

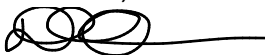
DOCKET NO. A81-525
Y-O Limited

**MOTION TO
RECONSIDER**

LUC's 2023 Decision and Order Denying
Petitioner's 2022 Motion for Extension of Time

STAFF REPORT

Hearing
November 16, 2023



Daniel E. Orodenker, Executive Officer

Submitted: November 9, 2023

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1. EXPLANATION OF THE PROCEEDING

The proceeding before the Land Use Commission (“Commission”) is a Motion to Reconsider The Commission’s Decision and Order issued on August 5, 2023, denying Petitioner’s Motion for an order further amending the Decision and Order issued on January 19, 1983, to allow for an extension of time to apply for the redistricting of Phase II, filed timely by RCFC KALOKO HEIGHTS, LLC, a Delaware limited liability company (“Petitioner”), on August 11, 2023.

Pursuant to HAR §15-15-84 Reconsideration of decision

A Motion for Reconsideration shall:

- Be filed within seven (7) calendar days after issuance of the Commission’s D&O¹;
- Clearly state that it’s a motion for reconsideration; and,
- Specifically state the grounds on which the decision or order is unreasonable, unlawful, or erroneous.

Definitions:²

“Unreasonable”

Irrational; foolish; unwise; absurd; silly; preposterous; senseless; stupid. Not reasonable, immoderate; exorbitant. Capricious; arbitrary; confiscatory.

“Unlawful”

That which is contrary to, prohibited, or unauthorized by law. That which is illegal; not lawful. The acting contrary to, or in defiance of the law; disobeying or disregarding the law. While not necessarily implying the element of criminality, it is broad enough to include it.

“Erroneous” – involving error.

Error – A mistaken judgement or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law. Such a mistaken or false conception or application of the law to the facts of a cause as will furnish grounds for a review of the proceedings upon a writ of error.

¹ The Decision and Order in this matter was issued on August 5, 2023. The seven (7) day requirement filing deadline of August 14, 2023 was determined.

² Black’s Law Dictionary, Revised 4th Addition

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. Petitioner has the burden to show good cause for the request and a preponderance of 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.

Should the Commission deny Petitioner’s Motion to Reconsider, the Petitioner will be able to seek redress of the decision with the court.

2. BACKGROUND INFORMATION

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

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 Redistricting, 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 20th, 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, 2023, the LUC Received [Petitioner's Reply](#) Memorandum to OPSD's Response to Motion; Declaration of Mark Meyer; COS

On April 5, 2023, 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.

On April 10, 2023, the LUC received Petitioner's Fourth Supplemental Memorandum in Support of Motion for Extension of Time, Declaration of William W.L. Yuen, Exhibit List, Exhibit 44, and COS.

On April 10, 2023, the LUC received public testimony from the following: Kaloko-Honokohau National Historic Park, Isaac "Paka" Harp, and Tanya Souza.

On April 10, 2023, the LUC provided a signed Staff Report for public review at its office and posted to its website.

On April 10, 2023, the LUC received Petitioner's Fifth Supplemental Memorandum in Support of Motion for Extension of Time, Exhibit List, Exhibit 45, and COS.

On April 11, 2023, the LUC received public testimony from the following: Antu Harvey.

On April 11, 2023, the LUC received Stipulation Regarding Petitioner's Motion for Extension of Time to Apply for Redistricting of Phase II, and COS.

On April 12, 2023, the LUC received Petitioner's Powerpoint presentation used at LUC meeting on April 12, 2023.

On April 12, 2023, the LUC received public testimony from the following: Janice Palma Glennie, and Steve Holmes.

On August 5, 2023, the LUC issued its Decision and Order Denying Motion for Time Extension electronically to all parties.

On August 7, 2023, the LUC mailed its Decision and Order Denying Motion for Time Extension to all parties.

On August 11, 2023, the LUC received Petitioner’s Motion for Reconsideration of Decision and Order Denying Motion for Extension of Time to Apply for Redistricting of Phase II (“Motion to Reconsider”); Memorandum in Support of Motion; Declaration of Richard M. Crum; Exhibit “A”, and COS.

On August 22, 2023, the LUC received OPSD’s Response to Petitioner’s Motion to Reconsider; and COS.

SUMMARY OF PETITIONER’S MOTION TO RECONSIDER

The Petitioner has filed the following documents in support of their position. These are summarized below and available via the link to the electronic document on the LUC website:

[Petitioner’s Motion to Reconsider](#) (pgs. 1-2)

Memorandum in Support of Motion (pgs. 3-18)

Declaration of Richard M. Crum (pgs. 19-20)

Exhibit A – Copy of July 30, 2021 Report from the County of Hawai`i, Department of Environmental Management (“DEM”) addressed to the Hawai`i County Council regarding Petitioner’s construction of a sewer line and related improvements. (pgs. 21-116)

Certificate of Service (pgs. 117-118)

Petitioner filed its Motion to Reconsider within the seven-calendar day requirement under HAR §15-15-8. The LUC Decision and Order Denying Petitioner’s Motion to Extend was filed on August 5, 2023 and Petitioner filed its Motion to Reconsider on August 11, 2023. The Motion to Reconsider clearly stated its purpose and requested a hearing on its motion. The grounds for the Motion to Reconsider are stated in Petitioner’s Memorandum in Support of Motion pgs. 3-18).

Petitioner’s Memorandum in Support of Motion provides the following arguments:

- The Commission is not the appropriate agency to determine whether a previous environmental assessment for the sewer line was sufficient. The County of Hawai`i, DEM, had previously determined that an environmental assessment satisfied HRS, 343.
- Petitioner’s request (in its Motion to Extend) was not an “action” that would require the Commission to conduct an analysis mandated under *Ka Pa`akai O Ka`Aina v. Land Use Comm’n, State of Hawai`i*, 94 Haw. 31, 7 P.3d. 1068, (2000), as amended (Jan. 18, 2001)(“Ka Pa`akai”).
- Petitioner would reassess the Project’s compliance with HRS Chapter 343 when it seeks reclassification of Phase II lands. At that time, Petitioner would

conduct an EA and any other necessary studies for Phase II lands. Petitioner states that it would be unreasonable and erroneous not to reconsider the Commission’s decision in light of Petitioner’s willingness to comply with HRS Chapter 343 requirements if they may be applicable to Phase II of their Project in the future.

- The Commission should reconsider and allow Petitioner an extension of time by requiring Petitioner to prepare and submit any required environmental compliance studies prior to submitting a petition to reclassify Phase II lands.

SUMMARY OF OPSD POSITION STATEMENT

The Office of Planning and Sustainable Development (“OPSD”) supported partial approval of Petitioner’s Motion to Extend with revisions and recommendations. OPSD recommended 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, instead of the ten years being requested by Petitioner.

OPSD now supports Petitioner’s request in the Motion to Reconsider.

OPSD Points in Support of Petitioner’s Motion to Reconsider

- HRS Chapter 343 review was not triggered or required by the LUC for the original Petition in 1981. At that time, Petitioner represented that wastewater from the Project would be handled either by cesspools or on-site wastewater treatment facility. No use of County lands was contemplated. (OPSD Response to Motion to Reconsider, pgs. 3-4)
- A Motion for Time Extension is not a “trigger” for an HRS Chapter 343 review. (OPSD Response to Motion to Reconsider, pg. 3, para. 6; and pg. 4, para 4)
- The method of sewage disposal changed, and new cesspools no longer allowed by the County. Also, Petitioner donated lands (10.755 acres) to a non-profit affordable housing developer in order to meet its affordable housing condition. Petitioner proposed constructing a wastewater transmission line to connect to a County wastewater facility. (OPSD Response to Motion to Reconsider, pg. 4, para. 2)
- Construction of the wastewater line and affordable housing project both triggered HRS Chapter 343 review. A Final Environmental Assessment (FEA) was prepared and accepted by the State HHFDC in 2019 and deemed sufficient by the County’s Department of Environmental Management (“DEM”). An MOA between the County DEM and the affordable housing developer confirms that the wastewater line would service both the affordable housing project and the larger Petition area. OPSD Response to Motion to Reconsider, pg. 4, para. 3)
- A Cultural Impact Assessment (“CIA”) was conducted as part of the 2019 FEA. The CIA was centered on the affordable housing project area (10.755 acres out of the overall Projects 408.719 acres). OPSD believes that archaeological and cultural

impact concerns have been adequately addressed for both the affordable housing and the overall Project's Phase I. (OPSD Response to Motion to Reconsider, pg. 5, para. 1 and 2)

- OPSD agrees with Petitioner that a Motion for Extension of Time is not a substantive action requiring the LUC to make a determination consistent with the Ka Pa'akai decision. OPSD does agree that such a determination would be required before the LUC could decide on a motion to reclassify Petitioner's Phase II lands. (OPSD Response to Motion to Reconsider, pg. 5, para. 3)
- OPSD recognizes that the plans associated with the Petition Area have changed but does not believe an amendment is necessary to reflect those changes. (OPSD Response to Motion to Reconsider, pg. 7, para. 4). Of concern is the reduction in the number of residential units that leads to fewer affordable units. OPSD recommends addressing this matter when a petition (to reclassify) Phase II lands is heard. (OPSD Response to Motion to Reconsider, pg. 8, para. 2)

3. SUMMARY OF COUNTY POSITION STATEMENT

The County of Hawai'i Department of Planning has not submitted a position on the Petitioner's Motion for Reconsideration.

4. STAFF NOTES

Pursuant to HAR §15-15-84 Reconsideration of decision, the burden of proof is on the Movant (Petitioner) to provide specific examples and legal arguments for the grounds on which the decision or order is unreasonable, unlawful, or erroneous.

Petitioner's Memorandum in Support of its Motion (to Reconsider) does not provide specific examples tied to Findings of Fact or Conclusions of Law within the LUC's 2023 Decision and Order Denying Motion for Time Extension. Petitioner's arguments are general assertions not tied to identifying specifics directly contained in the LUC's 2023 D&O.

The only example provided is a reference to Conclusion of Law para. 14, which cites *Sierra Club v. Office of Planning* in support of a conclusion that a HEPA analysis is required for an entire development at the reclassification stage" where development proposed use of State land. Petitioner's point is that their request was a Motion for Extension of Time and not a reclassification; therefore, the LUC was in error to suggest that a HRS Chapter 343 review might be required.

Petitioner's submittal is primarily an attempt to reargue its positions in the Motion for Extension of Time rather than a well-reasoned legal argument pointing out the grounds upon which the LUC's 2023 D&O denying Petitioner's Motion for Extension of Time

was based.

OPSD's submittal supports the Petitioner's position without providing specific legal arguments that identify portions within the LUC's 2023 D&O that are "...unreasonable, unlawful, or erroneous."

The Commission should determine if the Petitioner or other parties have provided good cause and sufficient legal grounds to reconsider the LUC's 2023 D&O denying Petitioner's Motion for Extension of Time.

A denial of the Motion for Reconsideration would be a final determination allowing Petitioner to seek any further legal redress with the court.

A denial of the Motion for Reconsideration would not stop the Petitioner's project from moving forward. The LUC's 2023 D&O denying Petitioner's Motion for Extension of Time provided specific concerns that the Petitioner needs to address before coming back to the LUC with any further requests to extend the time to reclassify Phase II of the Project.

Approval of the Motion to Reconsider would require the LUC to hold further hearings at which time Petitioner and other parties would have an opportunity to reargue their Motion for Extension of Time.