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BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of

KAONOULU RANCH

To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for approximately 88 acres at Kaonoulu, Makawao-Wailuku, Maui, Hawaii; Tax Map Key Nos. 2-2-02: por. of 15 and 3-9-01:16

DOCKET NO. A-94-706

DEPARTMENT OF PLANNING, COUNTY OF MAUI'S MOTION TO EXCLUDE EVIDENCE RELATED TO THE 1998 KIHEI-MAKENA COMMUNITY PLAN AND DETERMINATION OF THE SCOPE OF REVIEW; MEMORANDUM IN SUPPORT OF MOTION; EXHIBIT "A"; CERTIFICATE OF SERVICE

Hearing:

Date: November 1 - 2, 2012

Time: 9:30 a.m.

**DEPARTMENT OF PLANNING, COUNTY OF MAUI'S
MOTION TO EXCLUDE EVIDENCE RELATED TO
THE 1998 KIHEI-MAKENA COMMUNITY PLAN**

Department of Planning, County of Maui ("County"), by and through its attorneys, Patrick K. Wong, Corporation Counsel, Michael J. Hopper and Jane E.

Lovell, Deputies Corporation Counsel, hereby moves to exclude evidence related to the 1998 Kihei-Makena Community Plan.

The sole issue before the Land Use Commission at this stage of the docket is whether the land owner “has violated the applicable conditions of the Findings of Fact, Conclusions of Law, and Decision and Order filed February 10, 1995 (“D&O”)”. See Land Use Commission’s September 27, 2012 Scheduling Order, p.3. However, Intervenor’s seek to introduce testimony regarding the project’s alleged non-compliance with the 1998 Kihei-Makena Community Plan (“1998 Plan”), which did not become law until three years after the D&O was issued.

The Commission lacks jurisdiction to address a project’s compliance with Maui County laws, including the Community Plans. See Kuleana Kuikahi, LLC v. Land Use Commission, 2012 WL 1510188 *4 (Hawaii App., April 27, 2012). In addition, because the 1998 plan was not made law until three years after the D&O was adopted, it does not have any bearing on whether any conditions of the D&O have been violated. Finally, county community plans were first added as part of the Commission’s decision making criteria in 2008, over a decade after the D&O. Thus, the community plan was not one of the criteria in HRS § 205-17 reviewed by the commission in issuing the D&O.

The County requests that the Commission exclude any evidence by any party related to compliance with the 1998 Kihei-Makena Community Plan, and determine that its scope of review in this proceeding is limited to compliance with

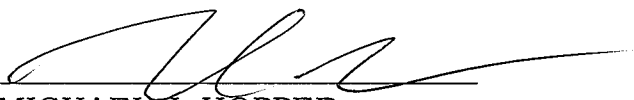
the D&O and not the 1998 Kihei-Makena Community Plan.

In particular, County requests exclusions of the portions of the testimony in Intervenors' Exhibits I-25, p. 11-12, 14, I-26 p.4-5, 6-7 related to community plan compliance, as well as any other written or oral testimony related to compliance with the 1998 Plan.

This motion is based on HRS § 91-10(1), HAR § 15-15-63(b) and HAR § 15-15-65; on the memorandum in support hereof; and on such argument of counsel as may be heard at the hearing on this motion.

Dated: Wailuku, Maui, Hawaii, October 25, 2012

PATRICK K. WONG
Corporation Counsel
Attorney for Department of Planning,
County of Maui

By 
MICHAEL J. HOPPER
JANE E. LOVELL
Deputies Corporation Counsel

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of

KAONOULU RANCH

To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for approximately 88 acres at Kaonoulu, Makawao-Wailuku, Maui, Hawaii; Tax Map Key Nos. 2-2-02: por. of 15 and 3-9-01:16

DOCKET NO. A-94-706

MEMORANDUM IN SUPPORT OF MOTION

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Intervenors seek to introduce written expert testimony (and presumably oral testimony) at the upcoming hearing on Owners' compliance with the 1998 Kihei-Makena Community plan. In particular, the testimony of both Michael Foley and Richard Mayer (Intervenors' I-25 and I-26) and many of the Intervenors' exhibits relate to compliance with the 1998 Plan.

The sole issue before the Commission at this stage is whether the land owner "has violated the applicable conditions of the Findings of Fact, Conclusions of Law, and Decision and Order filed February 10, 1995 ("D&O)". See Land Use Commission's September 27, 2012 Scheduling Order, p. 3. Whether the Owners are in compliance with the 1998 Plan is an entirely separate issue within the sole jurisdiction of the County of Maui.

A. The Commission Lacks Jurisdiction To Determine The Project's Compliance With The 1998 Kihei-Makena Community Plan

In Kuleana Kuikahi, LLC v. Land Use Commission, the Intermediate Court of Appeals held that the Land Use Commission properly limited its scope of review in a declaratory ruling proceeding to issues of State law. The Court found: "The counties were clearly granted the power to enforce and regulate zoning. Kuleana cites to no authority that would give LUC the power to oversee county zoning and regulations . . . LUC simply does not have the authority to approve or condemn county actions" Kuleana Kuikahi, LLC v. Land Use Commission, 2012 WL 1510188 *4 (Hawaii App., April 27, 2012).

Community Plans are adopted as ordinances by the Maui County Council as set forth in Chapter 2.80B of the Maui County Code. As with zoning and subdivision laws, it is Maui County, rather than the Commission, that has the authority to oversee compliance with community plans. While the Commission may review compliance with its own decisions and orders, it lacks jurisdiction to independently determine compliance with a County law that was adopted three years after the subject D&O.

B. Because the 1998 Kihei-makena Community Plan Was Adopted Three Years after the 1995 D&o, Any Alleged Violation of That Plan Would Be Irrelevant to Any Alleged Violation of the D&O.

The 1998 Plan was adopted by Ordinance 2641 and became effective on March 6, 1998. Because the D&O was issued three years prior to the existence

of the 1998 Plan, the Commission could not have considered the language of the plan in issuing the D&O. Nonetheless, Intervenors seek to present the issue of compliance with the 1998 Plan before the Commission in depth, with reference to language in the plan that was not adopted until 1998. See e.g. Exhibits I-25, p. 11-12, 14, I-26 p.4-5, 6-7.

The only condition in the D&O related to a Community Plan is condition 1, which states: “The Petitioner shall obtain a Community Plan Amendment and Change in Zoning from the County of Maui”. D&O p. 26. The community plan was amended as part of a comprehensive update in the 1998 Plan, thus fulfilling the only condition required of the Commission. This condition required that an amendment to the property’s designation be obtained; however, it did not incorporate any plan by reference, and did not give license to the Commission to oversee compliance with the 1998 Plan, which did not even exist in 1995.

C. County Community Plans Were Not A Part of The Commission’s Decision-making Criteria Until 2008, Thus The Commission Was Not Required To Consider The Community Plan In Its 1995 D&O.

In 2008, the Hawaii State Legislature amended the district boundary amendment decision-making criteria in HRS § 205-17 to add general and community plans as factors for the Commission to consider. See Act 26 (2008) attached as Exhibit “A”. Prior to this Act, the Hawaii state plan was part of the required decision-making criteria, but the county general or community plans were not. This is an additional reason that the Commission lacks jurisdiction to

oversee community plan compliance, as community plans first became part of the decision-making criteria over a decade after the D&O was issued.


D. Relief Requested

Based on the foregoing, the County requests that the Commission exclude all evidence related to non-compliance with the 1998 Kihei-Makena Community Plan, and to determine that its scope of review in this proceeding is limited to compliance with the D&O, rather than the 1998 Kihei-Makena Community Plan.

In particular, County requests exclusion of the portions of the testimony in Intervenors' Exhibits I-25, p. 11-12, 14, I-26 p.4-5, 6-7 related to community plan compliance, as well as any other written or oral testimony related to non-compliance with the 1998 Plan.

Dated: Wailuku, Maui, Hawaii, October 25, 2012

PATRICK K. WONG
Corporation Counsel
Attorney for Department of Planning,
County of Maui

By 
MICHAEL J. HOPPER
JANE E. LOVELL
Deputies Corporation Counsel



GOV. MSG. NO. 651

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

April 22, 2008

The Honorable Colleen Hanabusa, President
and Members of the Senate
Twenty-Fourth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

This is to inform you that on April 22, 2008, the following bill was signed into law:

HB2523

A BILL FOR AN ACT RELATING TO THE LAND USE
COMMISSION.
(ACT 26)

Sincerely,

LINDA LINGLE

EXHIBIT " A "

Approved by the Governor

on APR 22 2008

HOUSE OF REPRESENTATIVES
TWENTY-FOURTH LEGISLATURE, 2008
STATE OF HAWAII

ACT 026
H.B. NO. 2523

A BILL FOR AN ACT

RELATING TO THE LAND USE COMMISSION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 205-17, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "**§205-17 Land use commission decision-making criteria.** In
4 its review of any petition for reclassification of district
5 boundaries pursuant to this chapter, the commission shall
6 specifically consider the following:

7 (1) The extent to which the proposed reclassification
8 conforms to the applicable goals, objectives, and
9 policies of the Hawaii state plan and relates to the
10 applicable priority guidelines of the Hawaii state
11 plan and the adopted functional plans;

12 (2) The extent to which the proposed reclassification
13 conforms to the applicable district standards;

14 (3) The impact of the proposed reclassification on the
15 following areas of state concern:

16 (A) Preservation or maintenance of important natural
17 systems or habitats;



- 1 (B) Maintenance of valued cultural, historical, or
2 natural resources;
- 3 (C) Maintenance of other natural resources relevant
4 to Hawaii's economy, including agricultural
5 resources;
- 6 (D) Commitment of state funds and resources;
- 7 (E) Provision for employment opportunities and
8 economic development; and
- 9 (F) Provision for housing opportunities for all
10 income groups, particularly the low,
11 low-moderate, and gap groups;
- 12 (4) The standards and criteria for the reclassification or
13 rezoning of important agricultural lands in section
14 205-50; ~~and~~
- 15 (5) The county general plan and all community,
16 development, or community development plans adopted
17 pursuant to the county general plan, as they relate to
18 the land that is the subject of the reclassification
19 petition; and
- 20 ~~(5)~~ (6) The representations and commitments made by the
21 petitioner in securing a boundary change."



H.B. NO. 2023

1 SECTION 2. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 3. This Act shall take effect upon its approval.

4 Calvin K. Day

Melle Carroce

INTRODUCED BY:

~~Joe~~

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Alvin Throck

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John Jyla B. Berg

Maip B. Lee Cindy Evans

Kirk Caldwell John

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Kevin

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JAN 18 2008

H.B. NO. 2523

APPROVED this 22 day of APR, 2008

A handwritten signature in black ink, appearing to read "Linda Liza", written in a cursive style.

GOVERNOR OF THE STATE OF HAWAII

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of

DOCKET NO. A-94-706

KAONOULU RANCH

CERTIFICATE OF SERVICE

To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for approximately 88 acres at Kaonoulu, Makawao-Wailuku, Maui, Hawaii; Tax Map Key Nos. 2-2-02: por. of 15 and 3-9-01:16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served on October 25, 2012, upon the following parties, by depositing same in the U.S. Mail, postage prepaid, at their last known addresses:

METHOD OF SERVICE

MAIL HAND DELIVERY E-MAIL

DANIEL ORODENKER, ESQ. Executive Director Land Use Commission P. O. Box 2359 Honolulu, HI 96804 E-mail: daniel.e.orođenker@dbedt.hawaii.gov	X	X
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TOM PIERCE, ESQ. P. O. Box 798 Makawao, Hawaii 96768 E-mail address: tom@mauilandlaw.com	X	X
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Attorney for Intervenors Maui Tomorrow Foundation, Inc., South Maui Citizens For Responsible Growth, and Daniel Kanahale

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Attorneys for Pi'ilani Promenade North,
 LLC and Pi'ilani Promenade South, LLC
 and Honua'ula Partners, LLC

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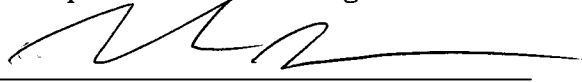
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Attorney for State Office of Planning

DATED: Wailuku, Hawaii, October 25, 2012.

PATRICK K. WONG
 Corporation Counsel
 Attorney for County of Maui
 Department of Planning

By



MICHAEL J. HOPPER
 JANE E. LOVELL
 Deputies Corporation Counsel