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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

To Amend the Agricultural Land Use District Boundary to Reclassify Approximately 236 Acres Located at Kahuku, Koolauloa, County of Honolulu, State of Hawaii, to the Urban Use District	DOCKET NO. A85-595 OFFICE OF PLANNING'S RESPONSE TO DEFEND OAHU COALITION'S RENEWED MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE WHY THE BOUNDARY RECLASSIFICATION SHOULD NOT BE REVOKED FOR FAILURE TO PERFORM CONDITIONS, REPRESENTATIONS AND COMMITMENTS; EXHIBITS "1" – "3"; CERTIFICATE OF SERVICE

OFFICE OF PLANNING'S RESPONSE TO DEFEND OAHU COALITION'S RENEWED MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE WHY THE BOUNDARY RECLASSIFICATION SHOULD NOT BE REVOKED FOR FAILURE TO PERFORM CONDITIONS, REPRESENTATIONS AND COMMITMENTS

Movant Defend Oahu Coalition's Renewed Motion for Issuance of An Order to Show Cause Why the Boundary Reclassification Should Not be Revoked for Failure to Perform Conditions, Representations and Commitments should be denied. No explicit condition has been violated, and the boundary amendment approved in 1986 was issued without "time performance" or "compliance with representation" requirements. In order to ensure the efficacy of the state land use and planning system, parties subject to an administrative decision must have fair warning of the conduct government prohibits or requires. Based on available information,

Petitioner is working to address project impacts consistent with its Land Use Commission ("LUC") entitlements.

I. FACTUAL AND PROCEDURAL SUMMARY

A. The Establishment of the State Land Use Classification System

In 1964 and 1969, the LUC classified large acres of land across the state in legislative-type hearings as one of the first steps in establishing the current state system of classifications. No conditions were attached to these overarching statewide classification decisions. Among the lands classified was approximately 582 acres of land within the larger Turtle Bay Resort project (the "Existing Urban Lands"), including the land around Kawela Bay upon which hotels are currently proposed to be built. See Exhibit 1.

In 1972, the Turtle Bay Resort Hotel was completed. See Kuilima Resort Company's Status Report Regarding the Kuilima Expansion Project (Findings of Fact, Conclusions of Law and Decision and Order Dated March 27, 1986, as Amended on March 15, 1986) at page 2, dated August 18, 2008 ("August 18, 2008 Status Report").

B. The 1986 Decision and Order

On June 14, 1985, Kuilima Development Company ("KDC" or "Petitioner") filed a petition to amend approximately 236 acres of additional land from the State Agricultural district to the Urban district. See Exhibit 2. The Petition Area included 132 acres for a golf course, 78 acres for 1,000 resort condominium units, 10 acres for a public beach park, 6 acres for a private park, and 10 acres for a stable. The Petition Area would be developed as part of a larger resort expansion of the Existing Urban Lands. See Finding of Fact 13 of the March 27, 1986 Findings of Fact, Conclusions of Law, and Decision and Order ("1986 Decision and Order").

On March 27, 1986, the LUC issued its 1986 Decision and Order granting the reclassification request subject to certain conditions. On March 15, 1989, the LUC issued an Order to Amend the 1986 Decision and Order to allow for the dedication of the wastewater treatment facility to the City and County of Honolulu. The amendments are not relevant to the matter currently before the LUC.

In reviewing the many documents in this case and as noted by Movant Defend Oahu Coalition, Finding of Fact 18 of the 1986 Decision and Order states as follows:

> 18. Petitioner proposes to start constructing the first phase of condominiums on the Property by 1988 after obtaining all necessary governmental approvals.

Finding of Fact 60 of the March 27, 1986 Decision and Order states as follows:

> 60. Petitioner proposes to complete substantial portions of the infrastructure as described in Finding of Fact No. 17 as well as 315 of the proposed 1,000 resort condominium units within five years of the Commission's approval and to complete the entire Resort Development by 1996.

In testimony, KDC indicated that Kahuku Point Park would be dedicated upon the finish of Phase I which was anticipated to be in May 1988. Transcript of Proceedings dated October 16, 1986 at page 156, lines 7-9 (hereinafter "Tr. 10/16/85 at ___, lines ___-___"). Phase II would be commenced immediately thereafter and completed in 1990 or 1991, subject to government approvals. Tr. 10/16/85 at 159, lines 5-11. Furthermore, the LUC appears to have amended Condition 1 in part because Petitioner might not complete all four hotels within the next five years. Tr. 1/15/86 at 62-67.

It is important to note, however, that certain conditions normally found in current district boundary amendment decisions were not included in the 1986 Decision and Order. There was no condition requiring Petitioner to substantially comply with its representations. There was no condition requiring construction within a specific time period. There was no condition requiring the filing of annual status reports.

C. Post-hearing Development Activities

Since 1986, Petitioner has constructed a wastewater treatment facility, the Opana Well Facilities, and a moat around the Punahoolapa Marsh. It has improved the existing hotel and constructed Ocean Villas on the Existing Urban Lands, and constructed a golf course which lies on both the Petition Area and the Existing Urban Lands. Other development activities have been orally described during the status reports on October 2 and November 6, 2008.

There has also been a succession of owners and litigation on various matters involving the Kuilima Resort Expansion.

D. The Motion for Order to Show Cause

On or around April 3, 2008, Defend Oahu Coalition ("Movant") filed its Motion for Issuance of an Order to Show Cause Why the Boundary Reclassification of Kuilima Development Company Should Not be Revoked for Failure to Perform Conditions, Representations and Commitment by Kuilima Development Company ("Motion for OSC"). Nothing in this Motion for OSC will prohibit the development of lands outside of these 236 acres, including the development of hotels around Kawela Bay.

The Motion for OSC alleges that KDC has failed to comply with Conditions 1, 2, 3, and 7 of the March 27, 1986 Decision and Order and lacks the financial capacity to proceed with development.[1] Accordingly, Defend Oahu Coalition argues that the 236 acres of the Petition Area should be reverted to the Agricultural district.

Condition 1 of the March 27, 1986 Decision and Order states as follows:

> 1. The Petitioner shall develop full-service hotels on lands outside of the Property as designated in Petitioner's Master Plan for the Kuilima Resort in order to ensure employment opportunities for North Shore Residents.

This condition was specifically amended during decision-making to avoid specifying how many hotels needed to be developed. Tr. 1/15/86 at 56-67. At this time, Petitioner has not yet developed any new hotels, but is currently proposing to construct multiple hotels on the existing urban lands.

Condition 2 of the March 27, 1986 Decision and Order states as follows:

> 2. Petitioner shall provide housing opportunities for low and moderate income Hawaii residents and employees employed at the Kuilima Resort by constructing and offering for sale or rent, on a preferential basis on its own or in cooperation with either or both the Hawaii Housing Authority and the City and County of Honolulu, within or without the Property, a number of residential units, not less than ten percent of the number of resort condominium residential units to be developed on the Property to residents of Hawaii and employees employed at the Kuilima Resort of low and moderate income as determined by the Hawaii Housing Authority or the City and County of Honolulu from time to time, or by contributing to the development of such housing without the Property. The preferential residential units shall be offered for sale or rent at prices not

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[1] A change in the financial situation of Petitioner after a decision and order is issued is not a basis for issuing an OSC.

exceeding prices that enable such purchasers or including bargaining unit employees of the Petitioner or the full service hotels at the Kuilima Resort to qualify for and obtain State assisted financing, i.e. Act 105 or Hula Mae or federally insured or assisted financing, i.e. FHA, Section 245 Program, intended to encourage home ownership by low and moderate income families.

According to the testimony of Francis Oda, senior partner at Group 70, Petitioner intended to provide 95 housing units off-site in Kahuku. Tr. 10/16/85 at 51, lines 14-15. According to the City, the particulars would be the subject of negotiations. Tr. 10/16/85 at 169, lines 12-14. At this time, neither the resort condominium units nor the workforce housing have been built.

Condition 3 of the March 27, 1986 Decision and Order states as follows:

3. Petitioner shall fund the design and construction of improvements to Kamehameha Highway for the Kuilima Resort Expansion as required by the State Department of Transportation, including fully channelized intersections at Marconi Road, Kuilima Drive and West Kuilima Drive. Petitioner shall also assist the State Department of Transportation in its attempt to acquire a 50-foot right-of-way for widening Kamehameha Highway parallel to the boundary of the Kuilima Resort Expansion.

At this time, although Petitioner has prepared reports, proposals, and construction drawings, the scope of the development may change. Accordingly, the scope of the needed traffic improvements has not yet been fully defined, and discussions are ongoing with the State DOT.

Condition 7 of the March 27, 1986 Decision and Order states as follows:

7. The Petitioner shall insure free public access and parking for parks and rights-of-way to the shoreline. Continuous pedestrian access along the shoreline of the proposed Kuilima Resort Expansion shall also be assured by the Petitioner. Petitioner shall dedicate approximately 10 acres of land to the City and County of Honolulu for park purposes.

Petitioner created easements for access to the shoreline. Some improvements have been done. No lands have been dedicated to the City and County of Honolulu for a park. See November 2001 Monitoring Report. Petitioner may have more information about public access, public parking, and the status of the public park dedication.

E. The Hearings

On July 11, 2008, the parties presented arguments on the Motion for OSC. The LUC voted 5-0 to take the matter under advisement in light of the complex legal issues presented, and to ask the Petitioner to submit a status report at the next appropriate meeting.

On October 2, 2008 and November 6, 2008, Petitioner presented their oral status report, with comments from OP. After the second status report, the LUC decided that the Motion for OSC should be placed on the agenda at the next appropriate meeting.

On February 6, 2009, the parties presented further arguments on the Motion for OSC. After a variety of questions from the LUC, the LUC voted 5-0, with one member recused, to take the matter under advisement in order to consult with its attorney.

On February 4, 2010, the parties again presented arguments on the motion. The LUC voted 4-1, with one member abstaining, to deny the Motion for OSC. A motion to grant the Motion for OSC failed for lack of a second. Lacking five (5) affirmative votes for either result, the LUC issued no decision and the matter remained on the calendar for scheduling at a future date.

OP's position regarding the OSC has not changed throughout these proceedings.

F. The Renewed Motion for Order to Show Cause

On November 7, 2012, Petitioner filed its Draft Supplemental Environmental Impact Statement in response to the ruling of the Hawaii Supreme Court in Unite Here! Local 5 v. City and County of Honolulu and Kuilima Resort Company, Civil No. 06-1-0265 (2010).

On June 18, 2013, Movant filed a Renewed Motion for Issuance of an Order to Show Cause Why the Boundary Classification Should not be Revoked for Failure to Perform Conditions, Representations and Commitments ("Renewed Motion"). Movant argues that the following additional events have occurred: (1) the Hawaii Supreme Court issued its decision in Unite Here! Local 5 v. City and County of Honolulu; (2) The LUC has considered two other cases regarding a Motion for Order to Show Cause; and (3) Draft Supplemental Environmental Impact Statement ("SEIS") has been issued, indicating changes from the original 1986 proposal.

II. ARGUMENT

A. Whether Defend Oahu Coalition is a Proper Movant

Petitioner has argued that the Defend Oahu Coalition is not a proper movant. HAR § 15-15-93 allows an "interested person" to file a motion for order to show cause. There is no specific definition of an "interested person." Although the term "interest" is used to determine whether a party should be allowed to intervene, the policy in favor of freely granting intervention in a district boundary amendment proceeding does not necessarily apply in a motion for order to show cause. Intervention at the beginning of the process gives the intervenor party-status in the decision-making. Once that reclassification decision has been made, however, a request to participate years after the reclassification decision from a new entity which did not participate in the initial proceeding should require more justification.

The LUC should consider the precedential effect of its decisions, and require movant Defend Oahu Coalition to meet a level of interest which would be required in all other cases to avoid motions for order to show cause from persons with possibly less justification than the current movant.

Movant has submitted reasonable evidence as to why its members have an interest in affordable housing, traffic, and public parks as implicated by Conditions 2, 3, and 7. Movant also asserts an interest in jobs, although it is less clear that Movant has an interest in encouraging the construction of additional hotels as implicated by Condition 1.

B. An Implied Deadline or Requirement

Conditions 1, 2, 3, and 7 have not yet been met. The primary issue is whether the failure to meet one or more conditions at this time is a violation of the Decision and Order.

Movant has argued that the Decision and Order contains representations and findings of fact regarding when the development will be completed, and impliedly requires that the conditions have to be satisfied within a reasonable time. Furthermore, sections 6-2 and 6-3 of the State Land Use District Regulations then in effect (March 1977) contemplate that projects are completed within five years.

There is no condition requiring Petitioner to comply with its representations or requiring Petitioner to take action within a specific period of time. Furthermore, there was no rule explicitly imposing a deadline for completion of conditions. As discussed below, the LUC must

give fair warning to Petitioners of the requirements, and an implied requirement is not fair warning.

Movant also argues that section 6-3 requires that Petitioner "shall make substantial progress in the development of the area redistricted to the new use approved within a period specified by the Commission not to exceed five (5) years from the date of approval of the boundary change. The Commission may act to reclassify the land to an appropriate District classification upon failure to perform within the specified period according to representations made to the Commission." (Emphasis added.)

Section 6-3 requires Petitioner to make substantial progress within a period specified by the Commission. But the LUC has not specified such a period. So, there is no violation of section 6-3. Furthermore, Petitioner has made substantial progress in the development of the area, including various actions that have been completed and reported in its October 2 and November 6, 2008 oral status reports.

C. Enforceability

Regardless of whether an implied deadline exists, the LUC must also determine whether it can enforce a condition which has not been expressed. In Lanai Co. Inc. v. Land Use Comm'n, 105 Hawaii 296 (Haw. 2004), the LUC had prohibited the use of "potable water from the high level groundwater aquifer for golf course irrigation use." The LUC issued an Order to Show Cause when water from the high level aquifer was used to irrigate the golf course. In deciding whether the order prohibited the use of all water or only potable water from the high level aquifer, the Hawaii Supreme Court stated:

> Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies. See e.g., Gates & Fox v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986) (reasoning that an "employer is entitled to fair notice in dealing with his government," and thus the agency's regulations "must give an employer fair warning of the conduct it prohibits or requires"). In this light, the 1991 Order cannot be construed to mean what the LUC may have intended but did not express. Cf. id. (explaining that "a regulation cannot be construed to mean what an agency intended but did not adequately express"). An administrative agency, such as the LUC, has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed. Cf. id. (reasoning that the "enforcer of the act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated").

Lanai Co. Inc. v. Land Use Comm'n, 105 Hawaii at 314.

In this case, the Decision and Order did not set a schedule or deadline by which the conditions must be met, and did not require that the Petitioner substantially comply with its representations to the LUC. Accordingly, Petitioner has not been given fair warning or notice that it has violated the Decision and Order.

There are valid and important policy reasons to have deadlines. Over the last seven to eight years, the LUC has imposed clear and unambiguous deadlines by which the infrastructure for a Petition Area must be developed. Properties which obtain their entitlements but remain undeveloped admittedly create significant planning challenges. If one does not know when the entitled property will be developed, one does not know when the associated infrastructure will be built. This creates problems for future projects relying upon the infrastructure promised but not yet delivered by the entitled property. However, given the absence of an explicit deadline in this case, the Petitioner has not been given fair notice of the requirement and an Order to Show Cause should not be issued.

D. Renewed Motion for OSC

Movant argues that the following additional events have occurred: (1) the Hawaii Supreme Court issued its decision in Unite Here! Local 5 v. City and County of Honolulu; (2) the LUC has considered two other cases regarding a Motion for Order to Show Cause; and (3) a DSEIS has been issued, indicating changes from the original 1986 proposal.

With respect to the Hawaii Supreme Court decision and the filing of a Draft SEIS, these events clarify the pathway which the Turtle Bay Resort Expansion must follow. After the Final SEIS is accepted, Petitioner should have an improved ability to identify the specific changes that will be occurring in the larger Turtle Bay Resort Expansion. But with respect to the Petition Area, the SEIS does not indicate any increased or different impacts. Residential units are still being planned, and the total acreage is not demonstrably higher. If the number of residential units is decreased, the impacts may be less. But under the facts presented in this case, a simple decrease in units does not provide a basis for an Order to Show Cause. Any proposed changes to uses outside the Petition Area do not impact the conditions applicable to the Petition Area.

Movant also argues that the Hawaii Supreme Court's decision in Unite Here! Local 5 applies to OSC. However, the issues are legally and factually distinct. The issue posed in Unite Here! Local 5 was whether the City and County of Honolulu could properly rely upon an allegedly outdated EIS prepared pursuant to HRS Chapter 343, for its decision to subdivide. In this case, the issue is whether the LUC may revert property from urban to agricultural, pursuant to HRS Chapter 205, for Petitioner's alleged failure to comply with a condition that does not exist. The requirement of fair notice was irrelevant in Unite Here! Local 5, but is ultimately dispositive in this case.

With respect to the cases involving Bridge Aina Lea, Docket No. A87-617 and Kaonoulu Ranch, Docket No. 94-706, those two cases are also clearly distinct. In Bridge Aina Lea, there was an explicit condition to obtain certificates of occupancy for the affordable housing units within five years. Petitioner did not. In Kaonoulu Ranch, there was an explicit condition requiring Petitioner to comply with its representations. Petitioner later proposed a completely different type of use of the Petition Area which was not in compliance with its representations. In this case, there is no explicit condition requiring action within a specific deadline or requiring general compliance with representations made.

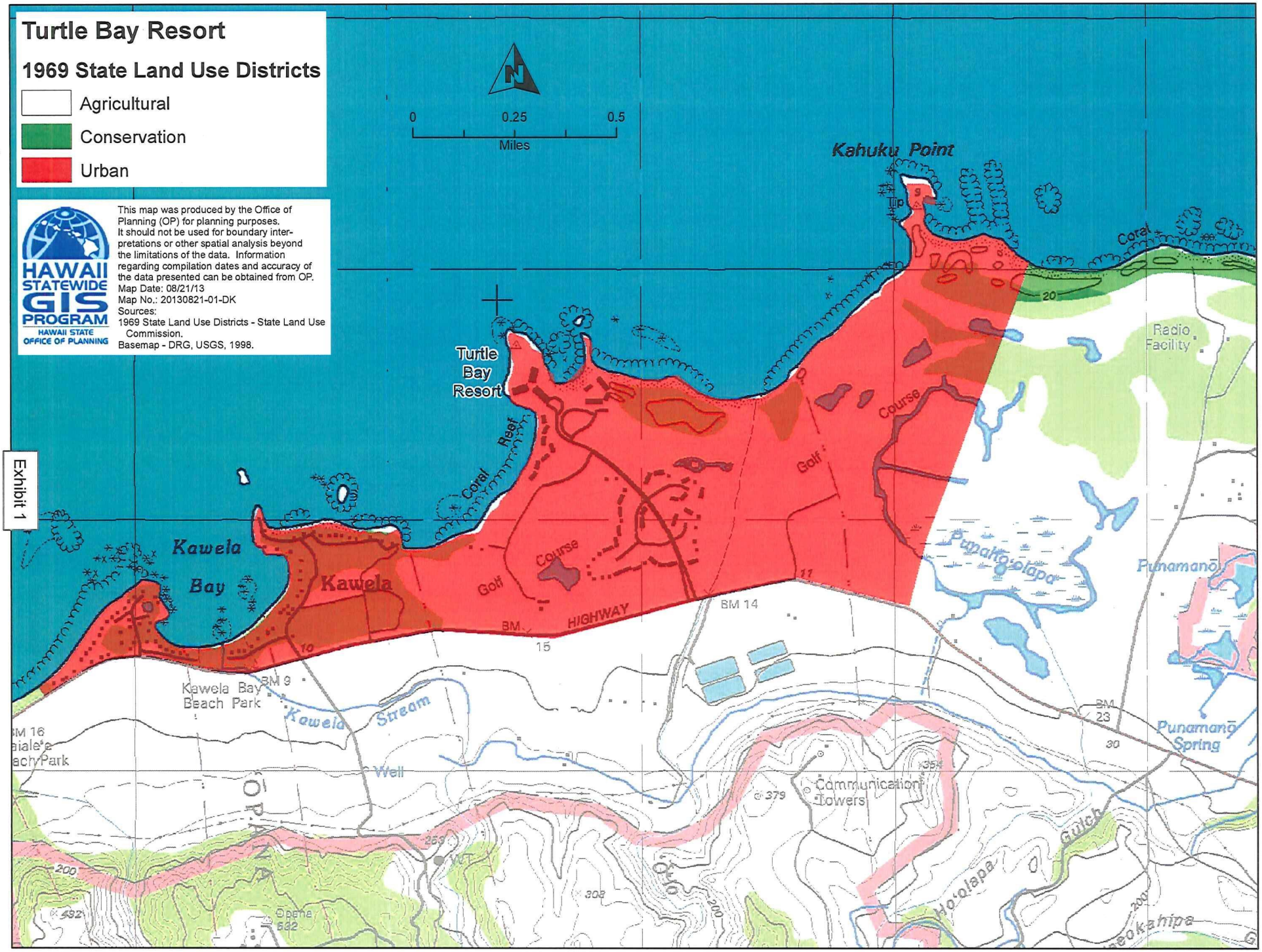
III. CONCLUSION

For the above reasons, Defend Oahu Coalition's Motion for OSC should be denied. Neither the Decision and Order nor the rules then in effect when the LUC issued the D&O give Petitioner fair warning of an obligation to perform within a specific time period.

DATED: Honolulu, Hawaii, August 22, 2013.

OFFICE OF PLANNING
STATE OF HAWAII

JESSE K. SOUKI
Director


Turtle Bay Resort
1969 State Land Use Districts
Agricultural
Conservation
Urban
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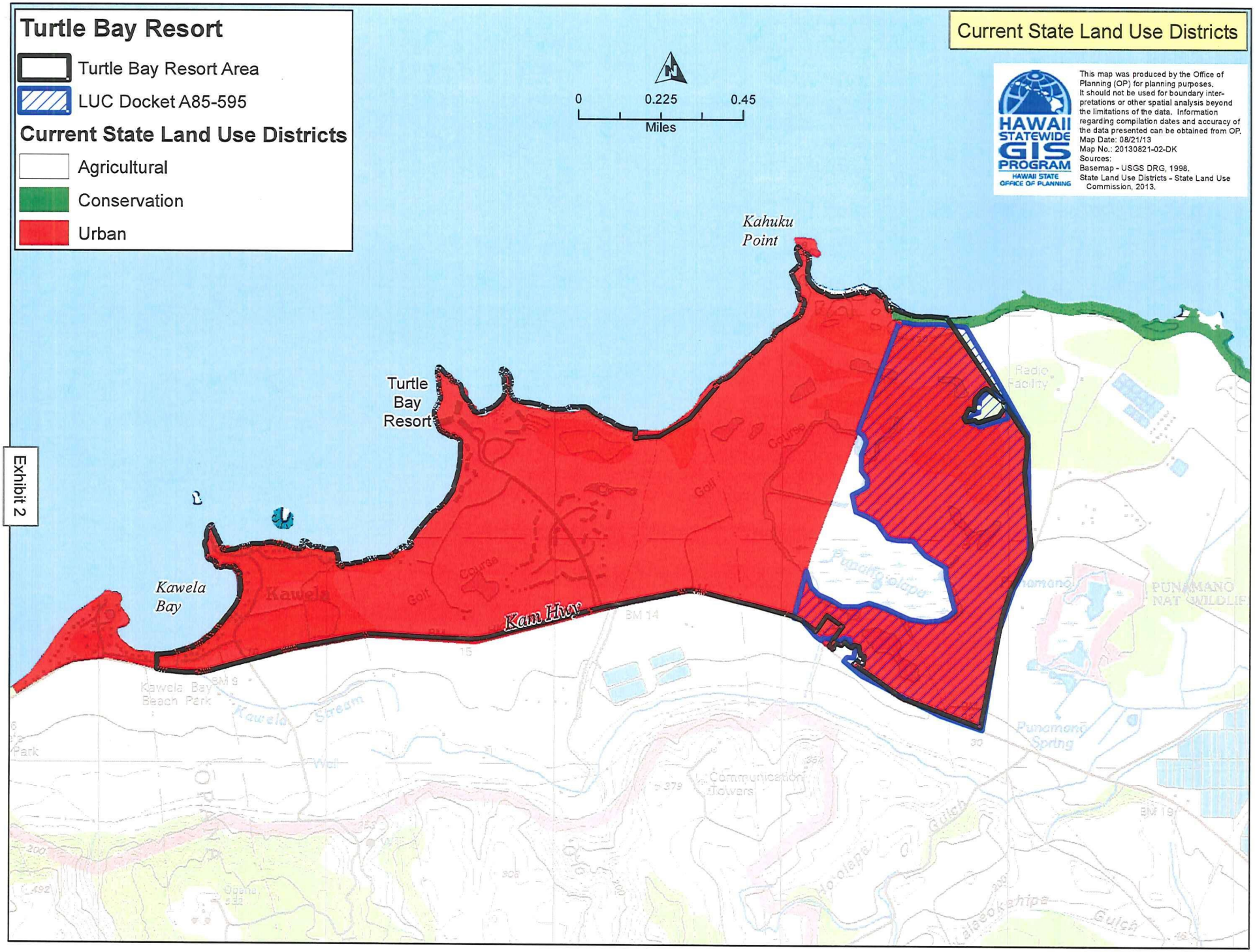
HAWAII STATEWIDE GIS PROGRAM
HAWAII STATE OFFICE OF PLANNING
This map was produced by the Office of Planning (OP) for planning purposes. It should not be used for boundary interpretations or other spatial analysis beyond the limitations of the data. Information regarding compilation dates and accuracy of the data presented can be obtained from OP.
Map Date: 08/21/13
Map No.: 20130821-01-DK
Sources:
1969 State Land Use Districts - State Land Use Commission.
Basemap - DRG, USGS, 1998.
Kahuku Point
Turtle Bay Resort
Coral Reef
Golf Course
Radio Facility
Kawela Bay
Kawela
Kawela Bay Beach Park
Kawela Stream
Well
HIGHWAY
BM 14
BM 15
BM 9
BM 23
Communications Towers
Punamano
Punamano Spring
Ho'olapa Gulch
Opana
Exhibit 1


Turtle Bay Resort
Turtle Bay Resort Area
LUC Docket A85-595
Current State Land Use Districts
Agricultural
Conservation
Urban
Current State Land Use Districts
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Miles
This map was produced by the Office of Planning (OP) for planning purposes.
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Map Date: 08/21/13
Map No.: 20130821-02-DK
Sources:
Basemap - USGS DRG, 1998.
State Land Use Districts - State Land Use Commission, 2013.
HAWAII STATEWIDE GIS PROGRAM
HAWAII STATE OFFICE OF PLANNING
Kahuku Point
Turtle Bay Resort
Kawela Bay
Kam Hwy
Exhibit 2

HAWAII STATEWIDE GIS PROGRAM
HAWAII STATE OFFICE OF PLANNING

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Map Date: 08/21/13
Map No.: 20130821-03-DK
Sources:
Turtle Bay Resort Master Plan: Draft Supplemental Environmental Impact Statement, Nov 2012, Lee Sichter LLC.
LUC Docket A85-595: State Land Use Commission.

0 0.25 0.5
Miles

Turtle Bay Resort Master Plan

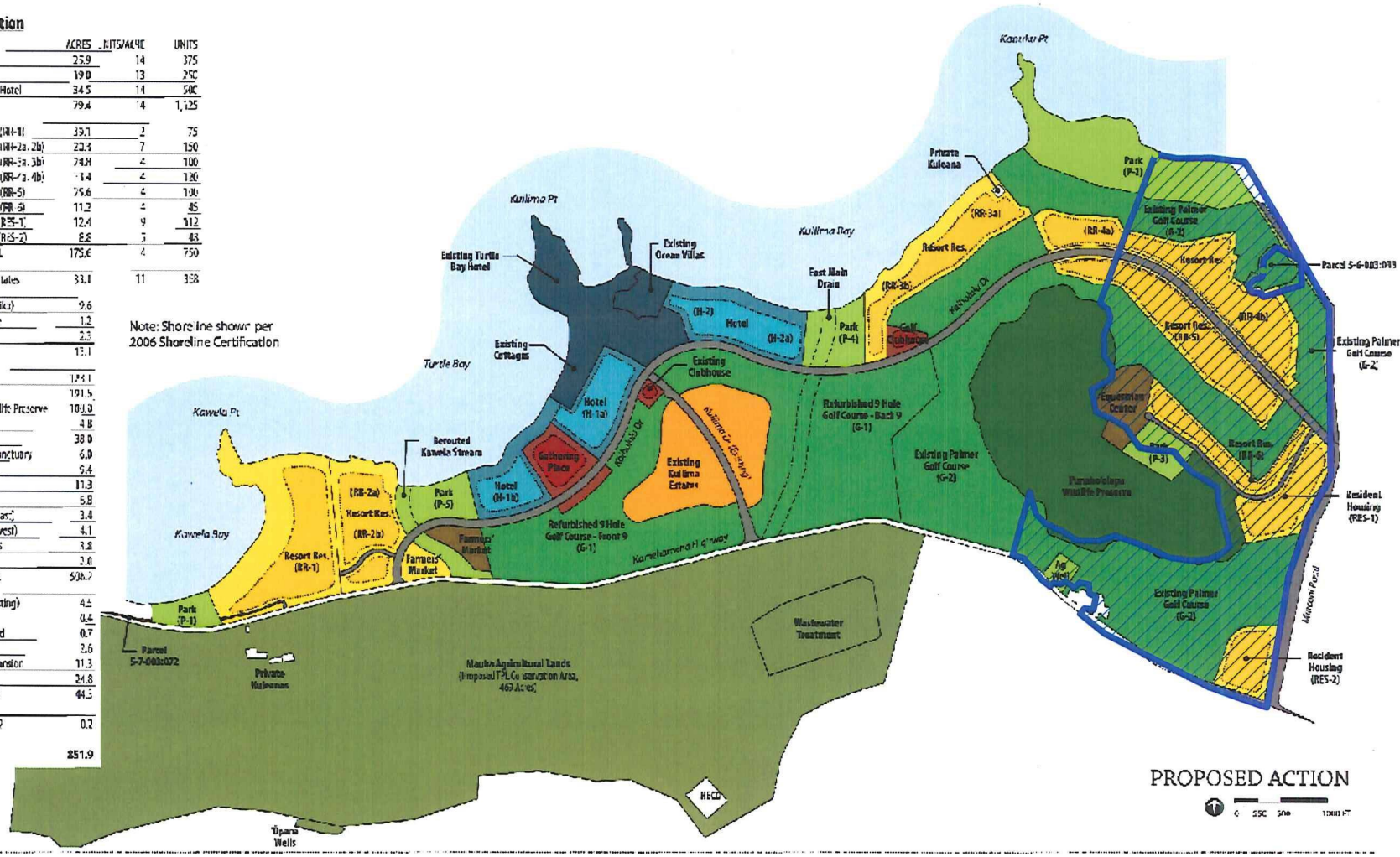
LUC Docket A85-595

Exhibit 3

Proposed Action

AREA	ACRES	UNITS/ACRE	UNITS
Hotel (H-1a, 1b)	25.9	14	375
Hotel (H-2, 2a)	19.0	13	250
Existing Turtle Bay Hotel	34.5	14	500
TOTAL HOTEL	79.4	14	1,125
Resort Residential (RR-1)	39.1	2	75
Resort Residential (RR-2a, 2b)	22.5	7	150
Resort Residential (RR-3a, 3b)	24.8	4	100
Resort Residential (RR-4a, 4b)	14.4	8	120
Resort Residential (RR-5)	25.6	4	100
Resort Residential (RR-6)	11.2	4	45
Resident Housing (RES-1)	12.4	9	112
Resident Housing (RES-2)	8.8	5	43
TOTAL RESIDENTIAL	175.8	4	750
Existing Kuilima Estates	33.1	11	358
Gathering Place (Pikai)	9.6		
Existing Clubhouse	1.2		
New Clubhouse	2.3		
TOTAL OTHER	13.1		
Golf Course (G-1)	134.1		
Golf Course (G-2)	191.5		
Punahoolapa Wildlife Preserve	104.0		
Park (P-1)	4.8		
Park (P-2)	38.0		
Park (P-3) - Bird Sanctuary	6.0		
Park (P-4)	9.4		
Park (P-5)	11.3		
Equestrian Center	5.8		
Farmers' Market (east)	3.4		
Farmers' Market (west)	4.1		
Parcel 5-5-003:055	3.8		
AG Well (Lot 524)	2.0		
TOTAL OPEN SPACE	530.7		
Kuilima Drive (Existing)	4.5		
TCH Access Road	0.4		
4R-1/2 Access Road	0.7		
Equestrian Road	2.6		
Marconi Road Expansion	11.3		
Kaihalulu Drive	24.8		
TOTAL ROADWAYS	44.5		
Parcel 5-7-003:072	0.2		
TOTAL SITE	851.9		

Note: Shore line shown per 2006 Shoreline Certification



BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

To Amend the Agricultural Land Use District Boundary to Reclassify Approximately 236 Acres Located at Kahuku, Koolauloa, County of Honolulu, State of Hawaii, to the Urban Use District	)	DOCKET NO. A85-595 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that due service of a copy of **OFFICE OF PLANNING'S RESPONSE TO DEFEND OAHU COALITION'S RENEWED MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE WHY THE BOUNDARY RECLASSIFICATION SHOULD NOT BE REVOKED FOR FAILURE TO PERFORM CONDITIONS, REPRESENTATIONS AND COMMITMENTS**, was made by hand-delivery or by depositing the same with the U. S. mail, postage prepaid, on August 22, 2013, addressed to:

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DATED: Honolulu, Hawaii, August 22, 2013.

JESSE K. SOUKI, Director
Office of Planning