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BEFORE THE LAND USE COMMISSION  
 OF THE STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A99-729
	)	
THE NEWTON FAMILY LIMITED	)	OFFICE OF PLANNING'S RESPONSE
PARTNERSHIP, A HAWAII LIMITED	)	TO PETITIONER'S AMENDED MOTION
PARTNERSHIP	)	FOR ORDER AMENDING THE
	)	FINDINGS OF FACT, CONCLUSIONS
	)	OF LAW, AND DECISION AND ORDER,
To Amend the Conservation Land Use	)	DATED NOVEMBER 16, 2001;
District Boundary into the Agricultural Land	)	AND CERTIFICATE OF SERVICE
Use District for Approximately 885.40	)	
Acres of Land at Kukuau, South Hilo,	)	
Hawaii, TMK No.: (3) 2-4-008: Por. 33	)	
	)	

**OFFICE OF PLANNING'S RESPONSE TO PETITIONER'S AMENDED MOTION FOR  
 ORDER AMENDING THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
 DECISION AND ORDER, DATED NOVEMBER 16, 2001**

On October 16, 2020, the Office of Planning ("OP") filed its *Response to Petitioner's Motion for Order Amending the Findings of Fact, Conclusions of Law and Decision and Order dated November 16, 2001* ("OP Response"). On October 21, 2020, successor Petitioner Hawaiian Islands Land Trust ("HILT"/ "Successor Petitioner") filed its *Amended Motion for Order Amending the Findings of Fact, Conclusions of Law, and Order, filed November 16, 2001* ("Amended Motion"), which includes in part HILT's agreement and/or modifications to OP's proposed modifications to conditions in OP's Response. For clarity and completeness, OP provides its revised position on all twenty-three Decision and Order conditions, as follows:

**1. Condition No. 1**

**A. Original 2001 Condition:**

“The proposed subdivision will be restricted to a maximum of 8 lots, with a minimum lot size of 80 acres. Each deed conveying title to a subdivided lot will include a 20-year restriction commencing upon final subdivision approval against further subdivision, and a general prohibition against large-scale commercial agriculture operations, animal hospitals, campgrounds, and other similar open area recreational activities, mausoleums, group living facilities, golf courses, golf driving ranges, golf maintenance facilities, and golf clubhouse, adult care homes, community buildings, day care centers, hospitals, stadiums and sports arenas and schools.”

**B. HILT’s Originally Proposed Condition:**

“The Petition Area will not be subdivided. Any structures that HILT erects or constructs in the Petition Area shall be allowed by HRS 205-2(d), or HILT will seek a Special Permit to erect or construct such structure(s).”

**C. OP’s Proposed Modification to HILT’s Proposed Condition:**

“The Petition Area ~~will~~ shall not be subdivided. Any structures that ~~HILT~~Petitioner erects or constructs in the Petition Area ~~shall~~ must be ~~allowed by~~ permitted under HRS 205-2(d), or ~~HILT~~Petitioner ~~will~~ shall seek appropriate permits and/or a Special Permit(s) to erect or construct such structure(s).”

**2. Condition No. 2**

**A. Original 2001 Condition:**

“Endangered birds and bats, including the Hawaiian Hawk and the Hawaiian Bat, have been observed in the Petition Area. Petitioner and its successors shall implement mitigation measures to avoid any negative effects to existing rare, endangered or threatened species. Such mitigation measures will include leaving any large stands of native forest trees and clusters of native vegetation intact, and focusing residential sites to areas that were previously cleared and incorporating the use of native plants in landscaping plans. Petitioner and its successors shall not develop the Petition Area into a project which would change the overall character of the area or generate major increases in residential population. Petitioner and its successors shall preserve the existing lowland native forest, and protect he Hawaiian Hawk and the Hawaiian Bat. Any

such protection or mitigation measures that are initiated shall be first approved by the U.S. Fish and Wildlife Service, and the State Department of Land and Natural Resources.”

**B. OP’s Proposed Condition With Petitioner’s Minor Modifications (in bold):**

“Fish and Wildlife Protection. Petitioner shall comply with the following:

(a) The State listed Hawaiian Hawk (‘io) is known to occur in the project vicinity. To avoid impacts to the Hawaiian Hawk, prior to any construction and/or tree harvesting activities, the area should be surveyed during the breeding season from March to September to ensure no Hawaiian Hawk nests are present if trees are to be cut. If this cannot be avoided, no trees should be disturbed, removed or trimmed without consulting DOFAW. (b) If the State listed Hawaiian Goose or Nene are present during construction activities, all activities within 100 feet (30 meters) shall cease, and the bird should not be approached. Work may continue after the bird leaves the area of its own accord. If a nest is discovered at any point, DOFAW shall be contacted. (c) The movement of plant soil material between worksites such as in fill shall be minimized. Petitioner shall contact the **Big Island** Invasive Species Committee to minimize the risk of spreading invasive species. All equipment, materials and personnel should be cleaned of excess soil and debris to minimize the risk of spreading invasive species. (d) To avoid potential impacts to the Hawaiian hoary bat, the clearing of dense vegetation, including woody plants greater than 15 feet should not occur between June 1 to September 15 when bats may be carrying young and potentially at risk by such clearing activities. If this cannot be avoided, woody plants greater than 15 feet tall should not be disturbed, removed, or trimmed without consulting DOFAW. Barbed wire shall not be installed on fencing within the Petition Area.”

**C. OP’s Position on Condition No. 2:**

OP agrees with HILT’s Proposed Condition No 2.

**3. Condition No. 3**

**A. Original 2001 Condition:**

“Prior to clearing and grubbing the alignment for the subdivision roadway and utilities, Petitioner will stake the centerline for the proposed access road, conduct a 500-meter wide survey of the proposed roadway alignment to assure that there are no Hawaiian Hawk and/or Hawaiian Bat nests in the area. The U.S. Fish and Wildlife Service (“USFWS”) and the State Department of Land and Natural Resources will be provided with a copy of the results of such survey and consulted as to the need for any mitigating or conservation measures.”

**B. HILT's Proposed Condition:**

HILT proposes deletion of Condition No. 3.

**C. OP's Position:**

OP does not object to the deletion of Condition No. 3.

**4. Condition No. 4**

**A. Original 2001 Condition:**

"Petitioner, developers, and/or landowners shall minimize the use of night lights and shield all exterior lighting and light sources to mitigate the downing of Pelagic seabirds that may fly over the Property to return to their nesting colonies on the upper slopes of Mauna Kea."

**B. OP's Proposed Condition:**

"Construction activity shall be restricted to daylight hours as much as practicable during the seabird breeding season (April through November) to avoid the use of nighttime lighting that could be an attraction to seabirds. All nighttime work that requires outdoor lighting shall be avoided during the seabird fledging fallout period from September 15 through December 15. All outdoor lighting at the Project shall be shielded to prevent upward radiation so as to reduce the potential for seabird attraction."

**C. HILT's Position:**

HILT agrees with OP's proposed Condition No. 4 at page 16 of its Amended Motion.

**5. Condition No. 5**

**A. Original 2001 Condition:**

"There are kipuka in the Petition Area which harbor native forest. Petitioner and its successors shall implement conservation measures such as leaving large stands of native forest trees and clusters of native vegetation within the Petition Area intact, containing residential sites to areas previously cleared, maintaining the Remainder Area (area above the Ola'a Flume Road) in Conservation, utilizing a grading plan that will leave undisturbed the stands of forest in the makai parcel that extend into the Petition Area to as low as the 1,600-foot level as a buffer for the Remainder Area. The grading plan shall be approved by the State Department of Land and Natural Resources, the US Fish and Wildlife Services, and any other appropriate governmental agencies."

**B. HILT's Proposed Condition:**

“The Petition Area includes significant native forest. HILT and its successors shall develop and implement a forest management plan within 2 years from the date of this Decision and Order, which HILT will provide to this Commission, and HILT will provide reports to this Commission every 5 years on native forest restoration progress per plan benchmark projections. Forestry is an allowable use in the Petition Area.”

**C. OP’s Position on HILT’s Proposed Condition:**

OP does not object to HILT’s proposed Condition No. 5. “HILT” should be replaced with “Petitioner”.

**6. Condition No. 6**

**A. Original 2001 Condition:**

“Best management practices will be used during construction to control erosion and prevent runoff from damaging native forest resources.”

**B. HILT’s Position:**

HILT seeks to retain Condition No. 6.

**C. OP’s Position:**

OP takes no position on Condition No. 6.

**7. Condition No. 7**

**A. Original 2001 Condition:**

“Petitioner and its successors shall complete, prior to any land alteration, an archaeological inventory survey of the acreage that would be distributed by any specific development, including roadway, driveway, house site and agricultural site. The survey results will be provided to the DLNR State Historic Preservation Division (SHPD) and the Office of Hawaiian Affairs (OHA) for review and comment. Subsequent work shall proceed upon clearance from the SHPD. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot.”

**B. OP’s Proposed Condition:**

“Petitioner and its successors shall complete, prior to any land alteration, an archaeological inventory survey (AIS) of the ~~acreage~~ area that would be disturbed by any specific development, including roadway, driveway, parking, ~~house site~~ and agricultural building site. The AIS ~~survey~~ results will be provided to the DLNR State Historic Preservation Division (SHPD) ~~and the Office of Hawaiian Affairs (OHA)~~ for review and ~~comment~~ approval.

~~Subsequent work shall proceed upon clearance from the SHPD. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot.~~

**C. HILT's Proposed Condition:**

“Prior to commencing any proposed projects that involve ground-disturbing activities, Petitioner and its successors shall provide the DLNR State Historic Preservation Division (“SHPD”) the opportunity to review, comment, and have Petitioner comply with any of SHPD’s requirements for the project(s). HILT will consult with SHPD to assess the scope of work and whether some level of archeological reconnaissance is required.”

**D. OP's Position on HILT's Proposed Modifications to OP's Proposed Condition:**

OP does not object to HILT's proposed Condition No. 7. “HILT” should be replaced with “Petitioner”.

**8. Condition No. 8**

**A. Original 2001 Condition:**

“To the extent that any archaeological sites are located on the Petition Area, Petitioner and its successors shall work with SHPD in developing a data recover/mitigation/preservation plan. This plan will include input from the local native Hawaiian community and relevant Hawaiian groups, including the OHA. The plan shall be approved by SHPD, and a certified copy thereof filed with the Commission, prior to any land alteration affecting such sites. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot.”

**B. OP's Proposed Condition:**

~~“To the extent that any archaeological sites are located on the Petition Area, Petitioner and its successors shall work with SHPD in developing a data recovery/mitigation/preservation plan(s), as needed in conjunction with Condition 7. This plan will include input from the local native Hawaiian community and relevant Hawaiian groups, including the OHA. The plan shall be reviewed and approved by SHPD, and a certified copy thereof filed with the Commission, prior to any land alteration affecting such sites. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot.”~~

**C. HILT's Position:**

On page 18 of its Amended Motion, HILT agrees to OP's proposed Condition No. 8 with the exception of the last sentence, "The plan shall be reviewed and approved by SHPD prior to any land alteration affecting such sites." However, through discussions between HILT and OP, HILT has indicated that it is willing to include this last sentence.

**9. Condition No. 9**

**A. Original 2001 Condition:**

"Petitioner and its successors shall immediately stop work and contact SHPD should any previously unidentified archaeological resources such as artifacts, human burials, rock alignments, pavings or walls be encountered during the development of the proposed subdivision. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot."

**B. OP's Proposed Condition:**

"Petitioner and its successors shall immediately stop work and contact SHPD should any previously unidentified archaeological resources such as artifacts, human burials, rock alignments, pavings or walls be encountered during construction activities ~~the development of the proposed Kukuau forest management subdivision. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot.~~"

**C. HILT's Position:**

HILT agrees to OP's proposed Condition No. 8 at page 18 of its Amended Motion.

**10. Condition No. 10**

**A. Original 2001 Condition:**

"In connection with the subdivision of the Petition Area, Petitioner shall, if necessary, dedicate to the County of Hawaii an 80-foot right-of-way located near the Ola'a flume system to accommodate the County's planned secondary arterial."

**B. HILT's Position:**

HILT requests deletion of this condition.

**C. OP's Proposed Condition:**

OP takes no position on this request and defers to the County of Hawaii.

**11. Condition No. 11**

**A. Original 2001 Condition:**

“Petitioner and its successors shall fund and construct adequate individual wastewater transmission and disposal facilities, as determined by the County of Hawaii Department of Public Works (DPW) and the State Department of Health (DOH).”

**B. OP’s Position:**

OP recommends the retention of this condition in light of the planned uses of volunteer work days, field trips for local schools, and inviting Hawaiian cultural practitioners to the area.

**C. HILT’s Position:**

HILT agrees to retain Condition No. 11 at page 19 of its Amended Motion.

**12. Condition No. 12**

**A. Original 2001 Condition:**

“Petitioner and its successors prior to any construction activities, including grading or grubbing, shall consult with the Department of the Army (DA) to determine if a DA permit will be required and to ensure compliance of development plans with the Federal Emergency Management Agency.”

**B. HILT’s Position:**

HILT requests deletion of Condition No. 12.

**C. OP’s Position:**

OP does not object to the deletion of Condition No. 12.

**13. Condition No. 13**

**A. Original 2001 Condition:**

“Petitioner and its successors shall provide written notification to all prospective buyers of proposed lots within the proposed subdivision of the potential odor, noise, and dust pollution resulting from surrounding Agricultural District land.”

**B. HILT’s Position:**

HILT requests deletion of Condition No. 13.

**C. OP’s Position:**

OP does not object to the deletion of Condition No. 13.

**14. Condition No. 14**

**A. Original 2001 Condition:**

“Petitioner and its successors shall notify all prospective buyers of the proposed lots within proposed subdivision that the Hawaii Right-to-Farm Act, Chapter 165, Hawaii Revised



Statutes, limits the circumstances under which pre- existing farm activities may be deemed a nuisance.”

**B. HILT’s Position:**

HILT requests deletion of Condition No. 14.

**C. OP’s Position:**

OP does not object to the deletion of Condition No. 14.

**15. Condition No. 15**

**A. Original 2001 Condition:**

“Petitioner and its successors shall fund the design and construction of drainage improvements required as a result of the development of the Petition Area to the satisfaction of federal, state, and county agencies.”

**B. HILT’s Position:**

HILT requests deletion of Condition No. 15.

**C. OP’s Position:**

OP does not object to the deletion of Condition No. 15.

**16. Condition No. 16**

**A. Original 2001 Condition:**

“Petitioner and its successors shall participate in the funding and construction of adequate water source, storage, and transmission facilities and improvements to accommodate the proposed project. Water transmission facilities and improvements shall be coordinated and approved by appropriate state and county agencies.”

**B. OP’s Position:**

OP recommends the retention of this Condition in consideration of the planned uses of the area.

**C. HILT’s Position:**

HILT agrees with OP’s recommendation at page 21 of its Amended Motion.

**17. Condition No. 17**

**A. Original 2001 Condition:**

“Petitioner and its successors shall maintain the Remainder Area in Conservation and subject all development thereof to the approval of the State DLNR.”

**B. HILT’s Position:**

HILT requests deletion of Condition No. 17.

**C. OP's Position:**

OP does not object to the deletion of Condition No. 17.

**18. Condition No. 18**

**A. Original 2001 Condition:**

“Petitioner shall develop the Petition Area in substantial compliance with the representations made to the Commission. Failure to so develop the Petition Area may result in reversion of the Petition Area to its former classification, or change to an more appropriate classification.”

**B. OP's Position:**

OP recommends the retention of Condition No. 18 as a standard LUC condition.

**C. HILT's Position:**

HILT agrees with OP's recommendation at page 22 of its Amended Motion.

**19. Condition No. 19**

**A. Original 2001 Condition:**

“Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Petition Area, prior to development of the Petition Area.”

**B. OP's Position:**

OP recommends the retention of Condition No. 19 as a standard LUC condition.

**C. HILT's Position:**

HILT agrees with OP's recommendation at page 22 of its Amended Motion.

**20. Condition No. 20**

**A. Original 2001 Condition:**

“Petitioner shall timely provide without any prior notice, annual reports to the Commission, the Office of Planning and the County of Hawaii Planning Department in connection with the status of the subject project and Petitioner's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission.”

**B. HILT's Proposed Condition:**

“HILT and its successors shall develop and implement a forest management plan within 2 years from the date of this Decision and Order, which HILT will provide to this Commission, and HILT will provide reports to this Commission every 5 years on native forest restoration progress per plan benchmark projections.”

**C. OP’s Position:**

OP does not object to HILT’s proposed Condition No. 20.

**21. Condition No. 21**

**A. Original 2001 Condition:**

“The Commission may fully or partially release the conditions provided herein as to all or any portion of the Petition Area upon timely motion and upon the provision of adequate assurance of satisfaction of these conditions by Petitioner.”

**B. OP’s Position:**

OP recommends retention of this Condition as a standard LUC condition.

**C. HILT’s Position:**

HILT does not seek modification or deletion of this Condition at page 23 of its Amended Motion.

**22. Condition No. 22**

**A. Original 2001 Condition:**

“Within 7 days of the issuance of the Commission’s Decision and Order for the subject reclassification, Petitioner shall (a) record with the Bureau of Conveyances a statement that the Petition Area is subject to conditions imposed by the Land Use Commission in the reclassification of the Petition Area, and (b) shall file a copy of such recorded statement with the Commission.”

**B. OP’s Position:**

OP recommends retention of this Condition as a standard LUC condition.

**C. HILT’s Position:**

HILT does not seek modification or deletion of this Condition at page 23 of its Amended Motion.

**23. Condition No. 23**

**A. Original 2001 Condition:**

“Petitioner shall record the conditions imposed herein by the Commission with the Bureau of Conveyances pursuant to Section 15-15-92 Hawaii Administrative Rules. All such conditions shall run with the land.”

**B. OP’s Position:**

OP recommends retention of this Condition as a standard LUC condition.

**C. HILT’s Position:**

HILT does not seek modification or deletion of this Condition at page 23 of its Amended Motion.

In conclusion, OP recommends approval of HILT’s Amended Motion, subject to the proposed modification of conditions provided herein. Unless modified herein, all representations made in the original OP Response shall continue.

DATED: Honolulu, Hawaii, November 2, 2020.

OFFICE OF PLANNING  
STATE OF HAWAII

*Mary Alice Evans*

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MARY ALICE EVANS  
DIRECTOR

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petitions of:	)	DOCKET NO. A99-729
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THE NEWTON FAMILY LIMITED	)	OFFICE OF PLANNINGS RESPONSE
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	)	THE FINDINGS OF FACT,
To Amend the Conservation Land Use	)	CONCLUSIONS OF LAW, AND
District Boundary into the Agricultural Land	)	DECISION AND ORDER, DATED
Use District Boundary into the Urban Land	)	NOVEMBER 16, 2001; CERTIFICATE
Use District for Approximately 885.40	)	OF SERVICE
Acres of Land at Kukuau, South Hilo,	)	
Hawaii, TMK No.: (3) 2-4-08: Por. 33	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was duly served on this date on the below-named parties by U.S. Mail, postage prepaid:

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Dated: Honolulu, Hawaii, November 2, 2020.

OFFICE OF PLANNING  
STATE OF HAWAII

A handwritten signature in black ink that reads "Mary Alice Evans". The signature is written in a cursive style with a horizontal line underneath it.

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MARY ALICE EVANS  
DIRECTOR