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BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of KAONOULU RANCH To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for approximately 88 acres at Kaonoulu, Makawao-Wailuku, Maui, Hawaii	DOCKET NO. A-94-706 PRE-HEARING MOTION *IN LIMINE* REGARDING SCOPE OF EVIDENCE; REQUEST FOR HEARING; MEMORANDUM IN SUPPORT; CERTIFICATE OF SERVICE **Filed by**: Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth and Daniel Kanahele SHOW CAUSE HEARING DATE: November 1 & 2, 2012

PRE-HEARING MOTION IN LIMINE REGARDING SCOPE OF EVIDENCE

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahele ("Intervenors"), through their attorney Tom Pierce, Esq., hereby submit this Pre-Hearing Motion *In Limine* Regarding Scope of Evidence, and request the Land Use Commission issue appropriate orders limiting the evidence that may be presented at the show cause hearing scheduled for November 1 and 2, 2012.

Intervenors hereby request a hearing of this Motion, pursuant to Hawaii Administrative

Rules ("HAR") §15-15-70(c), prior to the show cause hearing scheduled for November 1 and 2, 2012.

This Motion is filed pursuant to Hawaii Administrative Rules ("HAR") section 15-15-70, and Subchapters 5 and 7 of HAR 15-15, and is supported by the attached memorandum in support, and the record and files herein.

DATED: Makawao, Maui, Hawaii, October 24, 2012.

TOM PIERCE
Attorney for Maui Tomorrow
Foundation, Inc., South Maui Citizens
for Responsible Growth, and Daniel Kanahele

MEMORANDUM IN SUPPORT OF MOTION

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahele ("Intervenors") submit this Memorandum in Support of the attached Pre-Hearing Motion on Burden of Proof.

I. INTRODUCTION

This is motion *in limine* to exclude certain evidence is filed to assure efficiency at the show cause hearing scheduled for November 1 and 2, 2012, and to avoid prejudice to Intervenors by the admission of irrelevant evidence. (Intervenors reserve the right to make additional evidentiary objections, including oral motions, at the show cause hearing.)

II. BRIEF PROCEDURAL HISTORY

On September 10, 2012, the Commission issued the final written *Order Granting Movants' Motion for a Hearing, Issuance of Order to Show Cause, and Other Relief* ("Show Cause Order") against Pi`ilani Promenade South, LLC, Pi`ilani Promenade North, LLC, and Honua`ula Partners, LLC (respectively "PPN/PPS," "HP," or "collectively "Piilani" or "Landowners"). The Show Cause Order provides in pertinent part as follows:

> After discussion and deliberation by the Commissioners, a motion was made and seconded to (1) grant the Motion for a Hearing on the basis that there is reason to believe [Landowners], as the successors-in-interest to original Petitioner Ka`ono`ulu Ranch for all purposes under the Decision and Order filed February 10, 1995, have failed to perform according to the conditions imposed or to the representations or commitments made by Ka`ono`ulu Ranch; and (2) set this matter for a show cause hearing as it pertains to the entire approximately 88-acre Petition Area.

Show Cause Order at 6. The Show Cause Order concluded by stating the Commission "HEREBY ORDERS that the Movants' Motion for a Hearing be GRANTED, and that

this matter be set for a show cause hearing as it pertains to the entire approximately 88-acre Petition Area." *Id.* at 7.

On September 17, 2012, the Commission issued the *Order Granting Movants' Petition to Intervene in Show Cause Hearing*.

On September 11, 2012, the Commission's Executive Officer issued a *Prehearing Order*. The Prehearing Order explained that the issues resulting from the Show Cause Order would be bifurcated into a "liability" phase and a "remedy" phase:

> The parties are reminded that, as explained by Vice-Chair Heller at the hearing on Movants' Petition to Intervene in Show Cause Hearing, this Commission ***will first consider whether [any or all of the Landowners] has violated the applicable conditions of the Findings of Fact, Conclusions of Law, and Decision and Order filed February 10, 1995***; should this Commission find that [any of the Landowners] has failed to perform according to the conditions imposed or the representations or commitments made, this Commission will then determine whether reversion or other designation is the appropriate remedy. Accordingly, the witnesses and exhibits presented by the parties **at this time** should address the first phase of the proceeding only, that is, ***whether there has been a violation.***

Prehearing Order at 2-3 (italicized emphasis added).

III. THE LAW SUPPORTS LIMITING IRRELEVANT EVIDENCE

Hawaii Revised Statutes ("HRS") Chapter 91, entitled "Administrative Procedure," ("HAPA") governs, among other things, how agencies, such as the Commission, conduct contested cases. The upcoming show cause hearing is a "contested case" under HAPA. Section 91-10, HRS, entitled "rules of evidence," governs the rules of evidence in contested cases. Those rules are more relaxed than court rules of evidence, yet with an emphasis on *efficiency* and *fairness* to all parties. Thus, HRS § 91-10(1) provides in pertinent part as follows: "[A]ny oral or documentary evidence may be received, but every agency ***shall as a matter of policy*** provide for the ***exclusion of***

irrelevant, immaterial, or unduly repetitious evidence . . . ." The Commission's counterpart rule, HAR § 15-15-63(b) reads essentially the same.

IV. THE COMMISSION MAY AND SHOULD RULE ON THIS MOTION *IN LIMINE*

Because of the foregoing rules, the Commission is within its sound discretion when it *excludes* evidence if it finds it irrelevant, immaterial or unduly repetitious. *Cf. Application of Hawaiian Tel. Co.*, 65 Haw. 293, 305, 651 P.2d 475, 484 (1982). Moreover, if a party objects to the introduction of irrelevant or incompetent evidence and thereafter shows prejudice resulting from the *admission* of such evidence, it can result in reversible error by an agency. *Shorba v. Bd. of Ed.*, 59 Haw. 388, 397, 583 P.2d 313, 319 (1978). In other words, there are circumstances where the Commission would abuse its discretion by admitting irrelevant or incompetent evidence, even though the Commission's discretion is acknowledged to be broad. Because of the risk of prejudice to the parties from irrelevant testimony, the Commission should take a hard look at the evidence proposed to be introduced into evidence by the Landowners, the County Maui ("County") and the Hawaii Office of Planning ("OP").

The most efficient and least prejudicial way to consider that evidence is by hearing and ruling on this Motion *in limine*. "*In limine"* is Latin for "at the start." Thus, a motion *in limine* regarding evidence is a motion made before a hearing regarding what may or may not be introduced into evidence. The Commission is acting in a quasi-judicial capacity at the upcoming show cause hearing to "ensure the effective application of established state land use policies through an adversarial process in a hearing in which diverse interests will have an opportunity to present their views in an open and ***orderly*** manner." HAR § 15-15-34 (emphasis added). A motion *in limine* can increase the

efficiency of a judicial proceeding, including quasi-judicial ones, by determining *before* the hearing (*i.e.,* "trial") certain evidentiary questions:

> A motion *in limine* is a procedural device . . . intended to afford the trial courts and the parties the opportunity to resolve, prior to trial, ***matters that would otherwise obstruct the smooth and orderly progress of the trial***[.]

Barcai v. Betwee, 98 Haw. 470, 489-90, 50 P.3d 946, 965-66 (2002) (emphasis added). The Supreme Court in *Barcai* confirmed a motion *in limine* promotes efficiency for the decision maker and reduces the risk of prejudice to a party:

> *The motion in limine affords an opportunity to the court to rule on the admissibility of evidence in advance,* and prevents encumbering the record with ***immaterial or prejudicial matter*** . . . . *Kuroda v. Kuroda*, 87 Hawai'i 419, 427, 958 P.2d 541, 550 (App. 1998) (quoting 75 Am.Jur.2d Trial § 94 (1991); *see also Proper v. Mowry*, 90 N.M. 710, 568 P.2d 236, 240 (N.M.Ct.App.1977) ("Such a motion is also ***a useful tool in preventing immaterial matter*** from encumbering the record. It gives the court an opportunity to rule in advance on the admissibility of evidence.").

Barcai, 98 Haw. at 489-90, 50 P.3d at 965-66 (some emphases added; some parenthetical information omitted).

The *Barcai* case also confirms that courts have the clear discretion to decide evidentiary issues by ruling on motions *in limine*: "In both civil and criminal cases, courts are vested with authority to dispose of trial-related disputes prior to trial." 98 Haw. at 489, 50 P.3d at 965 (quoting, among others, *Meyer v. City and County of Honolulu,* 6 Haw. App. 505, 510 n. 8, 729 P.2d 388, 393 n. 8 ("[T]he granting or denying of a motion in limine is within the trial court's ***inherent*** power to exclude or admit evidence.") (emphasis added).

Similarly, the Commission has the inherent power to make pre-hearing rulings on evidence. This is a show cause hearing, and as such the hearing is conducted "in accordance with the requirements of subchapter 7" of the Commission's rules. *See* HAR

§ 15§ 15-15-93(c). HAR § 15-15-63 of subchapter 7, entitled "Evidence," includes twelve subsections identifying the Commission's or "presiding officer's" authority and providing guidance regarding the same. That authority certainly includes the ability to render rulings on evidentiary matters, such as motions *in limine*. For example, HAR § 15-15-63(c) provides the "presiding officer shall rule on the admissibility of all evidence."

V. DEFINITION OF "RELEVANT EVIDENCE"

Although neither HAPA nor the Commission's rules define "relevance," it has been well-defined for courts, and the same definition is equally applicable to agencies acting in a quasi-judicial capacity. Rule 401 of the Hawaii Rules of Evidence provides that *"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."*[1]

VI. "RELEVANT EVIDENCE" WITHIN THE FIRST PHASE OF THIS SHOW CAUSE HEARING IS LIMITED

While the evidentiary definition of relevance is broad, it is not unbounded. The Commission has already ordered the parties to limit the evidence for the November 1 and 2 show cause hearing to "whether [any or all of the Landowners] has violated the applicable conditions of the Findings of Fact, Conclusions of Law, and Decision and Order filed February 10, 1995 [1995 Order]." Prehearing Order at 2-3 (quoted in its

[1] The Commentary to Rule 401 provides in pertinent part:

> The rule . . . encompasses the old materiality requirement by specifying that the "fact" to which the evidence is directed be "of consequence to the determination of the action." For this reason, the words "material" and "materiality" do not appear in these rules. . . .
>
> This rule preserves the Irebaria distinction between relevance and sufficiency by establishing, as the requisite standard of probability, that the consequential fact be rendered "more probable or less probable than it would be without the evidence."

Haw. Rev. Stat. § 626-1.

entirety in Part II, above). Therefore, any evidence which is not relevant to whether or not the Landowners have violated the 1995 Order is clearly *irrelevant*, and therefore should be excluded to promote efficiency of the hearing and reduce the risk of prejudice to Intervenors.

Review of the case, *Alt v. Krueger*, 4 Haw. App. 201, 663 P.2d 1078 (1983), is instructive to the issues to be presented at this show cause hearing. In *Alt*, the plaintiffs complained the attorney lacked the authority to settle a case with a claims adjuster. Similar to here, the trial court bifurcated the case into a "liability" phase and a "damages" phase. The same has occurred here in this show cause hearing. The trial court held the liability phase would be limited to determining whether or not the attorney had authorization to settle the case. Similarly, here, the Commission has limited the issue to determining whether there has been a violation of the 1995 Order. The trial court then excluded certain evidence during the course of the hearing that it found irrelevant to the issue of the attorney's authorization to settle.

The plaintiffs appealed the trial court's ruling regarding the exclusion of certain evidence. The plaintiffs argued it was relevant whether they *believed* they had entered an engagement contract with the attorney, and the trial court should not have excluded evidence on that subject. The appellate court disagreed:

> The court in the exercise of its discretion having properly limited the trial to the issue of authorization, the evidence relating to the employment contract, [Plaintiff] David's ***understanding of the settlement*** and [plaintiff] Adrienne's ***actions, and the custom and practice*** of processing claims ***was clearly and entirely irrelevant.*** None of the evidence tended in any way to make the existence of any fact of consequence to the determination of the question of authorization more or less probable than it would have been without the evidence. Rule 401, Hawaii Rules of Evidence, Chapter 626, Hawaii Revised Statutes.

Alt, 4 Haw. App. at 208, 663 P.2d at 1083. The plaintiffs also argued their *subjective* understanding of the settlement agreement, *i.e.*, whether they *believed* it was a final settlement was relevant. The appellate court disagreed with this argument as well, holding this evidence to be irrelevant. *Id.*

VII. IRRELEVANT EVIDENCE SHOULD BE EXCLUDED

Similar to the *Alt* case, here, any evidence that is not directly relevant to the issue of whether or not there has been a violation of the 1995 Order is irrelevant. Extensive amounts of testimony and documentary evidence will be irrelevant, based on the pre-hearing submissions of the Landowners, the County, and the Office of Planning. Intervenors therefore request the Commission, before the show cause hearing begins, rule on the exclusion of the following general types of evidence, as well as the specific proposed evidence cited to below.

A. Other than the 1995 Order's Contents, Evidence and Testimony Presented to the Commission in the 1994-95 Proceedings Is Irrelevant

The 1995 Order includes 104 separate findings of fact encompassing 24 pages of text (sometimes referred to below as "FOF"). Rehashing the testimony or evidence presented to the Commission in 1994 or 1995 is irrelevant because it was legally summarized into those FOF that were *accepted and ruled on* by the Commission:

> The Land Use Commission ***having examined the testimony and evidence presented during the hearing***, having heard the arguments of counsel, and ***having reviewed Petitioner's Proposed Findings of Fact***, Conclusions of Law, and Decision and Order, the County of Maui Planning Departments' Stipulation to Petitioner's Proposed Findings of Fact, Conclusions of Law, and Decision and Order, and the record herein, ***hereby makes the following findings of fact***, conclusions of law, and decision and order[.]

1995 Order at 1-2 (emphasis added). The 104 findings of fact are the *only* relevant facts for the November 1 and 2 hearing. Kaonoulu Ranch assisted in the preparation of those

facts, and accepted the final version prepared by the Commission. Thereafter, the Landowners chose to purchase portions of the subject Property knowing it was subject to the 1995 Order, including the findings of fact therein. Other than the 104 enumerated facts in the 1995 Order, no other facts regarding the 1994 and 1995 Commission proceedings are relevant.[2]

Based on the above premise, the following specific proposed exhibits or testimony should be excluded:

PPN/PPS Exhibits	
2	Kaonoulu Ranch's Petition for Boundary Amendment
3	Exhibit 5 to Petition (market feasibility study and economic report)
4	Exhibit 6 to Petition (project assessment report)
5	Exhibit 7 to Petition (conception master plan, etc.)
6	Transcript of 1994 hearing
7	Maui Planning Department's recommendation
OP Exhibits	
6	1994 traffic impact analysis prepared by Kaonoulu Ranch

B. Evidence and Testimony Related to Petitioner's or Successor Petitioners' Entitlement Process at the County Level, and the County's Opinion of Consistency, Is Irrelevant

The County ordinance reflecting the change in zoning for the Property is a legislative act, which is clear and unambiguous. It thus speaks for itself. Likewise, the Kihei-Community Plan Amendment is a legislatively adopted amendment with the force and effect of law. It also speaks for itself. The subdivision process at the County level is concluded with a letter of final subdivision approval. All other documents related to that process are irrelevant, unless expressly referred to in that letter of subdivision approval.

[2] This information also should be excluded under a number of equitable doctrines, including *res judicata*, because it is essentially an attempt by the Landowners to relitigate final adjudicated matters from 1995. This was fully briefed by Intervenors in their Reply Memo, entitled *Movants' Reply to Landowners' and County's Responses*, filed July 27, 2012, and is incorporated herein by reference.

No other evidence or testimony regarding the negotiations or correspondence is relevant. It should therefore be excluded, including the following identified exhibits:

PPN/PPS Exhibits	
8	1998 Letter from County Director of Planning transmitting an application for change in zoning
10	County Planning Director letter regarding meeting County zoning conditions
12	Letter from MIP to Mayor Arakawa regarding community plan
15	2007 letter from County Public Works Department regarding preliminary subdivision
23	April 2012 Letter from County Director of Planning to Mayor Arakawa regarding consistency with community plan, etc.
25	May 2012 Letter from Mayor Arakawao to Kihei Community Association regarding Property's entitlements, etc.
26	Testimony of County Director of Planning at August 24, 2012 show cause hearing
27	Testimony of County Planner from County Planning Department at August 24, 2012 hearing
37	Updated traffic analysis prepared by Kaonoulu Ranch for County change in zoning
HP Exhibits	
2	1994 Market feasibility study by Kaonoulu Ranch
3	1994 Transcript of Commission proceedings
4	2006 letter from Charles Jencks to Mayor Arakawa re County entitlements
6	2010 letter from HP to Maui County Council re compliance with County conditions
8	2011 letter from HP to Maui County Council re compliance with County conditions
9	Testimony of County Director of Planning at August 24, 2012 show cause hearing
10	Testimony of County Planner from County Planning Department at August 24, 2012 hearing
County Exhibits	
1	Proposed expert testimony of County Director of Planning William Spence[3]
2	Most of the documents identified by County for official notice
4	2012 Maui Island Plan map

[3] This testimony is further objectionable because Mr. Spence has already admitted under oath to the Commission at the initial Motion for show cause hearing that he is not an expert on Land Use Commission matters.

C. Evidence and Testimony Related to State Agency's Opinions regarding Feasibility of Conditions Within 1995 Order Are Irrelevant

Some of the parties seek to confuse the issues by submitting evidence regarding what some agencies or persons believe is feasible or infeasible as it relates to the express conditions in the 1995 Order. This evidence is irrelevant to whether or not there is a violation of the 1995 Order and therefore should be excluded. Examples include the following exhibits, which should be excluded.

PPN/PPS Exhibits	
35	Undated email from Charles Jencks to Department of Transportation regarding feasibility of Condition 5[4]
36	October 2012 email from Department of Transportation to Charles Jencks regarding feasibility of Condition 5

D. Evidence and Testimony Related to Other Developments, Other Community Plans, and Related Arguments by Analogy Are Irrelevant

Some of the parties seek to take up the Commission's time, and prejudice the Intervenors, by introducing evidence about other projects, other community plans, and related "analogous situations." Such information is irrelevant to whether or not PPN/PPS and HP have violated the 1995 Order, and therefore the evidence should be excluded, including the following specific proposed exhibits:

PPN/PPS Exhibits	
38-42	Exhibits related to a "Lahaina Gateway" project
43-44	Exhibits related to the West Maui Community Plan
HP Exhibits	
7	Letter from Hawaii Dept. of Education to Mayor Tavares re impact fees

[4] This is also objectionable and should be excluded because it is clearly not a complete copy of the original email.

VIII. CONCLUSION

For the foregoing reasons, Intervenors respectfully request the Commission exclude irrelevant evidence and testimony, as specified herein, or as otherwise identified during the show cause hearing.

DATED: Makawao, Maui, Hawaii, October 24, 2012.

TOM PIERCE
Attorney for Maui Tomorrow
Foundation, Inc., South Maui Citizens
for Responsible Growth, and Daniel Kanahele

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was sent electronically to the Hawaii Land Use Commission, and to the following on the date indicated below. The required hard copies of the documents shall be mailed to the Hawaii Land Use Commission and upon the following within 48 hours of the date indicated below.

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DATED: Makawao, Maui, Hawaii, October 24, 2012.

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