



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

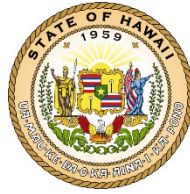
In the Matter of the Petition of	)	DOCKET NO. A81-525
	)	
Y-O LIMITED PARTNERSHIP,	)	
	)	
To Amend the Agricultural Land Use District	)	FINDINGS OF FACT, CONCLUSIONS OF
Boundary to the Urban Land Use District for	)	LAW, DECISION AND ORDER DENYING
Approximately 408.719 Acres of Land at	)	THE 2023 MOTION FOR
Kaloko and Kohanaiki, North Kona, Hawai'i,	)	RECONSIDERATION, AND CERTIFICATE
State of Hawai'i. TMK Nos.: (3) 7-3-09:19,	)	OF SERVICE
20 and 57 to 62.	)	
_____	)	

**FINDINGS OF FACT.**  
**CONCLUSIONS OF LAW, DECISION AND ORDER,**  
**AND**  
**CERTIFICATE OF SERVICE**

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.

May 4, 2024

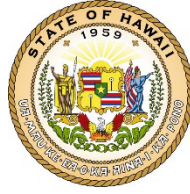
BY   
\_\_\_\_\_  
DANIEL E. ORODENKER  
Executive Officer



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**FINDINGS OF FACT.**  
**CONCLUSIONS OF LAW, DECISION AND ORDER DENYING THE 2023 MOTION**  
**FOR RECONSIDERATION**

Successor Petitioner RCFC Kaloko Heights, LLC, a Delaware limited liability company, Kaloko Heights B1A Holdings, LLC, a Delaware limited liability company, and Kaloko Heights Investors, LLC, a Delaware limited liability company (“Petitioner”) filed a Motion for Reconsideration of Decision and Order Denying Motion for Extension of Time to Apply for Redistricting of Phase II. The Motion requested the Land Use Commission of the State of Hawai'i (the 'Commission" or “LUC”) to reconsider its 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,

the extension of time requested was to January 20, 2033, which is ten years from January 20, 2023.

The Commission, having heard and examined the testimony, evidence, and argument of counsel for the Petitioner and other Parties presented during the hearing, along with the pleadings filed herein, and public testimony received, makes the following Findings of Fact, Conclusions of Law and Decision and Order Denying the 2023 Motion for Reconsideration of the Decision and Order Denying Extension of Time to Apply for Redistricting of Phase II.

### **PROCEDURAL HISTORY**

1. On August 5, 2023, the 2023 Order Denying the Motion for Time Extension was signed, and the following Monday, August 7, 2023, the Order was sent to the parties, and posted on the Land Use Commission's website.
2. On August 11, 2023, the Petitioner filed the Motion for Reconsideration of Decision and Order Denying Motion for Extension of Time to Apply for Redistricting of Phase II; Memo in Support of Motion; Declaration of Richard M. Crum; Exhibit "A"; and Certificate of Service ("COS").
3. On August 22, 2023, the Office of Planning and Sustainable Development ("OPSD") filed their Response to Petitioner's Motion for Reconsideration of the Decision and Order Denying Motion for Extension of Time to Apply for Redistricting of Phase II, and COS.
4. On November 7, 2023, The Land Use Commission ("LUC") mailed and emailed the Agenda for the November 16, 2023, hearing to parties, and Commission's Statewide and Hawai'i circulation lists.

5. On November 13, 2023, the LUC made the Staff Report publicly available at the Land Use Commission Office and on the LUC website for the November 16 hearing.
6. On November 13, 2023, the Land Use Commission received one public comment from Council Member Holeka Inaba.
7. On November 15, 2023, the Land Use Commission received five public comments from Antu Harvey (two submissions: email and public testimony form), Maki Morinoue (two submissions: email and public testimony form), Richard Bodien, Tanya Souza, and The State Department of Land and Natural Resources Hawai'i State Aha Moku Council.
8. On November 15, 2023, the County of Hawai'i filed a letter of no objection.
9. On November 16, 2023, the Commission held an in-person hearing on the Petitioner's 2023 Motion for Reconsideration of Decision and Order Denying Motion for Extension of Time to Apply for Redistricting of Phase II.
10. During the first opportunity for public testimony eleven members of the public provided oral testimony in support of upholding the Commissions previous decision on the matter, testifiers included; Clare Loprinzi, Kimberly Crawford, Lily Salinas, Loke Aloua, Chuck Flaherty, Kilihea Inaba, Keliyah Kimitete, Janice Palma Glennie, Maki Morinoue, Ashley Obrey, and Cindy Freitas.
11. Petitioner Mark Mayer and Counsel commenced with its case in-chief, providing testimony in support of Petitioners Motion.

12. The County witness, Hawai'i County Planning Department Deputy Director Jeff Darrow<sup>1</sup>, and Deputy Corporation Counsel Michelle Ahn, provided testimony in support of the Petitioner's Motion. OPSD witness Land Division Chief Katia Balassiano and Counsel Allison Kato provided testimony in support of the Petitioners Motion, but argued for partial approval of Petitioner's Motion for Time Extension with modification, specifically a shorter time extension of three years.
13. Commissioners questioned the Parties on their arguments. Particular areas of concern were the legal standards for reconsideration, identification of the specific contested Findings of Fact and Conclusions of Law in the 2023 Decision and Order, impacts on Phase I development, conditions in the 1983 Original Decision and Order, and the applicability of a Ka Pa'akai analysis.
14. Following discussion, the parties provided closing arguments on Petitioner's Motion for Extension of Time to Apply for Redistricting of Phase II.
15. During the second opportunity for public testimony, three members of the public provided oral testimony Chuck Flaherty, Kimberly Crawford, and Ruth Aloua testified in support of upholding the Commissions previous decision on the matter.
16. Thereafter, the Commission entered deliberation, and a motion was made and seconded to approve the Petitioners Motion to Reconsider, the motion failed with 2 ayes and 7 nays.
17. A second motion was made and seconded to deny the Petitioners Motion to Reconsider, and the motion passed with 7 ayes and 2 nays.

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<sup>1</sup> Hawai'i County Planning Director Zendo Kern was present at the beginning of the hearing but left after the lunch break, and Deputy Director Jeff Darrow presented on behalf of the County.

18. The Commission, in discussion on its motion to deny Petitioner’s Motion for Reconsideration, determined that the Petitioner failed to meet its burden of proof to support the Motion and failed to show or identify that the Decision and Order issued on August 5, 2023 was unreasonable, unlawful, or erroneous pursuant to Hawai‘i Administrative Rules (“HAR”) §15-15-84(b).
19. On November 17, 2023, the LUC received written public testimony from Loke Aloua.

**OFFICE OF PLANNING AND SUSTAINABLE DEVELOPMENT (“OPSD”) POSITION**

20. OPSD’s Response to Petitioner's Motion for Reconsideration of Decision and Order Denying Motion for Extension of Time to Apply for Redistricting of Phase II, was filed on August 22, 2023 [OPSD filing, 08/22/2023].
21. The Office of Planning and Sustainable Development stated their position has not changed from the previous hearing. OPSD was in support of the Petitioner’s Motion to Reconsider, and recommended revisions of the Petitioners Motion, and supported the approval with revisions, of Petitioners 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 [Tr 11/16/23; pg.143-144].
22. OPSD’s written and oral positions did not address the standards of review appropriate as stated in HRS §91-14(g) and HAR §15-15-84(b) for the motion to reconsider.

**COUNTY OF HAWAI‘I DEPARTMENT OF PLANNING POSITION**

23. The County of Hawai‘i filed their response to Petitioner’s Motion for Reconsideration of Decision and Order Denying Motion for Extension of Time to Apply for Redistricting of

Phase II on November 15, 2023, which stated that the County of Hawai‘i had no objections to the Petitioner’s Motion [County filing, 11/15/2023].

24. During the hearing Deputy Director Jeff Darrow, stated that the County of Hawai‘i is in support of Petitioner's request for a reconsideration of the motion [Tr 11/16/23; pg.115].

25. The County of Hawai‘i’s written, and oral positions did not address the standards of review appropriate as stated in HRS §91-14(g) and HAR §15-15-84(b) for the motion to reconsider.

26. To the extent these Findings of Fact contain Conclusions of Law, they shall be so considered and construed.

## **FINDINGS BY THE COMMISSION<sup>2</sup>**

27. Pursuant to Hawai‘i Administrative Rules §15-15-84, the Motion was filed six days after the issuance of the Decision and Order, and the Commission found that the Petitioner timely filed the Motion to Reconsider the Commission’s Decision and Order Denying 2022 Motion for Extension of Time to Apply for Redistricting of Phase II.

28. Petitioner contested Conclusion of Law numbers 15 and 19 through 23, but at the time of the hearing Petitioner was unsure of which Findings of Fact were being contested, so under questioning the Commission led Petitioner though the Findings of Fact of the 2023 Decision and Order Denying the Extension of Time [Tr 11/16/23; pg.82-84].

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<sup>2</sup> Conclusions of Law and Findings of Fact referenced in this section are from the 2023 Decision and Order Denying the Extension of Time, unless indicated otherwise.



29. Petitioner agreed and the Commission found that Finding of Fact number 40 was not erroneous and did not provide evidence of error or support reconsideration [Tr 11/16/23; pg.86-87].
30. Petitioner agreed and the Commission found that Finding of Fact number 41 was not erroneous and did not provide evidence of error or support reconsideration [Tr 11/16/23; pg. 87].
31. Petitioner agreed and the Commission found that Finding of Fact number 42 was not erroneous and did not provide evidence of error or support reconsideration [Tr 11/16/23; pg. 87-88].
32. Petitioner agreed and the Commission found that Finding of Fact number 43 was not erroneous and did not provide evidence of error or support reconsideration [Tr 11/16/23; pg. 88-89].
33. Petitioner indicated that the highway referenced in Finding of Fact number 44 is a County Highway rather than a State Highway, which is a non-substantive correction. Neither the State nor County commented to provide evidence to support this assertion. Petitioner agreed and the Commission found that apart from this non-substantive correction, Finding of Fact number 44 was not erroneous or misleading in any way and did not support reconsideration [Tr 11/16/23; pg. 90].
34. Petitioner agreed and the Commission found that according to HRS §343-5(a)(1) the use of state and county lands or funds trigger an environmental assessment [Tr 11/16/23; pg. 93-94].

35. Petitioner agreed and the Commission found that the Supreme Court concluded that for an EIS to meet its intended purpose, it must address a particular project at a given location, based on an explicit or implicit timeframe, at the earliest possible time [Tr 11/16/23; pg. 96-97]

36. Regarding the Commissions Ka Pa‘akai analysis findings and conclusions of law (“COL”) (COL 17,18,21, and 23<sup>3</sup>), the Petitioner agreed and the Commission found that a complete Ka Pa‘akai analysis had never been conducted as part of the redistricting process and the Petitioner did not challenge the Commission’s findings and conclusions of law relating to a Ka Pa‘akai analysis [Tr 11/16/23; pg. 102].

## **RULINGS ON FINDINGS OF FACT**

Any of the findings of fact submitted by Petitioner or other parties not already ruled upon by the Commission by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

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 or construed as a finding of fact.

## **CONCLUSIONS OF LAW**

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<sup>3</sup> Conclusions of Law and Findings of Fact referenced in this section are from the 2023 Decision and Order Denying the Extension of Time pages 14-17.

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 §15-15-84:
  - a) A motion for reconsideration shall be filed with the commission within seven calendar days after issuance of the commission's written decision and order. The motion for reconsideration shall clearly specify that the motion is for reconsideration.
  - b) The motion for reconsideration shall state specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.

- c) In no event will the commission consider any motion for reconsideration on any petition after the period within which the commission is required to act on the petition.
5. 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.”
  6. 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.”
  7. HRS §343-5(a)(1) Applicability of Requirements, provides that an environmental assessment shall be required for actions that: propose the use of state or county lands or the use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or funds to be used for the acquisition of unimproved real property; provided that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies; provided further that an environmental assessment for proposed uses under section 205-2(d)(11) or 205-4.5(a)(13) shall only be required pursuant to section 205-5(b)
  8. Article XI, Section 1, of the Hawai‘i State Constitution requires the State to conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals and energy sources and to promote the development and utilization of these

resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

9. Article XI, Section 1, of the Hawai‘i State Constitution provides that all public natural resources are held in trust by the State for the public benefit, and the State should make appropriate assessments and require reasonable measures to protect public natural resources, while applying a higher level of scrutiny where public natural resources are used for economic gain [Kaua‘i Springs, Inc. v. Planning Comm’n of Cnty. of Kaua‘i, 133 Hawai‘i 141, 324 P.3d 951 (2014)].
10. Article XI, Section 7, of the Hawai‘i State Constitution requires that the State has an obligation to protect, control and regulate the use of Hawai‘i’s water resources for the benefit of its people.
11. The Hawai‘i Supreme Court has required a comprehensive Chapter 343 analysis for an entire project where there is a use of State or county lands, and where utility or infrastructure connections are made with State or county facilities. [Umberger v. Department of Land and Natural Resources, 140 Hawai‘i 500, 403 P.3d 277 (2017)]<sup>4</sup>; [Sierra Club v. Office of Planning, State of Hawai‘i, 109 Hawai‘i 411, 126 P.3d 1098 (2006)]<sup>5</sup>; [Protection of North Kohala Coastline v. County of Hawai‘i, 91 Hawai‘i 94,

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<sup>4</sup> “...use of State land includes permitting program for aquarium fish collection in State marine conservation district”.

<sup>5</sup> Chapter 343 analysis for entire project required at reclassification stage and the development proposed a use of State land because it involved tunnelling under State land.

103, 979 P.2d 1120, 1129 (1999)]<sup>6</sup>;*[Kahana Sunset Owners Association v. County of Maui, 86 Hawai‘i 66, 74, 947 P.2d 378, 386 (1997)]*<sup>7</sup>.

12. Based on the facts of this case, including the use of State funds and the use of State lands, a Chapter 343 analysis for the entire project is required by Hawai‘i law as part of the redistricting or reclassification process, which includes considerations and approvals of additional phases of a project. *[Unite Here! Loc. 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 231 P.3d 423 (Hawai‘i 2010); Citizens for Prot. Of N. Kohala Coastline v. Cnty. of Hawai‘i, 91 Haw. 94, 979 P.2d 1120 (Hawai‘i 1999)]*
13. Article XII, Section 7, of the Hawai‘i State Constitution requires the State to protect Native Hawaiian traditional and customary rights. The State of Hawai‘i and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised Native Hawaiian rights to the extent feasible *[Public Access Shoreline Hawai‘i v. Hawai‘i Cnty. Planning Comm’n, 79 Hawai‘i 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995)]*.
14. The Hawai‘i Supreme Court has recognized an affirmative duty on State agencies to preserve and protect traditional and customary native Hawaiian rights, and the State and its agencies have “the power to protect these rights and to prevent any interference with the exercise of these rights”. In addition, “state agencies such as the LUC may not act without independently considering the effect of their actions on Hawaiian traditions and

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<sup>6</sup> Chapter 343 analysis required where development involved construction of two underpasses under a State highway.

<sup>7</sup> Chapter 343 analysis required for entire project where proposed drainage system would run under State land.

practices” [Ka Pa‘akai O Ka‘Aina v. Land Use Commission, State of Hawai‘i, 94 Hawai‘i 31, 7 P.3d 1068 (2000)]<sup>8</sup>.

15. In actions which impact Native Hawaiian rights or practices practices, the LUC has the duty to determine:

- a) The identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary Native Hawaiian rights are exercised in the Petition area;
- b) The extent to which those resources – including traditional and customary Native Hawaiian rights - will be affected or impaired by the proposed action;  
and
- c) The feasible action, if any, to be taken by the LUC to reasonably protect Native Hawaiian rights if they are found to exist.

[*Ka Pa ‘akai*, 94 Hawai‘i at 47, P.3d at 1084.]

16. The efforts made by the Applicant to ascertain whether traditional and customary rights are being practiced on the Property were not sufficient to allow the LUC to determine the identity and scope of valued cultural, historical, or natural resources in the Property, including the extent to which traditional and customary Native Hawaiian rights are exercised in the petition area.

17. Without an adequate identification of valued cultural, historical, or natural resources on the Property, the LUC is unable to make further determinations regarding the extent to

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<sup>8</sup> “... state agencies such as the LUC may not act without independently considering the effect of their actions on Hawaiian traditions and practices”.

which those resources will be affected or impaired by the proposed actions and the feasible action, if any, to be taken by the Commission to reasonably protect Native Hawaiian rights if they are found to exist.

18. The Commission concludes that a Ka Pa‘akai analysis is applicable to the Petitioner’s Motion for Extension of Time and should be undertaken prior to the Commission taking affirmative action on the Motion [Tr. 11/16/2023; pg. 153-154] [Ka Pa‘akai O Ka‘Aina v. Land Use Comm’n, State of Hawai‘i, 94 Hawai‘i 31, 7 P.3d 1068 (2000)].
19. The LUC concludes that its original decision and findings to deny the motion to amend the 1983 Order is consistent with its duties arising under Article XI, Section 1, Article XI, Section 3, Article XI, Section 7 and Article XII, Section 7 of the Hawai‘i State Constitution, based on the records and files in this matter and the factual findings above.
20. Based upon the record and files herein and the findings set forth above, the Commission concludes that Petitioner has failed to meet its burden of proof and there is not a preponderance of evidence in the record or good cause to support the Motion To Reconsider.

## **DECISION AND ORDER**

The LUC, having duly considered the written and oral arguments presented by the Petitioner, Hawai‘i County, the Office of Planning and Sustainable Development, and members of the public, and a motion having been made and seconded at the meeting on November 16, 2023 held at the West Hawai‘i Civic Center, Community Meeting Hale, Building G, 74-5044



Ane Keohokālole Highway, Kailua-Kona, Hawai‘i 96740, and the motion having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motion,

HEREBY ORDERS that the Motion for Reconsideration be DENIED for the following reasons:

Pursuant to Hawai‘i Revised Statute (“HRS”) Chapter 205 and the Commission Rules under Hawai‘i Administrative Rule (“HAR”) chapter 15-15, upon consideration of the Petitioners 2023 Motion to Reconsider under HAR §15-15-84 and based upon the preponderance of the evidence, the Commission determined and concludes that the motion for reconsideration being requested by the Petitioner failed to show that the Decision and Order issued on August 5, 2023 was unreasonable, unlawful, or erroneous, or that the Decision and Order issued on August 5, 2023, is inconsistent with the policies and criteria established pursuant to HRS §205 and HAR §15-15-84.

Efforts made by the Applicant to ascertain whether traditional and customary rights are being practiced on the Property were not sufficient to allow the LUC to determine the identity and scope of valued cultural, historical, or natural resources in the Property, including the extent to which traditional and customary Native Hawaiian rights are exercised in the Petition Area.

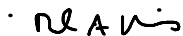
The Commission reaffirms that the Decision and Order issued on August 5, 2023, denying Petitioner's Motion for an extension of time to apply for the redistricting of Phase II, is affirmed.

ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER on May 4, 2024. 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 day of May 4, 2024, per motion on November 16, 2023.

APPROVED AS TO FORM



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DANIEL MORRIS  
Deputy Attorney General

LAND USE COMMISSION  
STATE OF HAWAI'I



\_\_\_\_\_  
DAN GIOVANNI  
Chairperson and Commissioner

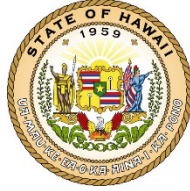
Filed and effective on:

May 4, 2024

Certified by:



\_\_\_\_\_  
DANIEL E. ORODENKER  
Executive Officer



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DENYING THE 2023 MOTION FOR RECONSIDERATION was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

HAND            Mary Alice Evans, Acting Director  
DEL.:            Office of Planning and Sustainable Development  
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Dated May 4, 2024  
Honolulu, Hawai'i.



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DANIEL E. ORODENKER  
Executive Office