



LAND USE COMMISSION
STATE OF HAWAII

2020 DEC 15 A 11: 33

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
PARTNERSHIP, A Hawai'i Limited
Partnership

AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER; AND
CERTIFICATE OF SERVICE

To Amend The Conservation Land Use
District Boundary Into The Agricultural
Land Use District For Approximately
885.40 Acres Of Land At Kūkūau, South
Hilo, Hawai'i, TMK No: (3) 2-4-008: Por. 33

AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER

AND

CERTIFICATE OF SERVICE

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.

DATE

December 15, 2020

by _____

EXECUTIVE OFFICER



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On September 17, 2020, the Hawaiian Islands Land Trust ("Petitioner"), successor-in-interest to The Newton Family Limited Partnership, a Hawai'i limited partnership ("NFLP"), filed a Motion for Order Amending the Findings of Fact, Conclusions of Law, and Decision and Order Dated February 10, 1995 [sic] and Certificate of Service (collectively "Motion for Order Amending the D&O"), pursuant to Hawai'i Administrative Rules ("HAR") §§ 15-15-70 and 15-15-94.

On October 21, 2020, Petitioner filed an Amended Motion for Order Amending D&O; Declaration of Laura H.E. Kaakua; Exhibit "1"; and Certificate of

Service (collectively “Amended Motion for Order Amending the D&O”), pursuant to HAR §§ 15-15-70 and 15-15-94.

In its Amended Motion for Order Amending the D&O, Petitioner requested the State of Hawai‘i Land Use Commission (“Commission”) for an Order: 1) recognizing Petitioner’s standing to seek and obtain the relief requested therein; 2) amending the Findings of Fact, Conclusions of Law, and Decision and Order dated November 15, 2001¹ (“D&O”) to release the subject property consisting of approximately 885.40 acres of land located at Kūkūau, South Hilo, Hawai‘i, identified as Tax Map Key (“TMK”) No: (3) 2-4-008: Por. 33 (“Petition Area”), from the conditions of the D&O; and 3) issuing a new D&O for the Petition Area for the purpose of establishing appropriate findings of fact, conclusions of law, and conditions that are specifically applicable to Petitioner’s proposed native forest management plans and project (“Kūkūau Forest Management Project”).

The Commission, having heard and examined the testimony, evidence, and arguments of counsel for Petitioner, the State of Hawai‘i Office of Planning (“OP”), and the County of Hawai‘i Planning Department (“Planning Department”), both written and oral, presented at its meeting on November 5, 2020, using the Zoom Webinar Virtual Meeting platform, hereby makes the following amended findings of fact, conclusions of law, and decision and order:

¹ While the D&O was dated November 15, 2001, it was filed on November 16, 2001.
Docket No. A99-729 The Newton Family Limited Partnership, a Hawai‘i limited partnership
Amended Findings of Fact, Conclusions of Law, and Decision and Order

FINDINGS OF FACT

PROCEDURAL MATTERS

1. On September 17, 2020, Petitioner filed its Motion for Order Amending the D&O.
2. On October 16, 2020, OP filed a Response to the Motion for Order Amending the D&O; Exhibits 1 through 5; and Certificate of Service.
3. On October 16, 2020, the Planning Department filed a Response to the Motion for Order Amending the D&O; Exhibit "A"; and Certificate of Service.
4. On October 21, 2020, Petitioner filed an Amended Motion for Order Amending the D&O.
5. On October 21, 2020, Ronald N.W. Kim, Esq., filed a Notice of Appearance of Co-Counsel for Petitioner and Certificate of Service.
6. On November 2, 2020, OP filed a Response to the Amended Motion for Order Amending the D&O and Certificate of Service.
7. On November 2, 2020, the Planning Department filed a Response to the Amended Motion for Order Amending the D&O; Exhibit "A"; and Certificate of Service.
8. On November 4, 2020, the Planning Department filed an Errata Re: Certificate of Service to its Response to the Amended Motion for Order Amending the

D&O; and Incorporating OP's Response to Motion for Order Amending the D&O; Exhibit "A"; and Certificate of Service.

9. On November 5, 2020, the Commission considered the Amended Motion for Order Amending the D&O at its meeting using the Zoom Webinar Virtual Meeting platform. Ronald N.W. Kim, Esq., and Laura H.E. Kaakua appeared on behalf of Petitioner. Dawn Apuna, Esq., and Rodney Funakoshi appeared on behalf of OP. Diana M. Mellon-Lacey, Esq., and April Surprenant appeared on behalf of the Planning Department.² At the meeting, the Commission heard from Petitioner, the Planning Department, and OP. Following discussion, a motion was made and seconded to grant the Amended Motion for Order Amending the D&O as follows: (1) recognize Petitioner's standing to seek and obtain the relief requested therein; (2) amend the Decision and Order filed November 16, 2001, to reflect appropriate findings of fact, conclusions of law, and conditions that are applicable to Petitioner's Kūkūau Forest Management Project; (3) amend Condition No. 1 as agreed to by Petitioner and OP and as modified by the Planning Department; (4) modify Condition Nos. 2 and 7 as agreed to by Petitioner and OP; (5) modify Condition Nos. 4, 5, 8, and 9 as agreed to by the parties; (6) delete Condition Nos. 3, 12 through 15, 17, and 20; (7) retain Condition Nos.

² Prior to the start of the meeting, Vice-Chair Nancy Cabral disclosed that counsel for Petitioner, Ronald N.W. Kim, is a tenant on a property for which she is a landlord, but that would not affect her ability to remain fair and impartial in the proceeding. There were no objections by the parties to Ms. Cabral's continued participation in the meeting.

6, 10, 11, 16, 18, 19, 21, 22, and 23 in their original form; (8) authorize the Commission staff to make non-substantive editorial changes in the Amended D&O; and (9) authorize the Chair of the Commission to sign the Amended D&O in this matter on behalf of the Commission.³ There being a vote tally of 7 ayes and 0 nays, the motion passed.⁴

NFLP's PETITION AND PROPOSAL

10. On August 31, 1999, NFLP filed a Petition to Amend the Land Use District Boundary of the Conservation District in Order to Reclassify Certain Land from Conservation to Agricultural ("Petition"). The Petition included a Draft Environmental Assessment ("DEA") as required by HRS § 343-5(a)(7). (11/16/01 D&O ¶ 1)

11. NFLP was a family limited partnership organized in the State of Hawai'i. Its general partners were George N. Newton, Trustee of the Revocable Trust of George N. Newton dated April 5, 1976, and Mary Jo Newton, Trustee of the Revocable Trust of Mary Jo Newton dated April 5, 1976. The limited partners were the four adult children of George and Mary Jo Newton (collectively the "Newton Children"). NFLP's mailing address was P. O. Box 426, Kailua, Hawai'i 96734. (11/16/01 D&O ¶ 2)

³ Upon comments from OP, the Movant noted that although it was his intention that the terms "HILT" and "Petitioner" be synonymous in his motion, he agreed to the sole use of the latter term when referring to the Petitioner. The seconder to the motion agreed to the change.

⁴ There are eight sitting commissioners presently on the Commission. The ninth seat is currently vacant. Chair Jonathan Scheuer previously recused himself from participating in the proceedings. Docket No. A99-729 The Newton Family Limited Partnership, a Hawai'i limited partnership Amended Findings of Fact, Conclusions of Law, and Decision and Order

12. NFLP proposed to reclassify the Petition Area from the Conservation District to the Agricultural District as part of its plan to subdivide an approximately 1,645.823-acre parcel ("Property") into nine parcels, consisting of eight agricultural parcels within the Petition Area and one large conservation parcel consisting of approximately 760.423 acres ("Remainder Area"). The eight agricultural lots would have ranged in size from approximately 80 acres to 153 acres. (11/16/01 D&O ¶ 34)

13. NFLP proposed to distribute five of the agricultural lots to George and Mary Jo Newton and to each of the Newton Children. The three remaining agricultural lots would be sold to non-family members at fair market value as a means of offsetting the cost of the subdivision infrastructure improvements. The Remainder Area would be retained by NFLP. (11/16/01 D&O ¶ 35)

14. Structural improvements on the Property would include up to eight residences within the Petition Area, and a possible residence, subject to the approval of the Board of Land and Natural Resources, on the Remainder Area. (11/16/01 D&O ¶ 36)

15. Agricultural activities in the Petition Area would be for personal and limited commercial use. Potential limited agricultural activities included vegetable gardens, citrus orchards, fruit or nut tree groves, greenhouse plant and flower nurseries, pasture or grazing. No large-scale agricultural production or operations were planned or would be allowed. (11/16/01 D&O ¶ 37)

16. On September 23, 1999, the Commission met in Waikapu, Hawai'i, to consider whether the anticipated effects as discussed in NFLP's DEA to reclassify the Petition Area from the State Land Use Conservation District into the State Land Use Agricultural District constituted a "significant effect" pursuant to chapter 343, HRS. At the meeting, the Commission granted in part and denied in part NFLP's Motion to Continue Action On Its Petition To Amend the Land Use District Boundary of the Conservation District Lodged on August 31, 1999, filed on September 23, 1999. On October 12, 1999, the Commission issued its written Order. (11/16/01 D&O ¶ 3)

17. On November 15, 1999, NFLP filed a Supplement to the Petition, which included a Supplement to the DEA. (11/16/01 D&O ¶ 4)

18. On November 17, 1999, NFLP filed a Secondary Supplement to the DEA dated November 16, 1999. (11/16/01 D&O ¶ 5)

19. On November 18, 1999, the Commission took a field trip to the Petition Area. (11/16/01 D&O ¶ 6)

20. On November 19, 1999, the Commission met in Hilo, Hawai'i, to continue its consideration of NFLP's DEA. At the meeting, the Commission granted NFLP's oral request to allow NFLP additional time to supplement the DEA to address concerns raised by the Commission and OP. On January 21, 2000, the Commission issued its written Order. (11/16/01 D&O ¶ 7)

21. On January 21, 2000, NFLP filed a Third Supplement to the Petition, which included a revision to the DEA dated January 17, 2000. (11/16/01 D&O ¶ 8)

22. On February 2, 2000, NFLP filed a Fourth Supplement to the Petition, which included a Fourth Supplement to the DEA dated February 2, 2000. (11/16/01 D&O ¶ 9)

23. On February 3, 2000, the Commission met in Hilo, Hawai'i, to continue its consideration of NFLP's DEA. At the meeting, NFLP filed a Fifth Supplement to the DEA dated February 2, 2000. The Commission requested that NFLP provide the Commission with further information, including proposed conditions to mitigate potential impacts, to complete the preparation of the DEA, pursuant to HAR § 11-200-9(b)(2). The Commission, upon its own motion, continued the meeting until such time that a revised and complete DEA was received from NFLP. On February 18, 2000, the Commission issued its written Order. (11/16/01 D&O ¶ 10)

24. On November 1, 2000, NFLP filed an Amended Petition, which included an Amended DEA ("ADEA") dated October 30, 2000. (11/16/01 D&O ¶ 11)

25. On December 8, 2000, the Commission met in Honolulu, Hawai'i, to continue its consideration of NFLP's ADEA. At the meeting, the Commission made a preliminary determination of a finding of no significant impact for an environmental assessment. The Commission further required NFLP to submit the ADEA with the assurances, clarifications, and other revisions noted and agreed to by NFLP's counsel at

the meeting relating to the size of the proposed project and the proactive measures NFLP proposed to take to ensure against “significant effects” on the environment in the future. On January 24, 2001, the Commission issued its written Order. (11/16/01 D&O ¶ 12)

26. On January 25, 2001, NFLP filed a 1st Amendment to Amended Petition, which included an ADEA dated January 23, 2001. This ADEA reflected the assurances, clarifications, and other revisions previously agreed to by NFLP's counsel. (11/16/01 D&O ¶ 13)

27. The ADEA was subject to a 30-day public review and comment period pursuant to HRS § 343-5(c). The review and comment period ended on March 10, 2001. (11/16/01 D&O ¶ 14)

28. NFLP filed a Final Environmental Assessment (“FEA”) with the Commission on April 6, 2001. (11/16/01 D&O ¶ 15)

29. On April 19, 2001, the Commission met in Honolulu, Hawai`i, to consider whether the anticipated effects as discussed in NFLP’s FEA to reclassify the Petition Area from the State Land Use Conservation District into the State Land Use Agricultural District constituted a “significant effect” pursuant to HRS chapter 343. The Commission determined that the proposed action would not have a “significant effect” on the environment and therefore did not require an EIS. On June 5, 2001, the Commission issued its written Order. (11/16/01 D&O ¶ 16)

30. The Commission conducted a prehearing conference regarding the Petition on June 29, 2001, at which time exhibits and lists of witnesses were exchanged by the parties. (11/16/01 D&O ¶ 17)

31. On June 22, 2001, the County of Hawai'i submitted its Testimony of the County of Hawai'i Planning Department in Support of the Petition. (11/16/01 D&O ¶ 18)

32. On June 25, 2001, OP submitted its Testimony of the Office of Planning in Support of the Petition. (11/16/01 D&O ¶ 19)

33. The Commission opened the hearing on the Petition on August 9, 2001, in Hilo, Hawai'i, pursuant to notices published in the *Honolulu Star-Bulletin* and the *Hawai'i Tribune-Herald* on May 23, 2001. (11/16/01 D&O ¶ 20)

34. No persons appeared to testify as public witnesses, and no written testimonies or letters were submitted. (11/16/01 D&O ¶ 21)

35. On November 16, 2001, the Commission filed its D&O granting the Petition and imposing certain conditions based on NFLP's development plans and representations. (11/16/01 D&O)

PETITIONER'S PROPOSED KŪKŪAU FOREST MANAGEMENT PROJECT

36. Petitioner is the successor-in-interest to the Petition Area, having received the Property by Limited Warranty Deed from George N. Newton, Trustee of the Revocable Trust of George N. Newton dated April 5, 1976, and Mary Jo Newton,

Trustee of the Revocable Trust of Mary Jo Newton dated April 5, 1976. (Declaration of Laura H.E. Kaakua ("Kaakua Decl.") ¶ 4; Exhibit 1)

37. Petitioner is a Hawai'i non-profit and IRS 501(c)(3) corporation that is a state-wide and nationally accredited land trust with the mission of protecting and stewarding the lands that sustain Hawai'i and perpetuating Hawaiian values by connecting people with the 'Āina, protecting lands that are integral to Hawai'i's well-being and character, and upholding the organization's kuleana to those lands and the communities nearby and within to build reciprocal relationships and connections between the community and the 'Āina. Laura H.E. Kaakua is the Chief Executive Officer of Petitioner, and Petitioner's mailing address is 126 Queen Street, Suite 306, Honolulu, Hawai'i, 96813. (Kaakua Decl. ¶¶ 1-3)

38. The Kūkūau Forest Management Project will actively manage and restore the native koa and 'ōhi'a forest on the entirety of the Property beginning with the Petition Area, and engage, educate, and connect the Hilo community with the 'Āina of Kūkūau, furthering Petitioner's mission to inspire community stewardship of the Kūkūau Forest founded on Mālama 'Āina (caring for the lands that care for us) and extending this practice to other lands. (Kaakua Decl. ¶ 15)

39. Active native forest management will consist of constant invasive species monitoring and/or removal; fencing for ungulate control; gathering seeds of native plants; growing and/or planting native plants from seeds and cuttings; selectively

harvesting koa trees and reinvesting harvest proceeds back into land management; regularly monitoring and documenting native species' use of the native forest habitat, such as the Hawaiian hawk, Hawaiian hoary bat, and other native bird and insect species; pest management; and dynamically adjusting stewardship practices in response to observations of native flora and fauna, changing weather patterns, and new or evolving threats. (Kaakua Decl. ¶ 16)

40. Petitioner's mission includes connecting Hawai'i's communities with the 'Āina (the land that feeds us), so the Kūkūau Forest Management Project will also include community outreach; hosting community volunteer workdays and educational forest walks; hosting learning field trips for local schools; inviting Hawaiian cultural practitioners, such as hula hālau, to spend time, learn from, and care for the Kūkūau Forest; and potentially other culturally appropriate recreational opportunities. (Kaakua Decl. ¶ 17)

41. Proposed structural improvements include a native plant greenhouse with equipment storage; a structure to provide shelter for community volunteers, Hawaiian cultural practitioners, and school children on educational field trips or utilizing the Petition Area as a place of study and research; and up to two water catchment tanks and/or two compostable toilets (as needed). Petitioner will use Best Management Practices ("BMPs") in the construction of any and all structures which it

constructs on the Petition Area to control erosion and prevent runoff. (Kaakua Decl. ¶¶ 18-19)

42. The Petition Area will be accessed by an unimproved easement from Wilder Road, which is located approximately 2,900 feet below the eastern boundary of the Petition Area. Alternate access to the Petition Area will require the use and extension of an existing County of Hawai'i Department of Water Supply 20-foot-wide service road. (Kaakua Decl. ¶ 20)

DESCRIPTION OF THE PETITION AREA

43. The Petition Area is located in the Upper Kūkūau area, South Hilo, Hawai'i, and is designated as TMK No.: (3) 2-4-008: Por. 33. The Petition Area that is designated within the Agricultural District is approximately 885.40 acres and consists of a portion of the approximately 1,645.823-acre Property. The Remainder Area, consisting of approximately 760.423 acres of the Property, has remained in the Conservation District. (11/16/01 D&O ¶ 22)

44. The Petition Area is owned by Petitioner in fee simple. (Kaakua Decl. ¶ 4; Exhibit 1) There are no ceded lands in the Petition Area. (11/16/01 D&O ¶ 23)

45. The annual rainfall averages approximately 230 inches. (11/16/01 D&O ¶ 24)

46. The U.S. Natural Resources Conservation Service identifies the soils on the Petition Area as Ke`ei Series (rKGD), extremely rocky muck. This soil consists of well-drained, thin organic material very dark brown muck up to approximately 10 inches thick overlying pahoehoe lava bedrock. Permeability is slow, but water moves rapidly through cracks. Runoff is medium and its erosion hazard is slight. This soil is used mostly for pasture. Its Capability Classification is VIIS, non-irrigated, which indicates that the soil, when not irrigated, has very severe limitations that make it unsuitable for cultivation and restrict its use largely to pasture or range, woodland or wildlife. (11/16/01 D&O ¶ 25)

47. The State Department of Agriculture's Agricultural Lands of Importance to the State of Hawai'i Map does not classify the Petition Area. The Land Study Bureau's overall suitability rating for agricultural purposes classifies the Petition Area as "D," or "Poor," with the exception of a small portion of land at the northeast corner of the Petition Area classified as "E," or "Very Poor." (11/16/01 D&O ¶ 26)

48. Although the Petition Area is still shown within the Hilo Forest Reserve on some United States Geological Survey maps, it is no longer in the current State forest reserve jurisdiction. The Petition Area was included in the Hilo Forest Reserve under a voluntary 30-year surrender agreement with the State of Hawai'i, formalized in 1948. The Petition Area was subsequently withdrawn from the forest reserve by the State of Hawai'i. (11/16/01 D&O ¶ 27)

49. The Petition Area has changed over the years from sugarcane production to a vacant and undeveloped land primarily covered by forest and heavy shrub vegetation, consisting of native forest with an overstory of primarily `ōhi`a and koa and an understory of primarily uluhe fern. (Kaakua Decl. ¶ 8)

50. Both the Petition Area and Remainder Area also contain invasive species, primarily strawberry guava and Koster's curse (*Clidemia hirta*), which are overtaking sections of the native forest and continually expanding. (Kaakua Decl. ¶ 9)

51. A modest amount of grazing may occur within the Petition Area by cattle from adjacent lands, but Petitioner has not provided permission for any adjacent owners to pasture their cattle on the Property. (Kaakua Decl. ¶ 10)

52. The Property has the State Forest Reserve on its mauka boundaries, and a healthy native forest on the Property, including the Petition Area, acts as a buffer for the State Forest Reserve to keep the native forest there healthy. Allowing invasive species to take over the native forest on the Property, including the Petition Area, will result in those invasive species spreading into the State Forest Reserve. (Kaakua Decl. ¶¶ 11-12)

53. The Flood Insurance Rate Map prepared by the Federal Emergency Management Agency designates the Petition Area as Zone X, an area determined to be outside the 500-year flood plain. (11/16/01 D&O ¶ 30)

54. A 150-foot-wide easement designated for electrical transmission line purposes runs partially along the northern boundary of the Petition Area. This easement serves the Hawaii Electric Light Company, Inc. site, which is located on the makai boundary of the Petition Area. (11/16/01 D&O ¶ 31)

55. A 40-foot-wide unimproved access easement runs along the Petition Area's entire northern boundary. This easement can be accessed from Wilder Road and services the Petition Area and adjacent mauka subdivisions. (11/16/01 D&O ¶ 32)

56. Puna Sugar Company, Ltd., formerly known as “‘Ōla`a Sugar Company,” is the current holder of a right-of-way for one or more flumes granted by Akana Amelia Richardson in favor of ‘Ōla`a Sugar Company by instrument dated November 5, 1900, recorded in the Bureau of Conveyances of the State of Hawai`i in Liber 212, Page 747, as modified by Quitclaim Deed dated March 31, 1938. The abandoned flume and the dirt road which parallels the route of the flume, commonly referred to as the “‘Ōla`a Flume Road,” are located within the Petition Area. The ‘Ōla`a Flume Road connects Kaūmana Drive and Stainback Highway, and delineates the approximate alignment of the future county secondary arterial. The mauka boundary of the Petition Area also coincides with this route. (11/16/01 D&O ¶ 33)

PETITIONER'S FINANCIAL CAPABILITY TO UNDERTAKE THE PROPOSED DEVELOPMENT

57. Petitioner owns the Petition Area free of any mortgages or liens.

(Kaakua Decl. ¶ 4; Petitioner's Ex. 1)

58. As a non-profit land trust that understands the need for active forest management on the Petition Area, Petitioner understands it can only responsibly retain the Petition Area and fund the Kūkūau Forest Management Project's forest stewardship and community engagement activities to bring the community a multitude of environmental, cultural and educational benefits with a reliable annual income obtained by actively managing the forest to selectively harvest koa trees. (Kaakua Decl. ¶ 21)

59. The Kūkūau Forest Management Project will need to fund significant initial and continuing annual costs, including hiring and retaining necessary knowledgeable staff from Hawai'i Island; contracting foresters and other conservation professionals who specialize in the needed large-scale capital improvements (*i.e.*, fencing to keep out ungulates and invasive species, a native plant greenhouse, and a structure for a covered gathering space); maintaining those capital improvements over time; and annually paying other typical land stewardship expenses, such as property taxes and liability insurance. (Kaakua Decl. ¶ 22)

60. Petitioner intends to partner with a forestry company employing certified foresters to selectively harvest koa and has been consulting with a forest management company that projects a selective harvesting program over a 30-year period would result in approximately 1½ times more koa trees on the Property. (Kaakua Decl. ¶ 23)

STATE AND COUNTY PLANS AND PROGRAMS

61. The Petition Area is designated within the State Land Use Agricultural District, as reflected on the Commission's official map, H-61 (Pi'ihonua), and is zoned as Agricultural (A-80a) by the County of Hawai'i. (Amended Motion for Order Amending the D&O, p. 3)

62. The Hawai'i County General Plan Land Use Pattern Allocation Guide ("LUPAG") Map designates the Petition Area as Extensive Agriculture and part of the Remainder Area as Conservation. The LUPAG Map designates the area immediately to the north and east of the Petition Area as Extensive Agriculture, and to the south and west as Conservation. Those areas have been designated as such since the adoption of the 2005 General Plan. (Amended Motion for Order Amending the D&O, p. 3; 11/16/01 D&O ¶ 42)

63. Land immediately to the northeast of the Petition Area is County-zoned Agricultural (A-10a and A-20a), and land to the south and west of the Petition Area is zoned Forest. (11/16/01 D&O ¶ 43)

NEED FOR DEVELOPMENT

64. The Petition Area contains invasive species, primarily strawberry guava and Koster's curse (*Clidemia hirta*), which are overtaking sections of the native forest and continually expanding. The native forest is not pristine and cannot thrive in perpetuity just by remaining under Petitioner's ownership. It requires active management to avoid being completely overtaken by the invasive species. (Kaakua Decl. ¶ 9)

65. The Kūkūau Forest Management Project will provide much-needed forest stewardship as well as community engagement activities to bring the community a multitude of environmental, cultural, and educational benefits. (Kaakua Decl. ¶¶ 15-21)

SOCIAL IMPACTS

66. The community surrounding the Petition Area is characteristically country and serene, with large parcels of agricultural lands, open space, forest reserves, and rural residences. The Kūkūau Forest Management Project will be consistent with the type and density of development in the area and help preserve and maintain healthy native forest reserves. (11/16/01 D&O ¶ 45; Kaakua Decl. ¶¶ 11-15)

67. Based on the Kūkūau Forest Management Project's active forest management and restoration and community engagement, it is expected to positively impact the social character of the area. (Kaakua Decl. ¶ 15)

ECONOMIC IMPACTS

68. The Kūkūau Forest Management Project will include the agricultural uses such as forestry and forage activities and uses, and potentially bonafide agricultural services and uses which support and are accessory to these activities. (Kaakua Decl. ¶ 13)

69. The selective harvesting of koa trees will provide a reliable annual income to fund the Kūkūau Forest Management Project's forest stewardship and community engagement activities. (Kaakua Decl. ¶ 21)

70. The value of the land is expected to increase after the Kūkūau Forest Management Project is initiated due to the increased number of koa trees and capital improvements. The Kūkūau Forest Management Project will require the hiring and retaining of foresters and other conservation professionals. (Kaakua Decl. ¶¶ 22-23).

71. The Kūkūau Forest Management Project is not expected to result in any significant adverse economic impacts. (Kaakua Decl. ¶ 23)

IMPACTS UPON RESOURCES OF THE AREA

Agricultural Resources

72. The Kūkūau Forest Management Project will not have any adverse impact upon agricultural resources or productivity. The reclassification of the Petition Area to the Agricultural District allowed for agricultural activities, and Petitioner

intends to engage in agricultural activities, such as forestry and forage activities and uses, and potentially bonafide agricultural services and uses which support and are accessory to these activities. (Kaakua Decl. ¶ 13) Petitioner will work with the State Department of Land and Natural Resources (“DLNR”) to develop and approve a Forest Stewardship Plan. Petitioner will develop and implement this plan within two years of this decision and order. (Kaakua Decl. ¶¶ 14, 24)

Flora and Fauna

73. The Property supports three kipuka: two in the Petition Area and one in the Remainder Area. The kipuka in the Remainder Area is the largest and most significant. (11/16/01 D&O ¶ 51)

74. The `aku`aku (*Cyanea platyphylla*) is the only species of flora listed as a protected species by the U.S. Fish and Wildlife Service (“USFWS”) that was located on the Property, and only a single species was found in the Remainder Area. (11/16/01 D&O ¶ 52) No USFWS protected species were located in the Petition Area, which was used in the past for grazing and possibly logging. The native forest on the Property, including the Petition Area, consists of an overstory of primarily `ōhi`a and koa and an understory of primarily uluhe fern, but invasive plants such as strawberry guava and Koster’s curse (*Clidemia hirta*) are overtaking sections of the native forest and continually expanding. (Kaakua Decl. ¶¶ 8-9). The Kūkūau Forest Management Project will actively manage and restore the native koa

and 'ōhi'a forest on the entirety of the Property, including the Petition Area, and monitor and remove invasive species in doing so. (Kaakua Decl. ¶¶ 15-16) In addition, areas in the Petition Area where wetland vegetation indicator species were identified were not large enough to require planning considerations. (11/16/01 D&O ¶ 52)

75. The proposed improvements include building a native plant greenhouse with equipment storage; a structure to provide shelter for community volunteers, Hawaiian cultural practitioners, and school children on educational field trips or utilizing the Petition Area as a place of study and research; up to two water catchment tanks and/or two compostable toilets (as needed); and fencing for ungulate control. These improvements are essential to the Kūkūau Forest Management Project, which will have a positive impact on the Petition Area's native vegetation. (Kaakua Decl. ¶¶ 16, 18)

76. Petitioner will minimize the movement of plant soil material between worksites. Petitioner will also contact the Big Island Invasive Species Committee to minimize the risk of spreading invasive species. Petitioner will clean all equipment, materials, and personnel of excess soil and debris. (Amended Motion for Order Amending the D&O, p. 15)

77. Various bird and mammal species exist on the Property. Two endemic bird species, the Hawaiian hawk and the Hawaiian hoary bat, were both sighted on the Property. (11/16/01 D&O ¶ 54)

78. The Kūkūau Forest Management Project will include restoring the native forest and regularly monitoring and documenting native species' use of the native forest habitat such as the Hawaiian hawk, Hawaiian hoary bat, and other native bird and insect species. (Kaakua Decl. ¶ 16)

79. Petitioner will survey the area where any construction and/or tree harvesting activities is planned during the breeding season of the Hawaiian hawk from March to September to ensure that no nests are present if trees are to be cut. If this cannot be avoided, Petitioner will not disturb, remove, or trim any trees without consulting the Department of Forestry and Wildlife ("DOFAW"). (Amended Motion for Order Amending the D&O, p. 14)

80. Petitioner will cease all construction activities within 100 feet (30 meters) if the Hawaiian goose, or Nene, is present. If a nest is discovered at any point, Petitioner will contact DOFAW. (Amended Motion for Order Amending the D&O, pp. 14-15)

81. To avoid potential impacts to the Hawaiian hoary bat, Petitioner will not clear dense vegetation, including woody plants greater than 15 feet, between June 1 and September 15 when bats may be carrying young. If this cannot be avoided,

woody plants greater than 15 feet tall will not be disturbed, removed, or trimmed without consulting DOFAW. Petitioner will not install barbed wire on fencing within the Petition Area. (Amended Motion for Order Amending the D&O, p. 15)

82. To mitigate the downing of Pelagic seabirds, the use of night lights will be minimized and all exterior lighting and light sources will be shielded. Petitioner will restrict construction activities to daylight hours as much as practicable during the seabird breeding season (April to November). All nighttime work that requires outdoor lighting will be avoided during the seabird fledging fallout period from September 15 through December 15. To reduce the potential for seabird attraction, Petitioner will shield all outdoor lighting. (11/16/01 D&O Cond. 4; Amended Motion for Order Amending the D&O, p. 16)

83. The improvements in the Petition Area are not anticipated to have a significant impact on native or federally protected avian or mammalian species, including the Hawaiian hawk and the Hawaiian hoary bat, given the minimal improvements by the Kūkūau Forest Management Project and the planned mitigation. (Kaakua Decl. ¶ 18; Amended Motion for Order Amending the D&O, pp. 14-16)

Archaeological/Historic Resources

84. Paul H. Rosendahl, Ph. D., Inc. ("PHRI"), conducted inspection level field work of the Petition Area. There are no archaeological or cultural sites or features of any kind in the Petition Area. Based on the historical sugarcane cultivation

on the Petition Area, significant archaeological/historic sites are unlikely to have survived. (11/16/01 D&O ¶ 55)

85. PHRI also consulted with four individuals recognized by the local native Hawaiian community as knowledgeable in various aspects of traditional Hawaiian culture. The purpose of the consultation was to determine if any native Hawaiian cultural practitioners might currently be exercising traditional and customary access and use rights within the Petition Area, or might have knowledge of any specific cultural sites or areas within the Petition Area that might qualify as legitimate traditional cultural properties. No valued cultural or natural resources have been identified in the Petition Area and no traditional and customary native Hawaiian rights are exercised in the Petition Area. (11/16/01 D&O ¶ 56)

86. The Kūkūau Forest Management Project aims to restore cultural and natural resources and practices, as it will include community outreach; hosting community volunteer workdays and educational forest walks; hosting learning field trips for local schools; inviting Hawaiian cultural practitioners such as hula hālau to spend time, learn from, and care for the Kūkūau Forest; and potentially other culturally appropriate recreational opportunities. (Kaakua Decl. ¶ 17)

87. The 'Ōla'a flume system has been determined to be eligible for the National Register of Historic Places under Criterion D (a site that has yielded, or is likely to yield, information important in local history). (11/16/01 D&O ¶ 57) The

proposed Kūkūau Forest Management Project will not involve the flume system, so no adverse impacts are anticipated. (Kaakua Decl. ¶¶ 15-18)

88. Prior to commencing any development that involves ground-disturbing activities, the State Historic Preservation Division (“SHPD”) will be provided the opportunity to review, comment, and have Petitioner comply with any of SHPD’s requirements. The SHPD will be consulted to assess the scope of work and to determine whether some level of archaeological reconnaissance is required. (Amended Motion for Order Amending the D&O, pp. 17-18)

89. Petitioner and its successors will work with the SHPD to develop a data recovery/mitigation/preservation plan(s), as needed, which will be reviewed and approved by the SHPD prior to any land alteration affecting any archaeological sites located on the Petition Area. (Amended Motion for Order Amending the D&O, p. 18; OP’s Response to Amended Motion for Order Amending the D&O, pp. 6-7)

90. Should any previously unidentified archaeological resources be encountered during construction activities, work will immediately stop and the SHPD will be contacted. (Amended Motion for Order Amending the D&O, pp. 18-19)

Groundwater Resources

91. The Petition Area does not contain any perennial streams or lakes. The groundwater under the Petition Area is approximately 800 feet below the site.

(11/16/01 D&O ¶ 58)

92. The Petition Area is in the Hilo Aquifer System of the Northeast Mauna Aquifer Sector. (11/16/01 D&O ¶ 59) The Kūkūau Forest Management Project will meet any needs for water by using catchment rainwater. (Kaakua Decl. ¶ 18)

93. Due to the minimal improvements planned, the extremely limited and selective use, if any, of pesticides, and the use of BMPs to control erosion and runoff during construction, the Kūkūau Forest Management Project is not anticipated to adversely impact groundwater resources. (Kaakua Decl. ¶¶ 9, 18-19)

Recreational/Scenic/Resources

94. There are no recreational resources, areas, or sites known in the Petition Area, (11/16/01 D&O ¶ 61) but the Kūkūau Forest Management Project will also include community outreach; hosting community volunteer workdays and educational forest walks; hosting learning field trips for local schools; inviting Hawaiian cultural practitioners such as hula hālau to spend time, learn from, and care for the Kūkūau Forest; and potentially other culturally appropriate recreational opportunities. (Kaakua Decl. ¶ 17)

95. The Kūkūau Forest Management Project will be a low-profile, low-density development that will not significantly change the visual or scenic characteristics of the Petition Area. (Kaakua Decl. ¶¶ 15, 18)

Coastal/Aquatic Resources

96. The Petition Area is located five miles from the coast (11/16/01 D&O ¶ 63).

97. Petitioner will minimize the use of herbicides and limit it to those products that are designed for use in water or near water to reduce the potential offsite impacts. Petitioner will also employ BMPs in the construction of any structures to control erosion and prevent runoff to any coastal or aquatic resources. (Kaakua Decl. ¶¶ 9, 19)

ENVIRONMENTAL RESOURCES

Noise

98. Construction associated with the Kūkūau Forest Management Project is not expected to generate significant levels of noise due to the limited number of structures planned. (Kaakua Decl. ¶ 18)

99. Based on the proposed activities planned for the Kūkūau Forest Management Project, operational noise will be minimal. (Kaakua Decl. ¶¶ 16-17, 20)

Air Quality

100. The overall impact of the Kūkūau Forest Management Project on air quality is expected to be minimal due to the planned active forest management and restoration. (Kaakua Decl. ¶¶ 15-16)

Water Quality

101. The Kūkūau Forest Management Project will only involve the use of herbicides as necessary to control invasive species and will limit the use of herbicides as much as possible. If herbicides are required, they will be products designed for use in or near water to minimize any potential offsite impacts. Petitioner will also incorporate BMPs in the construction of any structures to control erosion and prevent runoff from adversely affecting water quality. (Kaakua Decl. ¶¶ 9, 19)

ADEQUACY OF PUBLIC SERVICES AND FACILITIES

Highway and Roadway Services

102. Access to the Kūkūau Forest Management Project will be provided by an unimproved easement off of Wilder Road (Kaakua Decl. ¶ 20), a two-lane, 24-foot-wide paved County road that extends from Kaūmana Drive. Kaūmana Drive is the major mauka-makai right-of-way that connects Hilo and West Hawai'i via the saddle between Mauna Kea and Mauna Loa. (11/16/01 D&O ¶ 71)

103. The Kūkūau Forest Management Project will have minimal impact on local roadways. In a typical week, it is anticipated that two people will work onsite for three days a week, while large projects may generate approximately ten vehicles accessing the site per day for work periods that may average two weeks. Volunteers may access the site on a monthly basis in approximately five to ten vehicles.

Occasionally large groups may volunteer that could generate between 15 to 30 vehicles.

(Kaakua Decl. ¶ 20)

Water Service

104. County water is currently available via an 8-inch line along Wilder Road. (11/16/01 D&O ¶ 73) There will be no need to use County water for the Kūkūau Forest Management Project, as Petitioner will meet any need it has for water by constructing up to two water catchment tanks. (Kaakua Decl. ¶ 18)

Wastewater Disposal

105. The Petition Area is not presently serviced by a public wastewater collection system. (11/16/01 D&O ¶ 75) Petitioner may install up to two compostable toilets for waste from employees, volunteers, or invitees. (Kaakua Decl. ¶ 18)

Drainage

106. The Petition Area does not contain any gulches, major drainage ways, promontories, or rock cliffs. The Petition Area contains soil that is well-drained, thin in depth, and overlying pahoehoe lava. The lava is not very permeable, but water moves rapidly through the cracks. On other occasions, water will not drain as fast and will stay in the area a little longer. (11/16/01 D&O ¶ 76)

107. BMPs will be used during construction of the native plant greenhouse with equipment storage, shelter, water catchment tanks and/or compostable

toilets to control erosion and prevent runoff from damaging native forest resources. No roadway improvements are planned. (Kaakua Decl. ¶ 18-19)

Solid Waste Disposal

108. The Petition Area is not presently serviced by a solid waste collection and disposal system, and Petitioner's activities are not reasonably anticipated to generate solid waste. (11/16/01 D&O ¶ 78; Kaakua Decl. ¶¶ 16-17)

Schools

109. The Kūkūau Forest Management Project will not increase the area's educational needs, as there will not be residents on the Petition Area. The Kūkūau Forest Management Project will provide educational opportunities through community outreach, community volunteer workdays and educational forest walks, learning field trips for local schools, and inviting Hawaiian cultural practitioners to the Petition Area. (Kaakua Decl. ¶ 17)

Police and Fire Protection

110. Police protection will be provided as needed by the Hawai'i County Police Department. The nearest police station is the Hilo Police Station located on Kapi'olani Street in the central business district. Fire protection will be provided as needed by the Hawai'i County Fire Department. Fire emergency calls will be accommodated by the Kaūmana Fire Station located on Kaūmana Drive, with assistance from the Central Fire Station in downtown Hilo, if necessary. (11/16/01 D&O ¶ 82)

Electrical Utility Services

111. There are no plans to obtain electrical power and/or telephone service. (Kaakua Decl. ¶ 18)

COMMITMENT OF STATE FUNDS AND RESOURCES

112. The Kūkūau Forest Management Project does not call for a substantial commitment of government-supplied services or facilities. Petitioner will seek DLNR's assistance and partnership in the development and approval of the Kūkūau Forest Stewardship Plan. This is a specific type of plan that will be created using DLNR's format and implemented with DLNR oversight to implement the Kūkūau Forest Management Project. (Kaakua Decl. ¶ 14)

CONFORMANCE TO AGRICULTURAL DISTRICT STANDARDS

113. The reclassification of the Petition Area conforms to the State Land Use Agricultural District standards set forth in HAR § 15-15-19 in the following respects:

a. The Petition Area has the potential for forestry and forage activities and uses and potentially bonafide agricultural services and uses that support and are accessory to these activities. (Kaakua Decl. ¶ 13)

b. The Petition Area is contiguous to agriculture zoned lands.

(11/16/01 D&O ¶ 85b)

CONFORMANCE WITH THE GOALS, OBJECTIVES AND POLICIES OF THE
HAWAII STATE PLAN, RELATIONSHIP WITH APPLICABLE PRIORITY
GUIDELINES AND FUNCTIONAL PLANS

114. The reclassification of the Petition Area generally conforms to the following goals, objectives, priorities, and policies of the Hawai'i State Plan, as defined in HRS chapter 226:

a. HRS § 226-11. Land-Based, Shoreline and Marine Resources.

Other than the relatively minimal improvements of a greenhouse with storage, shelter structure, fencing, catchment tanks, and compostable toilets, the Petition Area will not be further improved or developed. (Kaakua Decl. ¶ 18) This will minimize the impact on the natural character of the area as well as to promote conservation practices. There will be no road or utility improvements. (Kaakua Decl. ¶ 18) Overall, the Kūkūau Forest Management Project will manage and further the protection and conservation of Hawai'i's unique and fragile environmental resources; pursue compatible relationships among activities, facilities, and resources; and promote increase accessibility and prudent use of inland areas for public recreational, educational, and scientific purposes through its activities of active native forest restoration and community engagement. (Kaakua Decl. ¶¶ 15-17)

b. HRS § 226-12. Scenic, Natural Beauty and Historic

Resources. The Kūkūau Forest Management Project is a low-profile, low-density development. The visual characteristics of the Petition Area will not significantly

change. Improvements will be designed to complement the scenic qualities of the area. Unobtrusive, low-key design elements will be used for the greenhouse with storage, shelter structure, fencing, catchment tanks, and compostable toilets. (Kaakua Decl. ¶ 18)

c. HRS § 226-13. Land, Air and Water Quality. Improvements are intended to have a minimal effect on the environment, including land and water resources. Minimal grading and construction will result in minimal alteration to the land. (Kaakua Decl. ¶ 18) Groundwater resources will not be noticeably impacted. Overall, the Kūkūau Forest Management Project will improve resources through native forest restoration and increased public awareness and appreciation of environmental resources through various methods, including educational opportunities; modeling proper management of land resources; reducing threats of erosion and flooding; and fostering recognition of the importance and values of land resources to Hawai'i's people and their cultures and visitors. (Kaakua Decl. ¶¶ 15-17)

d. HRS § 226-15. Solid and Liquid Wastes. The Kūkūau Forest Management Project is not expected to be a generator of solid and liquid waste. (Kaakua Decl. ¶ 18)

e. HRS § 226-16. Water. Rainfall in the vicinity is abundant. (11/16/01 D&O ¶ 86e) Catchment tanks or basins will be used for the Kūkūau Forest Management Project as needed. (Kaakua Decl. ¶ 18)

f. HRS § 226-104. Population Growth and Land Resources

Priority Guidelines. The Petition Area will be maintained in its natural condition, preserving open space and the rural character of the area. The Kūkūau Forest Management Project seeks to restore the native forest starting in the Petition Area, which serves as a wildlife habitat, open space, and natural area, and will help to ensure the protection of the environment and availability of conservation lands for future generations. (Kaakua Decl. ¶¶ 7-12, 15-17) The Remainder Area will remain in the Conservation District, thereby maintaining critical environmental areas. (Amended Motion for Order Amending the D&O, p. 6)

g. HRS § 226-108. Sustainability. The Kūkūau Forest

Management Project will actively manage and restore the native koa and `ōhi`a forest on the entirety of the Property beginning with the Petition Area, and engage, educate, and connect the Hilo community with the `Āina of Kūkūau, furthering Petitioner's mission to inspire community stewardship of the Kūkūau Forest founded on Mālama `Āina (caring for the lands that care for us) and extending this practice to other lands. (Kaakua Decl. ¶ 15)

Active native forest management will consist of constant invasive species monitoring and/or removal; fencing for ungulate control; gathering seeds of native plants; growing and/or planting native plants from seeds and cuttings; selectively harvesting koa trees and reinvesting harvest proceeds back into land management;

regularly monitoring and documenting native species' use of the native forest habitat, such as the Hawaiian hawk, Hawaiian hoary bat, and other native bird and insect species; pest management; and dynamically adjusting stewardship practices in response to observations of native flora and fauna, changing weather patterns, and new or evolving threats. (Kaakua Decl. ¶ 16)

115. The proposed reclassification of the Petition Area generally conforms to the following functional plans:

a. State Agriculture Functional Plan (1991). The Kūkūau Forest Management Project will have no negative impact on agricultural lands. The Kūkūau Forest Management Project puts additional lands into some agricultural uses on a limited scale. (Kaakua Decl. ¶ 13) Relatively high rainfall provides natural irrigation, reducing dependence on county drinking water for use in irrigation. (11/16/01 D&O ¶ 87a)

b. State Conservation Lands Functional Plan (1991). The Petition Area will be maintained in its natural condition with the native forest being restored and actively managed. (Kaakua Decl. ¶¶ 11-16) The Remainder Area will remain in the Conservation District, thereby maintaining critical environmental areas. (Amended Motion for Order Amending the D&O, p. 6)

c. State Historic Preservation Functional Plan (1991). An archaeological assessment was conducted of the Petition Area, which included a review

and evaluation of archaeological and historical documents, including archival literature, legends, records, boundary awards, and cartographic sources relative to the Petition Area, an inspection level fieldwork, and a written report. Follow-up research and an evaluation report on cultural concerns were also prepared and submitted to the SHPD. (11/16/01 D&O ¶ 87c)

Prior to commencing any development that involves ground-disturbing activities, the SHPD will be provided the opportunity to review, comment, and have Petitioner comply with any of the SHPD's requirements. The SHPD will be consulted to assess the scope of work and to determine whether some level of archaeological reconnaissance is required. (Amended Motion for Order Amending the D&O, pp. 17-18)

Petitioner and its successors will work with the SHPD to develop a data recovery/mitigation/preservation plan(s), as needed, which will be reviewed and approved by the SHPD prior to any land alteration affecting any archaeological sites located on the Petition Area. (Amended Motion for Order Amending the D&O, p. 18; OP's Response to Amended Motion for Order Amending the D&O, pp. 6-7)

Should any previously unidentified archaeological resources be encountered during construction activities, work will immediately stop and the SHPD will be contacted. The Kūkūau Forest Management Project will not have any significant

or adverse effect on cultural practices or sites. (Amended Motion for Order Amending the D&O, pp. 9, 18-19)

CONFORMANCE WITH COASTAL ZONE MANAGEMENT OBJECTIVES AND POLICIES

116. The proposed reclassification on the Petition Area generally conforms to the following objectives and policies:

a. Recreational Resources. The Kūkūau Forest Management Project does not interfere with any existing or planned recreational opportunities along the shoreline. Public access to coastal recreational resources will not be obstructed or interfered with. (Kaakua Decl. ¶¶ 15-17)

b. Historic Resources. An archaeological assessment was conducted, which included a review and evaluation of archaeological and historical documents, including archival literature, legends, records, boundary awards, and cartographic sources relative to the Petition Area, an inspection level fieldwork, and a written report. Follow-up research and an evaluation report on cultural concerns were also prepared and submitted to the SHPD. (11/16/01 D&O ¶¶ 87c, 88b) Prior to commencing any development that involves ground-disturbing activities, the SHPD will be provided the opportunity to review, comment, and have Petitioner comply with any of SHPD's requirements. The SHPD will be consulted to assess the scope of work

and to determine whether some level of archaeological reconnaissance is required.

(Amended Motion for Order Amending the D&O, pp. 17-18)

Petitioner and its successors will work with the SHPD to develop a data recovery/mitigation/preservation plan(s), as needed, which will be reviewed and approved by the SHPD prior to any land alteration affecting any archaeological sites located on the Petition Area. (Amended Motion for Order Amending the D&O, p. 18; OP's Response to Amended Motion for Order Amending the D&O, pp. 6-7)

Should any previously unidentified archaeological resources be encountered during construction activities, work will immediately stop and the SHPD will be contacted. (Amended Motion for Order Amending the D&O, pp. 18-19)

c. Scenic and Open Space Resources. The Kūkūau Forest Management Project is a low-profile, low-density development. The Petition Area will not be developed as previously envisioned by NFLP, as the only structures built will be a greenhouse, shelter, water catchment tanks, and compostable toilets as needed. (Kaakua Decl. ¶ 18) The Kūkūau Forest Management Project will involve some limited agricultural activities and uses, primarily selective forestry and foraging. (Kaakua Decl. ¶ 13) The Remainder Area will remain in its natural state and maintain existing scenic qualities and visual corridors. (Amended Motion for Order Amending the D&O, p. 6)

d. Coastal Ecosystems. Inventory studies of appropriate resources on the Petition Area have been conducted, and an assessment of the proposed

subdivision anticipated impacts on the natural resources was undertaken. (11/16/01 D&O ¶ 88d) Based on the proposed uses associated with the Kūkūau Forest Management Project, the valuable coastal ecosystems of the island's coastline and marine waters will not be adversely affected. (Kaakua Decl. ¶¶ 18-19) There are no stream waters on the Petition Area that will discharge into the ocean. (11/16/01 D&O ¶ 88d)

e. Economic Uses. Based on the proposed uses associated with the Kūkūau Forest Management Project, coastal dependent activities, including their social, visual, and environmental qualities, will not be adversely affected. (Kaakua Decl. ¶¶ 17-18)

f. Coastal Hazards. There is no danger from tsunami inundation, storm waves, shoreline erosion, and coastal subsidence. There are no streams or rivers on the Petition Area, thus no riverine flooding is anticipated. The Petition Area is not located in any flood designated areas. (11/16/01 D&O ¶ 88f)

g. Managing Development. The Kūkūau Forest Management Project is not a coastal development. However, through the Commission's proceedings, public participation in the planning and review process has been facilitated. (11/5/20 Commission meeting)

h. Public Participation. The Commission's process for consideration of the Amended Motion for Order Amending the D&O has been

consistent with objectives to stimulate public awareness, education, and participation.

(11/5/20 Commission meeting)

i. Beach Protection. The Petition Area is located more than five miles from the shoreline. (11/16/01 D&O ¶ 88i) Based on the proposed uses associated with the Kūkūau Forest Management Project, shoreline resources will not be adversely affected. No shoreline erosion-protection structures are proposed and no interference with existing recreational and waterline activities is anticipated. (Kaakua Decl. ¶¶ 17-18)

j. Marine Resources. The Petition Area is not located near coastal and marine resources. (11/16/01 D&O ¶ 88i) Based on the proposed uses associated with the Kūkūau Forest Management Project, it will not have any impact with respect to efforts to promote the protection, use, and development of such resources to assure their sustainability. (Kaakua Decl. ¶¶ 15-16)

RULING ON PROPOSED FINDINGS OF FACT

Any of the proposed findings of fact submitted by Petitioner or the other parties 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 conclusion of law herein improperly designated as a finding of fact should be deemed or construed as the conclusion of law; any findings of fact herein

improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

1. Pursuant to HAR § 15-15-94(b), for good cause shown, the Commission may act to modify or delete any of the conditions imposed or modify the Commission's order.

2. Based upon the record and files herein and the findings set forth above, the Commission concludes that there is good cause to recognize Petitioner's standing to seek and obtain the relief requested in its Amended Motion for Order Amending the D&O.

3. Based upon the record and files herein and the findings set forth above, the Commission also concludes that there is good cause to amend the D&O filed on November 16, 2001, to release the Petition Area from certain conditions imposed therein.

4. Based upon the record and files herein and the findings set forth above, the Commission further concludes that there is good cause to amend the D&O filed on November 16, 2001, to issue a new D&O for the Petition Area for the purpose of establishing appropriate findings of fact, conclusions of law, and conditions that are specifically applicable to Petitioner's Kūkūau Forest Management Project.

5. Based upon the record and files herein and the findings set forth above, the Commission further concludes that the conditions imposed below are necessary or appropriate to protect public health, safety, and welfare; and are material to the Commission's approval.

6. Based upon the record and files herein and the findings set forth above, the Commission further concludes that the conditions imposed below are necessary or appropriate in granting the approval, including, but not limited to, ensuring the adherence to representations made by Petitioner.

7. Based upon the record and files herein and the findings set forth above, the Commission further concludes that the reclassification of the Petition Area is reasonable, not violative of HRS § 205-2 and part III of HRS chapter 205, and consistent with the policies and criteria established pursuant to HRS §§ 205-16 and 205-17.

8. Article XI, section 1, of the Hawai'i State Constitution requires the State to conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and to promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

9. Article XI, section 3, of the Hawai'i State Constitution requires the State to conserve and protect agricultural lands, promote diversified

agriculture, increase agricultural self-sufficiency, and assure the availability of agriculturally suitable lands.

10. Article XI, section 7, of the Hawai'i State Constitution states that the State has an obligation to protect the use of Hawai'i's water resources for the benefit of its people.

11. Article XII, section 7, of the Hawai'i State Constitution requires the Commission to protect Native Hawaiian traditional and customary rights. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua'a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

12. The State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised Native Hawaiian rights to the extent feasible. *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, 79 Hawai'i 425, 903, P.2d 1246, *certiorari denied*, 517 U.S. 1163, 116 S.Ct. 1559, 134 L.Ed.2d 660 (1996).

13. The Commission is empowered to preserve and protect customary and traditional rights of Native Hawaiians. *Ka Pa`akai O Ka`Aina v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000).

DECISION AND ORDER

IT IS HEREBY ORDERED that the Petition Area being the subject of this Docket No. A99-729, consisting of approximately 885.40 acres of land in the State Land Use Conservation District at Kūkūau, South Hilo, Hawai'i, identified as TMK No: (3) 2-4-008: Por. 33, and approximately shown on Exhibit "A" attached hereto and by this reference made a part hereof, is hereby reclassified into the State Land Use Agricultural District, and the State land use district boundaries are amended accordingly.

Based upon the findings of fact and conclusions of law stated herein, it is hereby determined that the reclassification of the Petition Area will not significantly affect or impair the preservation or maintenance of natural systems and habitats or the valued cultural, historical, and natural resources of the area.

IT IS HEREBY FURTHER ORDERED that the reclassification of the Petition Area from the State Land Use Conservation District to the State Land Use Agricultural District shall be subject to the following conditions which shall replace the previously recorded conditions of the D&O filed on November 16, 2001, in their entirety:

1. The Petition Area shall not be subdivided. Any structures that Petitioner erects or constructs in the Petition Area must be permitted under HRS § 205-2(d), or Petitioner shall seek appropriate permits and/or Special Permit(s) to erect or construct such structures(s). Petitioner shall work cooperatively with the County

Planning Department to rezone the Petition Area to a zoning density that would prevent subdivision.

2. 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.

3. DELETED

4. 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. 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.

5. The Petition Area includes significant native forest. Petitioner and its successors shall develop and implement a forest management plan within 2 years from the date of this Decision and Order, which Petitioner will provide to this Commission, and Petitioner 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.

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

7. Prior to commencing any proposed projects that involve ground-disturbing activities, Petitioner and its successors shall provide the SHPD the

opportunity to review, comment, and have Petitioner comply with any of the SHPD's requirements for the project(s). Petitioner will consult with the SHPD to assess the scope of work and whether some level of archaeological reconnaissance is required.

8. To the extent that any archaeological sites are located on the Petition Area, Petitioner and its successors shall work with the SHPD in developing a data recovery/mitigation/preservation plan(s), as needed in conjunction with Condition 7. The plan shall be reviewed and approved by the SHPD prior to any land alteration affecting such sites.

9. 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 of the proposed Kūkūau forest management.

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

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

12. – 15. DELETED

16. 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.

17. DELETED

18. 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 a more appropriate classification.

19. 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.

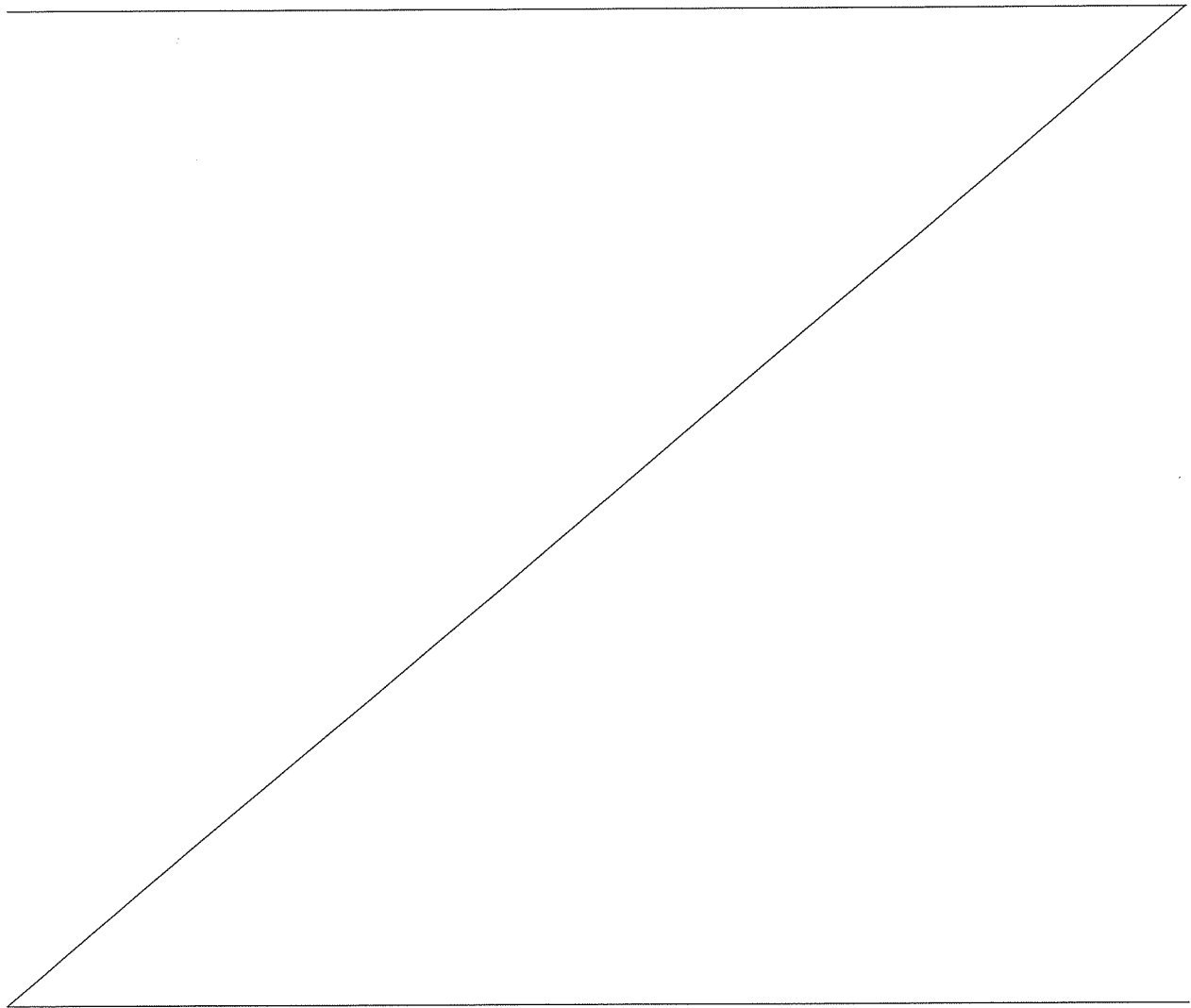
20. DELETED

21. 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.

22. 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.

23. Petitioner shall record the conditions imposed herein by the Commission with the Bureau of Conveyances pursuant to HAR § 15-15-92. All such conditions shall run with the land.



ADOPTION OF ORDER

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, Hawai'i, this 15th, day of December, 2020, per motion on 11/5/2020.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAII

Lauren Chun

Deputy Attorney General

By

Nancy Cabral

NANCY CABRAL
Vice Chairperson and Commissioner

Filed and effective on:

12/15/2020

Certified by:



DANIEL ORODENKER
Executive Officer



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
PARTNERSHIP, A Hawai'i Limited
Partnership

CERTIFICATE OF SERVICE

To Amend The Conservation Land Use
District Boundary Into The Agricultural
Land Use District For Approximately
885.40 Acres Of Land At Kūkūau, South
Hilo, Hawai'i, TMK No: (3) 2-4-008: Por. 33

CERTIFICATE OF SERVICE

I hereby certify that a certified copy of the AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER; _was served upon the
following by depositing the same in the U. S. Postal Service by registered or certified
mail as noted:

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Department of Planning

Dated: Honolulu, Hawai'i, December 15, 2020



DANIEL E. ORODENER
Executive Officer

