MEMORANDUM

Date: March 26, 2008

From: Bob Hunter

To: Townscape and Kohala CDP Steering Committee

Subject: Planning Director's Explanation of the Takings Issue

Attached is a copy of a letter from Chris Yuen to the County Council Planning Committee explaining how the his recommendation to downzone a parcel in North Kohala is consistent with Supreme Court decisions related to the takings issue.

Harry Kim
Mayor

Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT
101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224
(808) 961-8288 • FAX (808) 961-8742

March 5, 2008

Honorable Angel Pilago, Chair
And Members of the Committee on Planning
COMMITTEE ON PLANNING
333 Kilauea Avenue, Second Floor
Hilo, HI 96720

Dear Chair Pilago and Members of the Committee on Planning:

SUBJECT: BILL 237 – KOHALA LLC
TAX MAP KEY: 5-9-001:008

This letter is to further explain some of the reasons for initiating this proposed rezoning of an area of coastline in North Kohala from RS-15 to RA-5a, and to respond to letters from the landowner's attorney alleging various procedural irregularities and constitutional issues.

The property in question is makai of the Akoni Pule Highway. It is about 2100' long, and 650'-900' wide from shoreline to highway, and consists of 37.88 acres. In this area, the highway comes closer to the sea than further north, and there is a sweeping vista of the coastline and ocean. The General Plan recognizes this area, Waiakailio Bay, as one of 18 listed sites of natural beauty in the North Kohala district.

All shoreline property between the highway and the sea northwest of this spot, to Mahukona, for a distance of about eight miles, is currently zoned A-5a, and the shoreline area is almost completely undeveloped. The shoreline property immediately to the southeast is also zoned A-5a, and recently received an SMA permit that would allow development of one home per five acre lot. RA-5a zoning is basically very similar to A-5a, allowing one home per five acre lot, but it is more appropriate than A-5a for this property because it is in the state land use urban district rather than the agricultural district.

The most important reason to rezone the property to RA-5a is to limit the total amount of development to preserve some of the open space in the area. This would be much easier to do in a development of seven homes, as would be allowed under the RA-5a zoning, rather than fifty homes. There is also a concern about the potential for ocean water pollution from more intensive development of this coastal area. The rezoning to RA-5a would be more consistent with zoning to the north and south. North Kohala community members have repeatedly expressed the wish, embodied in two legislative resolutions, that coastal open space be preserved. While development could be limited even more than the proposed RA-5a, for example, by an RA-20a zoning that limited the development of the property to a single home, this would also have more drastic effect on the landowner's use of the property, and not be consistent with zoning to the north and south.

This property was zoned A-5a prior to 1997, when it received a change of zone to RS-15. A condition of zoning limited development to 50 lots. Shortly thereafter, the Planning Commission also granted an SMA permit for the 50 lot project. The project was given five years to obtain final subdivision approval, with the possibility of a five year administrative time extension that could be given by the Planning Director. That time has expired. After the initiation of this rezoning to RA-5a, the landowner applied for time extensions on the RS-15 zoning, and on the SMA permit. The Planning Commission would have to decide on the time extension on the SMA permit.

Legality

The landowner's attorney has made some claims that the proposed downzoning is illegal. There is a simple answer: it isn't. It is ultimately up to the Council whether this property is zoned RA-5a, RS-15, or something different. Although there is a legal framework in which this decision is made, and a zoning decision can go too far in limiting a private owner's rights and become illegal, the proposed rezoning to RA-5a is well within legal bounds. The laws do not compel a decision either way. It is the Council's decision whether or not it is a good idea. But because these legal arguments have been raised, and accompanied by threats of suit, it is useful to briefly discuss the legal limits of zoning.

Vested rights. Generally, laws and regulations affecting land use can be changed. So, for example, an ordinance may reduce the height limit for buildings in a certain area, and if an owner applies to build on a vacant property, the owner must comply with the new height limit. And through rezoning, the government has the power to change a

landowner's zoning to a less intensive use. The law recognizes, however, that land development proceeds in stages, and that after a certain point, the owner should be allowed to complete a project as planned, and be protected from changes. The term normally used is that the owner has "vested rights" to proceed with a development.

In Hawai'i land use law, the developer has "vested rights" when there is no further discretionary action required for the project to proceed, and the owner has expended substantial amounts in reliance upon that final discretionary action. Kauai County v. Pacific Standard Life Ins. Co., 65 Haw. 318 (1982). The "discretionary action" is a key concept. It means a permit or other approval that requires the decisionmaker to exercise judgment ("discretion") in deciding whether or not to issue the permit or approval. In a discretionary action, the decisionmaker must weigh a number of factors against broad standards given by the law.

The other type of permit, in contrast to a discretionary permit, is a "ministerial" permit: one where the factors leading to a decision are described with such precision that nothing is left to discretion, where the duty to act is absolute, clear, and imperative, 63C Am.Jur. 2d Public Officers sec. 325, and where the only requirement to proceed is that a public officer process an application for compliance with all applicable statutes, ordinances, rules, and regulations, and the conditions attached to such approvals. Life of the Land v. City and County of Honolulu, 61 Haw. 390 (1979).

A ministerial action will have precise, fixed standards. A building permit is a typical example of a ministerial permit. The Building Code sets out minimum requirements for a building, such as the spacing of floor joists, the required window area, the width of doorways, and the like. If the building meets these minimum requirements, the building official reviewing the permit has no discretion to refuse to issue the permit. In land use law, the ministerial approvals, such as building permits and driveway permits, typically follow the discretionary approvals, such as a rezoning.

A change of zone, or an amendment to an existing zoning is a legislative act, Save Sunset Beach Coalition v. City and County of Honolulu, 102 Haw. 465 (2003). It is discretionary (as are all legislative acts) because the decisionmaker—the County Council—must use its judgment in deciding whether or not to approve the rezoning or the proposed amendment.

Kohala LLC has no vested rights to proceed with its development under RS-15 zoning because the time conditions to perform on that zoning have lapsed. It needs several

discretionary approvals to proceed: the Council's extension of time on its RS-15 zoning, the SMA permit time extension from the Planning Commission, and tentative subdivision approval.

There is specific case law holding that whether or not to grant a time extension to a rezoning is a discretionary decision by a legislative body, and that the court will uphold the refusal to extend time if it has any reasonable basis in fact, which can include general land use considerations. Court House Plaza Co. v. City of Palo Alto, 117 Cal. App. 3d 871 173 Cal. Rptr. 161 (1981).

Takings. The Supreme Court has upheld the basic concept of zoning restrictions that limit the use, and often the market value, of private property, including restrictions that greatly diminish the value of property. If this were not so, the entire system of zoning and other land use regulations would be impossible. Courts have upheld land use regulations that reduce the value of property by as much as 95%. Decisions of this type go back as far as the U.S. Supreme Court's decision in Euclid v. Ambler Realty, 272 U.S. 365 (1926). Courts have also repeatedly sustained downzonings that reduce the value of the property to the landowner.

In a limited number of circumstances, though, the Supreme Court says that such regulations can go too far, however, and constitute a "taking" of private property for public use. In that case, the public must pay just compensation to the landowner, similar to the actual taking of property by eminent domain.

The law of "takings" can be complex, but in the typical situation, a zoning ordinance will not be a takings on the grounds that it limits the density of development allowed on a property, unless it does not leave the owner with some beneficial economic use of the property. The ability to build one home on a lot, for example, is enough of a beneficial economic use to defeat a "takings" claim. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

Applying this to proposed Kohala LLC rezoning, the RA-5a zoning, if later accompanied by an SMA permit for the same density, and a subdivision approval, would allow the 37.8 acre property to be subdivided into seven lots of five acres, and on each lot, a home could be built. This is a significant economic use, and the property, with that level of entitlement, is very valuable. To compare, the 63 acre property immediately to the southeast, also along the shoreline, was purchased in 2004 for $16.5 million. That

property was in the state land use urban district, county zoned A-5a. The owner of the 63 acre property did not seek rezoning, and has obtained SMA permit approval to subdivide the property into five acre lots. What the owner did with that property is basically what is being proposed for this property.

The Kohala LLC property clearly would have a beneficial economic use with the RA-5a zoning; it would have a market value of several million dollars.

"Equal Protection" There is also a claim that the rezoning to RA-5a would violate "equal protection", apparently because, according to the landowner's attorney, property has rarely been downzoned to a lower intensity of use in Hawai'i County against the wishes of the landowner. Equal protection, in zoning, simply requires that the decision have a rational basis: that is, that there is some logical reason to treat one piece of property differently from another. For this reason, equal protection arguments against zoning decisions rarely succeed, because land generally has unique aspects. In the case of the Kohala LLC property, the proposed RA-5a zoning would, in fact, be basically the same as the adjacent shoreline property in either direction. This property is mentioned in the General Plan as an example of natural beauty, and is in an area where legislative resolutions call for the preservation of open space.

The landowner's attorney incorrectly states that the General Plan policies for natural beauty have not changed since this property was zoned in 1997. In fact, the 2005 General Plan added two new policies that are relevant: "7.3(h) Protect the views of areas endowed with natural beauty by carefully considering the effects of proposed construction during all land use reviews" and "7.3(i) Do not allow incompatible construction in areas of natural beauty."

Whether downzoning is rare or not is irrelevant. It is one of the basic land use options available to this county and any other local government. Hawai'i County has, in fact, downzoned property against the landowner's wishes. In 1982, several ordinances were passed downzoning property in Keaukaha from V-.75 to RS-10 or A-5a, in many cases, against the objections of the property owner. Ord. 735, and Ords. 781-786.

We are faced with a decision what to do with the zoning on this property because the time for the RS-15 zoning has lapsed. Hawai'i County has not actually rezoned any shoreline property in the last seven years, except for a 1.4 acre State-owned property in Kawaihae, where the State dedicated a much larger adjacent area to open space.

The landowner's attorney also mentions "substantive due process" but makes no argument how this would violate this legal theory. The legal citation is to a case that involves an allegation that the government acted because of racial bias.

Personal Liability It is unfortunate that the landowner's attorney feels the need to make threats of legal liability against the councilmembers personally. To deal with this briefly: first, if the council does not violate the legal rights of the property owner, there is no basis for a suit. As explained above, a rezoning to RA-5a would not violate the landowner's legal rights. In addition, even if the legal rights were violated, councilmembers are not personally liable because they are absolutely immune from this type of suit when they take legislative actions. Bogan v. Scott-Harris, 523 U.S. 44 (1998). Rezoning is a legislative action. Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994); Corn v. City of Lauderdale Lakes, 997 F.2d 1369 (11th Cir. 1993); Save Sunset Beach Coalition v. City and County of Honolulu.

Procedure

The landowner's attorney asks for a deferral on the grounds that the landowner's request for a time extension on the rezoning is still being considered by the Planning Commission. Now, the only reason this is still being considered by the Planning Commission is that the landowner's attorney is deliberately keeping it there instead of sending it to the Council, which has the final say. At the Planning Commission's January 11, 2008 meeting, the landowner's attorney asked the Planning Commission to defer action on their request to extend the time on the zoning. He could have asked the Planning Commission to vote on it, and whether the vote was positive or negative, he could have had this sent up to the Council at the same time as the request to rezone to RA-5a, because of the long time that this had been pending at the Planning Commission. The first Planning Commission meeting on this was July 20, 2007. So the fact that the time extension on the RS-15 zoning is at the Planning Commission while the RA-5a zoning is before the Council is the decision of the landowner's attorney.

The argument that the Council should not act until the Planning Commission acts on the SMA permit time extension makes even less sense. Logically, the Council action on the zoning should precede the Planning Commission's action on the SMA permit. The Planning Commission can validly extend time on the SMA permit only if the Council grants the time extension on the zoning. The SMA permit depends upon the zoning.

It is not too harsh to say that this is simply a stalling tactic.

The landowner's attorney also complains that the Planning Department did not post a sign on the property giving notice of the proposed zoning change. I would, of course, recommend that in procedural issues like these the Council seek advice from Corporation Counsel, but posting of signs is clearly not required for zoning changes initiated by the Planning Director. The procedure is different for zoning code amendments initiated by landowner versus zoning code amendments initiated by the Planning Director or the Council. Ord. 05-136 required posting of signs to give notice of some kinds of land use changes, which are listed in Ord. 05-136. The Zoning Code section on landowner-initiated rezonings is sec. 25-2-42. Ord. 05-136 amended this section to require posting of signs, in sec. 25-2-42(b): "The applicant shall also post a sign for public notification on the property as provided by section 25-2-12." In contrast, zoning code amendments initiated by the Council and Planning Director are covered by sec. 25-2-43, which was not amended by Ord. 05-136, and which contains no sign posting requirement. Obviously, the fact that one section was changed while the other was not means that signs don't have to be posted for director and council-initiated rezonings. Sec. 25-2-12, which also discusses the posting of signs, calls the person who posts the sign "the applicant". In a landowner-initiated zoning amendment, the landowner is also called "the applicant". See sec. 25-2-42. But in a Council or Planning Director initiated zoning amendment, the Council or Planning Director are not referred to as "the applicant." See sec. 25-2-43.

The landowner does not, of course, complain that they were somehow unaware of the rezoning proposal. They were informed by letter dated May 31, 2007, that this action would be proposed. The first complaint of the lack of sign posting was by letter to the Council dated February 1, 2008, asking for a deferral. Again, this is a stalling tactic.

The landowner's attorney makes a number of other complaints alleging inadequate notice before the Planning Commission. Without going into unnecessary detail, the simple answer is that these involved continued hearings at the Planning Commission, where less notice is required. The landowner's attorney was notified well in advance of all hearings, and attended all of them.

Conclusion

The 1997 ordinance that rezoned this property from A-5a to RS-15 said, in condition V, that "should any of the conditions not be met or substantially complied with in a timely

fashion, the Director may initiate rezoning of the subject property to its original or more appropriate designation." The Director has done exactly that: initiated rezoning to a more appropriate designation, which is basically the same as the original zoning, and recommends that the Council vote in favor of more coastal open space protection by changing the zoning to RA-5a.

Sincerely,

CHRISTOPHER J. YUEN
Planning Director

CJY:pak
Wpwin60/Chris 08 – Pilago, Committee on Planning – Bill 237 – Kohala LLC

cc: Mayor Harry Kim
Corporation Counsel