

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
MAUD VAN CORTLANDT HILL SCHROLL)
TRUST)
)
To Amend Urban Land Use District)
Boundary to Reclassify Approxi-)
mately 32.910 acres, TMK: 5-6-07:)
18, 19, 20 and 21 at Pukoo,)
Island of Molokai, County of)
Maui, State of Hawaii, into the)
Rural Land Use District)
)

DOCKET NO. A84-568
MAUD VAN CORTLANDT HILL
SCHROLL TRUST

This is to certify that this is a true and correct copy of the document on file in the office of the State Land Use Commission, Honolulu, Hawaii.

JAN 13 1991 by *Esther Leide*
Date Executive Officer

ORDER DENYING MOTION TO AMEND THE CONDITIONS

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LAND USE COMMISSION
STATE OF HAWAII

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ORDER DENYING MOTION TO AMEND THE CONDITIONS

THE MOTION

This matter arises from a Motion to Amend the Conditions (hereinafter "Motion") imposed by the Land Use Commission (hereinafter "LUC") in Decision and Order of Docket No. A84-568, filed on March 27, 1990, by George Peabody on behalf of himself and the Citizens' Right of Way Dedication at Pukoo Committee (hereinafter collectively referred to as "Movant PEABODY") pursuant to §15-15-70, -79 and -90 of the Hawaii Land Use Commission Rules and the memorandum, exhibits and affidavit attached to the motion.

PURPOSE OF THE MOTION

In the motion, Movant PEABODY requested that the LUC amend the conditions contained in the LUC's Decision and Order dated January 15, 1985, alleging that the Petitioner, the Maud Van Cortlandt Hill Schroll Trust (hereinafter "Trust") and Maui

County failed to perform as represented to the LUC relating to creation and conveyance of public accesses on their lands fronting Pukoo Boat Harbor. Movant PEABODY requested that the LUC require the Trust to do, inter alia, five things:

- (1) create and convey in fee simple to the appropriate government entities non-exclusive public accesses;
- (2) that said shoreline public accesses shall be completed no later than September 1990 and that the Trust shall report the status of these matters on a monthly basis to the LUC;
- (3) that the gates, fences and signs erected by the Trust shall be removed no later than June 1, 1990;
- (4) that the Trust obtain a major SMA permit for the creation of shoreline public access; and
- (5) that the Trust create an interim plan to allow Molokai residents, including George Peabody, boat launching and shoreline accesses within 10 days of the Commission's order amending its previous conditions.

Additionally, Movant PEABODY requested the LUC to consider whether a contested case hearing is appropriate in this matter and, if so, movant requested the LUC to conduct a contested case hearing pursuant to chapter 91, Hawaii Revised Statutes and subchapters 7 and 9 of the Hawaii Land Use Commission Rules.

NOTICE OF HEARING OF MOTION AND NON-APPEARANCE OF MOVANT

This matter came on for hearing on November 15, 1990, at the Chart Room, Sheraton Coconut Beach Hotel, Coconut Plantation, Kapaa, Kauai, Hawaii as a continuation of an action meeting previously held on June 7, 1990. Because of the non-appearance of the movant, the hearing that was scheduled to begin at 10:00 a.m. was called for hearing at about 10:30 a.m. The meeting was then continued to about 2:15 p.m., because of movant's non-appearance and to provide the movant an ample opportunity to attend the hearing. The specific history of movant's failure to appear and the accommodation made to movant by the LUC appear at pages 94-96 of the transcript of the hearing and is incorporated herein by reference.

THE HEARING

Movant PEABODY failed to appear at the November 15, 1990 hearing, notwithstanding the fact that movant received notice of the meeting by certified mail and was given adequate time to appear at the hearing. Petitioner, the Maud Van Cortlandt Hill Schroll Trust appeared and was represented by its attorneys Benjamin Kudo and Danny Aranza. The Office of State Planning, State of Hawaii, was represented by Deputy Attorney General Rick Eichor and Abe Mitsuda. The County of Maui was represented by Deputy County Attorney Paul Horikawa.

FINDINGS OF FACT

The Land Use Commission, having duly considered the Motion, the record in this docket, the arguments of counsel for

the parties and the evidence introduced herein, makes the following findings of fact:

1. Movant PEABODY's substantive requests have been addressed by the Trust and the County of Maui by the County's approval and adoption of public shoreline access easements which were proposed by the Trust and intended to satisfy the LUC's condition on public beach access contained in its Decision and Order of April 18, 1985.

2. The factual background underlying the LUC's original imposition of public beach access requirements and the subsequent efforts made by the Trust and the County of Maui in complying with these requirements are discussed in detail in the Trust's Memorandum in Opposition to the Motion for an Order to Show Cause Why the Decision and Order in Docket No. A84-568 Should Not be Nullified and/or Reversed and/or Amended, which was previously filed with this Commission on March 4, 1990 and is incorporated herein by reference.

3. On May 18, 1990, the County Council (hereinafter "Council") of the County of Maui conducted a hearing to discuss the public beach access easements proposed by the Trust. Following the hearing, the Council voted to do the following:

a. It adopted a Resolution Accepting Grants of Easements, Parking Lot and Vehicular Turnaround for Land Situate at Pukoo, Molokai;

b. It adopted a Resolution Approving the Settlement in George Peabody, et al., vs. Maud Van Cortlandt Hill Schroll Trust, et al.; Civil No. 7243, Second Circuit Court.

c. It passed on first reading A Bill for an Ordinance Prohibiting Commercial Activity Within Public Accesses; and

d. It voted to consider the maintenance of the shoreline access easements being adopted by the County.

4. The metes and bounds descriptions of the specific shoreline access easements granted by the Trust were adopted by the County.

5. A map showing the specific location, alignment and area of the shoreline access easements granted by the Trust and adopted by the county was attached to Trust's Memorandum in Opposition to Motion to Amend the Conditions Imposed by LUC in Docket No. A84-568 as Exhibit "E".

6. As shown on Exhibit "E", the Trust granted and the County adopted two public shoreline access easements over its property at Pukoo. One easement is located on the east side of the property ("Easement A") and is 15 feet wide, has an area of 21,096 square feet and contains a parking site with 10 parking stalls and a vehicular turnaround area. The second easement is located on the west side of the property ("Easement B") and is 5 feet wide, has an area of 2,393 square feet, and is intended to provide pedestrian access to the beach

from the existing 15 feet wide State right-of-way that abuts the Trust's property on the west side.

7. The concerns that Movant PEABODY raises in the motion have been substantially resolved for the following reasons:

a. The Council has adopted resolutions effectuating two public beach access easements over the Trust's property in Pukoo.

b. The actual construction of improvements implementing the public beach access easements granted to the County will commence immediately upon the County of Maui's final adoption of the ordinance prohibiting commercial use of the public shoreline access easements granted by the Trust and the County of Maui's formal abandonment and quitclaim of the former pier road on the east side of the property. While the specific schedule of construction cannot be ascertained at this time, the Trust is committed to completing the public beach accesses as soon as possible and will immediately begin construction of the required improvements upon final resolution of the aforementioned issues.

c. The only public beach access currently existing at Pukoo is a 15 feet wide State right-of-way located on the west side of the Trust's property. The Trust has no fences, gates, or signs that block or otherwise interfere with the public access over and across this right-of-way.

d. While there is a fence and property signs along a portion of the perimeter of the Trust's property, they are there to demarcate the legal boundaries of the Trust's property and are intended to discourage unknown and unauthorized access by parties who may subject the Trust to liability claims for injuries or damage incurred on Trust property.

e. With respect to Peabody's assertions that the Pukoo lagoon and the former "1904 Pier Road" are public property, the United States District Court has determined that the lagoon is not subject to public access. Furthermore, the Court found that the Board of Commissioners of the Territory of Hawaii had abandoned the Pukoo Harbor prior to 1926 and the State of Hawaii has disclaimed any interest it had in the "1904 Pier Road."

f. On December 11, 1987, the Trust filed a minor SMA application with the County of Maui for the development of two mauka-makai public accesses over the Trust's Pukoo property.

g. On March 4, 1988, the County of Maui granted the Trust's SMA application, finding that it was subject to a Minor SMA permit and amending the public access plan by increasing the number of unpaved parking stalls from 8 to 10.

h. In addition, the County's approval was conditioned on the Trust submitting easement documents and any agreement for the maintenance of the two public beach rights of way for the County's review and approval.

i. Following the County's grant of the SMA permit, Movant PEABODY unsuccessfully appealed its issuance at the administrative and judicial appeal levels, which caused delays in the resolution of the public access issue, and the SMA permit remains valid.

j. The LUC finds that issues regarding the issuance of SMA permits are matters within the jurisdiction of the county governments and are not within the purview of this Commission. See §205A-29, Hawaii Revised Statutes.

k. In light of Maui Council's adoption of the resolutions granting the public beach access easements over the Trust's property on May 18, 1990, no interim public access plan is necessary.

CONCLUSION OF LAW

Inasmuch as the Trust, has resolved the issue of public beach access in a manner which is satisfactory to the County of Maui, the Land Use Commission's condition on public beach access contained in its Decision and Order of April 18, 1985, will be satisfied upon the provision of public beach access by the Trust. Movant PEABODY's concerns have been substantially resolved between the Trust and the County of Maui and, therefore, inasmuch as the LUC's order of January 15, 1985, will be satisfied, the motion is moot.


DECISION AND ORDER


IT IS HEREBY ORDERED that Movant PEABODY's Motion be and is hereby denied.

DOCKET NO. A84-568 - MAUD VAN CORTLANDT HILL SCHROLL TRUST

Done at Honolulu, Hawaii, this 31st day of January, 1991,
per motions on November 15, 1990 and January 10, 1991.

LAND USE COMMISSION
STATE OF HAWAII

By 
RENTON L. K. NIP
Chairman and Commissioner

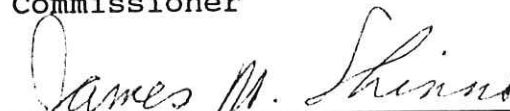
By 
ALLEN K. HOE
Vice Chairman and Commissioner

By 
ALLEN Y. KAJIOKA
Vice Chairman and Commissioner

By 
KAREN S. AHN
Commissioner

By (absent)
EUSEBIO LAPENIA, JR.
Commissioner

By 
JOANN N. MATTSON
Commissioner

By 
JAMES M. SHINNO
Commissioner

By 
ELTON WADA
Commissioner

By (absent)
DELMOND J. H. WON
Commissioner

Filed and effective on
January 31, 1991

Certified by:


Executive Officer

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order Denying Motion to Amend the Conditions was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

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DATED: Honolulu, Hawaii, this 31st day of January 1991.


ESTHER UEDA
Executive Officer