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BOARD OF LAND AND NATURAL RESOURCES
State of Hawaii

In the Matter of the Contested Case)	
Petitions Regarding Conservation)	DLNR File No. HA-06-03
District Use Application (CDUA))	
HA-3269 for Mr. Jonathan Cohen's)	KAKO'OS OPENING
Request to Construct a Single)	BRIEF; EXHIBIT LIST;
Family Residence at Pao'o, North)	WITNESS LIST; DECL-
Kohala, Hawaii)	ARATIONS OF WITNESSES;
	CERTIFICATE OF SERVICE

KAMAKANI 'O KOHALA 'OHANA, INC.
(KAKO'O)
OPENING BRIEF

IDENTIFYING KAKO'O:

Kako'o is a not-for-profit, incorporated environmental organization with its only offices in North Kohala. It is dedicated to the proper management of the community's resources with particular emphasis on its shoreline. Kako'o is not affiliated with any other organization (though it is the successor in interest of several prior local environmental organizations) and limits its activities to the Kohala area of the Big Island. It has no money to speak of and all witnesses, officers and attorneys appearing for it are unpaid volunteers.

PROCEDURAL POSITION:

The Petitioner, Jonathan Cohen, is here contesting his own Petition. His Petition was reviewed extensively by staff and given a resounding and well-deserved negative recommendation. Apparently Mr. Cohen hopes by this Contested Case process to overcome the

staff's work and its findings and conclusions.

The burden of proof is with Mr. Cohen to prove, by actual evidence, in this Hearing that his proposed development meets the criteria of Chapter 5, Section 13-5-30 (c) of the DLNR Administrative Rules governing Conservation District land.

KAKO'O'S CASE:

There are eight "criteria" established in Section 13-5-30(c) as tests by which the DLNR is to regulate any development in Conservation lands. As we intend to show in this Brief, Mr. Cohen's petition fails fully seven out of the eight. We intend to show that Mr. Cohen's compound not only fails to comply, it flies in the face of most of the criteria, proposing a huge walled compound in a place where it does not belong that would destroy the conservation value of this land and its surrounding areas.

We would like to present our case by going through each of the eight criteria of HAR 13-5-30(c) seriatim.

1. The proposed land use is consistent with the purpose of the conservation district;

The purpose of the conservation district is stated in section 13-5-1:

"... conserving, protecting, and preserving the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare."

It is a stretch to imagine that any part of Mr. Cohen's proposed compound will "conserve, protect or preserve" any natural resources in Pao'o or the coastline of which it is a part. The BLNR Staff report noted that this compound would "create the first Single Family Residence in an undeveloped coastal area, surrounded by undeveloped State lands." Exhibit B-4, page 22. As our evidence has shown the staff is correct and this compound would position itself virtually in the center of a twelve mile stretch of coastline on which there is not a single other single family residence. Declaration of Kanoa Withington. Not only

would it stand out like a sore thumb, but it would inevitably pave the way for more of the same.

The North Kohala community has always cherished this coastline and has actively sought to protect it for the last thirty years. Declaration of Pete Hoffman, Maika'i Kamakani 'O Kohala Exhibits B-22 and B-23, Testimony of Kanoa Withington. Recently the Hawaii County Public Access Open Spaces and Natural Resources Preservation Commission conducted a study of all desirable lands on the Island for acquisition. In it Pao'o earned a grade of 91% in its measurement of importance for preservation and was selected by the Commission as its number one priority for acquisition. Declaration of Pete Hoffman, Maika'i Kamakani 'O Kohala Exhibit B-21.

Pao'o is an area of rugged coastline dense with archeological sites and graves. It is important as a conservation site in many different ways, none of which would be enhanced by a large compound. Pao'o is undeveloped now and from a conservation viewpoint, that is the way it ought to stay. Certainly a development of this magnitude does not belong there. Declaration of Gail Byrne.

2. The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;

The sub-zone in question is the "resource" sub-zone which is described in section 13-5-13. Accepted uses in the resource sub-zone are outlined in section 13-5-24. One of the identified uses is a single family dwelling as long as it conforms to the design standards in exhibit 4 of the same document and that it satisfies the criteria in Section 13-5-30(c). Four of the critical standards are pushed to their farthest limits in the design of this compound and at least two Kako'o believes are taken beyond those limits as a matter of law. We apologize that we have been unable to engage a professional to analyze the development, so we have limited our objections to obvious features that don't need professional analysis:

- a. Maximum height limit is 25 feet from the highest point of the

roof structure to the lowest point of the grade or finished structure. As Mr. Withington's Declaration points out, the plan shows a structure with roof at maximum elevation and that structure is on higher ground than other structures in the compound. If we are to give credence to Mr. Cohen's contention that his entire compound is his developable area, then the entire compound has to be considered in measuring allowable heights. The provision is specific: the roof height must be measured from "the lower of the existing or finished grade at the lowest corner of the building." Are these scattered units all part of the single dwelling allowed under the Rule? If so, then according to the letter of this requirement, the highest roof must be not more than 25 feet above the lowest corner of the lowest unit that is part of the single dwelling.

b. Maximum developable area is 5,000 square feet. Mr. Cohen's architect has been ingenious at stretching these design restrictions to limits well beyond logic. For example, showers are not apparently counted. Other anomalies exist as outlined in Mr. Withington's declaration. There are some structures within the compound that do not have the requisite number of walls of their own and so are not counted. But if the whole compound is Mr. Cohen's allowed "developable area" as he contends, then aren't these structures merely "rooms" within an enclosed structure? They should all be included in calculating the 5000 foot allowed area. Finally, there is a portion of this lot that is within an Ag district, and several buildings and structures are planned there, adjacent to and that will impact this compound and the conservation zone as well. These are an integral part of the development, but they aren't counted either. Declaration of Kanoa Withington, page 5.

We cannot afford to hire an architect, so we are not in a position to argue that the architect's tallies are legally improper. Our point here simply is that every attempt by the regulations to restrict development size and impact has been stretched. And the outcome of all this stretching goes into the consideration of whether the ballooned-out result is consistent with the Resource Zone.

There is one specific standard in Exhibit 4, however, that is expressly applicable here. We refer to that portion of the design requirements that specifies that “*All structures connected or best alternative.*” This requirement makes clear that the intent of the 5000 foot limitation is to limit not only floor area but footprint on the land as well.

What is the meaning of the term “connected or best alternative”? It is an integral part of the law of this case and it must be interpreted to decide this case. Kako’o argues that it has a real and practical meaning. First, it means that the allowed 5000 square foot area must be built contiguously unless there is some reason why it cannot, that is, unless an alternative is needed. It appears to refer to a situation in which the topography or other circumstances on the ground do not allow the entire structure to be connected. If the provision has any meaning at all, it must envision a condition beyond the developer’s control. Second, the meaning of the “best alternative” taken within its context must refer to that alternative that least defeats the requirement of connectedness.

Mr. Cohen’s design turns the provision on its head. It ignores any requirement of contiguity and interprets the language to mean that the degree of connectedness is entirely up to him. Instead of a constrained footprint, he has fragmented this 5000 square foot limit into a series of unconnected pods spread out over what appears to be a third of an acre or more. The exact figure is not supplied by Mr. Cohen; Mr. Withington has estimated it at approximately 17,500 square feet with an error allowance of 300 square feet. Declaration of Kanoa Withington.

Please note that Mr. Cohen’s empty explanation, that spreading the units out would reduce height appearances, is truly empty. There is a roofline at maximum height in his plan and so this scattershot gains us nothing in height. Consider too the impact of Mr. Cohen’s negation of the connectedness requirement: What is the limit? How big could a footprint get by fragmenting the 5000 foot limit? An acre? Two?

For these reasons, it is Kako'o's contention that the requirement of "connected or best alternative" is a requirement of law, that Mr. Cohen has shown no necessity for an alternative and that the provision therefore prohibits the disconnection into units proposed by Mr. Cohen in this case. For this reason we believe that disapproval of his petition is required as a matter of law.

3. The proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management", where applicable.

The Staff's comment with respect to this criterion is succinct: "The proposal may decrease coastal recreation to the public. The proposal may modify access to resources uniquely sited for recreational activities that cannot be provided elsewhere. This area is one of the few places in which the public may gain access to the ocean." Maika'i Kamakani 'O Kohala Exhibit B-19, page 23.

Our own evidence supports and amplifies this finding. The Staff has understated the impact and its inevitability.

The Kohala coastline is eroded, with cliffs and jagged rocks along much of its length. Access to the shoreline is very limited, and access to the ocean is dangerous, even for the experienced and hardy. Pao'o, known locally as "Secrets," is unique in that it has a smooth, sandy small beach at which access to the ocean is safe, even for families. It is widely used by the community for surfing, fishing and family recreation. Declarations of Kainoa Willey, Guy Villacorte, Reginald Villacorte, Lucy Pasco, Tony Russel, Kanoa Withington. Pao'o is the only such "portal" for family access for an 11 mile stretch from Mahukona to Kawaihae. It is the only publicly accessible surfing area in a 27 mile stretch between Lighthouse and Kawaihae. Declaration of Kanoa Withington, Exhibit B-1.

Mr. Cohen's project is designed to dominate Pao'o. Looking up from the ocean recreation area the view will be a line of massive ten

foot high walls (ref. Applicant's Environmental Assessment) with decks and windows aimed directly down on the area. All sense of privacy and scale will be lost. As for the usable flat area above the beach where families now picnic, it will all be enclosed within these same massive walls. There is no place left to go. A number of witnesses who could see what is threatened have stated that of course they would no longer use Pao'o if it were so altered. Declarations of Kainoa Willey, Guy Villacorte, Reginald Villacorte, Lucy Pasco, Tony Russel, Kanoa Withington. Staff also cited this likelihood at page 23 of cite: ...the area, once settled, my cause traditional users to seek outdoor experiences elsewhere." Maika'i Kamakani 'O Kohala Exhibit B-19, page 23

The applicable guidelines in 205A are found in section 205A-2. They include the following:

205A-2-c-1-b: "Provide adequate, accessible, and diverse recreational opportunities in the coastal zone management area by:

205A-2-c-1-b-i: "Protecting coastal resources uniquely suited for recreational activities that cannot be provided in other areas; . . .

205A-2-c-1-b-viii: "Encouraging reasonable dedication of shoreline areas with recreational value for public use as part of discretionary approvals or permits by the land use commission, board of land and natural resources, and county authorities...

205A-2-c-3-c: "Preserve, maintain, and, where desirable, improve and restore shoreline open space and scenic resources; and

205A-2-c-3-d: "Encourage those developments that are not coastal dependent to locate in inland areas."

As we hope is evident, Mr. Cohen's proposed compound not only would not further any of these guidelines but would tend to work directly against them.

4. The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community or region.

The major natural resource, the beach called Secrets, would, as we have shown, most certainly be subjected to “substantial adverse impact” since it would become a view from Mr. Cohen’s window rather than a community gathering place.

Also, as Staff pointed out (Exhibit B-4, page 23), and as Mr. Withington verified, if Mr. Cohen’s compound is placed here, future conflicts with the public are most likely.

For the rest of this fourth criterion we are barely able to respond because Mr. Cohen’s Petition does not give us the information we need to evaluate. For example, as Mr. Withington states in his declaration, we have no information on which to determine the effects of the desalinization plant, many of which use corrosive chemicals, and the highly saline waste product, the waste disposal system that will have to be dug out of highly porous rock, nor of proposed fill or other materials that will certainly wash or leach into the ocean. We do not know where the State public trail is to be located.

No matter what mitigation measures are promised, there will be adverse impact to the pristine reef environment from such a large development so near the ocean. Testimony of Elizabeth Marrack, Gail Byrne, Alexandra Holecek, Tony Russell, Maika’i Kamakani ‘O Kohala Exhibit B-19, page 26. There may also be an adverse impact to the surrounding dryland forests during the frequent wildfires by increasing the burn area. Testimony of Gail Byrne.

There are threatened road changes, access changes, new public parking areas and access trails that are merely hinted at but not in any way explained.

For every part of Criterion #4 that we have information on, Mr. Cohen's proposal fails. As to the many other possibilities of harm, Mr. Cohen's Petition is incomplete. It does not provide Kako'o and the Department and the Hearings Officer with sufficient information to ascertain whether "substantial adverse impact" will result from necessary and inherently risky elements of the project. For this reason alone his Petition should be rejected.

5. The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels.

Staff concluded that, even with the most sincere "sustainable design standards" the incompatibility of the proposed compound could not be mitigated and found it to be incompatible with its environment. Maika'i Kamakani 'O Kohala Exhibit B-19, page 24

Alexandra Holecek, a professional planner, analyzed the project and in a thoughtful opinion concluded: "The proposed project is not appropriate for this landscape and locality from a planning or conservation and preservation perspective. It will have multiple negative impacts on the scenic beauty, archeological features and natural resources." Declaration of Alexandra Holecek.

It seems obvious to Kako'o, and probably to any impartial observer, that setting this massive walled compound down in the middle of an eleven mile stretch of uninhabited coastline is inherently incompatible with the locality.

6. The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable.

Staff's finding on this Criterion was clear: "The remote, undeveloped, and archeologically rich landscape will be permanently adversely

affected by the development.” Maika’i Kamakani ‘O Kohala Exhibit B-19, p. 24

Indeed. Consider that virtually every inch of humanly usable open space will be walled off. Or that Pao’o will disappear behind its forbidding walls. In what way could any of this “preserve or improve upon” the natural beauty and open space?

7. Subdivision of the land will not be utilized to increase the intensity of land uses in the conservation district.

Mr. Cohen does not violate the letter of this criterion, but his project certainly opposes its spirit. As Mr. Withington has ably pointed out, the design very deliberately uses adjacent Ag land for a number of non-agricultural structures and uses that certainly will increase “the intensity of land use” on the conservation land. (Declaration of Withington) So this project finds a way to impose on the conservation land by use of different land use designations rather than boundary lines. The imposition, however, is the same.

8. The proposed land use will not be materially detrimental to the public health, safety and welfare.

Kako’o understands that Maika’i Kamakani ‘O Kohala will explore the project’s detrimental potential to the public. For our purposes we have shown that the project if built would drive the public away from use of Pao’o and, there being no alternative to the community, this certainly would be “materially detrimental to the public ... welfare.”

SUMMARY

Mr. Cohen’s compound simply does not belong at Pao’o. It is not only the many ways that it would violate sound conservation principles but also how it would destroy a cherished community asset that cannot be replaced. It is very much the wrong design in the wrong place.

Kako'o sincerely requests that the Hearings Officer will recommend that this project not be approved

Thank you.

Dated: Kamuela, Hawaii, February 19, 2008.

Richard Schulze, Esq.
Attorney for Kako'o