

ORIGINAL

OFFICE OF PLANNING
STATE OF HAWAII
Leiopapa a Kamehameha, Room 600
235 South Beretania Street
Honolulu, Hawaii 96813
Telephone: (808) 587-2846
Facsimile: (808) 587-2824

LAND USE COMMISSION
STATE OF HAWAII
2016 SEP 30 A 9:48

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A81-525
)	
Y-O LIMITED PARTNERSHIP	)	OFFICE OF PLANNING'S
	)	MEMORANDUM IN PARTIAL
To Amend the Land Use District Boundary	)	OPPOSITION TO PETITIONER'S
of Approximately 408.719 Acres of Land	)	MOTION FOR AN ORDER
from the Agricultural District into the Urban	)	REGARDING SATISFACTION OF
District at Kaloko and Kohanaiki, North	)	AFFORDABLE HOUSING CONDITON,
Kona, Island of Hawaii, State of Hawai'i,	)	SUPPLEMENTAL MEMORANDUM IN
Tax Map Key Nos.: 7-3-09: 19, 20, 32, and	)	SUPPORT OF MOTION FOR AN
57 to 62.	)	ORDER REGARDING SATISFACTION
	)	OF AFFORDABLE HOUSING
	)	CONDITION, AND SECOND
	)	SUPPLEMENTAL MEMORANDUM IN
	)	SUPPORT OF MOTION FOR AN
	)	ORDER REGARDING SATISFACTION
	)	OF AFFORDABLE HOUSING
	)	CONDITION; CERTIFICATE OF
	)	SERVICE

OFFICE OF PLANNING'S MEMORANDUM
IN PARTIAL OPPOSITION TO PETITIONER'S MOTION FOR
AN ORDER REGARDING SATISFACTION OF AFFORDABLE HOUSING CONDITION,
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR
AN ORDER REGARDING SATISFACTION OF AFFORDABLE HOUSING CONDITION,
AND SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR AN
ORDER REGARDING SATISFACTION OF AFFORDABLE HOUSING CONDITION

The Office of Planning, State of Hawaii ("OP"), pursuant to Hawaii Administrative Rules
("HAR") § 15-15-70(e), submits this Memorandum in Partial Opposition to Petitioner Y-O

Limited Partnership's ("Petitioner") Motion For An Order Regarding Satisfaction of Affordable Housing Condition; Memorandum in Support of Motion, filed on July 19, 2016 ("Motion"), Supplemental Memorandum in Support of Motion of An Order Regarding Satisfaction of Affordable Housing Condition, filed on September 1, 2016 ("Supplemental Memorandum"), and Second Supplemental Memorandum in Support of Motion For An Order Regarding Satisfaction of Affordable Housing Condition, filed September 27, 2016 ("Second Supplemental Memorandum").

I. INTRODUCTION

Petitioner is requesting the Land Use Commission ("LUC") to provide assurances that Petitioner's proposed donation of a 10.775 acre parcel of land to the Hawaii Island Community Development Corporation ("HICDC"), a Hawaii nonprofit corporation, for the development of affordable housing units, "will provide an acceptable step towards satisfying" the requirements of Condition 1 of the LUC's Findings of Fact, Conclusions of Law, and Decision and Order, dated January 20, 1983 ("D&O"). Condition 1 requires the Petitioner to provide 10% of the lots or houses and lots for sale to low and moderate income residents. Petitioner also requests amendments to Condition 1, including a statement that Petitioner may provide some or all of the affordable housing units in cooperation with HICDC.

The Supplemental Memorandum states that the HICDC, with the assistance of the County of Hawaii Office of Housing and Community Development ("OHCD"), will develop at least 80 units, to be rented or sold as affordable units toward satisfaction of Condition 1. The Motion and Supplemental Memorandum includes an Affordable Housing Agreement between RCFC Kaloko Heights, LLC, ("RCFC"), successor-in-interest to Petitioner, and HICDC (Petitioner's Exhibit A), and an Agreement between HICDC and OHCD (Petitioner's Exhibit B).

Additionally, Petitioner requests that the LUC permit Petitioner to apply any excess number of affordable units by HICDC to Petitioner's affordable housing obligation under Phase II of the Petitioner's development plan.

II. BACKGROUND

On January 20, 1983, under the D&O, the LUC approved the reclassification of land from the State Agricultural District to the Urban District at Kaloko and Kohanaiki, North Kona, for a two-phased residential subdivision, each phase consisting of three increments. Phase I comprises 213.473 acres, and Phase II comprises 195.246 acres. Petitioner has been granted five time extensions by the LUC for Increment II of Phase I. The most recent extension established a deadline of January 20, 2023. The most recent proposal includes a total of 770 housing units, 459 single-family dwellings, and 311 multi-family units.

The HICDC proposal is for the development of approximately 80 affordable units for rent and/or sale. The Petitioner also requests that the LUC allow the Petitioner to apply the excess number of affordable units toward the affordable housing requirement of Phase II of the Petition.

The Petition is subject to six conditions of approval under the D&O. The subject Condition 1 of the D&O, which has been amended twice previously, currently reads as follows:

Petitioner shall provide housing opportunities for low and moderate income residents by offering for sale, on a preferential basis, on its own or in cooperation with both the Housing Finance and Development Corporation and the County of Hawaii, ten per cent (10%) of the lots or houses and lots to be developed on the subject property, to residents of the State of Hawaii of low and moderate family income as determined by the Hawaii Finance and Development Corporation and the County of Hawaii from time to time. The preferential lots or houses and lots shall be offered for sale at prices not exceeding prices that enable such purchasers to qualify for and obtain state- assisted financing (e.g., Hula Mae) or federally-insured or assisted financing (e.g., FHA Section 245 Program) intended to encourage home ownership by low and moderate income families.

Petitioner's proposed amended Condition 1 as provided in its Second Supplemental Memorandum reads as follows:

Petitioner shall provide housing opportunities for low and moderate income residents, by offering for sale or rental on a preferential basis, on its own or in cooperation with both the Hawaii Housing Finance and Development Corporation ("HHFDC") and the County of Hawaii, ten per cent (10%) of the lots or houses and lots to be developed in the Petition Area, to residents of the State of Hawaii of low and moderate family income as determined by HHFDC and the County of Hawaii Office of Housing and Community Development ("OHCD") from time to time (the "Affordable Housing Requirement"). The preferential lots, houses and lots and rental units (the "Affordable Units"), shall be offered for sale or rent at prices or rents not exceeding prices or rents (Affordable Prices") that enable such purchasers and renters to qualify for and obtain state-assisted financing (e.g., Hula Mae) or federally-insured or assisted financing (e.g., FHA Section 245 Program) intended to encourage home ownership by low and moderate income families, or that provide affordable rental housing opportunities to such families. Petitioner may provide some or all of the Affordable Units through development in the Petition Area in cooperation with Hawaii Island Community Development Corporation, a Hawaii nonprofit corporation ("HICDC").

The 10.775 acre parcel of land Petitioner proposes to donate to HICDC in satisfaction of Condition 1 is said to be a subdivided lot within the Petition Area with access to an improved street and sufficient water credits and water storage for development of at least 80 units.

III. DISCUSSION

A. OP Partially Opposes Petitioner's Proposed Amendments to Condition 1.

Petitioner's proposed amendments to Condition 1 essentially does the following: (1) makes technical, non-substantive changes; (2) allows Petitioner to provide rental, in addition to the sale, of affordable lots or housing units; and (3) states that Petitioner may provide some or all of the affordable units "in cooperation" with HICDC.

OP does not oppose the proposed technical, non-substantive amendments to Condition 1, except for Petitioner's proposed addition of "(the \"Affordable Housing Requirement\")", "(the \"Affordable Units\")", and "(\"Affordable Prices\")", which are unnecessary.

OP does not oppose the proposed rental, in addition to sale, of affordable lots or housing units by Petitioner under Condition 1. This proposed amendment broadens the range of affordable housing opportunities for moderate and low income residents who may often times be in a better financial position to rent rather than buy housing. OP notes that the current mandatory affordable housing condition for district boundary amendments under HAR §15-15-90(e)(7)¹ allows for both the sale and rental of affordable housing opportunities to residents.

OP opposes the Petitioner's proposed amendment to Condition 1 that allows Petitioner to provide some or all of the affordable lots or housing units in cooperation with HICDC for two reasons. First, the amendment is unnecessary as Petitioner is currently not restricted from working with a developer such as HICDC to provide the affordable lots and/or housing units.

Secondly, OP believes the additional language is a means for Petitioner to shift the responsibility of providing the affordable lots or housing units to HICDC. Petitioner perhaps hopes the donation of the 10.775 acre parcel to HICDC qualifies as sufficient "cooperation" with HICDC toward satisfaction of Condition 1, thereby releasing Petitioner from any further obligations under Condition 1. OP therefore proposes the deletion of the last sentence of Petitioner's proposed amendments to Condition 1.

¹ HAR §15-15-90(e)(7), which is the current mandatory condition of district boundary amendments states, "Petitioner shall provide affordable housing opportunities for low, low-moderate, and moderate income residents of the State of Hawai'i to the satisfaction of the respective county in which the land to which the boundary amendment applies is located. The respective county shall consult with the Hawai'i housing finance and development corporation prior to its approval of the petitioner's affordable housing plan. The location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between the petitioner and the respective county."

OP proposes an additional sentence to Condition 1 stating "This affordable housing condition shall be implemented to the satisfaction of OHCD," to reflect the current mandatory requirement under HAR §15-15-90(e)(7), and to provide the County, which is already tasked with executing and monitoring affordable housing policies, the opportunity to ensure affordable housing requirements and expectations meet applicable and appropriate standards.

B. OP Opposes the LUC Providing Assurances on Petitioner's Proposal.

Along with the proposed amendments to Condition 1, Petitioner is requesting that the LUC provide "assurances" that its proposal to donate the 10.775 acre parcel to HICDC is "an acceptable step towards satisfying" Condition 1. OP opposes the LUC providing "assurances" to Petitioner for two reasons: (1) it is unnecessary and premature for the LUC to weigh in on the progress and direction of the Petitioner's efforts in fulfilling Condition 1; and (2) OP objects to the donation of the 10.775 acre parcel alone as fulfilling Petitioner's obligation in satisfying Condition 1.

1. It is Unnecessary and Premature for the LUC to Provide Assurances to the Petitioner.

Clearly beyond its statutory duties, the LUC should not be tasked with micromanaging the steps of district boundary amendment projects. Providing such assurances could set a bad precedent for petitioners and unnecessarily and unduly add to the LUC's docket. The LUC should reserve any and all judgments and "assurances" on the satisfaction of a condition until the Petitioner enters a motion to delete the condition as satisfied pursuant to HAR §15-15-94 (Modification or deletion of conditions or orders). Additionally, Petitioner's request for assurances is more appropriately a request for a declaratory order under HAR Subchapter 14 (HAR §15-15-98 through §15-15-104.1), through which the LUC may terminate a controversy or remove uncertainty with regard to a decision and order.

2. OP Objects to the Donation of the 10.775 Acre Parcel as Satisfaction of Condition 1.

While Petitioner states it is only asking for "assurances" from the LUC that the donation of the 10.775 acre parcel "will provide an acceptable step towards satisfying the Affordable Housing Condition", OP believes Petitioner is essentially asking whether the donation of the 10.775 acre parcel satisfies Petitioner's obligations under Condition 1. OP opposes the satisfaction of Condition 1 merely through the donation of the 10.775 acre parcel for two reasons: (1) the donation of 10.775 acres is not equivalent to "affordable lots or houses and lots"; and (2) deeming Condition 1 satisfied eliminates any assurances to the LUC that the affordable units or lots will be rented or sold to low and moderate income residents.

a. The Donation of 10.775 Acres Is Not the Equivalent of Affordable Lots or Housing Units.

The donation of the 10.775 acre parcel falls short of meeting the intent of Condition 1 to require Petitioner to provide affordable lots or units for sale to moderate and low income residents. While Petitioner states that the parcel comes with water credits and storage for 80 units and infrastructure, the 10.775 acre parcel is far from the affordable lots or units envisioned or expected by the LUC. Findings of Fact ("FOF") of the D&O indicate that the affordable lots and units were not intended to merely be a single parcel of raw land with minimal improvements and facilities.

FOF #11 described the Petitioner's "proposed development program" by breaking down the original total of 1,433 residential "lots-units" as 289 single family residential lots-units with 15,000 sq. ft. lots, 432 single family residential lots-units with 10,000 sq. ft. lots, and 432 single family residential lots-units with 7,500 sq. ft. lots. FOF #13 stated further, "The Petitioner's proposed sales price for single family residential house and lot packages ranges between \$90,000

and \$150,000. The Petitioner intends to sell lots to purchasers who do not desire to purchase house and lot packages. The sales prices for the lots are as follows: \$58,500 for a 15,000 square foot lot, \$48,500 for a 10,000 square foot lot and \$43,500 for a 7,500 square foot lot." FOFs #11 and #13 provide context to Condition 1 to demonstrate that the affordable lots and units to be sold by Petitioner should at the very least be divided into individual lots ready for sale to low and moderate income residents.

Based on the information provided by Petitioner, the 10.775 acre parcel does not meet the standard of affordable lots or units contemplated by the LUC in the FOFs and Condition 1 of the D&O, and should therefore not be considered in satisfaction of Condition 1.

b. Satisfaction of Condition 1 Would Remove Assurances to the LUC the Affordable Lots/Units Will Be Built.

Should the LUC deem Condition 1 satisfied merely by Petitioner's donation of the 10.775 acre parcel to HICDC, and prior to the lots or units being built and ready for sale, the LUC will have eliminated its ability to ensure that the affordable lots or houses will ever be sold or rented to low and moderate income residents. A satisfaction of condition will extinguish the LUC's ability to require compliance of the Petitioner through an order to show cause why the Petition area should not revert to its former land use classification due to a failure to perform according to conditions imposed, pursuant to HAR §15-15-93 (Enforcement of conditions, representation, or commitments).

Petitioner may argue that the Affordable Housing Agreement (Petitioner's Exhibit A) between RCFC and HICDC, and the Agreement (Petitioner's Exhibit B) between HICDC and OHCD will ensure the development of 80 affordable units. However, both agreements are not within the realm or jurisdiction of the LUC. In fact, HICDC could fail to build the affordable housing, upon which according to Petitioner's Exhibit B, HICDC must convey

the parcel to OHCD, who may subsequently fail to build the affordable units. And yet, the LUC would not have the direct enforcement power over OHCD or HICDC to fulfill the affordable housing condition. Even if Condition 1 runs with the land to HICDC and OHCD, the threat of reversion of the 10.775 acre parcel to its former land use classification would likely be of far less consequence or loss to HICDC and OHCD as compared to the Petitioner.

C. OP Opposes Any Excess Number of Affordable Units Toward Petitioner's Obligation Under Phase II.

Petitioner is requesting that the LUC permit Petitioner to apply any excess number of affordable units by HICDC to Petitioner's affordable housing obligation for Phase II. OP opposes this arrangement as inequitably in favor of Petitioner who merely donates the 10.775 acre parcel to HICDC, while receiving full build out of the 80 affordable units and receiving excess affordable housing credits from HICDC.

IV. CONCLUSION

Based on the foregoing, OP recommends the following: (1) Approval of Petitioner's request to amend Condition 1 to allow the rental, in addition to the sale, of lots or houses and lots to be developed on the subject property to low and moderate income residents, and non-substantive, technical amending language; (2) Denial of Petitioner's request to amend Condition 1 with the addition of the last sentence stating the allowance of HICDC in cooperation with the Petitioner to provide some or all of the affordable units; (3) Inclusion of OP's suggested amended language to Condition 1 -- "This affordable housing condition shall be implemented to the satisfaction of OHCD."; (4) Denial of Petitioner's request for assurances from the LUC that the donation of the 10.775 acre parcel to HICDC to build the 80 affordable units will provide an acceptable step towards or means of satisfying Condition 1; and (5) Denial of Petitioner's request

that Petitioner be permitted to apply any excess number of affordable units by HICDC to
Petitioner's affordable housing obligation for Phase II.

For clarity, OP provides the following amended Condition 1 that includes all of OP's
recommended amendments:

Petitioner shall provide housing opportunities for low and moderate income residents, by offering for sale or rental on a preferential basis, on its own or in cooperation with both the Hawaii Housing Finance and Development Corporation ("HHFDC") and the County of Hawaii, ten per cent (10%) of the lots or houses and lots to be developed in the Petition Area, to residents of the State of Hawaii of low and moderate family income as determined by HHFDC and the County of Hawaii Office of Housing and Community Development ("OHCD") from time to time. The preferential lots, houses and lots and rental units, shall be offered for sale or rent at prices or rents not exceeding prices or rents that enable such purchasers and renters to qualify for and obtain state-assisted financing (e.g., Hula Mae) or federally-insured or assisted financing (e.g., FHA Section 245 Program) intended to encourage home ownership by low and moderate income families, or that provide affordable rental housing opportunities to such families. This affordable housing condition shall be implemented to the satisfaction of OHCD.

DATED: Honolulu, Hawaii, September 30, 2016.

OFFICE OF PLANNING
STATE OF HAWAII



LEO R. ASUNCION
Director

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

LAND USE COMMISSION
STATE OF HAWAII
2016 SEP 30 A 9:48

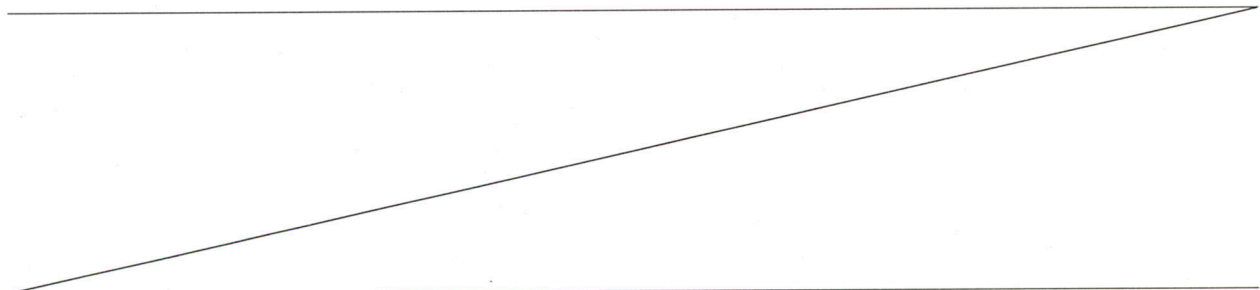
In the Matter of the Petition of	)	DOCKET NO. A81-525
)	
Y-O LIMITED PARTNERSHIP	)	CERTIFICATE OF SERVICE
)	
To Amend the Land Use District Boundary)	
of Approximately 408.719 Acres of Land)	
from the Agricultural District into the Urban)	
District at Kaloko and Kohanaiki, North)	
Kona, Island of Hawaii, State of Hawaii,)	
Tax Map Key Nos.: 7-3-09: 19, 20, 32, and)	
57 to 62.)	

CERTIFICATE OF SERVICE

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

WILLIAM W.L. YUEN
SARAH CHADWICK COCKE
1001 Bishop Street, Suite 1800
Honolulu, Hawaii 96813

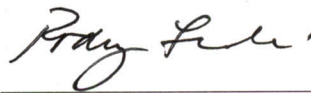
WILLIAM V. BRILHANTE, JR.
Assistant Corporation Counsel
Office of the Corporation Counsel
County of Hawaii
101 Aupuni Street, Unit 325
Hilo, Hawaii 96720



DUANE KANUHA, DIRECTOR
Planning Department
County of Hawaii
101 Pauahi Street, Suite 3
Hilo, Hawaii 96720

DATED: Honolulu, Hawaii, September 30, 2016.

OFFICE OF PLANNING
STATE OF HAWAII

Per 

LEO R. ASUNCION
Director