

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII



In the Matter of the Petition of) DOCKET NO. A17-804
)
HAWAIIAN MEMORIAL LIFE PLAN, LTD.) HAWAIIAN MEMORIAL LIFE
) PLAN, LTD.
To Amend The Conservation Land Use)
District Boundary Into The Urban Land Use)
District For Approximately 53.449 Acres Of)
Land At Kāneʻohe, Island of Oahu, State of)
Hawai`i, Tax Map Key: (1) 4-5-033: por. 001)
_____)

PETITIONER'S REBUTTAL TO INTERVENORS' COMMENTS
AND OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION AND ORDER, FILED SEPTEMBER 4, 2020

AND

CERTIFICATE OF SERVICE

BENJAMIN M. MATSUBARA, #993-0
CURTIS T. TABATA, #5607-0
Matsubara, Kotake & Tabata
888 Mililani Street, Suite 308
Honolulu, Hawai`i 96813

Attorneys for Petitioner
HAWAIIAN MEMORIAL LIFE
PLAN, LTD.

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of)	DOCKET NO. A17-804
)	
HAWAIIAN MEMORIAL LIFE PLAN, LTD.)	PETITIONER'S REBUTTAL TO
)	INTERVENORS' COMMENTS
To Amend The Conservation Land Use)	AND OBJECTIONS TO
District Boundary Into The Urban Land Use)	FINDINGS OF FACT,
District For Approximately 53.449 Acres Of)	CONCLUSIONS OF LAW AND
Land At Kāne'ōhe, Island of Oahu, State of)	DECISION AND ORDER, FILED
Hawai'i, Tax Map Key: (1) 4-5-033: por. 001)	SEPTEMBER 4, 2020
_____)	

PETITIONER'S REBUTTAL TO INTERVENORS' COMMENTS
AND OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION AND ORDER, FILED SEPTEMBER 4, 2020

Comes now, Petitioner HAWAIIAN MEMORIAL LIFE PLAN, LTD.

("Petitioner"), by and through its attorneys, MATSUBARA, KOTAKE & TABATA, and hereby respectfully submits its Rebuttal to Intervenor's Comments and Objections to Findings of Fact, Conclusions of Law and Decision and Order, filed September 4, 2020 ("Objections").

I. INTRODUCTION

Intervenor's Objections are without merit and are either unsupported by the weight of credible evidence or misapplies the law. The need for the project exists on multiple levels, the law relating to cultural resources has been properly observed, Petitioner's proposed protection affords the damselfly its best chance for survival, and Petitioner's

drainage plan will comply with the City's rules to make sure runoff is not more than pre-development conditions and will in fact reduce existing runoff.

II. DISCUSSION

Need for the Project

Intervenors object to Petitioner's proposed findings of fact ("FOF") 73, 74, 75, 76, 78 and 271 on the erroneous conclusion that there will be a surplus of interment plots by year 2040.

Petitioner's market expert, Mr. Thomas Holliday, made it clear that the midpoint demand for burial spaces by year 2040 is 120,000, and the total existing supply of burial spaces is only 16,500. [Tr. 6/9/20 112:12-112:24] Some proposed burial spaces may never exist and cannot be counted on for future supply because they are almost unsupportable, requiring entitlements and are subject to soils concerns, wetlands concerns, and require millions of dollars of infrastructure. [Tr. 6/9/20 113:1-113:21]

Increasing the number of interments per plot does not mean that people will choose the option, just because you can do something, doesn't mean that's what the market wants. And so you're still going to have a significant portion of the market which desires single interment. This conclusion is based on the history of cemetery development. [Tr. 6/9/20 159:4-160:13]

But even if you assume two interments per plot, the demand is far greater than supply and that would not change the conclusion. [Tr. 6/9/20 160:17-161:10]

Hawaiian Memorial needs the Project to continue its operations. Hawaiian Memorial's existing 80 acres is 93%-94% sold out on casket burial spaces. The Ocean View Garden has 25% of its burial space available, so without the Project, Hawaiian Memorial will not be able to provide future casket burial options, and cremation garden options will also be very limited. [Pet. Ex. 30, p. 3-4]

Hawaiian Memorial needs this Project to maintain its staffing. Hawaiian Memorial Life Plan, Ltd. employs 204 individuals and provides 100% medical for full time associates, Dental, 401k retirement with employer match, Life Insurance Benefits, Long and Short term disability, family funeral and cemetery benefits, and college tuition reimbursement program for those who wish to participate. [Pet. Ex. 30, p. 1-2]

The Project will provide 30 million dollars in up front construction cost that will be spent here locally. [Tr. 6/9/20 149:21-150:3]

Therefore, the State of Hawai'i needs the Project to address a severe future shortfall in interment plots, Hawaiian Memorial needs the Project to continue serving Hawai'i's families and to continue the employment and support of 204 employees and their families, and the immediate economic benefit of the Project in construction dollars is needed by Oahu and the State while we continue to struggle in the current economic crisis.

Ka Pa`akai O Ka`Aina v. Land Use Commission, 94 Hawai`i 31, 7 P.3d 1068 (2000)

Intervenors' reliance on *Ka Pa`akai O Ka`Aina v. Land Use Commission*, 94 Hawai`i 31, 7 P.3d 1068 (2000) is incorrect in their objection to FOF 79, 179 and 182.

Ka Pa`akai is a case from a different era when there was no *Ka Pa`akai* analysis required of every project brought in front of the Land Use Commission.

In *Ka Pa`akai*, the Commission delegated to the developer the responsibility to preserve and protect any gathering and access rights of native Hawaiians without identifying those rights or providing any specificity as to the locations on which native Hawaiians could be expected to exercise them. *Ka Pa`akai*, 94 Hawaii at 1086. For this to happen today would be unthinkable, because the identification of cultural resources is the first prong of the three-pronged test that comprises the required *Ka Pa`akai* analysis.

The fact that there was something called a management plan in the *Ka Pa`akai* case and that there is something called a preservation plan in connection with Hawaiian Memorial's proposed Cultural Preserve, and the false claim that there is a connection between the two sufficient to draw a parallel, is superficial at best and disingenuous at worst.

Hawaiian Memorial is not asking the Commission to delegate any responsibility. Hawaiian Memorial's cultural expert prepared the Cultural Impact Assessment ("CIA") in accordance with the *Ka Pa`akai* case which is attached to the Final Environmental Impact Statement. [Pet. Ex. 6, Appendix K]

The CIA identified tangible and intangible cultural resources of the Project area using the analytical methodology required by the *Ka Pa`akai* case. The CIA includes interviews and consultations, and identifies intangible resources, historic sites, natural resources, and traditional and customary native Hawai`ian practices. [Pet. Ex. 43, p. 2-4]

The CIA then went on to evaluate the Project's impacts on those cultural resources and concluded that, under the *Ka Pa`akai* analysis, the Project would not adversely impact traditional and customary native Hawai`ian rights. [Pet. Ex. 43, p. 5]

In the *Ka Pa`akai* case, the developer proposed to identify and protect cultural resources **after** development of the project. *Ka Pa`akai*, 94 Hawaii at 1088. That was unacceptable, and today the *Ka Pa`akai* analysis is required to be conducted **before** a project is developed in order to protect existing and historic cultural resources. That is the difference between the facts of the *Ka Pa`akai* case and Hawaiian Memorial's Project, and that is why Hawaiian Memorial is consistent with *Ka Pa`akai* and its three-part test which was correctly applied **before** any development.

Damselfly

Intervenors' objections to FOF 123, 124, 125, 127, 129 and 183 are groundless.

The State's entomologist, Ms. Cynthia King, testified that she reviewed Hawaiian Memorial's avoidance and minimization measures and found them to be sound recommendations. One of the most important measures is the installation of a

temporary and then permanent waterline to provide water to the seep. [Tr. 7/22/20 55:1-55:8]

Intervenors' own witness, Mr. Nathan Yuen, reached the exact same conclusion as Ms. King, that a water hose delivering clean water to the seep will greatly improve the damselfly's chance of survival, because if the water supply were to dry up, then the damselflies will die. [Tr. 8/12/20 30:25-33:18]

Ms. King also confirmed that no pesticides or herbicides are used in the area except for glyphosate which is not documented to impact invertebrates. Moreover, other native damselfly species appear to persist even in proximity to highly landscaped urban areas, which seems counterintuitive, but there are examples of some of other endangered species existing in ponds and golf courses, for example, on the Island of Lana`i, and also on the grounds of Tripler Army Medical Hospital. [Tr. 7/22/20 54:14-54:25]

Ms. King went on to testify that additional mitigation measures proposed by Hawaiian Memorial such as fencing the area from pigs will prevent ongoing degradation of the habitat. And providing safe areas for damselflies naiads to emergence population, also has the potential to increase emergence success in overall abundance of the species, reducing predation from invasive ants. [Tr. 7/22/20 56:1-56:7]

Ms. King explained that the primary threat to, not just damselflies, but most rare invertebrates species in Hawai`i is the impact of invasive species, whether that is

competition, direct predation, habitat destruction and habitat alteration, and if left alone, it's common for rare invertebrates to blink out at field sites where ongoing management or monitoring isn't being conducted, and where there are no eyes on the site to understand what new threats might be present. [Tr. 7/22/20 56:8-56:17]

Ms. Cynthia King, entomologist for the State of Hawaii, unequivocally stated "So in my opinion, the avoidance and minimization measures proposed for the site would increase the likelihood that this population would be preserved in perpetuity." [Tr. 7/22/20 56:18-56:21]

Drainage

Intervenors object to Petitioner's drainage plan at FOF 154, 157, 233, 236, 237, 238, 239, 240, 243, 244 and 245 with three unsupported arguments: 1) runoff during construction will adversely impact water quality; 2) the drainage basins are too small to decrease storm water runoff; and 3) the Project will increase storm water runoff.

First, Dr. Steve Spengler testified that there is a potential for increased Total Maximum Daily Load ("TMDL") in the event of a rain storm, but that it would depend on the types of BMP's that were installed during construction. [Tr. 6/10/20 161:2-161:10]

The mass grading work will be limited to maximum 5 acre increments, and Best Management Practices ("BMP") will be implemented before construction, during construction, and during adverse weather conditions. [Pet. Ex. 32, p. 8]

BMP measures before construction include not destroying existing ground cover more than 20 calendar days prior to construction, and erosion and sediment control measure will be in place before construction starts. [Pet. Ex. 32, p. 8]

BMP measures during construction include minimizing clearing to do site work, sequencing to minimize the area of cleared surfaces, phases (maximum 5 acres) will be stabilized before the next phase starts, slope management and protection will be required for slopes greater than 15%, stabilization will be accomplished through use of PVC sheet, geotextile filter fabric, berms or sediment basins, or vegetative controls such as grassing or hydromulch, and buffer strips 10 feet wide at the toe of slopes and upstream diversion of stormwater are required. [Pet. Ex. 32, p. 8]

BMP measures during adverse weather include daily monitoring of weather, stop work during emergency weather and secure equipment and materials, prior to recommencement of work contractor will inspect all BMPs, including silt fences, sandbag barriers, and stabilized construction entrance, and construction materials and debris that is dispersed during a storm will be reused or disposed of in compliance with State and County regulations. [Pet. Ex. 32, p. 9]

Second, the drainage basins were not designed nor intended to decrease runoff, instead they are required to function as a detention system and retain stormwater for water quality purposes. [Pet. Ex. 32, p. 16]

Furthermore, there is no evidence that Petitioner's proposed drainage basins are in violation of any rule or regulation. Intervenor's witness, Dr. Steven Businger, who testified regarding the drainage basins, could not point to any specific drainage rule that was being violated by Petitioner. [Tr. 8/12/20 60:13-61:5] Intervenor's engineer, Mr. John Higham, testified that the Department of Planning and Permitting ("DPP") would look at Hawaiian Memorial's drainage plans and say that it meets their standards. [Tr. 7/22/20 169:7-169:14]

Third, it would be physically and legally impossible for Hawaiian Memorial's Project to increase storm water runoff.

Any visit to Hawaiian Memorial Park will make it clear that the vast majority of the expanded cemetery will be covered with turf grass. Both engineers for Petitioner and Intervenor agree that turf grass has a lower runoff coefficient when compared to the existing alien forest, that runoff is greater where the land is undeveloped, and that turf grass with the decreased slope will retain more water on the Project. [Tr. 7/22/20 157:3-157:20; Tr. 6/10/20 45:14-45:21] It is undisputed that turf grass will generate less stormwater runoff than a forest of albizia trees.

In addition, the City's drainage rules will not allow the Project to generate more runoff than currently exists. Both the runoff quantity and general conditions sections of the rules provide that drainage areas for new developments where the downstream capacities are inadequate, runoff shall be limited to pre-development conditions. [Pet.

Ex. 65, p. 1 and 5] In other words, the City's rules will not allow the Project to increase runoff. This is true for other counties and is a familiar standard that is applied to projects that are brought before the Commission.

In fact, if the Commission were to approve this Project, then DPP will use the expertise that they have, engineering expertise, and will evaluate whatever plan that the landowner proposes, and it is possible that the final plan that is approved by DPP may be different from the current plan. [Tr. 7/22/20 169:22-170:9]

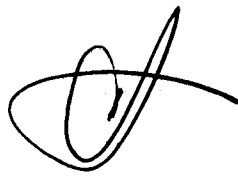
State and County Plans, Urban District Standards, Conclusions of Law and Order and All Other Issues Raised

Petitioner incorporates by reference the argument, evidence and legal authorities stated above and in Petitioner's Objections to Intervenors' Proposed Findings of Fact, Conclusions of Law and Decision and Order, and in Petitioner's Proposed Findings of Fact, Conclusions of Law and Decision and Order to rebut Intervenors Objections to Petitioner's findings of fact relating to State and County plans, urban district standards, proposed conclusions of law and order, and all other issues raised.

III. CONCLUSION

Based upon the foregoing, Hawaiian Memorial respectfully requests that the Commission approve the Petition.

DATED: Honolulu, Hawai'i, September 9, 2020.



Of Counsel:

MATSUBARA, KOTAKE & TABATA
A Law Corporation

BENJAMIN M. MATSUBARA

CURTIS T. TABATA

Attorneys for Petitioner

HAWAIIAN MEMORIAL LIFE PLAN, LTD.

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of) DOCKET NO. A17-804
)
HAWAIIAN MEMORIAL LIFE PLAN, LTD.) CERTIFICATE OF SERVICE
)
To Amend The Conservation Land Use)
District Boundary Into The Urban Land Use)
District For Approximately 53.449 Acres Of)
Land At Kāne'ōhe, Island of Oahu, State of)
Hawai'i, Tax Map Key: (1) 4-5-033: por. 001)
_____)

CERTIFICATE OF SERVICE

I hereby certify that a file-marked of the foregoing document was duly served upon the following **AS INDICATED BELOW** on September 9, 2020.

DAWN TAKEUCHI-APUNA, ESQ.
Deputy Attorney General
Department of the Attorney General
425 Queen Street
Honolulu, Hawai'i 96813

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED
dawn.t.apuna@hawaii.gov

MARY ALICE EVANS, DIRECTOR
Office of Planning, State of Hawai'i
235 South Beretania Street
Room 600, Leiopapa A Kamehameha Bldg.
Honolulu, Hawai'i 96813

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

KATHY K. SOKUGAWA, ACTING DIRECTOR
City and County of Honolulu
Department of Planning and Permitting
650 South King Street, 7th Floor
Honolulu, Hawai'i 96813

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED
bchong2@honolulu.gov

PLANNING COMMISSION
City and County of Honolulu
650 South King Street, 7th Floor
Honolulu, Hawai'i 96813

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED
bchong2@honolulu.gov

PAUL S. AOKI, ESQ.
Acting Corporation Counsel
DUANE W. H. PANG, ESQ.
Deputy Corporation Counsel
City and County of Honolulu
Department of Corporation Counsel
530 South King Street, Room 110
Honolulu, Hawai'i 96813

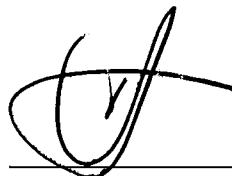
CERTIFIED MAIL
RETURN RECEIPT
REQUESTED
paoki@honolulu.gov
dpang1@honolulu.gov

HUI O PIKOILOA, an unincorporated
Association, LIANNE CHING, BETTYE
HARRIS, RICHARD MCCREEDY, JULIANE
MCCREEDY, JESSE REAVIS, and
GRANT YOSHIMORI
c/o 45-464 Lipalu Street
Kaneohe, Hawai'i 96744

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED
gyoshimo@hotmail.com
gyoshimo@gmail.com

DATED: Honolulu, Hawai'i, September 9, 2020.

Of Counsel:
MATSUBARA, KOTAKE & TABATA
A Law Corporation



BENJAMIN M. MATSUBARA
CURTIS T. TABATA
Attorneys for Petitioner
HAWAIIAN MEMORIAL LIFE PLAN, LTD.