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LAND USE COMMISSION
STATE OF HAWAII

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of)	DOCKET NO. A-94-706
)	
KAONOULU RANCH)	PIILANI PROMENADE SOUTH, LLC
)	AND PIILANI PROMENADE NORTH,
To Amend the Agricultural Land Use District)	LLC'S RESPONSE TO INTERVENORS'
Boundary into the Urban Land Use District)	PROPOSED FINDINGS OF FACT FOR
for approximately 88 acres at Kaonoulu,)	PHASE ONE; CERTIFICATE OF
Makawao-Wailuku, Maui, Hawai'i)	SERVICE
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PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S
RESPONSE TO INTERVENORS' PROPOSED FINDINGS OF FACT FOR PHASE ONE

COME NOW Piilani Promenade South, LLC ("PPS") and Piilani Promenade North, LLC ("PPN") (collectively "Piilani"), by and through their attorneys, McCorriston Miller Mukai MacKinnon LLP, and respond as follows to Intervenor's Proposed Findings of Fact For Phase One, filed herein on December 21, 2012 (hereinafter "Intervenor's Proposal").

Piilani objects to the format of Intervenor's Proposal, which fails to contain citations following the proposed Findings of Fact ("FOF") and Conclusions of Law ("COL"). Following the close of evidence in this matter, the Land Use Commission ("the Commission") Chair ordered that proposed FOF "must reference the witness as well as the date, page and line numbers of the transcripts to identify your facts. In addition to the transcript, exhibits in evidence should also be referenced." See November 16, 2012 Transcript at 173:17-21. Intervenor's Proposal fails to follow each FOF with citation, and instead attaches an unwieldy "Exhibit 1: Index of References to the Record in Support of Intervenor's Proposed Findings of Fact," and "Exhibit 2: Points of Authorities in Support of Intervenor's Proposed Conclusions of Law 2 and 3." To complicate matters further, Intervenor's proposed FOF Number 1 is five sentences long, thus containing in reality five separate FOFs. Moreover, the Index to that Proposed FOF is over eight pages long, and contains citation to **twenty-six (26)** subparts (a-z). No referenced is made as to which subpart addresses which alleged fact. Other FOFs contain similarly unwieldy subparts. Responding to this format is cumbersome, unwieldy, and likely to lead to confusion. Piilani submits that for this reason alone, Intervenor's Proposal should be rejected in its entirety.

Intervenors' Proposed FINDINGS OF FACT

Intervenors' Proposed FOF 1: Piilani first objects to the format of this Proposed FOF, for the reasons set forth, *supra*. Piilani does not dispute the first sentence of Proposed FOF 1. Piilani objects to sentences 2-5 on the ground that they misstate the record, and are therefore argumentative. In representations made to the Commission, it was made clear that the 123 lot commercial and light industrial subdivision to be called "Kaonoulu Industrial Park" was only a conceptual plan, that the lots would either be sold or leased, , and that lot sizes could change:

These estimates of lot sizes, quantity and values are provided for planning purposes only. It is only one conceptual alternative which meets current market conditions with considerations for economic, social and physical variables. These estimates require reassessments from time to time, and may need to be adjusted accordingly.

See Piilani Exhibit 3 at 8 (emphasis added). See also Testimony of Martin Luna, November 1, 2012 Transcript at 168:4-23. The only representation regarding commercial uses being ancillary to the light industrial uses was in the context of what the market, at that time, indicated were the likely tenant mixes. However, Petitioners specifically represented to the Commission, both in writing and at the hearing on the Petition, that all M-1 Zoning uses would be permitted, and that the market would determine the mix of tenants. Moreover, it was expressly indicated that the success of marketing the project depended on obtaining significant retail tenants:

The success of marketing these parcels will depend on the success of obtaining popular and internationally recognized outlets to occupy the larger parcels, the timeliness of the installation of the infrastructure (i.e. highways, schools, etc.) and the prosperity of the tourist related businesses in South Maui. Many businesses located in Wailuku and Kahului will create branches or satellite locations in Kaonoulu Industrial Park for convenience and cost effectiveness.

See Piilani Exhibit 3 at 7 (emphasis added). Testimony of Martin Luna, TR1 at 166:16-167:7. Petitioner even expressly told the Commission that such tenants would include discount retailers, fast food outlets, furniture and appliance outlets, and sporting goods stores, which are not the types of tenants which are ancillary to light industrial uses, but rather, are the type of tenants one would expect in a shopping complex. See Piilani Exhibit 3 at 6. The permitted uses represented to the Commission included both retail shopping centers, and apartments, and this was specifically discussed at the hearing before the Commission. See Piilani's Proposed FOF 56-63.

Comments on Index to Intervenors' Proposed FOF 1: Piilani objects to the statement in the first paragraph of Intervenors' "Index of References to the Record in Support of Intervenors' Proposed Findings of Fact" that the Petition "makes no representation that the proposed development would include a housing project or retain shopping centers of the type now proposed by HP, PPN, and PPS." This statement is misleading as it misstates the record and is argumentative. The 123-lot subdivision map presented to the Commission was labeled a "conceptual plan." The exhibits to the Petition, including the Market Feasibility Study and Economic Report and the Project Assessment Reports, made clear representations to the Commission that the permitted uses on the Subject Property could include retail uses, and that the amount of retail tenants and number of lots and configuration were subject to change, depending on the market conditions existing at that time. See Piilani's proposed FOF 19 through 52, and the evidence cited therein. In addition, the Petition disclosed the possibility of apartment uses within the Petition Area. See Piilani Exhibit 3, Market Feasibility Study and Economic Report, at numbered p. 14.

Piilani also objects to the statement that "[a]lthough residential use for the Property was initially considered by the [original petitioner], the concept was rejected in favor of a light

industrial park.” This statement is misleading, misstates the record, and is argumentative. State Office of Planning representative Rodney Funakoshi admitted under cross-examination that the “concerns of placing residential units so close to an industrial park” referred to in this statement related not to the apartment uses now proposed for the a portion of the Petition Area, but for single-family residential abutting other light-industrial uses:

Q Mr. Witten answered Mr. Kajioka's question, “I'm not specifically aware where and if there's single-family abutting that. Later the other planner may be able to respond more specifically. If we do about a **single-family residential use**, I think some consideration should be given to what the allowable land uses are and if additional landscaping may be desirable.

So would you agree, Mr. Funakoshi, that the concern about residential uses abutting light industrial is a concern about single-family residential abutting light industrial and not apartment abutting light industrial based on this exchange?

A **That's true. Single-family is referenced here.** But in general any residential abutting light is a concern.

Q Well, the proposed zoning that was, the zoning that was being proposed by the original Petitioner was light industrial, correct?

A I'm sorry? The...

Q In 1994 the Project, the Petitioner anticipated applying for a change in zone for the property to light industrial, is that correct?

A Yes. Yes.

Q And apartment use is a specific and at the time was a specifically approved use in light industrial, correct?

A Yes.

Testimony of Rodney Funakoshi, 11/16/12 Transcript at 74:11 – 75:14 (emphasis added).

Subparagraphs a – c: Piilani objects that while these are accurate quotes from portions of the Petition, in each quoted section, both light industrial and commercial uses were represented.

Thus, these quotes do not support the conclusion in Intervenor's Proposed FOF 1 that proposed commercial uses were only ancillary to light industrial uses, and are therefore argumentative.

Subparagraph d: Piilani submits that this inaccurately portrays the Market Feasibility Report, and therefore is argumentative. As set forth extensively in Piilani's proposed FOF, the Market Report specifically discusses commercial and retail uses, lists retail and apartment uses as permitted uses, and specifically represents that the market would ultimately determine the tenants.

Subparagraph e: Piilani does not object to subparagraph e, as far as it goes, but, notes that all of the uses proposed by Piilani and Honua'ula are allowed in the M-1 zoning, and are listed in the copy of the permitted uses attached to the Marketing Report. See Piilani's Exhibit 3.

Subparagraphs f& g: Piilani objects that while these subparagraphs are accurate quotes from portions of the Marketing Report, these selective quotes do not support the conclusion in Intervenor's Proposed FOF 1 that proposed commercial uses were only ancillary to light industrial uses.

Subparagraph h: Piilani objects that while subparagraph h accurately quotes part of the "Project Absorbtion" section of the Marketing Report, it is misleading and argumentative because it fails to disclose that the following language was also included:

The third category of occupants are generally long term lessees. These occupants require the best possible visibility advantage from highways and streets. The expectation is that other investors will purchase the land, develop improvements for multitenant use and have a long term lease with occupants. Examples of these occupants are: Discount retailers, auto part sales, furniture and appliance sales; sportswear and equipment; wholesale food distributors; fast food outlets; etc.

....

The success of marketing these parcels will depend on the success of obtaining popular and internationally recognized outlets to occupy the larger parcels, the timeliness of the installation of the infrastructure (i.e. highways, schools, etc.) and the prosperity of the tourist related businesses in South Maui. Many businesses located in Wailuku and Kahului will create branches or satellite locations in Kaonoulu Industrial Park for convenience and cost effectiveness.

See Piilani Exhibit 3 at 6-7 (emphasis added). Moreover, even the selectively quoted section does not support the conclusion in Intervenors' Proposed FOF 1 that proposed commercial uses were only ancillary to light industrial uses.

Subparagraph i: Piilani objects that while this subparagraph is an accurate quote of part of the "Conclusion" section of the Marketing Report, the selectively quoted portion does not support the conclusion in Intervenors' Proposed FOF 1 that proposed commercial uses were only ancillary to light industrial uses, and is therefore argumentative.

Subparagraph j: Piilani objects that while this subparagraph is an accurate quote from the "Recommendations" section of the Marketing Study, it is misleading without the following which was also included in that section:

These estimates of lot sizes, quantity and values are provided for planning purposes only. It is only one conceptual alternative which meets current market conditions with considerations for economic, social and physical variables. These estimates require reassessments from time to time, and may need to be adjusted accordingly. Any major variable (i.e. location of a new highway) may require an alteration of the subdivisions configuration, however, the current requirement for additional light industrial land in South Maui should not change.

See Piilani Exhibit 3 at 8 (emphasis added). Moreover, even the selectively quoted section does not support the conclusion in Intervenors' Proposed FOF 1 that proposed commercial uses were only ancillary to light industrial uses, and is therefore argumentative.

Subparagraphs k & l: Piilani objects that these are quotes from a portion of the Economic Reports, but the selectively quoted sections do not support the conclusion in Intervenors' Proposed FOF 1 that proposed commercial uses were only ancillary to light industrial uses, and are therefore argumentative.

Subparagraph m: This selective quote from the Project Assessment Report specifically notes that the 123 lot configuration is a "conceptual plan." Conceptual plans are, by definition, subject to change and are anticipated to evolve over time. See Piilani Proposed FOF 26 – 32 and the evidence cited therein.

Subparagraph n: Piilani objects that subparagraph n is inaccurate, misleading and therefore argumentative. The Petition also included visual representations of the landscaping for the project, which is substantially similar to that being proposed in the Piilani Promenade project. Compare Piilani Exhibit 5 with Piilani Exhibits 31, 32, and 33. Finally, "Figure 2" cited by Intervenors herein was never included in any exhibit submitted to the Commission in this proceeding, and as such, is not in evidence herein (see Intervenors' Exhibit 1, which does not contain a copy of "Figure 2" to the Project Assessment Report).

Subparagraph o: Piilani object that while subparagraph o is a quote from a portion of the Project Assessment Report, the selective quote does not support Intervenors' Proposed FOF 1. To the contrary, the quoted language supports Piilani's position that it was always anticipated that significant retail would or could be included in the proposed project.

Subparagraph p: While the Project Assessment Report contains references to "distribution activity," the only evidence regarding the meaning of these references was testimony that this appeared to be a reference to commercial activities, and sales of goods. See Testimony of Martin Luna, November 1, 2012 Transcript at 185:2-23. Piilani objects that this

subparagraph does not support Intervenors' Proposed FOF 1. In addition, the Project Assessment Report contains many references to significant retail uses. See response to Subparagraph h, *supra*.

Subparagraph q: Piilani objects on the ground that whether the proposed development complies with the Kihei-Makena Community Plan is beyond the jurisdiction of the Commission. See HRS § 205-5 & 205-12; Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai'i 296, 318-19, 97 P.3d 372, 394-95 (2004); Kuleana Ku'ikahi, LLC v. State, Land Use Com'n, Slip Copy, 2012 WL 1510188, *3 -*4 (Hawai'i App. April 27, 2012).

Subparagraph r: Piilani objects that subparagraph r is misleading and argumentative. The Project Assessment Report incorporates by reference the Market Study, which includes a list of all permitted uses. Those permitted uses include apartment and all the retail uses proposed by Piilani. As previously discussed herein and in Piilani's Proposed FOFs, both the Project Assessment Report and the Market Study made multiple references to significant retail uses.

Subparagraphs s through u: Piilani objects that subparagraphs s through u do not support Intervenors' Proposed FOF 1. The Commission was aware in 1994 of the fact that trip generation counts in the original TIAR were based on light industrial use, and that the possibility of retail use would create more traffic, which would be reassessed at the appropriate time. See Piilani Exhibit 6 at 108:1-11. Moreover, it was made clear in testimony by the State Department of Transportation that detailed traffic impacts of projects are not addressed during Land Use Commission boundary amendment proceedings, but rather, are addressed at subsequent stages, as they have been for this project. See Testimony of Ken Tatsuguchi, November 2, 2012 Transcript at 18:1-16 and at 20:4 – 21:2.

Subparagraphs v – x: Piilani objects that these subparagraphs not support Intervenors’ Proposed FOF 1. Notably, in every quote, the fact that the proposed project includes both commercial and light industrial uses is specifically stated.

Subparagraph y: Piilani does not dispute the fact stated in subparagraph y.

Subparagraph z: Piilani objects to subparagraph z on the ground that it is incomplete, and therefore argumentative. Mr. Luna also testified that this was one conceptual plan, subject to change. See e.g. Testimony of Martin Luna, November 1, 2012 Transcript at 161:13-25 and at 213:14 – 214:9.

Intervenors’ Proposed FOF 2: Piilani first objects to the format of this Proposed FOF, for the reasons set forth, *supra*. Piilani objects that proposed FOF 2 is misleading, and therefore argumentative. At the hearing, it was specifically represented that the permitted and possible uses included apartment and retail, and no commitment to limit the uses was made. See Piilani’s Propose FOF 53 – 68 and the citations to the record therein, which set forth in detail the representations made to the Commission contrary to Intervenors’ Proposed FOF 2.

Comments on Index to Intervenors’ Proposed FOF 2:

Subparagraph a: Piilani notes that landscape architect Tom Witten consistently testified as to a “conceptual” plan, and “proposed” project and landscaping plan See November 1, 1994 Transcript at 17:17, 18:4, 18:18-19.

Subparagraph b: Similarly, Mr. Unemori also testified about a “conceptual” plan. See November 1, 1994 Transcript at 24:25. In fact, he specifically states “this is still a conceptual plan.” Id. at 25:18. He also, upon cross examination, testified that he was not familiar with the types of various commercial or light industrial activities that are tentatively planned for the area. See November 1, 1994 Transcript at 33:15-18.

Subparagraph c: While Mr. Ng testified about the traffic impacts based on light industrial use, the Commission was aware and asked about the possibility that significant retail use would create more traffic. See Piilani Exhibit 6 at 108:1-11.

Subparagraph d: No comments.

Subparagraph e – g: Piilani objects that this selective citation to Mr. Sodetani’s testimony is misleading and argumentative. While Mr. Sodetani testified that it was more likely that light industrial tenants would be located on the project, he also made clear that the market would determine the tenants mix. See Piilani Exhibit 6 at 106:4 – 107:3 (“But again I think that market will dictate who would go in there and who would not.”) Mr. Sodetani made no representations that the Original Petitioner would attempt to limit what would be driven by the market. Moreover, Mr. Sodetani was specifically asked and testified to the fact that a predominance of retail use was a possibility, and that apartment use was also permitted. See Piilani Exhibit 6 at 105:23 – 106:4; Testimony of Martin Luna, November 1, 2012 Transcript at 175:8-10, 182: 15-25.

Subparagraph h and i: Piilani objects that these subparagraphs are misleading and therefore argumentative when the record is read as a whole.

Subparagraph j: Piilani objects that this subparagraph is misleading. While the Original Petitioner did not examine either Mr. Jencks or Mr. Miskae, there was discussion about the fact that the permitted uses in the project included retail, and Mr. Miskae testified that it was the County of Maui’s intention to seek a limitation on the amount of retail that would be allowed on the project. Thereafter, the Commission put no limits on the amount of retail, even though it has done so in other district boundary amendment orders, apparently leaving this issue up to the County. See Piilani Proposed FOFs 64-72 and the citations contained therein.

Intervenors' Proposed FOF 3: Piilani does not object to FOF 3.

Intervenors' Proposed FOF 4: Piilani objects to FOF 4 as an inaccurate statement of the record that is misleading and therefore argumentative. The 1995 Decision and Order did not say that the Commission “found that Kaonoulu Ranch would develop” the property as stated, but rather, only stated that “Petitioner proposes to develop” the property as stated (emphasis added). The fact that what was presented was a conceptual plan, and the other testimony and evidence cited in Piilani’s Proposed FOF, refutes the affirmative implication which Intervenors attempt to assert.

Intervenors' Proposed FOF 5: Piilani stipulates that the Kihei-Makena Community Plan was updated, effective March 6, 1998, which Piilani submits fulfilled the provision in Condition 1 of the 1995 Decision and Order requiring Petitioner to obtain a Community Plan Amendment. Piilani objects to the contention that the text of the community plan states that the Subject Property will be used for light industrial services with limited retail and commercial activities which are only accessory to the light industrial use on the ground that this claim is not supported by citations to the record. Intervenors fail to cite to where they assert this is found in the Kihei-Makena Community Plan (“KMCP. The Light Industrial designation itself contains no such limitation. Moreover, any interpretation or enforcement of the Kihei-Makena Community Plan is beyond the jurisdiction of the Commission. See HRS § 205-5 & 205-12; Lanai Co., Inc. v. Land Use Comm’n, 105 Hawai’i 296, 318-19, 97 P.3d 372, 394-95 (2004); Kuleana Ku'ikahi, LLC v. State, Land Use Com'n, Slip Copy, 2012 WL 1510188, *3 -*4 (Hawai’i App. April 27, 2012).

Intervenors' Proposed FOF 6: Piilani has no objection to Proposed FOF 6.

Intervenors' Proposed FOF 7: Piilani has no objection to Proposed FOF 7.

Intervenors' Proposed FOF 8: The rezoning referenced in Intervenors' Proposed FOF 8 was obtained in 2008, not 2007. Piilani objects that the remainder of Proposed FOF 8 is irrelevant.

Intervenors' Proposed FOF 9: Piilani does not object to proposed FOF 9.

Intervenors' Proposed FOF 10: Piilani objects to the extent that Intervenors' Proposed FOF asserts that the approximately 300,000 square foot parcel which PPN intends to develop is characterized as a "mall," which is an enclosed space. The Piilani Promenade project is for an open air complex, not a mall. See Piilani Exhibits 31 and 33; Testimony of Charles Jencks, November 15, 2012 Transcript at 45:14-24. Other than this clarification, Piilani does not object to the remainder of Intervenors' Proposed FOF 10.

Intervenors' Proposed FOF 11: Piilani notes that the rezoning referenced in Intervenors' Proposed FOF 11.a. was obtained in 2008. In addition, Piilani disputes that obtaining the rezoning referenced in Intervenors Proposed FOF 11.a. constitutes beginning to develop the Honua'ula Parcel, and submits that no development of that parcel has taken place. Piilani does not dispute the remainder of Proposed FOF 11.

Intervenors' Proposed FOF 12: Piilani does not dispute that the 1995 Decision and Order has not been amended since it was issued, and that neither Piilani nor Honua'ula have any present intention to seek an amendment thereof.

Intervenors' Proposed FOF 13: Piilani objects to this Proposed FOF as incorrect, incomplete, misleading and argumentative. The evidence presented demonstrated that what the Original Petitioner presented was one conceptual development project, which evolved over time, based on changes in the market. The Original Petitioner never represented that the name of the project, the number of lots, the lot sizes, or the types of ownership would be exactly that which

was in the conceptual project presented to the Commission. To the contrary, the Original Petitioner made clear that this was only one possible conceptual plan, and what was ultimately developed would depend on the market at the time of development. What is at issue before the Commission, and which both Intervenors and the State Office of Planning ignore, is not whether the Piilani Promenade and the proposed affordable housing development are substantially similar to the conceptual project presented to the Commission in 1994, but rather, whether what is currently intended to be developed is in substantial compliance with the representations made to the Commission. The evidence presented makes clear that both projects are consistent with the representations made to the Commission. See Piilani's Proposed FOFs 18-76. Regarding the testimony cited by Intervenors in the Index to Proposed FOF 13, Piilani notes the following: Michael Foley admitted that he never reviewed the transcript of the presentation of the Petition to the Commission, and as such, cannot know what was represented to the Commission at that hearing. See Testimony of Michael Foley, November 16, 2012 Transcript at 108:16 – 109:23. Similarly, Richard Mayer's report indicates that what he reviewed was only the Petition, select attachments, and the 1995 Decision and Order, and that he did not review the transcript of what was presented to the Commission regarding the Petition. See Intervenors' Exhibit I-37 at 2-3.

Intervenors' Proposed FOF 14: Piilani objects to this proposed FOF for essentially the same reasons as set forth in opposition to Intervenors' Proposed FOF 13. In addition, Piilani responds to the subparagraphs of Intervenors' Proposed FOF 14 as follows:

Subparagraph a(1) through (3): While the traffic impacts are different, the Commission was aware and asked about the possibility that significant retail use would create more traffic. See Piilani Exhibit 6 at 108:1-11. Moreover, testimony established that regardless of what project was ultimately developed on the Subject Property, an updated TIAR would have

been required, and said updated TIAR would have addressed traffic impacts and mitigation measures. See Testimony of Ken Tatsuguchi, November 2, 2012 Transcript at 18:1-16. Condition 5 of the 1995 Decision and Order ensures that the ultimate uses' traffic impacts would be properly mitigated, by requiring the landowner to work with the State Department of Transportation. See Intervenors' Exhibit I-2 at 27. To the extent that the proposed FOF asserts that the current TIAR does not include the traffic from the 250 workforce housing units, this is incorrect. Phillip Rowell specifically explained that the current TIAR does include impacts from the proposed 250 units of affordable housing proposed for the Honua'ula Parcel. See Testimony of Phillip Rowell, November 2, 2012 Transcript at 77:21 – 79:4. The current TIAR (Piilani Exhibit 24) at pages 69 – 73 addresses this, and in Figure 31 to that report, specifically shows a traffic count for vehicles going in and out of the future Honua'ula affordable housing project on "drive C". See Piilani Exhibit 24 at 71.

Subparagraph b(1): Piilani objects to this proposed FOF as being completely speculative. Since the conceptual project proposed by the original petitioner was never completed, it is impossible to know what types of jobs would actually have been created, and what benefits might have been associated with those jobs. Piilani also objects to this proposed FOF as being overly general. Intervenors rely upon the testimony of their economic expert, Richard Mayer, to justify this FOF, however, Mr. Mayer admitted under cross examination that he did not specifically analyze the percentage of part-time workers that one would typically expect to find in the light industrial sector.

Q (By Mr. Kam): Mr. Mayer, you testified a lot about the different types of benefits that are associated with jobs arising from a true light industrial subdivision as compared to retail, correct?

A Correct.

Q And one of those benefits that you described was the fact that, according to you, there's more part-time jobs in a retail development than you would expect to find in a true light industrial development.

A I said that.

Q Did you analyze what percentage of part-time workers you would typically find in the light industrial sector?

A Not per se.

Q So you don't know exactly what percentage of true light industrial employment is part-time, correct?

A Correct.

Q The benefits that are associated with light industrial employment compared to retail we would not have those benefits if the light industrial park is never built, correct?

A Of course. I don't think that was what was represented.

Testimony of Richard Mayer, Transcript 11/16/12 at 164:10 – 165:9 (emphasis added).

Accordingly, Mr. Mayer's conclusions appear to be based on generalizations, and there is no evidence that they would apply to the specific circumstances.

Subparagraph b(2): Piilani objects to this proposed FOF as being misleading and inaccurate, and therefore, argumentative. The petition filed by the original petitioner Kaonoulu Ranch expressly states that the proposed lots "are proposed to be sold in fee simple or leased on a long-term basis." Piilani Exhibit 2 at numbered p. 4. The market study submitted by the original petitioner also stated that "[t]he expectation is that other investors will purchase the land, develop the improvements for multi tenant use and have a long term lease with the occupants. Examples of these occupants are: Discount retailers, auto parts sales; furniture and appliance sales; sportswear and equipment; wholesale food distributors; fast food outlets; etc." Piilani Exhibit 3 at numbered p. 6; see also testimony of Rodney Funakoshi, Transcript 11/16/12 at

55:14 – 57:23. Accordingly, the record clearly establishes that “retail space leaseholds” were contemplated by the original petitioner and disclosed to the LUC as possible uses for the Petition Area.

Subparagraph b(3): Piilani objects to this proposed FOF as being vague and ambiguous as to what is meant by “economic multiplier.”

Subparagraph b(4): Piilani objects to this proposed FOF as being misleading and inaccurate for the same reasons set forth in Piilani’s objections to Intervenors’ proposed FOF 13.

Subparagraph b(5): Piilani objects to this proposed FOF as being speculative and misleading. This proposed FOF suggests that only the original conceptual plan proposed by the original petitioner would create new jobs in South Maui, whereas the proposed Piilani Promenade and Affordable Housing Project would merely cannibalize businesses for other areas of Maui. No credible evidence was presented to the LUC to support this conclusion. Instead, Intervenors rely solely upon conclusory statements by Richard Mayer in support of this FOF. However, Mr. Mayer admitted under cross-examination that no jobs would be created by the original conceptual plan if it is never built. See Testimony of Richard Mayer, Transcript 11/16/12 at 162:18 – 163:12. In that regard, Tom Holliday testified that the original conceptual plan is no longer feasible under current market conditions and not likely to be successful in the market for a period of years. See Testimony of Tom Holliday, Transcript 11/2/12 at 120:11 – 122:9. As a result, not only is it highly unlikely that the original conceptual plan for the Petition Area of 123 separate lots would ever be implemented, it would take a decade or more before meaningful jobs, economic activity, and tax revenues could be realized by the County of Maui and the State of Hawaii even if it were implemented. See Testimony of Tom Holliday, Transcript 11/2/12 at 121:23 – 122:2. Conversely, there is a present demand for the Piilani

Promenade project and it will create immediate construction jobs and within a couple of years long-term employment, economic activity, and tax revenues. See Testimony of Tom Holliday, Transcript 11/2/12 at 122:3-9.

Subparagraph c: Piilani objects that this proposed finding is incomplete, and therefore, misleading, without reference to the testimony of the Department of Education.

Subparagraph d: Piilani objects that this proposed finding lacks evidentiary support, as the exhibits cited therein do not evidence any significantly different scenic and visual impacts. In fact, Piilani submits that the proposed landscaping is substantially similar in many ways to what was presented to the Commission in 1994. Compare Piilani Exhibit 5 with Piilani Exhibits 32 and 33.

Subparagraph e: Piilani objects to this proposed FOF as being vague, ambiguous, unnecessary, outside the scope of the LUC's authority to determine, and moot. There is no evidence of what "community planning impacts" means. Community planning is the sole province and responsibility of the County of Maui. Furthermore, it is the position of the Director of the Maui County Planning Department that the Piilani Promenade project and the affordable housing use proposed by Honua'ula for the Honua'ula Parcel are consistent with the Kihei-Makena Community Plan, see Testimony of William Spence, Transcript 11/15/12 at 191:25–193:16, and that the light industrial designation for the Petition Area on the Kihei-Makena Community Plan allows all uses allowed within the M-1 light industrial zoning district, including retail and apartment uses, because the zoning code is the implementing mechanism for the community plan. See Testimony of William Spence, Transcript 11/15/12 at 190:25 – 191:24 and at 193:17-21.

Intervenors' Proposed FOF 15: Piilani objects that this proposed finding is misleading and argumentative. All of the evidence cited in Piilani's Proposed FOFs, including but not limited to representations made to the Commission regarding permitted uses, the conceptual nature of the plans, and the market driven forces, demonstrates that the Commission considered and assessed impacts of all of the uses proposed by Piilani and Honua'ula. In addition, the Commission wrote all of the conditions (that were intended to mitigate impacts) in such a way that they would be effective, regardless of the uses that are ultimately developed.

Intervenors' Proposed FOF 16: Piilani objects that this proposed FOF misstates the requirements of Conditions 5 of the 1995 Decision and Order, which only requires construction of a frontage road if approved by the State Department of Transportation. Piilani agrees that it has no intentions of installing a frontage road because the State Department of Transportation has determined that such is unfeasible, and could create safety and traffic issues. Piilani has no current intention of seeking to amend Condition 5, because it does not require a frontage road unless approved by the State Department of Transportation. Piilani denies that it does not plan to include connector roads. See Piilani's Proposed FOFs 162 – 207 and the citations to the record contained therein.

Intervenors' Proposed FOF 17: Piilani objects to this proposed FOF and asserts that the testimony of Charles Jencks, and the fact that Piilani was able to locate an Annual Report which was not found in the records of the Commission, demonstrate that the 10th through 13th Annual Reports were most likely submitted, but have been misplaced. Moreover, there is no dispute or contention that the current owners, Piilani and Honua'ula, have failed to file annual reports since they acquired title to the Subject Property. Piilani disputes that Annual Reports filed by either

Piilani or Honua'ula are incomplete, misleading, or inadequate, as they address, as required the progress as to each condition, as required by the 1995 Decision and Order.

Intervenors' Proposed FOF 18: Piilani objects and states that the Commissions' order dated September 17, 2012 is the best evidence of its contents.

Intervenors Proposed FOF 19: Piilani does not object, except to the extent that this proposed FOF is argumentative to the extent that it presumes that there is a violation of the 1995 Decision and Order.

CONCLUSIONS OF LAW

Intervenors' Proposed COL 1: No objection.

Intervenors' Proposed COL 2: Piilani objects to this proposed COL as Intervenors' misapply the doctrine of *res judicata* to this proceeding. Even if all of the technical requirements to apply *res judicata* were made, it would not apply because the claims and issues now being litigated are different. The issue or "claim" resulting in the 1995 Decision and Order was a reclassification of the land from Agricultural to Urban. Thus, the issues were whether the requirements for boundary amendment were met. In contrast, in this proceeding, this issue is whether the developments proposed by Piilani and Honua'ula substantially comply with the representations made to the Commission in 1994/1995.

Intervenors' *res judicata*, or "claims preclusion," argument wholly lacks merit. As Intervenors' note, the doctrine of *res judicata* requires "the same parties or their privities concerning the same subject matter." Ellis v. Crockett, 51 Haw. 45, 55, 451 P.2d 814, 822 (1969) (emphasis added); see also Sussel v. Civil Serv. Comm'n, 74 Haw. 599, 611, 851 P.2d 311, 317 (1993) ("The basic tenet of *res judicata* [is] that the judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies

concerning the same subject matter[.]”). The Intervenor was not a party to the initial action resulting in the 1995 Decision and Order and therefore cannot rely on *res judicata* as a bar to the instant action.

Even if the lack of privity did not bar application of *res judicata*, it does not apply in this case. According to the doctrine of *res judicata*, “the judgment of a court of competent jurisdiction is a bar to a new action in any court *between the same parties or their privies* concerning the same subject matter, and precludes the relitigation, not only of the [claims] which were actually litigated in the first action, but also of all grounds of claim . . . which might have been properly litigated in the first action but were not litigated or decided.” *Aga v. Hundahl*, 78 Haw. 230, 248, 891 P.2d 1022, 1040 (1995) (citing *Kauhane v. Acutron Co., Inc.*, 71 Haw. 458, 463, 795 P.2d 276, 278 (1990)) (italicized emphasis in original, underline emphases added). Because the instant action is not a “new action,” but instead a continuation of the prior proceedings before the Commission, the doctrine of *res judicata* does not apply. *Ross v. Stouffer Hotel Co.*, 76 Hawai‘i 454, 471, 879 P.2d 1037, 1054 (1994). The situation here is akin to the setting aside of an erroneous judgment in a civil action, which does not occur in a new action but in the initial proceedings, and thus is not barred by *res judicata*. *See Restatement (Second) of Judgments § 17*. Further, even if the instant proceedings were a separate action, interpretation of the 1995 Decision and Order is not a claim that arises out of the same transaction as the claim asserted in the supposed first proceedings, and thus is not precluded by *res judicata*. Application of the doctrine of *res judicata* as attempted by the Intervenor would essentially mean that any attempt of a litigant to interpret the effect of a judgment was barred by *res judicata*. In addition, Intervenor cites to no authority that the doctrine of *res judicata* would apply to a non-adversarial state board district boundary amendment decision.

Nor may the Intervenors rely on collateral estoppel. “Collateral estoppel is an aspect of *res judicata* which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim” when the litigation was between the same parties, Ellis v. Crockett, 51 Haw. 45, 55, 451 P.2d 814, 822 (1969) (citations omitted), or when “raised defensively by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue.” Id. at 55-56, 451 P.2d at 822 (citing, inter alia, Bernhardt v. Bank of Am. Nat’l Trust & Savs. Ass’n, 122 P.2d 892 (Cal. 1942)). The preclusive effect of collateral estoppel is less broad than *res judicata*, barring issues “actually litigated and finally decided in the earlier action.” Omerod v. Heirs of Kainoa Kupuna Kaheananui, 116 Hawai‘i 239, 264, 172 P.3d 983, 1008 (2007). As a threshold matter, then, to establish collateral estoppel and bar relitigation of an issue, “the issue decided in the prior adjudication [must be] identical to the one presented in the action in question. . . .” Kaho‘Ohanohano v. Dep’t of Human Servs., 117 Hawai‘i 262, 302, 178 P.3d 538, 578 (2008) (citing Exotics Hawaii-Kona, Inc. v. E.I. DuPont De Nemours & Co., 104 Hawai‘i 358, 365, 90 P.3d 250, 257 (2004)) (emphasis added).

The issues presented in the instant action are not identical to the issues actually litigated in the prior administrative proceedings before the Commission that resulted in the 1995 Decision and Order. The instant action involves the interpretation of the 1995 Decision and Order. Notably, the interpretation of the 1995 Decision and Order could not have been an issue actually litigated before the Commission in the prior hearing because such an issue would not exist prior to the Commission’s issuance of the 1995 D&O. A contrary result would have the unintended consequence of barring all litigants from issues arising from the interpretations of court orders and judgments.

Nor are Piilani and Honua'ula arguing that the 1995 Decision and Order is "so vague as to be unenforceable" as contended by Intervenors. Rather, Piilani and Honua'ula contend that an interpretation of Condition 15 of the 1995 Decision and Order which precludes retail and apartment use on the Subject Property would be improper, because Condition 15 does include any such express limitation, and does not state with ascertainable certainty that such a limitation is intended by Condition 15. See Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai'i 296, 314, 97 P.3d 372, 390 (2004).

Finally, Intervenors' reliance on Outdoor Circle v. Harold K.L. Castle Trust Estate, 4 Haw. App. 633, 644, 675 P.2d 784, 792 (Inter.Ct. App. 1983) is misplaced. Intervenors' contend that Outdoor Circle stands for the proposition that any facts or law not in the 1995 Decision and Order cannot be established or used herein. That is not the holding of Outdoor Circle. In Outdoor Circle, the appellants contended that the Commission erred in failing to specifically address and reject each of the appellant's proposed finding of fact. The Hawaii Intermediate Court of Appeals found no error, holding that Commission implicitly rejected appellant's proposed findings of fact by not adopting them in its order. If Piilani or Honua'ula were attempting to rely on a proposed finding of fact which they presented to the Commission but which did not get into the Commission's 1995 Decision and Order, then Outdoor Circle would apply. However, nothing in the Outdoor Circle case stands for the proposition that in determining what representations were made to the Commission by the Original Petitioner, the parties are limited to those findings of fact that are included in the 1995 Decision and Order.

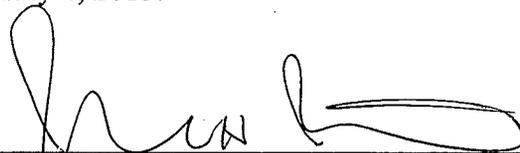
Intervenors' Proposed COL 3: Piilani objects and submits that the burden of proof is on Intervenor and/or the State Office of Planning to show a violation of the 1995 Decision and

Order, for the reasons set forth in Piilani's Proposed COL 36. See United States v. Nolen, 472 F.3d 362, 372 (5th Cir. Tex. 2006); United States v. Peele Co., 224 F.2d 667, 669 (2nd Cir. 1955); Riverview Packing Co. v. Reconstruction Finance Corp., 92 F. Supp. 376, 380 (D.N.J. 1950); Morehouse v. Pacific Hardware & Steel Co., 177 F. 337 (9th Cir. 1910); Goldstein v. United States, 11 F.2d 593 (5th Cir. 1926); 60 C.J.S., Motions and orders, § 20.

Intervenors' Proposed COL 4: Piilani disputes that Honua'ula has taken any overt acts to develop its property, and submits that the acts to develop the Piilani Parcels taken by Piilani are consistent with all conditions in the 1995 Decision and Order and the representations made to the Commission.

Intervenors' Proposed COLs 5 through 8: Piilani objects and submits that neither Piilani nor Honua'ula have violated any Conditions in the 1995 Decision and Order, or any representations made to the Commission. To the contrary, both Piilani's and Honua'ula's proposed developments are consistent with the representations made to the Commission.

Dated: Honolulu, Hawai'i, January 4, 2013.

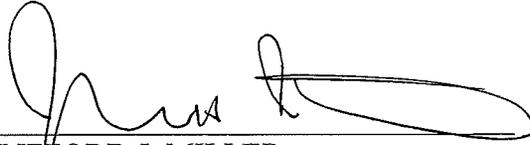


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Dated: Honolulu, Hawai'i, January 4, 2013.

A handwritten signature in black ink, appearing to read "Clifford J. Miller", written over a horizontal line.

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