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PU'UNOA HOMEOWNERS ASSOCIATION, INC. and
DEVONNE LANE

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

IN THE MATTER OF To issue a declaratory order that the proposed construction of a homeless encampment and commercial campground on 7.9 Acres of a 22.7 Acre Parcel Located at Hokiokio Place and Lahaina Bypass Road at Maui Tax Map Key No. (2) 4-7-003:031 (POR), Lahaina, Maui, Hawaii in the agricultural district requires a boundary amendment.	DOCKET NO. DR 15-54 **POSITION STATEMENT CONCERNING AND OPPOSITION TO CONSIDERATION OF RESCISSION OF FEBRUARY 24, 2016 LUC DECISION ON PETITION FOR DECLARATORY ORDER; EXHIBIT "A"; CERTIFICATE OF SERVICE**

POSITION STATEMENT CONCERNING AND OPPOSITION TO RESCISSION OF FEBRUARY 24, 2016 LUC DECISION ON PETITION FOR A DECLARATORY ORDER

PU'UNOA HOMEOWNERS ASSOCIATION, INC., and DEVONNE LANE, an individual and as a member of the Pu'unoa Homeowners Association, Inc., as interested persons, file this Position Statement Concerning and Opposition to the April 20, 2016 Agenda Item V to

consider rescission of February 24, 2016 Land Use Commission ("LUC") Decision on Petition for a Declaratory Order, for the following reasons:

I. NOTHING NEW HAS OCCURRED, EXCEPT THE APPEAL OF THE LUC'S DECLARATORY ORDER

The LUC's Decision on Pu'unoa Homeowners Association, Inc. and DeVonne Lane's (hereinafter referred to jointly as "Pu'unoa") Petition for a Declaratory Order was heard on February 24, 2016 at which time the Commission voted 6-1 to grant the petition. At the same meeting, the LUC voted to deny Ho'omoana's Motion to Intervene.[1] The Order on these decisions was issued on March 3, 2016. On March 29, 2016, Ho'omoana Foundation appealed the Order Denying Ho'omoana Foundation's Petition to Intervene to the Second Circuit Court.

The argument made on appeal is not "new" and was already addressed by existing, current and more relevant case law Petitioner brought to the LUC's attention before February 24, 2016. After the presentation by Pu'unoa on February 24, 2016, the Chair provided Ho'omoana the opportunity to state its position. Ho'omoana responded in part as follows:

> "...And we think that while there is two ways you could do this, the appropriate way for this type of project is through the Special Use Permit process."

Transcript of proceedings, p. 59, l. 1-3. Ho'omoana had also presented a position statement dated February 17, 2016 directly responding to the petition, as well as a motion to intervene, filed on February 19, 2016 before the hearing. Ho'omoana argued its facts and applicable law and failed to address the 1990 case referenced in Pu'unoa's own filings until the appeal was filed, but that doesn't change the reality that the case is old and was already considered by reference to the newer statutes and cases. Thus, Ho'omoana failed, on three separate occasions,

[1] Ho'omoana appealed the denial of its motion to intervene, apparently seeking contested case status before the LUC; however, it successfully opposed Pu'unoa's Motion to Intervene before the Maui Planning Commission to prevent contested case status at that level.

to voice any objections before the LUC made its decision as to what it might consider other or "new" information after being given the opportunity to do so.

In the appeal, Ho'omoana finds its voice and raises a 1990 case that *predates* the Save Sunset Beach Coalition v. City and County of Honolulu, 102 Haw. 465, 78 P. 3d 1 (2003) case cited by Pu'unoa in its Petition, and which 1990 case also predates revisions to HRS §204.5. The "new" case cited by Ho'omoana, Malama Maha'ulepu v. Land Use Commission, 71 Haw. 332, 790 P. 2d 906 (1990), stated that under HRS §205-6 a planning commission may permit unusual and reasonable uses that **promote** the effectiveness and objectives of Chapter 205 by a special use permit. The Court noted that it believed it could conform the seemingly contradictory provisions of HRS §§205-2 and 205-4.5(6) concerning golf courses and the special use permit process.

After this case, in 2005, the legislature made clear its intent to prohibit golf courses, and by implication, the use of special use permits to get around the HRS §205-4.5 statutory prohibitions, by adding a section (d). HRS §205-4.5 (d) reads as follows:

> Notwithstanding any other provision of this chapter to the contrary, golf courses and golf driving ranges approved by a county before July 1, 2005, for development within the agricultural district shall be permitted uses within the agricultural district.

Thus, the legislature clearly stated that the prohibitions do not apply for golf courses that predate the 2005 amendment only.

Save Sunset Beach, supra, referenced in Pu'unoa's Petition for a Declaratory Order, does acknowledge and address the Maha'ulepu case, not for its interpretation of HRS §§204.5 and 205-6, even though it interprets those sections, but for a completely different (and in this case irrelevant) principal and issue. The Court stated:

> However, we observe that the "reasonable and unusual" exception permitted by HRS §205–6 cannot be utilized to circumvent the essential purpose of the agricultural district. In Curtis, 90 Hawai'i at 397, 978 P. 2d at 835, this court held that the "essential purpose [of HRS § 205 -6] ...is to provide landowners relief in exceptional situations where the use desired would not change the essential character of the district nor be inconsistent therewith."

Similarly, the Land Use Commission has previously addressed the issue of overnight camps on agricultural land:

> The enacting statute, HRS Chapter 205, is very clear in prohibiting "overnight camps" as provided in HRS §205-4.5(6), "...but not including dragstrips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs and overnight camps. (emphasis added).
>
> ...HRS Chapter 205 does not expressly or by implication allow agricultural district lands to be used to accommodate overnight camps or dwellings where there is no apparent evidence of any activity for uses related to farming or animal husbandry.

In the Matter of Pono, Declaratory Order, August 6, 1997[2], Docket No. DR97-20, pp. 12 – 13, 14. This decision was also *after* the Maha'ulepu case. The vague, possible agricultural use, which will in the future only be accessory to the tent encampment, one that transient campers may, or may not, actually ever participate in and proposed by Ho'omoana to justify its commercial long stay campground, is much like the proposed optional agricultural uses in *Save Sunset Beach* – proposals that are inserted simply to try and avoid the disclosure of the real nature of the project and to avoid the appropriate permitting or applicable boundary amendment process.

In this instance Pu'unoa has asked the LUC for a Declaratory Order that a district boundary amendment is required for a number of reasons, not singly because of the express prohibitions stated in HRS §205 -4.5.

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[2] This order was later overruled for Sunshine law violations, but not on the substance of the declaratory ruling.

The Declaratory Order should stand based on the amendment to HRS §205 -4.5 by adding section (d) and the Save Sunset Beach case, but also for the original reasons stated in the Petition, reiterated below.

II. THE PARCEL EXCEEDS 15 ACRES, IS NOT A PERMITTED OR ACCESSORY USE, AND IS CONTRARY TO STATE, COUNTY AND COMMUNITY LONG-TERM PLANNING

The project is described as being 7.9 acres of a larger 22.68 acre agricultural site, consisting of a 2 acre campground while reserving 5.9 acres of adjacent agricultural field for possible future uses for the encampment residents. Future agricultural productivity is not a guaranteed or required for the campers. The parcel is over 15 acres, and should require a district boundary amendment before the LUC as a result. Under HRS §205-3.1(a) for land areas that are greater than 15 acres, the LUC is the body that must decide the district boundary amendment. In Ho'omoana's application it refers to the whole parcel as being part of its plan – 2 acres of actual campground and 20 acres of "gardening" area in conjunction therewith. Puunoa has been told by the Maui Planning Commission that this application has not been amended. In the original application at 6, Description of Use, p. 3, section (c) Ho'omoana states: "Small gardens are both therapeutic and productive for the campers. There will be a 20 acres of the 22 of the property that may be used for gardening." See Exhibit "A" attached hereto. Further possible references to agricultural activity are addressed as passing lip service, seemingly intended for the sole purpose of uttering the correct key or magic words to keep the project within the designated use.

Besides being designated as agricultural under the State's Land Study Bureau's Detailed Land Classification System ("B"), the property is designated as agricultural land by the West Maui Community Plan and the Maui County 2030 General Plan recently released. It is not

designated urban or conservation and it is not appropriate to exclude the community from the planning process at this time.

III. THIS SPECIAL USE PERMIT IS AN ATTEMPT TO CURRY SPECIAL TREATEMENT AND PLAY UPON EMOTIONS

It is clear that the attempt to gain permission for a use prohibited by HRS 205-4.5(6) (overnight camping) and equally prohibited by Maui County Code 19.04.040 (definition of camping unit), is nothing more than an attempt to avoid the rules and laws to rezone this property. Why would the applicant do this? Allowing urban uses here might open the door for support of an overall change in the zoning of this property (which runs along the Lahaina Bypass and is thus clearly visible to traffic, increasing its value as a commercial property). Puamana has submitted an email dated Jan. 5, 2016 where Mr. Scott Naganuma communicated with Peter Martin and was told that Mr. Martin thought he would apply for a zoning change for the property – obviously for the whole lot of 22.7 acres. This is just the first step in that plan.

In Save Sunset Beach, supra, the court examined a rezoning of 765 acres from agricultural use to a country district designation. In its review, the Court discussed the interplay among county zoning ordinances, permitted uses and statutorily defined uses, and found

> In Hawaii's land use system the legislature's statutory districts constitute more of a general scheme, and, presumably, by delegating authority to zone to the counties, the legislature intended that specific zoning be enacted at the county level. We believe that the "consistency doctrine" enunciated in [*Gatri v. Blane*, 88 Hawaii 108, 962 P.2d 367 (1998)] is somewhat instructive in the instant case. Because the uses allowed in country zoning, are prohibited from conflicting with the uses allowed in a State agricultural district, only a more restricted use as between the two is authorized. By adopting a duel land use designation approach, the legislature envisioned that the counties would enact zoning ordinances that were somewhat different from, but not inconsistent with, the statutes.

Id. at p. 482.

It is clear that an attempt to change the use to a commercial one is what is desired, even from Ho'omoana's own words. The application at issue requests permission for a commercial and transient campground, but in its opposition to Pu'unoa's application, only the transient hot-button homeless issue is discussed at all, and that is stated to be "temporary." In its Position Statement on Request for Declaratory Relief filed in February 2016, Ho'omoana states at pp. 2 and 3:

> If allowed to intervene, the Foundation will take the position that a district boundary amendment is not required in connection with the project to establish a temporary campground on agricultural land. ...
>
> ...this is a situation in which a lessee is proposing to conduct a use on agricultural land which, while not specifically permitted by statute, is so closely related to a permitted use as to be permissible on a temporary basis.

And on p. 4 of Ho'omoana's Petition to Intervene, Ho'omoana states:

> It is anticipated by the Foundation that the users of the campground will be among the functionally homeless population in West Maui.

In this manner, Ho'omoana tries to mask the spot zoning by couching its application as "temporary" and as "for the functionally homeless" rather than a conversion to a commercial use, with paying campers, completely unrelated to any permitted use. If this is a use to be allowed by the planning authorities, it should properly proceed to and be reviewed as a district boundary amendment, which is what is appropriate for this project.

IV. A DISTRICT BOUNDARY AMENDMENT IS CALLED FOR UNDER HRS §205–3.01(C)

The second way that the LUC may review this is under HRS §205-3.1(c) which allows the counties to determine district boundary amendments for land areas under 15 acres PROVIDED THAT SUCH USES ARE CONSISTENT WITH CHAPTER 205. The proposed uses are not consistent with the chapter, and Ho'omoana's application, as a result, should be before the LUC. As previously stated, the subject land is rated as Class B and this application is

not a permitted use under HRS 205-4.5 nor a permitted or approved accessory use under the Maui County Code.

The State Office of Planning, in its position statement notes that Ho'omoana proposes to build a "farm dwelling" as a residence for the camp manager, thus providing office space for the camp. It's a building, but not a "farm dwelling." Again, all Ho'omoana says in its application is that if the campground proves successful some of the land may, in the future, serve as accessory agricultural purposes. The State Office of Planning notes that the Dept. of Agriculture says it lacks information on this proposed, possible future agricultural use. That's because Ho'omoana doesn't even know if it will actually ever do any agricultural activity in association with this project. They don't know if they will be promoting agriculture or not. It is not simply enough to have an unrelated agricultural use (the horse pasturing) on another part of the property and say see, we have an agricultural use somewhere on the property; Ho'omoana is supposed to show that the proposed use will promote agriculture. This application is not consistent with Ch. 205. The State Office of Planning says that due to the minimal size of the project and incorporation of agriculture into the project, which may never happen, a district boundary amendment is not required. Ho'omona has made it clear that no agricultural use may ever happen and the State Office of Planning did not have the information that the proposed urban use was a domino set to fall; the applicant was looking to change the zoning and this is the necessary first step in avoidance of the LUC and the appropriate public avenue to change standing long-term planning. For these reasons there is no reason to rescind the Declaratory Order in place.

DATED: Wailuku, Maui, Hawaii, APR 15 2016.

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(6)

DESCRIPTION OF PROPOSED USE

EXHIBIT "A"

A. BACKGROUND

Property Information

The proposed Kauaula Campgrounds site is located along Hokiokio Place adjacent to the Lahaina By-Pass, in Maui, Hawaii and is identified by Tax Map Key (2) 4-7-003:031. The property is owned by Kauaula Land LLC and Ho`omoana is the applicant.

The project site is roughly two acres and is part of the roughly rectangular parcel, which is approximately 22.68 acres in area. Preliminary approval was granted by the County of Maui on November 21, 2006 for an almost identical proposal in a different location. The project site comprises the lot on the proposed location. .

The initial project site is approximately 2.0 acres in size and if successful, may use the additional 20 acreage for diversified agricultural cultivation.

Project Need

In Lahaina there is no access to campsites. South of Lahaina, there is camping in Olowalu. Due, in large part, to the absence of permitted campgrounds in the area, individuals seeking recreational and domestic campsites are left to find alternate means of habitation. Many of the campers are homeless and lack the financial resources to secure permanent housing.

Since there are two needs, it is anticipated that the proposed Kauaula Campground will contain a diverse mix of commercial campers and transient population. Through careful management oversight of the campground and strict adherence to campground rules, the two (2) populations may coexist harmoniously.

Project Overview

The applicant proposes to develop a commercial campground in addition to a farm dwelling at the site. A summary of the components of the site is described below. The campground intends to start with eight campers the first year and when phased up, not to exceed 26 campers. Each annual phase will increase by 8 campers until the intended maximum of 26 is reached. Since with will be a mix of commercial and local individuals, we intend to start slowly to ensure smooth growth.

a. **Commercial Campground**

The commercial campground will initially contain 8 camping pods, separated by landscaped shrubbery for privacy. The campground area will also contain 2

restroom facilities with community showers and toilets and a location for common trash collection. In addition, recognizing many campers do not own a vehicle, 20 parking stalls will be provided onsite for campground use and an area for safely locking bikes/moped will be provided. The driveway, parking stalls, and landscape will reflect ZAED (County code 19.36A) requirements. The proposed campground will be the principal use of the parcel and up to 18 more pods will be added as the site proves it is feasible for a total of 26 pods and a total of 80 possible campers.

b. **Farm Dwelling**

Operation and oversight of the commercial campground will require the presence of an onsite manager. The campground manager will take residence in the dwelling constructed on the north entrance of the site. In addition to the dwelling, the manager's portion of the property will contain a barn, two (2) visitor parking spaces, and a yard. Farm dwelling will also serve as an office for the camp manager

c. **Agriculture Area**

Small gardens are both therapeutic and productive for the campers. There will be a 20 acres of the 22 of the property that may be used for gardening. This agricultural area is consistent with the agricultural and open space uses to the north and will provide a buffer between these areas and the commercial campgrounds. Another purpose of the farming area is to provide a means for campers to work to pay for rental of their campsites through the maintenance of small-scale gardens and other agricultural pursuits. The decisions on what to grow will be a community decision aided by local volunteers who host successful gardens in the area. All equipment will be stored in a small shed purchased from Home Depot.

Infrastructure

Infrastructure elements provided onsite are described below.

a. Electricity will be supplied by MECO using existing overhead power lines and tied to the existing power grid system to provide on-site utilities. Once the project proves sustainable, we will consider developing off-grid or may eventually be provided by Maui Electric Company via an existing overhead electrical distribution system. The existing overhead utility lines are located along the Puunoa Subdivision near the project site.

b. Potable and non-potable water will be supplied by the Launiupoko Water Company and the Launiupoko Irrigation Company. Non-potable water will be priced at

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served upon the following parties, at their last known address indicated below, by depositing a copy with the U.S. Postal Service, First Class Mail, postage prepaid, on April 15, 2016.

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