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LAND USE COMMISSION
STATE OF HAWAII
2013 JAN 11 P 3:42

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, LLC'S RESPONSE TO INTERVENORS' OBJECTIONS TO PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECISIONS AND ORDER; CERTIFICATE OF SERVICE
To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for approximately 88 acres at Kaonoulu, Makawao-Wailuku, Maui, Hawai'i	

PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S RESPONSE TO INTERVENORS' OBJECTIONS TO PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECISIONS AND ORDER

I. INTRODUCTION:

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 Intervenors' Objections to Piilani's Proposed Findings of Fact and Conclusions of Law and Decision and Order, filed herein on January 4, 2013 (hereinafter "Intervenors' Objections").

Piilani's responses to the majority of the points raised in Intevenors' Objections have already been made in Piilani's Response to Intervenors' Proposed Findings of Fact for Phase One, filed herein on January 4, 2013 ("Piilani's Objections"). Piilani will not repeat all of those arguments and rebuttals herein, but rather, incorporates those responses herein by reference. This Response to Intervenors' Objections will attempt to address select issues which either have not been previously addressed, or which Piilani feels require reemphasis. The failure to specifically address a point made in Intervenors' Objections herein should not be considered agreement with Intervenors, as Piilani disagrees with and objects to essentially all of the arguments and assertions contained in Intervenors' Objections.

II. DISCUSSION:

Intervenors' Objections are based on a fundamental misinterpretation of Condition 15 of the 1995 Decision and Order. Intervenors presume that Condition 15 requires the landowner to develop substantially the same project presented in the Petition. However, that is **not** what Condition 15 or HRS § 205-4 requires. To the contrary, both Condition 15 and HRS § 205-4

provide for development of the land in substantial compliance with the representations made to the Commission. The overwhelming evidence presented at the hearing on the Order to Show Cause demonstrates that the Original Petitioner represented that significant retail and apartment uses were permitted, and that the market would determine the ultimate uses for the Subject Property. Ironically, it is Intervenors who now ask the Commission to ***imply*** certain representations to the Original Petitioner, such as that commercial uses at the Subject Property would only be ancillary or secondary to light industrial uses, or that certain permitted uses which were explicitly disclosed would not be pursued. It would be improper to imply such a representation to the Original Petitioner, and ignore the specific representations actually made to the Commission. Because the proposed Piilani Promenade and the affordable housing development are within the proposed uses represented to the Commission, there has been no violation of Condition 15, and the Order to Show Cause should be vacated.

III. RESPONSES TO INTERVENORS GENERAL OBJECTIONS

A. & B. Res Judicata Does Not Apply.

Intervenors continue to assert the novel proposition that the doctrine of *res judicata* applies in this case to limit any examination of what representations were made to the Commission to the four corners of the 1995 Decision and Order, and that the Commission should not consider the Petition itself, the exhibits to the Petition (including the Market Study and Project Assessment Report), or testimony before the Commission regarding the Petition. For the reasons set forth at pages 20-23 of Piilani's Objections, the doctrine of *res judicata* does not apply. The issue being determined today (whether the development is substantially consistent with the representations made to the Commission) is not the same issue before the Commission in 1994/1995 (whether the land should be reclassified from Agricultural to Urban). Intervenors'

arguments *might* carry some weight if Piilani was asking the Commission to adopt a finding of fact that it previously proposed for inclusion in the 1995 Decision and Order, but which was rejected by the Commission. Intervenors have failed to cite to any such evidence.

Nor is Application of Hawaii Elec. Light Co., Inc., 60 Haw. 625, 641-42, 594 P.2d 612, 623 (1979), on point. Therein, the Hawaii Supreme Court noted that the purpose of the statute requiring that an agency set forth findings of fact and conclusions of law is to allow the courts to review those determinations, if challenged in Court. That case says nothing about the *res judicata* effect of a Land Use Commission order when a challenge alleging a violation of that order is brought. Nor are Petitioners attempting to "steer clear" of the 1995 Decision and Order. Therein, it was made clear that the reason for the boundary amendment was for a subdivision which could accommodate either commercial or light industrial uses. Piilani submits that the Commission needs to consider all the evidence, including the Petition, the exhibits to the Petition, the statements made at the hearing on the Petition, and the 1995 Decision and Order in determining what representations were made to the Commission.

C. Intervenors' "Level" of Findings Objection is Without Support.

Intervenors raise a confusing objection that Piilani's proposed facts are not "ultimate facts" and therefore must be rejected. Piilani disagrees that findings of fact are limited to stating "Ultimate facts" as opposed to also including citation to "Basic" facts demonstrated by the evidence. Application of Hawaii Elec. Light, which Intervenors rely upon, specifically states that "Ultimate" facts need to be supported by "Basic" facts, as well as citation to evidence. There is no case holding that stating basic facts and the evidence supporting same is somehow improper.

D. Piilani Does Not Admit Any Violations.

Intervenors assert that Piilani's proposed FOF admit violations of the three Conditions that Intervenors claim are at issue herein. No such admission have been made. Whether there has been a violation of Conditions 5 and 15 has been fully addressed in Piilani's Proposed FOF and in Piilani's Objections. Piilani notes, with regards to Subsection D.2.(e). of Intervenor's Objections, Intervenors incorrectly focus on whether the "impacts" from the Piilani Promenade are substantially similar to those from the conceptual project presented to with the Petitioner. The substantial similarity of the impacts of the conceptual as opposed to the ultimately developed project is not what the Commission has to decide. The question before the Commission is whether the Piilani Promenade and Affordable Housing Projects are in substantial compliance with the representations made to the Commission. Moreover, the Commission's focus should be on the impacts of reclassification, not specific projects. In its decision making criteria, the Commission is required to consider the "impacts of the proposed reclassification" on certain areas of state concern. See HAR § 15-15-77(b)(3) and H.R.S. § 205-17(3).

Piilani's Proposed FOF 208 through 218 do not admit a violation of Condition 17. To the contrary, Piilani submits that the evidence cited therein demonstrates that all annual reports were in fact submitted, or at most, a few annual reports during the time prior to when Piilani and Honua'ula owned the Subject Property are missing. No showing of any inadequacy of the annual reports has been demonstrated, as each annual report meets its requirements, as it specifically addresses how each condition is being addressed.

E. Intervenors' "Scintilla" Statement Borders on the Ridiculous.

In Subsection E, Intervenors argue that none of the Petitioners' proposed FOF are supported by any evidence. They go on to assert that Petitioners have not presented a "scintilla"

of evidence. A "scintilla" is defined as "a minute amount, an iota or a trace." For Intervenors to argue that Piilani and Honua'ula have presented absolutely no evidence that the Piilani Promenade and the Affordable Housing projects are in compliance with Conditions 5, 15, and 17 is hyperbole. The Commission sat through four days of testimony. Surely at least one iota of what was presented evidenced compliance with these conditions. Intervenors' extremist arguments are indicative of their refusal to consider the evidence objectively. Piilani submits that it has not only presented a scintilla of evidence, but has demonstrated by a preponderance of evidence that it has complied with all conditions in the 1995 Decision and Order.

IV. RESPONSES TO INTERVENORS' SPECIFIC OBJECTIONS

The following sections address some, but not all, of Intervenors' "Specific Objections to All Petitioners' Proposed Findings of Fact", subsections A. through DD. Not all Subheading letters or arguments are specifically addressed and rebutted. As to those not specifically addressed, Piilani submits that Piilani's Objections or Piilani's Proposed FOFs already address those arguments, and Piilani incorporates those arguments and authorities by reference.

A. Petitioners Are Not "Proving a Negative": The Commission Knew that Retail and Apartment Uses Were a Possibility.

Throughout Intervenors' Objections and in Intervenors' Proposed FOF, Intervenors raise the argument that, if Piilani's position is accepted, the Commission would have to foresee and address the impacts of every possible use of a given property. This argument fails for two reasons. First, it misreads the duties and responsibilities of the Commission, which is to address the impacts of reclassification, not the impacts of a particular project. See See HAR § 15-15-77(b)(3) and H.R.S. § 205-17(3). Moreover, Intervenors' argument fails specifically in this case, because the possible uses which are at issue here were specifically foreseen, considered, and discussed by the Commission.

When Commissioner Kajioka raised the fact that retail and apartments were permitted uses, and that there was a significant possibility that these uses could ultimately prevail and even predominate, the Commission demonstrated that it was on notice of this possibility. See Piilani Exhibit 6 at 105-106. When these questions were raised by the Commission at the hearing, the Original Petitioner never represented to or assured the Commission that it would not allow or even pursue such uses. To the contrary, the Original Petitioner agreed that this was a possibility, and stated that the market would ultimately dictate what types of tenants would occupy the Subject Property. Similarly, when Commissioner Kajioka raised the issue of whether the impacts on traffic from retail at the Subject Property were different from that based on light industrial presented in Julian Ng's TIAR, the Original Petitioner never attempted to deny that there might be different impacts, nor did the Petitioner attempt to preclude the Commission from looking at the differing possible impacts. See Piilani Exhibit 6 at 108:1-11. To the contrary, the Original Petitioner specifically offered to recall Julian Ng to respond to questions from the Commission regarding these different traffic impacts based on retail uses. The Commission declined that invitation. See Piilani Exhibit 6, November 1, 1994 Transcript at 121:8-11.

B. Intervenors, Not Piilani, Are Selectively Citing and Misconstruing Evidence Before the Commission.

Intervenors' Objections assert in a number of places that Piilani's Proposed FOF are objectionable because they selectively cite to portions of the Petition, the Market Feasibility Study, the Project Assessment Report, and testimony before the Commission. At issue in this case are what representations were made to the Commission. The Petition, the Market Feasibility Study, and the Project Assessment Report all contain representations about what could be developed at the Subject Property if the district boundary amendment was granted reclassifying the land from Agricultural to Urban. Piilani has cited to and quoted from numerous portions of

those documents where it was specifically represented to the Commission that development of the property could include retail and apartment uses. Intervenors have selectively cited to other portions of those same documents, none of which rebut or otherwise contradict the quotations cited by Piilani. While Piilani has cited to specific sections of these documents which state that retail and apartment use are permissible, Intervenors have cited to nothing in the record where the Original Petitioner made a representation (or even implied) that it would limit the amount of retail, or would preclude apartment use.

Similarly, the Transcripts of the hearing before the Commission on November 1, 1994 and on February 2, 1994 contain further representations to the Commission, and provide insight into what the Commission considered and how it viewed the materials submitted along with the Petition. The cited exchange between Mr. Sodetani and Commissioner Kajioka demonstrated that the Commission understood that apartment and retail were permitted and possible uses if the Petition was granted. That the Commission was specifically aware of this, and yet did not put in any specific condition to limit this possibility, demonstrates that the current uses proposed by Piilani and Honua'ula do not violate the 1995 Decision and Order.

The testimony of Brian Miskae which Intervenors object to has similar import. Piilani did not cite Maui County Planning Director Miskae's testimony as constituting a representation to the Commission. Rather, the testimony of Director Miskae demonstrates, again, that it was clearly known and understood, by both the Maui County Planning Director, the Commission, and anyone at the hearing (including the State Office of Planning), that any of those uses permitted that any use permissible under M-1 zoning was a possibility in the Petition Area. Director Miskae advised the Commission that the County would raise this with the Maui County Council, and seek a specific limitation on the amount of retail allowed when the Subject Property was

rezoned. The Commission, if it wanted such a limit, could have itself included a condition to this effect. It knowingly chose not to include a condition, and left the determination of whether or not to restrict the commercial/retail use of the Property up to the Maui County Council.

C. Intervenors Assertion that the Proposed Use was Primarily Light Industrial With Only Ancillary Commercial Use Is Unsupported and Contrary to the Evidence.

Throughout Intervenors' Objections, Intervenors assert that the proposed use was for a light industrial subdivision, and that that any proposed commercial use was secondary to light industrial. See Intervenors' Objection at 9 ("The Petition makes clear that 'commercial' uses are ancillary, secondary, and minor aspect of the overarching light industrial park proposal.") This is simply false. Intervenors **never cite to any evidence** to support this contention, either in Intervenors' Objections, or in Intervenors' Proposed FOF. Everywhere in the Petition the project is described as "commercial **and** light industrial." (emphasis added). The words "secondary," "ancillary," and "minor" **never appear** in the Petition or in any exhibit attached to the Petition describing the commercial aspect of the project. Moreover, the Marketing Study specifically described retail uses that are neither ancillary nor secondary to light industrial uses (discount retailers, sportswear and equipment, furniture sales). It was specifically disclosed to the Commission that successful marketing of the project would depend on "obtaining popular and internationally recognized outlets." See Piilani Exhibit 3 at 7.

Intervenors underlying assumption that the primary use proposed for the Subject Property was light industrial, and that commercial would be limited to ancillary uses is demonstrably incorrect. This mistaken assumption by the Intervenors permeates the entirety of Intervenors' Proposed FOF and Intervenors' Objections. Absent this unproven and implied representation, the rest of Intervenors' proposed FOF and COL fail, and must be rejected.

D. Piilani's Commitment to A Home Improvement Use Is Not Objectionable.

Intervenors assert that Piilani committing to devote 125,000 gross square feet, which together with associated parking would comprise 11.5 acres, to a home improvement center type use is somehow objectionable. Both the State Office of Planning and Intervenors, in submissions filed with the Commission, asserted that the Piilani Promenade did not contain any non-B1, B-2 or B-3 type of M-1 light industrial uses. Because Piilani had already been planning to and marketing for a home improvement use tenant, and because the County of Maui considers a home improvement center to be a light industrial type of use, Piilani made the determination to commit to the Commission to devote this acreage to this type of use. Piilani submitted unrebutted evidence of this proposed use and commitment.

Intervenors' first objection is that this is procedurally improper because such a commitment somehow requires a motion to amend. This argument lacks context and support. None of the arguments raised in this regard are specific to the commitment to the home improvement use, but rather, address the entire issue before the Commission – whether the proposed uses (Piilani Promenade and the Affordable Housing project) violate the 1995 Decision and Order or not (they do not). Piilani notes, in addition, one misstatement in Intervenors' argument. Intervenor contends that HAR § 15-15-50(c)(18) requires the Commission to assess the compatibility of "proposed developments" with community plans. See Intervenors' Objection at 24. First, this subsection was not the law at the time the Commission acted on the Petition, thus the Commission was not required to consider the community plan. See Exhibit A to the Department of Planning, County of Maui's Motion to Exclude Evidence Related to the 1998 Kihei-Makena Community Plan and Determination of the Scope of Review, filed herein on October 25, 2012 (adding the language in 50(c)(18) in 2008). In addition, even if this criteria

had been before the Commission in 1995, Intervenors misstates HAR § 15-15-50(c)(18), which requires the Commission to assess "the conformity of the reclassification" to community plans (emphasis added). Whether a proposed use or development violates a community plan has already been held by the Hawaii Supreme Court to be beyond the jurisdiction of the Commission, and within the jurisdiction of the County. 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).

Second, Intervenors object that Piilani's commitment only goes to at most 13% of the acreage in the Subject Property, or possibly less. However, neither Intervenors nor the State Office of Planning offered any proposed FOF as to what percentage of the Subject Property is required to be light industrial in order to comply with the 1995 Decision and Order. In fact, SOP witness Rodney Funakoshi testified that the SOP was unable to ascertain how much retail was allowed under the 1995 Decision and Order, and had no position as to that required alleged maximum. See Testimony of Rodney Funakoshi, TR4 at 48:8-20 and at 66:20 – 67:6.

E. Condition 5 Must be Interpreted as Only Requiring a Frontage Road if Approved By the State Department of Transportation.

In Piilani's Response to the State Office of Planning's Comments and Objections to Petitioners' Proposed Findings of Fact and Conclusions of Law, submitted of even date herewith, Piilani discusses at length how the only interpretation of Condition 5 which does not lead to an absurdity is that a frontage road need be developed only if such is approved by the State Department of Transportation. Piilani incorporates by reference those arguments herein in response to Intervenors' Objections Subsections Z. and AA.

F. Intervenors' Objections Regarding School Impact Fees Lack Merit

In section CC of Intervenors' Objections, Intervenors mistakenly claim that the 1995 Decision and Order contains a finding of fact (FOF 62) that the project would have only employees and not residents. This claim misstates the 1995 Decision and Order, which in fact provides at FOF 62, in pertinent part, as follows:

> "Petitioner has represented that the extent to which employees within the Project will reside in the Kihei-Makena region is not known; any impacts on educational resources would be more appropriately addressed at the time of application of specific residential projects."

The finding is only that the Original Petitioner represented that it was unknown to what extent persons employed within the Petition Area might also reside within the Kihei-Makena region. The finding does not preclude the possibility of employees residing within the Petition Area. It also does not preclude the possibility that the Petition Area itself could contain an apartment use. If anything, FOF 62 acknowledges that impacts on educational resources are more appropriately addressed later in the development process when there is more certainty about specific projects. Ironically, this is exactly what has occurred in this case, as the educational impacts from the proposed Affordable Housing project have been addressed through the Wailea 670 Project District Ordinance which requires the Affordable Housing project to be constructed. In addition, Department of Education Heidi Meeker testified that under current law, Honua'ula will need to obtain an educational impact agreement from the DOE before the Affordable Housing project can be constructed. See OP Exhibit 13; Testimony of Heidi Meeker, Transcript of November 2, 2012 at 57:3-12. Accordingly, the impacts on educational resources from the Affordable Housing project have been and will be addressed just as anticipated by the 1995 Decision and Order.

V. RESPONSE TO INTERVENORS OBJECTIONS TO PROPOSED CONCLUSIONS OF LAW

Piilani's proposed conclusions of law are fully supported by the evidence presented herein, and should be adopted by the Commission.

Intervenors' argue that Piilani has misapplied the Hawaii Supreme Court's holding in Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai`i 296, 97 P.3d 372 (2004). Specifically, Intervenors note that in Lanai Co. the Supreme Court held that "an agency must make its findings **reasonably** clear." Id. at 314, 97 P.2d at 390 (emphasis added). Intervenors claim that any reasonable person would find that Condition 15 clearly only permits a 123-lot light industrial complex. Intervenors go so far as to claim that Piilani, Honua'ula, and the County of Maui, who apparently do not read Condition 15 this way, must be hallucinating. See Intervenors' Objections at 32.

That one could reasonably ascertain that the 1995 Decision and Order, and particularly Condition 15, precludes the retail and apartment uses at issue here is belied by the evidence adduced herein. Rodney Funakoshi, who testified for the State Department of Transportation, admitted that the 1995 Decision and Order allowed some commercial/retail use at the Subject Property, but that it was not possible to ascertain how much was allowed or disallowed:

> Q. So sitting here today you can't say what percentage of light industrial would need to be on the property in order for it to comply with the Decision and Order.
> A. I cannot.

See Testimony of Rodney Funakoshi, Transcript of 11/16/12 at 48:16-20. See also Id. at 66:20 – 67:6. If SOP cannot reasonably ascertain what Condition 15 purportedly prohibits, neither can any landowner. Accordingly, the interpretation of Condition 15 urged by SOP and Intervenors must be rejected.

VI. CONCLUSION:

For the foregoing reasons, Piilani submits that its Proposed FOF and COL should be adopted in their entirety, that the Commission should find that there has been no violation of the 1995 Decision and Order, and the Order to Show Cause entered herein should be vacated.

Dated: Honolulu, Hawai'i, January 11, 2013.

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Piilani Promenade North, LLC

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STATE OF HAWAII

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KAONOULU RANCH	)	CERTIFICATE OF SERVICE
	)	
To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for approximately 88 acres at Kaonoulu, Makawao-Wailuku, Maui, Hawai'i	)	

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this date, a true and correct copy of the foregoing document was duly served upon the following party via U.S. Mail and electronic mail, addressed as follows:

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Dated: Honolulu, Hawai'i, January 11, 2013.

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