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South Maui Citizens for Responsible Growth  
and Daniel Kanahele

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. A94-706

PRE-HEARING MOTION ON BURDEN OF  
PROOF, ETC.; 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 ON BURDEN OF PROOF, ETC.**

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahele (“Intervenors”), through their attorney Tom Pierce, Esq., hereby submit this Motion and request the Land Use Commission of the State of Hawaii issue an order confirming that Piilani Promenade South, LLC, Piilani Promenade North, LLC, and Honua`ula Partners, LLC, have the burden of proof, as well as the burden of producing evidence, as well as the burden of persuasion 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 19, 2012.

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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 Kanahale (“Intervenors”) submit this Memorandum in Support of the attached Pre-Hearing Motion on Burden of Proof, Evidence and Persuasion.

### **I. BRIEF PROCEDURAL HISTORY**

On May 23, 2012, Movants filed a Motion for a Hearing, Issuance of Order to Show Cause, and Other Relief (“Motion to Show Cause”).

On July 16, 2012 and on July 26, 2012, Pi`ilani Promenade South, LLC, Pi`ilani Promenade North, LLC, and Honua`ula Partners, LLC (“collectively “Landowners”) filed Memoranda in Opposition to the Motion to Show Cause.

On July 27, 2012, Movants filed a Reply to Landowners’ Responses.

On August 24, 2012, the Land Use Commission of the State of Hawai`i (“Commission”) heard testimony and arguments of the parties and deliberated the Motion to Show Cause.

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”). The 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.

Order at 6. The 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.”

## II. LANDOWNERS HAVE ALL BURDENS, INCLUDING BURDEN OF PROOF

It is clear under the plain language of HAR § 15-15-93 that once the initial party has made a *prima facie* showing that there has been a failure to perform a condition, the burden then shifts to the petitioner to show cause by producing evidence explaining the noncompliance. Here are the relevant parts of the rule:

- Under the first part of this rule, any party or interested person may file a motion with the Commission “requesting an issuance of an order to show cause *upon a showing* that there has been a failure to perform a condition, representation, or commitment on the part of the petitioner.” HAR § 15-15-93(a) (emphasis added).  
At this first stage, the burden was on Intervenors, and Intervenors met their burden of proof.
- Under second part of the rule, whenever the Commission shall have reason to believe that there has been a failure to perform, the commission shall issue an order to *show cause*. HAR § 15-15-93(b).<sup>1</sup> At this second stage, the burden is on the Landowners, and the Landowners have the obligation to meet their burden of

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<sup>1</sup> HAR § 15-15-93(b) provides in pertinent part:

Whenever the commission 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 commission shall issue and serve upon the part 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. (Emphasis added).

proof, including the burden of producing evidence as well as the burden of persuasion.

Although there is no case law discussing the burden shifting in HAR § 15-15-93, an analogy may be drawn to the similar burden-shifting process used in civil contempt proceedings, when a court issues a “show cause” order:

“[C]ivil contempt proceeding[s] are] brought to enforce a court order that requires [a party] to act in some defined manner.” *Mercer*, 908 F.2d at 768. A petitioner “must [first] establish . . . that the alleged contemnor violated [a] court’s earlier order.” *United States v. Roberts*, 858 F.2d 698, 700 (11th Cir.1988) (citation omitted). Once this prima facie showing of a violation is made, ***the burden then shifts to the alleged contemnor “to produce evidence explaining his noncompliance” at a “show cause” hearing.*** *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir.1991); see *Mercer*, 908 F.2d at 768; *Roberts*, 858 F.2d at 701.

*Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998) (ellipses material and emphasis added, brackets in original). Cf. *F.T.C. v. Leshin*, 618 F.3d 1221, 1232 (11th Cir. 2010); *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 814, 821 (11th Cir. 2010); *Reynolds v. Alabama Dept. of Transp.*, 10 F. Supp. 2d 1263, 1273 (M.D. Ala. 1998).

Additionally, HAR § 15-15-93 provides for the “***Enforcement*** of conditions, representations, or commitments.” In this regard, it is also akin to civil contempt proceedings, as the Commission may punish a petitioner, where appropriate, under HAR § 15-15-93, for petitioner’s failure to follow the conditions of the Commission’s order. The power to punish for contempt is inherent in all courts and its existence is essential to the “***enforcement*** of the judgments, orders, and writs of the courts, and consequently to the administration of justice.” *In re Doe*, 96 Hawaii 73, 79, 26 P.3d 562, 568 (2001) (emphasis added).

### III. CONSISTENCY WITH THE ADMINISTRATIVE PROCEDURE ACT

The above interpretation is consistent with the evidentiary standard set forth in the Hawaii Administrative Procedure Act (“HAPA”), Hawaii Revised Statutes (“HRS”) Chapter 91. HRS § 91-10(5) provides that, “Except as otherwise provided by law, *the party initiating the proceeding* shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.” (Emphasis added).

The instant proceeding is identified by the Commission as Docket Number A94-706. This is the same docket *initiated* by Kaonoulu Ranch in 1994. In the Show Cause Order, quoted above in Part I of this Motion, the Commission has identified the 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.” (Emphasis added). Under HAPA, Landowners, as successors in interest, initiated this proceeding. Therefore, under HRS § 91-10(5), the burden of proof, including the burden of producing evidence as well as the burden of persuasion rests on the Landowners, “except as otherwise provided by law.” One such exception “provided by law” is HAR § 15-15-93(a), quoted in Part II, above, which identifies that the burden shifts to a movant when there is a motion for an order to show cause. However, HAR § 15-15-93(b), quoted in Part II, above, shows that the burden returns to the petitioner (*i.e.*, the Landowners), after the movants meet their burden. The Show Cause Order confirms the movants here (*i.e.*, the Intervenors) met their initial burden. Therefore, the above interpretation is consistent with HAPA.

#### **IV. CONCLUSION**

For the foregoing reasons, the Intervenors respectfully request that the Commission issue an order clarifying and confirming that that the Landowners have the burden of proof at the show cause hearing scheduled for November 1 and 2, 2012.

DATED: Makawao, Maui, Hawaii, October 19, 2012.

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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document was mailed to the Hawaii Land Use Commission, and has been duly served upon the following via email and at their addresses of record United States Mail, first class mail, postage prepaid on the date indicated below.

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DATED: Makawao, Maui, Hawaii, October 19, 2012.

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