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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

WALTER JOHN KELLY, et al., Plaintiffs vs. 1250 OCEANSIDE PARTNERS, a Hawaii limited partnership, et al., Defendants,	CIVIL NO. 00-1-0192K (Other Civil Action) FINDINGS OF FACT; CONCLUSIONS OF LAW; ORDER REGARDING TRIAL ON COUNT IV OF THE FIFTH AMENDED COMPLAINT

A non-jury trial on Count IV of the Fifth Amended Complaint for Declaratory and Injunctive Relief was held before the Honorable Ronald Ibarra on July 8-10, 15, and 22-23, 2003. Plaintiff Protect Keopuka Ohana was represented by Alan T. Murakami, Esq., Moses K. N. Haia, III, Esq., and Melissa W.L. Seu, Esq., Plaintiffs Walter John Kelly, Charles Ross Flaherty, Jr., Patrick M. Cunningham and Michele Constans Wilkins were represented by Robert D.S. Kim. Esq., Defendant 1250 Oceanside Partners was represented by Robert D. Triantos, Esq., David W. H. Chee, Esq., and Edmund W.K. Haitsuka, Esq., and Defendants County of Hawai'i, Christopher Yuen, and Dennis Lee were represented by Michael S. Kagami, Esq.

The Court, having received testimonial and documentary evidence, including evidence received in the trail and burial trials,[1] having heard the arguments of counsel, being otherwise fully advised in the premises, having reviewed the Proposed Findings of Fact and Conclusions of Law submitted by all parties on July 30, 2003, and judging the credibility of the witnesses, hereby makes and enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

To the extent not expressly contradicted by these Findings of Fact, the previous Findings of Fact and Conclusions of Law filed on August 01, 2001 and March 17, 2003 regarding the trail and burial phases are hereby incorporated as Findings, herein. If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

Background Information.

1. Plaintiffs Walter John Kelly, Charles Ross Flaherty, Jr., Patrick M. Cunningham and Michele Constans Wilkins (collectively "Kelly Plaintiffs") are residents of Kona, County and State of Hawai'i, and utilize the ocean area offshore of, and adjacent to, the land area designated by tax map key parcels 8-1-04:03 (portion), 7-9-12:03 (portion), 7-9-12:04 (portion), 7-9-12:05 (portion), 7-9-12:11, and 7-9-6:01 ("Hokuli'a project" or "project").

2. Plaintiff Protect Keopuka Ohana ("PKO") is a Hawai'i non-profit corporation, duly organized under the laws of the State of Hawai'i, which include as members a coalition of Hawaiian cultural practitioners, environmental advocates and lineal descendants of persons buried on the Hokuli'a project.

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[1]By stipulation of the parties, the Court may consider all of the evidence introduced in the previous trials.

3. Defendant County of Hawai'i is a municipal corporation and/or governmental entity located in the County and State of Hawai'i.

4. Defendant Christopher Yuen ("Yuen") is the Planning Director of the County of Hawai'i, and Defendant Dennis Lee is the Chief Engineer and Director of Public Works for the County of Hawai'i.

5. Defendant 1250 Oceanside Partners ("Oceanside") is a Hawai'i limited partnership with its principal place of business on the Island, County and State of Hawai'i.

6. Oceanside is developing the Hokuli'a project, formerly known as the Villages at Hokukano which extends mauka from the ocean to almost the Mamalahoa Highway, and straddles the boundaries of North and South Kona. PKO-679; PKO-680.

7. Oceanside's Hokuli'a development project (hereinafter "Hokuli`a") encompasses 1,550 acres of land in North and South Kona, County of Hawai`i. Originally, the property was classified as Agricultural and Conservation under the Hawaii Revised Statutes ("HRS") Chapter 205 land use classifications, designated as Extensive Agriculture, Orchards, and Open Space in the County General Plan, and zoned as Unplanned and Agriculture A-5a (five-acre lot minimum) under the County of Hawai`i's zoning code. *Exh. PKO-679, Excerpts from 9/93 Villages at Hokukano, Final Environmental Impact Statement ("FEIS") p. 1.*

8. Oceanside's initial development plan (then called Villages at Hokukano) for the Hokuli`a Project area envisioned a residential development, consisting of two separately zoned areas: a) A mauka area consisting of approximately 684 acres rezoned from Ag-5a to Ag-1a; and b) A makai area consisting of approximately 756 acres rezoned from Ag-5a to appropriate zoning for single family residential ½-acre lots or multi-family units. *Exh. PKO-668 p. 4; Test. R. Frye (7/10/03); Test. R. Stuit (7/23/03).*

9. In 1994, Oceanside changed the concept of the project such that the project, now called the Hokuli`a project, consisted entirely of one-acre Ag-1a lots. *Test. R. Stuit (7/23/03).*

10. In order to subdivide the property into one to three-acre lots for residences, Oceanside needed to change the minimum lot size requirement. On June 24, 1994, the Hawaii County Council approved Ordinance No. 94-73, which changed the county zoning of approximately 684 acres of land in the mauka portion of the property (Phase 1) to Agriculture one-acre minimum lots. *See, Exh. PKO-670, Hrg. Tr. before HI County Planning Comm'n. (5/5/00) p. 6-7.*

11. On January 15, 1996, Hawaii County Council passed: (a) Ordinance No. 96-7, which changed the zoning of 756 acres of land in the makai portion of the property (Phase 2) to Agriculture one-acre minimum lots. *Exh. DO-1234, Ord. No. 96-7*; and (b) Ordinance No. 96-8, which amended and deleted certain provisions of Ordinance No. 94-73 to address the Mamalahoa Highway Bypass Road. *Exh. DO-1247, Ord. No. 96-8.*

12. In order to move forward with construction of an 80-unit members' guest lodge in the "retreat resort" portion of the Hokuli`a project, Oceanside requested that the County reclassify a 14.854-acre area from Agriculture to Urban.

13. To do so, on March 13, 1997, the County first amended the County General Plan through Ordinance No. 97-34, which re-designated approximately 25+-acres of the Hokuli`a Project area from "Orchards" to "Retreat Resort." *Exh. DO-1282, Ord. No. 97-34.*

14. The same day the General Plan amendment was passed, the Council passed two additional ordinances affecting a smaller parcel within the 25+-acre parcel: 1) Ordinance No. 97-35, amending the land use classification for a 14.854-acre parcel, located within the larger 25+-acre parcel, from Agricultural to Urban, and 2) Ordinance No. 97-36, rezoning the same 14.854-acre parcel from Agricultural (A-1a) to Resort Hotel (V-6.0). *Exh. DO-1283, Ord. No. 97-35; Exh. DO-1284, Ord. No. 97-36; See also, Exh. DO-1260, Plann. Dept. Rec, Change of Zone App. 96-18.*

15. Thus, instead of reclassifying the total 25+-acre area redesignated in Ordinance No. 97-34, the area for reclassification and rezoning was limited to a 14.854-acre portion of the original 25+-acres.

16. The County issued final subdivision approval for Phase 1 of the Hokuli`a project on September 18, 1999, and for Phase 2 on December 1, 2000. *Exhs. DO-1303, DO-1304.*

The Nature Of The Hokuli`a Project.

17. Despite being located primarily on agricultural land, Hokuli`a is a private, luxury resort residential subdivision. *Exh. PKO-721, Printout of information at www.hokulia.com, visited 8/9/2002.* According to the Hokuli`a sales brochure, Hokuli`a is designed to be the "[m]ost private Oceanside golf community in the world." *Exh. PKO-722.* According to the Hokuli`a Marketing Plan, the general goal of Oceanside is to establish Hokuli`a as the "finest ocean side residential golf communities in the Hawaiian Islands." *Exh. PKO-194 Marketing Plan (1/21/99).*

18. Oceanside's promotional material describes Hokuli`a as:

> A rare find in the pacific isles, Hokuli`a, a private world-class Lyle Anderson community, offers a lifestyle like no other. Hokuli`a's number one amenity is its extraordinary climate: remarkably free from trade winds, with an average daily temperature of 75 degrees year round, providing for superb indoor-outdoor living conditions. Planned amenities will include a private championship Jack Nicklaus designed golf course, Clubhouse, Beach Club & Spa, two private boats, and a 140-acre shoreline park for quiet strolling and exercising. Private luxury estate homesites are now available for you to enjoy this exemplary lifestyle.

Exh. PKO-720, printout of information available at www.privatecommunities.com/Hawaii/Hokulia, visited on 8/9/2002; Exh. PKO-721; Exh. PKO-722, 2000 Hokuli`a brochure.

19. Neither the Hokuli`a website's nor Oceanside's marketing plan's description of the project above mention "agriculture." *Exhs. PKO-194; PKO-721.*

20. Oceanside's target market for the Hokuli`a project is a buyer who is: 1) 46-60 years old; 2) an established Fortune 500 executive; 3) possesses a household income of $300,000 or more; 4) has a net worth of $5 million plus; 5) an avid golfer; 6) residential equity rich (owns

homes in several destinations around the world); and 7) owns a current primary home in West Coast or in Japan. *Exh. PKO-194, Marketing Plan 1/21/99 p. 16.*

21. The Hokuli`a project, like all Lyle Anderson developments of which Richard Frye is personally aware, is geared to the high-end buyer that was targeted in the Marketing Plan dated January 21, 1999. *Test. R. Frye 7/10/03.* None of the Anderson projects involve development of an agricultural lot subdivision, other than one project which involved ranching. However, ranching has since been discontinued on that project. *Test. R. Frye (7/10/03); Exh. PKO-727.*

22. Oceanside's legal disclosure of the land use for which property is being offered for sale is a "high-quality community to be enhanced with agriculture." *Exh. PKO-458, Public Offering Statement (10/27/99) p. 3.* The agricultural component of the project will be located in common areas and roadways. Some agriculture may occur on easements on lots if deemed necessary and appropriate by the homeowners' association. *Id. at p. 27.* The intended agricultural use is to enhance the beauty of Hokuli`a. *Id.* "Buyers should not expect material financial benefits from agricultural activities." *Id.*

23. Farming operations must be able to adapt and diversify with changing market conditions. *Test. G. Teves (7/8/03).* If a farmer does not have complete control over his farming activities, he will not be able to adapt to these changing conditions, and his prospects for a successful farming operation would be severely constrained. *Id.*

24. Land, labor, water cost, and water availability must be factored into any analysis to determine the feasibility of the various and sundry agricultural plans for Hokuli`a. *Id.* Oceanside's agriculture plan did not include these factors.

25. Oceanside sold more than 90 lots in the Hokuli`a project between May 1998 and December 2000 and more than 190 lots between May 1998 and July 2003. *Test. R. Stuit (7/23/03).*

26. Between May 1998 and December 2000, Oceanside expended approximately $55,000,000 for construction and development costs for the project. *Test. R. Stuit. (7/23/03).* Between January 2001 and July 2003, Oceanside expended approximately $136,000,000 in additional construction and developement costs. *Id.*

27. Prices of the Hokuli`a lots range from $650,000 to $2.5 million. *(PKO Plaintiff's Exh. 625*). These prices will render agriculture on adjacent properties non-feasible because those land prices will inflate the value of adjacent properties and, at a minimum, discourage agricultural use of such property. *Id.* This increase in prices will also result in an increase in land taxes and, consequently, the cost of production for the farmer within the project and the surrounding agricultural lands outside the project. *Id.*

28. Agricultural activities as defined by HRS Chapter 205 include raising and breeding animals. Oceanside's prohibitions of this agricultural use hinders the farmer's ability to diversify and adapt in response to changing market conditions. *Id.*

29. Oceanside's condition that a lot owner need only place 20% of his/her one-acre lot in active agriculture will lessen the likelihood that there will be maximum use of agricultural lands. *Id.*

30. In order to run a viable farm on a one-acre lot, one would need to grow high intensity crops like hot-house tomatoes, orchids, and anthuriums. The agricultural plan for Hokuli`a does not include these crops. *Id.*

31. The ALISII system for agricultural lands is not determinative of the agricultural feasibility of certain lands. For example, the majority of agricultural land in Kona is rated C and D, which are excellent lands for coffee farming. The C and D ratings do not reflect the importance or productivity of these lands for coffee. *Id.*

32. The success of coffee farms in Kona has been attributed mainly to the family farm system whereby the family living on the land farms the land. *Id.* The high cost of land at Hokuli`a precludes coffee as a commercially viable crop. *Id.*

33. County of Hawai`i Planning Director Christopher Yuen reviewed Oceanside's Declaration of Covenants, Conditions and Restrictions for Hokuli`a dated December 20, 1999 ("CCR's"). *Test. Christopher Yuen, (7/8/03).*

34. Mr. Yuen believes that the terms of Oceanside's CCR's create a compliance problem with HRS Chapter 205; this should have alerted the County Planning Department to hold-up subdivision approval. *Id.*

35. Mr. Yuen's review of the county records indicate that at the time of subdivision approval its staff did not review the CCR's. *Id.* The County of Hawai`i did not receive the CCR's prior to subdivision approval. *Id.* Subdivision Control Code, Section 23, requires the County to review at least an outline or summary of these deed restrictions. *Id.*

36. As a matter of practice, the County of Hawai`i does not require a developer to provide this summary or outline of deed restrictions and did not do so in this case. *Id.*

37. The County of Hawai`i will ask and review a copy of the deed restrictions at the time Oceanside requests approval of Phase III. *Id.*

38. Unless instructed or ordered otherwise, the County of Hawaii will continue to issue permits for the construction and completion of Phases I and II of the Hokuli`a project. *Id.*

39. The County does not provide public notice of subdivision approvals, even to parties who object to the subdivision approval. *Id.*

Advice And Comments Received By Oceanside.

40. In planning the Hokuli`a development, Oceanside retained legal specialists in land use law to research the State land use laws regarding permissible agricultural uses of the land. *Test. R. Frye (7/10/03); Exh. PKO-195 Ag. Plan (1/21/99).*

41. Although early opinions addressed the Villages of Hokukano (1440 lots), Oceanside knew that in order to legally proceed with the Hokuli`a development (730 lots), the residences planned for the development needed to be bona fide "farm dwellings," i.e., single-family residences used in connection with a farm or providing income from agricultural operations to those occupying the residence. *Test. R. Stuit (7/23/03).*

42. In 1989, after reviewing two development options, Attorney Sandra Schutte advised Oceanside that once a "more concrete development proposal is established, the proposal be reevaluated and also reviewed by the appropriate state and county agencies involved in the land use permitting process." *Exh. DO-1354, Ltr. From S. Schutte to L. Anderson (6/30/89) p. 15.*

43. On June 30, 1989, Oceanside attorneys also advised their client that land use laws in Hawaii were complicated by the dual jurisdiction of state and county governments, and counseled that compliance with these laws would depend upon the consistency of three factors: (1) the general plan designation of the County of Hawai`i for the relevant area; (2) the LUPAG map for the area; and (3) the requirements of state land use law. Mr. Frye was aware of this advice. *Exh. PKO-704, Memo from Roehrig, Roehrig, et al. (6/30/89); Test. R. Frye (7/10/03).*

44. As Oceanside sought to rezone the property and obtain development approvals, it also received considerable input from State agencies reminding it of the agricultural classification and uses of the property. *Test. R. Frye 7/10/03; Exhs PKO-597A, PKO-599B, PKO-622, PKO-568, PKO-571, PKO-573, PKO-576, PKO-591, Letters from State agencies and Defendant's responses.*

45. The State Department of Agriculture ("DOA") commented that the proposed agricultural uses of the Hokuli`a property neither provided "any specific crop recommendations nor any evidence that agricultural use of the proposed lots will be implemented and continued." *Exh. PKO-571, Ltr. from Y. Kitagawa to V. Goldstein (7/12/93).*

46. Commenting on Oceanside's application for rezoning its mauka portion of its property from Ag-5a and Unplanned to Ag-1a, the DOA noted that the smaller size lots "will seriously limit range of economically viable uses of property." *Exh. PKO-571, Ltr. from Y. Kitagawa to R. Frye (7/12/93) p. 2.*

47. Oceanside did not adequately address this concern nor establish to any satisfactory extent that it will in fact implement a "bona fide agricultural use." *Exh. PKO-573, Ltr. from Y. Kitagawa to V. Goldstein (8/2/93); see, Exh. PKO-575, 8/6/93 Ltr. from J. Leonard to Y. Kitagawa; see also, Exh. PKO-579, 9/10/93 Ltr. from J. Leonard to Y. Kitagawa.*

48. In 1993, the Office of State Planning ("OSP") informed Oceanside that its planned Villages at Hokukano appeared to be a "small resort." *Exh. PKO-568, Ltr. from H. Masumoto to V. Goldstein (6/3/93).* Director Harold Masumoto noted that OSP's West Hawaii Regional Plan did not "encourage resort development at the project site." *Id.*

49. Oceanside responded to Mr. Masumoto that there was no intent to include a "resort" as part of the project. *See, Exh. PKO-576, Ltr. of J. Leonard to H. Masumoto (8/9/93).*

50. The County Planning Director Virginia Goldstein very early in the review of the Villages at Hokukano project cautioned that the law requires that the project be viewed "in its entirety to properly assess the project against the guidelines for approval of the various amendments to the land use designation and permits." *Exh. PKO-569, Ltr. from V. Goldstein to R. Frye (6/9/93).*

51. Ms. Goldstein never retracted this statement in writing, which constitutes the official position of the County of Hawaii. *Test. V. Goldstein, (7/22/03).*

52. In 1994, addressing Oceanside's request for advice on a State Land Use Commission ("LUC") declaratory ruling on a project known as "Crazy Horse,"[2] Oceanside's attorney Christine A. Low advised:[3]

> In its declaratory order, the LUC ruled that a dwelling situated on land located in the State Agricultural Land Use District must be a "farm dwelling" or related to an agricultural activity, pursuant to HRS § 205.4.5(a)(4).
>
> . . . .
>
> [T]he LUC ruled that the State land use law preempts any county law, ordinance, or rule that authorizes any residential dwelling as a permissible use within the state agricultural land use district. *Ltr. from C. Low to R. Frye (12/20/94), included in Exh. PKO-195.*

53. Ms. Low stated that other than a statement that Oceanside is "exploring options for integrating agricultural zones," "[t]here is no indication that the residential units proposed by Oceanside 1250 are either 'farm dwellings' or otherwise relate to an agricultural activity." *Id. at pp. 2-3.*

54. Ms. Low's letter explicitly addressed the statutory requirement of HRS § 205.4.5(a)(4) for a farm dwelling: each farm dwelling was required to be "tied to agricultural activity," rather than other uses, like a golf course, concluding:

> Given the ruling in the Crazy Horse development, it may also be anticipated that the State Land Use Commission and the County of Hawaii may not approve any permits, absent a petition for reclassification to urban and/or enactment of a County ordinance in conformity with the State land use law which specifically allows residential dwellings in connection with golf courses. *Id. at p. 3.*

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[2] "Crazy Horse" involved a development project on 10.496 acres of land in Kona, also classified as Agriculture 1-a. In that case, the LUC ruled that single-family dwellings that failed to meet the requirement of "farm dwellings" were not permissible uses for that type of land classification. Exh. PKO-681, State Land Use Commission, Docket No. DR94-17, In the Matter of the Petition of John Godfrey, Declaratory Order filed December 6, 1994. While this Declaratory Order was not binding on Defendant Oceanside, it nonetheless provided an indication of how the LUC would rule if Oceanside petitioned for reclassification of the Hokuli`a property.

[3] Ms. Low was responding to Richard T. Frye's concern as to "whether the agricultural use proposed at the Villages at Hokukano was sufficient to meet the standards enunciated in the LUC's declaratory order." Ltr. from C. Low to R. Frye (12/20/94) included in Exh. PKO-195.

55. Through Ms. Low's letter, Oceanside had express notice in 1994 that its proposed development did not comply with governing state land use laws, which preempted any apparent County authority for residential residences on agricultural land.

56. Earlier that year, another Oceanside attorney, Ben Kudo, had advised that "...the [LUC] is not expected to rule in favor of agricultural lots being used for residential uses. Developers will be forced to urbanize their lands in order to put them to residential uses in the future." *Exh. PKO-709, Ltr. from B. Kudo to R. Frye (9/2/94).*

57. In 1995, Oceanside amended its development plan for the Villages at Hokukano to rezone all areas containing residential development, including both the mauka and makai areas of its 1550 acres, to Ag-1a, and changed the name of the project to "Hokuli`a." *Test. R. Stuit (7/23/03).*

58. The 1995 plan to rezone all residential lots to Ag-1a was the final project configuration; Oceanside management ignored Ms. Schutte's advice that they seek review of its planned project by the LUC once it was amended and finalized, even though its Final Environmental Impact Statement ("FEIS") provided that Oceanside would seek a boundary amendment from the LUC.[4]

59. In 1995, after Oceanside revised its project to 730 residential lots, Gregory G.Y. Pai, OSP director, conveyed his doubts about the agricultural nature of Oceanside's project in light of the farm-dwelling requirement:

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[4] Specifically, the FEIS, Exh. PKO-679, at p. 114, states:

> For the project to move forward, a land use district boundary amendment will be submitted to the State Land Use Commission, to redesignate approximately 863 acres of the Agricultural District Lands for Low and Medium Density Urban uses. This will allow development of the proposed members' lodge and a predominately single family residential development in neighborhoods ranging in density from 2 to 4.7 units per acre.

While the FEIS contemplates lot sizes that are smaller than the current project, Oceanside knew that in order to build luxury residences (non-farm dwellings) on Agricultural land, it would need to have the land reclassified as Urban.

> The project's recreational, resort, and low-density single-family residential components do not conform to uses that are permissible within the State Agricultural District (HRS 205-4.5). Single-family dwellings within the Agricultural District are required to be "farm dwellings" as defined by Section 205-4.5(4). Because the project's residential dwellings do not appear to be accessory to economically viable agricultural activities, the project's residential dwellings may not conform to the State's farm dwelling requirement.
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> . . .
>
> State law requires that single-family dwellings located within the State Agricultural District must be restricted to farm dwellings. A farm dwelling is defined by HRS Chapter 205-4.5(4) as "a single family dwelling located on and used in connection with a farm . . . where agricultural activity provides income to the family occupying the dwelling."
>
> *Exh. PKO-589, Ltr. from G. Pai to V. Goldstein, (7/20/95) (emphasis in original) pp. 1, 2; see Exh. PKO-591,Ltr. from J. Leonard to G. Pai (9/12/95) (Oceanside response).*

60. Given the advice and comments from attorneys and state agencies with expertise in land uses and agriculture, at the very minimum, any reasonable developer reading these letters would have consulted with the LUC between 1989-95.

61. During a 1996 workshop addressing the pending amendment to the County General Plan for the "resort retreat" area, Councilperson Curtis Tyler, observed: "They [Oceanside] are trying to avoid the State Land Use Commission . . . ." *Exh. PKO-622, Meeting Notes, Planning Dept. Workshop (5/30/96) p.2-3.*

62. Douglas Blake from the Conservation Council stated, "This is not sticking to the County General Plan. This is spot zoning and just makes the General Plan meaningless." *Id.*

63. The LUC had its first formal opportunity to comment on the Hokuli`a project in 1996. The LUC addressed the proposed reclassification of only a 14.854-acre parcel of the Hokuli`a project in Ordinance 97-35. The LUC's Executive Officer, Esther Ueda, noted the LUC's continuing concern about "parcelling" of projects in order to allow reclassification of land by the County under HRS § 205-3.1. *Exh. PKO-597A, Ltr. from E. Ueda to V. Goldstein (8/6/96).* Mr.

Frye had notice of the Ms. Ueda's comments. *PKO-598, Ltr. from V. Goldstein to R. Frye (8/13/96); Test. R. Frye (7/9/03).*

64. Oceanside responded to Ms. Ueda's letter, summarily dismissing the LUC warning. *Exh. PKO-599B, Ltr. from J. Leonard to E. Ueda (9/19/96).*

65. The LUC's concern that the County of Hawaii may have been parceling the project to avoid LUC review pursuant HRS Chapter 205 prompted Ms. Ueda's comments. *Test. E. Ueda (7/22/03).* This concern was raised because of the County of Hawaii's past history with respect to similar projects. *Id.*

66. The LUC did not initiate a petition for declaratory order for the Hokuli`a project out of concern that doing so would place the LUC in a possible conflict of interest. *Id.*

67. On April 20, 1998, Oceanside and the County entered into a Development Agreement to develop Hokuli`a. *Exh. DO-1352.*

68. In the Development Agreement, Oceanside acknowledged its responsibility to comply with all land use regulations, including HRS chapter 205. *Id., paragraph 5.*

69. The Development Agreement imposed certain exactions on Oceanside, including: 1) construction of a bypass highway from Keauhou to Napoopoo; 2) dedication, improvement, and maintenance of a 140-acre shoreline park; 3) establishment of an employee housing program; and 4) dedication of additional acreage for Kona Scenic Park. *Test. R. Stuit (7/23/03).*

70. As late as the year 2000, the LUC warned the County of the requirement that only farm dwellings are allowed as residences on lands classified as Agriculture. *PKO-604A, Ltr. from E. Ueda to V. Goldstein (3/6/00).*

71. Mr. Frye testified that he presumed that: (a) Ag-1a zoning by the County of Hawai`i alone was sufficient to assure compliance with HRS chapter 205; (b) the "farm dwelling"

requirement only applied to lands rated A and B under the ALISH rating system; and (c) the project did not have to be viewed "in its entirety" for purposes of determining the proper land use designation. *Test. R. Frye (7/10/03).* Oceanside never asked the LUC to reclassify its residential subdivision from Agricultural to Urban. *Id.*

72. County officials reviewing the project allowed the project to proceed in spite of the comments by the state agencies.

73. Absent a court order, Oceanside will proceed with construction of its agricultural subdivision contrary to state land use law requirements, and the County Planning Director will grant approvals pursuant to the Development Agreement.

74. Oceanside officials testified they are convinced that their interpretations of state land use laws are correct, despite the numerous letters on record suggesting the contrary.

CONCLUSIONS OF LAW

To the extent not expressly contradicted by these Conclusions of Law, the previous Findings of Fact and Conclusions of Law filed on August 01, 2001 and March 17, 2003 regarding the trail and burial phases are hereby incorporated as Conclusions of Law, herein. If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

HRS Chapter 205

1. This Court previously found:

> 14. The primary use and activities within the agricultural lots are not agriculture. Furthermore, the agricultural use and activities are insubstantial.[5]

2. This Court further concluded that:

> 15. Pursuant to Hawaii Revised Statutes Section Chapter 421J, Hokuli`a CCR's are binding upon the Hokuli`a agriculture lot owners. The Court concludes under the

[5] Order Granting In Part And Denying In Part Plaintiff's Motion for Partial Summary Judgment Re: HRS Chapter 205 Count IV In The Fifth Amended Complaint Filed October 12, 2001 (hereafter "April 5, 2002 Order").

totality of the circumstances that the Hokuli`a activities and uses as proposed in the CCR's particularly within the agricultural lots violates Hawaii Revised Statute Chapter 205. *April 5, 2002 Order.*

3. HRS § 205-2 permits only land uses consistent with an Agriculture classification.

4. The feasibility or viability of agriculture is a relevant consideration in evaluating whether use of agricultural lands will comply with HRS chapter 205. *AG Op. 75-8.* While the statute does not require profitability, any analysis must include the costs of operations, including land and infrastructure costs. Otherwise, any *deminimis* agriculture activity will be able to satisfy the restrictions of that chapter, an absurd result that the Legislature could not have intended. Kim v. Contractor's License Bd., 88 Haw. 264, 270, 965 P.2d 806, 812 (1998) (holding that the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction and illogicality).

5. The LUC regulations supplement the statutory requirements of HRS chapter 205. The permitted use of A&B land for farm dwellings is extended by LUC regulation to a permitted use of C, D, E lands. HAR § 15-15-25(b).

6. The information and proposals available at the time of subdivision approval are the only relevant evidence of the legality of what uses are going to be made of the land. Any subsequent attempts to comply with HRS chapter 205 after court intervention are immaterial to this determination.

7. Oceanside's amendment of its CCR's, even if relevant as an attempt to cure this defect, does not alter this Court's conclusion that the use of the agricultural lots are not principally agriculture; the amendment merely gives the lot owner the ability to engage in farming activity as directed by the homeowners' association. *Exhibit PKO-724.* Moreover, the agricultural activities proposed are *deminimis* and do not change the purpose and character of the development, which is

luxury residential living within the setting of a golf course, club house, private lodge, and other amenities unrelated to agricultural activities.

8. Any dwelling on land classified Agriculture must be a "farm dwelling" as defined by HRS Chapter 205-4.5(a)(4).[6] The Hokuli`a residences are not farm dwellings. They will not be located on or used in connection with a farm, nor provide income to its occupants. Rather, they are luxury residences built around and to be used in connection with recreational activity centered around a golf course, members lodge and beach club and spa. *Exhs. PKO-709, PKO-710.*

9. Oceanside's omission or *deminimis* reference to any agricultural use of land in its promotional material and its emphasis instead on the exemplary life style surrounded by a golf course, club house, dining facilities, members' lodge, beach club, and private luxury home sites selling for one to three million dollars each collectively indicate a planned and continued urban use of land.

10. Pursuant to HRS § 205-4.5(a)(4), Oceanside must seek a boundary amendment from Agricultural to Urban from the LUC for houses to be built. *AG Op. 75-8.*

Laches.

11. There are two components to laches, both of which must exist before the doctrine will apply. First, there must have been a delay by the plaintiff in bringing his claim, and that delay must have been unreasonable under the circumstances. Second, that delay must have resulted in prejudice to defendant.[7]

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[6] This statute provides the following allowed use on Agriculatural land:
(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.

[7] Adair v. Hustace, 64 Haw. 314, 320, 640 P.2d 294, 300 (1982) ("Adair") citing W. McClintock, Equity § 528 at 71 (2d ed. 1948).

12. Laches precludes the very consideration of an equitable action because the prejudice to defendant caused by plaintiff's unreasonable delay consists in part of placing the defendant at an inequitable disadvantage in meeting plaintiff's allegations. *Adair,* 64 Haw. at p. 324.

13. Delay is reasonable if the claim was brought without undue delay after plaintiff knew of the wrong or facts and circumstances sufficient to impute such knowledge to him. *Id.* at p. 320, *citing* 3 S. Symons, Pomeroy's Equity Jurisprudence, § 917 (5th ed. 1941). The question of diligence in suits in equity is determined by the circumstances of each particular case. *Adair*, 64 Haw. at 321.

14. Here, Oceanside acknowledged in its 1993 FEIS that it needed LUC approval to move forward with the Hokuli`a project. *Exhibit PKO-679, FEIS, at p. 114.* The FEIS discloses a plan to build some lots ranging in density from 2 to 4.7 residential units/acre. However, when the Hokuli`a project was changed to consist of only 1 residence on each one to three-acre lots, Oceanside failed to notify the public in any supplemental EIS that it would be bypassing the LUC.

15. Moreover, the County never gave public notice of Oceanside's subdivision approvals in September 1999 and December 2000, leaving it to chance for Plaintiffs to discover. *Test. C. Yuen (7/8/03).*

16. Plaintiffs filed their Second Amended Complaint on December 21, 2000, adding alleged violations of HRS Chapter 205.

17. Given the concerns that Defendant Oceanside's development violated HRS Chapter 205, the County has a duty at a minimum to objectively investigate and enforce compliance with Chapter 205. The County did not investigate, cite, nor report any violations to the LUC or any other state agency. HRS § 205-12 provides, "[t]he appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to

agricultural districts under section 205-4.5 and shall report to the commission all violations." Certain language and content in the Development Agreement placed the County in a position of conflict regarding enforcement of Chap. 205, HRS. The County is faced with a breach of the Development Agreement had they "held up" or "stalled" the development through any investigation or reporting to the LUC. The County did not disapprove, but approved, all requested permits involving the development.

18. This Court has already ruled:

> 4. Pursuant to Haw. Rev. Stat. Sec. 205-12, the counties must take before-the-fact measures to insure preservation of prime agricultural land, and when investigation shows that a proposed subdivision in an agricultural district will in all likelihood not be used for agricultural purposes and may be an attempted circumvention of the land use district amendment procedure and controls provided in this chapter, the county should disapprove the subdivision application. Op. Att'y Gen. No. 75-8 (September 3, 1975). *Conclusion of Law No. 4, April 5 Order at 8.*

19. The Court does not have to wait until Hokuli`a residents obtain building permits for their residences before it can act to enforce HRS Chapter 205 and/or its regulations, given the intended uses.

20. The county must take affirmative preventative action to protect agricultural land and "cannot rely only on after-the-fact measures when a large area of agricultural land is involved." *Attorney General Opinion 75-8.* Without affirmative action prior to subdivision approval, the County's enforcement ability will be impractical when the County must prosecute 730 separate lot owners after subdivision approval. *See Id.* "Any doubt as to whether a proposed subdivision will result in a significant change of land use should be resolved in favor of a disapproval." *Id.*

21. The general public must be able to rely on the County of Hawaii to enforce HRS Chapter 205. The County of Hawaii, as the agency responsible for enforcement of HRS Chapter 205, must "thoroughly investigate any application for subdivision of a large area of agricultural land into lots that appear to be too small for economically feasible agricultural activity." *AG Op. 75-8.*

22. The County of Hawaii approved Defendant Oceanside's applications for subdivision approval of Phases I and II without considering the applicable CCR's and therefore failed to conduct the required thorough "before approved" investigation. The County of Hawaii's failure to conduct such an investigation left enforcement of HRS Chapter 205 to Plaintiffs.

23. Despite the contrary advice and information available to both Oceanside and the County of Hawai`i, the County appeared to be accommodating Oceanside's desire to avoid LUC involvement by privately assuring Oceanside that LUC involvement was not needed, in dereliction of the County's explicit duty to enforce "the restriction on use and conditions relating to agricultural districts[.]" HRS § 205-12. In view of HRS §§ 205-3.1 and 205-12, this Court concludes that the County of Hawai`i and Oceanside deliberately collaborated to avoid LUC involvement in exchange for the conditions imposed in the Development Agreement.

24. Any delay in bringing Plaintiffs' claims was caused by County of Hawaii's failure to enforce HRS Chapter 205, which failure to act this Court concludes is the result of the Development Agreement. Any financial prejudice to Defendant Oceanside was caused by the County of Hawaii's failure to enforce HRS Chapter 205, and Oceanside continuously and consciously did not comply with the spirit and intent of Chap. 205.

25. The project is not yet substantially complete. Of the approximately seven hundred houselots, only one house is in the process of being built. Given these circumstances, Plaintiffs were diligent in advancing these claims, and any delay that resulted in Plaintiff's pursuing these claims is not unreasonable; therefore, Oceanside has failed to meet its burden to prove its affirmative defenses under the doctrine of laches.

Improper Delegation.

26. The terms of the Development Agreement do not authorize Oceanside to proceed without complying with HRS chapter 205, as long as Oceanside attempts to comply in the future.

Hui Alaloa v. County Planning Commission, 68 Haw. 135, 137; 705 P.2d 1042, 1044 (1985) (holding that imposing self-serving conditions on an SMA permit without requiring a compliance hearing was in error). The LUC should have been given the opportunity to make that prior determination with specific findings and conclusions as to the effect of the development on agricultural resources in advance of any land use approvals. *Id.*

27. The County of Hawaii may not delegate the power and responsibility to determine the means to preserve the uses on agricultural land to a private developer, whose interest is in selling lands for recreational and luxury residential uses. Ka Pa`akai 94 Haw. 31, 51; 7 P.3d 1068, 1088 (2000) (holding, as in Hui Alaloa, that the delegation of the protection and preservation of native Hawaiian practices to a developer was inappropriate).

Vested Rights And Estoppel.

28. The defense of estoppel is derived from equity, but the defense of vested rights reflects principles of common and constitutional law. Similarly, the elements of the two defenses are different. Estoppel focuses on whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights focuses upon whether the owner acquired real property rights which cannot be taken away by governmental regulations. Nevertheless, the courts seem to reach the same results when applying these defenses to identical factual situations.[8]

29. Vested rights can only accrue as to legal and permissible uses of the land.[9]

30. The issuance of a permit that is invalidated upon direct judicial review creates no vested right upon which an owner can rely.[10]

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[8] Allen v. City and County of Honolulu, 58 Haw. 432, 435, 571 P.2d 328, 329 (Haw. 1977) (citations omitted.); *see also*, Mark S. Dennison, Zoning--Circumstances Warranting Relief from Zoning Enforcement, 25 Am. Jur. Proof of Facts 3d 541 (1994).

[9] *See generally*, Dorothy Tom, Development Rights in Hawaii, 6 U. Haw. L. Rev. 437 (1984).

[10] 35 AmJur POF 3d 385, Zoning: Proof Of Vested Right To Complete Development Project, § 14, Necessity of good faith on developer's part.

31. Neither equitable estoppel nor vested rights are applicable where a party had fair notice as to governing and applicable laws and an invalid action occurs. A permit issued illegally, or in violation of the law, or under a mistake of fact does not confer a vested right upon the person to whom it is issued, even though that person has made substantial expenditures in reliance thereon . . . . [citations omitted]. The underlying principle which supports this rule is that every person is presumed to know the extent of power of the municipal authorities.[11] Oceanside had legal advice and notice from several legal sources.

32. Good faith on the developer's part is always required in determining when a landowner-developer's rights to project completion vest under existing zoning regulations. 35 AMJUR POF 3d 385, *supra, n. 10.*

33. An owner who obtains an invalid permit "would derive no benefit, and whatever he might do in pursuance of this permission would be at his own risk and loss...."[12]

34. A developer who proceeds with construction in the face of a court challenge to his or her permit is deemed to have proceeded at his or her own risk and will not be accorded vested rights in the event of a subsequent court reversal.[13] In addition, an owner who obtains a permit and begins construction before the expiration of an appeal period proceeds at his own risk.[14]

35. Oceanside has a vested right to use the land for agriculture. It has no vested right to build luxury residences in the guise of "farm dwellings," or to operate an urban resort development on Agricultural lands.

36. Because both its rezoning and subdivision approvals are defective, Oceanside's reliance on its prior subdivision approval to assert a defense of either vested rights or equitable

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[11] Miller v. Board of Adjustment, 521 A.2d 642, 647 (Del. Super. Ct. 1986) (emphases added).

[12] Lipsitz v. Parr, 164 Md. 222, 227-28, 164 A. 743, 745-46 (1933).

[13] 35 AmJur POF 3d 385, § 14, citing O'Donnell v Bassler, 289 Md 501, 425 A2d 1003 (1981), later proceeding 56 Md App 507, 468 A2d 383, *cert. den.* 299 Md 426, 474 A2d 219.

[14] City of Hagerstown, 264 Md. at 496, 287 A.2d at 250; Lipsitz, 164 Md. at 225-28, 164 A. at 745-46.

estoppel for its planned "agricultural" subdivision must fail, and the County cannot ignore its enforcement duties under HRS § 205-12.

Failure to Act in Good Faith.

37. The elements of an equitable estoppel defense are: "(1) that a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine."[15]

38. "The developer's conduct is scrutinized for good faith attempts to comply with all the legal requirements known to him."[16]

39. In Life of the Land v. City Council, 60 Haw. 446, 592 P.2d 26 (1979), the Hawai`i Supreme Court held that where a developer, in good faith reliance upon existing law, has expended substantial sums of money for the preparation of plans and documents for the purpose of applying for a building permit, the county will be equitably estopped from denying him a building permit based on a subsequently enacted ordinance.

40. The relevant elements in Life of the Land that gave rise to equitable estoppel were: 1) good faith reliance; 2) upon existing law; 3) a substantial expenditure of monies (detrimental reliance); and 4) a subsequent change in the law.

41. A developer must show that his reliance on governmental conduct--whether it be issuance of a building permit, pre-permit assurances, or other official action--was both reasonable and in good faith. *Id.* In most cases, if a municipality shows that a developer acted in bad faith, there is no vested right to project completion. *Id.* This lack of good faith is viewed as an equitable

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[15] April 5, 2002 Order, Conclusion of Law No. 18, citing Miller v. Bd. of Adj. of Dewey Beach, 521 A.2d at 646.

[16] Dorothy Tom, *supra*, 6 U. Haw. L. Rev. at 444 (1984) (citing C. Siemon, W. Larson and D. Portor, Vested Rights: Balancing Public and Private Development Expectations (Urban Land Institute 1982)).

estoppel defense, or simply as evidencing a lack of the reliance necessary to a prima facie claim of vested development rights. *Id., citing* Dege v Maplewood, 416 NW2d 854 (Minn. App. 1987).

42 Unlike Life of the Land, in the instant case there has been no subsequent change in the law. The State's land use laws are the same now as they were when Oceanside started the permitting process for the Hokuli'a development. Those land use laws required Oceanside to seek a reclassification of the Agricultural lands at that time, just as they do now.

43. Oceanside is presumed to know the governing laws and cannot rely on permission obtained from the County contrary to law. Oceanside disregarded advice from several of its own counsel to be more careful, as evidenced when Mr. Frye proceeded with the Hokuli`a development under his erroneous presumption that: (a) Ag-1a zoning by the County of Hawai`i alone was sufficient to assure compliance with HRS chapter 205; (2) the "farm dwelling" requirement only applied to lands rated A and B under the ALISH rating system; and (3) all parts of the 1540-acre development did not need to be evaluated "in its entirety" for purposes of evaluating its proper land use designation. *Test. R. Frye (7/9/03).*

44. "[W]here an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous." Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 42 (2000)

45. Both the LUC Executive Director and the County Planning Director expressed concerns about the failure to view the Hokuli`a project "in its entirety" to determine the appropriate land use designation for the project under HRS chapter 205. These opinions lend persuasive weight to the conclusion that when viewed "in its entirety," the Hokuli`a project is essentially an urban, not agricultural, use of lands.

46. Pursuant to Hawaii Revised Statutes § 91-8, any interested person may petition an agency for declaratory order as to the applicability of any rule or order of the agency.

47. Given the advice Oceanside received from its counsel and the comments of the County of Hawai`i Planning Director, the Executive Director of the State LUC, the director of the State OSP; and the director of the State DOA, it was unreasonable for Oceanside to proceed with the development of Hokuli`a without seeking state LUC approval or a declaratory ruling. Oceanside's insistence on proceeding with only County approval for its rezoning of the agricultural lot area to Ag-1a in its residential subdivision, without regard for the additional requirement of HRS § 205-4.5 is a disregard for known risks that does not constitute "acting in good faith."

48. Oceanside's decision to nearly triple its alleged $55 million spending prior to the filing of this action establishes that it knowingly risked the additional $136 million it allegedly expended since the filing of the complaint. *Test. R. Stuit (7/23/03).*

49. Oceanside's April 20, 1998 Development Agreement with the County was explicitly conditioned on compliance with HRS Chapter 205:

> 5. PERMITTED USES OF THE PROPERTY. Permitted uses of the Property shall be all uses permitted under the Land Use Regulations[17] and Approvals, including, without limitation, the permitted uses in Chapter 205, HRS, the Zoning Code section 25-5-72, and all supplemental uses allowed under Zoning Code sections 25-4-1 through 25-4-14.

50. The LUC is not a party to the Development Agreement, and is not bound by the Development Agreement. *Exh. PKO-428, Development Agreement between County of Hawaii and Oceanside Exh 10.* Oceanside can only develop its lands under the Development Agreement if it complies with state land use laws.

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[17] The Development Agreement defines land use regulations as follows:

> v. LAND USE REGULATIONS. "Land Use Regulations" shall mean any and all State and County laws, ordinances, resolutions, rules and policies governing the permitted uses of the Property, including, without limitation, uses, density, design, height, size and building specifications of proposed buildings; construction standards and specifications for roads and utilities, roadway improvements; affordable housing; community benefit assessments; water utilization and all exaction requirements applicable to the development of the Property; made applicable and in force as of the date of this Agreement.

51. Given Oceanside's substantial resources and the exclusive nature and costs of its development, and balancing this with the risks raised by Oceanside's advisors, Oceanside acted unreasonably in not seeking declaratory relief or review and approval of the Hokuli`a development from the LUC prior to expending substantial amounts of money. Oceanside has the financial assets to secure land use approvals. It hired multiple attorneys and land use planners to advise it of applicable land use requirements.

52. Hokuli`a has sold approximately 190 lots. These lots range in price from $600,000 to $3 million each. Assuming an average price of $1 million per lot, the project should have $190 million at its disposal from sales revenue alone. As an indication of its fiscal power, Oceanside budgeted $8.874 million for its defense of this trial alone, and actually expended $7.768 million for its defense in trial through May 2003.[18] *Exhibit DO-1366.*

53. An equitable estoppel claim cannot prevail where Defendant clearly "took a chance." Pelosi v. Wailea Ranch Estates, 91 Hawai`i 478, 489, 985 P.2d 1045, 1056 (1999).

54. Oceanside "took a chance" when it disregarded its own counsel's July 30, 1989 advice to seek review by "the appropriate state and county agencies involved in the land use permitting process" ... "after a more concrete development proposal is established." *DO-1354 at 15.*

55. The comments from both Virginia Goldstein (County Planning Department) informing Oceanside of the need to view Hokuli`a "in its entirety," and Esther Ueda's (LUC) "parcelling" caution, put Oceanside on reasonable notice that it took a substantial risk of proceeding without review by the LUC. Oceanside cannot claim it acted in good faith on the affirmative acts of the County of Hawai`i, while ignoring the LUC and these notices. Despite knowledge of the risk of doing so, Oceanside, presumed the Ag-1a zoning was consistent, and parceled out only a 14.854-

acre lot for the members' lodge for county reclassification to "urban" under HRS § 205-3.1. October 1, 2002 Order, Finding of Fact No. 3.

Failure to Obtain Required Discretionary Permit.

56. In County of Kauai v. Pacific Standard Life Insurance, Co., 65 Haw. 318, 653 P.2d 766 (1982) ("Nukoli`i"), the Hawai`i Supreme Court, interpreting its earlier decision in Life of the Land v. City Council, 61 Haw. 390, 606 P.2d 866 (1980), stated: "Life of the Land therefore teaches that final discretionary action constitutes official assurance for zoning estoppel purposes . . . It preserves government control of development until the government's own process for making land use decisions leaves nothing to discretion." Nukoli`i, 65 Haw. at 328, 653 P.2d at 774. There is no single permit that constitutes final discretionary approval of a development. Rather, in each case, the focus should be on the existing legal process. *Id.* at 329, 774-775.

57. In the instant case, the existing law required Oceanside to seek reclassification of the lands from Agricultural to Urban by the LUC. Unlike Nukoli`i, the instant case does not involve a change in existing law.

58. Vested rights and equitable estoppel protect development only after issuance of required discretionary permits. The Development Agreement was not that discretionary permit.

59. Rather, as it was advised by state officials, Oceanside needed to assure that the LUC amend the Hokuli`a land use classification from Agricultural to Urban in compliance with state land use laws if it intended to develop a residential-golf course subdivision project.

60. Oceanside's presumption that reduction of lot density (from 5 acres to one-acre Ag) absolved it of the requirement to reclassify its land to "urban" uses. By ignoring contrary advice from its own counsel, its presumption was unreasonable. Proceeding without state land use approval does not confer a vested right upon Oceanside, even though Oceanside may have made substantial expenditures in reliance thereon from county officials. Miller, 521 A.2d at 647.

Equitable Estoppel As to the 14.854-Acre Parcel.

61. The simultaneous passage of Ordinances 97-34 (general plan amendment of 25 acres), 97-35 (land use reclassification of 14.854 acres), and 97-36 (rezoning) indicates that neither the County of Hawaii nor Oceanside considered the general welfare of the people of the County of Hawai`i.

62. The General Plan Amendment redesignating 25+ acres from "Orchard" to "Retreat Resort," immediately followed by the reclassification of a smaller area of 14.854-acres from Agricultural to Urban and subsequent rezoning from Agricultural to Resort Hotel reveals an intent to circumvent both the County General Plan and the State land use laws.

63. Because this Court has declared both the general plan amendment (Ord. 97-34) and the county reclassification of the 14.854-acre parcel (Ord. 97-35) both invalid, Ordinance 97-36, the attempt to rezone the parcel from Agricultural (A-1a) to Resort Hotel (V-6.0), is also invalid.

64. The 14.854 acres was a portion of the 25-acre parcel Oceanside redesignated for resort use under the County General Plan, and was below the maximum acreage subject to county jurisdiction under HRS § 205-3.1 by only 0.146 acre.

65. Had the resort area remained as the original 25+-acre parcel affected by Ordinance No. 97-34, Oceanside would have been required to go before the LUC to reclassify the parcel from Agricultural to Urban as required by HRS § 205-4.

66. Oceanside's circumvention of the rules and regulation applying to its application for approval of its lodge is evidence of a bad faith response to an obvious problem Oceanside faced, not an innocent, good faith belief that its project was in compliance with the existing rules and regulations.

67. The County's assent to limit the reclassification for the Members' Lodge to 0.146 acres less than the maximum allowable acreage under HRS § 205-3.1, indicates a lack of good faith in processing land use approvals in the instant case.

68. The County cannot subvert HRS § 205-3.1(c) by refusing to consider all parts of a development to deny the LUC jurisdiction over the larger development.

69. Because the ordinances on which it relies are invalid as a matter of law, Oceanside cannot rely on vested rights or equitable estoppel as defenses to an injunction against construction of its planned Members' Lodge.

Need for Injunctive Relief.

70. An injunction is considered prohibitory when the thing complained of results from present and continuing affirmative acts and the injunction merely orders a defendant to refrain from doing those acts. 42 AM JUR. 2d, *Injunctions*, § 4 (2000) (*citing* Arkansas Dept. of Human Servcs. v. Hudson, 338 Ark. 442, 994 S.W.2d 488 (1999).

71. Although generally exercised as a matter of discretion, the power to grant or deny injunctive relief is not arbitrary or unlimited, but is to be exercised with the guidance of established principles, rules, and practice of equity jurisprudence. 42 AM JUR. 2d, *Injunctions*, § 12 (2000) (*citing* Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).

71. Absent a court order, Oceanside will proceed with construction of its agricultural subdivision contrary to state land use requirements, making a prohibitory injunction necessary.

72. Absent a court order, the County Planning Director will continue to grant approvals pursuant to the Development Agreement, and contrary to state land use requirements.

ORDER

1. As a matter of law, Oceanside did not acquire vested rights to develop its agricultural subdivision known as Hokuli`a without first complying with HRS Chapter 205 at the time of subdivision approvals for phases 1 and 2, and for any future phases of the project;

2. As a matter of law, Oceanside is barred from asserting an equitable estoppel or laches defense to Count IV of the Fifth Amended Complaint because it cannot prove it relied in good faith on its county approvals for various land use permits and subdivisions for Hokuli`a;

3. Ordinance No. 97-36 is void and invalid because its rezoning is inconsistent with the land use classification for the planned members' lodge;

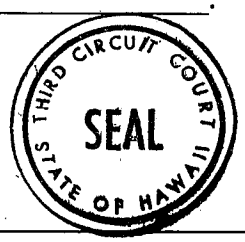
IT IS HEREBY ORDERED that Defendant Oceanside is permanently enjoined, and ordered to cease and desist, from pursuing any further construction activities or development of the Hokuli`a project in its present proposal, excluding its Shoreline Park and golf course, until it has obtained reclassification from the LUC for all portions of its agricultural subdivision and any other related urban uses in conformance with HRS chapter 205.

IT IS FURTHER ORDERED that Defendant Oceanside may satisfy this Court's Order requiring reclassification by obtaining a declaratory ruling from the LUC regarding any new changes to the Hokuli`a project as a whole.

IT IS FURTHER ORDERED that Defendant Christopher Yuen, in his official capacity as Director of the Department of Planning for the County of Hawaii, is hereby permanently enjoined, and ordered to cease and desist, from granting any further land use permits, ground altering activities, or subdivision approvals for the Hokuli`a project until Defendant Oceanside has complied with this Order.

IT IS FURTHER ORDERED that Plaintiffs are entitled to a reasonable award of attorneys' fees and costs as prevailing parties on this Count, based on their filing appropriate proof of such fees and costs at a later date.

DATED: Kealakekua, Hawai`i, SEP 0 9 2003.



JUDGE OF THE ABOVE-ENTITLED COURT