

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition for)
a Declaratory Order of)
THE SIERRA CLUB AND DAVID KIMO)
FRANKEL)
For A Declaratory Order Ruling That)
(i) Luxury Housing Developments And)
Hotels Are Not Permissible Uses On)
Agricultural Land; (ii) Landowner/)
Developer Pacific Star, LLC, Must)
Apply For A District Boundary)
Amendment To Develop Its Master-)
Planned Community Because Of The)
Urban-Like Nature, Size, And Scope)
Of The Development; And (iii) The)
County of Hawai'i May Not Grant A)
Special Permit For The Members' Hale)
Because The Members' Hale Is)
Connected To, Interrelated And)
Interdependent On, The Activities)
And Development On The Remaining)
Over 600 Acres)
_____)

DOCKET NO. DR00-23
DECLARATORY ORDER

This is to certify that this is a true and correct copy of the document on file in the office of the State Land Use Commission, Honolulu, Hawaii.

OCT 25 2000 by [Signature]
Date Executive Officer

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LAND USE COMMISSION
STATE OF HAWAII

DECLARATORY ORDER

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI`I

In the Matter of the Petition for) DOCKET NO. DR00-23
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FRANKEL)
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Hotels Are Not Permissible Uses On)
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And Development On The Remaining)
Over 600 Acres)
_____)

DECLARATORY ORDER

On August 3, 2000, The Sierra Club and David Kimo Frankel, as an individual and as a member of The Sierra Club ("Petitioners")¹, filed a Petition For A Declaratory Order ("Petition"), pursuant to section 91-8, Hawai`i Revised Statutes

¹The Sierra Club is a California non-profit corporation registered to do business in the State of Hawai`i. It is a national conservation organization comprised of approximately 610,000 members, and includes state chapters and groups which focus on local issues. The Sierra Club's Hawai`i Chapter represents over 3,700 members who live in the State of Hawai`i. In addition, the Hawai`i Chapter's Moku Loa Group includes over 500 members who live on the island of Hawai`i. David Kimo Frankel is the Chair of the Sierra Club, Hawai`i Chapter.

("HRS"), and section 15-15-98, Hawai`i Administrative Rules ("HAR").

The Petition requested a declaratory order from the Land Use Commission ("Commission") declaring that "(A) Luxury housing developments and hotels are not permissible uses on agricultural land; (B) Pacific Star must apply for a district boundary amendment to develop its master planned community at Keopuka because of the urban-like nature, size and scope of the development; and (C) the county may not grant a special permit for the 'members hale' because the 'members hale' is connected to, interrelated and interdependent on the activities and development on the remaining over six hundred acres." Petition, at pages 17 and 18.

This Commission, having heard and examined the testimony and evidence presented by Petitioners, Pacific Star, LLC, an Arizona limited liability corporation ("Pacific Star"), the Office of Planning ("OP"), the County of Hawai`i ("County"), and other public witnesses, at its meeting on September 29, 2000, in Kailua-Kona, Hawai`i, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

PROCEDURAL MATTERS

1. On August 3, 2000, Petitioners filed the Petition.

2. On August 22, 2000, the Office of the Corporation Counsel for the County filed a response to the Petition ("Response").²

3. On September 1, 2000, Pacific Star filed a Memorandum In Opposition To Petition For A Declaratory Order (Memorandum In Opposition).³

4. On September 7, 2000, OP filed Testimony Of The Office Of Planning ("Testimony").⁴

² In its Response, the County stated that it believed the Petition was inappropriate inasmuch as i) the Petition raised questions that were speculative and did not involve existing facts as there were no applications pending before the County on any of the items which were the subject of the Petition nor was there an accepted Final EIS for the Keopuka Lands project; and ii) the Petition requested the Commission to rule on issues relating to the determination of violations of use restrictions and to agricultural subdivision approvals that it had no jurisdiction and authority over.

³ In its Memorandum In Opposition, Pacific Star argued that this Commission should refuse to issue an order on the Petition because i) the questions presented were speculative and not ripe for review; and ii) the County was the appropriate agency to enforce the provisions of Chapter 205, HRS, relating to Agricultural Districts. In the alternative, Pacific Star requested the Commission to order that under the unique circumstances of this case, the dwellings and golf course contemplated by the Keopuka Lands project were permissible uses in the Agricultural District, and that the members' hale may be processed through the County Planning Commission without the need for any action by this Commission.

⁴ In its Testimony, OP pointed out that it believed the Keopuka Lands project constituted a significant urban use within or adjacent to the Agricultural and Conservation Districts, and as such Pacific Star should be required to file a boundary amendment. OP also contended that the County of Hawai'i should not grant a special permit for the members' hale because it was a hotel that was an integral component of a much larger development. OP further noted that the State had a strong interest in protecting the resources of the area as the project bordered the Kealakekua Bay State Historical Park, which included the Captain Cook Monument and a Marine Life Conservation District with class AA waters. OP also pointed out that the visual impact of the Keopuka Lands project from the bay had not been evaluated. OP believed that the project would violate the intent and spirit of Chapter 205, HRS, and was an attempt to bypass the comprehensive review of this Commission, something that OP has consistently opposed with other developments in the Agricultural District that involved special permits for lodge/resort retreats and/or incremental processing of permits.

5. On September 18, 2000, Petitioners filed a Verification and Reply Memorandum To Pacific Star's Memorandum In Opposition To Petition For A Declaratory Order ("Reply Memorandum").

6. On September 28, 2000, Pacific Star filed a Supplemental Memorandum In Opposition To Petition For A Declaratory Order ("Supplemental Memorandum").

7. On September 28, 2000, the Commission conducted a site visit to the project site.

8. On September 29, 2000, at its public meeting in Kailua-Kona, Hawai'i, the Commission considered the Petition pursuant to section 15-15-100, HAR.

9. At this meeting, the following individuals appeared as public witnesses and provided oral testimony:

Nancy Pisicchio
Roger Dilts
Virginia Isbell
Hanalei "Hank" Fergerstrom
Michele Wilkins
David Kimo Frankel
Steven S.C. Lim
William L. Moore
Al Jeremiah
David W. Blane
Ann Ogata-Deal
Lindsay Lindsey
John B. Ray
Curtis Tyler
Gordon Leslie
Julie Jacobson
Wayne Leslie
Kuhananui Kupuna Hannah Wahinemaikai `O Kaahumanu
Keliulananiole `O Kalamaka Kane Reeves
Abel S. Lui
Desi Castro

10. Many other persons indicated a desire to testify against the proposed development. To avoid unduly repetitious testimony, and to afford due process to persons wishing to speak in favor of the development, the presiding officer exercised his discretion to limit the number of public witnesses and to limit the length of time each witness could speak. See sections 15-15-65, HAR, and 91-10, HRS.

11. At the public hearing, the Commission entered the following into evidence:

Response from Patricia K. O'Toole, County of Hawai'i Deputy Corporation Counsel dated August 21, 2000.

Memorandum In Opposition from Steven S.C. Lim dated August 31, 2000.

Testimony of OP dated September 7, 2000.

Facsimile letter from Michele Wilkins dated September 21, 2000.

Reply Memorandum from David Kimo Frankel dated September 18, 2000.

Testimony from John B. Ray, President of Hawaii Leeward Planning Conference, dated September 27, 2000.

Supplemental Memorandum from Steven S.C. Lim dated September 27, 2000.

Testimony of Kahea "The Hawaiian Environmental Alliance" dated September 28, 2000.

Testimony of Kohanaiki `Ohana dated September 29, 2000.

Testimony of Nancy Pisicchio, County of Hawai'i Councilmember.

Testimony of Michele Wilkins and David Maddox.

Testimony of Virginia Isbell.

Testimony of Plan to Protect Kona dated September 29, 2000.

Testimony of Marjorie Ann Erway dated September 29, 2000.

Testimony of Lawrence M. Ford.

Testimony of the Kona Coffee Council dated September 29, 2000.

Video Cassette Tape entitled "Mud & Sediment Video of September 9, 10 and 20" from Michele Wilkins.

Testimony of the League of Women Voters of Hawai'i County dated September 29, 2000.

Testimony of Brenda Ford dated September 29, 2000, with attachments (Chapter 205, HRS, and Ordinance No. 96-160).

Testimony of Roger Dilts and copies of his slide show presentation with backup material (Star-Bulletin article entitled "Biologist says runoff kills coral, harms water quality.")

Testimony of Applied Life Sciences dated September 22, 2000.

Letter to the Editor received from Gordon Leslie.

Documents from Lindsay Lindsey, Executive Minister of the Kingdom of Hawai'i.

Testimony of Lei Kihoi dated April 29, 2000

Testimony of Kenneth Sheppard dated September 29, 2000.

Pacific Star's Draft Environmental Impact Statement ("DEIS").

Testimony of John Langenstein dated September 29, 2000.

Testimony of Lolana Medeiros dated September 29, 2000.

DESCRIPTION OF PROPERTY

12. The project site is situated at Keopuka and Onouli, South Kona, Hawai`i, and is identified as TMK 8-1-07: 1, 54, and 55 ("Property").

13. The Property is located within the State Land Use Agricultural and Conservation Districts, as represented on State Land Use District Boundaries Maps, H-8 (Kealakekua) and H-9 (Honaunau).

14. A portion of the Property near the shoreline is in the Conservation District.

15. The Property is bounded on the west by the Pacific Ocean, on the east by Mamalahoa Highway, on the north by the Hokulia project, and on the south by the lands of Ka`awaloa.

16. The western portion of Ka`awaloa encompasses the Kealakekua Bay State Historical Park, site of the Captain Cook Monument. Kealakekua Bay is designated a Marine Life Conservation District.

17. The County of Hawai`i General Plan Land Use Pattern Allocation Guide Map designates the Property as Extensive Agriculture and Orchards. The area along the coastline is designated Open Area.

18. The Kona Regional Plan designates the Property as Agricultural-5a, Unplanned, and Open.

19. The zoning for the Property is Agriculture-5 acre.

20. The makai portion of the Property located below the lateral Old Government Road to the shoreline is within the County of Hawai'i Special Management Area.

21. The USDA Soil Conservation Service Soil Survey Report identifies four soil types on the Property: rLV, a`a lava; rLW, Pahoehoe lava; rKED, Kaimu extremely stony peat, which is generally not suitable for cultivation, although some small areas can be used for pasture, macadamia nuts, papaya, and citrus fruits; and KEC, Kainaliu extremely stony silty clay loam, which may be suitable for macadamia nuts and pasture with proper irrigation. The rKED and KEC soil types, which are present on the mauka portions of the Property, comprise approximately 10 percent of the Property.

22. The University of Hawai'i's Land Study Bureau's Detailed Land Classification System classifies the soils on the Property as overall (master) productivity rating class "E," indicating that the soils are generally very poorly suited for agricultural use.

23. The State Department of Agriculture's Agricultural Lands of Importance to the State of Hawai'i Classification System designates approximately one-third of the Property as "other important agricultural land," indicating that portions of the Property can be used for agricultural uses.

PROPOSED USE OF THE PROPERTY

24. The landowner and developer of the Keopuka Lands project is Pacific Star. Mr. Lyle Anderson is the principal of Pacific Star.

25. The proposed development is known as Keopuka Lands, a 660-acre master-planned agricultural and recreational community.

26. According to the DEIS, the Keopuka Lands project is planned to include approximately 125 lots surrounding an 18-hole private golf course, a clubhouse and related facilities, and a 100-unit members' hale and related improvements.

27. The 125 lots are to be comprised of 1, 2, and 5+-acre lots. The 5+-acre lots (13 in all) are to be situated in a 75-acre area in the mauka portion of the Property, between Mamalahoa Highway and the proposed Bypass Road, where soils are present that can support agricultural activities.

28. At present, these 75 acres include 30 acres that are utilized for agricultural pursuits. Approximately 10 acres are currently cultivated in macadamia nut orchards. The remaining 20 acres are fallow.

29. Under the conceptual plan, the 13 5+-acre mauka lots would provide agricultural uses and income to the owners of lots on the makai portions of the Property, which have more limited agricultural opportunities due to the lava-based soils. It is anticipated that the resources from the other components of

the project would provide the needed capital to support the agricultural use on the mauka lots on an ongoing basis.

30. The planned 18-hole private golf course would include a clubhouse, practice range, maintenance facility, and related uses.

31. The proposed members' hale would provide accommodations for residents of the project, golf club members, and guests in up to 100 units located in a main pavilion and within detached suite and bungalow buildings. The hale would accommodate hospitality, reception, dining, and recreational (pool, spa, tennis) activities as well as administrative and service functions.

32. Pursuant to the Supplemental Memorandum filed on September 28, 2000, Pacific Star stated that it would not, under any circumstances, build a members' hale, lodge, hotel, or similar facility on the Keopuka Lands project for as long as the project was owned by Pacific Star or any organization affiliated with the Lyle Anderson Companies. However, the Commission finds there are no assurances that the premises could not be transferred to another entity and then developed at any time. Therefore, the Commission is not persuaded at these last minute assurances that a hale, hotel or like structure will not be built.

33. An onsite wastewater treatment system, non-potable water wells, water transmission system, internal roadways,

utilities, and other infrastructure and facilities are also proposed. In addition, there would be provisions for public and resident access to and along the shoreline from existing trails and roads.

34. At the time of the public hearing, Pacific Star had not filed any land use applications for the Keopuka Lands project with the applicable State and County agencies.

RULING ON PROPOSED FINDINGS OF FACT

Any of the proposed findings of fact not already ruled upon by the Commission by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

Any conclusions of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

JURISDICTION

1. The Commission has jurisdiction to issue this declaratory order. Section 91-8, HRS, as implemented by Subchapter 14 of the Commission rules, and sections 15-15-98 through 104, HAR, authorize the Commission to issue⁵ declaratory rulings "as to the applicability of any statutory provision or of

⁵Section 15-15-100, HAR, authorizes the Commission to issue a declaratory order on the matters contained in the Petition within 90 days after the receipt of a petition for declaratory order.

any rule or order of the agency." The Commission's statutes, the applicability of which are put at issue in this Petition, are those sections of Chapter 205, HRS, which govern the uses permitted on agricultural lands. Without limitation, these sections include 205-2(d) (describing activities and uses permitted in agricultural districts); 205-3.1 (concerning, in pertinent part, jurisdiction for boundary amendments involving less than fifteen acres of agricultural lands); and 205-4 (concerning procedures for district boundary amendments of agricultural lands involving greater than fifteen acres).

2. Section 205-5(b), HRS, authorizes the Commission to determine whether proposed uses on State Land Use Agricultural District lands with soil classified by the Land Study Bureau's Detailed Land Classification System as overall (master) productivity rating class C, D, E, or U are compatible with agricultural activities and are therefore permitted uses of agricultural lands. ["Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in section 205-2 and 205-4.5 may be further defined by each county by zoning ordinance." (emphasis added)].

3. The Commission has asserted its jurisdiction under almost identical questions in the past.

4. Pacific Star and the County argue that the Commission lacks subject matter jurisdiction over a petition for a declaratory ruling because section 205-12, HRS, provides the counties with the discretionary power to determine and enforce land use violations. The Commission is not persuaded by this argument for several reasons. First, neither Pacific Star nor the County has referred to any legal authority indicating that enforcement authority is exclusively with the counties, as opposed to shared between the counties and the state. More importantly, the Petition before the Commission requests, among other things, a declaratory ruling. This order is in the nature of a declaratory ruling whether certain proposed uses are permitted on agricultural lands. This is not an enforcement order assessing penalties or imposing injunctive relief for actual uses in violation of statutory requirements.

5. To the extent that Petitioners also seek an enforcement order in the nature of injunctive relief⁶, the Commission declines at this point to issue such injunctive because the matters are not properly before us. The Petition is styled as one for declaratory relief and is brought pursuant to section 15-15-98, HAR, and section 91-8, HRS. At this time, the Commission addresses only the Petitioners' first prayer for

⁶Petitioners seek an order from this Commission commanding Pacific Star to apply for a district boundary amendment. Petitioners also seek an order from this Commission enjoining the County from issuing a special permit.

relief for a declaratory order whether the developer's proposed development is permissible on agricultural lands.

6. As stated above at paragraph 32, at one point, Pacific Star contemplated development of a "members' hale" on a portion of the Property encompassing less than 15 acres. According to its earlier pleadings, the members' hale would encompass 13.5 acres. In its initial opposition to the Petition, Pacific Star argued that the Commission had no jurisdiction to issue a declaratory ruling whether the members' hale was a permissible use of agricultural lands because section 205-3.1, HRS, directs that petitions for boundary amendments be handled by the appropriate county land use decision-making authority in which the land is located. We acknowledge Pacific Star's later representation that it would not develop a members' hale. However, as found in paragraph 32 above, we are not persuaded that a hotel, hale or like structure will not be built simply by transferring ownership of the premises to another entity at any time. See Supplemental Memorandum. Pacific Star no longer pursues the argument that the Commission lacks subject matter jurisdiction because a portion of the development will be located on lands less than 15 acres. We note, however, that there is a distinction between a question of jurisdiction to grant a petition for a boundary amendment and a question of jurisdiction to issue a declaratory order clarifying which uses are permitted

on agricultural lands and which uses require a reclassification of agricultural lands.

7. Petitioners' request for a declaratory order whether the Pacific Star's proposed golf course, housing developments, subdivision, and possible member's hale are permissible uses on agricultural land is thus within the jurisdiction of the Commission as contemplated by sections 91-8 and 205-5(b), HRS.

8. Pacific Star and the County also argue that the Commission should refrain from issuing a declaratory order, even assuming it is within the scope of the Commission's authority to do so, because the question is speculative or purely hypothetical and does not involve existing facts. See section 15-15-102(1), HAR.

The Commission does not find this argument persuasive. First, it is discretionary, not mandatory, under section 15-15-104, HAR, whether the Commission may refuse to issue a declaratory order on the grounds that the question is speculative. Second, the Commission concludes that the proposed development is not so speculative or conceptual that would render a declaratory order futile. The preparation of the DEIS evidences Pacific Star's intention to develop the project in the near future. The Commission concludes that the proposed development is not "purely" hypothetical and that the development does involve "facts that can be expected to exist in the near

future." See also para 24, below, with respect to the members' hale.

9. The Commission notes that one of the purposes for issuing a declaratory order is to "terminate a controversy or to remove uncertainty." Section 15-15-98(b), HAR. Based on the number of public witnesses and the intensity of feelings generated by this proposed development, even if all the details have not been determined, the Commission concludes that it would be well within its discretion to say whether the proposed development is a permissible use of agricultural land.

10. Finally, if there were some uncertainty whether the Commission should or should not issue a declaratory order, the fact that the proposed Keopuka Lands project would border the State of Hawai'i Kealakekua Bay State Historical Park which includes the Captain Cook Monument and a Marine Life Conservation District with class AA (pristine) waters weighs heavily in favor of issuing a declaratory order. The Kealakekua Bay Archaeological and Historic District is on the National Register of Historic Places. The Commission was presented evidence that runoff into the ocean from a recent rainstorm on developer's neighboring project which abuts the premises herein caused disturbing affects to the class AA waters of Kealekekua Bay. The State of Hawai'i has a strong interest to protect the resources of the area.

11. Evidence was given to the Commission that PASH gathering rights are exercised in the waters abutting the development area, which may be jeopardized by the project scope. In view of the ruling of the Supreme Court of the State of Hawai'i in Ka Pa`akai O Ka`aina, the Commission must be vigilant when such evidence is presented. This Commission has jurisdiction to preserve such rights and must do so when properly before the Commission.

12. The OP suggests that further hearings are necessary before issuing a declaratory ruling. Section 15-15-103, HAR, allows, but does not require, that the Commission may set the matter for a hearing. In fact, section 15-15-98, HAR, allows the Commission to issue a declaratory order to terminate a controversy or to remove uncertainty on its own motion "without notice of hearing." The Commission concludes that based on the extensive facts presented at the hearing, the testimony of public witness, the pleadings filed, together with the documents and affidavits, and the opportunity granted to interested parties to present their views, that further hearings are not necessary.

Merits of the Petition

Having concluded that we have jurisdiction to issue a declaratory order determining whether the proposed development is permitted on agricultural lands, and having determined that the factual circumstances are not so speculative or purely hypothetical to warrant refusing to issue a declaratory order,

and having concluded that significant State interests may be implicated by the proposed development, we now turn to the merits of the Petition.

In brief, Petitioners argue that the proposed development as outlined in the developer's DEIS is not a permissible use of agricultural lands. We agree.

13. Assessing the development as a whole, we are convinced that the project is not permitted on agricultural land and can only proceed as envisioned in the DEIS only if there is a boundary amendment reclassifying the land from agricultural to urban approved by this Commission.

14. Developer would have us examine each component of the project, e.g., the single-family residences, the golf course, the large-sized mauka lots, and conclude that because each component as a stand alone development might be permitted, the entire development would also be permitted. We decline to adopt this narrow analytic thesis. We agree with the reasoning and conclusion of the OP on this issue: "The project must be assessed as a whole, not piecemeal." Testimony of Office of Planning, at page 6.

Judging this project as a whole, this development has all the characteristics we normally consider to be urban: it is a 600+-acre luxury residential resort whose essential features are framed around a golf course and other amenities, rather than on farming or agricultural activities. We do not find it

credible that houses along the cliff area to be marketed at one to 3 million dollars per lot are part of any true agricultural enterprise.

15. Even if we were to consider the 112 residential lots as a discrete use, Chapter 205, HRS, prohibits residential dwellings within the State Land Use Agricultural District unless the dwellings are related to an agricultural activity or constitute a "farm dwelling." We find that the luxury homes as contemplated are not related to agricultural activity and are not farm dwellings as presented.

16. Under the conceptual plan, the only agricultural activities proposed to be undertaken in the Keopuka Lands project would be on 13 5+-acre lots located in a 75-acre area in the mauka portion of the Property. Pacific Star admits that the proposed agricultural activity on the 13 lots would be of a modest scale.

17. No agricultural activity is proposed for the remaining 112 lots. These lots would require the importation of soil and irrigation in order to be suitable for agricultural use. It is unclear to what extent the dwellings on the 112 lots would be related to the proposed agricultural activity in the project and how much income the agricultural activity would provide to the families occupying the dwellings. Pacific Star provided no substantial definite evidence in this regard.

18. Pacific Star suggested that under 205-4.5, HRS, a "farm dwelling" includes single-family dwellings where agricultural activity provided income to the family occupying the dwelling. Under the facts presented here, the connection between the 112 residential lots and the mauka 13 5+-acre lots is too tenuous to allow the 112 residential lots to be characterized as farm dwellings. Under Pacific Star's interpretation, a family that operates and derives income from a farm in Nebraska would be allowed to build a single-family, second home on agricultural land in Hawai'i without any associate agricultural activity. We reject this broad interpretation of section 205-4-5, HRS. There must be some connection of significance between the single-family dwelling and agricultural activity on the same land if the dwelling is to be considered a permitted use of agricultural land.

19. In addition to the lack of a clear connection to agricultural activity, we consider such factors as the location of the residential lots (many will be situated along the proposed golf course fairways). Looking at the proposed characteristics of the residential component in totality, we conclude that these residential lots have little, if anything, connection to agricultural activity.

20. Pacific Star also at one point appears to argue that because the counties are given the authority under section 205-5(b), HRS, to further define accessory agricultural uses and

services, and because the County has by ordinance permitted single-family dwellings on agricultural lands, the Commission must conclude that single-family dwellings with no connection to farming or other agricultural activity are permissible uses on agricultural lands. We do not interpret section 205-5(b), HRS, to grant the counties such unfettered authority.

21. Statutes must be interpreted in a manner consistent with the intent and purpose of the law. We find Petitioners' arguments on the legislative history of Chapter 205, HRS, helpful in ascertaining the intent and purpose of sections of Chapter 205, HRS, dealing with agricultural lands.

22. We also note that the statute allows a county to "further define" accessory agricultural uses and services. Section 205-5(b) ("Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance." (emphasis added)). The phrase "further define" implies a limited authority granted to the counties to specify additional permissible accessory agricultural uses by way of a zoning ordinance consistent with the broad parameters otherwise set forth by statute. If we were to adopt Pacific Star's interpretation of the phrase "further define" to mean that the counties may allow any use whatsoever on agricultural lands so

long as the county passes a zoning ordinance, it would mean that the counties could define away completely any statutory restrictions on agricultural uses. Under Pacific Star's interpretation, all remaining portions of Chapter 205, HRS, delimiting the differences between agricultural use and urban, rural or conservation uses would be rendered superfluous. Pacific Star's interpretation of the phrase "further define" would conflict with the Commission's authority provided in the first clause of the sentence, i.e., to determine uses compatible to agricultural activities. Interpretation of statutes that harmonize all parts of the statute is favored. Because Pacific Star's interpretation of county authority under the phrase "further define" would lead to an internally inconsistent statute and would render other parts of Chapter 205, HRS, moot, it is hereby rejected.

23. Based on the evidence in the record, the Commission concludes that the proposed single-family residential dwellings on the 112 lots in the makai portion of the Property are not located on and used in connection with a farm, and are therefore not permissible uses of agricultural land.

24. Pacific Star took the initial position that the Commission had no authority over the proposed members' hale because the hale would be located on lands less than 15 acres. Several days before the commencement of the public hearings, Pacific Star represented that it would not build a members' hale,

lodge, hotel, or similar facility on the Keopuka Lands project for as long as the project was owned by Pacific Star or any organization affiliated with the Lyle Anderson Companies. It is within the discretion of the Commission to assess the value and weight of evidence and representations. Pacific Star did not offer any assurances that a members' hale, lodge, hotel, or similar facility could not be built on the Property by any other subsequent landowner of the Property, nor any indication that it would not change its mind at some point in the future. We conclude that the absence of a members' hale from the developer's present plans do not change the overall characteristics of the project to one permitted on agricultural lands.

DECLARATORY ORDER

At the Commission's meeting on the Petition on September 29, 2000, in Kailua-Kona, a motion was made and seconded that this Commission had the jurisdiction to act on the Petition. Following discussion by the Commission, a vote was taken on this motion. There being a vote tally of 5 ayes, 1 nay, and 3 excused, the motion carried.

Thereafter, a second motion was made and seconded that the Keopuka Lands project, as described in the DEIS, will require Pacific Star to file a petition for district boundary amendment with this Commission. Following discussion by the Commission, a vote was taken on this motion. There being a vote tally of 6 ayes, 0 nays, and 3 excused, the motion carried.

Having duly considered Petitioners' Petition, the oral and written arguments presented by Petitioners, Pacific Star, OP, the County, and other public witnesses in this proceeding, and two motions having been made at the Commission's meeting conducted on September 29, 2000, in Kailua-Kona, Hawai'i, and both motions having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motions, this Commission hereby RULES as follows:

This Commission has the jurisdiction to act on the Petition, and will exercise its discretion to issue a declaratory ruling.

IT IS FURTHER DECLARED that:

The Keopuka Lands project, as described in the DEIS, consisting of a proposed development of 660 acres of land in the Agricultural and Conservation Districts into thirteen 5+-acre farm parcels and the remaining 585 acres into 112 single-family residences of coastal house lots and house lots surrounding an 18-hole golf course, a clubhouse and related golf course amenities will require a district boundary amendment pursuant to section 205-4, HRS. In the event Pacific Star files a petition for district boundary amendment with this Commission, the petition shall include i) an assessment regarding the identity and scope of valued cultural, historical, or natural resources in the subject area, including the extent to which traditional and customary native Hawaiian rights are exercised in the subject area; ii) the extent to which those resources-including traditional and customary native Hawaiian rights-will be affected or impaired by the proposed action; and iii) the feasible action, if any, to be taken by this Commission to reasonably protect native Hawaiian rights if they are found to exist.

ADOPTION OF DECLARATORY ORDER

The undersigned Commissioners, being familiar with the record and the proceedings, hereby adopt and approve the foregoing DECLARATORY ORDER this 19th day of October 2000. The DECLARATORY ORDER and its ADOPTION shall take effect upon the date this DECLARATORY ORDER is certified and filed by this Commission.

LAND USE COMMISSION
STATE OF HAWAII

By M. Kelai
MERLE A. K. KELAI
Chairperson and Commissioner

By Lawrence N.C. Ing
LAWRENCE N.C. ING
Vice Chairperson and Commissioner

By P. Roy Catalani
P. ROY CATALANI
Commissioner

By Bruce A. Coppa
BRUCE A. COPPA
Commissioner

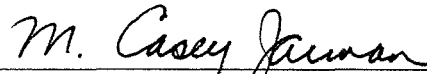
By (absent)
PRAVIN DESAI
Commissioner

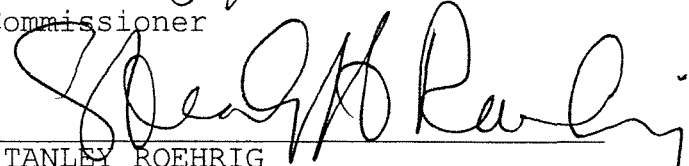
By Isaac Fiesta, Jr.
ISAAC FIESTA, JR.
Commissioner

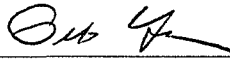
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Certified by:


Executive Officer

By 
M. CASEY JARMAN
Commissioner

By 
STANLEY ROEHRIG
Commissioner

By 
PETER YUKIMURA
Commissioner

APPENDIX

APPLICABLE LEGAL AUTHORITIES

1. Hawai'i Revised Statutes:

A) §91-8

Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

B) §205-2(d)

Agricultural districts shall include activities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, aquaculture, and game and fish propagation; aquaculture, which means the production of aquatic plant and animal life for food and fiber within ponds and other bodies of water; wind generated energy production for public, private, and commercial use; bona fide agricultural services and uses which support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, whether or not conducted on the same premises as the agricultural activities to which they are accessory, including but not limited to farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises; wind machines and wind farms; small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land, provided that such facilities shall not be used as or equipped

for use as living quarters or dwellings; agricultural parks; and open area recreational facilities, including golf courses and golf driving ranges; provided that they are not located within agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B. These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

C) §205-4.5(a)(4)

Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry;

Farm dwelling as used in this paragraph means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling.

D) §205-4.5(c)

Within the agricultural district all lands, with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

E) §205-5(b)

Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance. Other uses may be allowed by special permits issued pursuant to this chapter. The minimum lot size in agricultural districts shall

be determined by each county by zoning ordinance, subdivision ordinance, or other lawful means; provided that the minimum lot size for any agricultural use shall not be less than one acre, except as provided herein. If the county finds that unreasonable economic hardship to the owner or lessee of land cannot otherwise be prevented or where land utilization is improved, the county may allow lot sizes of less than the minimum lot size

as specified by law for lots created by a consolidation of existing lots within an agricultural district and the resubdivision thereof; provided that the consolidation and resubdivision do not result in an increase in the number of lots over the number existing prior to consolidation; and provided further that in no event shall a lot, which is equal to or exceeds the minimum lot size of one acre be less than that minimum after the consolidation and resubdivision action. The county may also allow lot sizes of less than the minimum lot size as specified by law for lots created or used for public, private, and quasi-public utility purposes, and for lots resulting from the subdivision of abandoned roadways and railroad easements.

F) §205-6(a)

The county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition.

G) §205-6(d)

Special permits for land the area of which is greater than fifteen acres shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting such approval, including the adherence to representations made by the applicant.

H) §205-12

The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

2. Hawai'i Administrative Rules:

A) §15-15-23 Permissible uses; generally.

Except as otherwise provided in this chapter, the following land and building uses are compatible and permitted within the following land use districts, except when applicable county ordinances or regulations are more restrictive. Except as otherwise provided in this chapter, uses not expressly permitted are prohibitive.

B) §15-15-25 Permissible uses within the "A" agricultural district.

(a) Permissible uses within agricultural district land classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be those uses set forth in section 205-4.5, HRS.

(b) Permissible uses within the agricultural district land classified by the land study bureau's detailed land classification as overall (master) productivity rating class of C, D, E, and U shall be those uses permitted in A and B lands as set forth in section 205-4.5, HRS, and

also those uses set forth in section 205-2(d), HRS.

C) §15-15-98 Who may petition.

(a) On petition of an interested person, the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission.

(b) Notwithstanding the other provisions of this subchapter, the commission, on its own motion or upon request but without notice of hearing, may issue a declaratory order to terminate a controversy or to remove uncertainty.

D) §15-15-100 Declaratory orders; commission action.

Within ninety days after the receipt of a petition for declaratory order, the commission shall either deny the petition in writing, stating the reasons for the denial, or issue a declaratory order on the matters contained in the petition, or set the matter for hearing, as provided in section 15-15-103 provided that if the matter is set for hearing, the commission shall render its findings and decision within one hundred twenty days after the close of the hearing.

E) §15-15-102 Refusal to issue declaratory order.

The commission, for good cause, may refuse to issue a declaratory order by giving specific reasons for the determination. Without limiting the generality of the foregoing, the commission may so refuse where:

- (1) The question is speculative or purely hypothetical and does not involve existing facts, or facts that can be expected to exist in the near future;
- (2) The petitioner's interest is not of the type that would give the petitioner standing to maintain an action if the petitioner were to seek judicial relief;

- (3) The issuance of the declaratory order may affect the interests of the commission in a litigation that is pending or may reasonably be expected to arise; or
- (4) The matter is not within the jurisdiction of the commission.

F) §15-15-104 Applicability of declaratory order.

An order disposing of a petition shall apply only to the factual situation described in the petition or set forth in the order.

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI`I

In the Matter of the Petition for) DOCKET NO. DR00-23
a Declaratory Order of)
) CERTIFICATE OF SERVICE
THE SIERRA CLUB AND DAVID KIMO)
FRANKEL)
)
For A Declaratory Order Ruling That)
(i) Luxury Housing Developments And)
Hotels Are Not Permissible Uses On)
Agricultural Land; (ii) Landowner/)
Developer Pacific Star, LLC, Must)
Apply For A District Boundary)
Amendment To Develop Its Master-)
Planned Community Because Of The)
Urban-Like Nature, Size, And Scope)
Of The Development; And (iii) The)
County of Hawai`i May Not Grant A)
Special Permit For The Members' Hale)
Because The Members' Hale Is)
Connected To, Interrelated And)
Interdependent On, The Activities)
And Development On The Remaining)
Over 600 Acres)
_____)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Declaratory Order was served upon the following by either hand delivery of depositing the same in the U. S. Postal Service by certified mail:

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DATED: Honolulu, Hawaii, this 25th day of October 2000.



ESTHER UEDA
Executive Officer