

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of)	DOCKET NO. A99-729
)	
THE NEWTON FAMILY LIMITED)	FINDINGS OF FACT,
PARTNERSHIP, a Hawai'i limited)	CONCLUSIONS OF LAW, AND
partnership)	DECISION AND ORDER
)	
To Amend the Conservation Land Use)	
District Boundary into the Agricultural Land))	
Use District for Approximately 885.40 Acres))	
of Land at Kukuau, South Hilo, Hawai'i,)	
TMK No: 2-4-08: por. 33)	
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FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER

The Newton Family Limited Partnership, a Hawai'i limited partnership ("Petitioner"), filed a Petition to Amend the Land Use District Boundary of the Conservation District in Order to Reclassify Certain Land from Conservation to Agricultural ("Petition") on August 31, 1999, pursuant to chapter 205, Hawai'i Revised Statutes ("HRS"), and chapter 15-15, Hawai'i Administrative Rules ("HAR"), to amend the Conservation Land Use District Boundary into the Agricultural Land Use District for approximately 885.40 acres of land at Kukuau, South Hilo, Hawai'i, identified as Tax Map Key No: 2-4-08: por. 33 ("Petition Area") for the development of an agricultural subdivision.

The Land Use Commission ("Commission"), having heard and examined the testimony, evidence, and argument of the parties, both written and oral, presented during the hearing held on August 9, 2001, and having reviewed Petitioner's Proposed Findings of Fact, Conclusions of Law, Decision and Order; the Office of Planning's ("OP") Response to the Petitioner's Draft Proposed Findings of Fact, Conclusions of Law, and Decision and Order; Petitioner's and the County of Hawai'i Planning Department's Stipulation for Proposed Findings of Fact, Conclusions of Law, Decision and Order; Petitioner's Reply to the Office of Planning's Response to the Petitioner's Draft Proposed Findings of Fact, Conclusions of Law, Decision and Order filed on September 14, 2001; and the record herein, hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

PROCEDURAL MATTERS

1. On August 31, 1999, Petitioner filed the Petition, which included a Draft Environmental Assessment ("DEA") as required by section 343-5(a)(7), HRS.
2. Petitioner is a family limited partnership organized in the State of Hawai'i. Its general partners are George N. Newton, Trustee of the Revocable Trust of George N. Newton dated April 5, 1976, and Mary Jo Newton, Trustee of the Revocable Trust of Mary Jo Newton dated April 5, 1976. The limited partners are the four adult

children of George and Mary Jo Newton (collectively, the "Newton Children").

Petitioner's mailing address is P. O. Box 426, Kailua, Hawai'i 96734.

3. On September 23, 1999, the Commission met in Waikapu, Hawai'i, to consider whether the anticipated effects as discussed in Petitioner's DEA to reclassify the Petition Area from the State Land Use Conservation District into the State Land Use Agricultural District constituted a "significant effect" pursuant to chapter 343, HRS. At the meeting, the Commission granted in part and denied in part Petitioner's Motion to Continue Action On Its Petition To Amend the Land Use District Boundary of the Conservation District Lodged on August 31, 1999, filed on September 23, 1999. On October 12, 1999, the Commission issued its written Order.

4. On November 15, 1999, the Petitioner filed a Supplement to the Petition, which included a Supplement to the DEA.

5. On November 17, 1999, the Petitioner filed a Secondary Supplement to the DEA dated November 16, 1999.

6. On November 18, 1999, the Commission took a field trip to the Petition Area.

7. On November 19, 1999, the Commission met in Hilo, Hawai'i, to continue its consideration of Petitioner's DEA. At the meeting, the Commission granted Petitioner's oral request to allow Petitioner additional time to supplement the DEA to

address concerns raised by the Commission and OP. On January 21, 2000, the Commission issued its written Order.

8. On January 21, 2000, Petitioner filed a Third Supplement to the Petition, which included a revision to the DEA dated January 17, 2000.

9. On February 2, 2000, Petitioner filed a Fourth Supplement to the Petition, which included a Fourth Supplement to the DEA dated February 2, 2000.

10. On February 3, 2000, the Commission met in Hilo, Hawai'i, to continue its consideration of Petitioner's DEA. At the meeting, Petitioner filed a Fifth Supplement to the DEA dated February 2, 2000. The Commission requested that Petitioner provide the Commission with further information, including proposed conditions to mitigate potential impacts, to complete the preparation of the DEA, pursuant to section 11-200-9(b)(2), HAR. The Commission, upon its own motion, continued the meeting until such time that a revised and complete DEA was received from Petitioner. On February 18, 2000, the Commission issued its written Order.

11. On November 1, 2000, Petitioner filed an Amended Petition, which included an Amended DEA ("ADEA") dated October 30, 2000.

12. On December 8, 2000, the Commission met in Honolulu, Hawai'i, to continue its consideration of Petitioner's ADEA. At the meeting, the Commission made a preliminary determination of a finding of no significant impact for an environmental assessment. The Commission further required Petitioner to submit the

ADEA with the assurances, clarifications, and other revisions noted and agreed to by Petitioner's counsel at the meeting relating to the size of the proposed project and the proactive measures Petitioner proposed to take to ensure against "significant effects" on the environment in the future. On January 24, 2001, the Commission issued its written Order.

13. On January 25, 2001, Petitioner filed a 1st Amendment to Amended Petition, which included an ADEA dated January 23, 2001. This ADEA reflected the assurances, clarifications, and other revisions previously agreed to by Petitioner's counsel.

14. The ADEA was subject to a 30-day public review and comment period pursuant to section 343-5(c), HRS. The review and comment period ended on March 10, 2001.

15. Petitioner filed a Final Environmental Assessment ("FEA") with the Commission on April 6, 2001.

16. On April 19, 2001, the Commission met in Honolulu, Hawai'i, to consider whether the anticipated effects as discussed in Petitioner's FEA to reclassify the Petition Area from the State Land Use Conservation District into the State Land Use Agricultural District constituted a "significant effect" pursuant to chapter 343, HRS. The Commission determined that the proposed action would not have a "significant effect"

on the environment and therefore did not require an EIS. On June 5, 2001, the Commission issued its written Order.

17. The Commission conducted a prehearing conference regarding the Petition on June 29, 2001, at which time exhibits and lists of witnesses were exchanged by the parties.

18. On June 22, 2001, the County of Hawai`i submitted its Testimony of the County of Hawaii Planning Department in Support of the Petition.

19. On June 25, 2001, OP submitted its Testimony of the Office of Planning in Support of the Petition.

20. The Commission opened the hearing on the Petition on August 9, 2001, in Hilo, Hawai`i, pursuant to notices published in the Honolulu Star-Bulletin and the Hawaii Tribune-Herald on May 23, 2001.

21. No persons appeared to testify as public witnesses, and no written testimonies or letters were submitted.

DESCRIPTION OF THE PETITION AREA

22. The Petition Area is located in the Upper Kukuau area, South Hilo, Hawai`i, and is designated as Tax Map Key No: 2-4-08: por. 33. The Petition Area is approximately 885.40 acres and consists of a portion of an approximately 1,645.823-acre parcel ("Property") of unimproved land. The remaining approximately 760.423 acres of the Property is proposed to remain in the Conservation District ("Remainder Area").

23. The Petition Area is owned by Petitioner in fee simple. There are no ceded lands in the Petition Area.

24. The annual rainfall averages approximately 230 inches.

25. The U.S. Natural Resources Conservation Service identifies the soils on the Petition Area as Keei Series (rKGD), extremely rocky muck. This soil consists of well-drained, thin organic material very dark brown muck up to about 10 inches thick overlying pahoehoe lava bedrock. Permeability is slow, but water moves rapidly through cracks. Runoff is medium and its erosion hazard is slight. This soil is used mostly for pasture. Its Capability Classification is VIIc, non-irrigated, which indicates that the soil, when not irrigated, has very severe limitations that make it unsuitable for cultivation and restrict its use largely to pasture or range, woodland or wildlife.

26. According to the State Department of Agriculture's Agricultural Lands of Importance to the State of Hawaii Map, the Petition Area is unclassified. The Land Study Bureau's overall suitability rating for agricultural purposes classifies the Petition Area as "D" or "Poor," with the exception of a small portion of land at the northeast corner of the Petition Area classified as "E" or "Very Poor."

27. Although the Petition Area is still shown within the Hilo Forest Reserve on the United States Geological Survey maps, it is no longer in the current State forest reserve jurisdiction. The Petition Area was included in the Hilo Forest Reserve under a voluntary 30-year surrender agreement with the State of Hawai'i, formalized in

1948. The Petition Area was subsequently withdrawn from the forest reserve by the State of Hawai'i.

28. The Petition Area has changed over the years from sugarcane production to forestry and grazing.

29. The Petition Area is primarily in forest and heavy shrub vegetation. A modest amount of grazing occurs within the Petition Area by cattle from adjacent lands.

30. The Flood Insurance Rate Map prepared by the Federal Emergency Management Agency designates the Petition Area as Zone X, an area determined to be outside the 500-year flood plain.

31. A 150-foot-wide easement designated for electrical transmission line purposes runs partially along the northern boundary of the Petition Area. This easement serves the Hawaii Electric Light Company, Inc. site, which is located on the makai boundary of the Petition Area.

32. A 40-foot-wide unimproved access easement runs along the Petition Area's entire northern boundary. This easement can be accessed from Wilder Road and services the Petition Area and adjacent mauka subdivisions.

33. Puna Sugar Company, Ltd., formerly known as "Ola`a Sugar Company," is the current holder of a right-of-way for one or more flumes granted by Akana Amelia Richardson in favor of Ola`a Sugar Company by instrument dated

November 5, 1900, recorded in the Bureau of Conveyances of the State of Hawai'i in Liber 212, Page 747, as modified by Quitclaim Deed dated March 31, 1938. The abandoned flume and the dirt road which parallels the route of the flume, commonly referred to as the "Ola`a Flume Road," are located within the Petition Area. The Ola`a Flume Road connects Kaumana Drive and Stainback Highway, and delineates the approximate alignment of the future county secondary arterial. The mauka boundary of the Petition Area also coincides with this route.

PROPOSAL FOR RECLASSIFICATION

34. Petitioner requests reclassification of the Petition Area from the Conservation District to the Agricultural District in order to subdivide the Property into nine parcels, consisting of eight agricultural parcels within the Petition Area, and one large conservation parcel being the Remainder Area. The eight agricultural lots will range in size from approximately 80 acres to 153 acres.

35. Petitioner proposes to distribute five of the agricultural lots to George and Mary Jo Newton, and each of the Newton Children. The three remaining agricultural lots will be sold to non-family members at fair market value as a means of offsetting the cost of the subdivision infrastructure improvements. The Remainder Area will be retained by Petitioner.

36. Structural improvements on the Property would include up to eight residences within the Petition Area, and a possible residence, subject to the approval of the Board of Land and Natural Resources, on the Remainder Area.

37. Agricultural activities in the Petition Area would be for personal and limited commercial use. Potential limited agricultural activities include vegetable gardens, citrus orchards, fruit or nut tree groves, greenhouse plant and flower nurseries, pasture or grazing. No large-scale agricultural production or operations are planned or will be allowed.

38. The proposed subdivision will be accessed by a private road to be constructed along an unimproved easement from Wilder Road, which is located approximately 2,900 feet below the eastern boundary of the Petition Area. Alternate access to the proposed subdivision would require the use and extension of an existing County of Hawai'i Department of Water Supply 20-foot-wide service road.

PETITIONER'S FINANCIAL CAPABILITY
TO UNDERTAKE THE PROPOSED DEVELOPMENT

39. Petitioner owns the Petition Area free of any mortgages or liens.

40. The income received from the sale of three of the eight agricultural lots will be used to offset the construction expense for the infrastructure improvements. These parcels will be sold after the County approves plans for the proposed roadway and utilities, and bonding of the improvements is completed.

STATE AND COUNTY PLANS AND PROGRAMS

41. The Petition Area is designated within the State Land Use Conservation District, as reflected on the Commission's official map, H-61 (Pi'ihonua), and is located in the Resource Subzone.

42. The Hawai'i County General Plan Land Use Pattern Allocation Guide ("LUPAG") Map designates the Petition Area as Conservation, which includes forest and water reserves, natural and scientific preserves, open area and lands within the State Land Use Conservation District. The LUPAG Map designates the area immediately to the north and east of the Petition Area as Orchards, and to the south and west as Conservation. Those areas have been designated as such since the adoption of the 1971 General Plan. Under the current General Plan Revision Program, the Petition Area is proposed to be designated Extensive Agricultural.

43. Land immediately to the northeast of the Petition Area is County-zoned Agricultural (A-10a and A-20a), and land to the southeast is Agricultural (A-20a and A-3a). Land to the south of the Petition Area is in the Upper Waiakea Forest Reserve.

NEED FOR DEVELOPMENT

44. Although the uses proposed for the Petition Area will not directly address affordable housing needs for the general public, they do meet the needs of a

smaller segment of the market by providing affordable opportunities for members of the Newton Family to become homeowners in Hawai'i.

SOCIAL IMPACTS

45. The community surrounding the Petition Area is characteristically country and serene, with large parcels of agricultural lands, open space, forest reserves, and rural residences. The proposed subdivision will be consistent with the type and density of development in the area.

46. Based on the rural and agricultural nature of the proposed subdivision, it is not expected to significantly impact or change the social character of the area.

ECONOMIC IMPACTS

47. The proposed subdivision will involve residential and small-scale agricultural use for which residual sales are expected to be very small. Commercial agricultural use will be limited and is not expected to serve as the primary source of income for the residents.

48. The value of the land is expected to increase after the infrastructure is installed, resulting in increased government revenues from property taxes.

49. The proposed subdivision is not expected to result in any significant adverse economic impacts and will likely generate increased revenues for the State and County governments.

IMPACTS UPON RESOURCES OF THE AREA

Agricultural Resources

50. The proposed subdivision will not have any adverse impact upon agricultural resources or productivity. The reclassification of the Petition Area will allow for limited agricultural activities.

Flora and Fauna

51. The Property supports three kipuka: two in the Petition Area and one in the Remainder Area. The kipuka in the Remainder Area is the largest and most significant.

52. The 'aku'aku (cyanea platyphylla) is the only species of flora listed as a protected species by the U.S. Fish and Wildlife Service ("USFWS") that was located on the Property, and only a single species was found in the Remainder Area. No USFWS protected species were located in the Petition Area, which is dominated by alien species and was used in the past for grazing and possibly logging. In addition, areas in the Petition Area where wetland vegetation indicator species were identified were not large enough to require planning considerations.

53. The proposed improvements will involve clearing of approximately 42 acres (or 5 percent) of the 885.40-acre Petition Area for residences, agricultural activities, and infrastructure and therefore will have an insignificant impact on the Petition Area's vegetation.

54. Various bird and mammal species exist on the Property. Two endemic bird species, the Hawaiian Hawk and the Hawaiian Hoary Bat, were both sighted on the Property. Any further clearing or improvements in the Petition Area is not anticipated to have a significant impact on native or federally protected avian or mammalian species, including the Hawaiian Hawk and the Hawaiian Hoary Bat, given the small amount of clearing and improvements proposed.

Archaeological/Historic Resources

55. Paul H. Rosendahl, Ph.D., Inc. ("PHRI") conducted inspection level field work of the Petition Area. There are no archaeological or cultural sites or features of any kind in the Petition Area. Based on the historical sugarcane cultivation on the Petition Area, significant archaeological/historic sites are unlikely to have survived.

56. PHRI also consulted with four individuals recognized by the local native Hawaiian community as knowledgeable in various aspects of traditional Hawaiian culture. The purpose of the consultation was to determine if any native Hawaiian cultural practitioners might currently be exercising traditional and customary access and use rights within the Petition Area, or might have knowledge of any specific cultural sites or areas within the Petition Area that might qualify as legitimate traditional cultural properties. No valued cultural or natural resources have been identified in the Petition Area and no traditional and customary native Hawaiian rights

are exercised in the Petition Area. Since such resources and activities have not been identified, they will not be affected or impaired by the proposed subdivision.

57. The Ola`a flume system has been determined to be eligible for the National Register of Historic Places under Criterion D (a site that has yielded, or is likely to yield, information important in local history). The proposed subdivision is designed to respect the alignment of the facility and keep it intact so that no adverse impact would result.

Groundwater Resources

58. The Petition Area does not contain any perennial streams or lakes. The groundwater under the Petition Area is approximately 800 feet below the site.

59. The Petition Area is in the Hilo Aquifer System of the Northeast Mauna Aquifer Sector. The proposed subdivision is expected to draw water from the County water system for domestic and limited agricultural uses, to be supplemented by rainwater.

60. Due to the limited improvements proposed in the Petition Area, the use of individual wastewater disposal units or the use of fertilizers or pesticides for yard maintenance and limited agricultural activities is not anticipated to adversely impact groundwater resources.

Recreational/Scenic/Resources

61. There are no recreational resources, areas, or sites known in the Petition Area.

62. The proposed subdivision will be a low-profile, low-density development which will not significantly change the visual or scenic characteristics of the Petition Area. Petitioner will establish design guidelines for residences and common areas of the subdivision to insure development compatibility with the natural beauty of the area.

Coastal/Aquatic Resources

63. The Petition Area is located five miles from the coast, and therefore the proposed subdivision will not have any negative impact or effect on any coastal or aquatic resources.

ENVIRONMENTAL RESOURCES

Noise

64. During construction, short-term or temporary noise is expected to be generated by site preparation activities for the subdivision access road and utilities. Construction of infrastructure will require the use of tractors, dump trucks, pavers, rollers, backhoes, scrapers and cranes. These heavy equipment will generate noise that could be audible to the nearest neighboring residents. No blasting, however, is

anticipated. Dwelling construction will generate minor noise which may not be audible to adjacent properties except on very quiet days.

65. Mitigation measures, if necessary, will be employed to reduce or lessen the impact of noise on nearby residents. These measures would include installation of noise suppressant devices, such as mufflers, on heavy noise-generating machinery or equipment, and work schedules that are arranged for daylight hours. Existing dense vegetation surrounding the site will provide a natural sound barrier for the Petition Area and with greater distance between the site and nearest neighboring residences, the impact from construction would be minimal.

66. Operational noise would be minimal when residents occupy their homes and engage in some form of agricultural activity. Large-scale commercial farming, mass agricultural production, and large-scale recreational activities are not expected to occur.

Air Quality

67. It is anticipated that during construction, the proposed subdivision will generate construction-related dust. This would be particularly evident during the site preparation stage when clearing, grubbing and grading occur. Dust would be generated when underground utilities are installed and landscaping is put in place. Emissions would also be generated from construction equipment operations as well as employee and contractor vehicles traveling to and from the site. The area of

construction will occur primarily along the access road and around the homes which are expected to be sited near the internal road.

68. Construction-generated dust would be controlled by water sprinkling, dust screens, or other measures prescribed by the Chief Engineer of the County of Hawai'i. Equipment used for on-site construction will emit some air pollutants via engine exhaust. Thus, such equipment will be properly maintained by the contractor to maximize fuel combustion efficiency and minimize excessive emissions from heavy equipment exhaust pipes.

69. After construction is completed, the long-term impacts from residential and minor agricultural uses would be minimal. These impacts will be relatively low in comparison to specified State and National ambient air quality standards.

Water Quality

70. Fertilizers and pesticides will be used for yard maintenance purposes and limited agricultural activities. Large-scale commercial agricultural ventures will not be permitted. The impact on groundwater from chemical uses, thus, would not be any more than what other domestic agricultural activities generate in the area.

ADEQUACY OF PUBLIC SERVICES AND FACILITIES

Highway and Roadway Services

71. Access to the proposed subdivision will be provided by Wilder Road, a two-lane, 24-foot-wide paved County road, which extends from Kaumana Drive. Kaumana Drive is the major mauka-makai right-of-way that connects Hilo and West Hawai'i via the saddle between Mauna Kea and Mauna Loa.

72. The proposed subdivision, which is limited to eight residential lots, will have little impact on local roadways, which are presently well below the capacity of the right-of-way. No more than 29 trips (one way) per day are anticipated to be generated by residents of the proposed subdivision. This represents a small fraction of the existing traffic on Wilder Road and Kaumana Drive.

Water Service

73. Water is currently available via an 8-inch line along Wilder Road. Approximately 5,400 gallons of water per day (based on County standards) will be required to service the domestic needs of the proposed subdivision. There will be little to no need to use County water for irrigation purposes.

74. Petitioner intends to connect to the 12-inch gravity line at least 100 feet below the County reservoir and pump water to the Petition Area through a 4-inch transmission line located within Petitioner's proposed access easement. There is sufficient water available to service the proposed subdivision from the primary and

secondary wells in the area. None of these sources is expected to be negatively impacted by the proposed subdivision.

Wastewater Disposal

75. The Petition Area is not presently serviced by a public wastewater collection system. Privately-funded individual wastewater disposal units will be utilized to serve the proposed subdivision.

Drainage

76. The Petition Area does not contain any gulches, major drainage ways, promontories, or rock cliffs. The Petition Area contains soil that is well-drained, thin in depth, and overlying pahoehoe lava. The lava is not very permeable, but water moves rapidly through the cracks. On other occasions, water will not drain as fast and will stay in the area a little longer.

77. Best Management Practices will be used during construction of the proposed subdivision to control erosion and prevent runoff from damaging native forest resources. Roadway improvements will be minimized; no curbs, gutters, or sidewalks will be constructed. Drainage will occur over natural swales.

Solid Waste Disposal

78. The Petition Area is not presently serviced by a solid waste collection and disposal system.

79. Solid waste collection and disposal for the proposed subdivision will be handled by a private contractor, or in the alternative, each parcel owner will be responsible for the disposal of his or her own solid waste.

80. The proposed subdivision is not expected to generate a significant amount of additional solid waste. Existing landfill and/or transfer stations are adequate to accommodate the solid waste generated by the residents of the proposed subdivision.

Schools

81. The educational needs of any children residing in the proposed subdivision will be provided by Hilo High, Hilo Intermediate, and Kaumana Elementary schools. Each of these schools has adequate resources to accommodate the small number of additional students that may move into the proposed subdivision.

Police and Fire Protection

82. Police protection will be provided to the proposed subdivision by the Hawai'i County Police Department. The nearest police station is the Hilo Police Station located on Kapiolani Street in the central business district. Fire protection will be provided to the proposed subdivision by the Hawai'i County Fire Department. Fire emergency calls will be accommodated by the Kaumana Fire Station located on Kaumana Drive, with assistance from the Central Fire Station in downtown Hilo, if necessary.

Electrical Utility Services

83. The electrical power and telephone service demand for the proposed subdivision is expected to be small, and will be provided via overhead lines from Wilder Road where HELCO and GTE Hawaiian Tel lines are currently available.

COMMITMENT OF STATE FUNDS AND RESOURCES

84. The conceptual plan for the proposed subdivision includes the privately funded development of all basic infrastructure needed to serve the subdivision. The proposed subdivision does not call for a substantial commitment of government-supplied services or facilities.

CONFORMANCE TO AGRICULTURAL DISTRICT STANDARDS

85. The proposed reclassification of the Petition Area conforms to the State Land Use Agricultural District standards set forth in section 15-15-19, HAR, in the following respects:

- a. The Petition Area is already in limited pasture use and such use can be expanded if more acreage is opened for cattle grazing.
- b. The Petition Area is contiguous to agriculture zoned lands.
- c. The Petition Area is suitable for limited timber production.

CONFORMANCE WITH THE GOALS, OBJECTIVES AND POLICIES OF THE HAWAII STATE PLAN; RELATIONSHIP WITH APPLICABLE PRIORITY GUIDELINES AND FUNCTIONAL PLANS

86. The proposed reclassification of the Petition Area generally conforms to the following goals, objectives, priorities and policies of the Hawai'i State Plan, as defined in chapter 226, HRS:

a. Section 226-11, HRS, Land-Based, Shoreline and Marine Resources. Approximately 42 acres of the land in the Petition Area (or 5 percent of the Petition Area) will be improved or developed. This will minimize the impact on the natural character of the area as well as to promote conservation practices. Rural or agricultural standards, in lieu of urban standards, for road and utility improvements will be utilized to ensure compatibility with the surrounding environment.

b. Section 226-12, HRS, Scenic, Natural Beauty and Historic Resources. This project is a low-profile, low-density development. The visual characteristics of the Petition Area will not significantly change. Improvements will be designed to complement the scenic qualities of the area. Unobtrusive, low-key design elements will be used for the farm dwellings.

c. Section 226-13, HRS, Land, Air and Water Quality. Improvements are intended to have a minimal effect on the environment, including land and water resources. There will be no curbs, gutters, or sidewalks (drainage will

occur over natural swales). Grading and construction will result in less alteration to the land. Groundwater resources will not be noticeably impacted.

d. Section 226-15, HRS, Solid and Liquid Wastes. The proposed subdivision is not expected to be a major generator of solid and liquid waste. Recycling green waste as mulch for backyard gardens or crops, re-using bottles and cans as storage containers, and applying scrap wood as fuel or wood repair projects will be undertaken by members of the Newton Family.

e. Section 226-16, HRS, Water. Rainfall in the vicinity is abundant. Catchment tanks or basins will be used. The county water system would provide only for the domestic needs in the Petition Area.

f. Section 226-19, HRS, Housing. The proposed subdivision meets the needs of providing affordable housing to the Newton Children. The Petition Area is located minutes away from public facilities and services.

g. Section 226-104, HRS, Population Growth and Land Resources Priority Guidelines. Off-site and on-site infrastructure will be developed using private funds. Most of the Petition Area will be maintained in its natural condition, preserving open space and the rural character of the area. The Remainder Area will remain in the Conservation District, thereby maintaining critical environmental areas.

87. The proposed reclassification of the Petition Area generally conforms to the following functional plans:

a. State Agriculture Functional Plan (1991). The proposed subdivision will have no negative impact on important agricultural lands. The proposed subdivision puts additional lands into agricultural use on a limited scale. Relatively high rainfall provides natural irrigation reducing dependence on county potable water for use in irrigation.

b. State Conservation Lands Functional Plan (1991). Most of the Petition Area will be maintained in its natural condition. The Remainder Area will remain in the Conservation District, thereby maintaining critical environmental areas.

c. State Historic Preservation Functional Plan (1991). An archaeological assessment was conducted of the Petition Area, which included a review and evaluation of archaeological and historical documents, including archival literature, legends, records, boundary awards, and cartographic sources relative to the Petition Area, an inspection level fieldwork, and a written report. Should any previously unidentified archaeological/historic resources be encountered, they will be protected and preserved by Petitioner, as required by the State Historic Preservation Division ("SHPD"). Follow-up research and an evaluation report on cultural concerns was also prepared and submitted to SHPD. The proposed subdivision would not have any significant or adverse effect on cultural practices or sites.

d. State Housing Functional Plan. The proposed subdivision meets the needs of providing affordable housing to the Newton Children.

CONFORMANCE WITH COASTAL ZONE
MANAGEMENT OBJECTIVES AND POLICIES

88. The proposed reclassification on the Petition Area generally conforms to the following objectives and policies:

a. Recreational Resources. The proposed subdivision does not interfere with any existing or planned recreational opportunities along the shoreline. Public access to coastal recreational resources will not be obstructed or interfered with.

b. Historic Resources. An archaeological assessment was conducted, which included a review and evaluation of archaeological and historical documents, including archival literature, legends, records, boundary awards, and cartographic sources relative to the Petition Area, an inspection level fieldwork, and a written report. Should any previously unidentified archaeological/historic resources be encountered, they will be protected and preserved by Petitioner, as required by the SHPD.

c. Scenic and Open Space Resources. The proposed subdivision is a low-profile, low-density project with very large lots. Only a small portion of the Petition Area will be developed with farm dwellings and limited

agricultural activities. The Remainder Area will remain in its natural state and maintain existing scenic qualities and visual corridors.

d. Coastal Ecosystems. Inventory studies of appropriate resources on the Petition Area have been conducted, and an assessment of the proposed subdivision anticipated impacts on the natural resources has been undertaken. The valuable coastal ecosystems of the island's coastline and marine waters will not be disrupted. There are no stream waters on the Petition Area that will discharge into the ocean. The proposed subdivision will comply with existing State water quality standards.

e. Economic Uses. The proposed subdivision will not interfere with coastal dependent activities, including their social, visual, and environmental qualities.

f. Coastal Hazards. There is no danger from tsunami inundation, storm waves, shoreline erosion, and coastal subsidence. There are no streams or rivers on the Petition Area, thus no riverine flooding is anticipated. The Petition Area is not located in any flood designated areas.

g. Managing Development. The proposed subdivision is not a coastal development. However, through the environmental review process and the Commission's proceedings, public participation in the planning and review process has been facilitated.

h. Public Participation. The Commission's process for consideration of the Petition has been consistent with objectives to stimulate public awareness, education, and participation.

i. Beach Protection. The proposed subdivision is located more than five miles from the shoreline and will not impact shoreline resources. No shoreline erosion-protection structures are proposed and no interference with existing recreational and waterline activities is anticipated.

j. Marine Resources. The proposed subdivision is not located near coastal and marine resources. It will not have any impact with respect to efforts to promote the protection, use, and development of such resources to assure their sustainability.

RULING ON PROPOSED FINDINGS OF FACT

Any of the proposed findings of fact submitted by Petitioner or the 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 the conclusion of law; any findings of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

Pursuant to chapter 205, HRS, and the Hawai`i Land Use Commission Rules under chapter 15-15, HAR, and upon consideration of the Land Use Commission decision-making criteria under section 205-17, HRS, this Commission finds upon a clear preponderance of the evidence that the reclassification of the Petition Area, consisting of approximately 885.40 acres of land in the State Land Use Conservation District at Kukuau, South Hilo, Hawai`i, identified as Tax Map Key No: 2-4-08: por. 33, into the State Land Use Agricultural District, is reasonable, conforms to the standards for establishing the Agricultural District boundaries, is non-violative of section 205-2, HRS, and is consistent with the Hawai`i State Plan as set forth in chapter 226, HRS, and with the policies and criteria established pursuant to sections 205-17 and 205A-2, HRS.

DECISION AND ORDER

IT IS HEREBY ORDERED that the Petition Area being the subject of this Docket No. A99-729 filed by Petitioner The Newton Family Limited Partnership, consisting of approximately 885.40 acres of land in the State Land Use Conservation District at Kukuau, South Hilo, Hawai`i, identified as Tax Map Key No: 2-4-08: por. 33, and approximately shown on Exhibit "A" attached hereto and by this reference made a part hereof, is hereby reclassified into the State Land Use Agricultural District, and the State land use district boundaries are amended accordingly.

Based upon the findings of fact and conclusions of law stated herein, it is hereby determined that no customary and traditional native Hawaiian rights and practices have been identified in the Petition Area, and that the proposed reclassification will therefore not significantly affect or impair the exercise of such rights and practices.

The reclassification of the Petition Area shall be subject to the following conditions:

1. The proposed subdivision will be restricted to a maximum of 8 lots, with a minimum lot size of 80 acres. Each deed conveying title to a subdivided lot will include a 20-year restriction commencing upon final subdivision approval against further subdivision, and a general prohibition against large-scale commercial agriculture operations, animal hospitals, campgrounds and other similar open area recreational activities, mausoleums, group living facilities, golf courses, golf driving ranges, golf maintenance facilities, and golf clubhouse, adult care homes, community buildings, day care centers, hospitals, stadiums and sports arenas and schools.

2. Endangered birds and bats, including the Hawaiian Hawk and the Hawaiian Bat, have been observed in the Petition Area. Petitioner and its successors shall implement mitigation measures to avoid any negative effects to existing rare, endangered or threatened species. Such mitigation measures will include leaving any

large stands of native forest trees and clusters of native vegetation intact, and focusing residential sites to areas that were previously cleared and incorporating the use of native plants in landscaping plans. Petitioner and its successors shall not develop the Petition Area into a project which would change the overall character of the area or generate major increases in resident population. Petitioner and its successors shall preserve the existing lowland native forest, and protect the Hawaiian Hawk and the Hawaiian Bat. Any such protection or mitigation measures that are initiated shall be first approved by the U.S. Fish and Wildlife Service, and the State Department of Land and Natural Resources.

3. Prior to clearing and grubbing the alignment for the subdivision roadway and utilities, Petitioner will stake the centerline for the proposed access road, conduct a 500-meter wide survey of the proposed roadway alignment to assure that there are no Hawaiian Hawk and/or Hawaiian Bat nests in the area. The U.S. Fish and Wildlife Service ("USFWS") and the State Department of Land and Natural Resources will be provided with a copy of the results of such survey and consulted as to the need for any mitigating or conservation measures.

4. Petitioner, developers, and/or landowners shall minimize the use of night lights and shield all exterior lighting and light sources to mitigate the downing of Pelagic seabirds that may fly over the Property to return to their nesting colonies on the upper slopes of Mauna Kea.

5. There are kipuka in the Petition Area which harbor native forest. Petitioner and its successors shall implement conservation measures such as leaving large stands of native forest trees and clusters of native vegetation within the Petition Area intact, containing residential sites to areas previously cleared, maintaining the Remainder Area (area above the Ola'a Flume Road) in Conservation, utilizing a grading plan that will leave undisturbed the stands of forest in the makai parcel that extend into the Petition Area to as low as the 1,600-foot level as a buffer for the Remainder Area. The grading plan shall be approved by the State Department of Land and Natural Resources, the US Fish and Wildlife Service, and any other appropriate governmental agencies.

6. Best management practices will be used during construction to control erosion and prevent runoff from damaging native forest resources.

7. Petitioner and its successors shall complete, prior to any land alteration, an archaeological inventory survey of the acreage that would be disturbed by any specific development, including roadway, driveway, house site and agricultural site. The survey results will be provided to the DLNR State Historic Preservation Division (SHPD) and the Office of Hawaiian Affairs (OHA) for review and comment. Subsequent work shall proceed upon clearance from the SHPD. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot.

8. To the extent that any archaeological sites are located on the Petition Area, Petitioner and its successors shall work with SHPD in developing a data recovery/ mitigation/ preservation plan. This plan will include input from the local native Hawaiian community and relevant Hawaiian groups, including the OHA. The plan shall be approved by SHPD, and a certified copy thereof filed with the Commission, prior to any land alteration affecting such sites. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot.

9. Petitioner and its successors shall immediately stop work and contact SHPD should any previously unidentified archaeological resources such as artifacts, human burials, rock alignments, pavings or walls be encountered during the development of the proposed subdivision. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot.

10. In connection with the subdivision of the Petition Area, Petitioner shall, if necessary, dedicate to the County of Hawai`i an 80-foot right-of-way located near the Ola`a flume system to accommodate the County's planned secondary arterial.

11. Petitioner and its successors shall fund and construct adequate individual wastewater transmission and disposal facilities, as determined by the

County of Hawai'i Department of Public Works (DPW) and the State Department of Health (DOH).

12. Petitioner and its successors prior to any construction activities, including grading or grubbing, shall consult with the Department of the Army (DA) to determine if a DA permit will be required and to ensure compliance of development plans with the Federal Emergency Management Agency.

13. Petitioner and its successors shall provide written notification to all prospective buyers of proposed lots within the proposed subdivision of the potential odor, noise, and dust pollution resulting from surrounding Agricultural District land.

14. Petitioner and its successors shall notify all prospective buyers of the proposed lots within proposed subdivision that the Hawai'i Right-to-Farm Act, Chapter 165, Hawai'i Revised Statutes, limits the circumstances under which pre-existing farm activities may be deemed a nuisance.

15. Petitioner and its successors shall fund the design and construction of drainage improvements required as a result of the development of the Petition Area to the satisfaction of federal, state, and county agencies.

16. Petitioner and its successors shall participate in the funding and construction of adequate water source, storage, and transmission facilities and improvements to accommodate the proposed project. Water transmission facilities and

improvements shall be coordinated and approved by appropriate state and county agencies.

17. Petitioner and its successors shall maintain the Remainder Area in Conservation and subject all development thereof to the approval of the State DLNR.

18. Petitioner shall develop the Petition Area in substantial compliance with the representations made to the Commission. Failure to so develop the Petition Area may result in reversion of the Petition Area to its former classification, or change to a more appropriate classification.

19. 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 Petition Area, prior to development of the Petition Area.

20. Petitioner shall timely provide without any prior notice, annual reports to the Commission, the Office of Planning, and the County of Hawai'i Planning Department in connection with the status of the subject project and Petitioner's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission.

21. The Commission may fully or partially release the conditions provided herein as to all or any portion of the Petition Area upon timely motion and upon the provision of adequate assurance of satisfaction of these conditions by Petitioner.

22. Within 7 days of the issuance of the Commission's Decision and Order for the subject reclassification, Petitioner shall (a) record with the Bureau of Conveyances a statement that the Petition Area is subject to conditions imposed by the Land Use Commission in the reclassification of the Petition Area, and (b) shall file a copy of such recorded statement with the Commission.

23. Petitioner shall record the conditions imposed herein by the Commission with the Bureau of Conveyances pursuant to Section 15-15-92 Hawai'i Administrative Rules. All such conditions shall run with the land.

Done at Honolulu, Hawai'i, this 15th day of November,
2001, per motion on November 15, 2001.

BAYS, DEAVER, LUNG, ROSE & BABA

OFFICE OF PLANNING

By A. Bernard Bays
A. BERNARD BAYS, ESQ.
Attorney for Petitioner

By David W. Blane
DAVID W. BLANE
Director

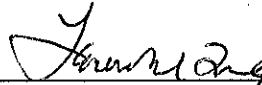
COUNTY OF HAWAII
PLANNING DEPARTMENT


6. By Christopher J. Yuen
CHRISTOPHER J. YUEN
Planning Director

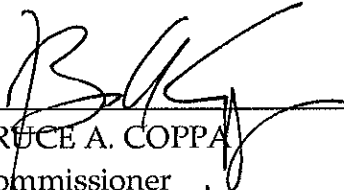
SO ORDERED:

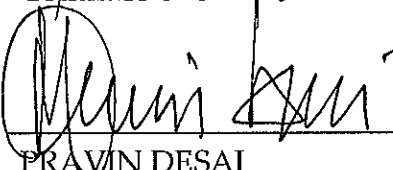
LAND USE COMMISSION
STATE OF HAWAII


By absent
MERLE A. K. KELAI
Chairperson and Commissioner

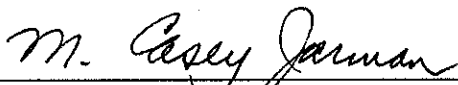
By 
LAWRENCE N.C. ING
Vice Chairperson and Commissioner

By 
P. ROY CATALANI
Commissioner

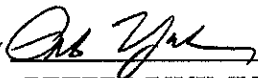
By 
BRUCE A. COPPA
Commissioner

By 
PRAVIN DESAI
Commissioner

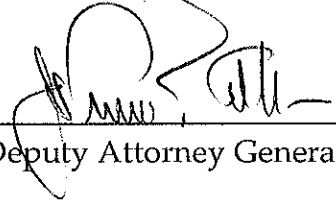
By 
ISAAC FIESTA, JR.
Commissioner

By 
M. CASEY JARMAN
Commissioner

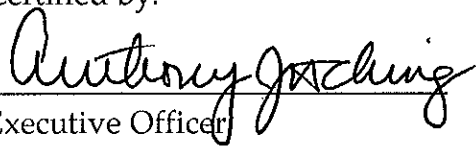
By absent
STANLEY ROEHRIG
Commissioner

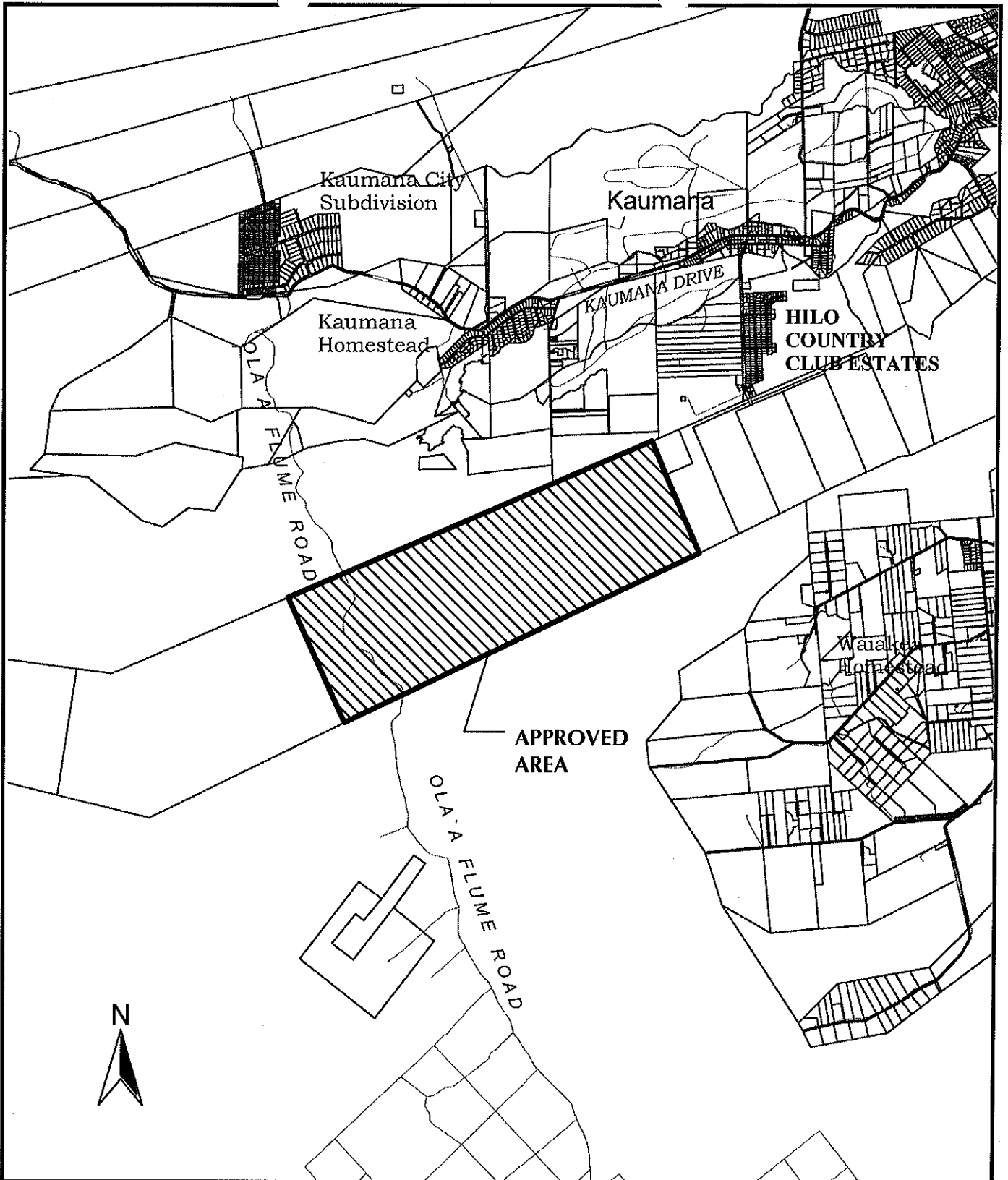
By 
PETER YUKIMURA
Commissioner

APPROVED AS TO FORM:


Deputy Attorney General

Filed and effective on
November 16, 2001

Certified by:

Executive Officer

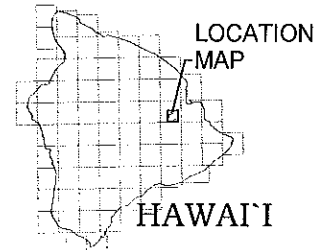


**A99-729 THE NEWTON FAMILY LIMITED PARTNERSHIP,
A Hawai'i Limited Partnership**

Location Map

Tax Map Key: 2-4-08: por. 33
Kukuau, South Hilo, Hawai'i
Scale: 1" = 2,000 ft.

EXHIBIT "A"



BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of)	DOCKET NO. A99-729
)	
THE NEWTON FAMILY LIMITED)	CERTIFICATE OF SERVICE
PARTNERSHIP, a Hawai'i limited)	
partnership)	
)	
To Amend the Conservation Land Use)	
District Boundary into the Agricultural Land)	
Use District for Approximately 885.40 Acres)	
of Land at Kukuau, South Hilo, Hawai'i,)	
TMK No: 2-4-08: por. 33)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Findings of Fact, Conclusions of Law, and Decision and Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

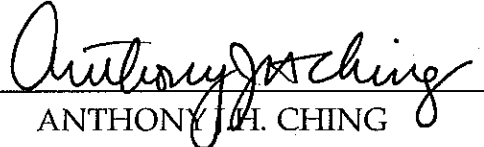
DEL. DAVID W. BLANE, Director
 Office of Planning
 P. O. Box 2359
 Honolulu, Hawaii 96804-2359

CERT. CHRISTOPHER YUEN, Planning Director
 Planning Department, County of Hawaii
 25 Aupuni Street
 Hilo, Hawaii 96720

CERT. LINCOLN ASHIDA, ESQ.
 Corporation Counsel
 County of Hawaii
 The Hilo Lagoon Center
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CERT. A. BERNARD BAYS, ESQ., Attorney for Petitioner
Bays, Deaver, Hiatt, Lung & Rose
1099 Alakea Street, 16th Floor
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, this 16th day of November 2001.



ANTHONY H. CHING
Executive Officer