



LAND USE COMMISSION  
STATE OF HAWAII

2018 DEC -3 P 2:02

BEFORE THE LAND USE COMMISSION  
STATE OF HAWAII

In the matter of the Petition of

HALE MUA PROPERTIES, LLC

To Amend the Land Use District  
Boundary of Certain Lands Situated at  
Waiehu, Island of Maui, State of Hawai'i,  
Consisting of 240.087 Acres from the  
Agriculture and Rural Districts to the  
Urban District, Tax Map Key No. 3-3-  
002:001 (portion)

DOCKET NO. A05-755

ORDER TO SHOW CAUSE; EXHIBIT  
"A"; CERTIFICATE OF SERVICE

**ORDER TO SHOW CAUSE**

**AND**

**CERTIFICATE OF SERVICE**

This is to certify that this is a true and correct  
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State Land Use Commission, Honolulu, Hawai'i

12/03/2018 by

Executive Officer



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FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
DECISION AND ORDER REVERTING  
THE PETITION AREA; EXHIBIT "A";  
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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND**

**DECISION AND ORDER REVERTING THE PETITION AREA**

**FINDINGS OF FACT**

**General Background**

1. On August 23, 2005, the Maui County Council adopted Resolution No. 05-123, approving the 201G-118<sup>1</sup>, Hawai'i Revised Statutes ("HRS") application for the Project which granted exemptions from the Maui County Code, including exemptions from obtaining a change in zoning and community plan amendments to enable subdivision approval.

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<sup>1</sup> The State's affordable housing provision has since been recodified as 201H-118, HRS.

2. The County did not support a portion of the subsequently proposed reclassification before the Land Use Commission: specifically, the proposed 19 large-estate lots into the Urban or Rural District.
3. The LUC, on February 12, 2007, approved the reclassification of 117+ acres from Agricultural to Urban and denied 120+ acres. The project as approved called for: development of 209 market rate housing units and 238 affordable housing units, 77 of which were required to be constructed within 5 years of the D&O; no `ohana units allowed; fair-share contributions or construction of necessary infrastructure for schools, roads, water, sewer, and drainage. The LUC's Decision and Order ("D&O") was subject to 25 conditions; of those Conditions 1, 3, 5, 18, 19, and 24 had a time of performance specified.
4. The LUC, on August 16, 2007, approved Petitioner's Motion to Amend the caption and acreage figures in Findings of Fact ("FOF") 102, 103, 242; Conclusions of Law ("COL2") and the first, second, and third paragraphs of the D&O based on Petitioner's filed metes and bounds descriptions of reclassified area (filed April 20, 2007). This was intended to address Condition 18.
5. The LUC, on January 31, 2008, approved Petitioner's Motion to Amend Condition 5 regarding the time frame to submit and get approval of a revised TIAR with DOT filed on August 10, 2007; requesting an additional 90 days. The original calculated deadline was by July 12, 2007. However, the Amended D&O for this motion incorrectly stated the original deadline to be August 12, 2007. The approved Amended D&O extended a new deadline to November 12, 2007.

6. The LUC, on January 31, 2008, received Petitioner's Declaration of Conditions for review prior to their filing with the State Bureau of Conveyances ("BOC"). The LUC informed the Petitioner by letter that we do not review and approve these declarations; that they should file with the BOC and provide us with a copy. To date there has been no information provided by Petitioner as to compliance with Condition 24.
7. Petitioner's first annual report was filed on February 15, 2008. No other annual reports filed to date since the first one. The February 2008 Annual Report provided the then status of time-sensitive conditions.
8. Successor Petitioner filed a Notice of Change to Ownership Interests on February 25, 2013. The new owner was identified as Southwest 7 LLC. The entity was incorporated in Delaware but identified elsewhere as a Colorado corporation.
9. In April of 2018, LUC staff made contact with Southwest 7 LLC (which is owned by the Estate of Robert Cooper) and was informed that they were represented by Thomas Millspaugh of Venable LLP. We were informed by Mr. Millspaugh that Mr. Cooper had passed away and the principal beneficiary of his estate is his wife, Ms. Kaitlin Cooper, and their primary advisor is Mr. Jack Pund.
10. Subsequent correspondence from Mr. Millspaugh stated that a Mr. Murray Smith would represent Southwest 7 LLC as their agent.
11. Southwest 7 LLC is the fee owner of a portion of the land affected by the LUC's D&O. Southwest 7 LLC came into ownership through a foreclosure action filed in 2011 against a Mr. Sterling Kim and Hale Mua Properties.
12. Southwest 7 LLC is aware of the conditions set forth in the D&O but is not in a position to proceed with development.

13. Southwest 7 LLC has been trying to sell the property but has been unsuccessful. The reasons he cited were: conditions attached to current plan are financially infeasible, that the plan encompasses a larger area than under the owner's control, and availability of utilities for the planned density is questionable.
14. On April 13, 2018, the Commission mailed notice for Southwest 7 LLC to appear and provide a status report at the Commission's May 9, 2018 meeting.
15. On April 18, 2018, the Commission mailed additional correspondence to Southwest 7 LLC to clarify their appearance at the Commission's May 9, 2018 meeting.
16. On May 1, 2018, the Commission mailed an agenda and notice to the Statewide and Maui mailing lists announcing the May 9, 2018 meeting in Kahului, Maui.
17. On May 2, 2018, the Commission received correspondence from Petitioner Southwest 7 LLC representative Mr. Murray Smith.
18. On May 9, 2018, the Commission held a status hearing in Kahului, Maui. Mr. Murray Smith attended as a representative of the current Petitioner – Southwest 7 LLC. Michael Hopper, Esq. and Jeffrey Dack represented the County of Maui; and, Dawn Apuna, Esq. represented the State Office of Planning. There was no oral or written public testimony.
19. Mr. Smith stated Southwest 7 has attempted to sell the property since 2012 but no one was interested due clouded title issues that might preclude clear title and ability to get title insurance.
20. Mr. Smith confirmed that it was the landowner's intention not to comply with conditions or develop the land as proposed but to sell the land.

21. Mr. Smith acknowledged that an Environmental Assessment (“EA”) was completed and accepted over ten years ago and that either an amended EA or a new Environmental Impact Statement (“EIS”) would need to be done to address changes due to time.
22. Mr. Smith, under questions from the Commission, agrees that the landowner is not in compliance with conditions of approval and has not substantially commenced use of the property.
23. On May 9, 2018, the Commission by motion, found a reason to believe that Petitioner had failed to perform according to conditions imposed and representations and commitments made to the Commission in obtaining reclassification of the Petition Area and there has not been substantial commencement of use of the land. The Commission directed that an Order to Show Cause be issued, the matter scheduled for hearing, and served upon the Petitioner notice of the hearing to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.
24. On May 29, 2018, the Commission received e-mail correspondence from Petitioner’s representative, Mr. Murray Smith, indicating the Mr. Chris Brown would be representing Cooper Trust on his behalf.
25. On May 30, the Commission received e-mail correspondence from Petitioner’s representative Thomas Millspaugh that Randall Sakumoto, Esq. and Scott MacKinnon would be representing Cooper Trust/Southwest 7 LLC.
26. On June 4, 2018, the Commission filed an Order to Show Cause upon the Petitioner and other parties and set the matter for hearing on July 25, 2018 in Maui.

27. On June 5, 2018, the Commission mailed Notice and Exhibit A which had been omitted from June 4, 2018 mailout.
28. On June 8, 2018, the Commission received Southwest 7 LLC's ("Petitioner") Notice of Appearance of Counsel for Petitioner Southwest 7 LLC, and Certificate of Service.
29. On July 10, 2018, the County of Maui emailed and filed a Position Statement on the Order to Show Cause. The County supports reversion of the Petition Area stating that most conditions have not been fulfilled, construction has never been initiated, and there has not been substantial compliance with representations made.
30. On July 16, 2018, the Commission mailed an agenda and notice to the Statewide and Maui mailing lists announcing the July 25, 2018 meeting in Kahului, Maui.
31. On July 18, 2018, the successor Petitioner (Southwest 7, LLC) filed a Position Statement on the Order to Show Cause. Southwest does not oppose a reversion of the Reclassified Area.
32. On July 19, 2018, the Office of Planning (OP) filed a Position Statement stating no objection to reversion of the Reclassified Area. OP provided information on non-compliance with Conditions 3, 5, 6, 7, 11, and 19; and stated that non-fulfillment of these conditions demonstrate Petitioner's failure to develop in substantial compliance with representations made.
33. On July 19, 2018, Petitioner, the County of Maui, and OP, filed a Stipulation stating no objection to a motion incorporating the order to show cause and reverting the Reclassified Area to its former "Agricultural" district classification. The parties also agreed to waive procedural requirements of Chapters 91 and 205, HRS, and Chapter 15-



- 15, HAR; thereby allowing the Commission to proceed with the disposition of the request.
34. On July 24, 2018, the Commission received an original signature page of Kristin Tarnstrom, Esq. the deputy corporation counsel for County of Maui Planning Department on the Stipulation of Parties.
35. On July 24, 2018, the Commission received OP's Exhibits A to D.
36. On July 25, 2018, the Commission held a hearing in Kahului, Maui to hear the Order to Show Cause. The meeting was cancelled due to lack of quorum and rescheduled to September 13, 2018.
37. On August 30, 2018, the Commission received Petitioner's Supplemental Position on Order to Show Cause.
38. On September 4, 2018, the Commission mailed and e-mailed the agenda and notice to all parties and the Statewide and Maui mailing lists for the September 13, 2018 meeting in Kahului, Maui.
39. On September 10, 2018, the Commission received correspondence from Maui County Department of Housing and Human Concerns ("DHHC"). DHHC provided general support for all affordable housing and asked for the Commission's favorable consideration of the project.
40. On September 13, 2018, the Commission held its hearing in Kahului Maui to hear the Order to Show Cause. The Commission received at its hearing: maps from Petitioner; and, informational handouts from Mr. Sterling Kim. Randall Sakumoto, Esq. and Murray Smith represented Petitioner – Southwest 7 LLC. David Galazin, Esq. and Michele McLean represented the County of Maui, Department of Planning, and Dawn Apuna,

- Esq. and Lorene Maki represented the Office of Planning. The Commission received public testimony from the following individuals: Joyclynn Costa and Henry Kaholokula.
41. On September 13, 2018, Mr. Sterling Kim identified himself as a representative of Hale Mua Properties LLC, and requested that organization be made a party to the proceedings. Representatives for the Petitioner, County of Maui, and Office of Planning stated no objection for Hale Mua Properties LLC being recognized as a party to the proceedings. The Commission then made and passed a motion including Hale Mua Properties LLC as a party.
42. On September 13, 2018, the Commission received oral argument by the parties, including their positions on the stipulated agreement to revert the property due to non-compliance with conditions of the Decision and Order and that there has been no substantial commencement of use of the land.
43. The Chair confirmed that the commissioners had each reviewed the records and transcripts for all meetings and were prepared to deliberate on the subject matter. A motion was made and seconded to revert the property to the original land use classification due to a failure to complete any of the conditions outlined in the parties' stipulation and a lack of commencement of use of the land.

#### CONCLUSIONS OF LAW

1. Any of the proposed findings of fact submitted by Petitioner or any other party not already ruled upon by the Commission by adoption, or rejected by clearly contrary findings of fact, are hereby denied and rejected. Any conclusions of law herein improperly designated as a finding of fact should be deemed and construed as a

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

2. The Commission has the authority to revert a Petition Area to its original land use classification for failure to comply with the conditions imposed by the Commission. Lana'i Co. Inc. v. Land Use Commission, 105 Hawai'i 296, 318 (Haw. 2004), and HRS Section 205-4(g).
3. Under the facts and circumstances of this case, Petitioners have failed to satisfy Condition 1 and have failed to substantially comply with representations made to the Commission, in violation of Condition 13.
4. Under the facts and circumstances of this case, reversion of the Petition Area to its original agricultural classification does not violate any applicable rule or statutory provisions, including Hawai'i Administrative Rules (HAR) subchapter 7 of Chapter 15-15, and HRS Chapters 91, 92, and 205.
5. The Commission does not rule upon questions of constitutional law.
6. Under the facts and circumstances of this case, reversion of the Petition Area to its original agricultural classification for violation of conditions of approval and lack of substantial commencement of use of the land is warranted pursuant to HRS Section 205-4(g).

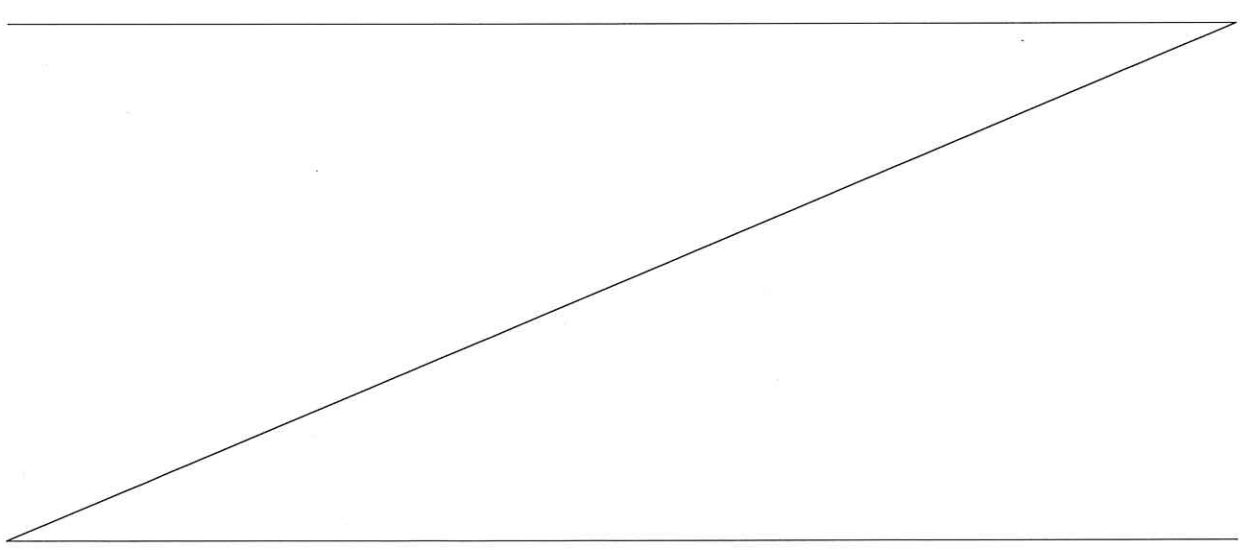
#### ORDER

This Commission, having duly considered the written reports, pleadings, and oral and written statements and testimony, and oral arguments of the parties, and a motion having been made and seconded at a hearing on September 13, 2018, in Kahului, Maui, and the

motion having received the affirmative votes required by HAR §15-15-13, and there being good cause for the motion,

HEREBY ORDERS:

1. The Petitioner, the Office of Planning, and the County have jointly stipulated to an agreement with the reversion.
2. The Intervener, Sterling Kim, has failed to show cause why the Petition Area should not revert to its prior land use classification.
3. The Petition Area of approximately 240.087 acres of land consisting of Tax Map Key No. 3-3-002:001 (portion), is therefore reverted to the Agricultural District.
4. In compliance with Hawai'i Administrative Rules § 15-15-93(e), the February 12, 2007 Decision and Order, as amended, is further amended to incorporate the order to show cause and to include the reversion of the Petition Area to its former land use classification; including the cancellation and release of all conditions imposed by that certain 2007 Decision and Order.



ADOPTION OF PROPOSED ORDER

The undersigned Chairperson and Commissioner, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 3rd day of December, 2018. This ORDER may be executed in counterparts.

Done at Maui, Hawai'i, this 3rd day of December, 2018,  
per motion on September 13, 2018.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAII

Randall S. Aishiyama  
Deputy Attorney General

By   
JONATHAN LIKEKE SCHEUER  
Chairperson and Commissioner

Filed and effective on:

12/03/18

Certified by:

  
DANIEL E. ORODENKER  
Executive Officer

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Rural Districts to the Urban District, Tax  
Map Key No. 3-3-002:001 (portion)

CERTIFICATE OF SERVICE

I hereby certify that a certified copy of the ORDER TO SHOW CAUSE, was served upon the following by depositing the same in the U. S. Postal Service by registered or certified mail as noted:

DEL. LEO ASUNCION, Director  
Office of Planning  
P. O. Box 2359  
Honolulu, Hawai'i 96804-2359

DEL. DAWN TAKEUCHI APUNA, Esq.  
Deputy Attorney General  
425 Queen Street  
Honolulu, Hawai'i 96813  
Attorney for State Office of Planning

MAIL. MICHELE CHOUTEAU McLEAN, Director  
County of Maui  
Planning Department  
2200 Main Street  
One Main Plaza, Suite 315  
Wailuku, Hawai'i 96793

- MAIL. PATRICK K. WONG, Esq.  
Department of Corporation Counsel  
200 South High Street, room 322  
Wailuku, Hawai'i 96793  
Attorney for County of Maui  
DEPARTMENT OF PLANNING
- CERT. RANDALL SAKUMOTO, Esq.  
McCorriston Miller Mukai MacKinnon LLP  
P.O. Box 2800  
Honolulu, Hawai'i 96803-2800  
Attorney for Petitioner  
Southwest 7, LLC
- CERT. MURRAY M. SMITH, P.E.  
CHRIS BROWN  
JLP & Associates/Southwest 7 LLC  
P.O. Box 11255  
Lāhainā, Hawai'i 96761  
Designated Representatives of Southwest 7, LLC
- CERT. THOMAS E.D. MILLSPAUGH, Venable LLP  
750 E. Pratt Street, Suite 900  
Baltimore, MD 21202  
Representative of Southwest 7, LLC and Estate of Robert Cooper
- MAIL. JOHN L. PUND, Jr.  
JLP & Associates LLC  
The Ellis House  
3837 West Chester Pike  
Newtown Square, PA 19073  
Representative of Estate of Robert Cooper
- CERT. STERLING KIM  
Hale Mua Properties LLC  
P.O. Box 6268  
Kahului, Hawai'i 96733  
Representative of Hale Mua Properties LLC

CERT. DEAN T. YAMAMOTO  
Yamamoto Caliboso LLC  
1100 Alakea Street, Suite 3100  
Honolulu, Hawai'i 96813  
Attorneys for Hale Mua Properties LLC

Dated: Honolulu, Hawai'i, 12/03/18.



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DANIEL E. ORODENKER  
Executive Officer