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LAND USE COMMISSION
STATE OF HAWAII

2019 OCT 28 A 10:07

Attorney for PETITIONERS

BEFORE THE LAND USE COMMISSION

THE STATE OF HAWAII

In the Matter of the Petition of) Docket No. DR19-67
)
KU'ULEI HIGASHI KANAHELE and) SUBMISSION OF REFERENCED
AHIENA KANAHELE, individuals, for a) MATERIALS; APPENDICES "A"- "B";
Declaratory Order Concerning the invalid) CERTIFICATE OF SERVICE
classification of the de facto and improper)
industrial use precinct on approximately 525)
acres of State Land Use Conservation District)
lands located in Mauna Kea and Hilo, County of)
Hawai'i, Tax Map Key No.: 4-4-015:009 (por.))

SUBMISSION OF REFERENCED MATERIALS

Petitioners KU'ULEI HIGASHI KANAHELE and AHIENA KANAHELE, individuals, (Petitioners) respectfully submit copies of materials referenced in their presentation to the Commission on October 25, 2019 in Hilo, Hawai'i, for reference and inclusion in Docket No. DR19-67. Petitioners' counsel, referenced this Commission's declaratory orders in *In the Matter of the Petition for a Declaratory Order of the Sierra Club and David Kimo Frankel*, Docket No. 00-23, filed October 25, 2000, attached as Appendix "A," and the underlying petition for declaratory orders, filed August 3, 2000, attached as Appendix "B."

DATED: Honolulu, Hawai'i October 28, 2019



LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorney for Petitioners

APPENDIX "A"

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

In the Matter of the Petition for)
a Declaratory Order of)
THE SIERRA CLUB AND DAVID KIMO)
FRANKEL)
For A Declaratory Order Ruling That)
(i) Luxury Housing Developments And)
Hotels Are Not Permissible Uses On)
Agricultural Land; (ii) Landowner/)
Developer Pacific Star, LLC, Must)
Apply For A District Boundary)
Amendment To Develop Its Master-)
Planned Community Because Of The)
Urban-Like Nature, Size, And Scope)
Of The Development; And (iii) The)
County of Hawai'i May Not Grant A)
Special Permit For The Members' Hale)
Because The Members' Hale Is)
Connected To, Interrelated And)
Interdependent On, The Activities)
And Development On The Remaining)
Over 600 Acres)
_____)

DOCKET NO. DR00-23
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.

OCT 25 2000 by *[Signature]*
Date Executive Officer

2000 OCT 25 A 8:54
LAND USE COMMISSION
STATE OF HAWAII

DECLARATORY ORDER

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

In the Matter of the Petition for) DOCKET NO. DR00-23
a Declaratory Order of)
)
THE SIERRA CLUB AND DAVID KIMO) DECLARATORY ORDER
FRANKEL)
)
For A Declaratory Order Ruling That)
(i) Luxury Housing Developments And)
Hotels Are Not Permissible Uses On)
Agricultural Land; (ii) Landowner/)
Developer Pacific Star, LLC, Must)
Apply For A District Boundary)
Amendment To Develop Its Master-)
Planned Community Because Of The)
Urban-Like Nature, Size, And Scope)
Of The Development; And (iii) The)
County of Hawai`i May Not Grant A)
Special Permit For The Members' Hale)
Because The Members' Hale Is)
Connected To, Interrelated And)
Interdependent On, The Activities)
And Development On The Remaining)
Over 600 Acres)
_____)

DECLARATORY ORDER

On August 3, 2000, The Sierra Club and David Kimo Frankel, as an individual and as a member of The Sierra Club ("Petitioners")¹, filed a Petition For A Declaratory Order ("Petition"), pursuant to section 91-8, Hawai`i Revised Statutes

¹The Sierra Club is a California non-profit corporation registered to do business in the State of Hawai`i. It is a national conservation organization comprised of approximately 610,000 members, and includes state chapters and groups which focus on local issues. The Sierra Club's Hawai`i Chapter represents over 3,700 members who live in the State of Hawai`i. In addition, the Hawai`i Chapter's Moku Loa Group includes over 500 members who live on the island of Hawai`i. David Kimo Frankel is the Chair of the Sierra Club, Hawai`i Chapter.

("HRS"), and section 15-15-98, Hawai'i Administrative Rules ("HAR").

The Petition requested a declaratory order from the Land Use Commission ("Commission") declaring that "(A) Luxury housing developments and hotels are not permissible uses on agricultural land; (B) Pacific Star must apply for a district boundary amendment to develop its master planned community at Keopuka because of the urban-like nature, size and scope of the development; and (C) the county may not grant a special permit for the 'members hale' because the 'members hale' is connected to, interrelated and interdependent on the activities and development on the remaining over six hundred acres." Petition, at pages 17 and 18.

This Commission, having heard and examined the testimony and evidence presented by Petitioners, Pacific Star, LLC, an Arizona limited liability corporation ("Pacific Star"), the Office of Planning ("OP"), the County of Hawai'i ("County"), and other public witnesses, at its meeting on September 29, 2000, in Kailua-Kona, Hawai'i, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

PROCEDURAL MATTERS

1. On August 3, 2000, Petitioners filed the Petition.

2. On August 22, 2000, the Office of the Corporation Counsel for the County filed a response to the Petition ("Response").²

3. On September 1, 2000, Pacific Star filed a Memorandum In Opposition To Petition For A Declaratory Order (Memorandum In Opposition).³

4. On September 7, 2000, OP filed Testimony Of The Office Of Planning ("Testimony").⁴

² In its Response, the County stated that it believed the Petition was inappropriate inasmuch as i) the Petition raised questions that were speculative and did not involve existing facts as there were no applications pending before the County on any of the items which were the subject of the Petition nor was there an accepted Final EIS for the Keopuka Lands project; and ii) the Petition requested the Commission to rule on issues relating to the determination of violations of use restrictions and to agricultural subdivision approvals that it had no jurisdiction and authority over.

³ In its Memorandum In Opposition, Pacific Star argued that this Commission should refuse to issue an order on the Petition because i) the questions presented were speculative and not ripe for review; and ii) the County was the appropriate agency to enforce the provisions of Chapter 205, HRS, relating to Agricultural Districts. In the alternative, Pacific Star requested the Commission to order that under the unique circumstances of this case, the dwellings and golf course contemplated by the Keopuka Lands project were permissible uses in the Agricultural District, and that the members' hale may be processed through the County Planning Commission without the need for any action by this Commission.

⁴ In its Testimony, OP pointed out that it believed the Keopuka Lands project constituted a significant urban use within or adjacent to the Agricultural and Conservation Districts, and as such Pacific Star should be required to file a boundary amendment. OP also contended that the County of Hawai'i should not grant a special permit for the members' hale because it was a hotel that was an integral component of a much larger development. OP further noted that the State had a strong interest in protecting the resources of the area as the project bordered the Kealahou Bay State Historical Park, which included the Captain Cook Monument and a Marine Life Conservation District with class AA waters. OP also pointed out that the visual impact of the Keopuka Lands project from the bay had not been evaluated. OP believed that the project would violate the intent and spirit of Chapter 205, HRS, and was an attempt to bypass the comprehensive review of this Commission, something that OP has consistently opposed with other developments in the Agricultural District that involved special permits for lodge/resort retreats and/or incremental processing of permits.

5. On September 18, 2000, Petitioners filed a Verification and Reply Memorandum To Pacific Star's Memorandum In Opposition To Petition For A Declaratory Order ("Reply Memorandum").

6. On September 28, 2000, Pacific Star filed a Supplemental Memorandum In Opposition To Petition For A Declaratory Order ("Supplemental Memorandum").

7. On September 28, 2000, the Commission conducted a site visit to the project site.

8. On September 29, 2000, at its public meeting in Kailua-Kona, Hawai'i, the Commission considered the Petition pursuant to section 15-15-100, HAR.

9. At this meeting, the following individuals appeared as public witnesses and provided oral testimony:

Nancy Pisticchio
Roger Dilts
Virginia Isbell
Hanalei "Hank" Fergerstrom
Michele Wilkins
David Kimo Frankel
Steven S.C. Lim
William L. Moore
Al Jeremiah
David W. Blane
Ann Ogata-Deal
Lindsay Lindsey
John B. Ray
Curtis Tyler
Gordon Leslie
Julie Jacobson
Wayne Leslie
Kuhananui Kupuna Hannah Wahinemaikai `O Kaahumanu
Keliulananiole `O Kalamaka Kane Reeves
Abel S. Lui
Desi Castro

10. Many other persons indicated a desire to testify against the proposed development. To avoid unduly repetitious testimony, and to afford due process to persons wishing to speak in favor of the development, the presiding officer exercised his discretion to limit the number of public witnesses and to limit the length of time each witness could speak. See sections 15-15-65, HAR, and 91-10, HRS.

11. At the public hearing, the Commission entered the following into evidence:

Response from Patricia K. O'Toole, County of Hawai'i Deputy Corporation Counsel dated August 21, 2000.

Memorandum In Opposition from Steven S.C. Lim dated August 31, 2000.

Testimony of OP dated September 7, 2000.

Facsimile letter from Michele Wilkins dated September 21, 2000.

Reply Memorandum from David Kimo Frankel dated September 18, 2000.

Testimony from John B. Ray, President of Hawaii Leeward Planning Conference, dated September 27, 2000.

Supplemental Memorandum from Steven S.C. Lim dated September 27, 2000.

Testimony of Kahea "The Hawaiian Environmental Alliance" dated September 28, 2000.

Testimony of Kohanaiki `Ohana dated September 29, 2000.

Testimony of Nancy Pisicchio, County of Hawai'i Councilmember.

Testimony of Michele Wilkins and David Maddox.

Testimony of Virginia Isbell.

Testimony of Plan to Protect Kona dated September 29, 2000.

Testimony of Marjorie Ann Erway dated September 29, 2000.

Testimony of Lawrence M. Ford.

Testimony of the Kona Coffee Council dated September 29, 2000.

Video Cassette Tape entitled "Mud & Sediment Video of September 9, 10 and 20" from Michele Wilkins.

Testimony of the League of Women Voters of Hawai'i County dated September 29, 2000.

Testimony of Brenda Ford dated September 29, 2000, with attachments (Chapter 205, HRS, and Ordinance No. 96-160).

Testimony of Roger Dilts and copies of his slide show presentation with backup material (Star-Bulletin article entitled "Biologist says runoff kills coral, harms water quality.")

Testimony of Applied Life Sciences dated September 22, 2000.

Letter to the Editor received from Gordon Leslie.

Documents from Lindsay Lindsey, Executive Minister of the Kingdom of Hawai'i.

Testimony of Lei Kihoi dated April 29, 2000

Testimony of Kenneth Sheppard dated September 29, 2000.

Pacific Star's Draft Environmental Impact Statement ("DEIS").

Testimony of John Langenstein dated September 29, 2000.

Testimony of Lolana Medeiros dated September 29, 2000.

DESCRIPTION OF PROPERTY

12. The project site is situated at Keopuka and Onouli, South Kona, Hawai'i, and is identified as TMK 8-1-07: 1, 54, and 55 ("Property").

13. The Property is located within the State Land Use Agricultural and Conservation Districts, as represented on State Land Use District Boundaries Maps, H-8 (Kealakekua) and H-9 (Honaunau).

14. A portion of the Property near the shoreline is in the Conservation District.

15. The Property is bounded on the west by the Pacific Ocean, on the east by Mamalahoa Highway, on the north by the Hokulia project, and on the south by the lands of Ka'awaloa.

16. The western portion of Ka'awaloa encompasses the Kealakekua Bay State Historical Park, site of the Captain Cook Monument. Kealakekua Bay is designated a Marine Life Conservation District.

17. The County of Hawai'i General Plan Land Use Pattern Allocation Guide Map designates the Property as Extensive Agriculture and Orchards. The area along the coastline is designated Open Area.

18. The Kona Regional Plan designates the Property as Agricultural-5a, Unplanned, and Open.

19. The zoning for the Property is Agriculture-5 acre.

20. The makai portion of the Property located below the lateral Old Government Road to the shoreline is within the County of Hawai'i Special Management Area.

21. The USDA Soil Conservation Service Soil Survey Report identifies four soil types on the Property: rLV, a`a lava; rLW, Pahoehoe lava; rKED, Kaimu extremely stony peat, which is generally not suitable for cultivation, although some small areas can be used for pasture, macadamia nuts, papaya, and citrus fruits; and KEC, Kainaliu extremely stony silty clay loam, which may be suitable for macadamia nuts and pasture with proper irrigation. The rKED and KEC soil types, which are present on the mauka portions of the Property, comprise approximately 10 percent of the Property.

22. The University of Hawai'i's Land Study Bureau's Detailed Land Classification System classifies the soils on the Property as overall (master) productivity rating class "E," indicating that the soils are generally very poorly suited for agricultural use.

23. The State Department of Agriculture's Agricultural Lands of Importance to the State of Hawai'i Classification System designates approximately one-third of the Property as "other important agricultural land," indicating that portions of the Property can be used for agricultural uses.

PROPOSED USE OF THE PROPERTY

24. The landowner and developer of the Keopuka Lands project is Pacific Star. Mr. Lyle Anderson is the principal of Pacific Star.

25. The proposed development is known as Keopuka Lands, a 660-acre master-planned agricultural and recreational community.

26. According to the DEIS, the Keopuka Lands project is planned to include approximately 125 lots surrounding an 18-hole private golf course, a clubhouse and related facilities, and a 100-unit members' hale and related improvements.

27. The 125 lots are to be comprised of 1, 2, and 5+-acre lots. The 5+-acre lots (13 in all) are to be situated in a 75-acre area in the mauka portion of the Property, between Mamalahoa Highway and the proposed Bypass Road, where soils are present that can support agricultural activities.

28. At present, these 75 acres include 30 acres that are utilized for agricultural pursuits. Approximately 10 acres are currently cultivated in macadamia nut orchards. The remaining 20 acres are fallow.

29. Under the conceptual plan, the 13 5+-acre mauka lots would provide agricultural uses and income to the owners of lots on the makai portions of the Property, which have more limited agricultural opportunities due to the lava-based soils. It is anticipated that the resources from the other components of

the project would provide the needed capital to support the agricultural use on the mauka lots on an ongoing basis.

30. The planned 18-hole private golf course would include a clubhouse, practice range, maintenance facility, and related uses.

31. The proposed members' hale would provide accommodations for residents of the project, golf club members, and guests in up to 100 units located in a main pavilion and within detached suite and bungalow buildings. The hale would accommodate hospitality, reception, dining, and recreational (pool, spa, tennis) activities as well as administrative and service functions.

32. Pursuant to the Supplemental Memorandum filed on September 28, 2000, Pacific Star stated that it would not, under any circumstances, build a members' hale, lodge, hotel, or similar facility on the Keopuka Lands project for as long as the project was owned by Pacific Star or any organization affiliated with the Lyle Anderson Companies. However, the Commission finds there are no assurances that the premises could not be transferred to another entity and then developed at any time. Therefore, the Commission is not persuaded at these last minute assurances that a hale, hotel or like structure will not be built.

33. An onsite wastewater treatment system, non-potable water wells, water transmission system, internal roadways,

utilities, and other infrastructure and facilities are also proposed. In addition, there would be provisions for public and resident access to and along the shoreline from existing trails and roads.

34. At the time of the public hearing, Pacific Star had not filed any land use applications for the Keopuka Lands project with the applicable State and County agencies.

RULING ON PROPOSED FINDINGS OF FACT

Any of the proposed findings of fact not already ruled upon by the Commission by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

Any conclusions 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.

CONCLUSIONS OF LAW

JURISDICTION

1. The Commission has jurisdiction to issue this declaratory order. Section 91-8, HRS, as implemented by Subchapter 14 of the Commission rules, and sections 15-15-98 through 104, HAR, authorize the Commission to issue⁵ declaratory rulings "as to the applicability of any statutory provision or of

⁵Section 15-15-100, HAR, authorizes the Commission to issue a declaratory order on the matters contained in the Petition within 90 days after the receipt of a petition for declaratory order.

any rule or order of the agency." The Commission's statutes, the applicability of which are put at issue in this Petition, are those sections of Chapter 205, HRS, which govern the uses permitted on agricultural lands. Without limitation, these sections include 205-2(d) (describing activities and uses permitted in agricultural districts); 205-3.1 (concerning, in pertinent part, jurisdiction for boundary amendments involving less than fifteen acres of agricultural lands); and 205-4 (concerning procedures for district boundary amendments of agricultural lands involving greater than fifteen acres).

2. Section 205-5(b), HRS, authorizes the Commission to determine whether proposed uses on State Land Use Agricultural District lands with soil classified by the Land Study Bureau's Detailed Land Classification System as overall (master) productivity rating class C, D, E, or U are compatible with agricultural activities and are therefore permitted uses of agricultural lands. ["Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in section 205-2 and 205-4.5 may be further defined by each county by zoning ordinance." (emphasis added)].

3. The Commission has asserted its jurisdiction under almost identical questions in the past.

4. Pacific Star and the County argue that the Commission lacks subject matter jurisdiction over a petition for a declaratory ruling because section 205-12, HRS, provides the counties with the discretionary power to determine and enforce land use violations. The Commission is not persuaded by this argument for several reasons. First, neither Pacific Star nor the County has referred to any legal authority indicating that enforcement authority is exclusively with the counties, as opposed to shared between the counties and the state. More importantly, the Petition before the Commission requests, among other things, a declaratory ruling. This order is in the nature of a declaratory ruling whether certain proposed uses are permitted on agricultural lands. This is not an enforcement order assessing penalties or imposing injunctive relief for actual uses in violation of statutory requirements.

5. To the extent that Petitioners also seek an enforcement order in the nature of injunctive relief⁶, the Commission declines at this point to issue such injunctive because the matters are not properly before us. The Petition is styled as one for declaratory relief and is brought pursuant to section 15-15-98, HAR, and section 91-8, HRS. At this time, the Commission addresses only the Petitioners' first prayer for

⁶Petitioners seek an order from this Commission commanding Pacific Star to apply for a district boundary amendment. Petitioners also seek an order from this Commission enjoining the County from issuing a special permit.

relief for a declaratory order whether the developer's proposed development is permissible on agricultural lands.

6. As stated above at paragraph 32, at one point, Pacific Star contemplated development of a "members' hale" on a portion of the Property encompassing less than 15 acres. According to its earlier pleadings, the members' hale would encompass 13.5 acres. In its initial opposition to the Petition, Pacific Star argued that the Commission had no jurisdiction to issue a declaratory ruling whether the members' hale was a permissible use of agricultural lands because section 205-3.1, HRS, directs that petitions for boundary amendments be handled by the appropriate county land use decision-making authority in which the land is located. We acknowledge Pacific Star's later representation that it would not develop a members' hale. However, as found in paragraph 32 above, we are not persuaded that a hotel, hale or like structure will not be built simply by transferring ownership of the premises to another entity at any time. See Supplemental Memorandum. Pacific Star no longer pursues the argument that the Commission lacks subject matter jurisdiction because a portion of the development will be located on lands less than 15 acres. We note, however, that there is a distinction between a question of jurisdiction to grant a petition for a boundary amendment and a question of jurisdiction to issue a declaratory order clarifying which uses are permitted

on agricultural lands and which uses require a reclassification of agricultural lands.

7. Petitioners' request for a declaratory order whether the Pacific Star's proposed golf course, housing developments, subdivision, and possible member's hale are permissible uses on agricultural land is thus within the jurisdiction of the Commission as contemplated by sections 91-8 and 205-5(b), HRS.

8. Pacific Star and the County also argue that the Commission should refrain from issuing a declaratory order, even assuming it is within the scope of the Commission's authority to do so, because the question is speculative or purely hypothetical and does not involve existing facts. See section 15-15-102(1), HAR.

The Commission does not find this argument persuasive. First, it is discretionary, not mandatory, under section 15-15-104, HAR, whether the Commission may refuse to issue a declaratory order on the grounds that the question is speculative. Second, the Commission concludes that the proposed development is not so speculative or conceptual that would render a declaratory order futile. The preparation of the DEIS evidences Pacific Star's intention to develop the project in the near future. The Commission concludes that the proposed development is not "purely" hypothetical and that the development does involve "facts that can be expected to exist in the near

future." See also para 24, below, with respect to the members' hale.

9. The Commission notes that one of the purposes for issuing a declaratory order is to "terminate a controversy or to remove uncertainty." Section 15-15-98(b), HAR. Based on the number of public witnesses and the intensity of feelings generated by this proposed development, even if all the details have not been determined, the Commission concludes that it would be well within its discretion to say whether the proposed development is a permissible use of agricultural land.

10. Finally, if there were some uncertainty whether the Commission should or should not issue a declaratory order, the fact that the proposed Keopuka Lands project would border the State of Hawai'i Kealakekua Bay State Historical Park which includes the Captain Cook Monument and a Marine Life Conservation District with class AA (pristine) waters weighs heavily in favor of issuing a declaratory order. The Kealakekua Bay Archaeological and Historic District is on the National Register of Historic Places. The Commission was presented evidence that runoff into the ocean from a recent rainstorm on developer's neighboring project which abuts the premises herein caused disturbing affects to the class AA waters of Kealekekua Bay. The State of Hawai'i has a strong interest to protect the resources of the area.

11. Evidence was given to the Commission that PASH gathering rights are exercised in the waters abutting the development area, which may be jeopardized by the project scope. In view of the ruling of the Supreme Court of the State of Hawai'i in Ka Pa`akai O Ka`aina, the Commission must be vigilant when such evidence is presented. This Commission has jurisdiction to preserve such rights and must do so when properly before the Commission.

12. The OP suggests that further hearings are necessary before issuing a declaratory ruling. Section 15-15-103, HAR, allows, but does not require, that the Commission may set the matter for a hearing. In fact, section 15-15-98, HAR, allows the Commission to issue a declaratory order to terminate a controversy or to remove uncertainty on its own motion "without notice of hearing." The Commission concludes that based on the extensive facts presented at the hearing, the testimony of public witness, the pleadings filed, together with the documents and affidavits, and the opportunity granted to interested parties to present their views, that further hearings are not necessary.

Merits of the Petition

Having concluded that we have jurisdiction to issue a declaratory order determining whether the proposed development is permitted on agricultural lands, and having determined that the factual circumstances are not so speculative or purely hypothetical to warrant refusing to issue a declaratory order,

and having concluded that significant State interests may be implicated by the proposed development, we now turn to the merits of the Petition.

In brief, Petitioners argue that the proposed development as outlined in the developer's DEIS is not a permissible use of agricultural lands. We agree.

13. Assessing the development as a whole, we are convinced that the project is not permitted on agricultural land and can only proceed as envisioned in the DEIS only if there is a boundary amendment reclassifying the land from agricultural to urban approved by this Commission.

14. Developer would have us examine each component of the project, e.g., the single-family residences, the golf course, the large-sized mauka lots, and conclude that because each component as a stand alone development might be permitted, the entire development would also be permitted. We decline to adopt this narrow analytic thesis. We agree with the reasoning and conclusion of the OP on this issue: "The project must be assessed as a whole, not piecemeal." Testimony of Office of Planning, at page 6.

Judging this project as a whole, this development has all the characteristics we normally consider to be urban: it is a 600+-acre luxury residential resort whose essential features are framed around a golf course and other amenities, rather than on farming or agricultural activities. We do not find it

credible that houses along the cliff area to be marketed at one to 3 million dollars per lot are part of any true agricultural enterprise.

15. Even if we were to consider the 112 residential lots as a discrete use, Chapter 205, HRS, prohibits residential dwellings within the State Land Use Agricultural District unless the dwellings are related to an agricultural activity or constitute a "farm dwelling." We find that the luxury homes as contemplated are not related to agricultural activity and are not farm dwellings as presented.

16. Under the conceptual plan, the only agricultural activities proposed to be undertaken in the Keopuka Lands project would be on 13 5+-acre lots located in a 75-acre area in the mauka portion of the Property. Pacific Star admits that the proposed agricultural activity on the 13 lots would be of a modest scale.

17. No agricultural activity is proposed for the remaining 112 lots. These lots would require the importation of soil and irrigation in order to be suitable for agricultural use. It is unclear to what extent the dwellings on the 112 lots would be related to the proposed agricultural activity in the project and how much income the agricultural activity would provide to the families occupying the dwellings. Pacific Star provided no substantial definite evidence in this regard.

18. Pacific Star suggested that under 205-4.5, HRS, a "farm dwelling" includes single-family dwellings where agricultural activity provided income to the family occupying the dwelling. Under the facts presented here, the connection between the 112 residential lots and the mauka 13 5+-acre lots is too tenuous to allow the 112 residential lots to be characterized as farm dwellings. Under Pacific Star's interpretation, a family that operates and derives income from a farm in Nebraska would be allowed to build a single-family, second home on agricultural land in Hawai'i without any associate agricultural activity. We reject this broad interpretation of section 205-4-5, HRS. There must be some connection of significance between the single-family dwelling and agricultural activity on the same land if the dwelling is to be considered a permitted use of agricultural land.

19. In addition to the lack of a clear connection to agricultural activity, we consider such factors as the location of the residential lots (many will be situated along the proposed golf course fairways). Looking at the proposed characteristics of the residential component in totality, we conclude that these residential lots have little, if anything, connection to agricultural activity.

20. Pacific Star also at one point appears to argue that because the counties are given the authority under section 205-5(b), HRS, to further define accessory agricultural uses and

services, and because the County has by ordinance permitted single-family dwellings on agricultural lands, the Commission must conclude that single-family dwellings with no connection to farming or other agricultural activity are permissible uses on agricultural lands. We do not interpret section 205-5(b), HRS, to grant the counties such unfettered authority.

21. Statutes must be interpreted in a manner consistent with the intent and purpose of the law. We find Petitioners' arguments on the legislative history of Chapter 205, HRS, helpful in ascertaining the intent and purpose of sections of Chapter 205, HRS, dealing with agricultural lands.

22. We also note that the statute allows a county to "further define" accessory agricultural uses and services. Section 205-5(b) ("Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance." (emphasis added)). The phrase "further define" implies a limited authority granted to the counties to specify additional permissible accessory agricultural uses by way of a zoning ordinance consistent with the broad parameters otherwise set forth by statute. If we were to adopt Pacific Star's interpretation of the phrase "further define" to mean that the counties may allow any use whatsoever on agricultural lands so

long as the county passes a zoning ordinance, it would mean that the counties could define away completely any statutory restrictions on agricultural uses. Under Pacific Star's interpretation, all remaining portions of Chapter 205, HRS, delimiting the differences between agricultural use and urban, rural or conservation uses would be rendered superfluous. Pacific Star's interpretation of the phrase "further define" would conflict with the Commission's authority provided in the first clause of the sentence, i.e., to determine uses compatible to agricultural activities. Interpretation of statutes that harmonize all parts of the statute is favored. Because Pacific Star's interpretation of county authority under the phrase "further define" would lead to an internally inconsistent statute and would render other parts of Chapter 205, HRS, moot, it is hereby rejected.

23. Based on the evidence in the record, the Commission concludes that the proposed single-family residential dwellings on the 112 lots in the makai portion of the Property are not located on and used in connection with a farm, and are therefore not permissible uses of agricultural land.

24. Pacific Star took the initial position that the Commission had no authority over the proposed members' hale because the hale would be located on lands less than 15 acres. Several days before the commencement of the public hearings, Pacific Star represented that it would not build a members' hale,

lodge, hotel, or similar facility on the Keopuka Lands project for as long as the project was owned by Pacific Star or any organization affiliated with the Lyle Anderson Companies. It is within the discretion of the Commission to assess the value and weight of evidence and representations. Pacific Star did not offer any assurances that a members' hale, lodge, hotel, or similar facility could not be built on the Property by any other subsequent landowner of the Property, nor any indication that it would not change its mind at some point in the future. We conclude that the absence of a members' hale from the developer's present plans do not change the overall characteristics of the project to one permitted on agricultural lands.

DECLARATORY ORDER

At the Commission's meeting on the Petition on September 29, 2000, in Kailua-Kona, a motion was made and seconded that this Commission had the jurisdiction to act on the Petition. Following discussion by the Commission, a vote was taken on this motion. There being a vote tally of 5 ayes, 1 nay, and 3 excused, the motion carried.

Thereafter, a second motion was made and seconded that the Keopuka Lands project, as described in the DEIS, will require Pacific Star to file a petition for district boundary amendment with this Commission. Following discussion by the Commission, a vote was taken on this motion. There being a vote tally of 6 ayes, 0 nays, and 3 excused, the motion carried.

Having duly considered Petitioners' Petition, the oral and written arguments presented by Petitioners, Pacific Star, OP, the County, and other public witnesses in this proceeding, and two motions having been made at the Commission's meeting conducted on September 29, 2000, in Kailua-Kona, Hawai'i, and both motions having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motions, this Commission hereby RULES as follows:

This Commission has the jurisdiction to act on the Petition, and will exercise its discretion to issue a declaratory ruling.

IT IS FURTHER DECLARED that:

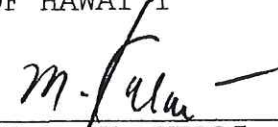
The Keopuka Lands project, as described in the DEIS, consisting of a proposed development of 660 acres of land in the Agricultural and Conservation Districts into thirteen 5+-acre farm parcels and the remaining 585 acres into 112 single-family residences of coastal house lots and house lots surrounding an 18-hole golf course, a clubhouse and related golf course amenities will require a district boundary amendment pursuant to section 205-4, HRS. In the event Pacific Star files a petition for district boundary amendment with this Commission, the petition shall include i) an assessment regarding the identity and scope of valued cultural, historical, or natural resources in the subject area, including the extent to which traditional and customary native Hawaiian rights are exercised in the subject area; ii) the extent to which those resources-including traditional and customary native Hawaiian rights-will be affected or impaired by the proposed action; and iii) the feasible action, if any, to be taken by this Commission to reasonably protect native Hawaiian rights if they are found to exist.

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 October 2000. The DECLARATORY ORDER and its ADOPTION shall take effect upon the date this DECLARATORY ORDER is certified and filed by this Commission.


LAND USE COMMISSION
STATE OF HAWAII

By



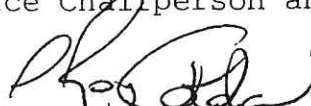
MERLE A. K. KELAI
Chairperson and Commissioner

By



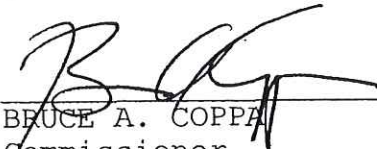
LAWRENCE N.C. ING
Vice Chairperson and Commissioner

By



P. ROY CATALANI
Commissioner

By



BRUCE A. COPPA
Commissioner

By

(absent)

PRAVIN DESAI
Commissioner

By



ISAAC FIESTA, JR.
Commissioner

Filed and effective on
October 25, 2000

Certified by:

Lothar Lind
Executive Officer

By *M. Casey Jarman*
M. CASEY JARMAN
Commissioner

By *Stanley Roehrig*
STANLEY ROHRIG
Commissioner

By *Peter Yukimura*
PETER YUKIMURA
Commissioner

APPENDIX

APPLICABLE LEGAL AUTHORITIES

1. Hawai`i Revised Statutes:

A) §91-8

Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

B) §205-2(d)

Agricultural districts shall include activities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, aquaculture, and game and fish propagation; aquaculture, which means the production of aquatic plant and animal life for food and fiber within ponds and other bodies of water; wind generated energy production for public, private, and commercial use; bona fide agricultural services and uses which support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, whether or not conducted on the same premises as the agricultural activities to which they are accessory, including but not limited to farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises; wind machines and wind farms; small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land, provided that such facilities shall not be used as or equipped

for use as living quarters or dwellings; agricultural parks; and open area recreational facilities, including golf courses and golf driving ranges; provided that they are not located within agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B. These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

C) §205-4.5(a)(4)

Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry;

Farm dwelling as used in this paragraph means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling.

D) §205-4.5(c)

Within the agricultural district all lands, with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

E) §205-5(b)

Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance. Other uses may be allowed by special permits issued pursuant to this chapter. The minimum lot size in agricultural districts shall

be determined by each county by zoning ordinance, subdivision ordinance, or other lawful means; provided that the minimum lot size for any agricultural use shall not be less than one acre, except as provided herein. If the county finds that unreasonable economic hardship to the owner or lessee of land cannot otherwise be prevented or where land utilization is improved, the county may allow lot sizes of less than the minimum lot size

as specified by law for lots created by a consolidation of existing lots within an agricultural district and the resubdivision thereof; provided that the consolidation and resubdivision do not result in an increase in the number of lots over the number existing prior to consolidation; and provided further that in no event shall a lot, which is equal to or exceeds the minimum lot size of one acre be less than that minimum after the consolidation and resubdivision action. The county may also allow lot sizes of less than the minimum lot size as specified by law for lots created or used for public, private, and quasi-public utility purposes, and for lots resulting from the subdivision of abandoned roadways and railroad easements.

F) §205-6(a)

The county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition.

G) §205-6(d)

Special permits for land the area of which is greater than fifteen acres shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting such approval, including the adherence to representations made by the applicant.

H) §205-12

The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

2. Hawai'i Administrative Rules:

A) §15-15-23 Permissible uses; generally.

Except as otherwise provided in this chapter, the following land and building uses are compatible and permitted within the following land use districts, except when applicable county ordinances or regulations are more restrictive. Except as otherwise provided in this chapter, uses not expressly permitted are prohibitive.

B) §15-15-25 Permissible uses within the "A" agricultural district.

(a) Permissible uses within agricultural district land classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be those uses set forth in section 205-4.5, HRS.

(b) Permissible uses within the agricultural district land classified by the land study bureau's detailed land classification as overall (master) productivity rating class of C, D, E, and U shall be those uses permitted in A and B lands as set forth in section 205-4.5, HRS, and

also those uses set forth in section 205-2(d), HRS.

C) §15-15-98 Who may petition.

(a) On petition of an interested person, the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission.

(b) Notwithstanding the other provisions of this subchapter, the commission, on its own motion or upon request but without notice of hearing, may issue a declaratory order to terminate a controversy or to remove uncertainty.

D) §15-15-100 Declaratory orders; commission action.

Within ninety days after the receipt of a petition for declaratory order, the commission shall either deny the petition in writing, stating the reasons for the denial, or issue a declaratory order on the matters contained in the petition, or set the matter for hearing, as provided in section 15-15-103 provided that if the matter is set for hearing, the commission shall render its findings and decision within one hundred twenty days after the close of the hearing.

E) §15-15-102 Refusal to issue declaratory order.

The commission, for good cause, may refuse to issue a declaratory order by giving specific reasons for the determination. Without limiting the generality of the foregoing, the commission may so refuse where:

- (1) The question is speculative or purely hypothetical and does not involve existing facts, or facts that can be expected to exist in the near future;
- (2) The petitioner's interest is not of the type that would give the petitioner standing to maintain an action if the petitioner were to seek judicial relief;

- (3) The issuance of the declaratory order may affect the interests of the commission in a litigation that is pending or may reasonably be expected to arise; or
- (4) The matter is not within the jurisdiction of the commission.

F) §15-15-104 Applicability of declaratory order.

An order disposing of a petition shall apply only to the factual situation described in the petition or set forth in the order.

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

In the Matter of the Petition for) DOCKET NO. DR00-23
a Declaratory Order of)
) CERTIFICATE OF SERVICE
THE SIERRA CLUB AND DAVID KIMO)
FRANKEL)
)
For A Declaratory Order Ruling That)
(i) Luxury Housing Developments And)
Hotels Are Not Permissible Uses On)
Agricultural Land; (ii) Landowner/)
Developer Pacific Star, LLC, Must)
Apply For A District Boundary)
Amendment To Develop Its Master-)
Planned Community Because Of The)
Urban-Like Nature, Size, And Scope)
Of The Development; And (iii) The)
County of Hawai`i May Not Grant A)
Special Permit For The Members' Hale)
Because The Members' Hale Is)
Connected To, Interrelated And)
Interdependent On, The Activities)
And Development On The Remaining)
Over 600 Acres)
_____)

CERTIFICATE OF SERVICE

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

CERT. DAVID KIMO FRANKEL
 Chair, Sierra Club, Hawaii Chapter
 P. O. Box 1185
 Volcano, Hawaii 96785

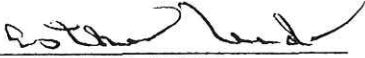
DEL. DAVID W. BLANE, Director
 Office of Planning
 P. O. Box 2359
 Honolulu, Hawaii 96804-2359

CERT. VIRGINIA GOLDSTEIN, Planning Director
 Planning Department, County of Hawaii
 25 Aupuni Street
 Hilo, Hawaii 96720

CERT. RICHARD D. WURDEMAN, ESQ.
Corporation Counsel
County of Hawaii
The Hilo Lagoon Center
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

CERT. STEVEN S.C. LIM, ESQ.
Carlsmith Ball
121 Waiianuenue Avenue
Hilo, Hawaii 96720-4252

DATED: Honolulu, Hawaii, this 25th day of October 2000.



ESTHER UEDA
Executive Officer

APPENDIX “B”

DAVID KIMO FRANKEL
Chair, Sierra Club, Hawai'i Chapter
P.O. Box 1185
Volcano, HI 96785
Telephone: (808) 985-8822
frankel@lava.net

LAND USE COMMISSION
STATE OF HAWAII

2000 AUG -3 P 1:13

BEFORE THE LAND USE COMMISSION OF THE STATE OF HAWAII

IN THE MATTER OF)
)
)
To issue a declaratory order that the)
construction of a hotel, 125 houses)
and a golf course on 660 acres in the)
agricultural district require a)
boundary amendment.)

Docket No. DR 00-23
PETITION FOR A DECLARATORY
ORDER; EXHIBIT; CERTIFICATE
OF SERVICE

PETITION FOR A DECLARATORY ORDER

The Sierra Club and David Kimo Frankel, as an individual and as a member of the Sierra Club, as interested persons, file this Petition for a Declaratory Order from the State Land Use Commission, pursuant to HRS §91-8 and HAR § 15-15-98 *et.seq.* of the State Land Use Commission Rules.

I. IDENTIFICATION OF PETITIONERS & PETITIONERS' INTERESTS

The Sierra Club is a California non-profit corporation, registered to do business in the State of Hawai'i, with its principal place of business in Hawaii at 800 S. Beretania St, Suite 260, Honolulu, HI 96813 (phone: 538-6616). The Sierra Club is a national conservation organization comprised of approximately 610,000 members, with state chapters and groups focusing on local issues. The Sierra Club's Hawai'i Chapter represents over 3700 members who live in the state of Hawai'i. The Sierra Club's Moku Loa Group represents over 500 members who live on the

island of Hawai'i. The general purposes of the Sierra Club, Hawai'i Chapter and Moku Loa Group include: educating the public about Hawaii's natural resources through hikes; exploring Hawaii's wild places and natural resources; restoring and preserving ecosystems through hands-on service trips; protecting open space through lobbying and litigation; ensuring sound planning through proper application of Hawaii's environmental laws; protecting the integrity of the state's Land Use Law and the Land Use Commission. The Sierra Club Moku Loa Group has led over a half dozen hikes along Ka`awaloa Road down to the Cook Monument. Sierra Club members hike, kayak, paddle canoes, snorkel, whale watch and fish in and/or near Kealakekua Bay and the Keopuka area. The Sierra Club and its members have educational, cultural, recreational, aesthetic, scientific and environmental interests that would be directly and indirectly affected by development adjacent to or near Kealakekua Bay.

David Kimo Frankel is the Chair of the Hawai'i Chapter of the Sierra Club. His mailing address is P.O. Box 1185 Volcano, HI 96785 (phone: 985-8822). He has hiked on public trails that traverse the area and snorkeled in the area as well. He has worked to protect agricultural land and open space from being developed inappropriately; defended the Land Use Commission from attack at the Legislature; and promoted more public involvement in land use decisionmaking. He has aesthetic, recreational, environmental and professional interests in ensuring that the agricultural land near Kealakekua Bay is not developed into a hotel and luxury housing development.

II. ISSUE

Does the construction of a hotel and 125 luxury houses scattered around a golf course on 660 acres in the agricultural district require a boundary amendment or can they all be built without Land Use Commission review and approval?

III. FACTS

Pacific Star, LLC, an Arizona limited liability corporation, proposes to build a gated community comprised of 125 luxury houses, an 18-hole private golf course, a clubhouse, and a hotel on 660 acres in the State Agricultural District. The house lots are built on land that Pacific Star identifies as very poorly suited for agricultural use. According to Pacific Star, ninety percent of the project area consists of lava lands with little or no natural soils. Electrical and communication lines within the project will be placed underground. The lots, according to Pacific Star, are expected to appeal to second home buyers. Although the zoning of the area requires a minimum lot size of five acres, Pacific Star is applying for a county Planned Unit Development, in order to cluster 28 one acre lots near the shoreline, and 75 two acre lots on the slopes with the views. These 112 house lots comprising 225 acres would provide financial support to 13 five-acre farms. Pacific Star proposes to build a 100 unit hotel, with a lobby, administration offices, kitchen facilities, bungalow buildings, dining room, pool, spa and tennis courts. Pacific Star is calling the hotel a "members' hale" with accommodations for "project residents, golf club members, and guests." A pavilion "will be designed to complement the style used in the golf clubhouse and each would share a common garden area set between the golf clubhouse and main pavilion." Pacific Star intends to apply for a special permit from the county for the 13.5-acre hotel. All components of the project are being proposed as a part of a "master planned community."

The Keopuka Lands project is located directly adjacent to the Kealakekua Bay State Historical Park, which features Captain Cook Monument and a Marine Life Conservation District. The endangered humpback whale, green sea turtle (listed as a species "threatened" with extinction) and spinner dolphin pass through the class AA pristine waters fronting the project.

Native shorebirds, hawks and owl as well as over a dozen indigenous plant species are found in the project area. The area is identified in the county general plan as an example of the natural beauty in the Kona districts.

The project is located partly within the Kealakekua Bay Archaeological and Historic District, which is on the National Register of Historic Places. Kealakekua is the home of Lono, the God of Agriculture and the inventor of the Makahiki Festival. Ka`awaloa, which borders Keopuka proper -- and part of which is included in the project area -- was the home of ali`i. It is where Captain Cook was killed.

IV. STATUTORY PROVISIONS AND RULES AT ISSUE

HRS § 205-4.5(c), with respect to permissible uses in the agricultural district, states:

(c) Within the agricultural district all lands, with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

HRS § 205-5(b), with respect to permissible uses in the agricultural district, states

(b) Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance. Other uses may be allowed by special permits issued pursuant to this chapter. . . .

HRS § 205-2(d), with respect to permissible uses in the agricultural district:

(d) Agricultural districts shall include activities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, aquaculture, and game and fish propagation; aquaculture, which means the production of aquatic plant and animal life for food and fiber within ponds and other bodies of water; wind generated energy production for public, private, and commercial use; bona fide agricultural services and uses which support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, whether or not conducted on the same premises as the agricultural activities to which they are accessory, including but not limited to farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises; wind machines and wind farms; small-scale meteorological, air quality,

noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land, provided that such facilities shall not be used as or equipped for use as living quarters or dwellings; agricultural parks; and open area recreational facilities, including golf courses and golf driving ranges; provided that they are not located within agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B. These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

HRS § 205-4.5(a)(4), with respect to farm dwellings states:

(4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry; Farm dwelling as used in this paragraph means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;

HRS § 205-3.1(a), with respect to boundary amendments, states:

(a) District boundary amendments involving land areas greater than fifteen acres shall be processed by the land use commission pursuant to section 205-4.

HRS 205-6(d), with respect to special permits, states:

(d) Special permits for land the area of which is greater than fifteen acres shall be subject to approval by the land use commission. The land use commission may impose additional restriction as may be necessary or appropriate in granting such approval, including the adherence to representations made by the applicant.

Hawaii Land Use Commission Rules, HAR § 15-15-03 includes the following definitions:

"Accessory building or use" means a subordinate building or use which is incidental to and customary with a permitted use of the land.

"Farm dwelling" means a single-family dwelling located on and used in connection with a farm or where agricultural activity provides income to the family occupying the dwelling.

Hawaii Land Use Commission Rules, HAR § 15-15-23, with respect to permissible uses generally, states:

Except as otherwise provided in this chapter, the following land and building uses are compatible and permitted within the following land use districts, except when

applicable county ordinances or regulations are more restrictive. Except as otherwise provided in this chapter, uses not expressly permitted are prohibited.

Hawaii Land Use Commission Rules, HAR § 15-15-25(b), with respect to permissible uses in the agricultural district, states:

(b) Permissible uses within the agricultural district land classified by the land study bureau's detailed land classification as overall (master) productivity rating class of C, D, E, and U shall be those uses permitted in A and B lands as set forth in section 205-4.5, HRS, and also those uses set forth in section 205-2(d).

HRS § 205-15, with respect to conflict of laws, states:

Except as specifically provided by this chapter and the rules adopted thereto, neither the authority for the administration of chapter 183C nor the authority vested in the counties under section 46-4 shall be affected.

V. STATEMENT OF THE CONTROVERSY INVOLVED

Pacific Star believes that it does not need to apply for a boundary amendment in order to build a hotel and 125 luxury houses surrounding an 18-hole private golf course on land classified by the LUC as agricultural. While it intends to apply to the county for a special use permit for the hotel, it identifies the hotel project area as less than 15 acres, thereby avoiding LUC review.

Petitioners believe that the urban nature of this project requires that Pacific Star submit a boundary amendment petition to the Land Use Commission. Furthermore, petitioners contend that the hotel ("members hale") is inextricably linked to the remaining 660-acre project since the only people who can stay at the 100-unit hotel are "Project residents, golf club members, and guests." As a master planned project, pieces of it cannot be separated out in order to limit the size of the project to less than 15 acres.

VI. PETITIONERS' POSITION & MEMORANDUM OF AUTHORITIES

The Hawai'i State Constitution, the plain language of HRS Chapter 205 (The Land Use Law), the legislative intent, the legislative history, the Land Use Commission's rules and orders,

Supreme Court and Intermediate Court of Appeals decisions and public policy make it abundantly clear that an urbanization project entailing a hotel, 125 luxury houses and a golf course are not permissible in the agricultural district.

A. THE LEGISLATURE INTENDED TO PROHIBIT URBANIZATION PROJECTS IN THE AGRICULTURAL DISTRICT THROUGH PASSAGE OF THE LAND USE LAW.

The Hawai'i State Constitution Article 11 Section 3 mandates: "The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands."

HRS Chapter 205's language and its legislative history demonstrate that the Legislature intended to prohibit major urban uses and subdivisions on land classified as "agricultural."

1. LANGUAGE

HRS Chapter 205 makes it abundantly clear that urban type uses are not allowed in the agricultural district. The type of uses is narrowly identified. Only those uses identified in HRS § 205-2(d) and HRS § 205-4.5 are allowed in the agricultural district, HRS § 205-4.5(c), HRS § 205-5(b).

HRS § 205-2(d) states:

(d) Agricultural districts shall include activities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, aquaculture, and game and fish propagation; aquaculture, which means the production of aquatic plant and animal life for food and fiber within ponds and other bodies of water; wind generated energy production for public, private, and commercial use; bona fide agricultural services and uses which support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, whether or not conducted on the same premises as the agricultural activities to which they are accessory, including but not limited to farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises; wind machines and wind farms; small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land, provided that such facilities shall not be used

as or equipped for use as living quarters or dwellings; agricultural parks; and open are recreational facilities, including golf courses and golf driving ranges; provided that they are not located within agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B. These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

The list of uses identified in HRS § 205-4.5(a)(4), is even more limited than the uses specified in HRS § 205-2(d), but it does include a definition of farm dwellings:

(4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry; Farm dwelling as used in this paragraph means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;

The proper procedure for developing in the agricultural district, is to apply for a boundary amendment pursuant to HRS § 205-3.1.

2. THE LEGISLATIVE HISTORY OF THE LAND USE LAW REFLECTS THE LEGISLATURE'S INTENT THAT HOUSING DEVELOPMENTS ARE PROHIBITED IN THE AGRICULTURAL DISTRICT

HRS Chapter 205 serves to protect agricultural lands, prevent scattered urban development, reduce infrastructure costs, protect natural resources and encourage urban growth in urban areas. 1961 House Journal 855; 1961 Sess. Laws 299; See also, HRS § 226-104. As the Hawai'i Supreme Court recently noted:

In sum, the overarching purpose of the state land use law is to "protect and conserve" natural resources and foster "intelligent," "effective," and "orderly" land allocation and development. See 1961 Haw. Sess. L. Act 187 § 1 at 299 ("[I]n order to preserve, protect and encourage the development of lands in the State for those uses to which they are best suited for the public welfare . . . , the power to zone should be exercised by the State.") See also Pearl Ridge Estates Community Ass'n v. Lear Siegler, Inc., 65 Haw. 133, 144 n.9, 648 P.2d 702, 709 n.9 (Nakamura, J., concurring)("Thus, conservation lands must be reserved if practicable, agricultural lands should be protected, and urban lands should be developed in orderly fashion.")

Curtis v. Board of Appeals, County of Hawai'i, 90 Haw. 384, 396 (1999), 978 P. 2d 822, 834.

The court has long observed that the emphasis of the Land Use Law is on controlling growth and protecting resources:

By enacting HRS ch. 205 in 1961, the legislature intended, inter alia, to “[s]tage the allocation of land for development in an orderly plan,” H.Stand.Comm.Rep. No. 395, 1st Haw.Leg., 2d Sess., reprinted House Journal 855-56, and to redress the problem of “inadequate controls [which] have caused many of Hawaii’s limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in long-term loss to the income and growth potential of our economy. Act 187, 1961 Haw.Sess. Laws 299.

Neighborhood Board v. State Land Use Commission, 64 Haw. 265, 272-3, 639 P.2d 1097

(1982). In passing the Land Use Law, the Senate noted:

The purpose of this bill is to preserve and protect land best suited for cultivation, forestry and other agricultural purposes and to facilitate sound and economical urban development in order to promote the economy and general welfare of the state, and to insure the efficient expenditure of public funds. . . .

The state must protect its valuable land resources. There is a special need to protect agricultural land from urban encroachment, to prevent scattered and premature development, to limit land speculation of urban areas, and to protect the unique natural assets of the state.

The state’s highly productive agricultural lands are jeopardized by normal economic laws which encourage land owners to place their own particular pieces of land to the most profitable current use for which they can find a market. Long term agricultural leases are expiring annually. Because of the pressure for urbanization the land owners are reluctant to continue long term renewals of such leases, and the lessee is therefore discouraged to develop the land to its maximum agricultural production. If exclusive agricultural zones are not established to preserve and protect prime agricultural lands from infringement by non-agricultural uses, the possibility of land speculation through inflated or artificial land prices may jeopardize the existence of major agricultural companies or activities. The most effective protection of prime agricultural lands, preservation of open space and direction of for urban growth, is through state zoning.

S. Stand.Comm.Rep. No.937, 1961 Senate Journal 883.

HRS Chapter 205 was enacted in an effort to manage growth on islands of limited resources:

Scattered subdivisions with expensive, yet reduced public services; the shifting of prime agricultural lands into non-revenue producing residential uses when other lands are available that could serve adequately urban needs . . . these are evidences of the need for public concern and action.

Act 187, 1961 Haw Sess. Laws 299.

Since the passage of the Land Use Law, it has been amended several times. These amendments reflect the Legislature's intent that housing development and other urban uses not be placed in the agricultural district.

In 1976, the Legislature amended the Land Use Law to clarify that urban type residential subdivisions are not authorized on agricultural land.

The purpose of the agricultural district classification is to control the uses of the land for agricultural purposes. This purpose is being frustrated by the development of urban type residential communities in the guise of agricultural subdivisions. To discourage abuse of this purpose, the bill, as amended, more clearly defines the uses permitted within the agricultural district. Except for such uses permitted under special use permits in Section 205-6, and for nonconforming uses permitted in Section 205-8, uses not permitted by this bill shall be prohibited.

S.Stan.Comm. Rep. No. 662-76, 1976 Haw.Leg. Sess., Senate J. 1177; See HRS 205-4.5.

(Although the bill applied only to lands classified A or B, the Land Use Commission later adopted rules that restricted the type of permissible uses on lands rated C, D, E and U to only those uses identified in this bill as well as those identified in HRS 205-2, Hawaii Land Use Commission Rules, HAR § 15-15-25(b).)

In 1985, the Legislature amended the Land Use Law to allow golf courses on non-prime land without a permit. As observed in the UH Law Review:

Ostensibly, by enumerating golf courses specifically as a permitted use on non-prime agricultural lands, the Act gave golf courses priority over other uses of land such as housing development, which are required to go through the permit process. Such priority was hotly debated. An exchange between Senators James Aki and Benjamin Cayetano exemplifies the controversy:

[Senator Cayetano:] I've always wondered why the Democratic Party chose the jackass as symbol while the Republicans chose the elephant, and after

listening to the debate today, I've come to the conclusion that with the jackass it's easier to kick yourself in the ass. That's what we're doing by passing this bill. . . . [T]hat's what we're doing when we elevate golf courses, a game in which one spends hours hitting a little white ball, when we elevate that to the level of priority that we don't even give housing[.] . . . [W]ho is this bill for?;

[Senator Aki:] This bill is for all of us, for all of Hawaii, for economic development, for jobs.

....

[Senator Cayetano:] Well, Mr. President [referring to the Senate President moderating the exchange]. I think I asked [Senator Aki] this question in the caucus, behind closed doors . . . when I asked, and I asked expressly and let me quote myself verbatim: "Who is this bill for" and the answer was "some developer in my district."

I find all of this incredible. . . . [T]his bill . . . will now raise the development of golf courses to a level of priority which is higher than housing and maybe it's on the level of geothermal energy.

Debate on House Bill No. 1063, 1985 Haw. Leg. Sess., Senate J 697-98.

13 UH Law Review (1991 pp. 215-216 at footnote 57).

The Legislature's 1985 action demonstrates that although golf courses do not need a permit in the agricultural district, it did not similarly allow subdivisions to be built on agricultural land.

B. THIS AGENCY'S RULES AND ORDERS PROHIBIT URBANIZATION PROJECTS IN THE AGRICULTURAL DISTRICT.

The Land Use Commission's rules provide that all uses not expressly permitted in the agricultural district are prohibited, HAR § 15-15-23. The only uses allowed in the agricultural district are those set forth in HRS § 205-4.5 and HRS § 205-2(d), HAR § 15-15-25(b).

This commission has itself recognized that residential dwellings that are unrelated to agriculture are not permitted in the agricultural district. The commission has concluded that:

Chapter 205, Hawaii Revised Statutes, does not authorize residential dwellings as a permissible use within an agricultural use district, unless the dwelling is related to an agricultural activity or is a "farm dwelling."

In the matter of Godfrey, Dec. 6, 1994 Declaratory Order (p. 17). In ruling that the Land Use Law and the Commission's rules do not allow overnight camps on State Land Use Agricultural District lands, the Commission held:

HRS Chapter 205 does not expressly or by any 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, May 7, 1997 (p. 14).

C. THE COURTS HAVE CONDEMNED PLOYS TO CIRCUMVENT THE LAND USE LAW

The Hawai'i Supreme Court has stressed the importance of preventing "ad hoc infusions of major urban uses into agricultural districts." Neighborhood Board v. State Land Use Commission, 65 Haw 265, 273 (1982). In that case, the Supreme Court vacated a special permit to build an amusement park on 103 acres in the agricultural district. The court found that the urban enterprise in the agricultural district would "frustrate the objectives and effectiveness of Hawaii's land use scheme." Id. at 272.

Similarly, in Curtis v. Board of Appeals, County of Hawai'i, 90 Haw. 384, 396 (1999), the Supreme Court looked to the "reason and spirit" of the state land use law to determine that allowing cellular towers in the agricultural district as a permissible use "unreasonably expands the intended scope of this term [utility lines] and frustrates the state land use law's objectives of protection and rational development."

The Intermediate Court of Appeals similarly demonstrated displeasure with attempts to circumvent the Land Use Law.

Although the enforcement of the State of Hawaii's land use laws is not before us in this case, we are extremely troubled by WRE's apparent use of the restrictive covenants to privately rezone land that is classified agricultural use and thereby create large estates for the wealthy, who have no intention of maintaining the land for agricultural purposes.

Angel Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 431 at fn 3, 876 P.2d 1320 (1994).

D. A GATED COMMUNITY OF 125 LUXURY HOUSES SURROUNDING A GOLF COURSE, TOGETHER WITH A HOTEL ARE NOT PERMISSABLE USES IN THE AGRICULTURAL DISTRICT.

Given the scope and nature of this project, it is hard to imagine what creative loophole is being crafted to justify it in the agricultural district. A gated community of 125 luxury houses surrounding a golf course together with a hotel is certainly as intrusive an urban use as an amusement park. Neighborhood Board v. State Land Use Commission, 65 Haw 265, 273 (1982).

Perhaps Pacific Star is attempting to rely on the lengthy phrase found in HRS 205-2(c), which reads:

bona fide agricultural services and uses which support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, whether or not conducted on the same premises as the agricultural activities to which they are accessory, including but not limited to farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises

Read carefully, this phrase provides a three-part test for certain kinds of accessory activities in the agricultural district. The three elements are the use or service:

- 1) is bona fide agricultural;
- 2) supports the agricultural activities of the fee or leasehold owner of the property; and
- 3) is accessory to cultivation of crops, orchards, forage, forestry, farming activities, animal husbandry, aquaculture, game and fish propagation, or wind generated energy production -- including, but not limited to, farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities,

vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises.

Pacific Star proposes that the 225 acres slated for 112 one and two acre house lots will provide financial support for 13 five-acre lots, comprising 75 acres. In so doing it seems to suggest that the luxury houses will be supporting the agricultural component of the project, and therefore are allowed under the law.

The luxury houses in and of themselves are not bona fide agricultural services or uses, however. No tortured construction of this phrase can suggest that luxury housing is a bona fide agricultural use. Providing some sort of financial support to the 13 farms on 75 acres does not make the remaining 112 houses on 225 acres a "bona fide agricultural service." To suggest so would make a complete mockery of the Legislature's intent in passing the Land Use Law to prevent scattered urban development, to limit land speculation, and to protect the unique natural assets of the state. Sanctioning such a scheme "unreasonably expands the intended scope of this term and frustrates the state land use law's basic objectives of protection and rational development." Curtis v. Board of Appeals, County of Hawai'i, 90 Haw. 384, 396 (1999).

Nor is it fair to suggest that these luxury houses are "accessory" to agriculture. Employee housing, farm buildings, mills, storage facilities, processing facilities, equipment storage areas and roadside stands are all part and parcel of providing agricultural services. They are clearly accessory uses, necessary for the viability of agriculture. Farms need mills, storage facilities etc. Farms, however, don't need luxury housing.

As the Land Use Commission's own rules recognize "'accessory building or use' means a subordinate building or use which is incidental to and customary with a permitted use of the land," HAR § 15-15-03. The 112 one and two acre houselots for luxury houses scattered over

225 acres are clearly not subordinate to the 13 farms on 75 acres. Nor are they incidental and customary to a permitted use of the land.

Finally, Pacific Star cannot claim that the 112 houses are slated for farm dwellings. While 13 of the lots are slated for agriculture, none of the remaining 112 are. In fact, Pacific Star asserts that ninety percent of the project area consists of lava lands with little or no natural soils. The house lots are built on land that Pacific Star identifies as very poorly suited for agricultural use. The lots, for which electrical and communication lines within the project will be placed underground are, according to Pacific Star, expected to appeal to second home buyers.

These houses are not farmhouses or related to agriculture in any meaningful way.

E. THE HOTEL MAY NOT BE SEGMENTED FROM THE REMAINDER OF THE MASTER PLANNED DEVELOPMENT PROJECT IN ORDER TO OBTAIN A SPECIAL PERMIT FROM THE COUNTY AND AVOID LUC REVIEW.

In expressing its intention to apply for a special permit (15 acres or less) from the county, Pacific Star attempts to segment its proposed development into pieces. Such segmentation would allow Pacific Star to avoid LUC review. Segmentation of the project for the purposes of obtaining a special permit should not be tolerated.

The law relating to environmental impact statements is instructive. Environmental Impact Statement Rules provide:

A group of actions proposed by an agency or an applicant shall be treated as a single action when:

- (1) The component actions are phases or increments of a larger undertaking;
- (2) An individual project is a necessary precedent for a larger project;
- (3) An individual project represents a commitment to a larger project; or
- (4) The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of actions as a whole.

Hawaii Administrative Rules 11-200-7. The rationale is clear:

[T]here are situations in which an agency is required to consider several related actions in a single EIS. Not to require this would permit dividing a project into multiple "actions," each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.

Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985). The approval process here should likewise allow the decision-maker to examine all the interrelated components of the project.

Pacific Star goes to great pains to describe its project as a "master planned community." It does so, in part, so that it can obtain the benefits of the county Planned Unit Development Ordinance. The purpose of the ordinance is to "encourage comprehensive site planning." Hawaii County Code 25-6-1. This ordinance provides, in part,

The development of a harmonious, integrated whole justifies exemptions, if required, to the normal requirements of this [zoning] chapter, and the contemplated arrangements or use make it desirable to apply regulations and requirements differing from those ordinarily applicable under the district regulations.

Hawaii County Code 25-6-3(6).

Pacific Star's master planned development's components are interrelated, connected and interdependent. Pacific Star's "members hale" will include a 100 unit hotel, with a lobby, administration offices, kitchen facilities, bungalow buildings, dining room, pool, spa and tennis courts. The "members' hale" provides "accommodations for project residents, golf club members, and guests." A pavilion "will be designed to complement the style used in the golf clubhouse and each would share a common garden area set between the golf clubhouse and main pavilion."

Because use of the "members hale" is limited to people who live in the houses within the development and members of the golf course (and their guests), the "members hale" cannot be designated as a stand-alone project. It is inextricably linked both to the golf course and the 125

house lots. It is part of the master planned community. It therefore may not be considered a separate action requiring only county approval.

F. ALLOWING THE DEVELOPER TO CIRCUMVENT LAND USE COMMISSION REVIEW WOULD UNDERMINE THE AUTHORITY OF THE LUC

Allowing this type of development to avoid Land Use Commission review and approval would establish a precedent that would ultimately undermine the value and effectiveness of the Land Use Law and the Commission. Instead of submitting reclassification petitions to the Commission, developers would creatively justify how each subdivision finances a minor agricultural component. The authority of the LUC would be completely undercut. The state would relinquish its ability to protect cultural sites and natural resources. It would be unable to minimize public infrastructure costs. The price of agricultural land would increase as the speculative value of these lands increases dramatically. Small farmers would be unable to afford to rent or buy agricultural land. Large landowners will be even less likely to enter into long-term and affordable leases to farmers as they perceive that these lands can be put to more profitable residential uses. Development would not longer be concentrated in urban clusters, but instead be sprawled out through out the islands. These new subdivisions would soon demand their fare share of urban services from state and county governments: schools, libraries, roads, police and fire protection and parks.

VII. CONCLUSION

Based upon the foregoing, Petitioners respectfully request that this Commission enter the following declaratory order:

A. Luxury housing developments and hotels are not permissible uses on agricultural land.

B. Pacific Star must apply for a district boundary amendment to develop its master planned community at Keopuka because of the urban-like nature, size and scope of the development.

C. The county may not grant a special permit for the "members hale" because the "members hale" is connected to, interrelated and interdependent on the activities and development on the remaining over six hundred acres.

Dated: Volcano, Hawai'i 3 August 2000



David Kimo Frankel
Sierra Club, Hawai'i Chapter Chair

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Sierra Club's petition was served upon the following by U.S.

Postal Service certified mail:


Pacific Star, LLC
c/o William L. Moore Planning
159 Halai Street
Hilo, HI 96720

Ms. Virginia Goldstein
County Planning Department
25 Aupuni St. Room 109
Hilo, HI 96720-8742

and that a copy of the Sierra Club's petition was served by hand to:

Office of Planning
235 S. Beretania
State Office Tower
Honolulu, HI 96813

Dated, Volcano, Hawai'i this day of 3 August 2000



David Kimo Frankel
Chair Sierra Club, Hawai'i Chapter

BEFORE THE LAND USE COMMISSION
THE STATE OF HAWAII

In the Matter of the Petition of)
) CERTIFICATE OF SERVICE
)
KU'ULEI HIGASHI KANAHELE and)
AHIENA KANAHELE,)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the above was duly served upon the following parties by U.S. Mail, postage pre-paid certified mail with a return receipt requested or hand delivered on this date as follows:

Riley K. Hakoda
Leiopapa A Kamehameha Building 235
South Beretania Street, Room 406
Honolulu, Hawai'i 96813

Chief Clerk,
LAND USE COMMISSION, STATE OF HAWAII

DATED: Honolulu, Hawai'i October 28, 2019



LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorney for Petitioners