TOM PIERCE, ATTORNEY AT LAW, LLLC

TOM PIERCE 6983
P.O. Box 798
Makawao, Hawaii 96768
Tel No. 808-573-2428
Fax No. 866-776-6645
Email: tom@mauilandlaw.com

Attorney for Maui Tomorrow Foundation, Inc.,
South Maui Citizens for Responsible Growth
and Daniel Kanahele

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of KAONOULU RANCH To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for approximately 88 acres at Kaonoulu, Makawao-Wailuku, Maui, Hawaii	DOCKET NO. A94-706 INTERVENORS' OBJECTIONS TO PIILANI PROMENADE SOUTH, LLC, AND PIILANI PROMENADE NORTH, LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECISION AND ORDER, FILED DECEMBER 21, 2012; CERTIFICATE OF SERVICE **Filed by**: Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth and Daniel Kanahele

INTERVENORS' OBJECTIONS TO PIILANI PROMENADE SOUTH, LLC, AND PIILANI PROMENADE NORTH, LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECISION AND ORDER, FILED DECEMBER 21, 2012

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahele ("Intervenors"), through their attorney Tom Pierce, Esq., hereby submit their objections to *Piilani Promenade South, LLC, And Piilani Promenade North, LLC's Proposed Findings of Fact and Conclusions Of Law and Decision and Order,* filed December 21, 2012 ("Petitioners' Proposed Findings"), which were joined in by Honua'ula Partners LLC

("HP") and the County of Maui ("County" or "COM"), as set forth below. (HP, PPN and PPS are collectively referred to herein as "Petitioners.")

I. GENERAL OBJECTIONS TO ALL PETITIONERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Res Judicata Prohibits Parties to the 1994-1995 Proceedings from Looking Behind the D&O For New Meaning

HP, PPN, and PPS are respective successors in interest to Kaonoulu Ranch and as such each stands in the shoes of the Ranch in these proceedings. The County was an actual party to the 1994-1995 proceedings. Petitioners and the County are bound by the principle of *res judicata*, barring them from looking behind the D&O for new facts not adopted by the Commission in 1995. In fact, the Commission expressly rejected the facts that the Petitioners and the County now seek to reintroduce.[1]

The concept of *res judicata* is based in part on the principle of judicial economy and fairness. *Res judicata* protects parties from having to retry matters previously settled, including Intervenors, Office of Planning, and the public. The public has a right to notice and to be heard in boundary amendment proceedings. In this case, the public has only had an opportunity to comment on a light industrial park project proposed by the Ranch, not housing and shopping center uses proposed by the current landowners. HAR § 15-15-51(c). This is why the Commission, like all agencies, enunciates the findings of fact in a final decision and order. *Application of Hawaii Elec. Light Co., Inc.*, 60 Haw. 625, 641-42, 594 P.2d 612, 623 (1979) ("The requirement that the Commission set out findings of fact and conclusions of law is no

[1] The 1995 Order provided that the Commission "having examined the testimony and evidence presented during the hearing, having heard the arguments of counsel, and having reviewed Petitioner's Proposed Findings of Fact . . . the County of Maui Planning Departments' [sic] Stipulation to Petitioner's Proposed Findings of Fact . . . ***hereby makes the following findings of fact . . .***" Order at 2 (emphasis added). The 1995 Order also provided: "Any of the proposed findings of fact submitted by any of the parties to this proceeding ***not adopted by the Commission by adoption herein,*** or rejected by clearly contrary findings of fact herein, ***are hereby denied and rejected.***" Order at 25 (emphasis added).

mere technical or perfunctory matter. . . . The purpose of the statutory requirement that the agency set forth separately its findings of fact and conclusions of law is to assure reasoned decision making by the agency and enable judicial review of agency decisions.") (internal citations omitted).

Petitioners' strategy to steer clear of the D&O and to reconstruct a different order to fit a parallel universe of proposed uses is particularly evident in Petitioners' Proposed Findings addressing compliance with D&O Condition 15 (requiring substantial compliance with the representations made to the Commission by the Ranch). Petitioners' Proposed Findings 1-161 and 230-240 relating to this core issue rarely mention the D&O (34, 79, 103, 157, 158, 159 and 160) and even when they do, they fail to address how the currently proposed projects fit within the Commission's earlier order. The bulk of the Petitioners' Proposed Findings either (1) focus on reinterpretation of selective evidence previously weighed and summarized by the Commission 18 years ago in conjunction with the Ranch's 123-lot, fee simple and long term lease "Kaonoulu Industrial Park" project or (2) attempt to sell the current Commission on a different set of projects (housing and large lot, large scale retail shopping centers offering leaseholds) based on financial inducements that might come to pass should the current, unapproved developments proceed in the absence of amendment of the D&O.

The D&O clearly delineates the legally recognized representations to the Commission:

> Proposal for Reclassification
>
> 21. Petitioner proposed to develop the Property as the Kaonoulu Industrial Park, a 123-lot commercial and light industrial subdivision. Improved lots are proposed to be sold in fee simple or leased on a long-term basis. The size of the lots will range from approximately 14,000 square feet to 54,000 square feet. And,

32. The Project would conform with the proposed Light Industrial designation for the Property. Light industrial uses include warehousing, light assembly, and service and craft-type industrial operations.

The Commission thoroughly analyzed the proposed Kaonoulu Industrial Park project in terms of the Ranch's financial capability to realize the development (FF 24-25); compatibility with state and county plans and programs (FF 26-35); need for the project (FF 36-38); economic impacts (FF 39); social impacts (FF 40); impacts on area resources (FF 41-46); archeological resources (FF 47-53); scenic and visual impacts (FF 54-56); environmental impacts (FF 57-58); and the adequacy of public services and facilities to meet the demands of the project, including solid waste disposal, schools, police, fire and health care facilities, electricity and phone service, highways and roadways, wastewater treatment, and drainage (FF 59-95).

Nowhere does the D&O reference a housing project or large-scale, large-lot shopping centers, and it is barren of any analysis of housing and/or retail shopping center impacts as would be required by law for approval of such uses.

B. The Doctrine of *Res Judicata* Renders Petitioners' Proposed Findings of Fact and Conclusions of Law that Seek to Look Behind the D&O Procedurally Improper.

As a matter of law, the D&O establishes all of the relevant factual representations made by Kaonoulu Ranch to the Commission in the boundary amendment proceeding. Intervenors therefore object to the following Petitioners' Proposed Findings on the basis of the doctrine of *res judicata* : 21-52, 54-76, 81-102, 106-109, 113-128, 132-144, 146-148, 152-161, 163-172, 175-182, 186, 188-207, and 220-240.

C. The Petitioners' Proposed Findings of Fact Consist Largely of Evidence and Do Not Rise to the Level of "Findings"

Findings are to state ultimate facts determined by a deliberative body and not merely recite selected evidence. *Application of Hawaii Elec. Light Co., Inc.*, 60 Haw. 625, 642,

594 P.2d 612, 623 (1979) ("In order that we might be informed of the factual basis upon which the [agency] relies, the Commission's findings of Ultimate facts must be supported by findings of Basic facts which in turn are required to be supported by the evidence in the record.") (bracketed material added; caps in original).[2]

Based on this, Intervenors object to the following Petitioners' Proposed Findings: 20-52, 54-76, 81-102, 106-109, 111-128, 132-144, 146-148, 152-161, 163-172, 175-182, 186, 188-207, 211-212, and 220-240.

D. Some of the Petitioners' Proposed Findings Admit Violation of D&O Conditions 5, 15 and 17; In the Alternative, Collectively They Fail to Show Compliance with Conditions 5, 15 and 17

1. Condition 5

Petitioners have not offered findings evidencing compliance with Condition 5 (requiring construction of a frontage and connector roads). Instead, the Petitioners' Proposed Findings offer legally insufficient excuses for non-compliance. *See* Petitioners' Proposed Findings 187-207. Accordingly, violation of Condition 5 is admitted by Petitioners.

2. Condition 15

(a) Petitioners' Proposed Findings 15, 129-133, and 230-240 constitute an admission that PPN and PPS do not intend to develop their parcels into "the Kaonoulu Industrial Park, a 123-lot commercial and light industrial subdivision" described in D&O Finding of Fact 21. Instead, they admit that their large lot parcels are to be developed into retail shopping centers.

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[2] "An 'ultimate' fact is usually cast in the statutory language. 2 Cooper, State Administrative Law 466 (1965)." *Id. n.10.*

(b) Petitioners' Proposed Findings 15, 149-151 constitute an admission that HP does not intend to develop its parcel of the Property into "the Kaonoulu Industrial Park, a 123-lot commercial and light industrial subdivision." Instead, HP admits that its large lot parcel will be developed into 250 unit workforce housing units.

(c) The absence of proposed findings evidencing compliance with the D&O Condition 15 constitutes an admission of violation.

(d) The offer made by Mr. Jencks, PPN and PPS to "commit" 125,000 gross square feet of leasable area to a "home improvement type of use which would include both a wholesale and retail function" is a further admission of noncompliance with D&O Condition 15. It is a frank acknowledgement that HP's, PPN's and PPS's housing and retail shopping center projects fail to meet D&O Condition 15's substantial compliance test.

(e) Even assuming Petitioners' theory of the case (that Kaonoulu Ranch actually represented to the Commission that it "would, could and might" develop the Property into 250 workforce housing units and two large-scale/large-lot shopping centers) and overlooking the fact that the D&O makes no reference to such uses, the Petitioners have failed to advance proposed findings showing that impacts arising from these new uses are substantially similar to those earlier weighed by the Commission in its evaluation of the "Kaonoulu Industrial Park" project. *See* HAR §§ 15-15-50, 15-15-77.

To the extent Petitioners or the County have advanced evidence comparing currently proposed uses to those represented by the Ranch, it augers against substantial compliance and proves violation of D&O Condition 15. For instance, see Petitioners' Proposed Findings 183-185 where Petitioners and the County admit that total afternoon traffic trips associated with the shopping centers will be four times greater (2,900) than those

represented to the Commission by the Ranch (700) associated with its light industrial park project.

3. Condition 17

Petitioners' Proposed Findings 208-218 constitute an admission that Petitioners, who are successors in interest to Maui Industrial Partners, failed to file the 10th, 11th, 12th and 13th annual reports with the Commission. In the alternative, since no finding of compliance is offered, violation of Condition 17 is admitted. In addition, these findings fail to address the total inadequacy of the 14th and 15th annual reports that amount to deception and misrepresentation to this Commission.

E. The Petitioners' Proposed Findings, in Whole and in Part, Are Not Supported by Any Evidence.

HP, PPN and PPS have failed to present a scintilla of evidence supporting a finding of compliance with D&O Conditions 5, 15 and 17.

II. SPECIFIC OBJECTIONS TO PETITIONERS' PROPOSED FINDINGS OF FACT

In addition to the general objections set forth above, Intervenors submit the following specific objections to Petitioners' Proposed Findings.

A. Objection to Petitioners' Proposed Finding 9 (Scope of the OSC)

Petitioners' Proposed Finding of Fact 9 improperly limits the scope of the Order to Show Cause ("OSC"). While the body of the OSC identifies some of the violations alleged by Intervenors (D&O conditions 5 and 15), the OSC in no way limits the Commission's scope of inquiry. Rather, it provides: "After discussion and deliberation by the Commission, a motion was made and seconded to (1) grant the Motion for a Hearing on the basis that there is reason to believe Piilani and Honua'ula, as the successors in interest to the original Petitioner Ka`ono`ulu Ranch for all purposes under the Decision and Order filed February 10, 1995, have failed to

perform ***according to the conditions imposed*** or to the representations or commitments made by Ka'ono'ulu Ranch . . . ." (Emphasis added).

B. Objection to Petitioners' Proposed Finding 13 (Misstatement of the Name of the Petition)

Intervenors object to proposed Finding 13 on the basis that it misrepresents the correct title of the Petition (see the cover sheet under which the Petition was filed), namely "Petition for Land Use District Boundary Amendment, Kaonoulu ***Industrial*** Park." *See* Piilani Exhibit 2 (emphasis added). (It is significant the cover page is not entitled "Land Use District Boundary Amendment for Workforce Housing and Retail Shopping Centers.")

C. Objection to Petitioners' Proposed Finding 21 (Mischaracterization of the Proposed Development)

Intervenors object to Petitioners' Proposed Finding 21 because it narrowly, selectively and erroneously states what Kaonoulu Ranch represented to the Commission. The Petition is a comprehensive, detailed document that must be read as a whole, including exhibits.

Second, if one were selectively to represent what the Ranch presented to the Commission in the Petition, one would *not* quote from paragraph IX entitled "Description of Surrounding Areas" as HP, PPN, PPS and the County have done, and instead would quote paragraph VIII entitled "Reclassification Sought and Proposed Use of Property." The latter section, in contrast to the former, describes the proposed use of the Property as follows: "Petitioner proposes to develop the Kaonoulu Industrial Park, a 123-lot commercial and light industrial subdivision, within the Property. Improved lots are proposed to be sold in fee simple or leased on a long-term basis. The size of the lots will range from approximately 14,000 square feet to 54,000 square feet." Piilani Exhibit 2 at 4.

D. Objection to Petitioners' Proposed Findings 22 and 23 (Selectivity)

Intervenors object to Petitioners' Proposed Findings 22 and 23 because they narrowly, selectively and erroneously state what Kaonoulu Ranch represented to the Commission in the Petition, a document that must be read in its entirety. The Petition makes clear that "commercial" uses are an ancillary, secondary, and minor aspect of the overarching light industrial park proposal.

E. Objection to Proposed Finding 24 (Proving a Negative and the Effect of Representations Made)

Intervenors object to proposed finding 24 on the basis that it is inconsistent with the whole of the representations and commitments made by Kaonoulu Ranch to the Commission in the Petition, in the body of evidence presented to the Commission at the hearing on the Petition in 1994, all as summarized in the D&O, particularly Findings of Fact 21, 32, 96, 97 and 98.

Furthermore, taken to its logical extreme, the proposed finding suggests that anything not specifically addressed and/or rejected in the Petition must necessarily have been represented by the Petitioner and permitted by the Commission. This is illogical and inconsistent with the rules and practices of the Commission, not to mention common sense. By way of example, although the Ranch did not say it would not develop a football stadium on the Property (a use permitted in County M-1), the fact that it did not make such a constraining representation cannot be taken as intent or permission to do so. *See, e.g.,* petition requirements outlined in HAR § 15-15-50(c) and the Commission's decision-making criteria itemized in HAR § 15-15-77.

Consistent with the Commission's rules and practices, D&O Condition 15 requires the Ranch and its successors to develop the Property "in substantial compliance with the representations made to the Commission."

The question before the Commission is whether the current projects proposed by HP (250 housing units), PPN (a 300,000 square foot retail outlet shopping mall) and PPS (a 400,000 square foot retail shopping center) meet the substantial compliance test, not whether the new uses proposed were expressly forsaken by the Ranch in 1994.

F. Objection to Petitioners' Proposed Findings 25-27 and 34 (The Industrial Park Layout/Conceptual Plan)

Although the map presented to the Commission in the Petition was described as a conceptual plan for the proposed industrial park, the Ranch's proposal was not merely conceptual. Instead, and consistent with the dictates of HRS § 15-15-50(c), the Ranch's verified Petition, including the conceptual map, was a formal representation to the Commission of what it would develop upon receipt of a boundary amendment. Petitions for boundary amendments are serious undertaking upon which the Commission, interested parties and the public rely, and the only way in which they can evaluate the impacts of the proposed use.

One seeking a boundary amendment in Hawaii must adhere to prescribed rules. HAR § 15-15-50(c) requires a petition for a boundary line amendment to include a variety of information including, but not limited to, "(6) Type of use or development being proposed, including, without limitation, a description of any planned development, residential, golf course, open space, resort, commercial or industrial use; (7) A statement of projected number of lots, lot size, number of units, densities, selling price, intended market and development timetables . . . (13) Economic impacts of the proposed reclassification, use or development . . . (14) An assessment of need . . . (15) An assessment of conformity . . .[with] the Hawaii state plan . . . (16) An assessment of conformity . . . [to] community plans, zoning designations . . . ."

Petitioners would have the Commission read this process as a "free for all." For example, under the Petitioners' rubric, it is entitled to build a football stadium (permitted by M-

1, light industrial, county zoning) because it submitted a mere *conceptual* proposal for the 123-lot light industrial park and received a right to seek M-1 county zoning. The Petitioners' interpretation is not supported by the law. While a conceptual plan may indeed require some flexibility, the boundary amendment process is a disciplined one. Petitions seeking boundary amendments must be framed carefully, HAR § 15-15-77(b)(5), and orders reclassifying land mandate landowners to develop the subject property "in substantial compliance with the representations made to the commission." HAR § 15-15-90(e)(1).

If times have changed and different uses make more sense, the law provides a process for evaluation of the new proposed use. Commission rules contain a formal process for amendment of boundary line decisions should a landowner choose to pursue a development no longer meeting the substantial compliance test or for other reasons. *See* § HAR 15-15-94. Yet Petitioners decline to seek amendment for their project which will purportedly be beneficial to the public. (11/15/12 RT, 167:24-25: "Mr. Steiner: I wanted to be clear. We are not at this point intending to move to amend.")

G. Objection to Petitioners' Proposed Findings 29-33 (Changing Circumstances)

None of these proposed findings are relevant to or probative of the "substantial compliance" question before the Commission. See the discussion above in response to Petitioners' Proposed Findings 25-27 and 34. Also see the discussion of and objections to Petitioners' Proposed Findings 230-240 below at paragraph "DD." While market conditions may change, that is something prospective landowners, such as Petitioners, take into account in deciding whether to purchase a property with limited entitlements, such as the instant Property, and negotiate a purchase accordingly so that they can budget for any necessary applications for amendments.

H. Objection to Proposed Finding 35-46 (Misconstruing the Market Feasibility Report)

The stated purpose of the Marketing Feasibility Study was to "determine the market feasibility of developing approximately 88 acres . . . into a light industrial subdivision containing approximately 122 lots." Nowhere does the study speak to development of 250 workforce housing units, a 300,000 square foot retail outlet shopping center and/or a 400,000 square foot retail shopping center.

The above aside, Intervenors incorporate herein by reference the detailed analysis of the Petition/Market Feasibility Study and Economic Report contained in the "Index of References to the Record in Support of Intervenors' Proposed Findings of Fact." ¶¶ FF1 c.-l. The Marketing Feasibility Report and attached Economic Report only assessed the feasibility of the proposed 123 lot light industrial park. Petitioners' Proposed Findings 35-46 are, therefore, not supported by the evidence.

Finally, Petitioners' Proposed Findings 35-46 are irrelevant to the test whether the current developments proposed by Petitioners are in substantial compliance with the representations made to the Commission described in the D&O.

I. Proposed Finding 36 (Erroneously Suggesting that Representations Made in a Petition are Mere Suggestions of What "Would, Could or Might" Be Developed)

In sum, this proposed finding misstates the law. Furthermore, the cited testimony does not support the finding. Finally, the "best evidence" rule precludes re-interpretation of the Petition - the document speaks for itself. Each issue is addressed below.

1. Misstatement of Law

The law requires a petition to present specific factors outlined in HAR § 15-15-50(c). HAR § 15-15-50 does not speak to what a landowner "would, could or

might develop." Rather it requires a petitioner to state, under oath, what is being proposed, supplemented by a host of representations, facts and data underlying the proposed development, including a thorough analysis of expected impacts. Any interpretation to the contrary would be illogical and against the policy behind providing the Commission and the public fair notice of the intended uses of the land.

2. Lack of Evidentiary Support

Martin Luna's testimony does not support the "would, could or might develop" concept. In fact, his testimony supports the need for clarity. See, for instance, the following direct testimony of Mr. Luna (11/1/12 RT 162:18-25):

> "A. [By Mr. Luna] It's [the Market Feasibility Study] a study that goes to support the feasibility of having a light industrial/commercial project for the 88 acres that were being proposed for a district boundary amendment.
>
> "Q. [By Mr. Steiner] And would this market feasibility study contain representations to the Commission regarding what the *developer was going to do*? (Emphasis added.)
>
> "A. Yes, it would."

On cross-examination, Mr. Luna admitted the following (11/1/121 RT 201:11-203:15):

> "Q. [By Mr. Pierce] Okay. Kaonoulu Ranch was the Petitioner for a district boundary amendment back in 1994, right?
>
> "A. Yes.
>
> "Q. When they decided to Petition the Land Use Commission they had a choice as to what kind of plans they would put before the Commission. Is that a fair statement?
>
> "A. Sure.
>
> "Q. So in this case they didn't choose to put before them a significant retail shopping center use, did they?
>
> "A. No.
>
> "Q. They didn't choose to put before them an apartment housing complex proposal, right?
>
> "A. Right.

"Q. But what they did put before them is what we see represented in Exhibit 1, a 123-lot light industrial - - commercial and light industrial use, right?

"A. Correct.

"Q. . . . . As part of the process of petitioning the Land Use Commission would you agree that it's a requirement of the Petitioner to identify the impacts that would be related to the proposed use?

"A. Yes.

"Q. So in this case what the Kaonoulu Ranch did was once they represented that they were going to do a 123-lot commercial and light industrial park, they presented evidence to the commission related only to that 123-lot commercial and light industrial park, correct?

"A. Yes.

"Q. So, for example, there was a traffic study that was submitted into evidence in 1994, is that right?

"A. Yes.

"Q. And that traffic study has the impacts related to the 123-lot commercial and light industrial park, right?

"A. Right.

"Q. It doesn't discuss impacts for residential uses at all, does it?

"A. No.

"Q. And it doesn't discuss retail shopping uses except those that might be permitted within the market assessment report, right?

"A. That's correct, yeah.

"Q. It certainly didn't assess a 700,000 square foot retail shopping center, right? That wasn't a proposal that was before the Commission?

"A. ***That wasn't before the Commission.***" (Emphasis added).

3. Violation of the "Best Evidence" Rule

The best evidence of what the Ranch represented to the Commission is the Petition itself and not a re-interpretation of what it says by another.

J. Petitioners' Proposed Findings 37-39 (Misconstruing the Marketing Feasibility Study: M-1 Zoning)

The purpose of the Marketing Feasibility Study attached to the Petition was to "determine the market feasibility of developing approximately 88 acres . . . into a light industrial

subdivision containing approximately 122 lots." Nowhere does the study suggest or represent that the multiplicity of uses allowed in M-1 zones would be pursued by the Ranch. Reference to M-1 zoning was made only to establish that M-1 zoning was most appropriate for the industrial park.

Furthermore, the citation given in support of proposed Finding 37 (Piilani Exhibit 3, page 3) cuts against the proffered conclusion. Under the caption "Permitted Uses" the report states: "The permitted uses of M1 (light industrial) zoning provided by the existing County of Maui Codes allow for *services or supplying communities, producing or manufacturing goods as provided under B1, B2 B3 and M1 zoning (see attached Exhibit "A").*" [Emphasis added.] In other words, the light industrial uses represented by the Ranch to the Commission fit within an M-1 zone, not that the Ranch would pursue a host of different uses unrelated to the proposed light industrial park.

While Exhibit "A" to the Marketing Feasibility Study included a copy of uses permitted within B-1, B-2, B-3 and M-1 zones, the import of the attachment was not to suggest that the Ranch was seeking a boundary amendment to pursue any or all of these disparate uses, including such things as churches, gymnasiums, hotels, baseball or football stadiums, dance halls, department stores, museums, sanitariums, trade schools, mortuaries, etc., but to indicate that the zoning appropriate for the proposed light industrial park was M-1 (light industrial).

The only development proposed/represented by the Ranch to the Commission was a light industrial park. No representation was made that the Ranch would pursue "all of the uses permitted in the County of Maui's B-1, B-2, B-3, and M-1 zoning districts" as proposed in Finding 39.

K. Objection to Petitioners' Proposed Findings 47-52 (Misconstruing the Project Assessment Report)

Petitioners' parsing of the Project Assessment Report is belied by the totality of the document. Intervenors incorporate herein by reference the detailed analysis of the Petition/ Project Assessment Report contained in Intervenors' "Index of References to the Record in Support of Intervenors' Proposed Findings of Fact." at FF1, subparagraphs m.-r.

The Project Assessment Report speaks to the singular concept of a 123-lot commercial and light industrial park. Nowhere does it address the possibility of 250 workforce housing units, a 300,000 square foot retail outlet shopping center and/or a 400,000 square foot retail shopping center. Petitioners' Proposed Findings 47-52 are, therefore, not supported by the evidence.

Finally, Petitioners' Proposed Findings 47-52 are irrelevant to whether the current developments proposed by HP, PPN and PPS are in substantial compliance with the representations made to the Commission described in the D&O.

L. Objection to Petitioners' Proposed Findings 53-68 (Misconstruing Testimony at the 11/1/94 Hearing)

Intervenors incorporate herein by reference the detailed analysis of the representations made by the Ranch at the November 1, 1994, hearing contained in the "Index of References to the Record in Support of Intervenors' Proposed Findings of Fact" at FF2, subparagraphs a.-j.

Representations made by the Ranch to the Commission at the November 1, 1994, hearing spoke to the singular concept of a 123-lot commercial and light industrial park. No witness presented by the Ranch (or any other witness for that matter) addressed the possibility of 250 workforce housing units, a 300,000 square foot retail outlet shopping center and/or a

400,000 square foot retail shopping center, or anything even remotely approaching such things. Petitioners' Proposed Findings 53-68 are, therefore, not supported by the evidence and are objectionable.

Petitioners' Proposed Findings 53-68 are irrelevant to the question whether the current developments proposed by HP, PPN and PPS are in substantial compliance with the representations made to the Commission described in the D&O.

M. Objection to Petitioners' Proposed Findings 58-61 (Misconstruing Sodetani-Kajioka Exchange Regarding Retail)

Petitioners' Proposed Findings 58-61 misconstrue the exchange between Commissioner Kajioka and Mr. Sodetani. Here is what Mr. Sodetani said about commercial activity in the light industrial park:

> "Q. The application also mentions some commercial activity besides the light industrial?
>
> "A. Yes.
>
> "Q. Did you research that?
>
> "A. Yes. Typically in any light industrial subdivision it's expected to have ***some*** commercial activities. Normally these activities are provided to ***support the primary occupants*** there which would be light industrial services. For example, it would be ideal to have some food service to support employees or personnel who are employed in that vicinity, perhaps a small branch of a bank would be ideal to be co-located in an area like that as well. And these types of services ***would be provided primarily for those individuals who are employed in that proximity***." (1994 RT, 81:16-82:4.) (Emphasis added).

Because the Ranch proposed to develop the Property into the "Kaonoulu Industrial Park, a 123-lot commercial and light industrial subdivision," D&O FF 21, and because HAR § 15-15-90(e)(1) requires every boundary amendment decision to include a provision requiring the petitioner to "develop the area reclassified in substantial compliance with the representations made to the Commission," the risk of commercial encroachment in the industrial

park discussed between Mr. Sodetani and Commissioner Kajioka was not that the Ranch would run amok after gaining approval for its development (as HP, PPN and PPS now propose to do by developing the Property into 250 workforce housing units, a 300,000 square foot retail outlet shopping center and a 400,000 square foot shopping center) but that over time, through *secondary* sales of lots and/or subleases, *some* commercial uses in the park could provide services to the primary/majority light industrial users. This is reinforced by D&O Finding 25 that notes that the Ranch might "either sell the equity in the project to a developer, enter into a joint venture to develop the property, or complete the development itself." The finding goes on to state that in the event of a sale "[P]etitioner has represented that it will commit to placing safeguards in the sales documents to assure that conditions for the boundary amendment are carried out."

It is inconceivable that had the Ranch embarked on development of the Property into housing and large shopping center uses that it would have been deemed in compliance with D&O Condition 15. What would have barred the Ranch's activities must likewise bar the Petitioners' activities because they stand in the shoes of the Ranch for all purposes.

N. Objection to Petitioners' Proposed Findings 61 and 66 (Erroneously Suggesting that A Negative Must Be Proved)

Petitioners and the County seek to extrapolate a positive from a negative, arguing that because the Ranch did not represent that it would refrain from developing retail shopping centers on the Property, therefore there is no limit to the amount of retail use allowed. This misstates the evidence, misconstrues the obligations imposed on a successful petitioner for a boundary amendment, and ignores the clear language of D&O Condition 15 requiring development of the Property "in substantial compliance with the representations made to the Commission" (and D&O FF 25).

Intervenors incorporate herein by reference FF2 e.-d. contained in the "Index of References to the Record in Support of Intervenors' Proposed Findings of Fact" wherein it is noted that Mr. Sodetani's testimony is devoid of any representation that the Ranch would develop the Property into anything other than a light industrial park, particularly when he dismissed the notion that a preponderance of retail and service-type uses would prevail in the park. *See* testimony quoted *supra* in Section II.M.

O. Objection to Petitioners' Proposed Findings 62-63 (Erroneously Ascribing An Exchange As A Representation Made by the Ranch)

An exchange between Commissioner Kajioka and Mr. Sodetani does not constitute a representation by the Ranch.

1. The Ranch never represented that it would develop housing on the Property, either in the Petition or in testimony presented by witnesses called by the Ranch.

2. Had the Ranch wanted to pursue housing uses, it would have had to have disclosed this in the Petition per HAR § 15-15-50(c)(14) and its impact would have to have been required to be assessed per HRS § 15-15-50(c), subsections (10), (11), (13), (15), (16) and (18), among others. None of this was done because no such representation was made.

3. Housing uses were expressly rejected as a use for the Property:

> "Q. My last question. As I understand it initially this was viewed as a residential project?
>
> "A. [By Mr. Sodetani] I guess it was a mixture of residential, commercial, light industrial.
>
> "Q. Is there a particular reason why you switched concepts?
>
> "A. Well, I think Mr. Kajioka had expressed a concern about having residential units in close proximity of light industrial properties. And I think we share the same concern too." (1994 RT, 100:18.)

4. The fact that M-1 (light industrial) zoning permits a variety of uses does not supersede representations made by the Ranch in the Petition and at the November 1

hearing that it would develop the Property into a 123-lot Kaonoulu Industrial Park. There simply is no evidence to the contrary. Further, while M-1 may be more permissive, the D&O is more restrictive. Under the law the more restrictive conditions on land shall apply.

5. The D&O makes no reference to housing uses. (D&O Finding 21 et seq.)

6. Commissioner Kajioka was not speaking for the Ranch when speaking to Mr. Sodetani.

P. Objection to Proposed Finding 65 (Erroneously Ascribing Testimony of A County Witness As A Representation Made by the Ranch)

County Planning Director Brian Miskae's testimony does not constitute a representation made by the Ranch (to the effect that the Ranch would pursue unlimited retail development within the proposed Kaonoulu Industrial Park):

1. The Ranch never represented it would do so, either in the Petition or in testimony presented by witnesses called by the Ranch. All testimony was to the contrary – the Ranch proposed to develop the Property into the Kaonoulu Industrial Park, a 123-lot commercial and light industrial subdivision.

2. HAR § 15-15-50(c) would have required disclosure of such an intent and assessment of impacts posed.

3. Mr. Miskae was not the Ranch's witness. (See proposed Finding 64: ". . . Brian Miskae . . . testified regarding the County of Maui's position on the Petition.")

4. The Ranch cannot seventeen years later adopt the coincidental testimony of a County witness as a Kaonoulu Ranch representation.

Q. Objection to Proposed Finding 67 (Asserting That Once Appropriate Zoning is Determined for a Proposed Use, Every Possible Use Within That Zone Must Be Analyzed)

Proposed Finding 67 erroneously states that "the Original Petitioner represented, that under the Proposed M-1 zoning, predominance or even a totality of retail at the proposed project was a possibility." The Ranch never made this suggestion or representation and the D&O is devoid of any finding to that effect. The only reason the Ranch mentioned M-1 zoning was to comply with HAR § 15-15-15(c)(18): an applicant must assess "conformity of the reclassification to the applicable county . . . zoning designations . . . ."

If, for the sake of argument, the Petitioners' proposition underlying proposed Finding 67 were accepted as true, then it would be incumbent on the Commission in every boundary amendment case not only to assess impacts of developments proposed, but to assess all possible uses available in a suitable zoning category. Here, this would have required the Commission to have assessed the impacts that could arise from 16 uses identified in B-1 zones, 66 uses identified in B-2 zones, 14 uses in B-3 zones and the 32 uses allowed in M-1 zones. More importantly, it would mean requiring every petitioner to present studies showing the impacts of all possible uses. The Petitioners' contention is, in a word, absurd.

R. Objection to Petitioners' Proposed Findings 66-71 (Asserting That the Commission Must Examine a Universe of Possible Uses, Not Just the Use Proposed in a Petition)

The Commission was under no obligation to imagine, anticipate or address the universe of possible uses permitted under M-1 zoning since its focus was simply to evaluate the proposed use submitted by the Ranch. The Commission acted within the scope of its responsibilities by assessing the Ranch's singular, proposed light industrial park and by

constraining future development per Condition 15 in the D&O consistent with HAR § 15-15-90(e)(1).

Additionally, what the Commission might have done or not done in other proceedings is irrelevant to the instant action. The only question here is whether the developments proposed by HP, PPN and PPS are in substantial compliance with the representations made to the Commission by the Ranch.

S. Objection to Petitioners' Proposed Findings 75-76 (Traffic Impact Analysis Report)

The traffic impact analysis report prepared by Mr. Ng had a singular focus in concert with the Ranch's proposed light industrial park. As stated in the first paragraph of the report under the heading "Traffic Impact Analysis Report *Kaonoulu Industrial Park* Kihei, Maui, Hawaii," the purpose of the T.I.A.R. was cast as follows: "Kaonoulu Ranch has proposed an 88-acre *industrial park* in Kihei, east of Piilani Highway across from the Kaonoulu Estates project (Figure1). This report summarizes a traffic impact analysis conducted to determine the potential impact of the *industrial park* and the appropriate roadway improvements to provide adequate traffic capacity to serve the *park*." (Emphasis added.)

As such, the TIAR stands in direct opposition to Petitioners' Proposed Findings 75 and 76.

Finally, the D&O is devoid of any suggestion that the Ranch contemplated housing uses or large-scale, large lot retail shopping center uses. In fact, the record shows the opposite.

T. Objection to Petitioners' Proposed Findings 80-94 (Subsequent Actions Re Zoning)

For the reasons stated in several of the sections above, Petitioners' Proposed Findings 80-94 relating to actions before the County to rezone the Property are irrelevant to

whether the landowners "have failed to perform according to the conditions imposed or to the representations or commitments made by Ka'ono'ulu Ranch . . ." to the Commission. (Order to Show Cause.)

U. Objection to Petitioners' Proposed Findings 95-102 (Other Developments in Maui County)

For a host of reasons, Petitioners' Proposed Findings 95-102 relating to other developments in Maui County are irrelevant to whether the landowners "have failed to perform according to the conditions imposed or to the representations or commitments made by Ka'ono'ulu Ranch . . ." to the Commission. Order to Show Cause. The reasons include, among others: the evidence presented was incomplete and the Commission cannot ascertain whether the circumstances of boundary amendment even occurred, or were similar to here; and, the fact that a use is there does not prove it is a legal use.

V. Objection to Petitioners' Proposed Findings 106-109, 112-128, 132, 134-144, 146-148, 152-161 (New Housing and Shopping Center Projects)

Petitioners' Proposed Findings 106-109, 112-128, 132, 134-144, 146-148,152-161, are irrelevant to whether the Petitioners, or any of them, "have failed to perform according to the conditions imposed or to the representations or commitments made by Ka'ono'ulu Ranch . . ." to the Commission. (Order to Show Cause.) Petitioners have clearly submitted these proposed findings of fact relating to the proposed public improvements as enticement for the Commission. However, in determining whether there has been a violation, the Order to Show Cause and the Commission Rules do not permit this Commission to evaluate purported promises of "good deeds to come." In fact, the "red herring" is this: If the project makes so much sense to the public, then the Petitioners should simply seek an amendment and go through the public hearing process.

W. Objection to Petitioners' Proposed Findings 134-138 (Home and Garden Center Offer)

Intervenors object to Petitioners' Proposed Findings 134-138 on both procedural and substantive grounds.

(1) Procedural Objection – Motion to Amend Required

The last minute, verbal offer to the Commission to devote 11.5 of 88 acres to a "home improvement type use" while continuing to develop the Property into 250 workforce housing units and two large-lot, large-scale retail shopping centers must be presented to the Commission in writing and comply with HAR § 15-15-94, which states, in pertinent part:

> "(a) If a petitioner pursuant to this subsection, desires to have a modification or deletion of a condition that was imposed pursuant to section 15-15-90(e) or (f), or modification of the commission's order, the petitioner shall file a motion in accordance with section 15-15-70 and serve a copy to all parties to the boundary amendment proceeding in which the condition was imposed . . . ." And,
>
> "(c) Any modification or deletion of conditions or modifications to the commission's order shall follow the procedures set forth in subchapter 11."

The landowners have failed to meet these requirements while seeking, in effect, to modify the D&O to approve construction of 250 workforce housing units and two large retail shopping centers on the Property, the impacts of which have never been weighed by the Commission, nor has the public been given an opportunity to be heard on these massive, transformative developments that will significantly and negatively affect the quality of life in south Maui, not to mention violate the 1998 Kihei-Makena Community Plan that remains in effect today. HAR § 15-15-50(c)(18) requires the Commission to assess compatibility of proposed developments with community plans. Given the explicit wording of the 1998 Kihei-Makena Community Plan requiring the Property to be developed into light industrial use with only ancillary commercial uses associated with light industrial uses, an amendment of the type

sought would trigger the need for a community plan amendment, which in turn would require a public hearing in south Maui and either an EA or an EIS. By statute, the Hawai`i legislature has deemed this environmental review process necessary. Petitioners may not be permitted to avoid the legal process by reinterpreting the 1995 D&O to permit uses clearly never intended by the original petitioner or the Commission.

(2) Substantive Objection

Without waiving the above procedural objection, Intervenors object to these proposed findings on several grounds:

(i) Taken alone, the verbal offer fails to address the variance in lot characteristics represented by the Ranch (fee simple and long term leases versus only leaseholds; 123 lots versus the large lot configuration) and the negative economic effects of same;

(ii) The offer is devoid of definition of any calculable light industrial use, if any, within such a center and, according to substantial evidence, is not a light industrial use at all. For instance, Mr. Mayer testified that home improvement centers are retail functions:

> "Q. Let me actually ask you more keeping to the economic side of it. The argument that's being raised is that Home Depot really fulfills a lot of those industrial uses. Is that your opinion?
>
> "A. Not at all.
>
> "Q. Can you explain why?
>
> "A. The United States Economic Census, which classifies industries and businesses, makes it very clear that home improvement centers, home centers as they call them, are retail. And they put it unequivocally in the retail category because they have certain characteristics which are of a retail nature. They advertise to the general public. They expect a large walk-in trade. They sell things in small quantities. By contrast a wholesaler or operation like a big lumber yard stand-alone that might be going into an industrial park, would be selling largely to contractors. They would probably not have a walk-in trade. They would probably not have a large parking lot out in front . . . ." (11/16/12 RT 149:23-151:15)

Also see the testimony of Mr. Funakoshi:

> "A. The home improvement center would be at least partially a light industrial use, so that would be an improvement to the current proposal which currently has no industrial uses. Although I would add, though, that a Home Depot-type operation is *primarily* commercial/retail in nature." (11/16/12 RT 45:18-24; emphasis added.)

Even Mr. Spence testified that a home improvement center is "a little bit of both [retail and light industrial]." (11/15/12 200: 8-17.)

(iii) The offer only included 11.5 acres of the 88 acre Property, or roughly 13% of the Property. And of that 13%, the amount that might be considered light industrial, if any depending on whose testimony is accepted, would necessarily be less. In either case, a project with less than 13% light industrial use and including unapproved housing and large scale shopping center uses is not in substantial compliance with the representation made by to the Commission by the Ranch.

X. Objection to Petitioners' Proposed Findings 153-154 (No Enforcement by Spence)

Whether the landowners are in violation of Condition 15 of the D&O is within the sole discretion of the Commission. Consequently, the testimony of Mr. Spence on the ultimate decision the Commission must make is irrelevant. Mr. Spence conceded the point at the contested case hearing (11/15/12 RT 197:21-25):

> "A. [By Mr. Spence] Representations made to the Commission I don't - - I'm not the one that can determine whether there is a breach of that condition or not. That's what we are here for today. This is a Commission decision, not mine."

Furthermore, Mr. Spence testified on cross-examination that while a number of uses are allowed by the County in M-1 light industrial zones, this does not mean that all such uses are light industrial (11/15/12 RT 203:13-204:19):

> "Q. [By Mr. Yee] When you were answering Mr. Steiner's question were you thinking that these home improvement center functions were retail uses and therefore qualified as light industrial uses?

"A. No.

"Q. You were applying a different definition of light industrial in his question, in the context of his question, is that right?

"A. Yes. What I was – if I need to clarify. You have all these light industrial uses that normally would be found in a light industrial park except in this case they're combined under one roof. So I would classify that use as more industrial in nature than it would be retail in nature. And in both cases whether it's a stand alone chop [*sic*] or a lumber yard, members of the public can still go into those particular shops and purchase items. Just because it's combined under one roof I don't see how that changes.

"Q. Well, and I guess the distinction I'm trying to draw is under zoning you can have a restaurant that's permitted under the light industrial zoning, correct?

"A. That's correct.

"Q. But a restaurant would not be considered a light industrial use as you answered Mr. Steiner's question.

"A. That's correct.

"Q. Would an apartment use be a light industrial use in the same context as you would answer Mr. Steiner's question?

"A. No, it would not."

Y. Objection to Petitioners' Proposed Findings 156-161 (Specificity of the D&O)

These proposed findings should be denied because they are conclusions of law. Whether the D&O is enforceable by Mr. Spence is a question of law that a court must answer, not Mr. Spence. In addition, what the Ranch represented to the Commission is clearly identified in the Petition, in testimony before the Commission in 1994 and in the D&O. The D&O is written in compliance with HAR § 15-15-90(e)(1) and standard practice and required the Ranch to place "safeguards in the sales documents to assure that conditions for the boundary amendment are carried out." D&O Finding 25.

A set of projects consisting of 250 housing units and two large-scale, large-lot shopping centers never before brought to the attention of the Commission are so far removed

from anything resembling a light industrial park that these proposed findings fail to pass the "straight face" test, irrespective of Mr. Spence's biased testimony.

Z. Objection to Petitioners' Proposed Findings 162-207 (Traffic/Condition 5)

Intervenors object to these proposed findings on both procedural and substantive grounds:

1. Procedural Objection – Motion to Amend Required

These proposed findings relating to Petitioner' argument that Condition 5 need not be adhered to amount to a *sub rosa,* or covert, motion to amend the D&O, one that fails to meet the requirements of HAR § 15-15-94, which states in pertinent part:

> "(a) If a petitioner pursuant to this subsection, desires to have a modification or deletion of a condition that was imposed pursuant to section 15-15-90(e) or (f), or modification of the commission's order, the petitioner shall file a motion in accordance with section 15-15-70 and serve a copy to all parties to the boundary amendment proceeding in which the condition was imposed . . . ." And,
>
> "(c) Any modification or deletion of conditions or modifications to the commission's order shall follow the procedures set forth in subchapter 11."

The landowners have failed to meet these requirements while seeking, in effect, to modify the D&O by asking the Commission to sanction construction of 250 workforce housing units and two large retail shopping centers on the Property, the impacts of which have never been weighed, nor has the public been given an opportunity to be heard on these massive, transformative developments that will significantly and negatively affect the quality of life in South Maui, not to mention violate the 1998 Kihei-Makena Community Plan that remains in effect today. HAR § 15-15-50(c)(18) requires the Commission to assess compatibility of proposed developments with community plans. Given the explicit wording of the 1998 Kihei-Makena Community Plan requiring the Property to be developed into light industrial use with

only ancillary commercial uses associated with light industrial uses, a amendment of the type sought would trigger the need for a community plan amendment, which in turn would require a public hearing in South Maui and either an EA or an EIS.

2. Substantive Objection

None of these findings are probative of or demonstrate compliance with Conditions 5 (construction of a frontage and connector roads) and/or show substantial compliance with the representations made to the Commission as required by Condition 15. As such they are irrelevant except to the extent that they show actual violation of these conditions inasmuch as there is no proposed finding that a frontage and connector roads will be constructed (the evidence is to the contrary: 11/15/12 RT 79:17-19). This is coupled with evidence of substantial traffic differences between that arising from the proposed light industrial park compared to traffic expected from the 700,000 square foot retail shopping centers (four times greater in the PM; see Petitioners Proposed Finding ¶ 185; and see Mr. Holliday's testimony that the projects are simply different (11/2/12 RT 138:7-80)).

AA. Objection to Petitioners' Proposed Findings 190-192 (February 2, 1995, Hearing Not Part of the Record)

Here, Petitioners seek to look behind the D&O to reinterpret Condition 5 in violation of the doctrine of *res judicata*. Nevertheless, the proffered evidence supports the alternative point from the one sought by Petitioners: Martin Luna, on behalf of Kaonoulu Ranch, requested that Condition 5 be omitted. The Commission apparently saw things differently. Consequently, Mr. Luna was unsuccessful in obtaining from the Commission an interpretation of Condition 5 different from its clear and unambiguous meaning. As a result, the findings should be rejected.

BB. Objection to Petitioners' Proposed Findings 208-218 (Failure to File Annual Reports)

Aside from the fact that the proposed findings fail to address the total inadequacy of, if not actual deception contained in, the 14th and 15th annual reports, the proposed findings fail to present substantial evidence that the 10th, 11th, 12th and 13th annual reports were filed with the Commission at a critical time when the Petitioners were pursuing development of the Property in stark contrast to the representations made to the Commission by the Ranch.

CC. Objection to Petitioners' Proposed Findings 219-229 (School Impact Fees)

The D&O mentions the industrial park's impact on schools at FF 62, noting that because the project will only have employees and not residents, impacts on educational resources "would be more appropriately addressed at the time of application of specific residential projects." D&O at 16. HAR § 15-15-15(c)(14), states that if residential uses are proposed, "the petition must address the housing needs of low and moderate income groups." That was not done here because no housing uses were proposed. In addition, HAR § 15-15-90(e)(8) mandates that if a proposal includes housing uses, then "the petitioner shall contribute to the development, funding and construction of public school facilities as determined by and to the satisfaction of the state department of education . . . ."

It is undisputed that the Department of Education was never involved in consideration of school fees for the Kaonoulu Industrial Park because housing uses were neither contemplated nor proposed. Accordingly, the D&O is silent with respect to them. (See, e.g., 11/2/12 RT 48-15-49:1.)

As a consequence, Petitioners' Proposed Findings 219-229 are irrelevant, except to demonstrate that the 250 workforce housing project is a new use completely at odds with the representations made by the Ranch to the Commission.

DD. Objection to Petitioners' Proposed Findings 230-240 ("Evolution of the Market")

These proposed findings are of no probative value to the question of substantial compliance with the representations made by the Ranch. If anything they constitute an admission that the current development projects fail to meet the test contained in Condition 15 due to what the Petitioner own terminology, "evolution," something that others might call undue delay in development of the Property. After all, the Ranch owned the Property for over 10 years after issuance of the D&O. Annual reports filed by the Ranch during that period indicate little or no activity, except that it obtained a community plan amendment and M-1 zoning consistent with Condition 1. In any event:

(1) if the market for light industrial use changed as alleged, the appropriate remedy is to move to amend the D&O, something Petitioners refuse to do, and

(2) 18 years is a long time for land to sit following a boundary amendment proposal that indicated the owners would proceed apace with development. D&O FF 23 provides: "Petitioner anticipates that the Project will be available for sales in the fourth quarter of 1996 and that the entire Project can be marketed by the year 2000, assuming the orderly processing of necessary land use approvals and avoidance of undue delays."

III. OBJECTION TO PROPOSED CONCLUSIONS OF LAW

A. In General

The 39 so-called conclusions of law are mostly a continuation of proposed facts not supported by the evidence and should be stricken in their entirety for lack of foundation, and are otherwise hereby objected to by Intervenors.

B. Specific Conclusions

Intervenors' expressly object to proposed Conclusions 13, 33, 34, 37-39, all of which are correctly cast as conclusions of law but none of which are supported by the record as discussed above and as set forth in Intervenors' Proposed Findings of Fact and Conclusions of Law, the attached Index, and in the affiliated Points and Authorities, all of which are incorporated herein by reference.

Petitioners' and County's continual assertion of the *Lanai Co., Inc. V. Land Use Comm'n*, 105 Hawai`i 296,314 (2004) for the proposition that the D&O lack sufficient clarity, including in Petitioners' Proposed Findings 21 and 22, is entirely misplaced and not supported by the record here, nor have they correctly summarized the *Lanai Co.* case. That Court noted: "This court has mandated that, in issuing a decision, an 'agency must make its findings reasonably clear. The parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency.'" *Id.* The inclusion of "reasonably" is telling. This is an objective standard. Any reasonable person can understand the D&O for what it is: an order permitting a 123-lot light industrial complex. Any *subjective* position taken by Petitioners and the County that the D&O was unclear is a hallucination on their part that need not be accounted for under the law.

The *Lanai Co.* Court went on to state: "Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies." Petitioners have come up with a *post hoc* rationale that the D&O permits any M-1 use. However, the *Lanai Co.* case will not support that creative ploy: Any *reasonable* person, who considered

the D&O in light of the underlying Commission Rules requiring specificity of the proposal in the petition for a boundary amendment, would conclude that they were fairly warned through the D&O that any significant shift from the proposed 123 lot light industrial park would not be permitted.

Finally, Intervenors also specifically object to proposed Conclusions 36 and 37 relating to which party has the burden of proof. Intervenors hereby incorporate by reference Section II of Intervenors Points and Authorities in Support of Intervenors' Conclusion of Law ¶ 3.

IV. CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Commission reject Petitioners' Proposed Findings and Conclusions of Law, and instead adopt Intervenors'.

DATED: Makawao, Hawaii, January 3, 2013.

TOM PIERCE
Attorney for Maui Tomorrow
Foundation, Inc., South Maui Citizens
for Responsible Growth, and Daniel Kanahele

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of INTERVENORS' OBJECTIONS TO PIILANI PROMENADE SOUTH, LLC, AND PIILANI PROMENADE NORTH, LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECISION AND ORDER, FILED DECEMBER 21, 2012; CERTIFICATE OF SERVICE has been duly served upon the following at their addresses of record via United States Mail, postage prepaid, on January 3, 2013:

Jonathan H. Steiner
Joel D. Kam
McCorriston Miller Mukai MacKinnon LLP
P.O. Box 2800
Honolulu, HI 96803-2800

John S. Rapacz
Attorney At Law
P.O. Box 2776
Wailuku, HI 96793

Attorneys for Pi`ilani Promenade North, Pi`ilani Promenade South and Honua`ula Partners LLC

Bryan C. Yee
Deputy Attorney General
Dept. of the Attorney General
425 Queen Street
Honolulu, HI 96813

Attorney for Office of Planning

Jane E. Lovell
Michael Hopper
Corporation Counsel
200 S. High St.
Wailuku, HI 96793

Attorneys for Department of Planning, County of Maui

DATED: Makawao, Maui, Hawaii, January 3, 2013.

TOM PIERCE
Attorney for Maui Tomorrow
Foundation, Inc., South Maui Citizens
for Responsible Growth, and Daniel Kanahele