

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Petition Of:) DOCKET NO. DR04-30
)
KULEANA KU'IKAHI, LLC) FINDINGS OF FACT,
) CONCLUSIONS OF LAW, AND
For A Declaratory Order To Address) DECISION AND ORDER
Certain Controversies And Uncertainties)
Involving Lands At Puehuehuiki, Paho,)
Polanui, Lahaina, Maui, Hawaii)
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FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER

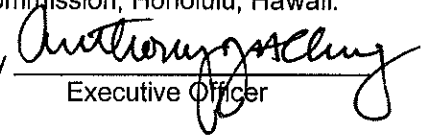
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APR 10 2008

Date

by

Executive Officer



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AND DECISION AND ORDER

The Land Use Commission ("Commission"), having reviewed the files in this proceeding, considered the testimony and evidence presented during the hearing herein, the Hearings Officer's Proposed Findings Of Fact, Conclusions Of Law And Decision And Order, the exceptions filed by the parties and the arguments of counsel, makes the following Findings of Fact, Conclusions of Law, and Decision and Order:

FINDINGS OF FACT

Procedural Matters

1. On July 22, 2004, Kuleana Ku'ikahi, LLC ("Petitioner") filed a Petition For Declaratory Order ("Petition"). The Petition requested the Commission to issue an order declaring that:

- i) The current and proposed uses at the Pu`unoa I, II, and III Subdivisions are not in conformity with and are in direct violation of county and State laws, rules, and regulations pertaining to the uses of agricultural lands and subdivisions, including §15-15-01, et seq., HAR; §205-17, HRS; §15-15-19, HAR; §15-15-20, HAR; §15-15-77, HAR; §205-4.5(c), HRS; §205-2(d), HRS; §205-4.5(a)(4), HRS; §205-5(b), HRS; §205-3.1(a), HRS; §15-15-25, HAR (“Issue Number 1”);
- ii) It was improper for the County of Maui (the “County”) to approve the agricultural subdivisions without establishing that there was an adequate supply of non-potable water to support compliance with the agricultural zoning requirements by each lot owner, and further that it was and is improper for the County to approve building permits to landowners in the subdivisions without first determining that there is an adequate supply of water and proper soil conditions to support the required level of farming (“Issue Number 2”);
- iii) The waters of the Kaua`ula Stream are a valued cultural, historic, and natural resource, which the native Hawai`ian tenants in the Kaua`ula Valley have the right to use for traditional and customary

uses, and further that their exercise of these rights is adversely affected by the subdivisions' use of Kaua`ula Stream as a source of non-potable water to support farming activities on the lots ("Issue Number 3");

- iv) The current and proposed uses in the subdivisions do not comply with the purposes or intentions of the following "laws" governing traditional access rights: Article XII, section 7, of the Hawai`i Constitution; §1-1, HRS; §7-1, HRS; §205-17, HRS; and §15-15-20, HAR ("Issue Number 4");
- v) The enforcement actions by the County pertaining to the use of agricultural lands do not conform to the provisions of §205-1, et seq., HRS and §205-12, HRS ("Issue Number 5");
- vi) The actions of the developers and landowners concerning the existing and proposed developments are creating and will create an interruption of the natural and historic flow of waters in the Kaua`ula Stream, adversely impacting the entire ecosystem of the streambed, and further that these actions are not in conformance with the provisions of §15-15-01, HAR; §15-15-20, HAR; and §205-17, HRS ("Issue Number 6"); and
- vii) The lands adjacent to Kaua`ula Stream, the streambed, and the area

surrounding the stream require protection and preservation by the Commission inasmuch as they meet the standards for determining the Conservation District boundaries under §15-15-20, HAR ("Issue Number 7").

2. On August 9, 2004, Petitioner filed a Certificate Of Service certifying service of the Petition upon (i) Kaua'ula Land Company, LLC ("KLC"); (ii) various lot owners of record within the Pu`unoa I and II Subdivisions; (iii) Kaua`ula Associates, LLC; (iv) KRS Development, Inc.; (v) Launiupoko Associates, LLC; (vi) Makila Land Company, LLC; (vii) the County Department of Planning ("DP"); and (viii) the State Office of Planning ("OP").

3. On August 26, 2004, Petitioner filed a Supplemental Certificate Of Service certifying service of the Petition, the Certificate Of Service, the Supplemental Certificate Of Service, the Pu`unoa II Subdivision plat ("Exhibit 'A'"), and the Pu`unoa I Subdivision plat ("Exhibit 'B'") upon various lot owners of record within the Pu`unoa I and II Subdivisions.

4. On August 26, 2004, Petitioner filed a Certificate Of Service certifying service of Exhibit "A," Exhibit "B," and the Supplemental Certificate Of Service upon (i) KLC; (ii) various lot owners of record within the Pu`unoa I and II Subdivisions, (iii) Kaua`ula Associates, LLC; (iv) KRS Development, Inc.; (v) Launiupoko Associates, LLC; (vi) Makila Land Company, LLC; (vii) the DP;

and (viii) the OP.

5. On October 6, 2004, Paul L. Horikawa, Esq., filed a Petition To Intervene And Request For Contested Case on behalf of Jason Cuevas and Concetta Cuevas (collectively, the "Cuevases").

6. On October 8, 2004, B. Martin Luna, Esq., and Blaine J. Kobayashi, Esq., filed a Petition To Intervene And Request For Hearing on behalf of R. Charles Bergson et al. (collectively, "Bergson").

7. On October 14, 2004, James W. Geiger, Esq., filed a Petition To Intervene And Request For Hearing on behalf of KLC.

8. On October 14, 2004, KLC filed a Response And Opposition To Petition For Declaratory Order.

9. On October 20, 2004, Petitioner filed a Statement Concerning Appearances And Service.

10. On October 21, 2004, the Commission considered the Petition and ordered that:

A hearing shall be set on Issue Number 1 pursuant to §15-15-100 and 15-15-103, HAR, subject to the matter being limited to the question as to whether the present and proposed uses of agricultural lands on the Property are not in conformity with and are in direct violation of the applicable State laws, rules, and

regulations pertaining to the uses of agricultural lands and subdivisions, and further that a hearing shall be set on Issue Number 5 only upon an affirmative finding on Issue Number 1. Issue Numbers 2, 3, 4, 6, and 7 are hereby dismissed and shall not be heard or considered by this Commission.

11. On October 21, 2004, the Commission considered the pleadings filed by the Cuevas, Bergson, and KLC, and granted them intervenor status in the proceeding. The Commission further ordered that the DP and OP shall be parties to the proceeding.

12. On November 10, 2004, Blaine J. Kobayashi, Esq., filed a Withdrawal And Substitution Of Counsel For Intervenors Jason M. Cuevas And Concetta Cuevas.

13. On December 2, 2004, the Commission appointed M. Casey Jarman as the Hearings Officer in this proceeding.

14. On December 14, 2004, the Commission issued its Order Dismissing Issues 2, 3, 4, 6 And 7 And Setting Issues 1 And 5 Of Petition For Declaratory Order For Hearing ("Order of Dismissal").

15. On December 14, 2004, the Commission issued its Order Granting Petitions To Intervene And Request For Hearing.

16. On December 21, 2004, Petitioner filed its Exceptions To Order Dismissing Issues 2, 3, 4, 6 And 7 And Setting Issues 1 And 5 Of Petition For Declaratory Order For Hearing Dated December 14, 2004 ("Exceptions To Order").

17. On December 29, 2004, James W. Geiger, Esq., filed a letter on behalf of KLC requesting the Commission take no action on Petitioner's Exceptions To Order and, on its own motion, strike the filing of the pleading.

18. On January 3, 2005, Blaine J. Kobayashi, Esq., filed a letter on behalf of Bergson requesting the Commission to summarily strike the Exceptions To Order.

19. On March 4, 2005, the Commission moved to deem Petitioner's Exceptions To Order as a Motion For Reconsideration filed pursuant to §15-15-84, HAR, and further denied the Motion For Reconsideration.

20. On April 15, 2005, the Hearings Officer conducted a pre-hearing conference on the Petition at the State Office Building in Wailuku, Maui. At the pre-hearing conference, the parties orally made the following motions: (i) Motion To Disqualify Hearings Officer made by the DP and joined in by Bergson; the Cuevases; and KLC; (ii) Motion For Release of Hearings Officer's Disclosure made by KLC; (iii) Motion for a More Definitive Statement made by Bergson; and

(iv) Motion To Accept Previous Record Made Before the Land Use Commission made by Petitioner.

21. On April 22, 2005, the Cuevas filed a Motion For A More Definite Statement.

22. On April 22, 2005, Bergson filed a Motion For A More Definite Statement.

23. On April 22, 2005, KLC filed a Motion For More Definite Statement.¹

24. On April 22, 2005, KLC filed a Motion To Require Disclosure From Hearings Officer (“Motion To Require Disclosure”).

25. On April 22, 2005, the DP filed a Motion To Disqualify Hearings Officer.

26. On April 25, 2005, KLC filed a Motion For Recusal Of Hearings Officer (“Motion For Recusal”).²

27. On April 26, 2005, the Commission issued its Order Denying Petitioner’s Motion For Reconsideration.

28. On May 16, 2005, the Hearings Officer conducted a second pre-hearing conference on the Petition at the Velma Santos Community Center in

¹ KLC joined the motions for a more definite statement filed by the Cuevas and Bergson insofar as said motions were consistent with KLC’s Motion For More Definite Statement.

² KLC joined the DP’s Motion To Disqualify Hearings Officer insofar as said motion was not inconsistent with the arguments and authorities made by KLC.

Wailuku, Maui. At the pre-hearing conference, the Hearings Officer granted KLC's Motion To Require Disclosure and denied (i) the DP's Motion To Disqualify Hearings Officer; (ii) KLC's Motion For Recusal; and (iii) the Motions For A More Definite Statement filed by Bergson; the Cuevas; and KLC.

29. On May 20, 2005, the following orders were issued: (i) Order Denying County of Maui, Department Of Planning's Motion To Disqualify Hearings Officer Dated April 22, 2005 And Kauaula Land Company, LLC's Motion For Recusal Of Hearings Officer Dated April 22, 2005; (ii) Order Granting Kauaula Land Company, LLC's Motion To Require Disclosure From Hearings Officer Dated April 22, 2005; and (iii) Order Denying Intervenors R. Charles Bergson, Et Al's Motion For A More Definite Statement Filed April 22, 2005; Intervenors Jason Cuevas And Concetta Cuevas' Motion For A More Definite Statement Filed April 20, 2005; And Kauaula Land Company, LLC's Motion For More Definite Statement Dated April 22, 2005.

30. On June 22, 2005, OP filed a Position Statement Of The Office Of Planning Regarding Kuleana Ku`ikahi, LLC's Petition For Declaratory Order.

31. On June 24, 2005, the Cuevases filed their Witness List, Exhibit List, and Exhibits 1 through 7.

32. On June 28, 2005, Bergson filed its List of Witnesses, List of Exhibits, and Exhibits 1 through 27.

33. On June 28, 2005, the DP filed the written testimony of Michael W. Foley and Lesli Otani, its Witness List and Exhibit List, and Exhibits 1 through 32.

34. On June 29, 2005, KLC filed its Witness List, Exhibit List, and Exhibits K-1 through K-44.

35. On June 29, 2005, KLC filed a Pre-Hearing Statement.

36. On June 29, 2005, Petitioner filed its List of Witnesses, Exhibit List, and Exhibits 1 through 74.

37. On June 29, 2005, Bergson filed an Errata Sheet to its List of Witnesses.

38. On July 5, and 6, 2005, KLC and the Lot 13 Owners filed and served Motions to Limit Testimony and Exclude Exhibits, which motions were acted upon before docket testimony was received by the Hearings Officer. The Hearings Officer ruled on the motions as follows:

- a) Testimony and evidence regarding claims that KLC ignored comments or recommendations of the State Historic Preservation Division are outside of the scope of the hearing based on the Order of Dismissal in which the claims, as part of Issue Number 7, were dismissed.

- b) Testimony and evidence regarding claims of enforcement by the County are outside of the scope of the hearing based on the Order of Dismissal in which the claims, as part of Issue Number 5, were to be addressed only after an affirmative finding on Issue Number 1.
- c) Testimony and evidence regarding claims concerning water and the Kaua`ula Stream are outside of the scope of the hearing based on the Order of Dismissal in which the claims, as part of Issue Numbers 2, 3, and 6, were dismissed.
- d) Testimony and evidence regarding native Hawaiian rights' issues, including cultural, historic, and access issues, are outside of the scope of the hearing based on the Order of Dismissal in which the claims, as part of Issue Numbers 3, 4, and 7, were dismissed.

39. On July 6, 2005, the Hearings Officer conducted a hearing on the Petition at the County Planning Commission Hearing Room in Wailuku, Maui, pursuant to a public notice published in the Honolulu Star-Bulletin on May 31, 2005, and in the Maui News on June 1, 2005. James Richard McCarty, Esq., appeared on behalf of Petitioner; Blaine J. Kobayashi, Esq., appeared on behalf of Bergson; Paul L. Horikawa, Esq., appeared on behalf of the Cuevases; James W.

Geiger, Esq., appeared on behalf of KLC; Jane E. Lovell, Esq., and Michael W. Foley appeared on behalf of the DP; and John W. K. Chang, Esq., Laura H. Thielen, and Abe Mitsuda appeared on behalf of the OP. At the hearing, the following individuals presented public testimony: Patty Nishiyama, William Waiohu, Annie Kekona, Jacob Kapu, Peggy Palakiko, Vicki McCarty, Michelle Anderson, Kaipo Kekona, Kapali Keahi, and Malahini Keahi. The Hearings Officer admitted the following exhibits into the record:

Exhibits

<u>Petitioner:</u>	1, 2, 9, 10, 11, 15, 16, 22, 29, 31 (paragraph 4 only), 33 through 39, 42, 43, 53, 56, 57, 61 through 64, 74 through 80, and 85. ³
<u>KLC:</u>	K-1 through K-34, K-35, K-36, K-38 (as amended), and K-40 through K-44. ⁴
<u>Bergson:</u>	1, 2, 6, 7, 8, 9 (as amended), 10, 12 through 21, 23, 25, and 27.
<u>Cuevases:</u>	1 through 7. ⁵
<u>DP:</u>	1 through 3, 8 through 10, 12, 13, 16 through 21, 25, 26, and 29 through 35. ⁶
<u>OP:</u>	1

³ Exhibits 57 and 74 through 80 were admitted into the record insofar as they pertained to Issue Number 1.

⁴ KLC subsequently withdrew Exhibit K-34 from the record. KLC also withdrew Exhibits K-37 and K-39, which had not been admitted into the record. Exhibits K-40 and K-42 were admitted into the record with the exception of those portions of the testimony and report, respectively, pertaining to water.

⁵ Exhibit 7 was admitted into the record with the exception of that portion of the testimony pertaining to water.

⁶ Exhibits 33 and 35 were admitted into the record insofar as they pertained to Issue Number 1. The DP subsequently withdrew Exhibit 32 from the record. The DP also withdrew Exhibit 15, which had not been admitted into the record.

40. On July 6, 2005, Petitioner called the following individuals as witnesses: Daniel Ku`ulei Palakiko, Ke`aumoku Kapu, U`ilani Kapu, Charlie Palakiko, Yolanda Dizon, and Albert Dizon.

41. On July 7, 2005, the Hearings Officer resumed the hearing on the Petition at the Waikapu Community Center in Waikapu, Maui. The Hearings Officer acknowledged receipt of a letter from Ann Perrick dated June 20, 2005, providing public testimony on the Petition. Petitioner called the following individuals as witnesses: Councilmember Jo Anne Johnson and Kai Markell. OP called Laura H. Thielen as a witness. KLC called the following individuals as witnesses: James Riley, Peter Martin, Paul Singleton, and David Minami. Bergson called the following individuals as witnesses: Gregory Ward, R. Charles Bergson, Steven Kikuchi, Ronald Brown, Anna Scott, Michael Gronemeyer, Sandra Braun-Ortega, Mark Allen, David Byars, and Howard Pietsch. The Cuevases called Jason Cuevas as a witness. The DP called Michael W. Foley and Lesli Otani as witnesses. Upon completion of the parties' respective cases, the Hearings Officer closed the hearing.

Description of the Property

42. The lands involved in this matter are the Pu`unoa Phase I and Pu`unoa Phase II Subdivisions (collectively, the "Property").

43. The Property is located near Lahaina, runs mauka from Honoapiilani Highway, and is about 240 acres in size.
44. The Hawai'i State Land Use designation of the Property is Agricultural; the County zoning classification is Agricultural.
45. The Pu`unoa Subdivisions were classified by the Land Study Bureau's Detailed Land Classification as Overall (MASTER) Productivity Rating Class B and E (no ALISH designation).
46. There are 14 separate lots in the Pu`unoa Phase I Subdivision that range in size from 5.022 to 6.7 acres.
47. There are 14 separate lots in the Pu`unoa Phase II Subdivision that range in size from 5.00 to 37.27 acres.
48. In 1999, KLC purchased the Property and began the process of subdivision.
49. The County gave final approval for the Pu`unoa Phase I Subdivision on April 27, 2001.
50. On April 24, 2003, the County gave final approval for the Pu`unoa Phase II Subdivision.
51. KLC adopted and placed against the agricultural lots the following restrictions: (1) a minimum size of 5 acres; (2) a requirement that the lots remain zoned agricultural with a restriction to prevent application for a future change in

zoning; (3) a restriction to prevent the condominiumization of the lots; and (4) a requirement that the owners submit agricultural plans to the lot owners association showing specific uses. The Declaration of Covenants, Conditions and Restrictions dated May 25, 2001, provides in part:

“Permitted Uses. Pu`unoa is an agricultural subdivision which shall be subject to the Hawai`i Right to Farm Act, HRS Chapter 165. All lots may be used for agricultural purposes including farm dwellings, orchards, crops, ranching and other productive agricultural pursuits, all as permitted by the Count [sic] of Maui Zoning Ordinance as amended from time to time.”

The Pu`unoa First Amendment of Declaration of Covenants, Conditions and Restrictions filed with the Land Use and Codes Admin, County of Maui on April 16, 2003, provides on page 2 at paragraph 4:

“Amendments Concerning Agricultural Activities. Section 3.01 is amended to better conform to State law and the County of Maui zoning ordinance, and is hereby amended in its entirety to read as follows:

“3.01 Permitted Uses. Pu`unoa is an agricultural subdivision and shall be subject to the Hawai`i Right to Farm Act, HRS Chapter 165. All lots may be used only for agricultural uses including farm dwellings, orchards, crops, ranching and other productive agricultural pursuits, all as

permitted by the County of Maui Zoning Ordinance and the State of Hawai'i Land Use Law, HRS Chapter 205, as amended from time to time. All buildings and structures shall comply with all applicable County of Maui codes and regulations."

Current and Proposed Uses of the Subject Property

52. Lot 1 of the Pu`unoa I Subdivision is owned by Richard and Gail Bergson , is approximately 6.798 acres in size, and is currently vacant.

53. Richard Bergson testified that his family's intent was to engage in farming activities as a family.

54. At the time of the hearing, Mr. Bergson was in the process of grubbing the land and trenching for irrigation to prepare for planting approximately 30 citrus trees and approximately 80 coconut trees, expecting the plants to be in the ground in the summer of 2005.

55. Mr. Bergson testified that he had spoken to members of Petitioner and told them he was going to engage in farming on his lot.

56. Mr. and Mrs. Bergson have prepared a farm plan detailing their intended farming activities and have submitted it to the DP for review and approval.

57. Lot 2 of the Pu`unoa I Subdivision is owned by Lindy Lu, LLC and is approximately 5.32 acres in size. Mark Allen is the manager of Lindy Lu, LLC.

58. Mr. Allen testified that his intent is to construct a caretaker's cottage and a barn and grow local plants and trees as nursery stock.

59. Mr. Allen has conducted grading and grubbing of Lot 2 of the Pu`unoa I Subdivision. He has also installed an irrigation meter and line.

60. No testimony was presented regarding Lots 3, 4, 5, and 6 of the Pu`unoa I Subdivision.

61. Lot 7 of the Pu`unoa I Subdivision is owned by J&J Maui R/E LLC of which Ron Brown is a part, and is approximately 5.1 acres in size.

62. The farm plan approved by the DP indicates that Mr. Brown intends to use Lot 7 of Pu`unoa I Subdivision for farming purposes, specifically, the planting of approximately 150 fruit-bearing citrus trees. Mr. Brown ordered, and has in stock, 68 fig trees, 38 assorted citrus trees, 23 avocado trees, and 24 mango trees. He has also begun installing irrigation for Lot 7 of the Pu`unoa I Subdivision. In addition, Mr. Brown intends to fence and use approximately 2 acres of Lot 7 as pasture land for horses and has installed approximately 3,000 lineal feet of split rail fencing on Lot 7 for that purpose.

63. A barn, caretaker's cottage, and foundation and framing for the main farm dwelling have been constructed on Lot 7 of the Pu`unoa I Subdivision. The DP permitted the building of the three structures at one time. Mr. Brown had already purchased 3,000 lineal feet of fence, 150 fruit trees, irrigation

equipment, and thousands of dollars worth of equipment. Mr. Brown plans to have the entire farm plan in place prior to occupying any building.

64. Lot 8 of the Pu`unoa I Subdivision is owned by David Neal Byars and Sandra Ventimiglia-Byars (collectively, the "Byars"), is approximately 6.1 acres in size, and is currently vacant.

65. Mr. Byars testified that he intends to grow palm trees on over 3 acres of the 6.1-acre Lot 8. He has filed a farm plan which the DP has approved to that effect .

66. Lot 9 of the Pu`unoa I Subdivision is owned by Michael J. Gronemeyer, is approximately 5.6 acres in size, and is currently vacant.

67. Mr. Gronemeyer testified that his intent was to farm Lot 9. He has spent over \$50,000 to improve Lot 9 for farming purposes, including the removal of a rock pile to double the amount of land available for farming. His short term use of Lot 9 will be to operate a sod farm.

68. Mr. Gronemeyer purchased a tractor to work the fields on Lot 9. The tractor has been in use on Lot 9.

69. Lot 10 of the Pu`unoa I Subdivision is owned by Ross and Anna Scott (collectively, the "Scotts"), is approximately 5.76 acres in size, and is currently vacant.

70. The Scotts prepared and submitted a farm plan for Lot 10 that has been approved by the DP. The Scotts testified that they intend to use Lot 10 to grow a variety of organic herbs, fruits, vegetables, and flowers for personal and commercial use. A diversified orchard, large kitchen garden, herb/medicinal garden, and Hawaiian species garden are planned for Lot 10, along with crops such as corn, tomatoes, and watermelon.

71. Lot 12 of the Pu`unoa I Subdivision is owned by Braun Trading Co., which is owned by Sandra Braun-Ortega, is approximately 5.2 acres in size, and is currently vacant.

72. Ms. Ortega testified that she has no current development plans for Lot 12 but intends to open it up for use by her daughter, who owns the adjacent lot, which is Lot 11 of the Pu`unoa I Subdivision. Ms. Ortega's Lot 12 is intended to be used in conjunction with the adjacent lot, specifically, Lot 11 of the Pu`unoa I Subdivision, which is owned by Ms. Ortega's daughter, Marla Braun-Ortega of MPB Enterprises, LLC.

73. The Cuevas own Lot 13 of the Pu`unoa I Subdivision.

74. The Cuevas' Lot 13 has no dwellings built on it and is currently being used for pasture purposes.

75. Mr. Cuevas testified that they plan to operate a nursery on Lot 13 once the DP has approved their farm plan.

76. Mr. Cuevas testified that they do not anticipate commencing construction of a farm dwelling on Lot 13 for at least six months to a year.

77. The Cuevas' Lot 13 and all lots located in the Pu`unoa I Subdivision are encumbered by two (2) Subdivision Agreements (Agricultural Use) that require the owners to engage in agricultural activities on said parcels of land as required by HRS, §205-4.5.

78. Lot 14 of the Pu`unoa I Subdivision is owned by Howard and Veronica Pietsch (collectively, the "Pietschs"), is approximately 5.8 acres in size, and is currently vacant.

79. Mr. Pietsch testified that they intend to use Lot 14 for growing a variety of mango trees, with approximately 70 trees planned for each acre.

80. The Pietschs have purchased farm equipment, removed a large rock pile from Lot 14 and purchased approximately 3,000 cubic yards of topsoil, half of which has been spread over the area impacted by the rock pile removal.

81. Lot 1 of the Pu`unoa II Subdivision is owned by Gregory A. Ward and Pamela Ward (collectively, the "Wards"), and is approximately 5.1 acres in size.

82. Mr. Ward testified that his family's intent was to create a tropical plant nursery for West Maui. As of June 12, 2005, Mr. Ward had spent over \$40,000 to develop the 20,000 square feet nursery (of which a portion, complete

with shade cloth structures and irrigation, had already been constructed) and expected to begin commercial operations by late June 2005. Photographs showing the use were received in evidence. Mr. Ward had several thousand plants on Lot 1 and was expecting another 5,000 plants within the next two weeks. Lot 1 of the Pu`unoa II Subdivision has been divided into areas for tropical cut flowers, fruit orchard, large tropical plants, and a sod area for Seashore Paspalum grass.

83. Lot 2 of the Pu`unoa II Subdivision is owned by Garrett, Shelley, and Ralph Hall (collectively, the "Halls"), is approximately 5.5 acres in size, and is currently vacant.

84. The Halls submitted a farm plan that has been approved by the DP. They testified that they intend to grow Dwarf Samoan coconut trees, Areca and Date palm trees, plumeria trees, tropical trees, and Seashore Paspalum grass on Lot 2 of the Pu`unoa II Subdivision.

85. The Halls have excavated and graded Lot 2 of the Pu`unoa II Subdivision, and removed tons of rock in order to prepare the lot for irrigation and planting. The Halls have purchased approximately 50 coconut trees in furtherance of their intended farming activities.

86. No testimony was submitted regarding Lot 3 of the Pu`unoa II Subdivision.

87. Lot 4 of the Pu`unoa II Subdivision is owned by Bruce and Bonnie Sue Chadwick (collectively, the "Chadwicks"), is approximately 5 acres in size, and is currently vacant.

88. The Chadwicks testified that they intend to use Lot 4 of the Pu`unoa II Subdivision to grow palm trees, herb plants, berries, and flowers. A portion of Lot 4 of the Pu`unoa II Subdivision will also be used for land conservation.

89. The Chadwicks testified that they have submitted a farm plan to the County.

90. No testimony was submitted regarding Lots 5, 6, or 7 of the Pu`unoa II Subdivision.

91. Lot 8 of the Pu`unoa II Subdivision is owned by Steven Kikuchi, is approximately 5.02 acres in size, and is currently vacant.

92. Mr. Kikuchi testified that he intends to raise a variety of coffee on Lot 8 of the Pu`unoa II Subdivision. He currently operates a 1,600-acre coffee plantation on Moloka`i, plans to plant 260 acres of coffee in Waikapu, and intends to plant his 5 acres of coffee on Lot 8 of the Pu`unoa II Subdivision at the same time his home is built.

93. KLC owns 5 lots in the Property; the lots are being leased for use as a horse stable, a plant nursery, a sod farm and the raising of roosters, each use being agricultural.

94. A portion of the lots owned by KLC at one time was proposed to be used for affordable housing, but that proposal was rejected by the County.

95. Peter Martin and James Riley testified that at the time of the hearing, KLC had not determined the future use for a portion of the lots it still retained.

96. Dave Minami, who works for West Maui Land Company, acts as a resource person for the owners of the lots in the Property. He receives contacts from lot owners almost daily to provide input and advice on agricultural activities such as fertilizer and pesticide programs, irrigation layouts, and planting schedules. Mr. Minami is in the Pu`unoa Subdivisions daily and sees agricultural and farming activity occurring and increasing.

Maui County Regulation of Agricultural Subdivisions

97. The County's ordinance regulating agricultural subdivisions is found at County Code §19.30A.

98. Chapter 19, the zoning ordinance of the County Code, is intended to implement State law, the County General Plan, and the County Community Plans.

99. The minimum agricultural lot size in the County is two acres. The County has a sliding scale that further restricts the size of parcels, especially the number of two acre lots.

100. The County agricultural zoning is more restrictive than the State law with respect to building coverage. One of the provisions of the County Agriculture Ordinance is that the maximum coverage is ten percent. That provision is found in County Code, §19.30A.030D, District Standards.

101. The ten percent lot coverage restriction applies to any hard surface, whether for a house, a barn, a tennis court, or a swimming pool.

102. In the County, the majority of the lot must be in agriculture or conservation use. That requirement is found in §19.04.040, which defines "farm" as "a lot on which the majority of the land is used for and the predominant activity is agriculture and/or agricultural land conservation."

103. The County has taken certain additional steps to assure that agricultural subdivisions comply with the County ordinance. The County requires a signed and recorded subdivision agreement in which the subdivider promises that the land will be used for agriculture. This agreement is also recorded, so any potential land buyer can see that such an agreement has been entered into and that it runs with the land.

104. The County PD testified that Maui County also reviews CC&R's for agricultural subdivisions and requires CC&R's to allow agricultural uses.

105. The County PD testified that the County requires a Farm Plan to be prepared by the owner or buyer of agricultural property. The Farm Plan must demonstrate how the owner intends to use the majority of the property for agriculture. The plan is intended to be simple enough so that the property owner can prepare it him or herself, without hiring a consultant or an attorney. The County's Farm Plan requires identification of the source of water supply; a description of how the owner intends to use the property; and a sketch, showing where the buildings and the crops or animals will be located. The Farm Plan must be recorded with the State Bureau of Conveyances.

106. The Maui County PD testified that if a Farm Plan doesn't appear to be adequate, the PD sends the applicant a letter outlining exactly what is missing. If necessary, the PD will meet with the owners to gain information verbally and to help them fill out the Farm Plan. The main thing the County's PD looks for is the type of agriculture that is proposed and the amount of land that will be dedicated to agriculture. The PD wants to know where the buildings are going to be versus where the agriculture is going to be. The PD requires the owners to sign and record this agreement.

107. The County PD testified that owners are required to get the Farm Plan approved prior to their first application for a Building Permit. Once the PD is satisfied with the Farm Plan, the owners are allowed to build a house. If, after some period time elapses, the owners come in for a Building Permit for an accessory farm dwelling, the PD checks to see if the owners are actually farming on most of their land. If they are, then they can get the second Building Permit. If they are not, they cannot get their second Building Permit.

108. The Farm Plan process implemented by the PD has not yet been adopted as an administrative rule and is not yet part of the County Code.

109. Under §19.04.040 of the County Code, a majority of the property must be in agricultural use or agricultural conservation. The PD's interpretation of the definition of "farm" is that any amount above 50 percent of the land must be in agriculture or agricultural conservation. It doesn't all have to be in crops or fruit trees or corrals. It could be a combination of those types of things, including preservation of native vegetation in a gulch.

110. The PD has the ability to impose criminal fines or civil penalties if farm plans are not implemented.

Permitted Uses in the Agricultural District Under State Law

111. Under HRS §205-4.5 and Commission Rule §15-15-25, uses permitted on agricultural district lands classified by the Land Study Bureau as A or B are limited to:

- (1) Cultivation of crops, including but not limited to flowers, vegetables, foliage, fruits, forage and timber;
- (2) Game and fish propagation;
- (3) Raising of livestock, including but not limited to poultry, bees, fish or other animal or aquatic life that are propagated for economic or personal use;
- (4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry; Farm dwelling as used in this paragraph means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;
- (5) Public institutions and buildings which are necessary for agricultural purposes;
- (6) Public and private open area types of recreational uses including day camps, picnic grounds, parks, and riding stables, but not including dragstrips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps;
- (7) Public, private, and quasi-public utility lines and roadways, transformer stations, waste transfer stations, major water storage tanks, and appurtenant small buildings such as booster pumping stations, but not including offices or yards for equipment, material, vehicle storage, repair or maintenance, or treatment plants or corporation yards, or other like structures;

- (8) Retention, restoration, rehabilitation, or improvement of building or sites of historic or scenic interest;
- (9) Roadside stands for the sale of agricultural products grown on the premises;
- (10) Buildings and uses, including but not limited to mills, storage, and processing facilities, maintenance facilities, and vehicle and equipment storage areas that are normally considered directly accessory to the abovementioned uses and are permitted under §205-2(d);
- (11) Agricultural parks; or
- (12) Wind energy facilities, including the appurtenances associated with the production and transmission of wind generated energy; provided that such facilities and appurtenances are compatible with agriculture uses and cause minimal adverse impact on agricultural land.

112. Under HRS §205-2(d) and Commission Rule §15-15-25, uses permitted on agricultural districts lands classified by the Land Study Bureau as E are broader than those uses permitted on A and B lands.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Petition pursuant to HRS §91-8 and HAR §15-15-98 .

2. HRS Chapter 205 does not prevent an owner from leaving his land vacant. Therefore, owners of Lots 1, 2, 8, 9, 10, 12, and 14 of the Pu`unoa I Subdivision and Lots 2, 4, and 8 of the Pu`unoa II Subdivision are not in violation of Chapter 205 because they currently have no activity occurring on them.

3. The current use of Lot 13 of the Pu`unoa I Subdivision as pasture is a permitted use under HRS §205-4.5(3).

4. The current use of Lot 1 of the Pu`unoa II Subdivision as a nursery is a permitted use under HRS §205-4.5(1).

5. The current uses of KLC's 5 lots as a horse stable, a plant nursery, a sod farm, and the raising of roosters are permitted uses under HRS §205-4.5(1) and (3).

6. Because no testimony was presented regarding Lots 3, 4, 5, 6, and 11 of the Pu`unoa I Subdivision and Lots 3, 5, 6, and 7 of the Pu`unoa II Subdivision, Petitioner failed to meet their burden of proof that the current or proposed uses of those lots violate HRS Chapter 205.

7. Farm plans filed with and approved by the PD are evidence of an owner's intended use of property in the State-Designated Agricultural District.

8. Lots 7, 8, and 10 of the Pu`unoa I Subdivision and Lot 2 of the Pu`unoa II Subdivision have farm plans approved by the PD. As long as any structures to be built on the lots in the future meet the statutory definition of farm dwellings as described below, the proposed uses are permitted uses under HRS §205-4.5 (1) and (3).

9. Based on uncontroverted testimony in the record, the owners of Lots 1, 2, 7, 9, 13, and 14 of the Pu`unoa I Subdivision and Lots 1, 2, 4, and 8 of the Pu`unoa II Subdivision intend to use their property for agricultural uses permitted under HRS §205-4.5 (1) and (3). As long as any structures to be built on the lots in the future meet the statutory definition of farm dwellings as described below, the proposed uses are permitted uses under HRS §205-4.5 (1) and (3).

10. Although KLC has not determined the future use of the 5 lots it owns once the current leases expire, Petitioner failed to prove that KLC will use the property for uses not permitted under HRS §205-4.5.

11. HRS §205-4.5 (4) requires that any single-family dwelling built on land in the agricultural district be a “farm dwelling” defined as “a single-family dwelling located on and used in connection with a farm . . . or where agricultural activity provides income to the family occupying the dwelling.”

12. The Hawai`i Supreme Court has not yet interpreted this statutory requirement.

13. Until landowners apply for building permits and build single-family dwellings on their property, the issue of whether proposed uses that

involve the building of single-family dwellings on the lots are in conformance with State law is not ripe for decision.

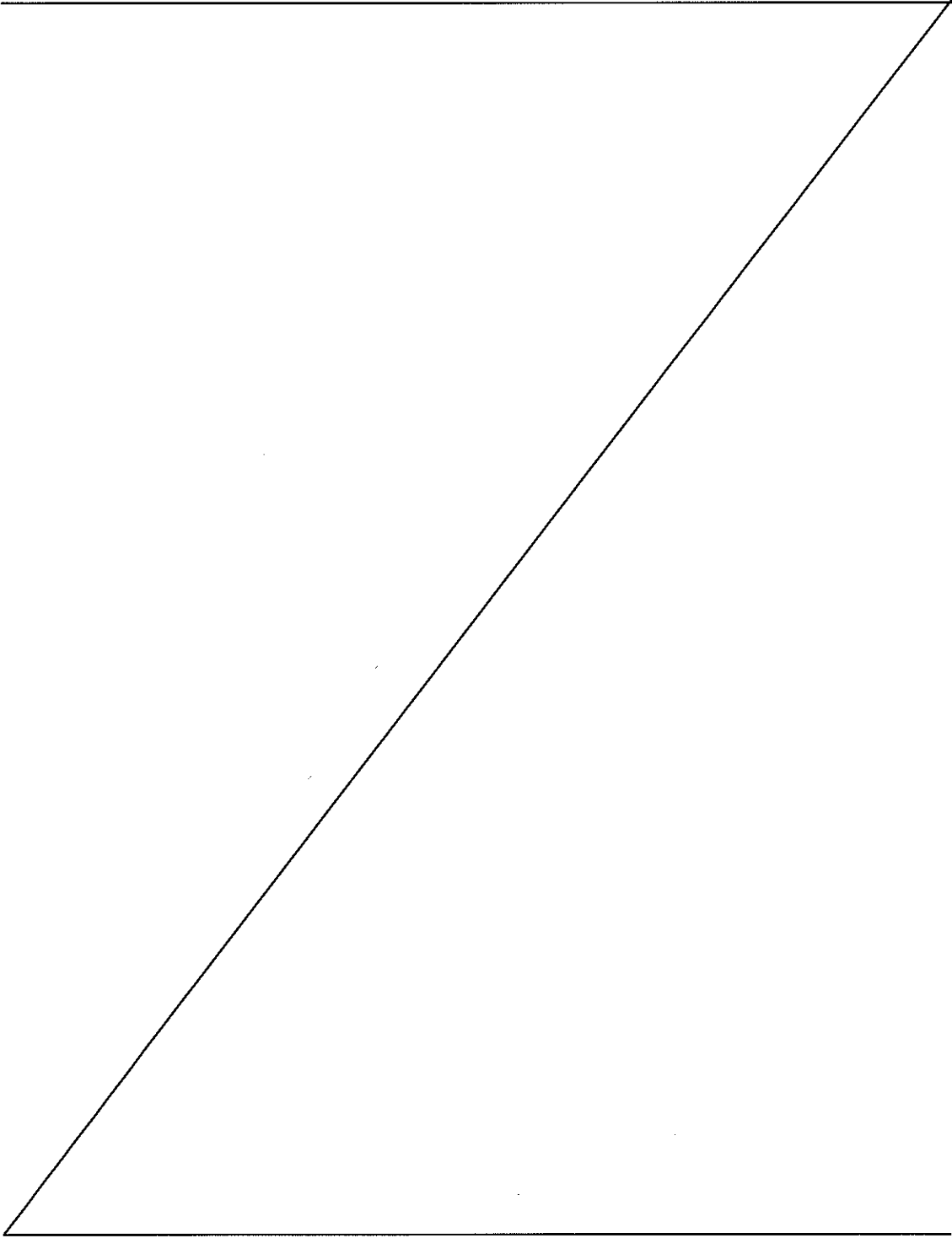
14. Based on the preceding conclusions of law, the County policy regarding regulation of agricultural subdivisions as described in findings of fact 97-110 are not relevant to the Commission's decision in this case.

15. Any of the proposed Findings of Fact or Conclusions of Law submitted by any of the parties and the Hearings Officer not already ruled on by the Commission by adoption or rejected by clearly contrary findings of fact or conclusions of law are hereby denied and rejected. Any conclusion of law that is or should be a finding of fact is to be taken as such notwithstanding its denomination as a conclusion of law; any finding of fact that is or should be a conclusion of law is to be taken as such notwithstanding its denomination as a finding of fact.

DECISION AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner failed to meet its burden of proof that the present and proposed uses of agricultural lands on the Property are not in conformity with and are in direct violation of applicable State laws, rules, and regulations pertaining to the uses of

agricultural lands and subdivisions; therefore, the Prayer for Relief regarding these issues is DENIED.




ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 6th day of April, 2006. This ORDER and its ADOPTION shall take effect upon the date this ORDER is certified and filed by this Commission.

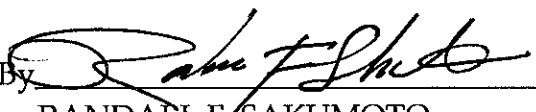
Any person aggrieved by this decision and order may seek judicial review in accordance with the provisions of HRS section 91-4.

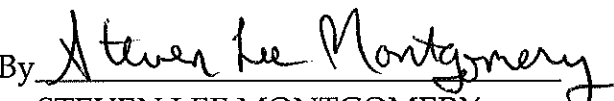
Done at Kahului, Maui, Hawai'i, this 6th day of April, 2006, per motion on February 3, 2006.

APPROVED AS TO FORM


Deputy Attorney General

LAND USE COMMISSION
STATE OF HAWAII

By 
RANDALL E. SAKUMOTO
Chairperson and Commissioner

By 
STEVEN LEE MONTGOMERY
Vice-Chairperson and Commissioner

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Petition Of) DOCKET NO. DR04-30
)
KULEANA KU'IKAHU, LLC) CERTIFICATE OF SERVICE
)
For A Declaratory Order To Address)
Certain Controversies And Uncertainties)
Involving Lands At Puehuhuiki, Paho,)
Polanui, Lahaina, Maui, Hawaii`i)
)

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 regular or certified mail as
noted:

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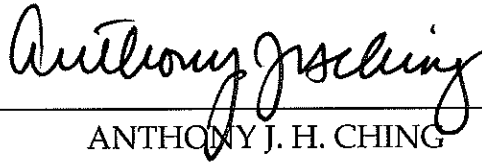
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Dated: Honolulu, Hawai'i, APR 10 2006.



ANTHONY J. H. CHING
Executive Officer