

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition for)
Declaratory Ruling or Order of)
PONO, Unincorporated Association)
and HALONA KAOPU'IKI, WALTER RITTE,)
WAYDE LEE, MATTHEW ADOLPHO, and)
JOSEPH KALIPI)

For a Declaratory Ruling or Order)
To Determine Whether "The Great)
Molokai Ranch Trail" Project,)
Consisting of Fifteen (15))
Commercial "Overnight Campgrounds")
On Agricultural Lands Rated C, D,)
E, and U, On The West End of)
Molokai Requires, At Least, A)
Special Use Permit)

DOCKET NO. DR97-20

DECLARATORY ORDER

LAND USE COMMISSION
STATE OF HAWAII
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DECLARATORY ORDER

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

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| In the Matter of the Petition for Declaratory Ruling or Order of |) | DOCKET NO. DR97-20 |
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| PONO, Unincorporated Association and HALONA KAOPU'IKI, WALTER RITTE, WAYDE LEE, MATTHEW ADOLPHO, and JOSEPH KALIPI |) | DECLARATORY ORDER |
| |) | |
| For a Declaratory Ruling or Order To Determine Whether "The Great Molokai Ranch Trail" Project, Consisting of Fifteen (15) Commercial "Overnight Campgrounds" On Agricultural Lands Rated C, D, E, and U, On The West End of Molokai Requires, At Least, A Special Use Permit |) | |
| |) | |

DECLARATORY ORDER

On February 27, 1997, Pono, an unincorporated association, and Halona Kaopu'iki, Walter Ritte, Wayde Lee, Matthew Adolpho, and Joseph Kalipi, as individuals and members of Pono (hereinafter cumulatively referred to as "Petitioner"), by and through its attorney Isaac Hall, Esq., filed a Petition for Declaratory Ruling or Order ("Petition") pursuant to Hawai'i Revised Statutes ("HRS") section 91-8, and Hawai'i Administrative Rules ("HAR") section 15-15-98.

The Petition requested the Land Use Commission ("Commission") to issue a Declaratory Ruling or Order on: 1) Are the fifteen (15) commercial "overnight campgrounds" that comprise the Great Molokai Ranch Trail Project, each containing numerous units rented on a short-term basis, permitted uses of

agricultural lands rated C, D, E, and U; 2) Are the activities and uses proposed of such a nature and scope that, at a minimum, a special use permit is required from the Molokai Planning Commission and the State Land Use Commission; and 3) Are the activities and uses proposed "urban-like" to the extent that a boundary amendment is required from the State Land Use Commission.

PROCEDURAL MATTERS

1. On February 27, 1997, Petitioner filed its Petition For Declaratory Ruling Or Order ("Petition").
2. On March 14, 1997, Molokai Ranch filed its Motion To Dismiss Petition For Declaratory Ruling Or Order, Or In The Alternative, For Leave To Appeal, Memorandum in Support of Motion ("Motion to Dismiss").
3. On March 19, 1997, the County of Maui filed its Request For Hearing And Memorandum In Partial Support Of, And Partial Joinder In, Molokai Ranch's Motion To Dismiss Petition For Declaratory Ruling.
4. On March 19, 1997, Petitioner filed its Verification Of Petition For Declaratory Relief Or Order.
5. On March 19, 1997, Petitioner filed its Further Memorandum In Support Of Petition For Declaratory Ruling Or Order Submitted By Pono And Its Members And Memorandum In Opposition To Molokai Ranch's Motion To Dismiss Petition For Declaratory Ruling Or Order, Or In The Alternative, For Leave To Appeal.

6. On March 19, 1997, Molokai Ranch filed its Memorandum In Opposition To Petition For Declaratory Ruling Or Order.

7. On March 20, 1997, Molokai Ranch filed its Joinder In County of Maui's Request For Hearing And Memorandum In Partial Support Of, And Partial Joinder In, Molokai Ranch's Motion To Dismiss Petition For Declaratory Ruling.

8. On March 20, 1997, Molokai Ranch filed its Reply Memorandum to Petitioner's Further Memorandum In Support Of Petition For Declaratory Ruling Or Order.

9. On March 21, 1997, at its meeting in Honolulu, Oahu, the Commission held an action hearing on the Petition pursuant to HAR §15-15-100.

10. At the March 21, 1997 meeting, John Rapacz, Esq., Kenneth Kupchak, Esq., Paul Mancini, Esq., Wayde Lee, Walter Ritte, Karen Holt, Colette Machado, and DeGray Vanderbilt appeared as public witnesses and provided oral or written testimony.

11. Upon due deliberation and in consideration of the testimony provided by the Petitioner and various public witnesses, the Commission set the Petition for hearing pursuant to HAR §15-15-103.

12. On April 8, 1997, the Order Setting Petition For Declaratory Ruling Or Order For Hearing was issued.

13. On April 21, 1997, the County of Maui filed its Petition To Intervene.

14. On April 21, 1997, Molokai Ranch filed its Petition To Intervene.

15. On April 25, 1997, at its meeting in Honolulu, Oahu, the Commission held an action meeting on the respective Petitions To Intervene. Having considered the arguments, both oral and written, presented by the County of Maui, Molokai Ranch, and Petitioner, and having considered the entire record herein, and with good cause shown, the Commission granted Intervention to the County of Maui and Molokai Ranch.

16. On April 29, 1997, the Order Granting County of Maui Petition To Intervene and Order Granting Molokai Ranch Petition To Intervene, was issued.

17. On April 25, 1997, a prehearing conference was held at Leiopapa A Kamehameha, Conference Room 405, 235 S. Beretania Street, Honolulu, Oahu, with representatives of Petitioner, Intervenor County of Maui, and Intervenor Molokai Ranch present.

18. At the prehearing conference, the scope of the May 7, 1997 proceedings were discussed. After discussion among the parties, the parties agreed to limit the scope of the meeting in Kalamaula, Kaunakakai, Molokai, to the determination of two questions: 1) whether to grant or deny Intervenor Molokai Ranch's Motion To Dismiss Petition For Declaratory Ruling Or Order Or In The Alternative, For Leave To Appeal, and 2) Petitioner Pono et al.'s question of whether overnight camps are permissible uses within lands classified as State Land Use Agricultural District with soil classified by the Land Study

Bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U. The schedule for the submission of exhibits, exhibit lists, witness lists, rebuttal exhibits, amended exhibit lists, and amended witness lists were set at the prehearing conference.

19. On April 29, 1997, a Prehearing Order was issued by the Commission which contained the abovementioned schedule for the submission of material, the scope which the proceedings would cover, and the timeframes afforded to the parties to argue and rebut the matters before the Commission at its May 7, 1997 meeting.

20. On April 30, 1997, Intervenor Molokai Ranch filed its Motion To Continue Hearing And Associated Dates, and Memorandum in Support.

21. On April 30, 1997, Intervenor Molokai Ranch filed its Memorandum In Opposition To Petition Re Whether Overnight Camps Are Permitted On Agricultural Lands Rated C, D, E, or U.

22. On April 30, 1997, Intervenor Molokai Ranch filed its Renewed Motion To Dismiss Petition For Declaratory Ruling Or Order.

23. On May 1, 1997, Petitioner filed its Further Memorandum In Opposition To Motion To Dismiss.

24. On May 1, 1997, Petitioner filed its Further Memorandum On First Question.

25. On May 2, 1997, Intervenor Molokai Ranch filed its Response To Petitioners' Further Memorandum On First Question.

26. On May 2, 1997, Intervenor Molokai Ranch filed its Response To Petitioners' Further Memorandum In Opposition To Motion To Dismiss.

27. On May 5, 1997, Petitioner filed its Memorandum In Opposition To Intervenors' Motion to Continue Hearing and Associated Dates.

28. On May 5, 1997, Petitioner filed its Combined Reply Memorandum On (1) The Motion To Dismiss and (2) The First Question.

29. On May 7, 1997, at its meeting in Kalamaula, Kaunakakai, Molokai, the Commission held a hearing on the Petition, pursuant to notice published on March 31, 1997 and amended notice published on April 4, 1997, in the Honolulu Advertiser and Maui News.

30. At the May 7, 1997 hearing Barbara Haliniak, Billy Buchanan, James Berg, Julie Lopez, Ernie Kanekoa, Zhantall Dudoit, Judy Meyer, Walter Ragsdale, Lyle Otsuka, Doris Miller, Rick Egged, Pilipo Solatorio, Elizabeth L. Berg, and Kaeo Adolpho appeared as public witnesses and provided oral testimony.

31. At the May 7, 1997 hearing written public testimony was received from David L. Callies, Esq., Jane Howell, Esq., Deputy Corporation Counsel, City and County of Honolulu, Barbara Haliniak, and K. Mahealani Davis.

32. At its May 7, 1997 meeting, the Motion To Dismiss Petition For Declaratory Ruling Or Order, Or In The Alternative, For Leave To Appeal and the Renewed Motion To Dismiss Petition For Declaratory Ruling Or Order filed by Intervenor Molokai

Ranch, came before the Commission. The Commission voted to deny the motion.

33. At its May 7, 1997 meeting, the Motion To Continue Hearing And Associated Dates filed by Intervenor Molokai Ranch came before the Commission. The Commission voted to deny the motion.

34. On August 5, 1997, the Order Denying Molokai Ranch's Motion To Dismiss Petition For Declaratory Ruling Or Order, Or In The Alternative, For Leave To Appeal was issued.

35. On August 5, 1997, the Order Denying Molokai Ranch's Motion To Continue Hearing And Associated Dates was issued.

POSITION OF THE PARTIES

36. At the May 7, 1997 hearing, Petitioner argued that overnight camps are not permitted on State Land Use Agricultural District lands with soil classified by the Land Study Bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U.

37. Intervenor Molokai Ranch argued that open area recreational facilities are permissible within agricultural district land classified C, D, E and U and that overnight camps are not specifically prohibited by rule or statute on State Land Use Agricultural district lands with soil classified by the Land Study Bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U.

38. Intervenor County of Maui argued that §205-2 allows open area recreational facilities in agricultural districts.

RULING ON PROPOSED FINDINGS OF FACT

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

CONCLUSIONS OF LAW

JURISDICTION

1. Jurisdiction of the Commission to consider the request of Petitioner is authorized under HRS §91-8, and HAR §15-15-98. HRS §91-8 authorizes the Commission to issue declaratory rulings "as to the applicability of any statutory provision or of any rule or order of the agency."

2. HRS §205-5(b) authorizes the Commission to determine permitted uses on State Land Use Agricultural district lands with soil classified by the Land Study Bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U.

APPLICABLE LEGAL AUTHORITIES

1. Hawaii Revised Statutes:

A) §91-8

Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

B) §205-2(d)

Agricultural districts shall include activities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, aquaculture, and game and fish propagation; aquaculture, which means the production of aquatic plants and animal life for food and fiber within ponds and other bodies of water; wind generated energy production for public, private, and commercial use; bona fide agricultural services and uses which support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, whether or not conducted on the same premises as the agricultural activities to which they are accessory, including but not limited to farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises; wind machines and wind farms; small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land, provided that such facilities shall not be used as or equipped for use as living quarters or dwellings; agricultural parks; and open area recreational facilities, including golf courses and golf driving ranges; provided that they are not located within agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B.

These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

C) §205-4.5(a)(6)

Public and private open area types of recreational uses including day camps, picnic grounds, parks, and riding stables, but not including dragstrips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps;

D) §205-4.5(c)

Within the agricultural district all lands, with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

E) §205-5(b)

Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission (emphasis added) shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance. Other uses may be allowed by special permits issued pursuant to this chapter. The minimum lot size in agricultural districts shall be determined by each county by zoning ordinance, subdivision ordinance, or other lawful means; provided that the minimum lot size for any agricultural use shall not be less than one acre, except as provided herein. If the county finds that unreasonable economic hardship to the owner or lessee of land cannot otherwise be prevented or where land utilization is improved, the county may allow lot sizes of less than the minimum lot size as specified by law for lots created by a consolidation of existing lots within an agricultural district and the resubdivision thereof; provided that the consolidation and resubdivision do not result in an increase in the number of lots over the number existing prior to consolidation; and provided further that in no event shall a lot, which is equal to or exceeds the minimum lot size of one acre be less than that minimum after the

consolidation and resubdivision action. The county may also allow lot sizes of less than the minimum lot size as specified by law for lots created or used for public, private, and quasi-public utility purposes, and for lots resulting from the subdivision of abandoned roadways and railroad easements.

F) §205-12

The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

2. Hawaii Administrative Rules:

A) §15-15-23 Permissible uses; generally.

Except as otherwise provided in this chapter, the following land and building uses are compatible and permitted within the following land use districts, except when applicable county ordinances or regulations are more restrictive. Except as otherwise provided in this chapter, uses not expressly permitted are prohibitive (emphasis added).

B) §15-15-25 Permissible uses within the "A" agricultural district.

(a) Permissible uses within agricultural district land classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be those uses set forth in section 205-4.5, HRS.

(b) Permissible uses within the agricultural district land classified by the land study bureau's detailed land classification as overall (master) productivity rating class of C, D, E and U shall be those uses permitted in A and B lands as set forth in section 205-4.5, HRS, and also those uses set forth in section 205-2, HRS.

C) §15-15-98 Who may petition.

(a) On petition of an interested person, the commission may issue a declaratory order as to the

applicability of any statutory provision or of any rule or order of the commission.

(b) Notwithstanding the other provisions of this subchapter, the commission, on its own motion or upon request but without notice of hearing, may issue a declaratory order to terminate a controversy or to remove uncertainty.

D) §15-15-100 Declaratory orders; commission action.

Prior to sixty days after the receipt of a petition for declaratory ruling, the commission shall either deny the petition in writing, stating the reasons for the denial, or issue a declaratory order on the matters contained in the petition, or set the matter for hearing, as provided in section 15-15-103 provided that if the matter is set for hearing, the commission shall render its findings and decision before one hundred twenty days after the close of the hearing.

E) §15-15-103 Declaratory orders; request for hearing.

The commission may, but shall not be required to conduct a hearing on a petition for declaratory ruling. Any petitioner or party in interest who desires a hearing on a petition for a declaratory ruling shall set forth in detail in the request the reasons why the matters alleged in the petition, together with supporting affidavits or other written briefs or memoranda of legal authorities, will not permit the fair and expeditious disposition of the petition, and to the extent that the request for a hearing is dependent upon factual assertion, shall accompany the request by affidavit establishing those facts. In the event a hearing is ordered by the commission, subchapter 7 shall govern the proceeding.

F) §15-15-104 Applicability of declaratory order.

An order disposing of a petition shall apply only to the factual situation described in the petition or set forth in the order.

3. The enacting statute, HRS Chapter 205, is very clear in prohibiting "overnight camps" as provided in HRS §205-4.5(a)(6), "... but not including dragstrips, airports,

drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps:" (emphasis added). However, the argument before this Commission was that this prohibition applies to only agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B. The agricultural district lands in question are presumed to be rated C, D, E, or U.

4. HRS §205-2 provides for "open area recreational facilities" upon agricultural district lands. "Open area recreational uses" is further defined in HRS §205-4.5(a)(6): "[P]ublic and private open area types of recreational uses including day camps, picnic grounds, parks, and riding stables, but not including ... overnight camps; ..." (emphasis added).

5. HAR §15-15-25(b), explicitly states that permissible uses within C, D, E, and U agricultural lands are limited to those set forth in HRS §205-4.5. This specific language contemplates that the prohibition of "overnight camps" applies to non-prime agricultural lands.

6. HAR §15-15-23 provides "uses not expressly permitted are prohibited." Neither the statutes nor the rules explicitly mention "overnight camps" as a permitted use. Therefore, the Commission is bound by the statute and rules to rule that "overnight camps" are not permitted uses in agricultural lands.

7. Statutory construction requires an interpretation acquired by reading separate but related sections of the statute

in question together. Therefore, the interpretation is such that HRS Chapter 205 does not expressly or by any implication allow agricultural district lands to be used to accommodate overnight camps or dwellings where there is no apparent evidence of any activity for uses related to farming or animal husbandry.

8. HRS Section 205-12 provides the counties with the discretionary power to determine and enforce land use violations. This section does not delegate discretionary authority to determine permitted uses under the Land Use Commission Law. Home Rule authority lies with the expressed authority to use discretion in issuing special permits.

9. The plain reading of the statutory and rule provisions of Chapter 91, and Chapter 205, Hawai'i Revised Statutes and Chapter 15, Hawai'i Administrative Rules clearly provides jurisdiction to the Land Use Commission to address petitions for declaratory rulings and to determine permitted uses in agricultural lands. Also section 205-2 and section 205-4.5, Hawai'i Revised Statutes, expressly prohibit the use of agriculture lands for "overnight camps." Section 91-1, Hawaii Revised Statutes explicitly excludes section 91-8 declaratory rulings from its definition of "Rule." Therefore, there is no necessity for any Chapter 91, Hawaii Revised Statutes rule-making procedures.

DECLARATORY ORDER


FOR GOOD CAUSE APPEARING, the Commission hereby rules that a plain reading of HRS §§205-2 and 205-4.5, in conjunction with HAR §§15-15-23 and 15-15-25, does not permit overnight camps on State

Land Use Agricultural District lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U.

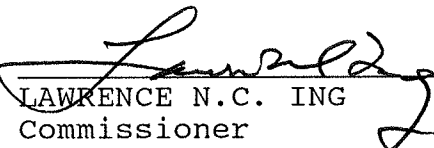
DOCKET NO. DR97-20 - PONO, ET AL.


Done at Honolulu, Hawai'i, this 6th day of August 1997,
per motion on May 7, 1997.

LAND USE COMMISSION
STATE OF HAWAI'I

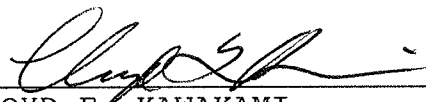
By 
TRUDY K. SENDA
Chairperson and Commissioner


By (absent)
RUPERT K. CHUN
Vice Chairperson and Commissioner

By 
LAWRENCE N.C. ING
Commissioner

By 
M. CASEY JARMAN
Commissioner

By (absent)
HERBERT S.K. KAOPUA, SR.
Commissioner

By 
LLOYD F. KAWAKAMI
Commissioner

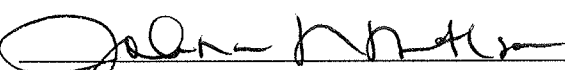
By 
MERLE A. K. KELAI
Commissioner

Filed and effective on
August 6, 1997

Certified by:


Executive Officer

By (absent)
EUSEBIO LAPENIA, JR.
Commissioner

By 
JOANN N. MATTSON
Commissioner

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| |) | |

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Declaratory Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

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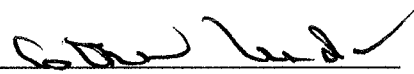
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DATED: Honolulu, Hawaii, this 6th day of August 1997.



ESTHER UEDA
Executive Officer