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BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

STATE OF HAWAII
LAND USE COMMISSION

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; Tax Map
Key Nos. 2-2-02: por. of 15 and 3-9-01:16

DOCKET NO. A94-706

DEPARTMENT OF PLANNING,
COUNTY OF MAUI'S TESTIMONY;
CERTIFICATE OF SERVICE
Order to Show Cause Hearing

Date: November 1, 2012

DEPARTMENT OF PLANNING, COUNTY OF MAUI'S TESTIMONY

The Planning Department ("Department") hereby submits its written testimony for the Order to Show Cause Hearing on the above matter.

I. POSITION

The State Land Use Commission on August 24, 2012 granted an Order to Show Cause limited to the issue of whether there has been a failure to perform according to the conditions imposed by the Decision and Order of February 10, 1995 in the above docket. The specific conditions in question are condition No. 5 which deals with local and regional roadway improvements, and Condition No. 15 relating to substantial compliance with representations made to the Land Use Commission (LUC). It is the

EXHIBIT "L"

Department's position that there has been no breach in conditions in as much as the proposal to build a shopping center on the property does not conflict with representations made by the landowner to the LUC. In addition, there is no condition in the LUC's 1995 decision and order restricting any of the uses that are allowed by County zoning.

In addition, on September 17, 2012, Honuaula Partners, LLC ("Honuaula") filed a Motion requesting that the Commission bifurcate this docket to separate out the portion of the Project proposed for affordable apartment use. In that document, Honuaula represented that it would move to amend the 1995 Decision and Order as to the parcel owned by Honuaula, and that no construction of any affordable housing units will occur unless and until the Commission grants a motion to amend. The Department supported the Bifurcation Motion, which is not scheduled to be heard until November 15, 2012. Honuaula has represented that it will not develop the affordable housing use until a motion to amend is granted. The Department maintains its position, expressed earlier in this docket, that apartment uses are not prohibited by the 1995 Decision and Order. Honuaula's representation that it will not develop the Honuaula property until a motion to amend is granted further indicates that Honuaula is not currently in violation of any portion of the 1995 Decision and Order, as it has essentially agreed to a stay of the development of that property at this time.

II. ANALYSIS OF CONDITIONS 15 AND 5

A. Intervenor's Have Not Shown That Condition Fifteen (15) Of the 1995 D & O Related To Development Of The Property In Substantial Compliance With Representations Made To The Commission Has Been Breached.

Intervenor's contend that condition 15 of the 1995 D & O has been breached by

(1) the anticipated use of the petition area for affordable apartments units, and (2) the anticipated use of the petition area for commercial shopping center purposes. A review of the record in this docket, however, reveals that any future use of the property for such purposes are entirely consistent with the representations made to the Commission during the approval process.

1. Petitioner Represented That The Property Could Be Used As Allowed, Without Limitation, By The Light Industrial Zoning In Place At The Time Of The Boundary Reclassification.

A review of the record in this docket reveals that the petitioner disclosed that the property could be used in any manner permitted by Maui County's light industrial zoning classification. The petitioner anticipated that the property would be sold or leased to third parties, and that those parties would operate the property in accordance with the zoning. The Petition included a copy of Maui County's M-1 light industrial and B-1, B-2 and B-3 business zoning ordinances as part of a "Market Feasibility Study and Economic Report." See Exhibit "B" to County's Request for Official Notice (Excerpts from Petition Exhibit 5)¹. The project is referred to as a "commercial and light industrial" development throughout the 1995 D&O. The business district ordinances were included because the County's M-1 Light Industrial District allows any use permitted in the Light Industrial District. Id. "Apartment houses" are listed as permitted uses in the Light Industrial District. Id.

The broad range of uses permitted by the M-1 zoning was recognized by the Commission. Numerous questions were asked by Commissioners about the uses

¹ The Department's "Request for Official Notice" that was filed with the Department's Response to Movant's Motion for order to Show Cause is listed as Exhibit "2" in the County's Exhibit List. The exhibits in the Request for Official Notice are referenced throughout this document.

allowed in the Light Industrial District in order to understand what may eventually be built on the site. A review of the questions and responses demonstrates that the Commission was fully informed of the potential uses for the project and that such uses would be based on the zoning for the property. The petitioner's market feasibility expert, Lloyd Sodetani, faced questions from Commissioner Kajjoka as follows:

Commissioner Kajjoka: Lloyd, it appears in terms of permitted uses within a light industrial it appears to be pretty broad. B1, B2, B3 districts permitted uses . . . Even apartment houses are permitted use in light industrial.

A: Right.

Q: In other words, we could have a preponderance of retail and service type establishments in this.

A: That's a possibility but I would say that the light industrial entities would probably be more likely to be located in a project like this rather than the commercial entities as described.

Q: But there's no way you can stop them.

A: That's true. But I think the market will dictate that too.

Request for Official Notice, Exhibit C (November 1, 1994 Transcript pp. 105-106). Mr. Sodetani explained that while he did not anticipate predominantly commercial use, there was no restriction on permitted uses for this project, and that the market would ultimately dictate what was built within the standards of the zoning. Id. 106-108.

Similarly, the petitioner's civil engineer, Warren Unemori was asked about the uses on the property by Deputy Corporation Council Gary Zakian:

Mr. Zakian: Are you aware of the types of various commercial or light industrial activities that are tentatively planned or considered to take place in this area?

Mr. Unemori: No, I'm not familiar. I don't think the developer knows just what type of development, the tenants that might be within the projects.

Id. , p. 33.

The record further shows that the Maui County Department of Planning and then-Director Brian Miskae recognized the broad range of uses allowed in M-1 zoning. Mr. Miskae explained during his testimony that to address this issue he would need to seek action from the County's legislative branch, the Maui County Council, to amend the M-1 zoning ordinance. Id. p. 139. Further, Director Miskae testified that apartments were permitted uses in the Light Industrial district. Id. p. 140.

2. Maui County's Industrial Zoning Districts Allow and Have Historically Allowed Commercial and Apartment Uses, and Such Uses Are Common Within Industrial Districts

In order for the Commission to better understand the uses allowed in the Light Industrial zoning district, and therefore this project, some historical background may be helpful. In approximately 1960, Maui County adopted a "Euclidian" zoning regime which is perhaps the oldest and most common zoning schemes used in the country. A common trait of this zoning is that uses are "stacked" or tiered" into progressively intense land use zonings. Uses thought to be less intense or intrusive are permitted in the more intense zoning categories because they are thought to be compatible.

Under this regime, Maui County industrial districts (including M-2 Heavy Industrial) allow, as of right, all of the commercial uses (retail, office, etc.) contained in the Maui County business districts, B-1, B-2 and B-3. "Apartment houses" are also listed as an outright permitted use. These different uses are stacked or tiered within the M-1 light industrial district because they are thought to be compatible with the light industrial uses.

In 1960, when the zoning code was adopted, the island's population was about 37,000 and the economy centered around agriculture and related industries. The County zoned a considerable amount of land in support of the primary economic engine. In Kahului alone we have approximately 385 acres of M-1 light industrial zoning, but only 57 acres of B-1, B-2, or B-3 Business zoning.

The demand for light industrial uses shifted to commercial uses as the economy changed away from agriculture to tourism and other businesses. The demand also changed as the population grew from 37,000 in 1960 to approximately 140,000 in 2010. The M-1 zoning allowed the flexibility for change with the economy. As a result of the above zoning regime and history, a very large portion of Maui's light industrial lands have converted to commercial uses.

At the present time, the vast majority of Maui's major commercial centers (including malls) are located on both light and heavy industrial zoned lands:

- Queen Ka'ahumanu Center (Kahului and the island's largest mall)
- Maui Mall (Kahului)
- Maui Marketplace (Kahului)
- Wailuku Town Center
- Lahaina Cannery
- Lahaina Gateway
- Haiku Cannery
- Haiku Marketplace
- Pauwela Cannery

This is not an exhaustive list. A significant number of smaller shopping centers are also located on heavy or light industrial zoned land. In addition, virtually all of the land on Maui with these zoning classifications is intermixed with uses that would be considered commercial and industrial. Traditional light industrial uses such as warehousing, trucking facilities and lumber yards are found adjacent to office buildings, retail, service establishments, and restaurants.

In addition, there are a considerable number of apartment units on land that is zoned for light industrial uses:

- Iao Parkside (Wailuku) 480 individually owned, affordable units
- Ali'i Koa Apartments – (Wailuku) 20 rental units
- Approximately 92 other units along Lower Main in Wailuku located next to or above commercial and light industrial uses
- Kahului Town Terrace – 72 low-income rental units
- Opukea – (Lahaina) 114 predominantly affordable units

A review of this information reveals that there is nothing unusual about shopping malls or apartment houses being located on light industrial land. Maui County has treated our M-1 District essentially as a default business district, as well as an apartment district.

In Docket 94-706, by virtue of placing it in the Urban District (and without any conditions to limit commercial uses), the LUC authorized the County to control the uses thereon by its own zoning codes and practices.

Maui's legislative body zoned the properties M-1 Light Industrial, a district that can only be applied in the State Urban District. Though during the zoning process

recommendations were made to limit commercial uses, the County Council chose not to do so. As a result, the zoning was granted without limitation.

3. No Limitations On The Percentage Of Commercial vs. Light Industrial Uses Were Placed On The Project By Either The Land Use Commission Or The Maui County Council.

While the Department does not dispute that the Commission has the authority impose conditions that are more restrictive than county zoning in certain cases, such conditions must be stated with an "ascertainable certainty". Lanal Company, Inc. v. Land Use Commission, 105 Hawai'i 296, 314, 97 P.3d 372, 390 (2004). Hawaii Revised Statutes § 205-2(b) states: "Urban districts shall include activities or uses as provided by ordinances or regulations of the county within which the urban district is situated."

It is undisputed that in its 1995 D & O, the Land Use Commission did not include any express conditions limiting the permitted uses available to the land owner. The Commission's D & O noted that the Department would "request" that the County Council place appropriate limitations on the commercial use of the property. Request for Official Notice, Exhibit A (Finding of Fact 34).

Despite being aware of the broad range of uses available to the project in the M-1 district, as well as the potential to limit such uses by condition, the Commission opted not to place any use restrictions on the property. Based on the record, including the testimony of the Maui County Planning Director and Finding of Fact No. 34, the Commission left the decision whether to limit permitted uses to the Maui County Council as part of its zoning review. This approach was entirely reasonable because, as Director Miskae told the Commission, use limitation conditions had been considered at

the zoning level in past cases. Request for Official Notice, Exhibit C (Transcript p. 139). By virtue of placing this property in the Urban District without any express conditions to limit commercial uses, the LUC authorized the County to control the uses thereon by the County's own zoning codes and conditions.

During the Change in Zoning and Community Plan Amendment process, the County's Planning Department did, in fact, recommend a zoning condition that would have limited the commercial uses of the project. See Request for Official Notice, Exhibit D (Excerpt from Maui Planning Department's Recommendation for the Maui Planning Commission, p. 11).

The condition proposed by Maui's Planning Department read as follows:

That seventy percent (70%) of the net property to be developed shall be leased or sold as restricted to uses permitted in the M-1 Light Industrial District, under Maui County Code, Title 19, Chapter 19.24, excluding the uses permitted in the B-1, B-2 and B-3 Business District. Id.

Also in its recommendation to the Commission, the Planning Department provided examples of three other light industrial projects where a similar limitation of commercial uses was proposed. See Id. pp. 10-12. In two of those projects, a limitation was adopted in some form, while in the other, no limitations were imposed.

Ultimately, the Planning Commission did not recommend a condition limiting uses in the Kaonoulu project, opting instead for the following discretionary language:

That the applicant shall use its best efforts in attracting traditional light industrial uses and shall consider locating these on the perimeter and focus non-industrial uses on the major traffic corridors.

Request for Official Notice, Exhibit E (9/20/98 transmittal to Council, p. 3).

The Maui County Council considered the Maui Planning Commission's

recommendation, as well as the Planning Department's proposed condition, but the Council ultimately chose to grant the change in zoning request without imposing any conditions limiting the use of the property. Request for Official Notice, Exhibit F (Ordinance 2772 (1999)).

4. The Land Use Commission Has Placed Express Conditions Limiting Commercial Uses In Light Industrial Zoned Lands That Were Not Present in This Docket.

In LUC Docket A03-739 for the Maui Business Park Phase II project, the Commission imposed the following express condition:

For a period of eight (8) years from the date of the County's approval of zoning for the Project a total of at least fifty percent (50%) of the Project acreage shall be (a) used and developed by Petitioner for non-retail, light industrial use and/or (b) sold or leased to and developed and used by third-party buyers for non-retail, light industrial use. For this same eight-year period, simultaneous with Petitioner's development or offer for sale or lease of the Property for retail use, Petitioner shall develop or offer for sale or lease an equal amount of acreage within the Property for non-retail light industrial use. The phrase "light industrial", as used in this paragraph, includes warehousing and distribution types of activity as well as compounding, assembly, or treatment of articles or materials with the exception of heavy manufacturing and processing of raw materials. It is the intent of this paragraph that at the end of the above-described eight-year period, to the extent that the Project is developed or in the process of being developed by Petitioner or any third party, no less than fifty percent (50%) of such development or development in process shall be for non-retail, light industrial purposes.

A true and correct copy of this condition is listed as Exhibit "3" in the County's Witness List.

This condition provides clear instructions to the developer and the Department regarding the composition of the project, meeting the "ascertainable certainty" standard required by the Hawaii Supreme Court. In stark contrast, the conditions in the current

docket do not reference the project's required composition despite the Commission's knowledge that such conditions had been imposed at the zoning level. Absent this, it becomes impossible for the developer or the Department to determine what proportion of commercial vs. light industrial uses is allowed by law, where the zoning does not provide any such limitations.

5. Based On The Record And The Absence Of Any Express Condition Limiting The Use Of The Property, Intervenor's Cannot Point To Any Conditions Or Representations That Have Been Breached.

Intervenor's appear to contend that the project is limited solely to light industrial use, based upon the representations the land owner made to the Commission in 1994-1995. However, Intervenor's cannot point to any conditions adopted by the Commission that limited the allowed uses on the property. Likewise, they do not cite to any representations in which the petitioner announced an intention to restrict the permitted uses for the property solely to light industrial. The petitioner's representative, Mr. Sodehani, testified that the ultimate use of the property would be dictated by the market as allowed by County zoning. Planning Director Miskae advised the Commission that the County's light industrial zoning ordinance would allow for a broad range of uses if not restricted by condition. After this testimony, it was abundantly clear to the Commission that it would have to impose conditions in its decision and order, or the County would have to change its zoning ordinance, in order to limit commercial, apartment or other allowed uses on the property. Yet neither the Commission nor the duly-elected County Council chose to take any such action.

The Commission chose not to impose a use limitation condition when it granted the District Boundary Amendment in 1995. Now, in 2012, the Commission may not

retroactively impute such a condition. To do so would not only alter the Commission's 1995 D & O, but would also conflict with the legislative decision of the Maui County Council not to limit the uses for this particular property.

B. Intervenors Have Not Shown That Condition Five Of The Order Related To Traffic Improvements Has Been Breached.

Intervenors claim that Condition 5 of the 1995 D & O, related to traffic, has been violated. However, that condition does not contain a timing requirement and requires ongoing coordination with the County and State Department of Transportation ("DOT"). Intervenors express concern regarding the construction of a "frontage" road.

Condition five of the Order states in full:

"5. Petitioner shall fund, design and construct necessary local and regional roadway improvements necessitated by the proposed development in designs and schedules accepted by the State Department of Transportation and the County of Maui. Petitioner shall provide traffic signals at the intersection of Piilani Highway and Kaonoulu Street, and shall submit a warrant study in coordination with the Department of Transportation. Petitioner shall also install a fence and appropriate screening, i.e. landscaping, etc., along the highway right-of-way in coordination with the State Department of Transportation. Petitioner shall provide for a frontage road parallel to Piilani Highway and other connector roads within the Petition area, in coordination with other developments in the area with the review and approval of the State Department of Transportation and the County of Maui."

Request for Official Notice, Exhibit A (Condition 5 to 1995 D&O).

The Project abuts the existing four lane Piilani Highway and proposes to construct a portion of the Kihei-Upcountry Highway bisecting the property that is anticipated to be under the jurisdiction of the State of Hawaii, Department of Transportation. It is the Department's understanding that there are ongoing discussions between the Developers and the State Department of Transportation with respect to the

specific traffic improvements required for the Project, which include an updated TIAR. Because the roadways abutting this project are all controlled (or will be controlled) by the State Department of Transportation, the Department defers to the State with respect to the traffic improvements required for this Project based on this condition.

III. CONCLUSION

A careful review of the record of the Land Use Commission's 1995 action in this docket reveals that the landowner made significant representations to the LUC as to the many different land uses that could be developed on the property once placed in the State Urban District and zoned Light Industrial. These representations do not conflict with the current owner's proposal to build a shopping center on the property. Likewise, the record reveals that neither the Commission nor the Maui County Council imposed any specific restrictions on the property with respect to any of the uses allowed by County zoning.

Moreover, the only activity that has occurred on the property to date is the issuance of County grading permits.

Therefore, County respectfully requests the Commission find that there has been no breach in conditions of the 1995 D&O in the Petition of Kaonoulu Ranch.

DATED: Wailuku, Maui, Hawaii, October 11, 2012


WILLIAM SPENCE
Planning Director

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; Tax Map Kay Nos. 2-2-02: por. Of 15 and 3-9-01:16

DOCKET NO. A94-706

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served on October 11, 2012, upon the following parties, by depositing same in the U.S. Mail, postage prepaid, at their last known addresses:

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DATED: Wailuku, Hawaii, October 11, 2012.

A handwritten signature in black ink, appearing to read "William Spence", written over a horizontal line.

WILLIAM SPENCE
Planning Director
Maui Planning Department