



## I. BACKGROUND

1. **Original Decision and Order:** On January 19, 1983, the Land Use Commission (“LUC”) approved reclassification of approximately 213.473 acres of land, now identified as TMKs (3) 7-3-09: 20, 32, 57 to 62, through Findings of Fact, Conclusions of Law and Decision and Order (“1983 Order”) for Phase I of the petition area. The LUC simultaneously approved incremental redistricting of approximately 195.246 acres, south of Hina Lani Street, now identified as TMK (3) 7-3-09: 19, or Phase II of the petition area. Before applying for redistricting, the 1983 Order required a prima facie showing within five years that Petitioner has made substantial completion of the onsite and offsite improvements within Phase I in accordance with the Petitioner’s development plan. The 1983 Order included conditions listed as A through F, and stated that the required prima facie showing of substantial completion included, but was not limited to, partial satisfaction of Condition A for affordable housing, satisfaction of Conditions D and E to the extent possible, and full satisfaction of Conditions B and C for access to Queen Kaahumanu Highway.
2. **First Extension of Time:** On January 12, 1988, the LUC approved a five-year extension of time to January 20, 1993 for Petitioner to substantially complete Phase I and to apply for redistricting of Phase II.
3. **Changes to the Affordable Housing Condition:** On June 13, 1990, the LUC approved minor revisions to Condition A involving affordable housing.
4. **Second Extension of Time:** On November 17, 1992, the LUC approved a five-year extension of time to January 20, 1998 to substantially complete Phase I and to apply for redistricting of Phase II. The LUC also renumbered and revised the conditions. A complete listing of the current approved conditions is below in Section III.
5. **Third Extension of Time:** On December 22, 1997, the LUC approved a five-year extension of time to January 20, 2003 to substantially complete Phase I and apply for redistricting of Phase II.
6. **Fourth Extension of Time:** On December 5, 2002, the LUC approved a 10-year extension of time to January 20, 2013 to substantially complete Phase I and apply for redistricting of Phase II.
7. **Fifth Extension of Time:** On December 10, 2012, the LUC approved a 10-year extension of time to January 20, 2023 to substantially complete Phase I and apply for redistricting of Phase II.
8. **Changes to the Affordable Housing Condition:** On November 22, 2016, the LUC approved an amended condition for affordable housing.

9. On November 22, 2022, the Petitioner filed a Motion for Extension of Time to Apply for Redistricting of Phase II (“Sixth Extension Motion”). The Petitioner also filed three supplemental memoranda with exhibits on January 4, 2023 (“First Memo”), January 9, 2023 (“Second Memo”), and January 31, 2023 (“Third Memo,” and together with the First Memo and Second Memo, the “Supplemental Memoranda”).

Although the Petitioner filed a “Motion for Extension of Time to Apply for Redistricting of Phase II,” the actual request was more comprehensive. The request was for the LUC to grant a ten-year extension of time to substantially complete Phase I and to apply for redistricting of Phase II. Petitioner requested an extension of the current deadline, January 20, 2023, to January 20, 2033.

10. On April 11, 2023, the Petitioner filed the Stipulation Regarding Petitioner’s Sixth Extension Motion. The Stipulation, to which both OPSD and the County of Hawaii Planning Department were parties to, recommended to the LUC that the Petitioner have three years, until January 20, 2026, to complete offsite infrastructure for the Kaloko Heights Project and for the Hawaii Island Community Development Corporation to complete construction of affordable housing units equal to at least 10% of the residential units to be developed in Phase 1 of the Kaloko Heights Project, and ten years until January 20, 2033, to substantially complete onsite development of Phase 1 of the Kaloko Heights Project and to submit an application to the Commission to reclassify Phase II to the Urban District.
11. On April 12, 2023, the LUC held an in-person hearing on Petitioner’s Sixth Extension Motion, voted to deny the Motion, and on August 5, 2023, the LUC issued its Findings of Fact, Conclusions of Law, Decision and Order denying Petitioner’s Sixth Extension Motion. (“2023 Order”).

## II. OPSD SUPPORTS PETITIONER’S MOTION TO RECONSIDER

The LUC’s decision to deny Petitioner’s Sixth Extension Motion is based on two major objections: the lack of a Hawaii Revised Statutes (“HRS”) Chapter 343 review for the entire project contemplated by the Original Petition and the need for an updated archeological inventory study and cultural impact survey.

### HRS Chapter 343 Review

Petitioner’s response to the LUC’s objection is that an HRS Chapter 343 review was not required for the Original Petition in 1981, that an HRS Chapter 343 Environmental Assessment - Finding of No Significant Impact (“EA-FONSI”) was conducted and accepted by the approving authority for the wastewater transmission line on Hawaii County land serving both the affordable housing and Phase 1 of the Kaloko Heights Project, and a motion for a time extension such as Petitioner’s Sixth Extension Motion is not a “trigger” for an HRS Chapter 343 review. OPSD agrees.

The Original Petition did not trigger HRS Chapter 343 review, nor did the LUC require a HRS Chapter 343 review. At the time, the Petitioner represented that wastewater generated by

the Project would be handled either by cesspools or by an on-site wastewater treatment facility, and no use of County lands was contemplated.

Subsequently, the method of sewage disposal changed. New cesspools are no longer allowed. Also, Petitioner donated 10.755 acres of Phase 1 lands to the Hawaii Island Community Development Corporation (“HICDC”) for the development of affordable rental housing. The Petitioner proposed construction of a wastewater transmission line to allow the HICDC lands, the Project lands, and other lands in the vicinity to connect to the County’s Kealahou wastewater treatment facility. Without this connection, HICDC would have to build and operate a less efficient and more maintenance-intensive package wastewater treatment facility.

Since construction of a wastewater transmission line required the use of the County right-of-way, a HRS Chapter 343 review was required. The HICDC affordable housing project also triggered HRS Chapter 343 because the housing would in part be funded by the State of Hawaii and because the development’s wastewater system would serve 50 or more single-family dwellings. A Final Environmental Assessment-Finding of No Significant Impact (“FEA-FONSI”) was prepared and accepted by the Hawaii Housing Finance Development Corporation in 2019, and subsequently, deemed sufficient by the Hawaii County Department of Environmental Management. Coordination of the construction and use of that line is identified in the Memorandum of Agreement (“MOA”) between the County Department of Environmental Management, Petitioner, and HICDC. The MOA also confirms that the treatment capacity at the Kealahou Wastewater Treatment Plant is adequate to accommodate sewer flows from the Proposed Project and Kaloko Heights Project. (Kaloko Affordable Housing Project FEA-FONSI, pgs. 2 and 3.) The LUC has no current standing to determine that the FEA-FONSI is incomplete, nor did the LUC question the County’s decision in 2019.

Finally, OPSD agrees with the Petitioner that a motion to extend a time deadline is not an action triggering the need for a HRS Chapter 343 review. In fact, the LUC has repeatedly considered and approved extensions of time deadlines for this docket and others without requiring a HRS Chapter 343 review.

#### Archaeological Inventory and Cultural Impact Survey

The Petitioner notes that previous archaeological studies of the Phase 1 lands were approved by the State Historic Preservation Division (“SHPD”), and the LUC approved the reclassification of these lands. Furthermore, in 2004, the area north of Hina Lani Street was resurveyed by Scientific Consultant Services, Inc. for the Kaloko Heights Project under Stanford Carr Development LLC. Although the survey determined that the Kaloko section had been extensively bulldozed, 89 archaeological sites were recorded. Of these, 48 required no further work, 29 were recommended for Data Recovery, and the remaining 12 sites were recommended for Preservation. The results of the survey led to a Burial Treatment Plan, a Preservation Plan, and a Data Recovery and Monitoring Plan, all of which were approved by SHPD. (Kaloko Affordable Housing Project FEA-FONSI, pg. 51.) These results are reflected in Petitioner’s revised Phase 1 site plan.

The Cultural Impact Assessment (“CIA”) conducted as part of the 2019 FEA-FONSI discussed above found four archaeological sites in the affordable housing project area, two that required no further work and two recommended for Data Recovery that were sufficiently mitigated so as there would be no impact. The CIA was centered on the affordable housing project area but placed the land in the broader context of the two ahupuaa the site straddles. Previous cultural impact studies of the surrounding region were reviewed, and community members were consulted. The CIA specifically cited the Hawaii Supreme Court’s Ka Paakai analytical framework and identified one specific traditional cultural place with associated practices identified to exist in the project area. This cultural place is the mauka-makai trail identified in a previous archaeological study. Petitioner has represented that this trail is incorporated into Petitioner’s revised Phase 1 site plan.

Consequently, OPSD finds that the archaeological and cultural impact concerns have been adequately addressed for both the affordable housing and Kaloko Heights Phase 1 projects. OPSD also agrees with Petitioner’s contention that consideration of an extension of time deadline is not a substantive action requiring the LUC to make a determination consistent with the Ka Paakai decision. OPSD does agree that such a determination would be required before the LUC could decide on a motion to reclassify Petitioner’s Phase 2 lands.

For the reasons stated above, OPSD recommends that the LUC reconsider the decision to deny Petitioner’s Sixth Extension Motion. OPSD reiterates its support for Petitioner’s Sixth Extension Motion as stated below.

### III. PETITIONER’S CURRENT ORDER AND CONDITIONS

Given that the 1983 Order has been amended and extended several times over the past 40 years, its current major components are listed below. The LUC’s order dated December 10, 2012 (“2012 Order”) captures the incremental redistricting requirement with the current deadline. The LUC’s order dated November 22, 2016 (“2016 Order”) captures the current affordable housing condition, which was renumbered from A to 1. The LUC’s order dated November 17, 1992 (“1992 Order”) includes the remaining conditions that were revised and renumbered as conditions 2 through 7.

#### A. 2012 ORDER

“Having duly considered Petitioner’s Motion...this Commission ORDERS that Petitioner’s Motion for a 10-year time extension to substantially complete Increment I and apply for redistricting of Increment II from January 20, 2013 through and including January 20, 2023 is hereby GRANTED, subject to the condition that Petitioner, consistent with its representation before the Commission, shall analyze the potential impacts and mitigation of Phase II developments that may result in the

imposition by the Commission of revised or additional conditions upon Petitioner's application for redistricting of Phase II."

B. 2016 ORDER

"1. 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 Hawaii Housing Finance and Development Corporation ("HHFDC") and the County of Hawaii, 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 Hawaii of low and moderate family income as determined by HHFDC and the County of Hawaii 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 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. This affordable housing condition shall be implemented to the satisfaction of OHCD."

C. 1992 ORDER

"2. Petitioner shall afford lot purchasers public access from the subject property to Queen Kaahumanu Highway and to Mamalohoa 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 Hawaii. 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 guarantees, 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 Hawaii 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 of 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.”

#### IV. OPSD’S REVIEW AND COMMENTS

In its Sixth Extension Motion and Supplemental Memoranda, Petitioner made certain representations and provided the status of Phase I of the petition area. Below are OPSD’s review and comments.

##### A. Changes to the Master Plan

Petitioner’s current plan contains many revisions from the original plan proposed under the 1983 Order, including a reduction in number of residential units. Between the original plan and the current plan, the total number of residential units proposed is 192 fewer residential units. The original plan proposed a total of 1,433 residential units. Petitioner’s current plan provides for a total of 1,141 residential units plus 100 affordable units. The table on Page 12 of the First Memo indicates that Phase I will contain 521 units plus the affordable housing development of 100 units for a total of 621 units and Phase II will contain 620 units. Thus, the total number of residential units proposed for both Phases I and II is 1,241, including the affordable units.

Petitioner provides the following reasons for reducing the number of residential units:

- a. Petitioner conducted a topographic survey of the petition area, which revealed significant slopes that affected the detailed grading plans and limited the proposed number of units on the sloped areas.
- b. The reduced number of units will reduce the quantity of necessary construction materials, which are costly and difficult to procure.
- c. The Petitioner enlarged and better incorporated/preserved the archaeological areas and historic trail site into Phase I of the petition area.
- d. The County required that the mid-level roadway, or Holo Holo Street, needed to be re-aligned and significantly redesigned to accommodate the affordable housing site.

OPSD recognizes that the plans associated with the petition area have changed but does not believe that an amendment is necessary to reflect those changes for the following reasons:

- a. The major components of this project have not changed. It continues to involve the production of much needed housing, including affordable housing, and provides the necessary infrastructure to support the housing. It creates green spaces for active and

- passive recreation, and other amenities for future residents and neighbors. It includes a street network with more access to adjoining parcels than originally proposed.
- b. The changes resulting from concerns that arose from the topographic survey appear to be reasonable. While the production of housing is necessary, the current proposal has been reasonably revised to consider the site's topographic challenges. The reduction of units will also have a lesser impact on County services and roads.
  - c. Certain changes were the result of accommodation of County requests, such as the realignment of Holo Holo Street.
  - d. The current plan accommodates several new archaeological preserves and trails within Phase I of the development. These preserves also appear to significantly increase the amount of green space within the proposed development.

OPSD is concerned, however, 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, and not 100, as Petitioner proposes. Petitioner proposes donating land in Phase 2 for affordable housing; however, OPSD recommends addressing this matter when the petition for Phase 2 is heard.

#### Petitioner's Request for a 10-Year Time Extension

The representation made to the LUC when it first granted the district boundary amendment for this project was that Phase I would be completed within five years. Since that time, five extensions have been granted and 40 years have passed, yet no housing construction has occurred. While there appear to be good reasons for this delay and significant progress has been made, 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.

Petitioner represented that it has received all approvals from the County needed to construct subdivision improvements for the first 46 lots. Also, that the Hawaii Island



Community Development Corporation (“HICDC”) has all the approvals needed to construct the proposed 100 affordable rental units. However, Petitioner states that construction of the market-rate units in the petition area will not commence until the County completes construction of the wastewater transmission line, which is expected to be completed in mid-2024 according to page 15 of the First Memo. Petitioner represents that construction will commence within one year of the wastewater line’s completion. Based on these representations, it is reasonable to expect that home construction will be underway or completed within three years.

B. Petitioner’s Compliance with the Conditions

Petitioner represented the following relating to the conditions:

- a. Condition 1 required affordable housing on TMK parcel 32. This will be provided in Phase I, by agreement with HICDC.
- b. Condition 2 required the participation of the Petitioner in the construction of Hina Lani Street. Petitioner represents they have completed construction of this Street.
- c. Condition 3 required that Petitioner dedicate sufficient land to State and the County for the provision of necessary public facilities. Petitioner represents that they have met and are meeting this requirement.
- d. Condition 4 requires the submission of annual reports to the LUC. Petitioner represents that they have met and will meet this requirement.
- e. Conditions 5 refers to the release of conditions. Petitioner represents that they have not requested the release of any conditions.
- f. Condition 6 refers to substantial compliance. Petitioner represents that they will develop the Petition Area in substantial compliance with representations made to the LUC.

Most of the conditions that were included in the requirement for substantial completion of Phase I have been satisfied. These included partially satisfying Condition A for affordable housing, satisfaction of Conditions D and E to the extent possible, and full satisfaction of Conditions B and C for access to Queen Kaahumanu Highway.

V. OPSD RECOMMENDATION

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.

OPSD finds that Petitioner has in part met the conditions and their representations made to the LUC throughout the forty-year period between the initial approval of the reclassification and the Petitioner's current request. Although certain components of the initial plan have changed, the project still involves the production of housing in an area where housing is needed and appropriate. An amendment of the original proposal is not needed because the current plan is reasonable, given the various studies that have been conducted, which include archaeological surveys, topographic, grading and planning studies, and because the County is in support of the plan.

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. The OPSD also recommends that the Phase II application for redistricting contain a proposal for the production of affordable housing.

Finally, OPSD recommends that the Phase II application comply with the State and County's policies, regulations, and rules pertaining to land development, including, for example, but not limited, conformity with current planning documents and subdivision design standards.

DATED: Honolulu, Hawaii, August 21, 2023.

OFFICE OF PLANNING AND  
SUSTAINABLE DEVELOPMENT  
STATE OF HAWAII

*Mary Alice Evans*

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MARY ALICE EVANS  
INTERIM DIRECTOR

BEFORE THE LAND USE  
COMMISSION OF THE STATE  
OF HAWAII



In the Matter of the Petition of	)	DOCKET NO. A81-525
	)	
Y-O LIMITED PARTNERSHIP	)	CERTIFICATE OF SERVICE
	)	
	)	
	)	
	)	
To Amend the Agricultural Land Use	)	
District Boundary into the Urban Land Use	)	
District for Approximately 408.719 Acres of	)	
Land at Kaloko and Kohanaiki, North Kona,	)	
Hawaii, TMK Nos.: (3) 7-3-09: 19, 20, and	)	
57 to 62.	)	
	)	
	—)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by either hand delivery, depositing the same in the U.S. Postal Service by regular mail, or by electronic mail.

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DATED: Honolulu, Hawaii, August 21, 2023.

OFFICE OF PLANNING AND  
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STATE OF HAWAII

*Mary Alice Evans*

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