

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In The Matter Of The Petition Of
KULA RIDGE, LLC

To Amend The Land Use District Boundaries
Of Approximately 34.516 Acres Of Land
From The Agricultural Land Use District Into
The Urban Land Use District And
Approximately 16.509 Acres Of Land From
The Agricultural Land Use District Into The
Rural Land Use District At Kula, Makawao,
Maui, Hawai'i, Tax Map Key: 2-3-01: Por.
23 And 174

DOCKET NO. A11-790

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

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

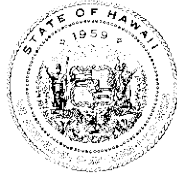
AND

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, Hawai'i.

August 12, 2021 by

Executive Officer



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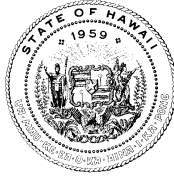
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 1) On August 25, 2008, Petitioner and County of Maui Department of Housing and Human Concerns filed a Notice of Intent to File a Land Use District Boundary Amendment Petition pursuant to section 201H-38, Hawai'i Revised Statutes ("HRS"), for the Kula Ridge Residential Workforce Housing Subdivision development. By letter dated October 22, 2008, Blaine J. Kobayashi, Esq., withdrew the Notice of Intent on behalf of Petitioner.

- 2) On October 6, 2008, Petitioner originally filed the application with the County Council on October 6, 2008. The Council's Policy Committee recommended a resolution to disapprove the then project based on concerns regarding the viability and cost of providing water to residents and the need for sidewalks along Lower Kula Road and for a comfort station in the proposed three-acre park. The revised application attempted to address these concerns and further included 34 senior duplex affordable units in place of the 34 single-family affordable units previously proposed for the project.
- 3) On January 24, 2011, Petitioner filed its Petition for Land Use District Boundary Amendment.
- 4) On April 8, 2011, Petitioner filed the First Amendment to clarify that the Petition Area consisted of approximately 51.025 acres of land in the State Land Use Agricultural District, and that Petitioner's request was to reclassify approximately 34.516 acres of the Petition Area from the State Land Use Agricultural District to the State Land Use Urban District and approximately 16.509 acres of the Petition Area from the State Land Use Agricultural District to the State Land Use Rural District.
- 5) On May 5, 2011, Petitioner filed the Second Amendment to its Petition to revise the metes and bounds map to show the existing waterline easement and to provide supplemental information pertaining to Section IX and X of the Petition. The LUC Executive Officer deemed the Petition a proper filing as of May 5, 2011.
- 6) On July 14, 2011, the Commission opened the hearing on the Petition.
- 7) On July 14-15, August 25-26, November 3, 2011 and January 6, 2012, the Commission conducted hearings on the Petition. The Commission conducted deliberations on the Petition on January 6, 2012 and voted to grant the reclassification of the Petition Area subject to 24 conditions.

- 8) On February 21, 2012, the Commission issued its Decision and Order approving reclassification of approximately 34.516 acres from the State Land Use Agricultural District to the State Land Use Urban District and approximately 16.509 acres (collectively “Petition Area”) from the State Land Use Agricultural District to the State Land Use Rural District.
- 9) On February 20, 2012, March 19, 2014, February 14, 2015, February 8, 2016, February 8, 2017, February 12, 2018, February 8, 2019 and February 12, 2020, Petitioner filed its annual reports.
- 10) On February 8, 2021, Thomas D. Welch, Esq., representative for the Trustees of the Raymond M. VonTempsky Marital Trust Dated May 14, 1979, As Amended April 11, 1983 and Amended by the Declaration dated January 22, 1983, Successor Petitioner to Kula Ridge, LLC (“Petitioner”), apprised the Commission that the VonTempsky family had reacquired the Petition Area by Deed in Lieu of Foreclosure and that the VonTempskys did not intend to develop the property and preferred that the State Land Use designation revert to agricultural, and that the annual report had not been filed as required by Condition No. 19 and the infrastructure deadline of February 23, 2022 would not be satisfied. The Commission then scheduled a status hearing on April 14, 2021 for Docket No. A11-790 Kula Ridge LLC.
- 11) On April 1, 2021, the LUC mailed/emailed the April 14, 2021 meeting agenda to the Parties, Statewide and County mailing lists.
- 12) On April 14, 2021, the Commission heard a status report on the docket from Thomas D. Welch, attorney representing the VonTempsky family. Mr. Welch advised the Commission that the original Petitioner, Kula Ridge, LLC, had defaulted on its purchase money mortgage and the original sellers, the VonTempsky family, had reacquired it by Deed in Lieu of

- Foreclosure.¹ This transfer of ownership was on March 27, 2019 and the Bureau of Conveyances recorded the transaction on January 7, 2020.
- 13) On June 3, 2021, the Commission issued its Order to Show Cause and mailed copies of the Order to the County of Maui Planning Department, the State Office of Planning and to Petitioner's Representatives Thomas Welch and Jeffery Ueoka.
 - 14) On June 4, 2021, the Commission received confirmation that the legal notice for the Order to Show Cause would appear in the June 6, 2021 edition of the Star-Advertiser, star-advertiser.com, Hawaii Tribune Herald, West Hawaii Today and The Garden Island papers and internet media, and the June 5, 2021 edition of the Maui News.
 - 15) On June 18, 2021, the Commission received OP's Position Statement that it had "no position".
 - 16) On June 24, 2021, the Commission received the County of Maui's Position Statement that it was "not opposed" to the reversion of the Petition Area back to Agricultural from Urban and Rural land use designations.
 - 17) On July 2, 2021, the LUC mailed/mailed the July 14-15, 2021 meeting agenda to the Parties, Statewide and County mailing lists
 - 18) On July 8, 2021, Petitioner filed a Stipulation of the Parties on the Land Use Commission's Order to Show Cause dated June 3, 2021
 - 19) On July 9, 2021 the Commission received written public testimony from Dana Naone Hall noting she had actively opposed the approval of the original redistricting and supported the reversion of the property.
 - 20) On July 14, 2021, under the authority of Section 205-4, Hawai'i Revised Statutes ("HRS"), and Section 15-15-93, Hawai'i Administrative Rules ("HAR"), Petitioner was required to appear before the Land Use Commission, State of Hawai'i ("Commission"), via ZOOM

¹ Kula Ridge, LLC has no further interest in, or claim against, the subject property, A copy of that entity's Deed in Lieu of Foreclosure in which they transferred and released all of their interest in the property was submitted to the Commission.

video conferencing technology at 9:00 a.m., to show cause as to why that certain land at Kula, County of Maui, State of Hawai‘i, Tax Map Key No. (2) 2-3-001-023 (por.) and 174, covering approximately 34.516 acres of land in the Urban Land Use District and approximately 16.509 acres of land in the Rural Land Use District should not revert to its former land use classification or be changed to a more appropriate classification.

- 21) On July 14, 2021, the Commission received oral argument by the Parties, including their positions on the stipulated agreement to revert the property due to non-compliance with conditions of the Decision and Order and that there had been no substantial commencement of use of the land.
- 22) The Chair confirmed that the Commissioners had each reviewed the records and transcripts for all meetings and were prepared to deliberate on the subject matter. A motion was made and seconded to revert the property to the original land use classification due to a failure to complete any of the conditions outlined in the parties’ stipulation and lack of commencement of use of the land.
- 23) Any of the proposed findings of fact submitted by Petitioner or any other party not already ruled upon by the Commission by adoption, or rejected by clearly contrary findings of fact, are hereby denied and rejected. Any conclusions of law herein improperly designated as a finding of fact should be deemed and construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed and construed as a finding of fact.
- 24) The Commission has the authority to revert a Petition Area to its original land use classification for failure to comply with the conditions imposed by the Commission. Lana‘i Co. Inc. v. Land Use Commission, 105 Hawai‘i 296, 317, 97 P.3d 372, 393 (Haw. 2004), and HRS Section 205-4(g). (HRS§205-4(g) expressly authorizes the LUC to “impose conditions.”). Moreover, “absent substantial commencement of use of the land in accordance

- with such representations made....in seeking [the] boundary change[,]” 48 the LUC is expressly authorized to order a reversion of land to the prior classification. HRS§405-4(g).”)
- 25) Whenever the Commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 196, 339 P.3d 685, 694 fn.2 (Hawai‘i 2014) (“HAR § 15–15–93 provided: *** (b) **Whenever the commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.** *** “ [emphasis in original]).
- 26) Once the LUC issues an Order to Show Cause (OSC), the relevant considerations to be taken into account by the LUC and the procedures it must follow turn on whether the petitioner has substantially commenced use of the land in accordance with its representations. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 209, 339 P.3d 685, 707 (Hawai‘i 2014) (“**once the LUC issues an OSC, the relevant considerations to be taken into account by the LUC and the procedures it must follow turn on whether the petitioner has substantially commenced use of the land in accordance with its representations.** When the LUC reverts property before the petitioner has substantially commenced use of the land, the LUC may do so without following the procedures otherwise applicable under HRS § 205–4.”).

27) To determine whether the use of the land has been substantially commenced, the Hawai‘i Supreme Court has provided the following guidance:

“Substantial” is, according to Black’s Law Dictionary, “considerable in amount or value; large in volume or number.” Black’s Law Dictionary 1656 (10th ed. 2014).” DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 213–14, 339 P.3d 685, 711–12 (Hawai‘i 2014).

28) The Hawai‘i Supreme Court, in DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 211–12, 339 P.3d 685, 709–10 (Hawai‘i 2014), explained that the legislature sought to empower the LUC to void a district boundary amendment where the petitioner does not substantially commence use of the land in accordance with representations made to the LUC.

This court explained that “[t]here is no provision in HRS § 205–12 that expressly delegates enforcement power to the LUC,” and that “[i]f the legislature intended to grant the LUC enforcement powers, it could have expressly provided the LUC with such power.” *Id.* Thus, this court observed, “looking to the express language of HRS § 205–12, it is clear and unambiguous that enforcement power resides with the appropriate officer or agency charged with the administration of county zoning laws, namely the counties, and not the LUC.” *Id.*

The one exception to this general rule is found in HRS § 205–4(g). That section provides in relevant part that, “The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations [made to the LUC by the petitioner], the commission shall issue and serve upon the party bound by the condition an OSC why the property should not revert to its former land use classification or be changed to a more appropriate classification.”

This sentence was added to HRS § 205–4(g) in 1990. 1990 Haw. Sess. Laws Act 261 § 1 at 563–64. The legislative history indicates that the legislature sought to empower the LUC to void a district boundary amendment where the petitioner does not substantially commence use of the land in accordance with representations made to the LUC. In this regard, the Senate Committee on Energy and Natural Resources explained in its report that the purpose of adding this sentence was “to allow the Land Use Commission to attach a condition to a boundary amendment decision which would void the boundary amendment when substantial commencement of the approved land use activity does not occur in accordance with representations made by the petitioner.” S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915 (emphasis added). The House

Committee on Planning, Energy, and Environmental Protection similarly stated in its report that the purpose of the bill was to “strengthen existing statutes by permitting the Land Use Commission further control over a proposed development by voiding a change in zoning if the petitioner does not make a substantial commencement of the approved land use activity.” H. Stand. Comm. Rep. No. 1086–90, in 1990 H. Journal, at 1265 (emphasis added).

The legislative history further indicates that the legislature added this language in order to empower the LUC to address a particular situation, namely, where the landowner does not develop the property in a timely manner. The Senate Committee on Energy and Natural Resources specifically noted that “[v]acant land with the appropriate state and county land use designation is often subjected to undesirable private land speculation and uncertain development schedules[.]” and that “[s]uch speculation and untimely development inflates the value of land, increases development costs, and frustrates federal, state, county, and private coordination of planning efforts, adequate funding, public services, and facilities.” S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915.

The fact that the legislature sought to address situations where the petitioner has not substantially commenced use of the land is further evidenced in the testimony presented to both the Senate and House committees. In both the Senate and the House, the Office of State Planning offered testimony that “[a] positive approach to comprehensive land use planning and a strong preventive measure to land speculation, necessitates this bill which will require that successful applicants for land use boundary amendments either ‘use it, or lose it.’ ” Letter from Office of State Planning, to S. Comm. on Energy & Natural Res. (Feb. 7, 1990) (on file with the Hawai‘i State Archives) (emphasis added); Letter from Office of State Planning, to H. Comm. on Planning, Energy & Envtl. Protection (Mar. 8, 1990) (on file with the Hawai‘i State Archives) (emphasis added). The LUC also offered testimony to both the Senate and the House, stating that “the proposed amendment will clarify the Commission’s authority to impose a specific condition to downzone property in the event that the Petitioner does not develop the property in a timely manner.” Letter from Land Use Comm’n, to S. Comm. on Energy & Natural Res. (Feb. 7, 1990) (on file with the Hawai‘i State Archives) (emphasis added); Letter from Land Use Comm’n, to H. Comm. on Planning, Energy & Envtl. Protection (Mar. 8, 1990) (on file with the Hawai‘i State Archives) (emphasis added). Thus, the legislative history establishes that by adding this sentence to HRS § 205–4(g) in 1990, the legislature sought to empower the LUC to void a boundary amendment, after giving the landowner the opportunity for a hearing, if the landowner failed to substantially commence use of the land in accordance with its representations.

DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 211–12, 339 P.3d 685, 709–10 (Hawai‘i 2014).

- 29) Whether Petitioner has substantially commenced use of the land in accordance with representations made to the LUC is a question of fact to be determined by the Commission. DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Haw. 187, 214, 339 P.3d 685, 712, fn.16 (Hawai‘i 2014) (“In the absence of both a statutory definition of “substantial commencement” and an expression of LUC's interpretation of “substantial commencement” for a particular project, a determination of whether a party has substantially commenced use of the land will turn on the circumstances of each case, not on a dollar amount or percentage of work completed.”).
- 30) The Commission concludes that the Petition Area has not been developed as represented to the Commission. The Commission concludes that no bond has been secured for the completion thereof within 10 years from the date of the Commission’s 2012 Decision & Order. “Development” means completion of backbone infrastructure as defined in finding of fact 84 of the 2012 Decision & Order.
- 31) The Commission concludes that the record of this docket evidences a failure to accomplish substantial progress in developing the Petition Area as represented to the Commission by the 2012 Decision & Order.
- 32) The Commission concludes that the record of this docket evidences a failure to perform a condition of approval, or a representation or commitment made on the part of Petitioner’s predecessor, Kula Ridge, LLC.
- 33) The Commission concludes that under the facts and circumstances of this case, Petitioners have failed to satisfy:

- Condition 1 Affordable Housing
- Condition 2 `Ohana Units;
- Condition 3 Wastewater Facilities;
- Condition 4 Traffic Impact Mitigation
- Condition 5 Civil Defense;
- Condition 6 Archaeological Monitoring Plan;
- Condition 7 Unidentified Archaeological Finds;
- Condition 8 Stormwater Management and Drainage Improvements;

Condition 9 Compliance with Section 205-3.5, HRD, Related to Agricultural Uses on Adjacent Agricultural Land;
Condition 10 Water System Improvements;
Condition 11 Water Supply Plan;
Condition 12 BMPs
Condition 13 Water Conservation Measures;
Condition 14 Energy Conservation Measures;
Condition 15 Established Access Rights Protected;
Condition 16 Solid Waste Management Plan;
Condition 17 Sidewalk Improvements;
Condition 18 Infrastructure Deadline
Condition 20 Compliance with Representations to the Commission

and failed to substantially comply with representations made to the Commission, in violation of Condition 20.

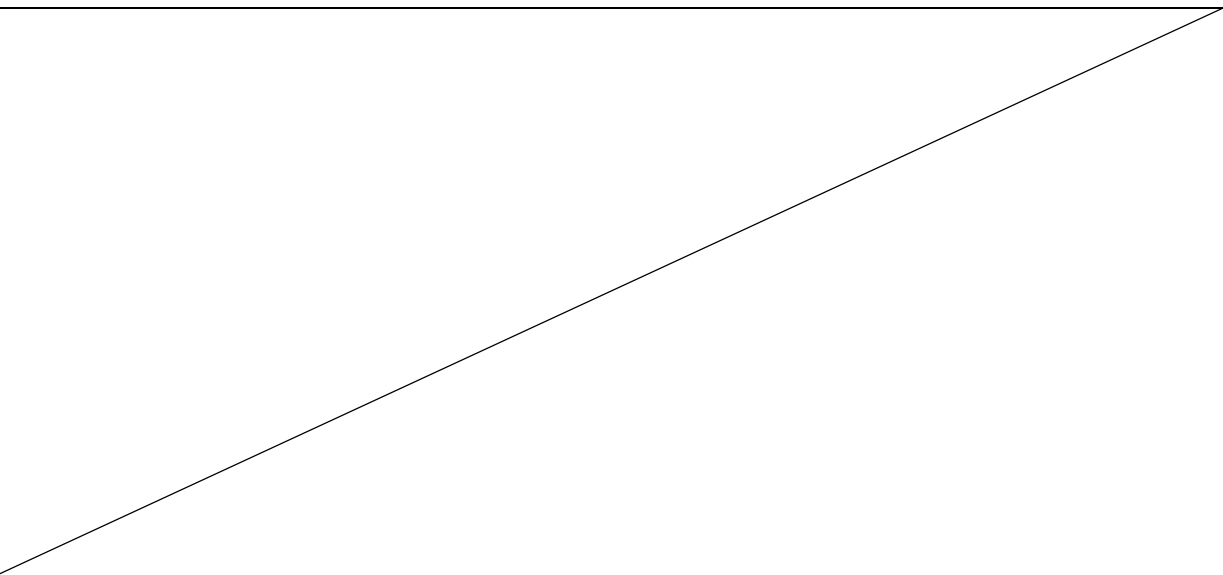
- 34). The Commission concludes that Petitioner has not substantially commenced use of the land in accordance with the representations of Petitioner's predecessor, Kula Ridge, to the Commission.
- 35) The Commission concludes that use of the land in accordance with the representations of Petitioner's predecessor, Kula Ridge, LLC., to the Commission has not been substantially commenced.
- 36) The Commission concludes that the Petition Area should therefore revert to its former classification.
- 37) The Commission does not rule upon questions of constitutional law.
- 38) Under the facts and circumstances of this case, reversion of the Petition Area to its original agricultural classification does not violate any applicable rule or statutory provisions, including Hawai'i Administrative Rules (HAR) subchapter 7 of Chapter 15-15, and HRS Chapters 91, 92, and 205 and reversion of the Petition Area to its original agricultural classification for violation of conditions of approval and lack of substantial commencement of use of the land is warranted pursuant to HRS Section 205-4(g).
- 39) The Petitioner, the Office of Planning, and the County have jointly stipulated to an agreement with the reversion.

ORDER

This Commission, having duly considered the written reports, pleadings, and oral and written statements and testimony, and oral arguments of the parties, and a motion having been made and seconded at a hearing on July 14, 2021 via ZOOM video conferencing technology, and the motion having received the affirmative votes required by HAR §15-15-13, and there being good cause for the motion,

HEREBY ORDERS:

1. The Petition Area of that certain land at Kula, County of Maui, State of Hawai‘i, Tax Map Key No. (2) 2-3-001-023 (por.) and 174, covering approximately 34.516 acres of land in the Urban Land Use District and approximately 16.509 acres of land in the Rural Land Use District referred to as the Subject Area, and identified on Exhibit “A”, attached hereto and incorporated herein, is reverted to the Agricultural District.
2. In compliance with Hawai‘i Administrative Rules § 15-15-93(e), the February 21, 2012 Decision and Order, as amended, is further amended to incorporate the order to show cause and to include the reversion of the Petition Area to its former land use classification; including the cancellation and release of all conditions imposed by that certain 2012 Decision and Order.



ADOPTION OF ORDER

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

Done at Honolulu, Hawai'i, this 12th, day of August, 2021, per motion on July 14, 2021.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAI'I

REAVIS

Deputy Attorney General

By 

JONATHAN LIKEKE SCHEUER
Chairperson and Commissioner

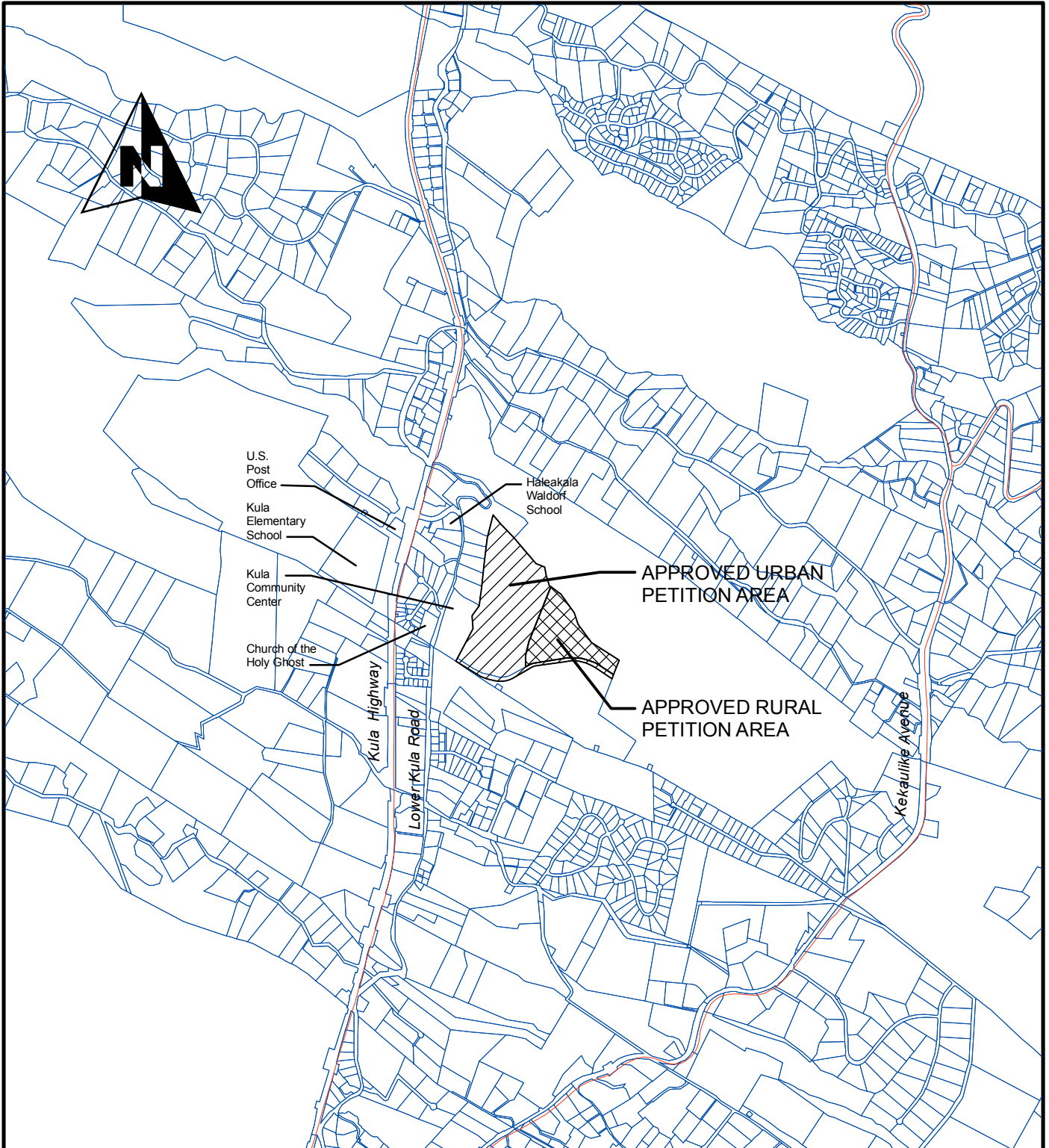
Filed and effective on:

8/12/2021

Certified by:



DANIEL ORODENKER
Executive Officer

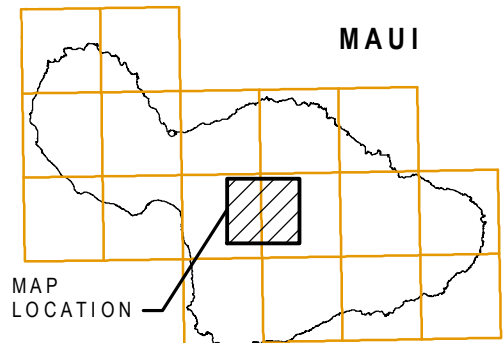


A11-790 KULA RIDGE, LLC

LOCATION MAP

Tax Map Key: 2-3-001: por. 023 & 174
 Kula, Makawao, Maui, Hawai'i
 Scale: 1: 24, 000

EXHIBIT "A"





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CERTIFICATE OF SERVICE

I hereby certify that a certified copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER REVERTING THE PETITION AREA; EXHIBIT "A", 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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Dated: Honolulu, Hawai'i, August 12, 2021



DANIEL E. ORODENKER
Executive Officer