

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
STEVEN K. BAKER)
For a Declaratory Order Clarifying)
the Location of the State Land Use)
Urban District Boundary of)
Petitioner's Parcel at Niu, O`ahu,)
TMK 3-7-02: 1)
_____)

DOCKET NO. DR01-24
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.
APR 20 2001 by *Dee Sprunt*
Date Acting Executive Officer

DECLARATORY ORDER

2001 APR 20 P 12:03
LAND USE COMMISSION
STATE OF HAWAII

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

In the Matter of the Petition of) DOCKET NO. DR01-24
)
STEVEN K. BAKER) DECLARATORY ORDER
)
For a Declaratory Order Clarifying)
the Location of the State Land Use)
Urban District Boundary of)
Petitioner's Parcel at Niu, O`ahu,)
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DECLARATORY ORDER

PETITIONER'S INTEREST

Steven K. Baker ("Petitioner") filed a Petition for Declaratory Order, pursuant to sections 15-15-98 and 15-15-22(f), Hawai`i Administrative Rules ("HAR"). Petitioner is the owner in fee simple of land located at 5857 Kalaniana`ole Highway, Honolulu, Hawai`i, and identified as TMK 3-7-02: 1 ("Property"). The Property is located makai of the highway, between Niu Peninsula and Paiko Peninsula, and is a shoreline parcel.

Petitioner filed the instant Petition for Declaratory Order "...to remove uncertainty regarding the location of the Urban District boundary of Petitioner's land."

FINDINGS OF FACT

PROCEDURAL MATTERS

1. On February 20, 2001, Petitioner filed its Petition for Declaratory Order.¹
2. On April 4, 2001, the Office of Planning ("OP") filed its testimony in this matter. The OP stated that accreted lands along the shoreline should be within the Conservation District until reclassified by the Land Use Commission ("Commission") through contested case proceedings. The OP further pointed out that since a decision on the Petition for Declaratory Order may set a precedent in other cases where the designation of accreted land was at issue, the matter should be fully developed and presented to the Commission. The OP noted that although Petitioner's Property experienced accretion over the years, there was no evidence that the process would not reverse itself over time. The OP recommended that Petitioner withdraw the Petition for Declaratory Order and instead file a boundary amendment petition to reclassify the accreted portion of the Property to the Urban District, or in the alternative,

¹ On December 4, 2000, Dean Y. Uchida, Administrator, Land Division, Department of Land and Natural Resources ("DLNR"), submitted a request to the Commission staff for a boundary interpretation of the Property. By letter dated January 8, 2001, the Commission staff advised Mr. Uchida that his request would be held in abeyance until such time as a petition for declaratory order was submitted for the Commission's consideration pursuant to §15-15-22(f), HAR, to determine the location of the district boundary.

that the Commission schedule a hearing on the Petition for Declaratory Order and allow interested parties to intervene.

3. On April 5, 2001, the DLNR filed comments on the Petition for Declaratory Order. The DLNR stated that it disagreed with Petitioner's opinion that the Urban District designation of the Property should extend to the accreted portion. The DLNR's position on the issue of accretion was that State accretion laws, as revised in 1986, "... were intended to protect beaches and shoreline areas for the public, and that this law was inclusive of all accreted lands 'judicially decreed' regardless of when the lands accreted." The DLNR further pointed out that "[t]o conclude that the lands judicially decreed or quite [sic] titled pursuant to Chapter 669 are not zoned Conservation, as required by the Statute, would be contrary to the law, and would potentially undermine the State's ability to protect the State's shoreline areas from improper coastal development." The DLNR believed that if Petitioner sought to have the accreted portion of the Property designated within the Urban District, Petitioner may file a boundary amendment petition with this Commission.

POSITION OF PETITIONER

4. It is the position of Petitioner that the Urban District designation applies to the entire Property, including the accreted portion. Petitioner argues that such a

determination would be consistent with the standards for determining the Urban District boundaries provided under section 205-2(a), Hawai'i Revised Statutes ("HRS"), and section 15-15-18, HAR, and with a reasonable interpretation of this Commission's official map, O-15 (Koko Head).

5. Petitioner states that a declaratory order clarifying the location of the Urban District boundary of the Property to include the accreted portion will remove any uncertainty regarding its designation and clarify Petitioner's property rights.

DESCRIPTION AND BACKGROUND OF THE PROPERTY

6. The Property in question is approximately 33,742 square feet, including approximately 8,480 square feet of accreted land.

7. In 1990, the former owner of the Property successfully quieted title to the approximately 8,480 square feet of accreted land, pursuant to chapter 669, HRS.

8. In 1999, Petitioner purchased the Property with the intention of building his home on it. Petitioner subsequently obtained a certified shoreline determination from the Chairperson of the Board of Land and Natural Resources ("BLNR") and a grading permit and a building permit from the City and County of Honolulu Department of Planning and Permitting for the construction of the residence. The residence

consists of three bedrooms with a detached bale, an open-air dining pavilion on four posts with a roof but no walls.

9. On November 28, 2000, the DLNR issued a Notice and Order ordering Petitioner to stop all work construction within the accreted portion of the Property pending its investigation of an alleged violation of section 183-45, HRS, which prohibited structures, retaining walls, dredging, grading, or other uses on accreted land as judicially decreed under section 501-33 or 669-1(e), HRS, that interfered with the future natural course of the beach, including future accretion or erosion.

10. At the time of the issuance of the Notice and Order, Petitioner's contractor had constructed the framework for the residence, including a bedroom wing but not the roof. This bedroom wing extends onto the accreted portion of the Property by approximately 18 feet.

11. On February 9, 2001, the BLNR permitted Petitioner to complete the bedroom improvements on the accreted portion of the Property, subject to the following six conditions:

- a. The application or landowner shall record a deed covenant (acceptable to the Department and approved by the Department of Land and Natural Resources, Land Division), against the subject property, which essentially prohibits the construction of shore protection on the accreted land, should the accretion commence to erode at

any time during the effective term. Construction shall not commence until the deed restriction is recorded with the Bureau of Conveyances and a copy of the deed restriction is filed with the Department of Land and Natural Resources, Land Division.

- b. The applicant shall file a completed Conservation District Use Application with the Department within one hundred eighty (180) days of the Board's action. The application shall include all improvements constructed on the accreted land. Improvements not constructed but planned on the accreted land may be included in the application.
- c. The Department is under no obligation to approve any constructed or planned improvements on the accreted land and may, with due notice, if the applicant or land owner fails to comply with these conditions, or if the CDUA is denied, order the applicant or landowner to remove the improvements in conformance with Chapters 183c and 183-45, Hawaii Revised Statutes.
- d. Land Division staff shall work with the appropriate entities, including the State Surveyor's and Attorney General's Offices to improve the way coastal landowners gain awareness of the State's accretion laws.
- e. That failure to comply with any of these conditions may render this authorization null and void.
- f. Other terms and conditions as prescribed by the Chairperson.

12. Petitioner states that the accreted portion of the Property has been in existence for more than 30 years, with portions thereof in existence continuously for more than 50 years. Petitioner provided aerial photographs of the Property

taken at various years. Petitioner overlaid historical vegetation lines of the Property based on aerial photographs taken in 1950, 1954, 1963, 1974, 1988, 1993, and 1999 onto a map of the Property to determine the relative changes in shoreline position (Pet. Exhibit 6, Figure 2). The map indicates that the shoreline continuously accreted from 1950-1988, that erosion occurred between 1988 and 1993, and that accretion had returned by 1999. Petitioner states that between 1950 and 1999, the vegetation line immediately fronting the Property moved seaward approximately 59 feet.

13. The Property is part of a residential subdivision created in 1927 as identified on File Plan 279.

14. The Urban District boundary for the Property previously established by the Commission does not clearly indicate whether accreted lands fall within the Urban District or the Conservation District.

15. An aerial photograph of the Property dated November 20, 1963, depicts a shoreline that extends beyond the original boundary of the Property as represented on File Plan 279. Based on a comparison of this shoreline and the Property's original boundary, there is evidence of accretion to the Property prior to the establishment of the Urban District boundary.

16. The shoreline, as represented on the aerial photograph dated November 20, 1963, is located mauka of the seaward boundary of the approximately 8,480-square-foot accreted land subject of the quiet title action.

CONCLUSIONS OF LAW

JURISDICTION

1. Jurisdiction of this Commission to consider the request of Petitioner is authorized under sections 15-15-98 and 15-15-22(f), HAR.

DECLARATORY ORDER

At the Commission's meeting on the Petition for Declaratory Order on April 5, 2001, in Honolulu, Hawai'i, a motion was made and seconded that the State Land Use Urban District boundary of the Property shall be the 1963 shoreline boundary of the Property as it appears on the 1993 aerial photograph (OP Attachment 1B). Petitioner shall prepare and submit to the Commission for its approval a legal description (in metes and bounds) of the Property as it appeared in 1963. OP and DLNR shall be given an opportunity to review the legal description prior to it being submitted to the Commission. Lands located mauka of the 1963 shoreline shall be designated within the State Land Use Urban District. Lands located makai of the 1963 shoreline shall be designated within the State Land Use Conservation District. Following discussion by the

Commission, a vote was taken on this motion. There being a vote tally of 7 ayes, 0 nays, and 2 excused, the motion carried.

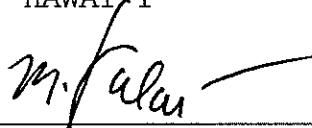
Having duly considered Petitioner's Petition for Declaratory Order, the oral and written arguments presented by Petitioner, OP, and DLNR, and a motion having been made at the Commission's meeting conducted on April 5, 2001, in Honolulu, Hawai'i, and the motion having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motion, this Commission hereby ORDERS as follows:

The State Land Use Urban District makai boundary of the Property shall be the 1963 shoreline as it appears on the 1993 aerial photograph (OP Attachment 1B) attached hereto and incorporated by reference herein as Exhibit "A." Petitioner shall prepare and submit to the Commission for its approval a legal description (in metes and bounds) of the Property as it appeared in 1963 by April 30, 2001. OP and DLNR shall be given an opportunity to review the legal description prior to it being submitted to the Commission. Lands located mauka of the 1963 shoreline of the Property shall be designated within the State Land Use Urban District. Lands located makai of the 1963 shoreline of the Property shall be designated within the State Land Use Conservation District.


ADOPTION OF DECLARATORY ORDER

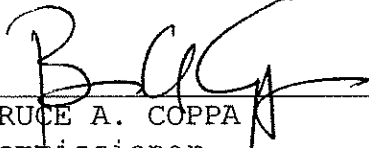
The undersigned Commissioners, being familiar with the record and the proceedings, hereby adopt and approve the foregoing DECLARATORY ORDER this 19th day of April 2001. The DECLARATORY ORDER and its ADOPTION shall take effect upon the date this DECLARATORY ORDER is certified and filed with the Commission.


LAND USE COMMISSION
STATE OF HAWAII

By 
MERLE A. K. KELAI
Chairperson and Commissioner


By (absent)
LAWRENCE N. C. ING
Vice Chairperson and Commissioner

By 
P. ROY CATALANI
Commissioner

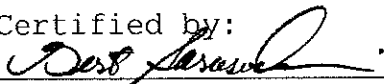
By 
BRUCE A. COPPA
Commissioner

By 
PRAMINI DESAI
Commissioner

By (absent)
ISAAC FIESTA, JR.
Commissioner

By 
M. CASEY JARMAN
Commissioner

Filed and effective on
April 20, 2001

Certified by:

Acting Executive Officer

By (absent)
STANLEY ROEHRIG
Commissioner

By (recused)
PETER YUKIMURA
Commissioner

1993 Aerial Photo

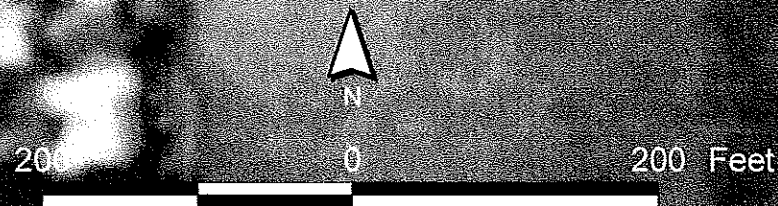
Kalaniana'ole Hwy

TMK: 3-7-02:01

House Site Plan



LUC Docket No. DR 01-24
Steven K. Baker
Niu Valley, Oahu



- Shoreline Year
- 1950
 - 1954
 - 1963
 - 1974
 - 1988
 - 1993
 - 1999

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.

Exhibit "A"

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STEVEN K. BAKER) CERTIFICATE OF SERVICE
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For a Declaratory Order Clarifying)
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Petitioner's Parcel at Niu, O'ahu,)
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_____)

CERTIFICATE OF SERVICE

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

DEL. DAVID W. BLANE, Director
Office of Planning
P. O. Box 2359
Honolulu, Hawaii 96804-2359

CERT. MR. RANDALL K. FUJIKI, Director
Department of Planning and Permitting
City and County of Honolulu
650 South King Street
Honolulu, HI 96813

CERT. ROY A. VITOUSEK III, ESQ., Attorneys for Petitioner
GRACE NIHEI KIDO, ESQ.
Cades Schutte Fleming & Wright
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, this 20th day of April 2001.



BERT SARUWATARI
Acting Executive Officer