

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

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STATE OF HAWAII

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In The Matter Of The Petition Of)	DOCKET NO. DR02-26
)	
KULEANA KU'IKAHI, LLC)	ORDER REGARDING
)	WITHDRAWAL OF PETITION
For A Declaratory Order Declaring that)	FOR A DECLARATORY ORDER
the Subdivision And Development Of)	
Approximately 4,500 Acres Of Land In)	
An Agricultural District Requires A)	
District Boundary Amendment)	
_____)	

ORDER REGARDING WITHDRAWAL OF PETITION FOR A
DECLARATORY ORDER

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District Boundary Amendment.)	
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ORDER REGARDING WITHDRAWAL OF
PETITION FOR A DECLARATORY ORDER

The Land Use Commission, hereafter ("LUC"), has been presented a letter of withdrawal of a petition for a declaratory order. This notice of withdrawal stems from an apparent resolution amongst the parties of the water access and usage issues that are necessary to support and sustain agricultural activities for the identified 4,500 acres of lands that are classified in the agricultural district.

The LUC acquired jurisdiction over this matter and over the parties pursuant to the petition for declaratory ruling that was filed with the LUC on October 2, 2002. The statutory authority for the LUC's jurisdiction is Hawaii Revised Statutes § 91-8. The parties before the LUC in this matter are: Petitioner Keleana Ku` Ikahi, LLC represented by J. Richard McCarty; Intervenor Makila Land Company, LLC, represented by Benjamin A. Kudo; Intervenor Launiupoko Associates, LLC,

represented by Richard J. Kiefer; Intervenor Kaua'ula Land Company, LLC, represented by Thomas D. Welch; the Office of Planning, State of Hawai'i, represented by Deputy Attorney General John Chang; and the County of Maui, represented by Madelyn D'Enbeau and Jane Lovell, Deputies Corporation Counsel.

The notice of withdrawal has been presented to the LUC while the Commission is in the midst of conducting the hearings on the petition with the Petitioner putting on its case-in-chief. Whether or not a party can unilaterally withdraw a petition without the approval of the LUC is unclear. There is no specific provision in the Hawaii Revised Statutes chapter 91 that allows for a unilateral withdrawal. Absent such authority, the LUC asserts its inherent power to control its proceedings and hereby issues this order.

The petition before the LUC requests a review of the subdivision described in the petition which is designated as lands in the Agriculture District on the island of Maui. Hawaii Revised Statutes § 205-2(d) provides that:

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 plant 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 agriculture 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 dwelling; 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.

Hawaii Revised Statutes § 205-4.5 provides that:

(a) Within the agricultural district all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be restricted to the following permitted uses:

- (1) Cultivation of crops, including but not limited to flowers, vegetables, foliage, fruits, forage, and timber;
- (2) Game and fish propagation;
- (3) Raising of livestock; including but not limited to poultry, bees, fish, or other animal or aquatic life that are propagated for economic or personal use;
- (4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry;
- (5) Public institutions and buildings which are necessary for agricultural practices;
- (6) Public and private open area type 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;
- (7) Public, private, and quasi-public utility lines and roadways, transformer stations, communications equipment buildings, solid waste transfer stations, major water storage tanks, and appurtenant small buildings such as booster pumping stations, but not including offices or yards for equipment, material, vehicle storage, repair or maintenance, or treatment plants, or corporation yards, or other like structures;
 - (8) Retention, restoration, rehabilitation, or improvement of buildings or sites of historic or scenic interest;
 - (9) Roadside stands for the sale of agricultural products grown on the premises;
 - (10) Buildings and uses, including but not limited to mills, storage, and processing facilities, maintenance facilities, and vehicle and equipment storage areas that are normally considered directly accessory to the abovementioned uses and are permitted under section 205-2(d);
 - (11) Agricultural parks; or
 - (12) Wind energy facilities, including the appurtenances associated with the production and transmission of wind generated energy; provided that such facilities and appurtenances are compatible with agriculture uses and cause minimal adverse impact on agricultural land.
- (b) Uses not expressly permitted in subsection (a) shall be prohibited, except the uses permitted as provided in section 205-6 and 205-8, and construction of single-family dwellings on lots existing before June 4, 1976. Any other law to the contrary notwithstanding, no subdivision of land within the agricultural district with soil classified by the land study

bureau's detailed land classification as overall (master) productivity rating class A or B shall be approved by a county unless the said A and B lands within the subdivision shall be made subject to the restriction on uses as prescribed in this section and to the condition that the uses shall be primarily in pursuit of an agricultural activity.

Any deed, lease, agreement of sale, mortgage, or other instrument of conveyance covering any land within the agricultural subdivision shall expressly contain the restriction on uses and the condition as prescribed in this section which restriction and condition shall be encumbrances running with the land until such time that the land is reclassified to a land use district other than agricultural district.

If the foregoing requirement of encumbrances running with the land jeopardizes the owner or lessee from obtaining mortgage financing from any of the mortgage lending agencies set forth herein below, and said requirement is the sole reason for failure to obtain mortgage financing, then such requirement of encumbrances shall, insofar as such mortgage financing is so jeopardized, be conditionally waived by the appropriate county enforcement officer; provided that such conditional waiver shall thereafter become effective only in the event that the property is subjected to foreclosure proceedings by the mortgage lender.

The mortgage lending agencies mentioned hereinabove are the Federal Housing Administration, Federal National Mortgage Association, Veterans Administration, United State Department of Agriculture, Federal Land Bank of Berkeley, Federal Intermediate Credit Bank of Berkeley, Berkeley Bank for Cooperatives, and any other federal, state, or private mortgage lending agency qualified to do business in Hawaii, and their respective successors and assigns.

(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).

Hawaii Revised Statutes § 205-5(b) provides that:

(b) Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in section 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 proposes, and for lots resulting from the subdivision of abandoned roadways and railroad easements.

At the hearings, the LUC received disturbing testimonies and evidence that raise serious concerns that the County of Maui, the authority that is supposed to apply and enforce the laws relating to uses within the Agriculture District, has not properly exercised its authority. The Hawaii Constitution in art. XI, sec. 3, provides that “[t]he State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing. Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.” The County of Maui must properly review and monitor the uses in the Agriculture District and ensure that agricultural lands are used for agriculture. See, Land Use Commission Declaratory Order in Docket No. DR94-17, *In the Matter of the Petition of John Godfrey*. The evidence before the LUC indicates that the County of Maui has allowed the subdivision and sale of parcels within the Agriculture District where nonagricultural uses such as the construction of single-family dwellings have been allowed to occur even before permitted agricultural activities have occurred and no agricultural plans have been submitted for review by the County. Further evidence

indicates that promotional brochures prepared by the developer suggests that the agricultural requirements are secondary to the residential use and could be ignored by the purchasers. Without evidence of sincere intention to conduct agricultural activities on the lands, and without an agricultural plan to indicate what activities would be conducted on the lands and when such activities would commence, the County of Maui has failed to carryout its responsibilities to protect agricultural lands. By allowing single-family dwellings to be constructed even before any active agricultural uses have occurred is in essence putting the proverbial cart before the horse. The “farm dwelling” is supposed to be a permitted use of agricultural lands to support the agricultural activity. At a minimum, there should be an agricultural plan that would indicate the nexus between the farm dwelling and the agricultural use.

It further concerns the LUC that the County of Maui has allowed the subdivision of these lands without any assurances of an adequate supply of non-potable water for irrigation. Such access to water from Kauaula Valley should be a condition precedent to any authorization to allow the subdivision of such lands. This concern must be of critical importance to the County of Maui. Innocent purchasers of subdivided parcels who must obey the land use restrictions and actively conduct agricultural activities on the lands, would be frustrated if they cannot productively conduct agricultural activities because of a lack of access to non-potable water.

In Horner, et al. v. Kumuliili, et al., 10 Haw. 174 (1895), the Supreme Court of the Republic of Hawaii reviewed and defined the water usages from the Kauaula stream. In its decision the Court determined as follows:

The lands watered from the Kauaula stream are separated into two principal divisions. Division one consists of the lands from Wainee to Polaiki, including both. Division two consists of the lands from Puunauiki to Waipaahao, including both. Principal Division one comprises the following named lands: 1, Wainee and Pakala; 2, Wainee two; 3, Wainee one; 4, Mokuhinia; 5, Puaanui; 6, Puaaiki and Waiokama; 7, Kooka; 8, Alio; 9, Kamani and Ilikahi; 10, Polanui; 11, Polaiki.

Principal Division two comprises the following named lands: 1, Puunauiki; 2, Puunau Nui; 3, Puunau and Kaulalo; 4, Halakaa; 5, Puehuehuiki; 6, Puehuehu Nui; 7, Puehuehupiliwale; 8, Makila; 9, Pahoa; 10, Puupapai; 11, Waipaahao.

These two principal divisions take the water from eleven consecutive days, one division by day and the other by night, and when the eleven days are completed the division taking the water by day takes it at night and vice versa, in endless rotation. In each principal division each of the lands comprising it is entitled to the water for twelve hours, by day or night as the case may be, in rotation in the order as their names are given above.

The lands of Kauaula and Makila above the head of Piilani auwai are entitled to water whenever needed without reference to "days." Kuia is entitled to water on Kooka's day and Haleu to water on Puupapai's day.

The whole of the Kauaula stream is entitled to be turned into the respective auwais when the assigned day or night comes round, for the use of the land whose day or night it is according to the above schedules. The amount of water to be turned into any particular auwai is not discretionary with plaintiffs.

The kalo patches Mauka are first to be filled full to the brim or top of the kuaunas (banks), and the auwai to be then closed at its head and the water remaining in the auwai is to run down to the patches then just filled, and not to the land whose turn comes next. When these Mauka patches are fully supplied and the auwai closed, the water will continue on in the bed of the stream to the lands of the same name below during the rest of the "day."

The LUC recognizes this precedent. This precedent should represent the starting point for the parties discussion of the water access issues. In Horner, the Court indicated that "[a]greements made between the parties defendants consolidating their rights to water and using them jointly are allowable, provided no injury is thereby done to others."

Whatever agreements that are made by the parties to this proceeding, should be consistent with the Horner precedent and the Water Commission's rules and regulations, which are the present guiding authorities regarding water rights in Hawaii. Other concerns such as recognition of PASH rights in the Kauaula Valley and reasonable access to kuleana families so that they may continue to practice traditional agricultural activities are recognized by the LUC and must be considered when allowing these subdivisions.

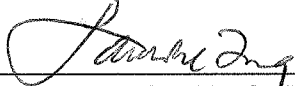
Because the parties have apparently agreed to continue mediation of their dispute through the retention of Allen Hoe and Dana Naone Hall, as joint mediators to determine a fair usage of the water resources and other matters relating to this petition, the LUC hereby allows the withdrawal of the petition for declaratory ruling, without prejudice, with


the understanding that the parties will be submitting their status report to the LUC within six months of this order. The parties are encouraged to submit its final agreement to the LUC. The LUC retains its authority and jurisdiction over this matter pursuant to § 15-15-98(b), Hawai'i Administrative Rules, to further address this matter should the facts and circumstances so require.


ADOPTION OF ORDER

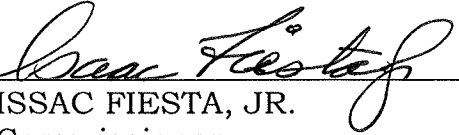
The undersigned Commissioners, being familiar with the record and the proceedings, hereby adopt and approve the foregoing order this 27th day of June, 2003. The order and its adoption shall take effect upon the date this order is certified and filed by this Commission.

LAND USE COMMISSION
STATE OF HAWAII

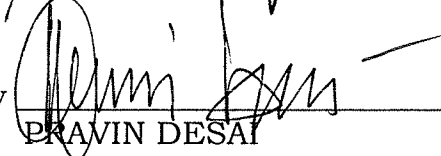
By 
LAWRENCE N. C. ING
Chairperson and Commissioner

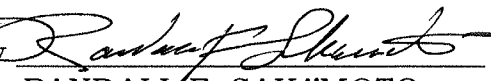
By 
P. ROY CATALANI
Vice Chairperson and Commissioner

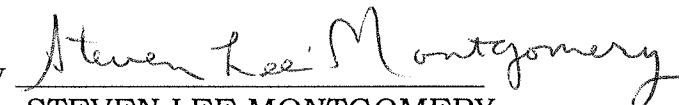
By 
STANLEY H. ROEHRIG
Second Vice Chair and Commissioner

By 
ISSAC FIESTA, JR.
Commissioner

By 
BRUCE A. COPPA
Commissioner


By 
PRAVIN DESAI
Commissioner

By 
RANDALL F. SAKAMOTO
Commissioner ^u _{cc}

By 
STEVEN LEE MONTGOMERY
Commissioner

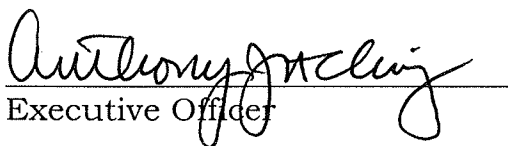
By (Not present)
PETER YUKIMURA
Commissioner

APPROVED AS TO FORM:


RUSSELL A. SUZUKI
Deputy Attorney General

Filed and effective on
July 2, 2003.

Certified by:


Executive Officer

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Petition Of) DOCKET NO. DR02-26
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KULEANA KU'IKAHI, LLC) CERTIFICATE OF SERVICE
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For A Declaratory Order Declaring that)
the Subdivision And Development Of)
Approximately 4,500 Acres Of Land In)
An Agricultural District Requires A)
District Boundary Amendment)

CERTIFICATE OF SERVICE

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

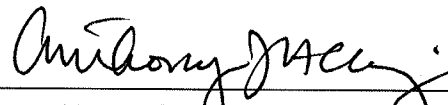
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Dated: Honolulu, Hawaii, 7/2/03.



ANTHONY J. H. CHING

Executive Officer