

DOCKET NO. DR14-51
Maui Lani Neighbors, Inc.

**Petition for Declaratory
Order**

Staff Report

Action Meeting
November 20, 2014



Daniel Orodener, Executive Officer

Submitted: November 14, 2014

TABLE OF CONTENTS

<u>Tab No.</u>		<u>Page No.</u>
1.	Introduction	3
2.	Background	4
3.	Arguments	7
4.	Course of Action	11
5.	Recommendation	15

1. INTRODUCTION

On October 6, 2014, Maui Lani Neighbors, Inc. ("MLN"),¹ by and through its attorney, Tom Pierce, Attorney at Law, LLC, filed a Petition for Declaratory Order ("Petition").

The Petition requests the State Land Use Commission ("Commission") to issue an order declaring that the proposed Central Maui Sports Complex uses² proposed by the State Department of Land and Natural Resources ("DLNR") violate Condition Nos. 5, 8, 16, 21, and 24 of the Commission's Findings of Fact, Conclusions of Law, and Decision and Order ("Decision and Order") filed June 21, 2012, in Docket No. A10-789/A&B Properties, Inc.

On November 6, 2014, MLN filed a Supplement to the Petition.

¹ MLN is a Hawaii non-profit membership corporation whose purpose is to support, promote, and advocate for sustainable and appropriate community planning and zoning for the central region of the island of Maui. Members of MLN number over 100 and consist of property owners representing over 60 lots within the Maui Lani master-planned community in Central Maui. Maui Lani is located adjacent to the Waiale Community project in which the proposed Sports Complex is planned.

² According to MLN, these uses include the following: three soccer fields; nine baseball/softball fields; lights for nighttime playing; over eight acres of hardened surface area; parking for 700 vehicles; multiple restroom facilities; concession stands; a water well and associated pumps for irrigation; and two retention basins.

2. BACKGROUND

By Decision and Order filed June 21, 2014, in Docket No. A10-789/A&B Properties, Inc., the Commission reclassified approximately 545.229 acres of land from the State Land Use Agricultural District to the State Land Use Urban District for the development of the Waiale Community project at Wailuku and Waikapu, Maui, Hawaii. In its granting of the reclassification, the Commission imposed 27 conditions.

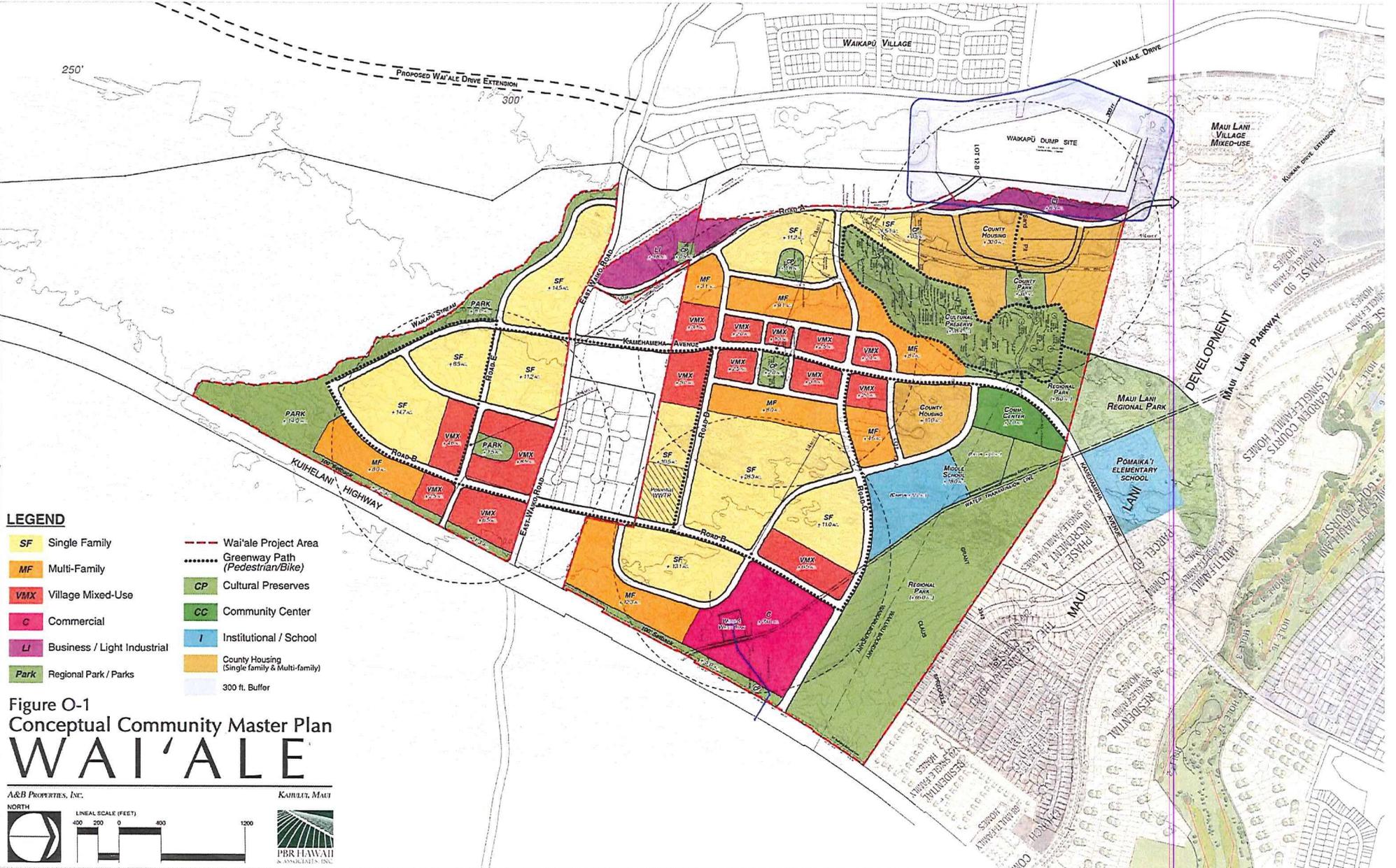
The project, as proposed, was a master-planned residential community that included the following uses: village mixed-use, commercial, business/light industrial, multi-family and single-family residential, community center, regional and neighborhood park, greenway and open space, cultural preserves, middle school, and related infrastructure. A total of approximately 2,550 residential units were planned at the project. See attached Master Plan.

It was represented that the provision of lands for park purposes would be undertaken in consultation with the County Department of Parks and Recreation to ensure that park and playground assessment requirements were appropriately addressed.

On May 2, 2013, A&B Properties, Inc. ("A&B"), the petitioner in the aforementioned docket, filed its first annual report. As part of the report, A&B disclosed that it had been working with the DLNR, Division of State Parks, regarding the planning and acquisition of approximately 65.378 acres of land within the northeastern portion of the Petition Area, identified as TMK: 3-8-07: 104, for the planned Central Maui Regional Park. The second annual report, dated August 29, 2014, noted that the DLNR, Division of State Parks, acquired the 65.378 acres in June 2014 under threat of condemnation.

In its Petition, MLN points out that A&B and the DLNR entered into a Disposition Agreement regarding the conveyance of the 65.378-acre portion of the Petition Area. Under said agreement, the DLNR agreed to be responsible for satisfying Condition Nos. 1, 2, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16, 19, and 21 of the Decision and Order as such conditions related to the 65.378 acres only. A&B agreed to be solely responsible for the remaining conditions as such conditions related to the remainder of the Petition Area.

On June 26, 2014, A&B and the DLNR executed and recorded with the Bureau of Conveyances a "Warranty Deed with Reservation of Easements,



- LEGEND**
- SF Single Family
 - MF Multi-Family
 - VMX Village Mixed-Use
 - C Commercial
 - LI Business / Light Industrial
 - Park Regional Park / Parks
 - Waialeale Project Area
 - Greenway Path (Pedestrian/Bike)
 - CP Cultural Preserves
 - CC Community Center
 - I Institutional / School
 - County Housing (Single family & Multi-family)
 - 300 ft. Buffer

Figure O-1
Conceptual Community Master Plan
WAI'ALE

A&B PROPERTIES, INC. KAUIHĀLA, MAUI

NORTH

LINEAL SCALE (FEET)
 400 200 0 400 1200

PBR HAWAII & ASSOCIATES, INC.

Covenants, Reservations and Restrictions.” The conveyance of the 65.378 acres to the DLNR was subject to 21 easements in favor of A&B.

In its Supplement to the Petition, MLN alleges that the DLNR has already commenced development activities in support of the Sports Complex uses, including clearing and grading.

On September 9, 2014, MLN filed a First Amended Verified Complaint with the Second Circuit Court. Through the Complaint, MLN had requested preliminary injunctive relief from the Circuit Court.

Among the allegations put forth by MLN in its Complaint are that the proposed Sports Complex uses violate zoning because (1) they are inconsistent with the Wailuku-Kahului Community Plan designation; (2) they are inconsistent with the Maui Island Plan; (3) they violate Maui County Code (“MCC”) Chapter 19.30A (pertaining to permissible uses in the Agricultural District; (4) they violate MCC § 19.510.070 (pertaining to special use permits); and (5) they violate the Commission’s Decision and Order.

MLN also alleges that the County of Maui Planning Commission lacked the authority to grant a special use permit for the Sports Complex uses, and therefore said permit is void as a matter of law. Relatedly, MLN alleges that the special use ordinance of the County of Maui is unconstitutionally vague and ambiguous, and therefore is illegal, null, and void. MLN further alleges that the acreage comprised by the Sports Complex uses does not meet the minimum lot size requirement set forth in MCC § 19.615.040(C)(1) as it amounts to only 65 acres rather than the minimum lot size of 100 acres required for a Regional Park District.

Additionally, MLN alleges that because the Sports Complex uses are part of the Waiale development, they violate the Hawaii Environmental Policy Act because (1) no Supplemental Environmental Impact Statement (“SEIS”) to the Waiale Community project’s Final Environmental Impact Statement was prepared (MLN argues that the Sports Complex’s Environmental Assessment does not constitute an SEIS) and/or (2) because the Sports Complex has been illegally segmented from the larger project of the State’s Sports Development Initiative and/or the comprehensive regional parks plan encompassing Central Maui.

Finally, MLN alleges that the Sports Complex uses (1) constitute a violation of Article XI, section 9, of the Hawaii Constitution (right to a clean and healthful

environment); (2) represent a public nuisance due to the additional traffic from the Sports Complex uses on existing infrastructure; (3) constitute a violation of the due process rights of citizens given the less thorough and expedited special use process used by the County compared to the more rigorous and comprehensive processes of a zoning change and Maui Island Plan and Wailuku-Kahului Community Plan amendments; and (4) constitute a violation of the due process rights of MLN's members by the DLNR's failure to fulfill application notice and public hearing notice requirements.

The County of Maui subsequently filed a Motion for Partial Dismissal of Plaintiff's First Amended Complaint Pursuant to HRCF Rule 8, or in the Alternative, for Failure to State a Claim Pursuant to HRCF Rule 12(b)(6).

On October 15, 2014, and by Order Denying in Part Defendant County of Maui's Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to HRCF Rule 8 or in the Alternative HRCF Rule 12(B)(6), Staying All Further Activities and Proceedings in this Matter, and for Deferral to the State of Hawai'i Land Use Commission filed October 29, 2014, the Second Circuit Court ordered that:

- (a) the Motion for Partial Dismissal of Plaintiff's First Amended Complaint pursuant to HRCF Rule 8, or in the alternative, for failure to state a claim pursuant to HRCF Rule 12(b)(6) filed by the County of Maui is denied as to Count 1F;
- (b) the matter of MLN's Complaint is stayed in its entirety pending further order of the Court;
- (c) the Court shall defer to the Commission for determination as to any potential violation by any person or party of the Decision and Order;
- (d) nothing in the Court's order shall require the Commission to determine if a violation has occurred or the procedures to be used in making such a finding; and
- (e) in the event the Commission determines that a violation of the Decision and Order has occurred, the Court requests that the Commission set forth its findings with specificity together with any recommendations that it may make.

3. ARGUMENTS

MLN argues that the proposed Sports Complex uses violate Condition No. 5 of the D&O.

Condition No. 5 states as follows:

5. Highway and Road Improvements. Petitioner shall fund, construct, and implement all transportation improvements and measures required to mitigate impacts to state roadway facilities caused by the Project as set forth in an MOA agreed to and executed between the DOT and Petitioner. Petitioner shall submit to the DOT prior to application for a zone change an updated TIAR. Petitioner shall obtain acceptance of the Project's TIAR from DOT and shall execute the MOA prior to final subdivision approval of the initial phase of onsite development by Petitioner.

The MOA shall include, but not be limited to, the following terms and conditions: (i) the accepted TIAR shall be incorporated in the MOA by reference; (ii) Petitioner's responsibilities for funding, construction, and implementation of improvements and mitigation; (iii) a schedule of agreed to improvements and a schedule for future TIAR updates or revisions to the accepted by DOT; (iv) development of the Project shall be consistent with the executed MOA and TIAR; and (v) any fees or in-kind contribution that is roughly proportional to any indirect or secondary impacts caused by the Project.

Petitioner shall construct roadway improvements to accommodate the development of the Petition Area in accordance with the requirements of the DPW.

According to MLN, under Condition No. 5, A&B is required to prepare a new traffic impact analysis report ("TIAR") before seeking any land entitlements, including a change in zoning. MLN also contends that A&B and/or the DLNR is required to execute a memorandum of agreement with the State Department of Transportation ("DOT") prior to final subdivision of the initial phase of onsite development. MLN further argues that while the DLNR did prepare a TIAR, it segmented the impacts of the Sports Complex as it did not

include a comprehensive traffic impact analysis of the entire Waiale project as required by Condition No. 5. It is MLN's belief that neither A&B nor the DLNR completed the memorandum of agreement with the DOT. MLN also argues that the proposed Sports Complex uses violate Condition No. 8 of the D&O.

Condition No. 8 states as follows:

8. Hazardous Wildlife Attractants on or Near Kahului Airport. As deemed necessary by the DOT to minimize the hazards to aircraft operations from Kahului Airport, Petitioner shall fund and implement a program to control any birds nesting or occupation and any insect, pest, or wildlife infestation, in any hazardous wildlife attractants (open swales, storm drains, retention and detention basins, and wastewater treatment facilities or associated settling ponds) serving the Project. Petitioner shall enter into an MOA with DOT to document hazardous wildlife attractant mitigation prior to final subdivision approval of the initial phase of onsite development by Petitioner.

MLN notes that the DLNR has identified two retention basins that are planned for the Sports Complex site. MLN points out that one of the basins will be 5.8 acres in size and is proposed to be constructed and in operation by December 2015. MLN contends that because these two retention basins will be in proximity (within five miles) to the Kahului Airport, they are subject to FAA Advisory Circular 150/5200-33B (Hazardous Wildlife Attractants On or Near Airports).

MLN argues that the County has already granted final subdivision approval. It is MLN's belief that no memorandum of agreement was prepared as required by Condition No. 8.

MLN further argues that the proposed Sports Complex uses violate Condition No. 16 of the D&O.

Condition No. 16 states as follows:

16. Endangered Species. To address the potential impacts on the endangered Blackburn's sphinx moth and other endangered species in the Petition Area, Petitioner shall consult with the

DLNR, DOFAW, and the USFWS to develop mitigation measures to avoid adverse impacts to endangered species. Mitigation measures may include obtaining approval of a Habitat Conservation Plan and Incidental Take License and Permit.

MLN asserts that the DLNR has not met this obligation with the necessary consultation, and is therefore in violation of Condition No. 16. MLN further believes that the DLNR has not prepared a habitat conservation plan or an incidental take license and permit, and is therefore again in violation of Condition No. 16.

MLN additionally argues that the proposed Sports Complex uses violate Condition No. 21 of the D&O.

Condition No. 21 states as follows:

21. Compliance with Representations. Petitioner shall develop the Petition Area in substantial compliance with the representations made to the Commission. Failure to so develop the Petition Area may result in reversion of the Petition Area to its former classification, or change to a more appropriate classification.

MLN believes that A&B's representations did not address the specific impacts of the proposed Sports Complex with respect to surface water runoff and drainage. MLN also points to A&B's representation that active recreational uses such as those that would be associated with the Sports Complex were planned for the southern portion of the Petition Area only, and not the northern portion where the 65.378 acres are currently located.

A&B's representations regarding subsequent land use entitlements following the district boundary amendment have also been called into question by MLN. MLN points that the DLNR has failed to carry through with A&B's representations that it would seek an amendment to the Wailuku-Kahului Community Plan (according to MLN, A&B noted that such an amendment would be necessary for the entire Petition Area inclusive of the proposed Sports Complex site), an amendment to the Maui Island Plan (if the final adopted version resulted in inconsistencies with A&B's proposed uses, as MLN believes), and undergo a comprehensive three-phase process for a change in zoning.

Finally, MLN argues that the proposed Sports Complex uses violate Condition No. 24 of the D&O.

Condition No. 24 states as follows:

24. Annual Reports. Petitioner shall timely provide without any prior notice, annual reports to the Commission, OP, and the DP, and their respective successors, in connection with the status of the development of the Petition Area and Petitioner's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission.

MLN contends that the DLNR has failed to file an annual report with the Commission regarding the proposed Sports Complex uses, which represent new and different uses for the site.

4. COURSE OF ACTION

Section 15-15-100, Hawaii Administrative Rules (“HAR”), provides the alternative actions required of the Commission for a petition for declaratory order.³ The Commission must consider at this time whether it will (1) deny the Petition, (2) issue a declaratory order, or (3) set the matter for hearing.⁴

Pursuant to section 15-15-101, HAR, the Commission may also dismiss a petition for declaratory order, without notice or hearing, if it deems that the petition fails in material respect to comply with the declaratory order requirements of subchapter 14, HAR.

Pursuant to section 15-15-100, HAR, the Commission, for good cause, may deny a petition for declaratory order if any one of four criteria is met. Based

³ Section 15-15-100(a), HAR, requires the Commission to act on the Petition within 90 days after it is submitted. The Petition was submitted to the Commission on October 6, 2014. Therefore, the 90-day timeframe expires on January 4, 2015.

⁴ The State Office of Planning (“OP”) recommends that the Commission hold a hearing on the Petition, subject to the submittal of an affidavit from MLN describing its interest in Condition Nos. 8, 16, and 24 (conditions which MLN did not allege violations of in its First Amended Verified Complaint) and the process of obtaining membership within MLN. OP further recommends that the Commission defer identifying a specific hearing date until such time all potential parties have a chance to intervene and gather information and a pre-hearing conference is held.

The County of Maui Department of Planning (“DP”) does not support the Petition and recommends that the Commission finds there is no violation of its D&O. On October 23, 2014, the County of Maui Planning Commission, the DP, and William Spence in his official capacity as the DP Director filed a Petition to Intervene. The DP requests that if a hearing is ordered, the Commission provides the parties with sufficient time to prepare their respective cases. On November 6, 2014, MLN filed its Opposition to DP’s Motion to Intervene. MLN believes that the DP’s interests are substantially the same as the DLNR (who has also requested to intervene in the proceeding; see below) or are not legitimate interests at all, and that the DP has already demonstrated its bias in the matter.

On October 28, 2014, the DLNR, the Board of Land and Natural Resources (“BLNR”), and William Aila, Jr., in his official capacity as Chair of the BLNR filed a Motion to Intervene. On November 6, 2014, MLN filed a Statement of No Position on the Motion to Intervene.

On November 12, 2014, A&B filed a Memorandum Re: MLN’s Petition, Request for Contested Case Hearing, and Notice of Intent to Intervene.

Pursuant to section 15-15-100(b), HAR, if the matter is set for hearing, the Commission is required to render its findings and decision within 120 days after the close of the hearing or, if post hearing briefs are filed, 45 days after the last brief is filed, unless a different time period is stated at the hearing.

on review of the current Petition, staff has made the following assessment of its conformance to the stated criteria:

- 1) **The question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future.**

The issue as to whether the proposed Sport Complex uses violate Condition Nos. 5, 8, 16, 21, and 24 of the D&O is not speculative nor purely hypothetical as it involves a previous boundary amendment petition that was considered and approved by this Commission and a use that is currently proposed by the DLNR. The Petition appears to present a sufficient factual situation to determine whether these issues warrant review and action by this Commission.

- 2) **The petitioner's interest is not of the type which confers sufficient standing to maintain an action in a court of law.**

MLN argues that it has membership and organizational standing. Further, MLN contends that it is an interested person and an interested party as it may be affected by the issue raised in the Petition as well as by the applicability of the statutory provision, rules, and orders. As noted above, members of MLN consist of property owners representing over 60 lots within the Maui Lani master-planned community located adjacent to the Waiale Community project in which the proposed Sports Complex is planned.

MLN has already sought judicial relief with the Second Circuit Court. In its First Amended Verified Complaint, MLN asserted that it has standing to bring forth the Complaint.

- 3) **The issuance of the declaratory order may adversely affect the interests of the State, the commission, or any of the officers or employees in any litigation which is pending or may be reasonably be expected to arise.**

MLN filed a First Amended Verified Complaint with the Second Circuit Court on September 9, 2014. Through the Complaint, MLN had requested preliminary injunctive relief from the Circuit Court. The County of Maui subsequently filed a Motion for Partial Dismissal of Plaintiff's First Amended Complaint Pursuant to HRCF Rule 8, or in

the Alternative, for Failure to State a Claim Pursuant to HRCF Rule 12(b)(6).

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 - (b) the matter of MLN's Complaint is stayed in its entirety pending further order of the Court;
 - (c) the Court shall defer to the Commission for determination as to any potential violation by any person or party of the Decision and Order;
 - (d) nothing in the Court's order shall require the Commission to determine if a violation has occurred or the procedures to be used in making such a finding; and
 - (e) in the event the Commission determines that a violation of the Decision and Order has occurred, the Court requests that the Commission set forth its findings with specificity together with any recommendations that it may make.
- 4) **The petitioner requests a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission.**

The issues raised in the Petition relate to potential violations of conditions imposed by this Commission. Section 205-4(g), Hawaii Revised Statutes, and section 15-15-90, HAR, provide the Commission with the authority to impose conditions that run with the land. Section 15-15-94, HAR, also provides the Commission with the authority to modify or delete any of the conditions imposed or modify the

Commission's order for good cause shown. Section 15-15-93(b), HAR, further provides "[w]henver the [C]ommission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the [C]ommission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification."

Based on the above, this Commission has the authority to determine whether its conditions have been violated, and therefore the Petition raises issues that are within the jurisdiction of this Commission.

5. **RECOMMENDATION**

Based on the above assessment, staff recommends that the Commission deny the Petition as the issuance of a declaratory order in this matter may adversely affect the interests of the Commission in the pending litigation brought forth by MLN. Staff notes that in its Order, the Second Circuit Court acknowledged it was not requiring the Commission to make a determination as to whether a violation of its conditions has occurred nor the procedures to be used in making such a finding. Given the Court's ruling, staff believes that the judicial process should be allowed to run its course.