

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

In The Matter Of The Petition Of

DEPARTMENT OF EDUCATION
STATE OF HAWAI'I

To Amend the Agricultural Land Use District
Boundary into the Urban Land Use District for
Approximately 77.2 Acres of land at Kīhei,
Maui, State of Hawai'i, Tax Map Key Nos. 2-
2-02: 81 and 83

DOCKET NO. A11-794

ORDER DENYING PETITIONER
DEPARTMENT OF EDUCATION'S
MOTION TO AMEND THE LAND USE
COMMISSION'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION
AND ORDER FILED ON JULY 29, 2013;
AND CERTIFICATE OF SERVICE

ORDER DENYING PETITIONER DEPARTMENT OF EDUCATION'S MOTION TO
AMEND THE LAND USE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER FILED ON JULY 29, 2013

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

September 28, 2022 by _____

DANIEL E. ORODENER
Executive Officer



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OF THE STATE OF HAWAI'I

In The Matter Of The Petition Of

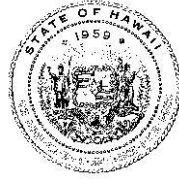
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On August 20, 2020, Petitioners filed a Motion to Amend the Land Use Commission's Findings of Fact, Conclusions of Law and Decision and Order Filed July 29, 2013 ("2013 Order"), pursuant to Hawaii Administrative Rules ("HAR") §§15-15-70 and -94; Memorandum in Support of Motion; and Exhibits 1-9.

Petitioner requested an amendment to Condition 1(b) of the 2013 Order, to allow, for the construction of a roundabout and ground level crosswalks, instead of a grade-separated pedestrian crossing ("GSPC").

This Commission having heard and examined the testimony and evidence presented by Petitioner, the State Office of Planning and Sustainable Development ("OPSD"), the County of Maui, Planning Department ("County" or "PD"), public testimony received, and the filings submitted via regular or electronic mail at its meetings on September 10, 2020, November 4,

2020, August 25, 2021, and on October 27, 2021, held via Zoom by interactive conference technology in Honolulu, Hawai‘i, hereby makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY

1. On December 20, 2011, the Land Use Commission (“LUC” or “Commission”) received a petition for a District Boundary Amendment (“DBA”) from the State of Hawai‘i’s Department of Education (“DOE” or “Petitioner”) to amend the State Land Use District boundary to reclassify approximately 77.2 acres of land at Kīhei, Maui, Hawai‘i, identified as Maui Tax Map Key Nos. 2-2-02: 81 and 83 ("Petition Area"), from the State Land Use Agricultural District to the State Land Use Urban District for the development and construction of Kīhei High School, a public high school ("Project").
2. On June 27, 2013, the Commission held an action meeting in Kahului, Maui, to decide on the Petition. The Commission heard final oral arguments from each of the parties. Thereafter a motion was made and seconded to grant the Petition subject to 25 conditions. This included a specific condition, Condition 1(b), requiring that an above- or below-ground pedestrian crossing be constructed prior to opening of Phase I [Transcript 6/27/2013, pg. 24, lines 1-4].
3. Maui Commissioner Sheldon Biga made the motion to approve with a specific condition requiring the construction of an above- or below-ground pedestrian crossing prior to opening of Phase I of the school. Further, in discussion on his motion he provided the following justification:

“...Living on Maui, traveling on that highway on numerous occasions, I’ve seen the speed that goes through that highway. Again, my concern is for the safety of the pedestrians and the children that will be going to that school...So that’s my concern, the safety of the public, the safety of the children that’re going to that school.” [Tr. 6/27/2013, pg. 26, lines 11-20]

4. On July 29, 2013, the Commission filed Findings of Fact, Conclusions of Law and Decision and Order (“2013 Order”).
5. On December 4, 2014, Petitioner filed a Statement of Imposition of Conditions for the DOE’s Petition to Reclassify Maui Tax Map Key Nos 8.2-2-02:81 and 83 for Kīhei High School.
6. On February 6, 2019, Maui County Council (“MCC”) filed with the Commission a resolution passed requesting the PD to file a petition for a declaratory order with the Commission regarding Condition 1(b) of the 2013 Order.
7. On February 22, 2019, the County filed a Petition for Declaratory Order seeking a ruling from the Commission reiterating and reaffirming that Condition 1(b) of the Commission’s 2013 Order requires an available above or below ground pedestrian crossing to allow pedestrians to safely cross Pi’ilani Highway, prior to the opening of Phase I of the Project.
8. On April 3, 2019, the Commission held a hearing where it received and heard testimony and arguments, and then affirmed that Condition 1(b) of the 2013 Order was mandatory and not an optional requirement for the Petitioner to construct a pedestrian overpass or underpass before the opening of the first phase of the new high school in Kīhei. The

Commission memorialized this ruling in a formal declaratory order dated April 25, 2019 (“DR19-65”).

MOTION TO AMEND

9. On August 20, 2020, Petitioners filed a Motion to Amend the Land Use Commission’s Findings of Fact, Conclusions of Law and Decision and Order Filed July 29, 2013 (“2013 Order”); Memorandum in Support of Motion; Exhibits 1-9, and Certificate of Service (“Motion to Amend”).
10. On August 28, 2020, the Commission mailed and emailed the LUC meeting agenda and notice for the September 9-10, 2020, meeting to the Parties and the Statewide and County of Maui mailing lists.
11. On August 31, 2020, the LUC received the County’s Position Statement on Petitioner’s Motion to Amend.
12. On September 1, 2020, the Commission received the OPSD’s response to Petitioner’s Motion to Amend.
13. Between September 7-10, 2020, the Commission received public comments from the Kīhei Community Association (“KCA”), Dr. Mary Trotto, Andrew Beerer, Therese Klaty, Randy Wagner, Patricia & Jefferson Stillwell, Natalia Hussey-Burdick, State Representative Tina Wildberger, Adele Rugg, Mark Hyde, Richard Moss, and Laura Dunham.
14. On September 10, 2020, the Commission met via Zoom virtual conferencing technology to hear this matter. Stuart Fujioka, Esq., Randall Tanaka, and Gaylyn Nakatsuka appeared on behalf of DOE. Ed Sniffen appeared on behalf of the State Department of Transportation (“DOT”), and Dawn Takeuchi-Apuna, Esq. and Rodney Funakoshi

appeared on behalf of OPSD. Michael Hopper, Esq. and Michele McClean appeared on behalf of the County. Public testimony was received from Mike Moran, President (Kîhei Community Association “KCA”); Dr. Mary Trotto, KCA Board member; Andrew Beerer; Andy Wagner; State House Representative Tina Wildberger; Daniel Kanahele; Rob Weltman; and Laura Dunham.

15. On October 27, 2020, the Commission mailed and emailed the LUC meeting agenda and notice for the November 4-5, 2020, meeting to the Parties and the Statewide, County of Hawai`i and County of Maui mailing lists.
16. On November 2, 2020, Petitioner filed an Update Regarding its Motion to Amend the Land Use Commission’s 2013 Decision and Order; Exhibits 10-18; and Certificate of Service.
17. Between November 2-4, 2020, the Commission received testimony from Andrew Beerer, Mike Moran, Libby and Terry Fulton, Patricia Stillwell, and State Representative Tina Wildberger.
18. On November 4, 2020, the Commission met via Zoom virtual conferencing technology to hear this matter. Stuart Fujioka, Esq. and Randall Tanaka appeared on behalf of DOE. Ed Sniffen and Robin Shishido appeared on behalf of DOT. Dawn Takeuchi-Apuna, Esq. and Rodney Funakoshi appeared on behalf of OPSD. Michael Hopper, Esq. and Michele McClean appeared on behalf of the County. Public testimony was received from Andrew Beerer; Mike Moran (KCA); State House Representative Tina Wildberger; and Patricia Stillwell.
19. At the hearing, the Commission felt a number of issues had not been adequately addressed and decided to pose a set of written questions to Petitioner. The Commission

discussed and suggested changes and additions to the list of questions. [Tr. 11/04/2020, pgs. 130-133]. A motion was made, seconded, and approved to transmit the questions to Petitioner and to defer further action on the Motion to Amend until the questions had been answered by Petitioner and reviewed by the Commission. [Tr. 11/04/2020, pgs. 134-135]

20. On November 10 and 12, 2020, respectively, the Commission emailed and mailed the set of questions developed at the November 4, 2020, hearing (“LUC Letter”) to be answered by Petitioner.
21. On February 1, 2021, Petitioner filed its Response to LUC’s Letter dated November 10, 2020, with respect to Petitioner’s Motion to Amend, and Exhibits 19-30 (“Petitioner’s Response”).
22. On May 4, 2021, Petitioner filed a Request for Hearing In Reference to its Motion to Amend.
23. On July 29, 2021, Petitioner filed a Request for the Issuance of Written Findings as to its August 20, 2020, Motion to Amend and additional Exhibits 31-37.
24. On August 2, 2021, Petitioner filed its 2021 Annual Report as required pursuant to the 2013 Order. The status update in the report indicates DOE’s reliance on construction of a roundabout rather than a GSPC as required under Condition 1(b). [DOE 2021 Annual Report; pgs. 2-5]
25. Between August 10–30, 2021, the LUC received and filed hundreds of public testimonies, including those of elected officials.

26. On August 12, 2021, the Commission mailed and emailed the LUC meeting agenda and notice for the August 25, 2021, meeting to the Parties and the Statewide and County of Maui mailing lists.
27. On August 17, 2021, OPSD filed its Response to Petitioner's Request for Issuance of Written Findings.
28. On August 19, 2021, DOE filed an Emergency Motion for Recusal or Disqualification of LUC Chair Jonathan Likeke Scheuer.
29. On August 25, 2021, the Commission met via Zoom to hear this matter, but due to the Emergency Motion filed by Petitioner, deferred the matter until September 8-9, 2021.
30. On August 31, 2021, Petitioner filed a Supplemental Exhibit to Petitioner's Motion to Amend the LUC Finding of Fact, Conclusion of Law, and Decision and Order and Exhibits 39-42.
31. On September 1, 2021, the Commission mailed and emailed the Notice and Agenda for its September 8-9, 2021, meeting to the Statewide, Maui, Hawai'i, and O'ahu mailing lists.
32. On September 3, 2021, OPSD filed its Response to Petitioner's Emergency Motion for Recusal or Disqualification.
33. On September 3, 2021, the Commission received an email communication from Chair Scheuer formally recusing himself from further participation in this matter.
34. Between September 3-8, 2021, the LUC received approximately 38 public testimonies.
35. On September 7, 2021, DOE filed Supplemental Exhibits to Petitioner's Motion to Amend; Exhibits 43-44; and Certificate of Service.

36. On September 8-9, 2021, the Commission held a meeting via interactive online conferencing protocols (Zoom Webinar) at the State Office Tower, 4th floor conference room, in Honolulu, Hawai'i. Stuart Fujioka, Esq. and Brenda Lowrey appeared on behalf of DOE. Edwin Sniffen appeared on behalf of DOT. Alison Kato, Esq., Mary Alice Evans, Rodney Funakoshi, and Lorene Maki appeared on behalf of OPSD. Michael Hopper, Esq. and Jordan Hart appeared on behalf of the County.
37. The following public witnesses testified: Kelly King (Maui County Council member); Mike Moran (KCA); Buck Joiner; Mandolin Wells; Louise Lambert; Nick Drance; Andrew Beerer (Education and Recreation Committee Chair – KCA); and Tina Wildberger (State House Representative for District 11).
38. On September 8, 2021, Petitioner filed a Motion to Amend the Land Use Commission's Findings of Fact, Conclusions of Law and Decision and Order Filed July 29, 2013; Exhibit 45; and Certificate of Service.
39. On September 8, 2021, the County filed a Supplement to Maui County Position Statement; Exhibit A: Pedestrian Crossing Guidelines; Exhibit B: Quantifying Benefits of Separating Pedestrians & Vehicles; and Certificate of Service.
40. Between September 10– 13, 2021, the LUC received three public testimonies.
41. On October 14, 2021, the County filed a Supplement to its Position Statement; Supplement 2; Exhibits 1-7; and Certificate of Service.
42. On October 19, 2021, the LUC mailed and emailed a meeting Notice and Agenda for its October 27, 2021, meeting to the Parties, Statewide and County mailing lists.
43. Between October 21– 27, 2021, the LUC received and filed approximately 26 public testimonies.

44. On October 26, 2021, DOE filed the written testimony of Edwin Sniffen, Deputy Director of the Hawai'i State Department of Transportation's Highways Division and Petitioner's Response to the Department of Planning, County of Maui's Supplement No. 2 to Its Position Statement on DOE's Request for the Issuance of Written Findings.
45. On October 27, 2021, the Commission held a meeting via interactive online conferencing protocols (Zoom Webinar) at the State Office Tower, 4th floor conference room, in Honolulu, Hawai'i. Stuart Fujioka, Esq. and Randall Tanaka appeared on behalf of DOE. Edwin Sniffen appeared on behalf of DOT. Alison Kato, Esq., Rodney Funakoshi, and Lorene Maki appeared on behalf of OPSD. Michael Hopper, Esq., Jordan Hart, and Tara Furukawa appeared on behalf of the County.
46. On October 27, 2021, DOE filed Supplemental Exhibits to its Motion to Amend; Exhibits 46-47; and Certificate of Service. This was accepted by the Presiding Chair Giovanni at the LUC hearing. [Tr. 10/27/2021; pgs. 157-159]
47. The following public witnesses testified: Andrew Beerer (Education and Recreation Committee Chair –KCA); and Tina Wildberger (State House Representative for District 11).

FINDINGS OF FACT

48. On April 25, 2019, the Commission rendered its decision in a declaratory order affirming that Condition 1(b) of the 2013 Order was a mandatory requirement for the Petitioner to construct a pedestrian overpass or underpass before the opening of the first phase of the new high school. [DR19-65]

49. DOT's position in 2019 was that only a roundabout was needed. [Transcript 10/27/2021, pgs 15-16; E. Sniffen testimony]
50. DOE decided to pursue a roundabout instead of a pedestrian overpass or underpass ("GSPC"), even though the Commission affirmed that Condition 1(b) of the 2013 Order was mandatory and not an optional requirement for the Petitioner to construct a GSPC before the opening of the first phase of the new high school in Kīhei in DR19-65 in 2019. [Transcript 10/27/2021, pg 119-121; S. Fujioka testimony]
51. DOE made a decision to construct a roundabout instead of a GSPC in November of 2019. [Transcript 10/27/2021, pgs 70-72; R. Tanaka testimony; pgs. 98-99, S. Fujioka testimony]
52. In 2022, DOE requested \$50 million in funding for Phase III of Kīhei High School only for classrooms. [Transcript 10/27/2021, pgs 44-45, 49, 57-58; R. Tanaka testimony]. However, DOE never requested funds for a GSPC. [Transcript 10/27/2021, pgs 55-56; R. Tanaka testimony]
53. DOT currently does not have funding for a GSPC, but if funds were available then DOT would plan and construct a GSPC. [Transcript 10/27/2021, pgs 18-19; E. Sniffen testimony]
54. DOT believed that if built in a safe manner a GSPC was a viable option. [Transcript 10/27/2021, pg. 23; E. Sniffen testimony]
55. In order to meet DOE's scheduled school opening date of 2022, the design and permitting process for a GSPC should have been started five years prior. [Transcript 10/27/2021, pgs 24, 33; E. Sniffen testimony]

56. Although DOT had the authority to make the technical recommendation regarding a GSPC, ultimately it was DOE, as landowner, that made the final decision not to pursue a GSPC. [Transcript 10/27/2021, pgs 20, 38-39; E. Sniffen testimony]
57. DOE was aware that an area legislator could request funding through a line-item appropriation; however, DOE never discussed such an appropriation with any legislators. [Transcript 10/27/2021, pg 64; R. Tanaka testimony]
58. Despite already having made a decision to the contrary, DOE sent a letter to Maui County in April 2020 stating that a GSPC was planned and in the design process. [Transcript 10/27/2021, pgs 67, 69-70; R. Tanaka testimony; Maui County Exhibit 4, Supplement 2].
59. Maui County issued four building permits for the high school in reliance that a GSPC would be included. [Maui County Exhibit 4, Supplement 2; Transcript 10/27/2021, pgs 102-103, 107-109, S. Fujioka]
60. DOE acknowledged that there was nothing in the record to show any attempt to communicate with the County prior to or after the April 2020 letter to indicate that DOE was not planning on moving forward with a GSPC. [Transcript 10/27/2021, pg 119-121; S. Fujioka testimony]
61. DOE's consultant, Fehr & Peers, in a technical memo as part of the 2012 Environmental Impact Statement, showed the primary option preferred was for a signalized intersection and GSPC. [Transcript 10/27/2021, pgs 98-99, 100-102; S. Fujioka; DOE Exhibit 11, 2012 EIS pg. 104; Transcript 10/27/2021, pg. 126, M. Hopper testimony]
62. DOE has acknowledged that there was nothing in the record showing a design for or an attempt to design a GSPC. [Transcript 10/27/2021, pg 113-114, 119-120; S. Fujioka testimony]

63. Pursuant to the ‘Āina Le‘a decision, as there was substantial commencement, enforcement of any violation of conditions are the responsibility of the County.
[Transcript 10/27/2021, pgs. 127, 132-134; M. Hopper testimony]
64. The County had proposed an amended condition as a compromise that was rejected by Petitioner. [Transcript 10/27/2021, pg 124-125, 137; M. Hopper testimony]
65. The Commission finds that DOE knew a GSPC was required as a condition under the 2013 Order and that requirement was then reaffirmed in 2019 in DR19-65. Further, nothing in the record to shows DOE had attempted to comply with that condition.
[Transcript 10/27/2021, pgs. 153-154; A. Kato testimony]
66. Following discussion, the parties provided closing arguments on DOE’s Motion to Amend. Thereafter, a motion was made and seconded to deny the Motion to Amend Condition 1(b) of the Land Use Commission’s 2013 Decision and Order.
67. The Commission, in discussion on its motion to deny Petitioner’s Motion to Amend, identified the following reasons for denial:
- Petitioner failed to meet its burden of proof to support the motion.
 - Petitioner’s own studies contradict what was argued by Petitioner.
 - DOT did not deny outright the ultimate need for a GSPC; and expressed a willingness to construct a GSPC should funding be made available.
 - Petitioner has not shown that a planned roundabout is a proper substitute for the required GSPC.
 - No evidence on the record that DOE attempted to comply with or meet the condition for a GSPC.

- Petitioner has not made a good faith effort to work with the County or community on the issue.

68. There being a vote tally of 7 ayes, 0 nays, and 1 recused, the motion passed.

69. Petitioner had filed a Request for the Issuance of Written Findings as to its August 20, 2020 Motion to Amend the Land Use Commission’s 2013 Order on July 29, 2021. After the decision to deny Petitioner’s Motion to Amend; the Commission’s Deputy Attorney General confirmed to presiding Chair Giovanni that Petitioner’s request was moot. Chair Giovanni indicated that the Commission would not be taking any formal action on Petitioner’s request as the issue was moot. [Transcript 10/27/2021; pgs. 178-179]

RULING ON PROPOSED FINDINGS OF FACT

Any conclusion 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 as a finding of fact.

CONCLUSIONS OF LAW

1. HRS §205-1(c) authorizes the Commission to “adopt rules guiding its conduct[.]”
2. As defined in HAR §15-15-03:

“Proceeding” means any matter brought before the commission over which the commission has jurisdiction and shall include, but not be limited to:

- (1) Petitions for district boundary amendment;

- (2) Petitions for special permit;
 - (3) Proceedings for the adoption, amendment, or repeal of rules under sections 91-3 and 205-7, HRS;
 - (4) Petitions for declaratory orders under section 91-8, HRS;
 - (5) An investigation or review instituted or requested to be initiated by the commission; and
 - (6) All other matters in the administration of chapter 205, HRS.”
3. Pursuant to HAR §15-15-70(a), any party may make a motion before, during, or after the close of hearing.
 4. Pursuant to HAR §15-15-94(a), if a petitioner desires to have a modification or deletion of a condition that was imposed by the Commission, or modification of the Commission’s order, the petitioner shall file a motion in accordance with HAR §15-15-70 and serve a copy on all parties to the boundary amendment proceeding in which the condition was imposed or in which the order was issued, and to any person that may have a property interest in the subject property as recorded in the county’s real property tax records at the time the motion is filed.
 5. Pursuant to HAR §15-15-94(b), for good cause shown, the Commission may act to modify or delete any of the conditions imposed or modify the Commission’s order.
 6. HRS §91-10(5) provides “Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.”

7. HAR §15-15-59((a), provides that “...Unless otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence and the burden of persuasion.”
8. Based upon the record and files herein and the findings set forth above, the Commission concludes that there is not a preponderance of evidence in the record to support amending Condition 1(b).
9. Based upon the record and files herein and the findings set forth above, the Commission further concludes and reaffirms that Condition 1(b) is necessary and appropriate to protect public health, safety, and welfare.

ORDER DENYING PETITIONER DEPARTMENT OF EDUCATION'S MOTION TO
AMEND THE LAND USE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF
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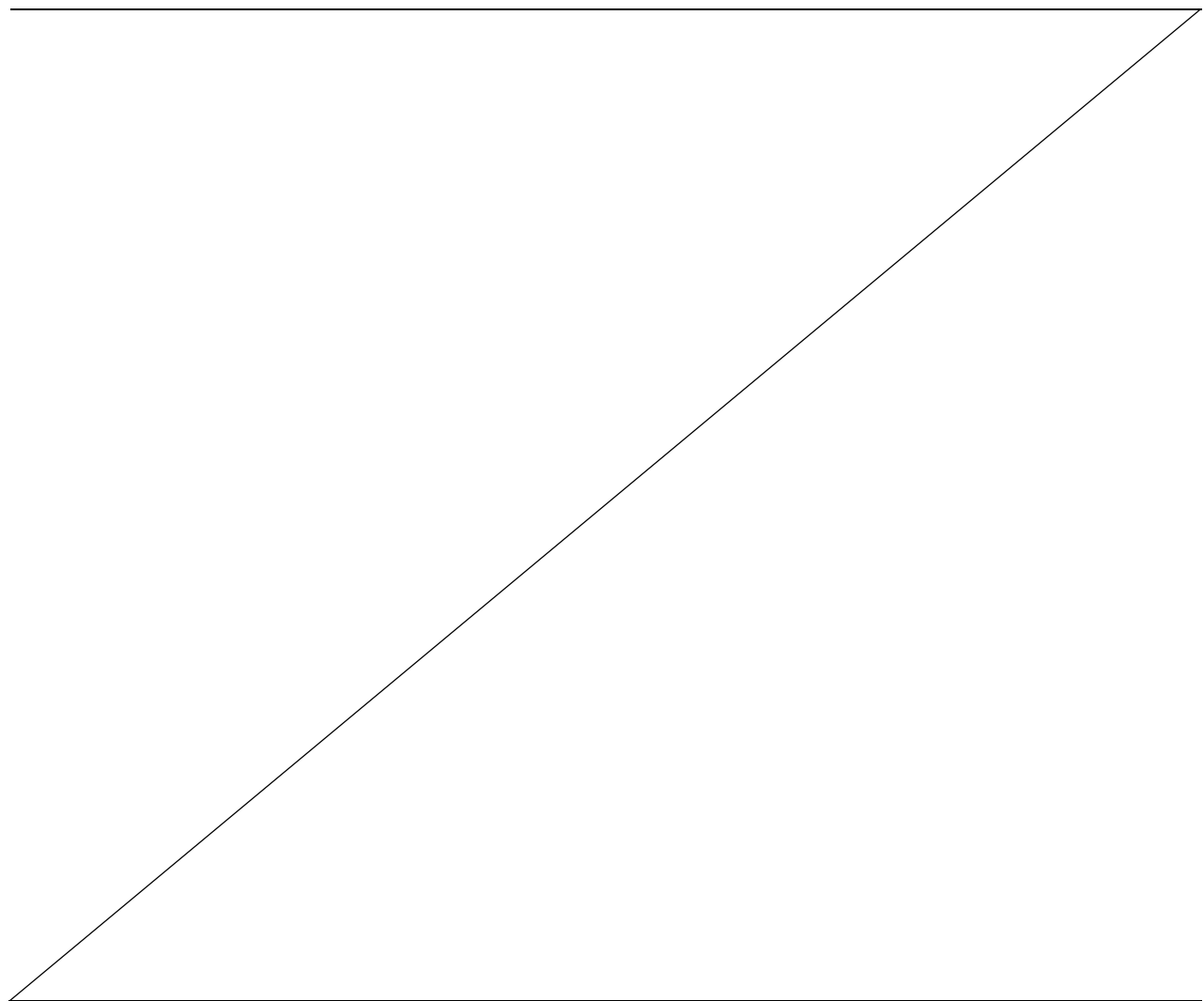
At the Commission's meeting on the Motion to Amend on October 27, 2021, a motion was made and seconded to deny the Motion to Amend. Following discussion by the Commission, a vote was taken on this motion. There being a vote tally of 7 ayes, 0 nays, and 1 recused¹, the motion carried.

The Commission having duly considered the Motion, the written and oral arguments presented by Petitioner, the pleadings filed by OPSD and the County, and written and oral testimony by the public, and a motion having been made at a meeting conducted on October 27,

¹ The Commission normally is comprised of nine members, however, an at-large position is currently vacant. Commissioner Jonathan Scheuer recused himself from further hearing or voting on this matter at the September 8, 2021 meeting.

2021, in Honolulu, Hawai'i, and the motion having received the affirmative votes required by HAR §15-15-13, and there being good cause for the motion, this Commission ORDERS that the Motion to Amend be DENIED and RULES as follows:

The Petitioner has not shown by a preponderance of the evidence or good cause for amending Condition 1(b) of the Decision and Order dated July 29, 2013. The Commission reaffirms that Condition 1(b) is necessary and appropriate to protect public health, safety, and welfare.




ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 28th day of September, 2022. This ORDER may be executed in counterparts. This ORDER shall take effect upon the date this ORDER is certified by this Commission.


Done at Honolulu, Hawai'i, this 28th day of September, 2022, per motion on October 27, 2021.

APPROVED AS TO FORM



Deputy Attorney General

LAND USE COMMISSION
STATE OF HAWAI'I

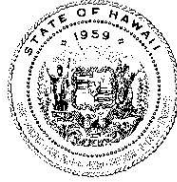
By 

DAN GIOVANNI
Chairperson and Commissioner

FILED AND EFFECTIVE ON:
September 28, 2022

Certified by: 

DANIEL E. ORODENKER
Executive Officer
State Land Use Commission



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Boundary into the Urban Land Use District)	
for Approximately 77.2 Acres of land at)	
Kihei, Maui, State of Hawai'i, Tax Map Key)	
Nos. 2-2-02: 81 and 83)	
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the ORDER DENYING PETITIONER DEPARTMENT OF EDUCATION'S MOTION TO AMEND THE LAND USE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED ON JULY 29, 2013 was served upon the following by either hand delivery or depositing the same in the U.S. Mail, by regular or certified mail as noted:

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Honolulu, Hawai'i September 28, 2022



DANIEL E. ORODENKER
Executive Officer