

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition) of) MIKE RESNICK, ET AL, INC.) To Amend the Agricultural Land) Use District Boundary to) Reclassify Approximately) 4.198 Acres TMK: 4-3-01:41) and Portion of 43 at Kahana,) Maui into the Urban Land Use) District) <hr/>	DOCKET NO. A85-596 MIKE RESNICK, ET AL, INC.
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DECISION AND ORDER

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition)	DOCKET NO. A85-596
)	
) of	MIKE RESNICK, ET AL, INC.
)	
MIKE RESNICK, ET AL, INC.)	
)	
To Amend the Agricultural Land)	
Use District Boundary to)	
Reclassify Approximately)	
4.198 Acres TMK: 4-3-01:41)	
and Portion of 43 at Kahana,)	
Maui into the Urban Land Use)	
District)	
_____)	

DECISION

THE PETITION

This matter arises from a Petition for an amendment to the State Land Use Commission district boundary filed on August 21, 1985, pursuant to Section 205-4 of the Hawaii Revised Statutes as amended, and Part VI, Rule 6-1, of the Land Use Commission's ("the Commission") Rules of Practice and Procedure and District Regulation by MIKE RESNICK, ET AL, INC. ("Petitioner") to amend the designation of the Property comprising approximately 4.198 acres of land, situate at Kahana, Island and County of Maui, State of Hawaii, identified as Maui Tax Map Key No. 4-3-01:41 and Portion of 43 (the "Property") from the Agricultural to the Urban Land Use District.

PURPOSE OF THE PETITION

Petitioner is requesting a boundary amendment from Agricultural to Urban so that it can construct a commercial shopping center, a restaurant and a fast service gas station on a portion of parcel 43 and a commercial office building on parcel 41. Petitioner represented that the decision making authority of Maui County had not adopted rules or set up a process to entertain the petition for a boundary amendment.

THE HEARING

The hearing on this Petition was conducted on November 22, 1985, in Wailuku, Maui, pursuant to Notice published on October 11, 1985, in the Maui News and the Honolulu Advertiser. Petitioner was represented by Martin Luna, Esq. of Carlsmith, Wichman, Case, Mukai & Ichiki; The County of Maui was represented by Staff Planner Colleen Suyama; and the Department of Planning and Economic Development was represented by Deputy Attorney General Everett Kaneshige. The following witnesses presented by the parties testified:

Petitioner:

Richard H. Cameron - Corporate Land Manager & Assistant Secretary for Maui Land & Pineapple Company, Inc.

Mike Resnick - Petitioner
Rogelio Hidalgo - Civil Engineer, R.T. Tanaka
Engineers, Inc.
Fred Rodrigues - President, Environmental
Communications, Inc.
Stephen Parker - Appraiser - Economic Feasi-
bility Expert

County of Maui:

Colleen Suyama - Staff Planner, County of
Maui Planning Department

DPED:

Tatsuo Fujimoto - Director, Land Use Division
DPED

POSITION OF THE PARTIES

The County of Maui - Approval. Department of
Planning and Economic Development - Approval.

The parties to this proceeding have also executed a
Stipulation Pertaining to the Commission's Proceedings on
Petition for District Boundary Amendment which provides that
the Commission has the requisite jurisdiction to act upon
this Petition. The Stipulation is attached hereto as
Exhibit 1 and made a part hereof.

APPLICABLE REGULATIONS

Standards for determining the establishment of an
Urban District are found under Part II, Section 2-2(1) of the
Commission's District Regulations. Said regulation provides
in pertinent part that:

- (1) "U" Urban District. In determining the boundaries for the "U" Urban District, the following standards shall be used:
- (a) It shall include lands characterized by "city-like" concentrations of people, structures, streets, urban level of services and other related land uses.
 - (b) It shall take into consideration the following factors:
 - 1. Proximity to centers of trading and employment facilities except where the development would generate new centers of trading and employment.
 - 2. Substantiation of economic feasibility by the petitioner.
 - 3. Proximity to basic services such as sewers, water, sanitation, schools parks, and police and fire protection.
 - 4. Sufficient reserve areas for urban growth in appropriate locations based on a ten (10) year projection.
 - (c) Lands included shall be those with satisfactory topography and drainage and reasonably free from the danger of floods, tsunami and unstable soil conditions and other adverse environmental effects.
 - (d) In determining urban growth for the next ten years, or in amending the boundary, lands contiguous with existing urban areas shall be given more consideration than non-contiguous lands, and particularly when indicated for future urban use on State or County General Plans.
 - (e) It shall include lands in appropriate locations for new urban concentrations and shall give considerations to areas of urban growth as shown on the State and County General Plans.

- (f) Lands which do not conform to the existing standards may be included within this District:
 - 1. When surrounded by or adjacent to existing urban development; and
 - 2. Only when such lands represent a minor portion of this District.
- (g) It shall not include lands, the urbanization of which will contribute towards scattered spot urban development, necessitating unreasonable investment, in public supportive services.
- (h) It may include lands with a general slope of 20% or more which do not provide open space amenities and/or scenic values if the Commission finds that such lands are desirable and suitable for urban purposes and that official design and construction controls are adequate to protect the public health, welfare and safety, and the public's interests in the aesthetic quality of the landscape.

FINDINGS OF FACT

The Commission, having duly considered the record in this docket, the testimony of the witnesses and the evidence introduced herein, makes the following findings of fact:

- 1. The Property is owned in fee simple by Maui Land & Pineapple Co., Inc., (MLPC) a Hawaii corporation. MLPC has authorized the Petitioner herein to file the subject Petition requesting the reclassification of the Property from the Agricultural to the Urban Land Use District. MLPC has executed a Purchase Agreement with Petitioner whereby Petitioner will purchase the Property

from MLPC upon the resolution of a quiet title and a partition action, Civil Case No. 3673(1) pending before the Second Circuit Court, State of Hawaii. The Property is comprised of two separate parcels consisting of 0.912 and 3.286 acres, identified as Maui Tax Map Key No. 4-3-01:41 and Portion of 43 respectively, located at Kahana, Island and County of Maui, State of Hawaii. The Property is located approximately three and one-half miles north of the Kaanapali Beach Resort, between Honoapiilani Highway and Lower Honoapiilani Road. Hoohei Road, a 50-foot wide County right-of-way with a 24-foot wide pavement, lies between the two parcels. Adjacent land uses include: to the south, Kahana Manor Condominium; and to the west, Pohailani Maui Condominium. Lands mauka of Honoapiilani Highway are currently in agricultural use. The Property is presently open and undeveloped and covered with noxious grasses and koa haole trees.

2. The Property is located within the State Land Use Agricultural District and the County of Maui Special Management Area. The Lahaina Community Plan presently designates portion of parcel 43 for business/commercial and parcel 41 for multi-family uses. In the event State Land Use Commission approval is granted, Petitioner will request an amendment to the Lahaina Community Plan to redesignate parcel 41 as commercial.

3. The Property has ground elevations ranging between 20 to 55 feet above sea level and an average slope between nine to ten percent. The University of Hawaii Land Study Bureau's "Detailed Land Classification - Island of Maui" classifies soils in the Property as Master Productivity Rating "A" and are excellent for cultivating pineapple, vegetable, sugarcane, orchard, and for grazing uses. However, the Property has not been used for cultivation for many years.

4. The U.S. Department of Agriculture Soil Conservation Service classifies soils on the Property as as Lahaina Silty Clay (LaC) which is described as having medium runoff, moderate permeability and moderate erosion hazard. According to the "Flood Insurance Rate Maps" for the County of Maui, the Property is located within Zone "C" which is characterized as "areas of minimal flooding". The Property is also located outside of the established 100-year coastal flood hazard district and the 100-year flood plain of Kahana Stream.

5. Petitioner requests the reclassification of the Property from Agricultural to Urban so that it may construct a commercial shopping center, restaurant and a fast service gas station on parcel 43 and a commercial office building on parcel 41. The shopping center, tentatively named Kahana

Mall, will be a 30-foot high single-story structure having 32,350 square feet of leaseable space. The Petitioner intends to seek anchor tenants who will provide entertainment services such as a bowling alley, movie theater, and a fun and game palace, rather than strictly retail operations. Petitioner hopes to satisfy the entertainment needs of the residential population in the Lahaina area.

Petitioner proposes to locate the restaurant and fast service gas station, covering approximately 3,200 square feet, at the opposite corners of parcel 43, adjacent to Hoohui Road.

Petitioner proposes to construct a three-story "L" shaped commercial office building on parcel 41. The office building will provide approximately 24,546 square feet of leaseable floor space.

Petitioner proposes to construct and complete the project within a year and a half after all governmental approvals have been obtained. Petitioner estimates costs for constructing the commercial complex to be \$3,561,631.00, and the commercial office building to be \$3,557,277.00. Petitioner has submitted its financial statement disclosing its financial capability to undertake and complete the proposed project.

6. Petitioner has presented evidence to reflect that the reclassification of the Property will not adversely impact the environmental, recreational, historic and scenic resources of the area. Although the Property was once utilized for sugarcane cultivation, its separation from surrounding agricultural lands by Honoapiilani Highway makes present agricultural activities on the Property unfeasible. Although the State Department of Agriculture (DOA) in its Agricultural Lands of Importance to the State of Hawaii (ALISH) classification system classifies the Property as "prime" agricultural lands, the DOA does not foresee any significant adverse impacts on agricultural resources of the area if this Petition is granted.

7. The reclassification of the Property will not unreasonably burden public agencies to provide necessary amenities, services and facilities because:

- a) Roadways: Access to the Property will be from Hoohei Road, a 50-foot wide right-of-way with 24 feet of asphalt pavement connecting Honoapiilani Highway and Lower Honoapiilani Road. Two entrances will be provided for parcel 43 and one entrance will be allotted for parcel 41. Parcel 41 will also have an additional access through the adjacent Kahana Manor project and will therefore be accessible

from Lower Honoapiilani Road. Petitioner proposes to improve Hoohui Road to County standards including pavement widening, providing curbs and gutters and construction of a 6 foot wide concrete sidewalk on both sides of the roadway. Petitioner also proposes to construct right turn and left turn lanes at Honoapiilani Highway and Lower Honoapiilani Road intersections to facilitate the movement of vehicular traffic in the area.

b) Water: Petitioner will construct a 6-inch line along Hoohui Road which will connect the project to the County's existing 16-inch waterline presently running along Lower Honoapiilani Road. There are adequate water services to service the project and the Maui County's Department of Water Supply has no objections to the proposed project.

c) Sewage Disposal: Petitioner proposes to construct an 8-inch diameter sewerline along Hoohui Road which will connect to the future Napili-Honokowai sewage system currently under construction.

- d) Drainage: Petitioner will construct a new 18-inch and 24-inch diameter drain lines on the project site and along Hoohui Road and Lower Honoapiilani Road to connect to an existing 18 to 36-inch drain line located on Lower Honoapiilani Road.
- e) Electrical & Telephone Services: Overhead electrical and telephone lines are currently available to service the proposed development.
- f) Police & Fire Protection: Fire and police services are located at Lahaina approximately four and one-half miles away.

8. Maui County Planning Department has testified that the reclassification of the Property will make it compatible with the surrounding areas which are either utilized for urban type uses or designated for future urbanization. The surrounding area contains primarily resort related uses such as hotels, apartment-condominiums, retail uses accessory to the hotels and restaurants. The proposed development will provide additional commercial goods and services to the area and therefore, would be compatible. The Maui County Planning Department also testified that there is a need for the proposed development in that it is located approximately midway between Honokowai

and Napili areas. Presently, the subject site is the only business designated parcel in this area that could provide necessary commercial goods and services to the surrounding hotels, multi-family residential and single-family residential uses. Except for the limited resort related commercial uses accessory to the existing hotels; the nearest opportunity for such commercial uses as professional offices, grocery stores and dry cleaners are in the Honokowai and Napili areas. Petitioner anticipates that the proposed development will have a positive impact in providing additional opportunities for business uses.

9. Based on a review of the Petition, the evidence adduced at the hearing and the provisions of Chapter 205 of the Hawaii Revised Statutes, the Maui County Planning Department and the Department of Planning And Economic Development have recommended that the reclassification of the Property be approved.

CONCLUSION OF LAW

The Land Use Commission, State of Hawaii, has the requisite jurisdiction to consider and act upon this docket due to the fact that the Petition was filed prior to the effective date of Act 230, Session Laws of Hawaii 1985. Parties to this proceeding furthermore, have concurred with the Commission's jurisdiction to consider and act upon this docket and in furtherance thereof have executed a

Stipulation reflecting the Commission's decision which is attached hereto as Exhibit "1".

Reclassification of the Property, consisting of approximately 4.198 acres of land situate at Kahana, Island and County of Maui, State of Hawaii, from Agricultural to the Urban District and an amendment to the district boundary accordingly is reasonable and non-violative of Section 205-2 of the Hawaii Revised Statutes.

ORDER

IT IS HEREBY ORDERED:

That the Property which is the subject of this Petition in this Docket No. A85-596, by Mike Resnick, et al., Inc., consisting of approximately 4.198 acres of land situate at Kahana, Island and County of Maui, State of Hawaii, identified as Maui Tax Map Key No. 4-3-01:41 and portion of 43, and approximately identified on Exhibit 2 attached hereto and incorporated by reference herein, shall be and hereby is reclassified from the Agricultural District to the Urban District and the district boundaries are amended accordingly.

DOCKET NO. A85-596 - MIKE RESNICK, ET AL, INC.

Done at Honolulu, Hawaii, this 18th day of March
1986, per motions on January 15, 1986 and February 5, 1986.

LAND USE COMMISSION
STATE OF HAWAII

By *J. Tacbian*
TEOFILO PHIL TACBIAN
Chairman and Commissioner

By *Frederick P. Whittemore*
FREDERICK P. WHITTEMORE
Vice Chairman and Commissioner

By *Toru Suzuki*
TORU SUZUKI
Commissioner

By *Everett L. Cuskaden*
EVERETT L. CUSKADEN
Commissioner

By *Lawrence F. Chun*
LAWRENCE F. CHUN
Commissioner

By *Winona E. Rubin*
WINONA E. RUBIN
Commissioner

By *Richard B. F. Choy*
RICHARD B. F. CHOY
Commissioner

By *Robert S. Tamaye*
ROBERT S. TAMAYE
Commissioner

DISSENT OF COMMISSIONER YUEN

I dissent from the Decision and Order filed by my fellow commissioners in this Docket because I do not believe that the Commission had the power and authority to approve this Petition after September 3, 1985.

Act 230, Session Laws of Hawaii, approved on June 5, 1985, removes the Commission jurisdiction to approve "district boundary amendments involving land areas of 15 acres or less...". Section 9 of Act 230 provides that the Act was to take effect 90 days from approval, on September 3, 1985. The Act did not authorize the Commission to retain jurisdiction over any petition filed before the effective date of the Act. Because the Legislature did not intend to reserve to the Commission power and authority to determine pending petitions, the Commission was acting ultra vires by approving this Petition.

Neither the Act nor any relevant House or Senate Committee Report on the Act, provides for retrospective application. One may infer that by enlarging the usual time between approval and operation in the Act, the Legislature wished to allow time for creation of new administrative procedures, while pending applications would proceed. However, there is no evidence that the Legislature intended that the Commission retain jurisdiction over applications submitted to the Commission before the effective date, but impossible to

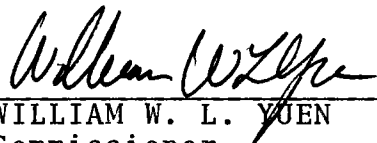
adjudicate by the effective date. Pentheny, Ltd. v. Government of the Virgin Islands, 360 F.2d 786 (1966).

The parties, cannot, by stipulation, confer jurisdiction of this matter on the Commission. No Power Line v. Minnesota Environmental Quality, 262 N.W.2d 312, 321 (1977).

In adopting Act 230, the Legislature expressed an intent that all subsequently filed applications be determined by the Counties, not the commission. I would deny this petition in order that the County of Maui determine the proper classification.

Done at Honolulu, Hawaii, this 18th day of March 1986.

LAND USE COMMISSION
STATE OF HAWAII

By 
WILLIAM W. L. YUEN
Commissioner

LAND USE COMMISSION
STATE OF HAWAII
Dec-33 7 47 AM '86
Jan 2

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of) DOCKET NO. A85-596
MIKE RESNICK, ET AL, INC.) MIKE RESNICK, ET AL, INC.
To Amend the Agricultural Land)
Use District Boundary into the)
Urban Land Use District for)
approximately 4.198 acres at)
Kahana, Maui, Tax Map Key:)
4-3-01: 41 and 43)

STIPULATION PERTAINING TO LUC PROCEEDINGS
ON PETITION FOR DISTRICT BOUNDARY AMENDMENT

THIS AGREEMENT dated this 30 day of December,
1985, by and between the COUNTY OF MAUI, a political subdivision
of the State of Hawaii (hereinafter called the "County"), the
DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, an
administrative department of the State of Hawaii (hereinafter
called the "DPED"), and MIKE RESNICK, ET AL, INC., a Hawaii
corporation (hereinafter called the "Petitioner"),

W I T N E S S E T H T H A T:

WHEREAS, Section 205-3.1(c), Hawaii Revised Statutes,
vests in each County in the State of Hawaii jurisdiction to act

upon district boundary amendments for land areas of 15 acres or less within its boundaries; and

WHEREAS, prior to the enactment of Section 205-3.1, HRS, jurisdiction to process and act upon petitions for amendments to district boundaries for lands in the various counties had been vested in the Land Use Commission, an agency of the State of Hawaii (hereinafter called the "LUC"); and

WHEREAS, Petitioner, on August 21, 1985, filed a petition for a district boundary amendment (hereinafter called the "LUC Petition") for two parcels of land in Kahana, Maui, totaling less than 15 acres; and

WHEREAS, at the time said Petition was filed with the LUC Section 205-3.1, HRS, had not yet come into effect; and

WHEREAS, Section 205-3.1, HRS, became effective on September 5, 1985; and

WHEREAS, besides Petitioner, the parties to this LUC proceeding are DPED and the County; and

WHEREAS, all the parties to said LUC proceeding are willing to have the LUC process and act upon said Petition; now, therefore,

IT IS HEREBY STIPULATED AND AGREED that the LUC will process and act upon the Petition pursuant to the LUC's present policies, rules and regulations, and that the decision of the LUC on said Petition, if not acceptable to the County, will not be

appealed by the County on the theory that Section 205-3.1 had divested the LUC of jurisdiction in this case.

DEPARTMENT OF PLANNING AND
ECONOMIC DEVELOPMENT

By Keneth Keith
Its Director

APPROVED AS TO FORM
AND LEGALITY:

Fred W. Rohlfing
FRED W. ROHLFING
Deputy Corporation Counsel
County of Maui

COUNTY OF MAUI

By Howard H. Mahana
Its Mayor

MIKE RESNICK, ET AL, INC.

By Myron A Resnick
Its PRESIDENT

M A I L E P A I

HONOPIILANI

HIGHWAY

KAHANA

STREAM

K A H A N A

TRUE NORTH
SCALE: 1" = 600'

AREA RECLASSIFIED TO
THE URBAN DISTRICT

TMK NOS.: 4-3-01: 41 & Portion 43

ALA HOKU

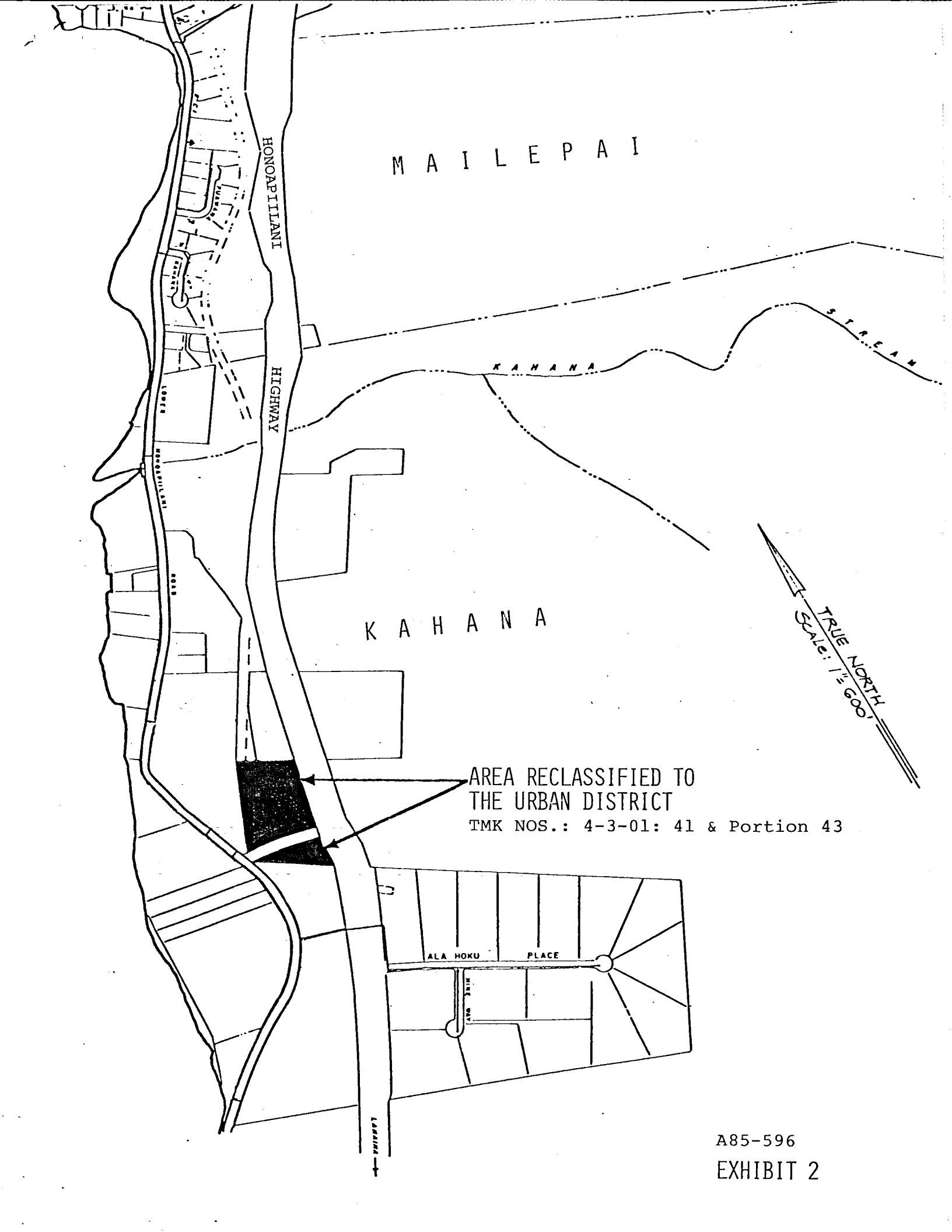
PLACE

HOLE WAY

LAAHIA

A85-596

EXHIBIT 2



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition)	DOCKET NO. A85-596
))	
) of	MIKE RESNICK, ET AL, INC.
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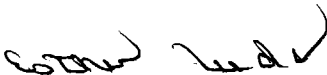
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order was duly hand delivered/mailed via Certified Mail, Return Receipt Requested, to the following at their respective addresses on March 18, 1986.

KENT M. KEITH, Director
Department of Planning and
Economic Development
State of Hawaii
8th floor, Kamamalu Building
250 South King Street
Honolulu, Hawaii 96813

CHRISTOPHER L. HART
Maui County Planning Department
200 South High Street
Wailuku, Maui, Hawaii 96793

B. MARTIN LUNA, ESQ.
Suite 201
2145 Wells Street
Wailuku, Maui, Hawaii 96793



ESTHER UEDA
Executive Officer

DOCKET NO. A85-596 - MIKE RESNICK, ET AL

A copy of the Land Use Commission's Decision and Order was served upon the following by regular mail on March 18, 1986.

EVERETT KANESHIGE, Deputy Attorney General
Department of the Attorney General
State Capitol, 4th Floor
Honolulu, Hawaii 96813

H. RODGER BETTS, Corporation Counsel
Office of the Corporation Counsel
County of Maui
200 South High Street
Wailuku, Hawaii 96793

BENJAMIN MATSUBARA, Hearing Officer
1717 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813