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BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

2013 FEB 20 A 8:50 AM
LAND USE COMMISSION
STATE OF HAWAII

In the Matter of the Petition)	DOCKET NO. A12-795
of:)	
)	PETITIONER'S MEMORANDUM IN
WEST MAUI LAND COMPANY, INC., a)	OPPOSITION TO INTERVENOR ROUTH
Hawaii corporation, and KAHOMA)	BOLOMET'S MOTION THAT THE LUC
RESIDENTIAL LLC, a Hawaii)	NOT TAKE PETITIONS THAT
limited liability company,)	CONTAIN ALLODIAL TITLED LANDS;
)	CERTIFICATE OF SERVICE
To Amend the Land Use District)	
Boundary of certain land)	
situated at Lahaina, Island of)	
Maui, State of Hawaii,)	
consisting of 16.7 acres from)	
the agricultural district to)	
the urban district, Tax Map Key)	
No. (2) 4-5-010:005.)	
)	

PETITIONER'S MEMORANDUM IN OPPOSITION TO
INTERVENOR ROUTH BOLOMET'S MOTION THAT THE LUC
NOT TAKE PETITIONS THAT CONTAIN ALLODIAL TITLED LANDS

On February 14, 2013, Petitioner, through counsel, was served with Intervenor Routh Bolomet's Motion That The LUC Not Take Petitions That Contain Allodial Titled Lands (the "Title Motion"). The Title Motion is defective on its face as it fails to comply with H.Admin.R. § 15-15-70 and further must be denied

as it has not set forth any basis upon which the relief requested could be granted.

A. The Motion Fails to Comply With Commission Rules.

Rule 15-15-70, H.Admin.R., tells a participant in district boundary amendment proceedings what she must do to bring a motion. If the motion involves a question of law, then it must "be accompanied by a memorandum in support of the motion, . . ." Id. at (b)(4). The Title Motion runs from the paragraph numbered 1 on page 18 through the bottom of page 22 of the pleading filed on February 6, 2013. Although reference is made to some cases used as a basis to claim title, no legal authority (statutes, administrative rules or reported court decisions) is referenced concerning the scope of the jurisdiction of the Land Use Commission (the "Commission") or how the Commission's jurisdiction might be impacted by a claim concerning title to land. As such, the Title Motion fails to comply with this Commission's rule concerning the contents of a motion and therefore is defective.

B. The Motion Is a Defective Request For Rulemaking.

The Title Motion seeks the following relief: "unless the LUC can prove that they [sic] have authority to assert their [sic] jurisdiction over foreign allodial titled lands here in Hawaii, that from here on out they [sic] cease and desist from accepting any petitions that involve foreign allodial titled

lands." Intervenor's Response to State OP Joiner Motion to Reconsider Decision and Order Adopted January 14, 2013, p. 22. The request asks that the Commission adopt a rule that it will not review boundary amendments of property which involve a claim that the lands are foreign allodial titled.¹ As a rulemaking request, the Motion is fatally defective.

Sections 15-15-105, et seq., H.Admin.R., describe the rulemaking process. The request must contain, among other things, the draft or substance of the proposed rule and the authority upon which the Commission could act to adopt the rule. H.Admin.R. § 15-15-106. Neither of these requirements was met in the Title Motion and the second requirement could not be met as this Commission's jurisdiction does not include matters involving title to lands. See, Section C, below.

Further, if the Title Motion is a request for rulemaking, the Commission's response is governed by H.Admin.R. § 15-15-107 which would require the Commission to not consider the request and so inform the person making the request. As such, the proper response to the Title Motion would be to inform Intervenor Bolomet that the request was denied for the reasons that it failed to comply with the requirements of Subchapter 15

¹ While Petitioner strenuously disagrees with a claim that the Petition Area involves foreign allodial titled lands and with a claim that such lands exist within the State of Hawaii, such claims are not raised by the Title Motion and would be beyond the scope of the Commission's jurisdiction.

of the Commission's Rules and that it failed to disclose sufficient reasons to justify the institution of public rulemaking proceedings. Id.

C. The Motion Does Not Raise Any Ground Upon Which The Relief Sought Might be Granted.

The Title Motion raises the same arguments made by Intervenor Bolomet in response to the Motion to Exclude Witnesses on International Law and Title. The Commission properly ruled that such matters were outside the scope of its jurisdiction.

The Commission was created by Chapter 205, H. Rev. Stat. As a creature of statute, the Commission can wield only the powers expressly or impliedly granted it by the legislature. TIG Ins. Co. v. Kauhane, 101 Haw. 333, 47 P.3d 810 (Haw. 2003).

Sections 205-1 and 205-2, H.Rev.Stat., respectively establish the Commission and confer upon the Commission the power to classify all of Hawaii's lands in urban, rural, agricultural or conservation districts based on existing use, statutory guidelines, Commission standards and county general plans. Neighborhood Board No. 24 (Waianae Coast) v. State Land Use Commission, 64 Haw. 265, 639 P.2d 1097 (1982). In addition, the Commission may change the boundary of a land use classification district upon a petition by a state or county

department or agency or by a person with a property interest in the land. H.Rev.Stat. § 205-3.1(b).

The statute and Neighborhood Board No. 24 (Waianae Coast) make clear that the Commission is authorized to establish and amend state land use district boundaries.² The Commission acts to designate how lands are to be used in a broad sense. The individual counties designate how lands are to be used in a more precise sense by exercising the zoning powers granted to them by the legislature in Chapter 46, H.Rev.Stat.

The authority of the Commission to act is limited to designating to how lands are to be classified and does not extend to matters of international law or to matters of sovereignty or to matters of foreign allodial title. The legislature stated:

There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts.

H.Rev.Stat. § 205-2(a) (emphasis added).

For these reasons, Intervenor Bolomet's arguments are without merit and do not raise an issue upon which relief might be granted.

² If Intervenor Bolomet was consistent in her position that the Commission cannot act on the Petition Area, she would assert that the Commission lacked the power to classify the Petition Area as Agricultural in the first place, a position which she has not taken.

D. The Title Motion Is Untimely.

The Title Motion is a request to reconsider the Commission's Order entered August 1, 2012. A party seeking reconsideration of a ruling previously made must do so within a certain time period. Section 15-15-84, H.Admin.R., states: "a motion for reconsideration shall be filed with the Commission within seven calendar days after issuance of the Commission's written decision and order." The Title Motion could be viewed as a request that the Commission reconsider and change the decision rendered in July 2012 and upon which an order was entered on August 1, 2012, both of which events were more than six months before the Title Motion was filed. A motion to reconsider that ruling had to have been filed by August 8, 2012. The Title Motion, as a request to change an earlier ruling, is simply too late and inappropriate. For this reason also, it should be denied.

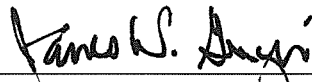
E. Conclusion.

Intervenor Bolomet made the Title Motion, as a part of a response to a filing by the State Office of Planning, seeking to have the Commission make a rule and reconsider a decision made in July 2012. The Title Motion is defective on its face for failing to comply with this Commission's rules, does not raise any legal or factual basis to address issues over which the Commission has jurisdiction, seeks to have the Commission

address issues over which it has no jurisdiction, and is an untimely attempt to seek a reconsideration of the August 1, 2012 order of the Commission.

The request is akin to a person appearing before the Public Utilities Commission ("PUC") in a tariff proceeding on power generation expansion asking the PUC to determine who holds title to the land on which the power generation facility will be built. The PUC does not have jurisdiction to make that determination. Similarly, the Commission does not have jurisdiction to entertain the motion made or to grant the relief requested because it does not have the power to effect title to lands. For all of these reasons, the Title Motion must be denied.

DATED: Kahului, Hawai'i, FEB 19 2013.



JAMES W. GEIGER
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CERTIFICATE OF SERVICE

I hereby certify that on the date hereof I caused a copy of the foregoing to be duly served by depositing same in the United States mail, postage prepaid, to the following at their last known address:

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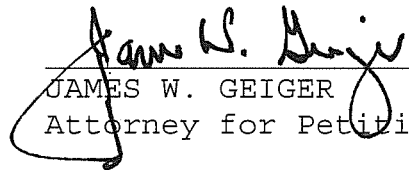
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