Cc-N 21

'03 MAY 15 P 2 09

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

LAND USE COMMISSION
STATE OF HAWAII

2003 MAY 14 A 8 08

RECEIVED
COUNTY OF HAWAII
PLANNING
DEPT.

In the Matter of the Petition of	)	DOCKET NO. A00-733
	)	
HARRISON J. & SHARENE Z. KLEIN	)	ORDER GRANTING PARTIAL
	)	RELEASE OF CONDITIONS
To Amend the Conservation Land Use	)	IMPOSED IN THE LAND USE
District Boundary into the Urban Land Use	)	COMMISSION'S FINDINGS OF
District for Approximately 2.621 acres of	)	FACT, CONCLUSIONS OF LAW
land at Keonepoko Iki, District of Puna,	)	AND DECISION AND ORDER FILED
Island, County and State of Hawaii.	)	NOVEMBER 5, 2001
TMK No: (3) 1-5-09: 39	)	

ORDER GRANTING PARTIAL RELEASE OF CONDITIONS IMPOSED IN THE STATE LAND USE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED NOVEMBER 5, 2001

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.

MAY 14 2003 by
Date Executive Officer

035160

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI`I

In the Matter of the Petition of	)	DOCKET NO. A00-733
	)	
HARRISON J. & SHARENE Z. KLEIN	)	ORDER GRANTING PARTIAL
	)	RELEASE OF CONDITIONS
To Amend the Conservation Land Use	)	IMPOSED IN THE LAND USE
District Boundary into the Urban Land Use	)	COMMISSION'S FINDINGS OF
District for Approximately 2.621 acres of	)	FACT, CONCLUSIONS OF LAW
land at Keonepoko Iki, District of Puna,	)	AND DECISION AND ORDER FILED
Island, County and State of Hawaii.	)	NOVEMBER 5, 2001
TMK No: (3) 1-5-09: 39	)	

ORDER GRANTING PARTIAL RELEASE OF CONDITIONS IMPOSED IN THE STATE LAND USE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED NOVEMBER 5, 2001

On January 23, 2003, Harrison J. and Sharene Z. Klein ("Petitioner"), filed their Motion to Release, Discharge, and Delete All Conditions in the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order Filed November 5, 2001; Memorandum in Support of Motion; Exhibits 1 and 2; Affidavit of Steven S. C. Lim ("Motion"), pursuant to sections 15-15-70, and 15-15-94, Hawai`i Administrative Rules ("HAR").

The Motion requested the release, discharge, and deletion of the nine (9) conditions set forth in the Findings of Fact, Conclusions of Law, and Decision and Order of the State Land Use Commission ("LUC" or "Commission") issued on November 5, 2001 ("Decision and Order").

The Motion asserted that Petitioner had substantially satisfied the conditions imposed by the Decision and Order and requested their release based upon the following: i) postponing of constructing an interior stairway within the single-family dwelling (Condition No. 1); ii) clearing of approximately ¼-acre portion of the Petition Area and the planting of 50 ti-leaf plants and 50 coconut trees (Condition No. 1); iii) maintaining of a 10-foot wide lateral pedestrian access corridor along the shoreline edge of the Petition Area (Condition No. 4); iv) continuing the use of an existing cesspool permitted by the State Department of Health (Condition No. 5); and v) complying with recordation requirements with the Bureau of Conveyances, Department of Land and Natural Resources (Condition Nos. 8 and 9).

On February 14, 2003, the Planning Department, County of Hawaii ("County"), submitted its Objection to Petitioner's Motion ("County's Objection"). The County's Objection expressed concern that granting Petitioner's Motion would render the Commission without any authority to enforce important conditions contained in the Decision and Order. Of particular concern were Condition Nos. 4 and 6, relating to lateral pedestrian shoreline access and mitigation of impact of unforeseen archaeological resources, respectively.

On February 19, 2003, Petitioner filed its Response to the County of Hawaii's Objection to Petitioner's Motion to Release, Discharge, and Delete All Conditions in the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order Filed November 5, 2001 ("Petitioner's Response"). Petitioner's Response stated the following, among other things: i) it complied with the required

recordation; ii) its request was intended to clear title to the property; iii) it is committed to allow lateral pedestrian shoreline access for traditional and customary cultural practices and related access; iv) the State Historic Preservation Division, Department of Land and Natural Resources ("SHPD") confirmed that there are no historical and/or cultural sites on the Petition Area due to prior agricultural and residential activities; and v) in the case of deletion of conditions, there are other enforcement remedies such as the Commission's issuance of an order to show cause, or State and County's enforcement of shoreline management areas.

The Motion came on for hearing before this Commission on February 20, 2003, in Kailua-Kona, Hawai`i, with appearances by Petitioner, County, and the Office of Planning, Department of Business and Economic Development and Tourism ("OP"). At the hearing, Petitioner stated that the intention of the Motion was to clear the conditions off the title of the Petition Area because it believed the proposed development has been completed. It stood by its positions in the Motion and Petitioner's Response, but offered to retain Condition Nos. 1 and 2 related to compliance and transfer ownership notice respectively. Petitioner also offered to record a public access easement for the 10-foot wide lateral pedestrian shoreline access in lieu of Condition No. 4, if Petitioner did not have to survey the property. In regard to Condition No. 6, it clarified that the entire Petition Area with exception of the shoreline and border areas was bulldozed for prior agricultural and residential activities.

The County stood by its position stated in its Objection, and especially requested to retain Condition Nos. 4 and 6. The County believed that an easement in lieu of

Condition No. 4 would make it more difficult to have the access enforced because litigation would place the burden of proof upon those trying to use the access rather than through LUC review and action. The County also believed that the SHPD confirmation regarding Condition No. 6 was known by the LUC, when the condition was imposed, whereby the Commission's concern was to ensure measures for unknown historical sites.

OP stated it did not file any written response to the Motion, and concurred with the County's position. OP believed that the conditions should be retained as a safeguard against noncompliance by any subsequent owners of the property, especially Condition Nos. 4 and 6. OP concurred with the County that an easement in lieu of Condition No. 4 would make it more difficult for the public to have the access enforced. OP believed that Condition No. 6 serves to ensure mitigation of any subsurface discoveries that may still occur despite prior surface grading activities.

The Commission acknowledged Petitioner's intention to clear title on the Petition Area, and the small scale of development on the Petition Area. It also acknowledged Petitioner's proposal to provide an access easement and the SHPD verification regarding Condition Nos. 4 and 6, respectively. However, the Commission believed that the conditions imposed by the Decision and Order reflected its sensitivity to issues unique to the Island of Hawaii.

Thereafter, a motion was made and seconded to retain Condition Nos. 1, 2, 4, 6, and 7; and to delete Condition Nos. 3, 5, 8, and 9 on the subject docket. There being a vote tally of 6 ayes, 0 nays, the motion carried.

ORDER

Having duly considered Petitioner's Motion, the oral and written arguments presented by the parties, and further representations made by Petitioner during the hearing, and a motion having been made at a hearing on February 20, 2003, in Kailua-Kona, Hawai`i, and the motion having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motion, this Commission ORDERS partial release of conditions imposed by the Decision and Order namely the release of Condition Nos. 3, 5, 8, and 9. All other conditions to the Decision and Order are affirmed and continue in effect, and renumbered accordingly.

Dated: Honolulu, Hawai`i, MAY 1 4 2003

LAND USE COMMISSION
STATE OF HAWAI`I

By LAWRENCE N. C. ING
Chairperson and Commissioner

APPROVED AS TO FORM:

Deputy Attorney General

Filed and effective on
MAY 1 4 2003, 2003
Certified by:

Executive Officer

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI`I

In the Matter of the Petition of	)	DOCKET NO. A00-733
	)	
HARRISON J. & SHARENE Z. KLEIN	)	CERTIFICATE OF SERVICE
	)	
To Amend the Conservation Land Use District Boundary into the Urban Land Use District for Approximately 2.621 acres of land at Keonepoko Iki, District of Puna, Island, County and State of Hawaii. TMK No: (3) 1-5-09: 39	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order Granting Partial Release of Conditions Imposed in the State Land Use Commission's Findings of Fact, Conclusions of Law and Decision and Order Filed November 5, 2001 was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

DEL. MARY LOU KOBAYASHI, Acting Director
Office of Planning
P. O. Box 2359
Honolulu, Hawaii 96804-2359

CERT. JOHN CHANG, ESQ.
Deputy Attorney General
Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813

STEVEN S. C. LIM, ESQ.
CERT. Carlsmith Ball LLP
121 Waianuenue Avenue
P. O. Box 686
Hilo, Hawaii 96721-0686

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

LINCOLN ASHIDA, ESQ.
CERT. Corporation Counsel
County of Hawaii
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720-4262

DATED: Honolulu, Hawaii, this 14th day of May, 2003.

ANTHONY J. H. CHING
Executive Officer