Exhibit 26

Missing pages 7, 8, 9. Not available from State library

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Op. No. 71-2

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HAWAII STATE CAPITOL
HONOLULU, HAWAII 96813

January 19, 1971

Mr. Goro Inaba
Vice Chairman
Land Use Commission
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to your inquiry as to whether the procedure followed by the Land Use Commission (hereinafter "LUC") in reclassifying approximately 89 acres on the lower slopes of Mt. Olomana from the Agricultural to the Urban district classification during its 5-year boundary review was illegal.

We reply in the negative.

We understand the facts to be as follows:

Pursuant to § 205-11, Hawaii Revised Statutes, the LUC conducted its 5-year boundary review. A notice of public hearing was published on May 9, 1969 in the Honolulu Star-Bulletin, advising that a public hearing would be held on May 23, 1969 on proposed changes in the rules and regulations of the LUC and on proposed changes in the Oahu district boundaries. The notice further stated that the proposed changes in the district boundaries were indicated on maps displayed in the LUC's office and the City and County Planning Department.

The maps, referred to in the notice of public hearing and showing the proposed changes throughout the island, indicated that the subject parcel was to be reclassified from the Agricultural to the Conservation district classification. The maps remained unchanged until sometime subsequent to the public hearing.

At the public hearing on May 23, 1969, the attorney for Hawaiian Pacific Industries, Inc., requested that the subject parcel be reclassified from Agricultural to Urban. No other person testified either for or against the request of Hawaiian Pacific Industries, Inc.

On June 18, 1969, the LUC's executive officer sent letters and enclosed maps of all windward rezoning requests to the President and Community Affairs Committee of the Windward Chamber of Commerce and to the President of the Windward Citizens Planning Conference. The enclosed maps indicated that the subject parcel was proposed to be reclassified from Agricultural to Urban. On July 17, 1969, the Pali Press published an article on the proposed reclassification of the subject parcel from Agricultural to Urban.

On August 12, 1969, KHVH Television presented a 5-minute news coverage of the proposed urban reclassification of the subject parcel on its 6 o'clock and 10 o'clock news broadcasts. Letters from windward organizations and residents of the area were received by the Commission, including those protesting the proposed reclassification to Urban.

On August 14, 1969, the LUC adopted the new Oahu district boundaries at an action meeting. Among the changes adopted was the reclassification of the subject parcel from Agricultural to Urban. Present at this meeting were representatives of various windward community groups. One of them, Ken Dickson of the Windward Chamber of Commerce, went on record as opposing the reclassification.

The question now presented is whether the LUC could validly adopt the reclassification of the subject parcel from Agricultural to Urban without publishing a new notice and holding a new public hearing subsequent to the request of Hawaiian Pacific Industries, Inc. presented at the public hearing.

This problem has arisen in other jurisdictions. There is a split of authority on this question. As stated by the editors of Corpus Juris Secundum:

> "According to one view, where sufficient notice is given prior to the hearing, the municipal zoning body may make changes or amendments to the proposed regulations in the course of its passage without giving further notice, or without another public hearing; under other authority, a zoning ordinance may be void where substantial amendments are made after the public hearing on the proposed ordinance without any new hearing on the changes and amendments." 101 C.J.S., Zoning § 11, p. 697.

We shall discuss first the line of cases upholding the validity of the rezoning. A situation almost identical to that in question was presented in Hewitt v. County Commissioners of Baltimore County, 151 A.2d 144 (Md. 1959). The zoning commissioner had submitted a map with proposed changes to the county commissioners. The map indicated that the property in question was to be placed in residential zoning. A notice of public hearing was published with reference to maps containing the proposed changes. At the public hearing, the suggestion was made for the first time that the subject property be reclassified for nonresidential uses. The plaintiffs, neighboring property owners, were not present at this public hearing although having constructive notice of it. Immediately thereafter, the plaintiffs filed a protest against the proposed change to nonresidential uses. They also requested an additional public hearing, which was refused by the county commissioners. The county commissioners thereafter approved new zoning maps, which rezoned the subject property to nonresidential uses. The plaintiffs brought suit to enjoin the use of the subject property for nonresidential purposes, alleging that the rezoning was invalid because of lack of proper notice and that a further hearing should have been conducted. Although ruling the rezoning invalid on other grounds, the Maryland Court of Appeals, the

highest court in the State, upheld the propriety and sufficiency of the notice given, stating:

> "The published notice of the hearing stated that the Zoning Commissioner had prepared and submitted to the County Commissioners a Final Report with respect to proposed amendments, supplements and changes in the boundaries of the zoning districts within a portion of the Eighth Election District and that the County Commissioners would hold a public hearing on said Final Report at a specified time and place, at which time and place the County Commissioners would 'hear objections and recommendations with respect to said Final Report.' The notice also stated that the 'Final Report consisting of a comprehensive zoning map setting forth in color the proposed amendments, supplements and changes' was on file and open to public inspection at the office of the County Commissioners during specified hours; and the notice described the area covered by the Final Report.
>
> "We do not think the statutory language could be construed as requiring the County Commissioners to state in advance (what they could hardly know) the exact nature of any action which they might take with regard to matters brought to their attention at the contemplated hearing. Indeed, it is difficult to see how (without either prejudgment or prophecy) the notice here given could have been much more explicit or informative than it was. The appellants certainly had no right to assume that the legislative body entrusted with the sole power to enact a comprehensive zoning or rezoning ordinance in Baltimore County was bound to adopt the proposals or recommendations submitted by the Zoning Commissioner. [Citing cases.]" 151 A.2d 148-149.

A similar situation was presented in City of Monett, Barry County v. Buchanan, 411 S.W.2d 108 (Mo. 1967), an action by the City to enjoin completion of a business building in an area zoned residential. The statute provided that the Zoning Commission shall make recommendations for rezoning to the

City Council, which would take final action. The Zoning Commission had recommended commercial zoning and a public hearing before the Council was so noticed and held. But in subsequent sessions, the City Council considered residential instead of commercial zoning for the subject property and ultimately adopted such zoning. The defendant alleged that the zoning ordinance was invalid for failure to hold a new public hearing before the change of the proposed zoning of the subject property to residential.

In upholding the validity of the ordinance, the Supreme Court of Missouri stated:

> "Ultimately the appellants' complaint here is that the council did not adopt the recommendation the zoning commission finally made, after having changed it, that their six lots be zoned C rather than A but, insofar as notice is involved, they 'had no right to assume that the legislative body (the city council) entrusted with the sole power to enact a comprehensive zoning or rezoning ordinance in Baltimore County was bound to adopt the proposals or recommendations submitted by the Zoning Commissioner,' and it may be added, especially after the council has once heard the appellants and is fully informed as to the basic problem. Hewitt v. County Commissioners of Baltimore County, 220 Md. 48, 151 A.2d 144, 149; Ciaffone v. Community Shopping Corp., 195 Va. 41, 77 S.E.2d 817, 39 A.L.R.2d 757. While it involved a zoning order, 465 acres of land and 1200 homes, the case nearest in point on its physical facts as well as appearance of objectors and the sufficiency of notice is Ridgewood Land Company v. Simmons, 243 Miss. 236, 137 So.2d 532. The only complaint here is the lack of a second notice, a notice that the council would meet again or at another time before finally voting and enacting the ordinance. There is no claim that the council was bound in any and all events to finally dispose of the proposed ordinance at the duly called meeting on April 28 or that it had no authority to adjourn and meet from time to time. And there is no claim that the statutes in specific terms, §§ 89.030-89.070, require a second or further notice once the council gave a proper notice and conducted a hearing attended by objectors. And finally there is no suggestion 'of improper motives on the part of the zoning authority' (the city

> council), a compelling factor in individual instances. 96 A.L.R.2d 1. c. 457. In conclusion upon this point, in the circumstances of this record it may not be said that the ordinance was not validly adopted solely because there was no officially published notice of another meeting of the city council at which the ordinance would be finally voted on and enacted." 411 S.W.2d 113-114.

See also Gerstenseld v. Jett, 374 F.2d 333 (U.S.C.A.-D.C. 1967); Johnson v. Town of Framingham et al., 242 N.E.2d 420 (Mass. 1968); and Town of Burlington v. Dunn, 61 N.E.2d 243 (Mass. 1941).

As we have stated earlier, another line of cases states that when substantial changes are made in a zoning proposal as originally noticed, the changed proposal is treated as a new one and a new notice is required to satisfy the statute requiring notice as a prerequisite to the valid enactment of zoning measures. 96 A.L.R.2d 491.

Among the cases cited in support of this view are Castle v. McLaughlin, 270 F.2d 448 (D.C.C.A. - 1959), and Shefler v. City of Geneva, 147 N.Y.S.2d 400 (1956).

In Castle v. McLaughlin, supra, the zoning ultimately adopted was completely different from that originally proposed in the public hearing notice. In ruling that the zoning amendments were invalid, the United States Court of Appeals stated:

> "The statute states that before an amendment is put into effect, a public hearing shall be held thereon. That was not done with respect to the amendment adopted for the area involved. The only hearing held related to the proposed amendment which was finally rejected by the Zoning Commission. Before another proposal could be adopted, a notice and hearing relating to it were required under the plain terms of the statute. . .
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> "The hearing on the rejected amendment cannot be treated as an acceptable substitute for the required hearing, since the amendment purportedly

The same reasoning should likewise apply to the instant situation, where the proposal for reclassification to urban was publicly made and discussed at the public hearing and opponents were given ample notice and opportunity to make their views known.

Finally, it should be pointed out that the proposal that was the subject of notice, public hearing and final single action by the LUC was the statutorily mandated, quinquennial change in land use classifications for the entire island of Oahu, not only for the subject parcel. Any change from that shown on the filed maps necessarily entailed change in land use classifications. To require new notice and hearing on any such change would place "too formidable a burden" on the comprehensive district boundary adoption process. Cf Ala Moana Boatowners Ass'n. v. State, supra. In this regard, a number of cases requiring new notice and hearing involved individual petitions for rezoning by individual property owners and are distinguishable. E.g., Nelson v. Town of Belmont, 174 N.E. 320 (Mass. 1931); Colonial Benson Oil Co. v. Zoning Board of Appeals, 23 A.2d 151 (Conn. 1941).

We therefore conclude that the procedure used by the State Land Use Commission in reclassification of approximately 89 acres on the lower slopes of Olomana, between the old and new Waimanalo Roads, was not contrary to law.

Respectfully submitted,

/s/ Walton D. Y. Hong

Walton D. Y. Hong
Deputy Attorney General

APPROVED:

/s/ Bertram T. Kanbara

BERTRAM T. KANBARA
Attorney General