

**DOCKET NO. A81-525**  
**Y-O Limited**

**MOTION FOR EXTENSION OF TIME TO  
APPLY FOR REDISTRICTING OF PHASE II**

***STAFF  
REPORT***

**ACTION MEETING**

**April 12, 2023**



**Daniel E. Orodenker, Executive Officer**

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**Submitted: April 10, 2023**

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## 1. EXPLANATION OF THE PROCEEDING

The proceeding before the Land Use Commission (“Commission”) is to consider the Motion to Extend Time to Apply for Redistricting of Phase II, filed by RCFC KALOKO HEIGHTS, LLC, a Delaware limited liability company (“Petitioner”), on November 22, 2022.

Hawai‘i Administrative Rules (“HAR”) §15-15-70(a) provides that “[a]ny party may make motions before, during, or after the close of a hearing.”

Pursuant to HAR §15-15-94, a petitioner who desires to have a modification or deletion of a condition that was imposed by the Commission, or a modification of the Commission’s order shall file a motion in accordance with HAR §15-15-70, including proper service and affidavits or declarations if the motion requires the consideration of facts not appearing in the record.

If good cause is shown, the Commission may modify or delete any of the conditions imposed or modify the Commission’s order (HAR §15-15-94(b)). “Good cause” can mean “a substantial reason amounting in law to a legal excuse,” and that it will also depend on the specific circumstances of an individual case. Determining “good cause” is at the discretion of the Commission.

Pursuant to Hawai‘i Revised Statute (“HRS”) §91-10(5), 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.

The Commission has discretion based on the facts presented in the case to consider other factors, including (1) whether the need for the condition still exists; (2) whether an alternative method for ensuring compliance exists that protects the public trust; or (3) whether compliance with the condition would create an undue hardship.

Given the 40 year history of this docket, staff has prepared a brief chronology of the significant events relating to the docket in the next section.

## 2. BACKGROUND INFORMATION

On January 20, 1983, the Commission issued Findings of Fact, Conclusions of Law, and Decision and Order to Amend the District Boundary of Property Situated in the Land Divisions of Kaloko and Kohanaiki, North Kona, Island of Hawai‘i (“[1983 D&O](#)”). The Commission redistricted 213.473 acres from the Agricultural to the Urban District, Tax Map Key No. 7-3-09: Por. 19 the area was referred to in the 1983 D&O as Phase I of Y-O Limited Partnerships (“Petitioner”) residential subdivision.

The Decision and Order also incrementally or conditionally approved the remaining area of Petitioner’s subdivision development, referred to as Phase II, consisting of 195.246 acres identified as Tax Map Key No. 7-3-09: Por. 19, for incremental districting from Agricultural to Urban pursuant to State Land Use District Regulation 6-2. The petition area is subject to six conditions.

The Conditions set forth in the 1983 D&O are as stated:

- A. Petitioner shall provide housing opportunities for low and moderate income Hawai‘i residents prior to assigning or transferring its interest in the subject property, by offering for sale, on a preferential basis, on its own or in cooperation with either or both the Hawai‘i Housing Authority or the County of Hawai‘i, ten per cent (10%) of the lots or houses and lots to be developed on the subject property, to residents of the State of Hawai‘i of low and moderate family income as determined by the Hawai‘i Housing Authority or County of Hawai‘i from time to time. The preferential lots or houses and lots shall be offered for sale at prices not exceeding prices that enable such purchasers to qualify for and obtain state—assisted financing (e.g., Act 105 or Hula Mae) or federally-insured or assisted financing (e.g., FHA Section 245 Program) intended to encourage home ownership by low and moderate income families; and
- B. Petitioner shall afford lot purchasers public access from the subject property to Queen Ka‘ahumanu Highway and to Māmalahoa Highway by participating in the construction of a roadway connecting the two highways and running through the subject property, the location and standard of design and construction of such roadway to be approved and accepted by the County of Hawai‘i. The Petitioner shall be responsible for constructing such portions of the roadway within the subject property. The Petitioner’s participation for the portions of the roadway outside the subject property may be by way of loans, loan guaranties, purchase of county obligations or otherwise.
- C. Petitioner shall execute and perform its obligation as a Developer under its Agreement I made with the Water Commission of the County of Hawai‘i for water source development, and shall not submit any applications to the County

of Hawai‘i for general plan or zoning changes, or for subdivision approvals or sell the subject property until it shall have submitted to the Commission an Agreement II for water source development executed by the Petitioner and County of Hawai‘i.

- D. Petitioner shall dedicate to appropriate State and County Agencies sufficient land for the provision of necessary public facilities.
- E. Petitioner shall submit annual progress reports to the Commission, Department of Planning and Economic Development and Hawai‘i County Planning Department as to its progress in satisfying these conditions.
- F. These conditions may be fully or partially released by the Commission as to all or any portion of the subject properties upon timely motion and provision of adequate assurance of satisfaction of these conditions by the Petitioner.

On January 12, 1988, the Commission issued the Order Approving [Motion for Extension](#) of Time to Apply for Redistricting of Phase II. Petitioner was granted an extension of time to not later than January 20, 1993, to substantially complete Phase I and to apply for redistricting of Phase II.

On June 30, 1990, the Commission issued the Order Approving the [Motion for Modification](#) of Condition “A” of the 1983 D&O. The Modification essentially removed the phrase, “. . . prior to assigning or transferring its interest in the subject property” from the original condition. All the other conditions continue in full force and effect.

The modified condition reads as follows:

“Petitioner shall provide housing opportunities for low and moderate income Hawai‘i residents by offering for sale, on a preferential basis, on its own or in cooperation with either or both the Hawai‘i Housing Authority or the County of Hawai‘i, ten percent (10%) of the lots or houses and lots to be developed on the subject property, to residents of the State of Hawai‘i of low and moderate family income as determined by the Hawai‘i Housing Authority or County of Hawai‘i from time to time. The preferential lots or houses and lots shall be offered for sale at prices not exceeding prices that enable such purchasers to qualify for and obtain state—assisted financing (e.g., Act 105 or Hula Mae) or federally-insured or assisted financing (e.g., FHA Section 245 Program) intended to encourage home ownership by low and moderate income families.”

On November 17, 1992, the Commission issued the [Order Granting Motion for Second Extension](#) of Time to Apply for Redistricting of Phase II and Amending the Conditions of the Decision and Orders Dated January 20, 1983 and June 13, 1990.

Petitioner was granted an extension of time to not later than January 20, 1998, to substantially complete Phase I and to apply for redistricting of Phase II, subject to the following conditions to read:

1. Petitioner shall provide housing opportunities for low and moderate income residents by offering for sale, on a preferential basis, on its own or in cooperation with both the Housing Finance and Development Corporation and the County of Hawai‘i , ten per cent (10%) of the lots or houses and lots to be developed on the subject property, to residents of the State of Hawai‘i of low and moderate family income as determined by the Housing Finance and Development Corporation and County of Hawai‘i from time to time. The preferential lots or houses and lots shall be offered for sale at prices not exceeding prices that enable such purchasers to qualify for and obtain state-assisted financing (e.g., Hula Mae) or federally - insured or assisted financing (e.g., FHA Section 245 Program) intended to encourage home ownership by low and moderate income families.
2. Petitioner shall afford lot purchasers public access from the subject property to Queen Ka‘ahumanu Highway and to Mamalahoa Highway by participating in the construction of a roadway connecting the two highways and running through the subject property, the location and standard of design and construction of such roadway to be approved and accepted by the County of Hawai‘i . The Petitioner shall be responsible for constructing such portions of the roadway within the subject property. The Petitioner’s participation for the portions of the roadway outside the subject property may be by way of loans, loan guaranties, purchase of county obligations or otherwise.
3. Petitioner shall dedicate to appropriate State and County Agencies sufficient land for the provision of necessary public facilities.
4. Petitioner shall submit annual progress reports to the Commission, Office of State Planning and Hawai‘i County Planning Department as to its progress in satisfying these conditions.
5. These conditions may be fully or partially released by the Commission as to all or any portion of the subject properties upon timely motion and provision of adequate assurance of satisfaction of these conditions by the Petitioner.
6. Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. **Failure to so develop the Property may result in reversion of the Property to its former classification**, or change to a more appropriate classification.

7. Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Property, prior to development of the Property.

These conditions replaced all previous conditions imposed by the Commission.

On December 22, 1997, the Commission issued the Order Approving [Motion for Third Extension](#) of Time to Apply for Redistricting of Phase II. Petitioner was granted an extension of time to not later than January 20, 2003, to substantially complete Phase I and to apply for redistricting of Phase II.

On December 5, 2002, the Commission issued the Order Approving [Motion for Fourth Extension](#) of Time to Apply for Redistricting of Phase II. Petitioner's Motion requesting a fourth extension of time for an additional ten-year period was granted. The ten-year extension began January 21, 2003 and lasted through January 20, 2013.

On November 30, 2004, the subject parcels were conveyed from Y-O Limited to Kaloko Heights Associates, LLC, a Delaware limited liability company by Limited Warranty Deed recorded in the Bureau of Conveyances. [See 2005- 2008 Annual Report Exhibit A.](#)

On December 10, 2012, the Commission issued the [Order Granting Petitioner's Motion](#) for Extension of Time to Apply for Redistricting of Phase II.

On January 22, 2013, the subject parcels were conveyed from Kaloko Heights Associates, LLC, a Delaware limited liability company to RCFC Kaloko Heights, LLC, a Delaware limited liability company, by Limited Warranty Deed recorded in the Bureau of Conveyances. [See 2014 LUC Notice of Conveyance](#)

On November 22, 2016, the Commission issued an [Order Granting in Part and Denying in Part Petitioner's Motion for an Order Regarding Satisfaction of Affordable Housing Condition](#). Which changes Condition one to read:

"Petitioner shall provide housing opportunities for low and moderate income residents, by offering for sale or rental on a preferential basis, on its own or in cooperation with both the Hawai'i Housing Finance and Development Corporation ("HHFDC") and the County of Hawai'i, affordable housing units equivalent to ten per cent (10%) of the lots and residential units to be developed in the Petition Area, to residents of the State of Hawai'i of low and moderate family income as determined by HHFDC and the County of Hawai'i Office of Housing and Community Development ("OHCD") from time to time (the "Affordable Housing Requirement"). The affordable housing units shall be offered for sale or rent at prices or rents not exceeding prices or rents ("Affordable Prices") that enable such purchasers and renters to qualify for and obtain state-assisted financing (e.g., Hula Mae) or federally-insured or assisted

financing (e.g., FHA Section 245 Program) intended to encourage home ownership by low and moderate income families, or that provide affordable rental housing opportunities to such families. This affordable housing condition shall be implemented to the satisfaction of OHCD. "

The Commission denied all other aspects of the Petitioners Motion which included removing the statement "Petitioner may provide some or all of the Affordable Housing Units through development in the Petition Area in cooperation with Hawai'i Island Community Development Corporation, a Hawai'i nonprofit corporation ("HICDC").

See Petitioners Correspondence in 2016 Motion to Amend ["Exhibit 1"](#) and the [2016 Decision and Order](#).

On November 22, 2022, the Petitioner filed [Motion for Extension of Time](#) to apply for redistricting of Phase II; memorandum in support of motion; declaration of William W. L. Yuen; Exhibits A-B; COS

On November 28, 2022, the Land Use Commission received the Petitioners most recent [Annual Report 2021- 2022](#)

On November 29, 2022, the Land Use Commission received the Office of Planning and Sustainable Developments [Extension Request](#)

On November 29, 2022, the Land Use Commission granted the Office of Planning and Sustainable Developments [Extension Request](#)

On January 4, 2023, Petitioner filed [Second Supplemental Memorandum](#) in Support of Motion for Extension of Time to Apply for Redistricting of Phase II; Declaration of William W. L. Yuen; Exhibits 33 Through 38; Certificate of Service

On January 19, 2023, the Office of Planning and Sustainable Developments [Second Extension Request](#)

On January 31, 2023, Petitioner filed [Petitioner's Third Supplemental Memo](#) in Support of Motion for Extension of Time to Apply for Redist, exhibit 39 AIS (Oct. 2005) Part 1 – 3, and Exhibits 40-43

On March 13, 2023, the OPSD filed [their response to the Petitioners Motion](#) for Extension of Time to Apply for Redistricting of Phase Two.

On March 20<sup>th</sup>, 2023, the Land Use Commission received the [County of Hawai'i 's email](#) with their position: no objection to the Petitioner Motion.

On April 2, [Environment Hawai'i](#) submitted an article as public testimony.

On April 3, 2023, the Agenda for the 04/12/23 meeting was distributed to Statewide and Hawai'i lists.

On April 4<sup>th</sup>, the LUC Received [Petitioner's Reply](#) Memorandum to OPSD's Response to Motion; Declaration of Mark Meyer; COS

On April 5<sup>th</sup>, The LUC received public testimony from [Deborah Chang](#). The LUC also received a [letter from the County of Hawai'i](#) which states no objection to the Motion.

### 3. SUMMARY OF OPSD POSITION STATEMENT

The Office of Planning and Sustainable Development (“OPSD”) supports partial approval of Petitioner’s Motion with revisions and recommendations. OPSD recommends approval with revisions of Successor Petitioner’s Motion for Extension of Time to Apply for Redistricting of Phase II for a period of three years from January 20, 2023, to January 20, 2026.

#### Revised Master Plan:

OPSD recognizes that the changes to the master plans associated with the petition area have changed but does not believe that an amendment is necessary. OPSD provided the following reasons in support of that statement:

1. The major components of the project have not changed
2. Changes resulting from concerns that arose from the topographic survey appear to be reasonable
3. Certain changes were the result of accommodations to County requests
4. The current plan accommodates several new archaeological preserves and trails within Phase I of the development.

#### Affordable Housing:

OPSD is concerned, that the reduced number of residential units will also reduce the number of affordable units. Petitioner appears to propose fewer units than the 10 percent minimum. Condition 1 for affordable housing requires that Petitioner provide affordable housing units equivalent to **10 percent (10%) of the lots and residential units to be developed in the Petition Area. If the proposed residential units in Phases I and II now total 1,241, the affordable units should minimally equal 124, not 100**, as Petitioner proposes. Petitioner should address this issue at the hearing.

#### Extension of Time:

OPSD is concerned, however, with the length of time that has passed since the original proposal was approved by the LUC. OPSD finds that another ten-year extension is unnecessary given the representations made by the Petitioner that construction can begin

once the wastewater line is in place, i.e., 2024. A shorter extension would give the LUC an opportunity to weigh in earlier, if the project is further delayed

OPSD recommends that the **LUC consider limiting the current request for a 10-year time extension to a three-year time extension.** A shorter extension would give the LUC an opportunity to weigh in earlier if the project is further delayed. This recommendation is based on Petitioner’s representations regarding the relationship between home construction and the County’s construction of the wastewater transmission line.

#### 4. SUMMARY OF COUNTY POSITION STATEMENT

The County of Hawai‘i Department of Planning sent a letter and an email stating support and has no objection to the Petitioners Motion.

#### 5. STAFF NOTES

Specific points of concern:

##### *Affordable Housing*

Fewer affordable Housing Units than required in Condition 1:

Condition 1 for affordable housing requires that Petitioner provide affordable housing units equivalent to 10 percent (10%) of the lots and residential units to be developed in the Petition Area. If the proposed residential units in Phases I and II now total 1,241, the affordable units should minimally equal 124, not 100, as Petitioner proposes.

**The Commission should ask the Petitioner and County about the agreement between Hawai‘i Island Community Development (“HICD”), as well as HICD’s development plans.**

**The Commission should also ask the Petitioner to explain how the current limited affordable housing scenario provides affordable housing for the residents of the State of Hawai‘i.**

##### *Affordable Housing*

The 2021-2022 Annual Report mentions

### *Credits*

that the Petitioner previously acquired four housing credits from an unspecified housing developer.

The Annual Report also mentions an Affordable Housing Agreement (Credits), dated March 30, 2015, between the Petitioner and the County of Hawai'i's Office of Housing and Community Development ("OHCD") which the County recognized that RCFC Kaloko was entitled to use the four housing credits to satisfy affordable housing requirements for a maximum of forty (40) residential units pursuant to the LUC Docket A81-525 and Change of Zone Ordinance 86-91 for its first increment of development.

The LUC Staff is particularly concerned about the legitimacy of any agreements discussed with OHCD.

**Therefore, the Commission should question the Petitioner and County on the status of discussions with OHCD regarding any affordable housing agreements, the status of additional housing credits, and if needed the integrity of any arrangements made.**

**The Commission should ask the Petitioner and County about how many affordable housing credits the Petitioner has, as well as the credits the non-profit housing developer has, and what that means for the total affordable housing credits for the proposed project.**

**The Commission should ask the County of Hawai'i about their [recently published report](#) on the audit of the affordable housing credits, in regards to the success of project development/**

**housing for residents and the integrity of the housing credits.**

*Petitioner's Current Development Plan*

Upon its acquisition of the Petition Area in 2013, Petitioner began to evaluate the viability of development of the Project using the original conceptual site plan, there were several factors that were re-designed.

The factors involved in revising the Phase I Site Plan included:

- Accommodate Holoholo Street as a “through” road across the northern portion of the Petition Area in accordance with the Kealakaa Extension Final Report Alignment.
- Relocate the HICDC affordable housing project to the former Open zoned land at the corner of the future Holoholo Street and Hina Lani Street.
- Set aside of 25 acres to protect the 18 archaeological preservation sites found in 2005.
- Relocate the 5-acre park that is required pursuant to Condition O of Change of Zone Ordinance No 86-91, to be located reasonably close to the HICDC affordable housing project.
- Create a road network/development plan that can reasonably balance the earthwork to be done minimize amount of material that needs to either be imported to or exported from the Petition Area.
- Optimize lot configurations within the existing zoning district boundaries

Petitioner submitted the resulting Revised Site Plan to the County Planning Department for approval on July 19, 2017.

**The Petitioner and County should be questioned regarding why the revised master plan was not previously brought before the Commission.**

**The County should be questioned on why the County did not inform Petitioner on the proper protocol when submitting a new master plan.**

**The County should be asked if they thought accepting the revised Master Plan on their behalf changes the Decision and Order.**

Staff does not agree with the OPSD's position statement/ belief that a motion to amend is not necessary for the amended site plan.

The revised Site Plan changes the original site plan in multiple aspects, this is currently not reflected in the Decision and Order. The revised site plan results in numerous changes that are in the Decision and Order, and results in a decrease in planned unit density within Phase I.

*Stale and Lack of  
Studies*

The applicant has not provided sufficient and up to date information to demonstrate that their proposed/ updated project will not negatively impact the environment, cultural resources, and surrounding developments.

Studies need to be updated to ensure no negative impacts will occur.

**Petitioner/OPSD/County should discuss whether a Supplemental EIS, a new EA, or new EIS would be most appropriate.**

The Petition Area lies upslope from nearshore resources that have been subject to considerable research on negative impacts to ground water and nearshore water quality. The LUC has conditioned other developments in the area with requirements to address such potential development impacts. This appears to be another area where updated study is necessary.

Questions have been raised with respect to historic and archaeological resources within the Petition Area and whether changes contemplated in the revised Master Plan have been adequately addressed.

No Ka Pa‘akai analysis has been done for the Project to date.

*Incremental  
Districting and Time  
Extension Request*

Since the District Boundary Amendment was granted in 1983, the Petitioner has requested five-time extensions, and 40 years have passed, and no housing construction has occurred.

It has been 10 years since the current Petitioner acquired the land involved with this docket, and about 6.5 years since the amendment to Condition one was made, to allow any affordable housing units developed in excess of the 10% required for Phase I to be applied to Petitioner's obligation to satisfy the affordable housing condition on Phase II of the Petition Area.

**The Commission should determine if there is good cause for the lag on development, by asking the petitioner about why Increment I has not been developed in the 10 years the current Petitioner has owned the land.**

If the Commission decides to deny any motion having to do with incremental districting, there is no clear statement of what the result will be in HAR 15-15-78 relating to incremental districting.

If the Commission decides to deny the Petitioners Motion, staff believes the Projects Phase II would go into “limbo” until the Petitioner meets the Conditions of Phase I. Upon meeting the Conditions of Phase I, the Petitioner would have to appear before the Commission with a request for approval of Phase II. Staff believes the Condition does not go away, but the consideration would be postponed to the future.