

OFFICE OF PLANNING

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LAND USE COMMISSION
STATE OF HAWAII

2013 OCT -4 A 8: 12

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A13-797
)	
CMBY 2011 INVESTMENT, LLC	)	OFFICE OF PLANNING'S COMMENTS
	)	AND OBJECTIONS TO PETITIONER'S
To Amend the Land Use District Boundary	)	PROPOSED FINDINGS OF FACT,
of Approximately 86.03 Acres of Land from	)	CONCLUSIONS OF LAW, AND
the Agricultural District into the Urban	)	DECISION AND ORDER; SECOND
District at Pulehunui, Wailuku, Island of	)	AMENDED LIST OF EXHIBITS;
Maui, State of Hawaii, Tax Map Key No:	)	EXHIBIT 9; CERTIFICATE OF
(2) 3-8-008: 019	)	SERVICE

**OFFICE OF PLANNING'S COMMENTS AND OBJECTIONS TO PETITIONER'S
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND
ORDER; SECOND AMENDED LIST OF EXHIBITS; EXHIBIT 9; AND CERTIFICATE
OF SERVICE**

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BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)	DOCKET NO. A13-797
)	
CMBY 2011 INVESTMENT, LLC	)	OFFICE OF PLANNING’S COMMENTS
	)	AND OBJECTIONS TO PETITIONER’S
To Amend the Agricultural Land Use	)	PROPOSED FINDINGS OF FACT,
District Boundaries into the Urban Land Use	)	CONCLUSIONS OF LAW, AND
District For Certain Lands Situate at	)	DECISION AND ORDER
Pulehunui, District of Wailuku, Island and)	
County of Maui, State of Hawaii, consisting)	
of approximately 86.030 acres, Tax Map)	
Key No. (2) 3-8-008:019)	
)	

**OFFICE OF PLANNING’S COMMENTS AND OBJECTIONS TO
PETITIONER’S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER**

On September 20, 2013, Petitioner CMBY 2011 INVESTMENT, LLC (“Petitioner”) filed *Petitioner’s Proposed Findings of Fact, Conclusions of Law, and Decision and Order* (“Petitioner’s Proposed Decision and Order”).

Except as set forth below, the Office of Planning (“OP”) has no comments or objections to the Petitioner’s Proposed Decision and Order.

I. FINDINGS OF FACT

1. Finding of Fact (“FOF”) 9. Procedural Matters. OP recommends the following clarification to this procedural finding:

FOF 9. On July 18, 2013, OP submitted its Office of Planning’s Statement of Position, in support of the Project with conditions. [OP Ex. 1]

2. FOF 62. The term “unimproved” should be revised to “improved” which typically refers to undeveloped land to which roads and utilities are developed.

62. Petitioner is responsible for constructing the backbone infrastructure for the Project; the unimproved subdivided lots will be sold or leased to interested users. [C.Jencks, Tr. 9/5/13, 126:15 - 126:17; G.Tadaki, Tr. 9/5/13, 55:21-55:23]

3. FOF 116A, Impact Upon Resources of the Area. OP recommends the addition of a general finding before the specific categories in Section I.I.

FOF 116A. Petitioner represented that this Project will be performing or implementing the mitigations recommended by Petitioner’s consultants or equivalent or better mitigation. [C. Jencks, Tr. 9/5/13, 134: 15-20]

4. FOF 134A. Flora and Fauna. Insert a finding reflecting recommendations from the U.S. Fish and Wildlife Service.

134A. The U.S. Fish and Wildlife Service recommended that Petitioner should contact their office for additional information on avoiding impacts to the Nene goose. The proposed retention basins may attract endangered waterbirds to the site. Barbed wire fencing may adversely impact the Hawaiian hoary bat and should not be used for fencing. To avoid impacts to the Hawaiian petrel and Newell’s shearwater, project-related lighting should be minimized, and all project lights should be shielded so the bulb is not visible at or above bulb-height. [OP Ex. 1, Att. B]

5. FOF 214A, Highway and Roadway Facilities. Insert a finding reflecting the State Department of Transportation’s (DOT) recommendations and requirements concerning Mokulele Highway.

214A. The State DOT recommended that the TIAR be revised and resubmitted for acceptance prior to the Petitioner obtaining preliminary subdivision approval. All recommended transportation improvements to mitigate local and direct project-generated impacts should be implemented, including the dedication of roadway rights-of-way on Mokulele Highway, prior to occupancy. A fair share contribution for the cost of regional improvements related to and proportional to the reasonably foreseeable impacts of the project should be considered. [OP Ex. 1, Att. D; R. Funakoshi, Tr. 9/6/13, 48:11-49:18]

214B. There is adequate time for the acceptance of the TIAR prior to obtaining preliminary subdivision approval from the County. The anticipated submittal of the subdivision application will not occur prior to the granting of approval by the Planning Commission, which is not expected until the second quarter of 2014. Upon submittal of the subdivision application, the County has 45 days to grant the approval. Accordingly, there will be at least nine months to obtain TIAR acceptance from the DOT which is more than sufficient given the minor revisions required. [R. Funakoshi, Tr. 9/6/13, 48:13-49:9]

6. FOF 220, Water Service. Revise to correct the DOH branch reference.

220. The Project's water system will be privately owned and maintained by the Association to make sure the water system remains in compliance with DOH ~~Clean Water Branch~~ Safe Drinking Water Branch regulations. [C.Jencks, Tr. 9/5/13, 128:19-128:21; Pet. Ex. 37, 2:21-2:22]

7. 223A and 226A. Wastewater. Insert findings regarding the separation distance required for septic systems from potable water systems and notification procedures for new drinking water sources.

223A. According to DOH wastewater system rules (HAR Chapter 11-62), any cesspool, seepage, pit, or soil absorption system must be a minimum distance of 1,000 feet from a potable water source. The subdivision layout will take into account the 1,000-foot radius. [HAR Chapter 11-62 Appendix F, Table 2; S. Otomo, Tr. 9/5/13, 93:4-24]

226A. The DOH Safe Drinking Water Branch has public notification procedures for new drinking water sources below the Underground Injection Control line. Notification is required to property owners within a one-quarter mile radius of the drinking water well. The notice, however, does not include any warning that individual wastewater systems must be sited a minimum distance of 1,000 feet from the drinking water source. [OP Ex. 9]

8. 243A and 243B. Drainage and Stormwater. Insert findings regarding DOH recommendations for pollution prevention and need for water quality monitoring.

243A. In its memorandum of August 13, 2013, the DOH recommended that specific conditions be imposed relating to injection wells, drainage catch basins, and the development of Pollution Prevention Plans that incorporate Best Management Practices for the operations of the heavy industrial lots. [OP Ex. 7 and 8]

243B. A water quality monitoring program should be implemented to determine if there are any adverse effects on ground and coastal water quality as a result of the industrial operations. [S. Dollar, Tr. 9/6/13 40:24-42:10]

DECISION AND ORDER

9. Condition 1. Highway and Road Improvements. Revise Condition 1.a) to reflect DOT acceptance of the TIAR prior to Preliminary Subdivision Approval.

1.a) The **TIAR** shall be revised and resubmitted to the State Department of Transportation ("**DOT**") for review, prior to Petitioner submitting an application for Preliminary Subdivision Approval to the County of Maui. The DOT shall accept the The Petitioner shall obtain acceptance of the revised TIAR ("**Revised TIAR**") from the DOT prior to Petitioner receiving Preliminary Final Subdivision Approval from the County of Maui.

10. Condition 3. Water System. Amend Condition 3 to include notification to surrounding landowners regarding the required separation distance for individual wastewater systems.

3. **Water System.** Petitioner shall provide the necessary water source, storage and transmission facilities to the satisfaction of the County of Maui's Department of Water Supply and/or DOH and/or Commission on Water Resource Management, as applicable, to service the Petition Area. Petitioner shall also provide notice to surrounding landowners regarding the required separation distance for individual wastewater systems from the proposed drinking water source.

11. Condition 10. Water Quality Monitoring. Revise the proposed condition to replace monitoring specifics with DOH consultation and approval of the proposed water quality monitoring program.

10. **Water Quality Monitoring.** Petitioner shall develop and implement a near shore water quality monitoring program to detect the presence of contaminants resulting from the development of the Project. The monitoring program will be developed by the Petitioner in consultation with the State Department of Health, to include the sampling constituents, the location, frequency and duration of monitoring, and reporting requirements. The monitoring program shall entail sampling and analysis of salinity and dissolved inorganic nutrients which may include silica, nitrate, nitrogen and phosphate phosphorus ("Contaminants"). Groundwater samples shall be taken from well(s) located within the Petition Area, and the near shore water quality samples shall be taken from coastal waters that receive groundwater discharges from the same hydrologic unit within which the Petition Area is located. ~~The monitoring program shall be initiated no later than three (3) months prior to the start of grading activity within the Petition Area to establish a baseline understanding of the groundwater below the Petition Area, as well as the salinity levels and presence of Contaminants. Thereafter, samples shall be taken from the on-site well(s) on a semi-annual basis, and from the near shore environment on an annual basis, until the earlier of: (i) fifty percent (50%) of the developable area within the Petition Area is sold; or (ii) fifty percent (50%) of the Project is occupied. If Contaminants are present, and such presence is irrefutably linked to the development of, or operations at, the Project, Petitioner, its successors and assigns, shall, in coordination~~

with the DOH, implement appropriate revisions to the pollution prevention plan and BMPs, and CC&Rs if applicable, to address such Contaminants.

DATED: Honolulu, Hawaii, this 4th day of October 2013.

OFFICE OF PLANNING
STATE OF HAWAII



JESSE K. SOUKI
Director

LAND USE COMMISSION

DOCKET NO./PETITIONER: A13-797 CMBY 2011 INVESTMENT, LLC
PARTY: OFFICE OF PLANNING (OP)

SECOND AMENDED
LIST OF EXHIBITS

LAND USE COMMISSION
 STATE OF HAWAII
 2013 OCT -4 A 8:13

EXHIBIT NUMBER	DESCRIPTION	PARTY: OBJECTIONS	ADMIT
1	Office of Planning (OP) Statement of Position		
2	Office of Planning (OP) Written Testimony		
3	Resume of OP Representative – Rodney Y. Funakoshi, Planning Program Administrator, Land Use Division		
4	State Department of Health (DOH) Written Testimony	Withdrawn	
5	Resume of DOH Representative	Withdrawn	
6	Map, Petition Area and Region, OP		
7	Letter from Office of Planning to Department of Health, Dated August 6, 2013		
8	Letter from State Department of Health, Dated August 13, 2013		
9	State Department of Health, Safe Drinking Water Branch. Public Notification Procedures for New Drinking Water Sources For Regulated Public Water Systems Below The Underground Injection Control Line, May 2009. As requested by the LUC. Tr. 9/6/13, 11-18		

HAWAII STATE DEPARTMENT OF HEALTH
SAFE DRINKING WATER BRANCH

PUBLIC NOTIFICATION PROCEDURES FOR NEW DRINKING WATER SOURCES
FOR REGULATED PUBLIC WATER SYSTEMS BELOW THE
UNDERGROUND INJECTION CONTROL LINE
MAY 2009

Establishing a new drinking water well below the Underground Injection Control (UIC) line can negatively affect injection well viability in the water well's capture zone. Outreach measures may be required by the Applicant to seek, notify, and solicit comments from affected property owners. The notification and solicitation of comments shall inform the affected property owners about the proposed drinking water well and the implications that protective measures for the drinking water well will have on properties within or near to the well's capture zone. The cost for such measures is the responsibility of the water system owner. Materials and information contained in public notices and direct mailings, must be reviewed and approved by the Safe Drinking Water Branch (SDWB) and its UIC Section prior to distribution.

1. The public notice and information mailings must be distributed before the engineering report for a new drinking water source for regulated public water systems may proceed to the interagency review process. At the SDWB's discretion, the interagency review may run concurrently with the public notice period.
2. To begin the public notification process, the Applicant shall submit to the SDWB:
 - A map of appropriate scale and detail delineating the well's entire capture zone;
 - Identification of all properties and property owners within the entire capture zone; and
 - Proposed materials and information to implement contacting affected land owners, for example, contents for a public notice and for direct mailings.

The capture zone is defined as a 1/4-mile radius around the drinking water well. If the proposed drinking water well is artesian, the capture zone also includes a

1/2-mile swath running hydrologically up-gradient from the drinking water well to the UIC line.

3. The submitted information and materials will be used to draft a public notice and to generate for-your-information mailers, the reproduction and distribution of which will be at the Applicant's expense. The Applicant will be informed if further information or clarification is needed to complete this task.
4. Once approved, the Applicant shall publish the public notice in the local County newspaper(s) (e.g. Garden Isle, Honolulu Star-Bulletin, Maui News, West Hawaii Today and Tribune Herald) and send the for-your-information mailers to all identified property owners within the capture zone by certified mail with return receipt.
5. The Applicant shall submit verification of the public notice and mailing of the for-your-information mailers to the SDWB.
6. If comments are generated from the public notice or mailers, the Applicant shall respond to all comments with consensus and input from the SDWB. The Applicant shall mail all comment responses by certified mail with return receipt. A copy of all responses shall be submitted to the SDWB.
7. The conclusion of this initiative to inform affected property owners about a proposed drinking water well will depend on the complexity of comments and issues to be resolved. The SDWB may impose additional conditions on the drinking water well, including but not limited to, additional regulatory monitoring of contaminants known to be injected into the aquifer.

Other Considerations

If the water system owns all of the property within the capture zone, the Applicant shall submit documentation of property ownership, and parts of the above procedures may be waived by the SDWB.

The SDWB strongly recommends siting drinking water wells, where the water system may exercise source water protection and eliminate potentially contaminating activities, such as injection wells (e.g. owning all the land within the capture

zone). In addition, if the water system-owned property is later sold, the SDWB strongly recommends including a deed restriction prohibiting potentially contaminating activities.

The SDWB reserves the authority to amend these procedures or contents for applicability, efficiency, effectiveness, clarity or changing concerns. An amendment, if any, may be effective immediately.

Docket No. A13-797

CERTIFICATE OF SERVICE LAND USE COMMISSION
STATE OF HAWAII

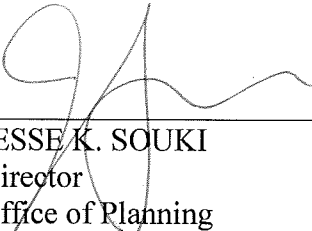
I hereby certify that a copy of the foregoing was served upon the following by either hand
2013 OCT 04 A 8 13
delivery or depositing the same in the U.S. Postal Service by regular mail.

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DATED: Honolulu, Hawaii, this 4th day of October 2013.



JESSE K. SOUKI
Director
Office of Planning