

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
WAIHEE OCEANFRONT HAWAII, INC.,)
a Hawaii corporation)
)
To Amend the Land Use District)
Boundary of Certain Lands Situated at)
Waihe'e, Island of Maui, State of Hawaii,)
Consisting of Approximately 105.64 Acres)
from the Agriculture to the Urban District)
and Approximately 22.64 Acres from the)
Urban to the Conservation District; Tax)
Map Key Nos.: 3-2-10: por.01, 3-2-12:)
por.01 and 3-2-13: por.10)
)
)
_____)

DOCKET NO. A89-650

WAIHE'E OCEANFRONT
HAWAII, INC., a Hawaii
corporation

ORDER TO PARTIALLY RESCIND AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION AND 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.

MAY 10 2004

Date

Anthony J. King
Executive Officer

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ORDER TO PARTIALLY RESCIND AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION AND ORDER

WAIHE'E OCEANFRONT HAWAII, INC., a Hawaii corporation,

(hereinafter "Petitioner"), filed a Petition on December 1, 1989, and amendments to the Petition on January 29, 1990, March 19, 1990, May 3, 1990, June 7, 1990, and June 18, 1990 (collectively referred to as the "Petition"), pursuant to Chapter 205, Hawaii Revised Statutes ("HRS"), as amended, and Title 15, Subtitle 3, Chapter 15, Hawaii Administrative Rules, as amended (hereinafter "Land Use Commission Rules"), to amend the Land Use District Boundary to reclassify approximately 105.648 acres of land from the Agricultural Land Use District to the Urban Land Use District, and

approximately 26.456 acres from the Urban Land Use District to the Conservation Land Use District, situate at Waihe'e, Wailuku, Island and County of Maui, State of Hawaii, identified as Tax Map Key Nos.: 3-2-10: portion of 001, 3-2-12: portion of 001, and 3-2-13: portion of 010, to develop an 18-hole golf course, clubhouse, pool, tennis courts, and other related facilities.

The Land Use Commission (hereinafter "Commission") entered FINDINGS OF FACT, CONCLUSIONS OF LAW, AND (a) DECISION AND ORDER in this Docket No. A89-650 on November 20, 1990 ("ORDER"). That ORDER reclassified Maui Tax Map Key Nos. 3-2-10: portion of 1, 3-2-12: portion of 1, and 3-2-13: portion of 10, approximately 98.922 acres, from the Agricultural ("A") District to the Urban ("U") District, and reclassified Maui Tax Map Key No. 3-2-10: portion of 1, approximately 26.456 acres, from the Urban ("U") District to the Conservation ("C") District, (collectively referred to as the "Property"), was subject to 28 conditions.

The Commission entered AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND (a) DECISION AND ORDER on June 3, 1991 ("ORDER #2), as the result of the Petitioner's Motion to Amend and Modify Findings of Fact, Conclusions of Law and Decision and Order, submitted on April 8, 1991. ORDER #2 amended condition number 7 concerning the sand dunes; modified condition number 18 by adding certain historic sites to be preserved and by requiring additional archaeological testing of the sand dunes; modified condition 21 by adding historic sites

on which the Petitioner was to undertake data recovery; adding a new condition 23, requiring an on-site archaeologist during grubbing and grading activities and to provide mitigation; and renumbered conditions 23, 24, 25, 26, 27a, 27b and 28, to 24, 25, 26, 27, 28a, 28b and 29, respectively.

The Commission entered its ORDER GRANTING MOTION TO AMEND AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED ON JUNE 3, 1991, on December 17, 1993 ("ORDER #3"). ORDER #3 amended conditions 9, 13, 19 and 25, so that condition 9 requires annual reports; condition 13 requires connection with the County sewer system or a temporary private system until County capacity is available; condition 19 requires a preservation plan prior to publication of the notice of the SMA hearing; and condition number 25 requires annual reports to be provided to the Intervener.

The Commission entered its ORDER AMENDING ORDER GRANTING MOTION TO AMEND AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED ON JUNE 3, 1991, on January 6, 1994 (ORDER #4"). ORDER #4 made a correction by stating that condition 25 is not amended, but rather condition 26 is amended requiring annual reports to the Intervener. The foregoing Orders are collectively referred to as the "Prior Orders".

In May 1991, Petitioner filed its application with the County of Maui for project district (Phase 1) approval of its golf course development. On December 8, 1992,

the Maui County Council enacted Ordinance No. 2202 adopting Project District 4 for the golf course project.

In April 1993, Petitioner filed its applications with the Maui County Planning Department for a special management area (SMA) use permit and for project district (Phase II) approval for the golf course within the Property. A hearing was held on the applications before the Maui County Planning Commission on November 10, 1994 and intervention status was granted to several petitioners. A hearing officer has been appointed but no evidentiary hearings have been scheduled although there has been extensive discovery and several pre-hearing conferences.

The Petitioner had been engaged in negotiations with the County of Maui for the acquisition of all or a majority of the Property. However, those negotiations did not result in the County's acquisition of any portion of the Property. Moreover, Petitioner had stayed prosecution of its pending project district and SMA applications to allow these negotiations to come to some conclusion.

On February 4, 2004, Petitioner filed its MOTION FOR AN ORDER TO RESCIND AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER, on which a hearing was held on February 20, 2004 and continued, and on March 10, 2004, the Petitioner filed its AMENDED MOTION FOR AN ORDER TO PARTIALLY RESCIND AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER ("Amended Motion").

In its Amended Motion the Petitioner seeks a partial rescission of the Prior Orders entered in this proceeding but did not request the reversion of the 26.456-acre portion (Parcel B) of the Property within the State Land Use Conservation District to its former Urban Land Use District classification.

Petitioner no longer intends to develop the property as a private golf course and has specifically requested the deletion of all conditions imposed by the Commission and the return of all payments made by Petitioner to the fund for management of the conservation easement pursuant to condition 9 of the Prior Orders.

Petitioner has stated its intent to convey the petition area or property to certain Buyers, namely the MAUI COASTAL LAND TRUST ("TRUST") a charitable non-profit organization, and the DOWLING COMPANY ("DOWLING"), a Hawaii corporation. In the Amended Motion, Petitioner alternatively requested the retention within the Urban District of the parcel it proposes to sell to DOWLING for the development of a single-family residential subdivision for the Department of Hawaiian Home Lands of the State of Hawaii ("DHHL").

The Commission having heard and examined the testimony, evidence, and arguments presented during the hearings on February 20, 2004 and on March 19, 2004, does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACTS

PROCEDURAL MATTERS

1. Petitioner filed its Petition for a Land Use District Boundary Amendment on December 1, 1989, and motions for amendments to Petition on January 29, March 19, May 3, June 7, and June 18, 1990, on February 4, 2004 and on March 10, 2004.
2. Petitioner is Waihe'e Oceanfront Hawaii, Inc., a Hawaii corporation, whose business and mailing address is 72-3890 Hawaii Belt Road, Kailua-Kona, Hawaii 96740.
3. The County of Maui Department of Planning (hereinafter "County"), has stated its position to be in support of the Amended Motion.
4. The Office of State Planning (hereinafter "OP") has stated its position to be one of "no opposition" to the Amended Motion.
5. Intervenor Bert Sakata testified in favor of the Amended Motion.
6. The Property or Petition Area consists of approximately 132.124 acres on three contiguous parcels of land.
7. The Property or Petition Area is a portion of Petitioner's overall holdings at Waihe'e consisting of approximately 313.224 acres of land.
8. The Property's land use classification pursuant to the Commission's Prior Orders by tax map key designation and acreage:

<u>Tax Map Keys</u>	<u>Acres</u>	<u>District From</u>	<u>Reclassification to</u>	<u>Parcel</u>
3-2-10:por. 001, 3-2-12:por. 001 & 3-2-13:por. 010	98.922	Agricultural	Urban	A
3-2-10:por. 001	<u>26.456</u>	Urban	Conservation	B
Total	125.378			

9. The overall property's acreage and designation by tax map key and current land use designations including lands not within the Petitioner Area are as follows:

<u>Tax Map Keys</u>	<u>Acres</u>	<u>Land Use District Classification</u>
3-2-10:001	247.123	Urban, Agricultural, Conservation
3-2-10:002	3.470	Agricultural
3-2-12: por. 001	35.931	Urban, Conservation
3-2-13:010	<u>26.700</u>	Agricultural, Conservation
Total	313.224	

10. The 313.224-acre overall lands of Petitioner surrounds the makai half of the Waihe'e Village Urban District, together with the Kahekili Highway which forms its southwestern boundary. The ocean and the Conservation District lands along the shoreline form the entire makai and northeastern boundary of the Property. To the north is the Waihee Stream, the Waihee Valley rural district, and a small amount of acreage within Urban District. A macadamia nut tree farm within the Agricultural

District and the County of Maui's municipal golf course which is within the Conservation District is to the east of the Property.

11. The Petitioner no longer intends to develop its private golf course project although it has made cash payments of approximately \$1,000,000.00 to date into a fund for the management and restoration of the conservation easement pursuant to Condition No. 9 of the Prior Orders as well as completed a number of scientific studies and investigations of the petition area to mitigate the anticipated impact of original project.

12. The 26.456-acre portion of the sand dunes found on Parcel B is an important biological, cultural and scenic resource on the island of Maui that should be retained in the State Land Use Conservation District.

13. In light of Petitioner's intent to abandon its original proposal to develop the Property for a private golf course project, the need for Condition No. 9 and the other mitigating conditions of the Prior Orders no longer exists.

THE NEW USES OF THE LANDS

14. The Petitioner has recently concluded negotiations for the TRUST to purchase 277.459 acres of Petitioner's lands, including most of the Property, to create a natural area preserve (the "Waihe'e Preserve").

15. The Petitioner has also successfully concluded negotiations with DOWLING to purchase a 35.64-acre portion (Tax Map Key No. 3-2-12:001) of the Property for development of a residential subdivision for the DHHL.

16. The Petitioner has entered into a PURCHASE AND SALE AGREEMENT with the TRUST, the Effective Date being October 10, 2003, for the sale of Tax Map Key No. 3-2-10-1 (approximately 247.009 acres), Tax Map Key No. 3-2-10-2 (approximately 3.47 acres), and Tax Map Key No. 3-2-13-10 (approximately 26.98 acres), all of which were formerly included in the golf course project proposed by the Petitioner and described in the Petition, Findings, Conclusions, Decisions and Order filed during the proceedings in Docket A89-650.

17. The sale of these lands to the TRUST is set to close no later than April 10, 2004.

18. The TRUST will complete its purchase of the Waihe'e Preserve with grants from the U.S. Fish and Wildlife Service ("FWS") and the County of Maui which funds were recently made available for the subject transaction.

19. The entire portion of the Property purchased from Petitioner by the TRUST will be placed in a Conservation Easement in perpetuity.

20. The Waihe'e Preserve will be owned and managed by the TRUST, which manages, controls or holds in trust other coastal lands on the island of Maui.

21. The TRUST is a 501(c)(3) non-profit Land Trust whose express mission is "to acquire, preserve and protect the coastal lands of Maui Nui for the benefit of the natural environment and of current and future generations".

22. The TRUST is buying these lands, which includes most of the Property, to preserve, protect and restore the natural resources found there as perpetual stewards of these lands.

23. A Representative of the TRUST appeared and provided the Commission with a summary of the Trust's vision and plans for the Waihe'e Preserve at the hearings on this Motion.

24. The Petitioner also signed an AGREEMENT OF PURCHASE AND SALE with DOWLING, or its assignee, on December 29, 2003, for the sale of Tax Map Key No. 3-2-12:001 consisting of approximately 35.64 acres.

25. The sale to DOWLING is set to close on or before May 29, 2004.

26. DOWLING is a Hawaii corporation that proposes to develop single-family house lots for the DHHL and will secure additional land use approvals if required for the DHHL project.

27. DOWLING has developed other residential subdivisions for the DHHL on the island of Maui that required the developer to enter into a development agreement providing amongst other provisions, that construction and development standards meeting with the approval of the DHHL shall be identified and maintained

by DOWLING before any work can commence on its single-family residential subdivisions.

28. A representative of the Dowling Company testified that it is DOWLING's intent, as set out in its purchase agreement with Petitioner, to develop the subject parcel as a DHHL residential subdivision.

29. The DOWLING representative gave additional testimony on his Company's past developments for the DHHL and about the need to keep the costs of this DHHL development affordable for qualifying beneficiaries of the Hawaiian Homelands trust by minimizing land use requirements for such projects.

30. The DOWLING representative gave testimony that DHHL wants to commence and complete construction on this 35.64-acre parcel as soon as possible, to provide affordable housing for Native Hawaiian families while interest rates are low.

31. While the AMENDED MOTION had requested a reversion of the Urban land use classification for the 35.64-acre parcel to its prior Agricultural land use classification, it also provided an alternative to keep this parcel within the Urban District for the purpose of facilitating its development as a DHHL residential subdivision.

32. The Petitioner's representative also testified in support of retaining this parcel within the State Land Use Urban District as long as it is developed as a single-family residential subdivision pursuant to an agreement with the DHHL.

33. The deletion of the golf course development and the creation of the Waihe'e Preserve owned and managed by the TRUST will resolve many of the environmental and cultural concerns, and eliminate the need for the establishment of the fund to manage the conservation easement.

34. The sale of the Waihe'e Preserve to the TRUST is expressly conditioned on the return of all monies paid into the fund by Petitioner to date, pursuant to Condition No. 9 of the Prior Orders. However, the representatives of Petitioner and the TRUST did not object to the imposition of new conditions requiring: that copies of recorded deeds evidencing the transfer of lands be provided to the Commission within 60 days of closing; that within 30 days of the execution of a conservation easement in perpetuity for those portions of the Property being purchased by the TRUST a copy of the easement be provided to the Commission; and that biennial reports are provided to the Commission, the Office of Planning and the County of Maui until the TRUST has executed the abovementioned conservation easement.

35. The sale of the 35.64-acre parcel to DOWLING is expressly conditioned on the deletion of all conditions of the Prior Orders to that portion of the Property it intends to develop for a DHHL residential subdivision. However, the representatives of Petitioner and DOWLING did not object to the imposition of new conditions requiring: that copies of recorded deeds be provided to the Commission

showing the transfer of ownership of the parcel in the Petition Area within 60 days of closing; that within 30 days of entering into a development agreement with the DHHL, copies of such an agreement be provided to the Commission; that there shall be no use or development on the subject parcel other than for a residential development pursuant to a development agreement with the DHHL and in accordance with all applicable state, county and federal laws; and that biennial reports be provided to the Commission, Office of Planning and the County of Maui Planning Department until the residential subdivision has been completed to the satisfaction of the DHHL.

36. Notice of the Motion was provided to the State Office of Hawaiian Affairs, the Waihee Community Association and to the parties pursuant to Condition No. 29 of the Prior Orders.

Any conclusion 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.

RULING ON PROPOSED FINDINGS OF FACT

Any of the proposed findings of fact submitted by Petitioner or the other parties to this proceeding not already ruled upon by the Commission by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

CONCLUSIONS OF LAW

Pursuant to Chapter 205 of the Hawaii Revised Statutes, as amended, and the Hawaii Land Use Commission Rules, the Commission finds by a preponderance of the evidence that the partial reclassification of the Property, consisting of approximately 63.282 acres (98.922 less 35.64 acres) of land situate at Waihe'e, Wailuku, Island and County of Maui, State of Hawaii, identified as Tax Map Key Nos. 3-2-10: portion of 1 and 3-2-13: portion of 10, from the State Land Use Agricultural District to the Urban District should be rescinded and that property should revert to the Agricultural District.

DECISION AND ORDER

IT IS HEREBY ORDERED that: (1) the portion of the Property, consisting of approximately 63.282 acres (98.922 less 35.64 acres) of land situate at Waihe'e, Wailuku, Island and County of Maui, State of Hawaii, identified as Tax Map Key Nos. 3-2-10: portion of 1 and 3-2-13: portion of 10, shall be and is hereby rescinded from the State Land Use Urban District, and that property should revert to the Agricultural District, and the State land use district boundaries shall be amended accordingly; (2) the approximately 26.456 acres of land situated at Waihe'e, Wailuku, Island and County of Maui, State of Hawaii, identified as Tax Map Key No. 3-2-10: portion of 1, classified within the State Land Use Conservation District shall remain in the Conservation District; and (3) the 35.64 acres of land situate at Waihe'e, Wailuku, Island and County

of Maui, State of Hawaii, identified as Tax Map Key No. 3-2-12: 1 classified within the State Land Use Urban District shall remain in the Urban District.

Based upon the findings of fact and conclusions of law stated herein, it is hereby determined that the rescission of the Petition Area from the State Land Use Urban District to the Agricultural District will not significantly affect or impair the preservation or maintenance of natural systems and habitats or the valued cultural, historical, agricultural, and natural resources of the area.

IT IS HEREBY FURTHER ORDERED that the 29 conditions as they apply to the approximately 63.282 acres of land situate at Waihe'e, Wailuku, Island and County of Maui, State of Hawaii, identified as Tax Map Key Nos. 3-2-10: portion of 1 and 3-2-13: portion of 10, rescinded from the State Land Use Urban District to the State Land Use Agricultural District and the approximately 26.456 acres of land situated at Waihe'e, Wailuku, Island and County of Maui, State of Hawaii, identified as Tax Map Key No. 3-2-10: portion of 1, classified within the State Land Use Conservation District are hereby deleted and replaced by the following conditions.

A. The funds held in the Bank of Hawaii account required by Condition No. 9 of the Prior Orders will be released as soon as possible to the Petitioner.

B. The Petitioner shall provide recorded deeds to the Commission evidencing the transfer of ownership for these parcels in the Petition Area to the TRUST within 60 days of closing.

C. Within 30 days of the execution of a conservation easement in perpetuity for these parcels by the TRUST, which has been reviewed by the Department of Land and Natural Resources, a copy of the executed easement shall be provided to the Commission.

D. Petitioner and/or its Successors shall provide biennial reports to the Commission, the Office of Planning and the County of Maui Planning Department until the TRUST has executed a conservation easement, which has been reviewed by the Department of Land and Natural Resources. The report shall be in a form prescribed by the Executive Officer of the Commission.

IT IS HEREBY FURTHER ORDERED that the 29 conditions, except for no. 12, 13, 16, 21 (as it relates to data recovery for site no. 2461), 22, and 23 as they apply to the 35.64 acres of land situate at Waihe'e, Wailuku, Island and County of Maui, State of Hawaii, identified as Tax Map Key No. 3-2-12: 1 classified within the State Land Use Urban District are hereby deleted and replaced by the following conditions.

1. The Petitioner shall provide recorded deeds to the Commission evidencing the transfer of ownership for the parcel in the Petition Area to DOWLING within 60 days of closing.

2. Within 30 days of entering into a development agreement with the Department of Hawaiian Home Lands for that parcel, DOWLING or any other

developer shall provide the Commission with a fully executed copy of such development agreement.

3. There shall be no use or development of the subject property being purchased by DOWLING, by DOWLING or any other developer other than for a residential development pursuant to a development agreement with the Department of Hawaiian Home Lands and approved by the Department of Hawaiian Home Lands and in accordance with all applicable State, County and federal laws.

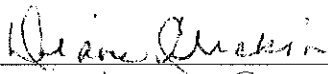
4. Petitioner and/or any Successors shall provide biennial reports to the Commission, the Office of Planning and the County of Maui Planning Department until DOWLING and/or any other developer has completed the residential subdivision pursuant to any development agreement executed with the Department of Hawaiian Home Lands. The report shall be in a form prescribed by the Executive Officer of the Commission.

ADOPTION OF ORDER

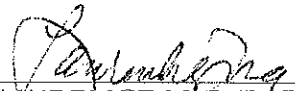
The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER the 6th day of May, 2004. This ORDER and its ADOPTION shall take effect upon the date this ORDER is certified and filed by this Commission.

Done at Makena, Maui, Hawai'i, the 6th day of May, 2004,
per motion on May 6,, 2004.

APPROVED AS TO FORM

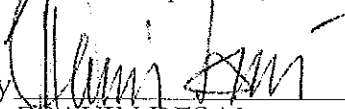

Deputy Attorney General

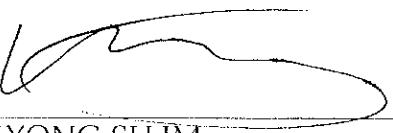
LAND USE COMMISSION
STATE OF HAWAII

By 
LAWRENCE N.C. JNG
Chairperson and Commissioner

By absent
P. ROY CATALANI
Vice-Chairperson and Commissioner

By 
BRUCE A. COPPA
Vice-Chairperson and Commissioner

By 
PRAVIN DESAI
Commissioner

By 
KYONG-SU IM
Commissioner


By absent
ISAAC FIESTA, JR.
Commissioner

By absent
STEVEN LEE MONTGOMERY
Commissioner

Filed and effective on
MAY 10 2004

Certified by:


ANTHONY CHING

By 
RANDALL F. SAKUMOTO
Commissioner

By 
PETER YUKIMURA
Commissioner

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order To Partially Rescind Amended Findings of Fact, Conclusions of Law and Decision and Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

DEL. MARY LOU KOBAYASHI
 Office of Planning
 P. O. Box 2359
 Honolulu, Hawaii 96804-2359

CERT. JOHN CHANG, Esq.
 Deputy Attorney General
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