §11-200-17(i) of the cumulative impacts of the Project and other developments in the area on

the economy, police and fire protection services, schools, solid waste, civil defense, utilities, and medical facilities; and (2) the FEIS does not contain a thorough discussion as required by HAR §11-200-17(i) of the secondary impacts of the Project, particularly in regard to the potential impacts from future developments mauka of Pi`ilani Highway brought about by the construction of the KUH, and further to have the Commission authorize the Executive Officer to notify and submit a record of this non-acceptance to Pi`ilani and the OEQC by the July 27, 2017, deadline for Commission action. The motion was thereafter amended and seconded to also have the Commission authorize the Chair of the Commission to sign the Decision and Order in this matter.

During deliberations, the Commission raised additional concerns that the FEIS does not meet the requirements of HRS chapter 343 and HAR chapter 11-200, because (1) the FEIS contains contradictory and unclear information on the source of drinking water for the Project, and therefore no meaningful analysis of the possible impact of this new water use on that source; (2) the FEIS lacks sufficient information of the effect of the Project on the Kīhei-Mākena Community Plan; (3) the FEIS is vague as to what will actually take place on the site and lacks sufficient information on the impact of the Project on existing and planned retail developments, including the Kīhei Downtown project; (4) the FEIS contains inaccurate and incomplete information on cultural, historical, and natural resources and traditional and customary Native

Hawaiian rights being exercised within the Project site to enable the Commission to

render a decision in satisfaction of *Ka Pa`akai O Ka`Aina v. Land Use Com'n, State of Hawai`i*, 94 Hawai`i 31, 7 P.3d 1068 (Hawai`i, 2000); (5) the FEIS lacks sufficient information regarding the traffic impacts from the Project in comparison to the 123-lot commercial and light industrial subdivision originally planned for the Petition Area; and (6) the FEIS fails to address all of the environmental impacts from the development of the entire approximately 88-acre Petition Area in compliance with the Commission's Order to Show Cause proceeding, which covered all 88 acres of the Petition Area.

There being a vote tally of 6 ayes, 0 nays, and 3 excused, the amended motion carried.

RULINGS ON PROPOSED FINDINGS OF FACT

Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

1. "'Acceptance' means a formal determination of acceptability that the document required to be filed pursuant to HRS chapter 343 fulfills the definitions and requirements of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement." HAR §11-200-2

2. “[N]either HRS chapter 343 nor the administrative rules of chapter 11-200 indicate the level of detail or specificity that should be included in any given subject. The statute and rules were designed to give latitude to the accepting agency as to the content of each EIS. Thus, what is required in one EIS may not be required in another, based upon the circumstances presented by the particular project.

Accordingly, the standard to consider the sufficiency of an EIS under the “rule of reason” is that

an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.” Price v. Obayashi Hawaii Corp., 81 Hawai`i 171, 183, 914 P.2d 1364, 1376 (1996) quoting Life of the Land v. Ariyoshi, 59 Haw. 156, at 164-65, 577 P.2d at 1121 (1978)

3. HAR §11-200-18 specifies the content requirements for FEISs. An FEIS shall consist of (i) the DEIS revised to incorporate substantive comments received during the consultation and review process; (ii) reproductions of all letters received

containing substantive questions, comments, or recommendations and, as applicable, summaries of any scoping meetings held; (iii) a list of persons, organizations, and public agencies commenting on the DEIS; (iv) the responses of Pi'ilani to each substantive question, comment, or recommendation received in the review and consultation processes; and (v) the text of the FEIS shall be written in a format which allows the reader to easily distinguish changes made to the text of the DEIS.

4. HAR §11-200-23 specifies the criteria for the acceptability of an FEIS. These criteria include: (i) the procedures for assessment, consultation process, review, and the preparation and submission of the FEIS have all been completed satisfactorily as specified in HAR chapter 11-200; (ii) the content requirements described in HAR chapter 11-200 have been satisfied; and (iii) comments submitted during the review process have received responses satisfactory to the accepting authority, or approving agency, and have been incorporated in the FEIS.

5. The proposed FEIS does not meet requirements of HRS chapter 343 and HAR chapter 11-200 in at least the following ways:

- (i) The FEIS fails to include a thorough discussion as required by HAR §11-200-17(i) of the cumulative impacts of the Project and other developments in the area on the economy, police and fire protection services, schools, solid waste, civil defense, utilities, and medical facilities.

- (ii) The FEIS fails to include a thorough discussion of the secondary impacts of the Project, particularly in regard to the potential impacts from future developments mauka of Pi`ilani Highway brought about by the construction of the KUH.
- (iii) The FEIS contains contradictory and unclear information on the source of drinking water for the Project, and therefore no meaningful analysis of the possible impact of this new water use on that source.
- (iv) The FEIS lacks sufficient information of the effect of the Project on the Kīhei-Mākena Community Plan.
- (v) The FEIS is vague as to what will actually take place on the site and lacks sufficient information on the impact of the Project on existing and planned retail developments, including the Kīhei Downtown project.
- (vi) The FEIS contains inaccurate and incomplete information on cultural, historical, and natural resources and traditional and customary Native Hawaiian rights being exercised within the Project site to enable the Commission to render a decision in satisfaction of *Ka Pa`akai O Ka`Aina v. Land Use Com'n, State of Hawai`i*, 94 Hawai`i 31, 7 P.3d 1068 (Hawai`i, 2000).

- (vii) The FEIS lacks sufficient information regarding the traffic impacts from the Project in comparison to the 123-lot commercial and light industrial subdivision originally planned for the Petition Area.
- (viii) The FEIS fails to address all of the environmental impacts from the development of the entire approximately 88-acre Petition Area in compliance with the Commission's Order to Show Cause proceeding, which covered all 88 acres of the Petition Area.

6. Pursuant to HRS chapter 343 and HAR chapter 11-200, and a motion having been made and seconded and subsequently amended and seconded on July 20, 2017, in Kahului, Maui, Hawai'i, and the amended motion having received the affirmative votes required by HAR §15-15-13, and there being good cause for the amended motion, the Commission concludes that Pi'ilani's proposed FEIS does not meet the criteria and procedures governing the acceptance of an FEIS under HAR §11-200-23.

DECISION AND ORDER

IT IS HEREBY ORDERED that the proposed FEIS filed by Pi'ilani in Docket No. A94-706/Ka'ono'ulu Ranch is NOT ACCEPTED pursuant to HRS chapter 343 and HAR chapter 11-200.

This Decision and Order may be appealed to the Environmental Council in accordance with HRS §343-5 and HAR §11-200-24.

ADOPTION OF ORDER

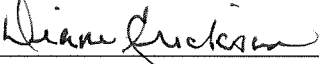
This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, Hawai'i, this 27th day of July, 2017, per motion on July 20, 2017.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAII



Deputy Attorney General

By 

EDMUND ACZON
Chairperson and Commissioner

Filed and effective on:

7/27/2017

Certified by:



DANIEL ORODENKER
Executive Officer



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In The Matter Of The Petition Of

KA'ONO'ULU RANCH

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Maui, Hawai'i, Tax Map Key: 3-9-01: 16,
169, And 170 Through 174

DOCKET NO. A94-706

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DENYING THE ACCEPTANCE OF A FINAL ENVIRONMENTAL IMPACT STATEMENT AND CERTIFICATE OF SERVICE was served upon the following by either by hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

	HAND DELIVERED	REGULAR MAIL	CERTIFIED MAIL
LEO ASUNCION, DIRECTOR Office of Planning 235 S. Beretania Street Rm. 600 Honolulu, Hawai'i 96813	X		
BRYAN YEE, ESQ DAWN TAKEUCHI-APUNA, ESQ. Deputy Attorney General Hale Auhau, Third Floor 425 Queen Street Honolulu, Hawai'i 96813		X	

	HAND DELIVERED	REGULAR MAIL	CERTIFIED MAIL
TOM PIERCE, Esq. PO Box 798 Makawao, Hawaii 96768			X
William Spence Director, County of Maui Planning Department 250 S. High St Kalana Pakui Bldg Ste 200 Wailuku, HI 96793		X	
MICHAEL HOPPER, Esq. Deputy Corporation Counsel 200 S. High St. Kalana O Maui Bldg 3rd Flr Wailuku, HI 96793			X
BENJAMIN M. MATSUBARA, #993-0 CURTIS T. TABATA, #5607-0 Matsubara-Kotake 888 Mililani Street, Suite 308 Honolulu, Hawaii 96813			X
RANDALL SAKUMOTO, Esq.. McCorriston Miller Mukai MacKinnon LLP Five Waterfront Plaza, 4th Floor 500 Ala Moana Boulevard Honolulu, Hawai'i 96813			X

Honolulu, Hawai'i, July 27, 2017.



DANIEL ORODENKER
Executive Officer