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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

2013 JAN 11 P 2:03
LAND USE COMMISSION
STATE OF HAWAII

In the Matter of the Petition)	DOCKET NO. A94-706
)	
of)	THE OFFICE OF PLANNING'S REPLY TO
)	PIILANI PROMENADE SOUTH, LLC AND
KAONOULU RANCH)	PIILANI PROMENADE NORTH, LLC'S
)	RESPONSE TO OFFICE OF PLANNING'S
To Amend the Agricultural Land Use District)	PROPOSED FINDINGS OF FACT,
Boundary into the Urban Land Use District)	CONCLUSIONS OF LAW, AND
for approximately 88 acres at Kaonoulu,)	DECISION AND ORDER;
Makawao-Wailuku, Maui, Hawaii.)	
_____)	CERTIFICATE OF SERVICE

THE OFFICE OF PLANNING'S REPLY TO PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S RESPONSE TO OFFICE OF PLANNING'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Piilani Promenade South, LLC, Piilani Promenade North, LLC, and Honua'ula Partners, LLC, ("Petitioners") in their Response to Office of Planning's Proposed Findings of Fact, Conclusions of Law, and Decision and Order ("Petitioners' Response") have objected to nearly all of the Office of Planning's ("OP) proposed findings of fact and conclusions of law. This stems from a basic disagreement about the outcome of this case, and has been addressed in OP's Comments and Objections to Petitioners' Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed on January 4, 2013. Rather than engage in a line by line review, OP highlights only those issues of particular significance in this case.

I. ARGUMENT

A. Fundamental Concerns

Petitioners have admitted that “the proposed Piilani Promenade and the affordable housing are different from the initial concept, which was a 123-lot [sic] light industrial subdivision. . . .” (Petitioners’ Response, p. 11.) This goes to the heart of the issue and is what OP has been contending from the outset – that what is currently being proposed is a much different project.

The fundamental difference between Petitioners and OP is what constitutes the Petitioner’s initial representations regarding use of the Petition Area and whether this constitutes substantial compliance. Petitioners believe that their representations were for proposed uses that were only conceptual in nature and thereby could be changed or even abandoned at any time. Petitioners believe the mere listing of a use in a county zoning code appendix entitles that use to be fully pursued without considering whether that use created different impacts requiring different conditions and possible reconsideration by the Commission. Much more than this, petitioners are explicitly required to describe the proposed use and number of lots, lot size and number of units, densities, selling price, intended market, and the impacts from the proposed use. Hawaii Administrative Rules (“HAR”) §§ 15-15-50(c)(6), (7), and (10). Petitioners may try to characterize the 123-lot light industrial subdivision as just an “initial concept.” But this was the specific representation about the proposed use of the Petition Area and the basis for which the LUC evaluated impacts, determined the appropriate conditions, and decided on reclassification of the Petition Area. OP and the LUC expend great amounts of time, effort, and resources in analyzing proposed uses and their impacts based on Petitioner’s specific representations on what they intend to develop.

There is a significant difference between what can be done in Maui County's light industrial zoning districts and what Petitioner represented would be done in this Petition Area. The LUC's knowledge about the possible uses of land zoned as light industrial differs from the Petitioner's representations as to the actual proposed uses of the Petition Area. Petitioner's representations excluded residential uses and included light industrial uses as the primary activity. At no time did Petitioners state that the Petition Area would be used for any or all purposes allowed under the Maui County Light Industrial zoning. At no time did Petitioners analyze the impacts for all uses allowed under the Maui County Light Industrial Zoning. Most importantly, the LUC did not specifically authorize all uses in the Maui County Light Industrial Zoning. Zoning allowances are left to the counties to administer and the LUC's approval does not convey endorsement of any particular county zoning district.

Nevertheless, Petitioners argue that the mere knowledge that apartment use was a possibility under a light industrial zoning and that some portion of the Petition Area (although minimized at the time of the original petition) could be used for commercial purposes is enough to allow for the inclusion of apartments and the elimination of any substantive light industrial uses. If true, the Petition was in violation of HAR §§ 15-15-70(c)(6), (7) and (10) for failing to analyze all the impacts of the project, and the LUC's determinations under Hawaii Revised Statutes ("HRS") §§ 205-16 and 205-17 were fatally flawed.

B. Specific Responses

More specifically, Petitioner objects to OP's Finding of Fact (FOF) 13 and 43 which described the change in the name of the project as reflecting the change in the use. But if Petitioner agrees that the current project is different from the 123-lot light industrial subdivision as originally proposed (Petitioners' Response, at p. 11), it is unclear why Petitioners are

objecting to the references to the name change. OP's proposed finding simply noted that Petitioners changed the name of the project, because they knew the nature of the project had changed. When asked about the change in the project name from Kaonoulu Industrial Park to Kaonoulu Market Place, the Petitioner's own representative testified as follows:

Q Does "marketplace" denote something different from an industrial park?

A It's an evolution from the industrial park name to a project that more accurately reflected what was needed in the marketplace at the time. (Tr. 11/15/12, 15:21-25.)

Petitioner objects to OP's FOF 13, FOF 48 and several other findings based upon alleged representations in the market study report. But the market study bases its conclusions upon the shortage of light industrial complexes in South Maui. A reference to larger lots includes both commercial and light industrial uses. But the larger lots with either commercial or light industrial uses would constitute approximately 20 percent, not 100 percent of the Petition Area. Furthermore, the larger lots were sized at 1 to 3 acres, not 13 to 30 acres as currently proposed. There is also no analysis of the market for residential use. The market study is consistent with the finding that the Petition Area was proposed for primarily light industrial use.

Petitioners object to FOF 48 which stated: "The original LUC Petition and the 1995 Decision and Order did not propose any residential uses in the Petition Area." Petitioners object to this finding as "ambiguous," and argue that the original LUC Petition indicated the possibility of apartment uses. But the original Petition was amended to specifically exclude residential use. (OP FOF 49 and Tr. 11/1/94 at 100: 9-18)

Petitioner objects to FOF 15 which characterizes Mr. Sodetani's testimony as evidence that Petitioner represented that the project would be completed within 10 years. However, such representation for completion within 10 years is an explicit and important requirement of the

LUC (HAR § 15-15-50(c)(19)). So, if Mr. Sodehani's testimony cannot be characterized as a representation that the Petition Area would be completed within 10 years, the original petition should not have been approved.

Petitioner objects to FOF 18 which characterizes the home improvement center as being primarily retail. Petitioner argues that William Spence's interpretation of the Maui Zoning Code carries greater weight than Mr. Funakoshi. But this case is not about the interpretation of the zoning code, but rather about the interpretation of land uses under a state decision-making process. The testimony of Mr. Funakoshi and the Office of Planning is entitled to its due weight with respect to the interpretation of a state process and state decision, and deference is not owed to the County simply based upon its authority over the county's zoning code.

Petitioner objects to FOF 22 and 38 for its use of Ann Cua's testimony. Ms. Cua did testify that the LUC was aware of the various uses of land under the light industrial zoning, and that these uses included apartment and commercial. She also testified that there were no specific amounts of light industrial and commercial use proposed for the Petition Area. On cross-examination, she also testified that outside of the zoning context, light industrial uses are different than commercial uses which are different from residential uses. Ms. Cua who was present at the original hearings also testified that the primary focus at the original hearings was on light industrial uses. As discussed above, the LUC's knowledge about the possible uses of land zoned as light industrial differs from the Petitioner's representations as to the actual proposed uses of the Petition Area. The focus on light industrial uses also demonstrates why the absence of any substantive light industrial uses within the Petition Area is a violation of the 1995 Decision and Order.

Petitioners object to FOF 50 which states that the addition of apartments would have made a significant difference in the LUC's analysis regarding impacts. Petitioners cite to the testimony of Mr. Funakoshi who testified that he could not specifically determine what different conditions would be imposed if the residential units were proposed in 1994. Tr 11/16/12, 80:4-5. However, such determination would be speculative in the absence of a motion to amend, which would be followed by a more thorough analysis of unmitigated impacts to determine whether new or revised conditions should be imposed. FOF 50 does not assert that any of the conditions would change. It instead finds that the analysis would have been different. This fact is axiomatic, since (1) there is no analysis of the impacts of residential units in the 1994 record, and (2) an analysis is required if residential units are being proposed for a project. See HRS §§ 205-16 and 205-17.

Petitioner objects to FOF 54 which found that "Petitioners were aware as early as 2008 the land use for the Petition Area had changed to residential units." Petitioners point to the testimony of Rodney Funakoshi regarding a different statement in OP's testimony that the county had changed the land use for the Petition Area. Mr. Funakoshi agreed that the land use had not been changed by the county. But he did not agree that there was no change in land use. The land use was not changed by the county, but rather by Petitioners. FOF 54 does not assert that the land use was changed by the county. It simply states that Petitioners were aware as early as 2008 that the land use had changed, but failed to notify the LUC until 2012.

Petitioner objects to FOF 63 which merely repeats a portion of Condition No. 5. Petitioner's objection is based upon a statement made by Petitioner's counsel in 1994. Petitioner characterizes the statement as an "understanding." But there is no affirmation or agreement by the Commission or by any of the parties. As discussed in OP's Response, statements by

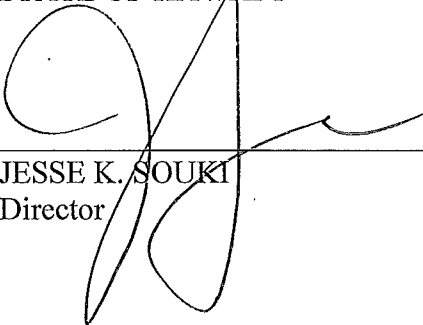
Petitioner's attorney should not be used to reach a tortured interpretation of a clear condition. Petitioner's attorney is not an unbiased observer, and attorney statements are not made under oath or admissible as evidence. Furthermore, in this case, the language is clear. Condition No. 5 requires the construction of a frontage road to be approved by DOT and County, not a frontage road only if approved by DOT and the County. Petitioners point to nothing in the documentary evidence, testimony under oath, or LUC discussion to support an interpretation contrary to the clear language of Condition No. 5.

II. CONCLUSION

For all the aforementioned reasons, the Office of Planning respectfully requests that the LUC adopt Finding of Fact, Conclusions of Law, and Decision and Order finding that Petitioners have violated Conditions 5 and 15, and ordering the parties to appear at a subsequent hearing to determine whether the Petition Area should revert to its former or another land use classification.

DATED: Honolulu, Hawai'i, this 11th day of January 2013.

OFFICE OF PLANNING
STATE OF HAWAII



JESSE K. SOUKI
Director

Docket No. A94-706

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular mail.

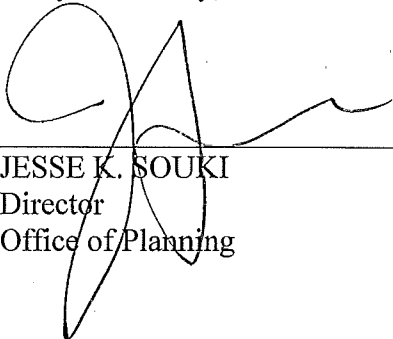
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DATED: Honolulu, Hawai'i, this 11th day of January, 2013.



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