

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the matter of the Petition	)	DOCKET NO. A05-757
	)	
of	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
JAMES W. McCULLY and	)	AND DECISION AND ORDER
FRANCINE M. McCULLY	)	DENYING PETITION FOR LAND
	)	USE DISTRICT BOUNDARY
To Amend the Land Use District Boundary	)	AMENDMENT
of Certain Lands situate at Wailea, South	)	
Hilo, Island of Hawai'i, State of Hawai'i,	)	
TMK Nos. (3) 2-9-003: 013, 029 and 060,	)	
consisting of approximately 4.6 acres,	)	
from the Conservation District to the	)	
Agricultural District.	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**  
**DENYING PETITION FOR A STATE LAND USE DISTRICT BOUNDARY**  
**AMENDMENT**

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 - 9 2006

Date

by

Anthony Jolley  
Executive Officer

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER  
DENYING PETITION FOR A STATE LAND USE DISTRICT BOUNDARY  
AMENDMENT**

James W. and Francine M. McCully ("Petitioner"), filed a Petition For Land Use District Boundary Amendment ("Petition") on March 4, 2005, pursuant to section 205-4, Hawai'i Revised Statutes ("HRS"), and chapter 15-15, Hawai'i Administrative Rules ("HAR"), to amend the State Land Use District boundary by reclassifying approximately 4.6 acres of land at Wailea, South Hilo, Hawai'i, identified as Tax Map Key Nos. (3) 2-9-003:013, 029 and 060 ("Petition Area"), from the State Land Use Conservation District to the State Land Use Agricultural District.

The Land Use Commission of the State of Hawai'i ("LUC"), having heard and examined the testimony, evidence, and arguments of Petitioner, the County of Hawai'i Planning Department ("County"), the Office of Planning of the State of Hawaii ("OP"),

and their respective witnesses and counsel, the LUC hereby makes and enters the following findings of fact, conclusions of law, and decision and order:

#### FINDINGS OF FACT

1. On March 4, 2005, Petitioner filed the Petition and Draft Environmental Assessment ("DEA"). Petitioner proposed to consolidate the Petition Area's three existing lots of record with a former railroad right-of-way within the Petition Area and resubdivide the three existing lots of record and railroad right-of-way into a configuration of three new lots ("Project"). Upon completion, the Project would result in the following change for each parcel:

- a. Parcel 13 will be 1.11 acres, an increase of 0.92 acres
- b. Parcel 29 will be 1.12 acres, a decrease of 1.709 acres
- c. Parcel 60 will be 2.37 acres, an increase of 1.607 acres

2. At its hearing on March 16, 2005, held in Hilo Hawaii, the LUC determined that it agreed to be the appropriate accepting authority for the DEA, and that an anticipated finding of no significant impact is warranted for the Project, pursuant to chapter 343, HRS, and chapter 11-200, HAR. Subsequently, on April 12, 2005, the LUC issued its Order Determining: (1) That The Land Use Commission Agrees to Be The Accepting Authority Pursuant To Chapter 343, Hawaii Revised Statutes; and (2) Determining That The Draft Environmental Assessment Dated March 4, 2005 Warrants An Anticipated Finding Of No Significant Impact.

3. On April 18, 2005, Petitioner filed its Affidavit of Service of Notification of Filing of Petition.

4. On May 19, 2005, Petitioner filed its Final Environmental Assessment (“FEA”).
5. On June 2, 2005, LUC met in Makena, Maui, Hawaii, to consider acceptance of Petitioner’s FEA. Subsequently, on July 26, 2005, the LUC issued its Findings Of Fact, Conclusions Of Law, And Decision And Order Determining A Finding Of No Significant Impact For A State Land Use District Boundary Amendment.
6. On June 9, 2005, Petitioner filed its revised FEA which addressed a collating error in Appendix D of the FEA.
7. As of June 9, 2005, the Petition was deemed properly filed and accepted for processing by the Executive Officer of the LUC.
8. A prehearing conference was held on July 19, 2005, in Honolulu, Hawaii. At the prehearing conference: the Petitioner filed its List of Exhibits and List of Witnesses; the County filed its List of Witnesses and List of Exhibits; OP filed its OP Exhibits Nos. 1-2, List of Exhibits, List of Witnesses, and Certificate of Service.
9. On July 22, 2005, County filed its Exhibit No. 1.
10. On August 5, 2005, Petitioner filed its Stipulation of Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment.
11. On August 11 and 12, 2005, the LUC conducted a hearing on the Petition in Waikoloa, Hawai’i, pursuant to a public notice published in the Honolulu Star Bulletin and Hawai’i Tribune Herald on July 11, 2005. Entering appearances were R. Ben Tsukazaki, Esq. and James McCully for the Petitioner; Bobby-Jean Leithead-Todd, Esq.

and Norman Hayashi for the County; and John W. K. Chang, Esq. and Laura Thielen, Abe Mitsuda and Lorene Maki of OP. No individuals provided public testimony.

12. On August 11, 2005, Petitioner filed its First Amended List of Exhibits, Exhibit Nos. 8-9.

13. On September 16, 2005, Petitioner filed its First Amended Stipulation of Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment.

14. On September 29, 2005, the LUC continued its hearing on the Petition in Waikoloa, Hawai'i.

15. On December 16, 2005, Claudia Rohr and Public Access Shoreline Hawai'i submitted their written Testimony Against Petition.

16. On January 18, 2006, the LUC received written testimony from an anonymous person and written testimony from a group referred to as Big Island Concerned Citizens opposing the Petition.

17. On January 19, 2006, the LUC received written testimony from Jacqueline Mello opposing the Petition.

18. On January 19, 2006, the LUC conducted a site visit to the Petition Area.

19. On January 20, 2006, the LUC continued its hearing on the Petition in Hilo, Hawai'i. The LUC closed the evidentiary portion of the hearing subject to the response and report or answers to any of the LUC's specific requests to include information regarding the number of existing homes in the Conservation District along the Hamakua coast and if those homes were permitted via the Conservation District Use Permit ("CDUP") process.

20. On March 16, 2006, OP filed information received from the Office of Conservation and Coastal Lands relating to approved CDUP for dwellings located on the Hamakua Coast.

21. On April 5, 2006, Petitioner filed its Second Amended Stipulation of Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment.

22. On April 21, 2006, OP filed its Office of Planning's Response to Proposed Second Amended Stipulation of Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment.

23. On May 4, 2006, the LUC continued its hearing on the Petition in Hilo, Hawai'i. At the hearing, the LUC accepted Petitioner's Exhibits Nos. 10-12 and OP's Exhibit No. 3 into the record.

24. At its action meeting on May 4, 2006, in Hilo, Hawai'i, following deliberation by the Commissioners, a motion was made and seconded to grant the Petition in part and deny it in part and to adopt the Second Amended Stipulated Findings of Fact, Conclusions of Law and Decision and Order for a State Land Use District Boundary Amendment, as modified by the Commissioners.

There being a vote tally of 5 ayes, 2 noes, and 1 absent, the motion FAILED.

CONCLUSIONS OF LAW

1. Pursuant to § 205-1, HRS, and the LUC's Rules under chapter 15-15, HAR, six affirmative votes are necessary for any boundary amendment.
2. Pursuant to HAR § 15-15-13(b), if the LUC's action on a petition for boundary amendment fails to obtain six affirmative votes, findings of fact, conclusions of law, and decision and order denying the petition shall be filed by the LUC.

ORDER

Based upon the findings of fact and conclusions of law stated herein, it is hereby determined that the reclassification of the Petition Area is DENIED.

DATED: May 9, 2006.

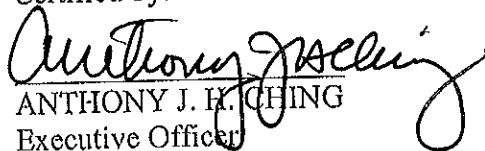
  
RANDALL F. SAKUMOTO  
Chair

Filed and effective on:

MAY - 9 2006

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Certified by:

  
ANTHONY J. H. CHING  
Executive Officer

BEFORE THE LAND USE COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Findings of Fact, Conclusions of Law,  
and Decision and Order Denying Petition for Land Use District Boundary Amendment  
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:

DEL. LAURA H. THIELEN, Director  
Office of Planning  
P. O. Box 2359  
Honolulu, Hawaii 96804-2359



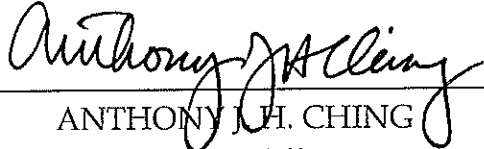
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Dated: Honolulu, Hawaii,                     MAY - 9 2006                    .

  
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ANTHONY J. H. CHING  
Executive Officer