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OUR REFERENCE NO.:
063792-00001

November 18, 2015

VIA HAND DELIVERY

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Executive Officer
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Edmund Aczon, Chair and Members of the
Land Use Commission, State of Hawai'i
State Office Tower
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Honolulu, Hawai'i 96813

Re: LUC Docket A10-786 Olowalu Town Master Plan Final EIS - Request for
Extension of 30-Day Acceptance Period Under HAR § 11-200-23(d)

Dear Chair Aczon, Executive Officer Orodener and Members of the Commission:

We represent Olowalu Town LLC, a Hawai'i limited liability company, and Olowalu Ekolu LLC, a Hawai'i limited liability company (collectively "**Petitioner**"). On October 26, 2015, Petitioner filed with the Commission the Final Environmental Impact Statement for the Proposed Olowalu Town Master Plan ("**FEIS**"), prepared by Munekiyo Hiraga. Prior to that, on October 12, 2015, advance courtesy copies of the FEIS were sent to the Hawai'i State Office of Planning ("**OP**"), and the County of Maui Department of Planning ("**MPD**").

On November 17, 2015 at approximately 3:07 p.m., OP filed a letter with the Commission recommending that the Commission not accept the FEIS at this time so that Petitioner could address the alleged inadequacies cited in OP's letter. Petitioner wholeheartedly disagrees with the claimed inadequacies on legal grounds, i.e., there is no basis in Chapter 343, Hawai'i Revised Statutes ("**HRS**") and the applicable regulations to reject the FEIS for the reasons stated by OP. Petitioner also contests the substance of OP's allegations. Nevertheless, OP's last minute letter, as well as the considerable amount of written testimony submitted to the

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Commission regarding the FEIS, leads us to anticipate that the Commission may desire more time to review the FEIS before deciding whether it meets the legal sufficiency requirements under Chapter 343, HRS.

Should the Commission determine that the additional time will facilitate decision-making and provide even greater opportunity for public review, Petitioner is submitting this written request, as required under Hawai'i Administrative Rules ("HAR") § 11-200-23(d), and will make an oral motion to the Commission with this request during Petitioner's presentation at the hearing on November 18, 2015, with the understanding that the Commission would engage in decision-making hearing on the acceptance of the FEIS no later than December 9 and/or 10, 2015.

Under HAR § 11-200-23(d), the Commission must accept or reject a FEIS within 30 days. In this case, the FEIS was submitted to the Commission on October 26, 2015. Therefore, a decision must be rendered by November 25, 2015. However, HAR § 11-200-23(d) further provides that:

... the thirty-day period may be extended at the request of the applicant for a period not to exceed fifteen days. The request shall be made to the accepting authority in writing. Upon receipt of an applicant's request for an extension of the thirty-day acceptance period, the accepting authority shall notify the office and applicant in writing of its decision to grant or deny the request. The notice shall be accompanied by a copy of the applicant's request. An extension of the thirty-day acceptance period shall not be allowed merely for the convenience of the accepting authority. In the event that the agency fails to make a determination of acceptance or non-acceptance for the statement within thirty days of the receipt of the final EIS, then the statement shall be deemed accepted.

(Emphasis added.)

A 15-day extension would bring the Commission's deadline for decision making to Thursday, December 10, 2015. We note that the Commission is tentatively scheduled to meet on

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December 9 and 10, 2015. As such, there is no risk that extending the decision-making deadline would preclude the Commission from taking formal action on the acceptance of the FEIS.

Petitioner is ready to proceed with its presentation to the Commission at the meeting scheduled on November 18, 2015, for which the acceptability of the FEIS has been placed on the agenda. Petitioner maintains that the FEIS is adequate and meets all criteria for acceptability. See Petitioner's Analysis of the FEIS dated November 9, 2015. However, in light of the last minute filing by OP and OP's position that the public should have even more time to review the Traffic Impact Analysis Report that was included in the FEIS (and posted to the Commission's website on October 27, 2015, and posted on the OEQC website and published by OEQC in *The Environmental Notice* on November 8, 2015), as well as Petitioner's expectation that public testimony will consume a good deal of the time that the Commission has scheduled for this matter on November 18, and the fact that Petitioner's marine water quality expert, Mr. Steve Dollar, Ph.D., was required to travel to Samoa this week and is therefore not available to respond to questions that the Commission may have regarding the assessment of marine water quality (a matter of great concern to Petitioner and the Olowalu community at large) included in the FEIS, Petitioner submits this written request for the Commission to extend the 30-day acceptance period for an additional 15 days pursuant to HAR § 11-200-23(d).

Petitioner wishes to note for the record that, contrary to the position articulated by OP in its November 17, 2015 letter, the Hawai'i Supreme Court has explicitly ruled that an archaeological inventory survey ("AIS") is not required under HRS Chapter 343 in order for an EIS to be accepted. *Kaleikini v. Yoshioka*, 128 Hawai'i 53 (2012). In that case the Court elaborated on its holding by confirming that "what is required in one EIS may not be required in another, based upon the circumstances presented by the particular project. Accordingly, the fact that other EISs have included an AIS is not sufficient to show that an AIS was required in the instant case." *Id.* at 84. Under Hawai'i law, the key determination is whether the FEIS contained information about historic and archaeological resources within the proposed Olowalu Town Master Plan. The FEIS fully discloses such information. As noted by OP, discussed in Chapter II, Sec. 11 of the FEIS (pp. 123 – 148), and set forth in great detail in Appendix G-1 of

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the FEIS ("An Archaeological Literature Review for the Olowalu Town Master Plan" (Feb. 2012)) several inventory level surveys of the OTMP area have been conducted and approved by the State Historic Preservation Division. The details of those studies are provided in Appendix G-1 of the FEIS.

With respect to OP's claim that additional public review of the TIAR that was included as Appendix P-1 of the FEIS is required, we note that OP fails to provide legal support for this position and therefore Petitioner is uncertain how OP proposes that the alleged problem be resolved, nor how much additional public review OP feels is appropriate. The FEIS has been widely available to the public at least since November 8, 2015 (OEQC's publication date), and more accurately available since October 27th when the FEIS was posted to the Commission's website.

We note for the record that Chapter 343, HRS has no provisions setting forth standards for when a supplemental draft EIS is required. However, the National Environmental Policy Act (a source frequently consulted in the interpretation of Chapter 343), does have such a provision. Supplemental draft EIS documents are required if "the agency makes substantial changes in the proposed action that are relevant to environmental concerns." *See* 40 CFR § 1502.9(c). In other words, supplementation of a Draft EIS is required only when there has been a change to the proposed action; not when a study has been revised and refined in response to public and agency comments during the Draft EIS stage, which is what happened here.

Even in a case where there is a change to the proposed action between the publication of the Draft EIS and the Final EIS, the Ninth Circuit Court of Appeals noted that "supplementation is not required when two requirements are satisfied: (1) the new alternative is a 'minor variation of one of the alternatives discussed in the draft EIS,' and (2) the new alternative is 'qualitatively within the spectrum of alternatives that were discussed in the draft [EIS].'" *See Russell Country Sportsmen v. U.S. Forest Service*, 668 F.3d 1037, 1045 (9th Cir. 2011) (adopting the two-part test set forth by the Council for Environmental Quality). This two-part framework has been adopted by the First, Eighth, Ninth and Tenth Circuits. There is simply no support in the law for

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requiring recirculation and republication of a Draft EIS merely because a study that was dubbed "preliminary" in the initial Draft EIS was refined, more detailed and dubbed "final" in the Final EIS.

Thank you for your kind attention to this matter.

Sincerely,



Jennifer A. Lim
Craig G. Nakamura
Onaona P. Thoene

JAB1/PPT

Enclosure(s)

cc: Leo R. Asuncion, State of Hawai'i, Office of Planning
Bryan C. Yee, Esq., Deputy Attorney General
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