

TOM PIERCE, ATTORNEY AT LAW, LLLC

TOM PIERCE 6983
P.O. Box 798
Makawao, Hawaii 96768
Tel No. 808-573-2428
Fax No. 866-776-6645
Email: tom@mauilandlaw.com

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

2013 APR 16 P 2:44
LAND USE COMMISSION
STATE OF HAWAII

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

INTERVENORS' MEMORANDUM IN
OPPOSITION TO PILANI PROMENADE
SOUTH, LLC'S MOTION TO STAY PHASE II
OF THE ORDER TO SHOW CAUSE
PROCEEDING; DECLARATION OF TOM
PIERCE; APPENDIX "A"; CERTIFICATE OF
SERVICE

Filed by: Maui Tomorrow Foundation, Inc.,
South Maui Citizens for Responsible Growth
and Daniel Kanahele

INTERVENORS' MEMORANDUM IN OPPOSITION TO PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S MOTION TO STAY PHASE II OF THE ORDER TO SHOW CAUSE PROCEEDING

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahele ("Intervenors"), through their attorney Tom Pierce, Esq., hereby submit this memorandum in opposition to Piilani Promenade South, LLC and Piilani Promenade North, LLC's ("collectively "Piilani") Motion to Stay Phase II of the Order to Show Cause Proceeding, filed April 8, 2013 ("Piilani's Motion").

I. INTRODUCTION

Piilani's Motion may appear benign enough at first glance. However, a closer look reveals that Piilani's request for a "stay" is not that at all. Piilani is asking this Commission to *dismiss the case against Piilani (and apparently Honua'ula Partners too) without the case being concluded and without all parties' consent*. The Commission cannot grant Piilani's Motion however attractive it may appear. The Commission is currently acting as a *judge* in this matter with clear *judicial* obligations as expressed by Hawai'i Administrative Rules § 15-15-93 ("Enforcement of conditions, representations, or commitments"); and Hawai'i Revised Statutes Chapter 91 ("Hawai'i Administrative Procedure Act"). In fairness to all parties to this quasi-judicial process, the Commission has an obligation to complete as soon as is practicable this contested case. Piilani's motion must therefore be denied.

Moreover, Piilani has been estopped from requesting a motion to amend. Before this contested case started, Piilani had an opportunity to amend. That opportunity vanished when Piilani decided instead to argue it was compliant with the 1995 Order. That was Piilani's choice. Now that this Commission ruled against Piilani and HP, Piilani may not simply ask for the case to be stayed, *i.e.*, dismissed.

II. A “CONTESTED CASE” HEARING MUST BE COMPLETED

Piilani is asking this Commission to stop in mid-stride and leave *unfinished* this contested case hearing. Piilani is further suggesting this Commission should avoid a final *determination* on the merits. Piilani offers absolutely no legal support for its position, and there is none. The Commission is acting here in a quasi-judicial capacity. Piilani’s request is really a motion to dismiss the case. Except that this Commission does not have the discretion to dismiss the case without all parties’ consent, just as a judge would not be able to do so.

This is an order to show cause (“OSC”) hearing. OSC hearings are “contested cases.” *See Kaniakapupu v. Land Use Com’n*, 111 Hawai’i 124, 136, n.16 (2006) (citing *Lanai Co., Inc. v. Land Use Com’n*, 105 Hawai’i 296, 97 P.3d 372 (2004)). The Commission confirmed this was a contested case hearing when it issued the written OSC against Piilani and Honua‘ula Partners, LLC (“HP”) on September 17, 2012 and explained: “[T]his Commission will conduct a hearing on this matter *in accordance with the requirements of chapter 91, HRS, and subchapters 7 and 9 of chapter 15-15, HAR.*” (Emphasis added). The only refinement made to this Order to Show Cause was through the *Scheduling Order*, filed September 27, 2012 by the Chairperson of the Commission, wherein a first hearing was scheduled on whether Piilani and HP had violated the 1995 Order. Once that had occurred, the Order provided: “[S]hould this Commission find that [Piilani and/or HP] 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.*” (Emphasis added).

A “contested case” “means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law *to be determined after an opportunity for agency hearing.*” Hawai’i Revised Statutes (“HRS”) § 91-1(5). (Emphasis added). Nothing in the Commission’s rules or in HRS Chapter 91 permits this Commission to stay a contested case, as is being

requested by Piilani. Instead, the law makes clear that the Commission must *continue and complete the contested case and render a final decision and order*. HRS § 91-9(c) provides, “Opportunities shall be afforded all parties to present evidence and argument on all issues involved.” Once the evidence has been received, the Commission is required to issue a written decision and order “*within a reasonable period of time*”:

Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions *within a reasonable time* to each party or to the party's attorney of record.

(Emphasis added). *Cf.* HAR § 15-15-82(d).¹

A “reasonable time” might include dealing with scheduling conflicts and other matters before the Commission. However a reasonable time certainly does not include an entirely open ended period that will last a half year or more as being requested by Piilani. Granting Piilani’s request would be a clear breach of this Commission’s adjudicatory obligations. In *Outdoor Circle v. Harold K.L. Castle Trust Estate*, 4 Haw. App. 633, 641-42, 675 P.2d 784, 791 (1983), the Commission argued “that after it had accepted the final version of the findings of fact and voted to deny [a party’s] petition at open meetings, its adjudicatory functions were concluded.” The Hawai‘i Intermediate Court of Appeals disagreed, explaining: “Administrative adjudication has been defined as ‘*any final decision*, determination or ruling by an agency affecting personal or property rights.’ *Id.* (emphasis added). Similar to *Outdoor Circle*, this Commission must issue a final decision on all remaining issues.

¹ HAR § 15-15-82(d) provides: “Every decision and order adverse to a party to the proceeding, rendered by the commission in a contested case, shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the commission shall incorporate in its decision a ruling upon each proposed finding so presented.”

The “Enforcement of conditions” provision of the Commission rules indicates that an OSC hearing will proceed in orderly fashion from start to finish. *Nowhere* in the rules does it suggest the Commission can stay enforcement so that a petitioner can attempt to *avoid* a final ruling against it, as is being attempted here. HAR § 15-15-93 provides in pertinent part:

(c) The commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7, where applicable. . . .

(d) Post hearing procedures shall conform to subchapter 7 or subchapter 9. Decisions and orders shall be issued in accordance with subchapter 7 or subchapter 9.

(e) The commission shall amend its decision and order to incorporate the order to show cause by including the reversion of the property to its former land use classification or to a more appropriate classification.

III. A STAY WOULD GREATLY PREJUDICE INTERVENORS AND THE PUBLIC

A year ago, on May 10, 2012, Intervenors sent a cease and desist letter to Eclipse Development, who had sought a grading and grubbing permit from the County of Maui. Declaration of Tom Pierce. After receiving that letter, Piilani and HP had an opportunity to evaluate in good faith the legality of their proposed project, and to voluntarily choose to seek an amendment from the Commission. However, they did not. Instead, Intervenors were required to seek relief from this Commission. On May 23, 2012, Intervenors filed the *Motion for a Hearing, Issuance of Order to Show Cause, and Other Relief*. Once this motion was granted, a contested case was initiated. Once Intervenors were granted a right to intervene, they became parties, with the same rights as all other parties in the action. *See* HRS § 91-1(3) (“‘Party’ means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding.”) (Emphasis added).

As a party to the contested case, Intervenors expended significant resources establishing that Piilani and HP’s respective projects violated the 1995 Order. In accordance with the

Commission's rules Intervenor filed proposed findings of fact and conclusions of law.

Thereafter, the Commission held a hearing and then voted. A majority of the Commission found violations of the 1995 Order. Intervenor, acting on behalf of the public, and pursuant to HRS Chapter 91, are entitled to a final decision. A failure to issue a final decision and order in Intervenor's favor is tantamount to a denial of due process of law.

IV. A STAY WOULD CAUSE PROCEDURAL CONFUSION

Piilani would now have this determination - not yet reduced to formal findings and conclusions - stayed indefinitely. This would render the entire case a nullity, or, at minimum, create significant procedural confusion. For example: Would the Commission ever render findings of fact and conclusions of law on the first phase of the hearing? Will the Commission be able to render findings and conclusions later if the same Commissioners are no longer there due to term limits? What is the implication of the failure of the Commission to conclude the expressly enunciated enforcement process established by HAR § 15-15-93? What is the effect of the Commission never amending the 1995 Order to show reverter of the subject property, as set forth in HAR § 15-15-93(e)? If the Commission does render findings and conclusions say, a year or more from now, will Piilani and HP still be permitted to file a motion for reconsideration at that time pursuant to HAR § 15-15-84, which permits a party to file such a motion "within seven calendar days after issuance of the commission's written decision and order," even though the issues will no longer be fresh in the minds of the parties or the Commission? What is the effect of granting a stay for Piilani, but not for HP? When does the Commission's ruling or lack of a ruling become appealable?² All of these procedural concerns are eliminated if the Commission simply completes the contested case that is before it.

² Intervenor contends they will have a right to appeal immediately if the Commission were to grant the stay requested by Piilani because they would be denied the relief they sought. *See* HRS § 91-14(a):

V. BIFURCATION OF THE PARTIES IS NOT PERMITTED

In a footnote, Piilani suggests this Commission should order bifurcation of the docket thereby splitting this matter into two matters – one for Piilani, the other for HP. Intervenors strenuously object to this proposal. First, it has not been put before the Commission properly by motion. Second, Intervenors fully briefed this issue previously and showed conclusively that the Commission’s rules do not permit such a bifurcation of the docket under the circumstances here. *See Intervenors’ Memorandum in Opposition to Honua’ula Partners, LLC’s Motion for Order Bifurcating Docket No. A94-706 And Suspending Show Cause Hearing as to Honua’ula Partners, LLC*, filed September 28, 2012, a true and correct copy of which is attached hereto as Appendix “A,” and which is incorporated herein by reference.

VI. OFFICE OF PLANNING HAS FAILED TO ACKNOWLEDGE THIS IS A CONTESTED CASE

OP has filed a memorandum in support stating “these issues are not uncommon” *Office of Planning’s response in Support of Piilani Promenade South, LLC and Piilani Promenade North LLC’s Motion to Stay Phase II of the Order to Show Cause Proceeding*, filed April 12, 2013. OP provides no examples where (1) the Commission is in the middle of a contested case hearing, (2) has taken proposed findings and conclusions from the parties, (3) has voted against the petitioner, and (4) then the petitioner asks for the case to be essentially dismissed without a final decision and order being issued. To the extent such a case exists, Intervenors contend it would be an example of a violation of due process, and therefore should

Any person aggrieved by a final decision and order in a contested case *or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief* is entitled to judicial review thereof under this chapter

(Emphasis added).

not become precedent setting. Therefore, in this instance, OP's support of Piilani's motion should be questioned.

VII. CONCLUSION

For the foregoing reasons, the Commission must deny Piilani's Motion.

DATED: Makawao, Maui, Hawaii, April 15, 2013.

A handwritten signature in black ink, appearing to read 'Tom Pierce', written in a cursive style.

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

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of

DOCKET NO. A94-706

KAONOULU RANCH

DECLARATION OF TOM PIERCE

To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for approximately 88 acres at Kaonoulu, Makawao-Wailuku, Maui, Hawaii

DECLARATION OF TOM PIERCE

Tom Pierce, Esq. states as follows:

1. I am over 18 years of age, am licensed to practice law in the State of Hawaii, represent Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth and Daniel Kanahela (collectively "Intervenors"), in the above captioned matter, have personal knowledge of the matters set forth in this declaration, and, if called upon to testify, I could and would competently testify thereto. (Abbreviations in the attached document are incorporated herein.)
2. A year ago, on May 10, 2012, Intervenors sent a cease and desist letter to Eclipse Development, who had sought a grading and grubbing permit from the County of Maui.
3. Eclipse Development, Piilani, and HP did not consent to cease and desist their development efforts. Instead, Intervenors moved for an order to show cause, which was granted by the Commission thereby starting a contested case.
4. Attached hereto as Appendix A is a true and correct copy of Intervenors' Memorandum in Opposition to Honua`ula Partners, LLC's Motion for Order Bifurcating Docket

No. A94-706 and Suspending Show Cause Hearing as to Honua`ula Parnters, LLC excluding exhibits.

I, Tom Pierce, Esq., declare under penalty of perjury that the facts set forth in the attached Memorandum in Opposition are true and correct to the best of my knowledge and belief.

DATED: Makawao, Maui, Hawaii, April 15, 2013.

A handwritten signature in black ink, appearing to read 'Tom Pierce', written in a cursive style.

TOM PIERCE, ESQ.

TOM PIERCE, ATTORNEY AT LAW, LLLC

TOM PIERCE 6983
P.O. Box 798
Makawao, Hawaii 96768
Tel No. 808-573-2428
Fax No. 866-776-6645
Email: tom@maulandlaw.com

Attorney for Maui Tomorrow Foundation, Inc.,
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. A-94-706

INTERVENORS' MEMORANDUM IN
OPPOSITION TO HONUA'ULA PARTNERS,
LLC'S MOTION FOR ORDER
BIFURCATING DOCKET NO. A94-706 AND
SUSPENDING SHOW CAUSE HEARING AS
TO HONUA'ULA PARTNERS, LLC;
EXHIBITS A – C; CERTIFICATE OF
SERVICE

Filed by: Maui Tomorrow Foundation, Inc.,
South Maui Citizens for Responsible Growth
and Daniel Kanahele

LAND USE COMMISSION
STATE OF HAWAII
2012 SEP 28 A 7:55

**INTERVENORS' MEMORANDUM IN OPPOSITION TO HONUA`ULA
PARTNERS, LLC'S MOTION FOR ORDER BIFURCATING
DOCKET NO. A94-706 AND SUSPENDING SHOW CAUSE HEARING AS TO
HONUA`ULA PARTNERS, LLC**

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahele (“**Intervenors**”), through their attorney Tom Pierce, Esq., hereby submit this memorandum in opposition to Honua`ula Partners, LLC’s (“**HP**”) Motion for Order Bifurcating Docket No. A94-706 and Suspending Show Cause Hearing as to Honua`ula Partners, LLC, filed September 14, 2012 (“**HP’s Motion**”).

I. INTRODUCTION

HP makes the following telling representation in its Motion: “[HP] hereby represents that it will file a Motion to Amend the 1995 D&O *to clarify* that the Honua`ula Parcel may be used as the site for the desired affordable housing units” HP’s Motion at 5 (emphasis added). On the one hand, HP has been arguing that it is not violating the 1995 Order, which means it should be prepared to go through the show cause hearing scheduled for November 1 and 2, 2012, and be cleared of any liability based on the facts and law. Yet, through its Motion HP is conceding it has failed to meet the clear and unambiguous terms and conditions of the 1995 Order. HP has a problem: It can’t expressly admit that it is violating the order. So, in a desperate effort, it instead is asking the Commission to be excused from the show cause hearing. HP suggests that the purpose for the more than one year delay it is requesting will be to prepare a “motion to amend.” As the above quote from HP’s Motion makes clear, all HP plans on doing in a year is to ask for a change in the 1995 Condition “to clarify” that it was always entitled to use the “**Honua`ula Parcel**” (the thirteen acre parcel owned by HP which is part of the 88 acre “**Petition Area**,” both as defined in HP’s Motion and adopted here). In the

meantime, HP asks the Commission to "insulate" it from any rulings or consequences in the show cause hearing that has been ordered against it.

HP cites no law or rule permitting the Commission to grant the extraordinarily relief requested through HP's Motion, and none exists. As shown below, the laws and rules that confine the Commission's authority and discretion will not permit: bifurcation of the already scheduled show cause hearing; a stay of the show cause hearing for more than a year; an amendment or "clarifying" of the conditions in the 1995 Order in the manner proposed by HP in the instant Motion; and "insulation" from a show cause proceeding that has already been ordered by the Commission pursuant to the Commission's rules ("**LUC Rules**"), set forth in the Hawaii Administrative Rules ("**HAR**") 15-15, *et. seq.* Furthermore, the facts below show that HP comes to the Commission with unclean hands. The law does not condone rewarding a party with procedural protection where the party has abused the law, as HP has done here.

HP who is being represented by the same legal firm as the other landowner/petitioners, Pi'ilani Promenade North and Pi'ilani Promenade South (collectively, "**PPN/PPS**") complains through its motion that it is a victim of the other activities taking place within the Petition Area, and has somehow been improperly pulled into the show cause proceedings. However, this is patently false, as the facts show below. HP has *had at least five years* to petition the Commission regarding the change in use to the Honua'ula Parcel; however, to date, it has failed to do so. Rather, the goal of HP's Motion is a thinly veiled attempt to split the issues so that HP & PPN/PPS may each pursue what they believe are their best strengths: PPN/PPS believe they are in the best shape to survive the show cause hearing because of their "commercial" activities. HP

believes it is in the best shape to survive some form of more extensive public hearing (a year from now) because it is offering workforce housing, which is admittedly a laudable goal. However, as shown below, HP has made promises before regarding workforce housing but has always failed to deliver, while blaming others for its failure to deliver. Intervenor request that the Commission not be persuaded by this ploy but instead focus on the law, which shows all of HP's requests are insupportable.

II. BIFURCATION OF THE SHOW CAUSE HEARING IS NOT PERMITTED BY THE LUC RULES AND IS OTHERWISE UNWARRANTED

HP's requests that the Commission "bifurcate this docket and issue a new docket number for the Honua'ula Parcel." HP's Motion at 2. (It should first be noted that the Commission has already *sua sponte* bifurcated this case into a "liabilities" phase and an "appropriate relief" phase. See Order Granting Movants' Petition to Intervene in Show Cause Hearing, filed Sept. 17, 2012 at 3.¹) HP, which has the burden of proof for its Motion, has failed to enunciate any legal basis or policy justification for bifurcation, as explained below.

A. The Commission Has Not Established a Rule Permitting Bifurcation of a Proceeding or Contested Case Hearing, and Therefore May Not Grant Bifurcation

The Commission is acting in a quasi-judicial policy.² It is therefore helpful and relevant to review the well-settled criteria judges use to properly evaluate a motion to

¹ Intervenor orally objected to the manner of the Commission's bifurcation of the issues at the intervention hearing.

² The instant contested case is a "proceeding" under the Commission's rules. *See* HAR § 15-15-03 (defining "proceeding" as, among other things, "(5) [a]n investigation or review instituted or requested to be initiated by the commission; and (6) [a]ll other matters in the administration of chapter 205, HRS"). In a proceeding before the Commission, the Commission is acting in a "quasi-judicial" capacity overseeing "an adversarial process in a hearing in which diverse interests will have an opportunity to present their views . . ." HAR § 15-15-34(a).

bifurcate. Both the federal court rules and the Hawaii court rules incorporate a Rule 42, which is composed of two parts, as entitled: "Consolidation; Separate Trials". The Hawaii rule provides as follows:

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court, *in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy*, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as given by the Constitution or a statute of the State or the United States.

Haw. R. Civ. P. 42 (emphasis added). Rule 42(b) of the federal rules includes the same standards as the Hawaii rule.³

In comparison to these judicial rules, the LUC Rules do *not* expressly grant the Commission the discretion to *separate* or *bifurcate* proceedings or hearings. Instead, the LUC Rules only grant the Commission the discretion to *consolidate* cases in situations where it "will not unduly delay the proceedings." HAR 15-15-54. Intervenors respectfully submit that the Commission lacks the authority and discretion to bifurcate the show cause hearing, as requested by HP, because it has never created a rule to deal with bifurcation. On this basis, Intervenors request that the Commission deny HP's

³ Rule 42(b) of the federal rules provides as follows:

(b) **Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Fed. R. Civ. P. 42

Motion in its entirety. If the Commission were to grant bifurcation, it would constitute improper rule making:

Where the subject matter of a quasi-judicial adjudication encompasses concerns that transcend those of individual litigants and implicates matters of administrative policy, rulemaking procedures should be followed. These procedural requirements ensure fairness by providing public notice, an opportunity for all interested parties to be heard, full factual development and the opportunity for continuing comment on the proposed action before a final determination is made.

Aluli v. Lewin, 73 Haw. 56, 59, 828 P.2d 802, 804, 1992 WL 55844 (1992) (brackets omitted). *Cf. Shoreline Transp., Inc. v. Robert's Tours & Transp., Inc.*, 70 Haw. 585, 591-92, 779 P.2d 868, 872 (1989) (explaining the line between quasi-judicial adjudication and rulemaking “is not always a clear one and in fact the two functions merge at many points.”)⁴

B. Any Discretion the Commission Has to Bifurcate a Proceeding or Contested Case Hearing is Limited to Assuring Efficiency and Effecting Justice for All Parties

To the extent discretion exists, the Commission must first find, like other judicial decision-makers, that HP’s proposed bifurcation furthers convenience, avoids prejudice to the nonmoving party, and will be conducive to expedition and economy. HP admits this, when it notes that the Commission must “manage proceedings before it in a *just and efficient* manner.” HP’s Motion at 5 (emphasis added). For that proposition, HP cites HAR § 15-15-01, which provides in pertinent part that “practice and procedure before the

⁴ Quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 770, 89 S.Ct. 1426, 1432, 22 L.Ed.2d 709 (1969) (Black, J., concurring):

For example, in exercising its quasi-judicial function an agency must frequently decide controversies on the basis of new doctrines, not theretofore applied to a specific problem, though drawn to be sure from broader principles reflecting the purposes of the statutes involved and from the rules invoked in dealing with related problems. If the agency decision reached under the adjudicatory power becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power, and both an adjudicatory order and a formal “rule” are alike subject to judicial review.

Shoreline Transp., Inc. 70 Haw. at 591-92, 779 P.2d at 872.

land use commission . . . shall be construed to secure the *just and efficient* determination of every proceeding.” (Emphasis added). Cf. HAR § 15-15-34, quoted *supra*.

A recent federal case expounds on these fundamental criteria a judicial decision-maker, such as the Commission, must consider on a motion to bifurcate:

Bifurcation . . . is the exception rather than the rule of normal trial procedure; Rule 42(b) allows, but does not require, bifurcation to further convenience or avoid prejudice. See id.; see also Fed.R.Civ.P. 42 advisory committee's note (1966 Amendment) (“[S]eparation of issues for trial is not to be routinely ordered[.]”).

“With respect to both discovery and trial,” the moving party has the “burden of proving that the bifurcation will promote judicial economy and avoid inconvenience or prejudice to the parties.” Spectra–Physics Lasers, Inc. v. Uniphase Corp., 144 F.R.D. 99, 101 (N.D.Cal.1992) (citations omitted); see also Burton v. Mountain W. Farm Bureau Mut. Ins. Co., 214 F.R.D. 598, 612 (D.Mont.2003).

Factors that courts consider in determining whether bifurcation is appropriate include: (1) *whether the issues are significantly different from one another*; (2) whether the issues are to be tried before a jury or to the court; (3) whether the posture of discovery on the issues favors a single trial or bifurcation; (4) *whether the documentary and testimonial evidence on the issues overlap*; and (5) *whether the party opposing bifurcation will be prejudiced if it is granted*.

Clark v. I.R.S., 772 F. Supp. 2d 1265, 1269 (D. Haw. 2009) (emphasis added, omitted material noted by ellipses, some citations omitted).

In *Clark*, the court found bifurcation of the liability issue and the damages issue, requested by the plaintiff in a Freedom of Information Act (“FOIA”) case, was not warranted. *Id.* The court found the plaintiff had failed to meet its burden of showing the bifurcation would “promote judicial economy and avoid inconvenience or prejudice to the parties.” Importantly, the court concluded, “the Court finds that *requiring Defendant to prepare for two separate trials*, given the moderate chance Plaintiff’s FOIA claim offers with respect to the recovery of documents dispositive to prove actual damages, *is more than a simple inconvenience*. *Id.* (emphasis added).

C. HP Has Failed to Meet its Burden of Proof that Bifurcation is Just and Efficient

As explained above, HP has the burden of proof on its motion to bifurcate. HP has failed to meet its burden of showing bifurcation of the show cause hearing will “promote judicial economy and avoid inconvenience or prejudice to the parties,” or in the words of the LUC Rules, be “just and efficient.” In fact, HP never even addresses these criteria. Intervenor identify below the manifold reasons why bifurcation would be neither just nor efficient.

No efficiency is created through two show cause hearings relating to the same 1995 Order, with the same parties, and the same underlying facts. HP admits that the “Honua`ula Parcel” identified in its motion is subject to the 1995 Order, and that the Order covers the entire 88 acres, referred to in HP’s Motion as the “Petition Area.” HP’s Motion at 3. No efficiency is created by making the Commission sit through two separate show cause hearings. HP implicitly is arguing that a show cause hearing as to it may somehow be avoided; however, what it does, or is permitted to do, in the future with respect to the Honua`ula Parcel does not have any relevance with respect to whether it has from present, retrospectively, violated the conditions in the 1995 Order, and that is what the Order to Show Cause is about. As explained further below, HP is not entitled to evade the show cause proceeding. Nor should it be delayed and complicated through bifurcation of HP’s hearing from the hearing related to PPS and PPN.

Two hearings would be prejudicial to Intervenor. In addition to causing the Commission to have to sit through two separate hearings dealing with many of the same facts and matters of law, two hearings would be very prejudicial to Intervenor, who brought this matter, and properly requested relief from the Commission pursuant to HAR

§ 15-15-93, after which the Commission issued an order to show cause. HP's attempt to evade scrutiny is not permitted by that provision, and bifurcation would cause Intervenor to have to prepare for two different cases, at least twelve months apart (since HP, according to its motion, does not intend to move forward for almost a year).

Potential appeals from Commission decisions will become extremely complex if bifurcation is granted. If either party appeals in the first proposed show cause hearing involving PPN/PPS, it will be winding its way through the appellate process, possibly for many months even before the next hearing is held on HP, which may present the same appealable issue, and set in motion another appeal on a separate track, even though it deals with the same issues. Bifurcation clearly creates grave inefficiencies in that situation and would complicate the adjudication and final resolution of the issues relating to the 1995 Order which covers the entire Property.

Two hearings on the interpretation of Condition 15 of the Order would be inefficient and complicate the proceeding. At the show cause hearing, both HP and PPN/PPS intend to introduce evidence attempting to show that Condition 15 (requiring the petitioner to "develop the Property in substantial compliance with the representations made to the Commission") was not violated because their representations to the Commission in 1994 and 1995 were consistent with the newly proposed uses for their respective parcels, namely retail shopping and outlet malls and employee housing. Two hearings would require the parties to adduce evidence on the same issue, and require the Commission to hear the issue twice, and make decisions on it twice. Bifurcation does not create efficiency.

Two hearings on the interpretation of Condition 5 of the Order would be inefficient and complicate the proceeding. Similarly, both HP and PPN/PPS intend to argue that they are not obligated to build a connector road as provided in Condition 5 (requiring a connector road). Two hearings would require the parties to adduce evidence on the same issue, and require the Commission to hear the issue twice, and make decisions on it twice. Bifurcation does not create efficiency.

Two hearings on the traffic and other impacts would be inefficient and complicate the proceeding. Intervenors intend to present evidence showing that the impacts from the originally proposed light industrial bear no resemblance to the impacts that will be caused by the new uses proposed by HP and PPN/PPS. Furthermore, those impacts are cumulative rather than independent of each other. Two hearings would require the parties to adduce evidence on the same issue, and require the Commission to hear the issue twice, and make decisions on it twice. Bifurcation does not create efficiency.

Two hearings will make it difficult, if not impossible, to ascertain as to which of the two parties is responsible for meeting certain conditions in the 1995 Order. Bifurcation of the hearing will create confusion over which of the landowners is responsible for some of the conditions. For example, Conditions 3, 5, 6, 8, and 11 require the petitioner to fund various infrastructure costs. Funding cannot be properly evaluated and allocated between the three landowners with PPN/PPS proceeding in one hearing and HP proceeding in a different hearing.

III. THE COMMISSION HAS NO DISCRETION TO STAY A SHOW CAUSE HEARING

In addition to asking for bifurcation from PPN/PPS, HP also requests a stay of unknown length of the show cause hearing, but certainly for at least a year. *See* HP's

Motion at 5 (stating it will “file the Motion to Amend by not later than July 31, 2013,” making it clear a show cause hearing would not occur until sometime thereafter). In fact, HP as much as argues in its Motion that the show cause hearing need not ever take place against it, and that is certainly the intent of the Motion. However, no rule permits the Commission to grant HP a stay of the show cause hearing previously mandated by the Commission’s Order to Show Cause, filed September 17, 2012. That Order provides in pertinent part:

Accordingly, this Commission *will conduct a hearing on this matter* in accordance with the requirements of chapter 91, HRS, and subchapters 7 and 9 of chapter 15-15, HAR. *All parties* in this docket shall present testimony and exhibits to this Commission as to whether [PPS]; [PPN]; and [HP], as the successors to original Petitioner [KR] for all purposes under the [1995 Order], have failed to perform according to representations made in seeking the land use reclassification.

The hearing is mandatory. HAR 15-15-93(c) provides the “Commission *shall* conduct a hearing on an order to show cause.” This is confirmed in *Kaniakapupu v. Land Use Com’n*, 111 Hawai’i 124 (2006):

HAR § 15–15–70(i) plainly states that, once a hearing is requested, *the executive officer must set a date and time for the hearing* on the motion [for an order to show cause]. In other words, if a motion is accompanied by a request for a hearing, *the LUC must conduct a hearing on the motion. Inasmuch as the LUC does not have any discretion to determine whether to hold a hearing* once a hearing is requested and the [movant] did request a hearing on its motion, the . . . hearing [i]s required by HAR § 15–15–70.

Id. at 133 (bracketed material added; some citations and footnotes omitted).

Consistent with this mandate, the Commission, through its Director, scheduled the hearing for November 1 and 2, 2012. HAR § 15-15-93(c) further provides that a procedure in an order to show cause hearing may only be waived “by stipulation of the parties.” Intervenors are now parties to the case and have not stipulated to a continuance of the November 1 and 2 hearing by more than one year, as requested by HP. Staying the

show cause hearing for over a year and permitting the petitioner to conduct further acts with respect to the subject part is tantamount to denial of the hearing. The Commission lacks the discretion to deny the show cause hearing, including to stay the show cause hearing as to HP. Therefore, the Commission must deny HP's Motion.

IV. PERMITTING HP TO EVADE THE SHOW CAUSE ORDER WOULD SET BAD PRECEDENT AND POLICY FOR LAND USE IN HAWAII

Most concerning is HP's flippant attitude to the Commission's Order to Show Cause. HP's Motion is really suggesting that it should never have to answer the Order to Show Cause despite its record of bad behavior. This violates the underlying principles and policies behind the Commission's one and only enforcement power -- the power to issue an order to show cause -- established by HRS 205-4(g), and HAR § 15-15-93(b).⁵ That "show cause" power is essentially the same as "contempt of court" powers. Pursuant to § 15-15-93(b), the Commission may punish, where appropriate, a petitioner or its successors for failing to follow the conditions of Commission order.

In promulgating HRS 205-4(g), the legislature clearly understood that a Commission's district boundary amendment order would have no teeth unless there was some concomitant enforcement mechanism. For similar reasons, the legislature has also granted courts the power to hold contempt of court proceedings and punish someone for contempt of court. *See, e.g.*, HRS § 710-1077(1) (providing, "A person commits the offense of criminal contempt of court if . . . [t]he person knowingly disobeys or resists the

⁵ 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).

process, injunction, or other mandate of a court . . .”). The Hawaii Supreme Court has explained, “[t]he power to punish for contempts is inherent in all courts; *its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the administration of justice.* The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.” *In re Doe*, 96 Hawaii 73, 79, 26 P.3d 562, 568 (2001) (emphasis added) (citing, *inter alia*, *Kukui Nuts of Hawaii, Inc. v. R. Baird & Co.*, 6 Haw.App. 431, 436, 726 P.2d 268, 271 (1986) (noting that the power to issue contempt sanctions is an inherent power of the trial courts to do those things necessary for the proper administration of justice).

Similarly, sanctions in contempt proceedings serve an important purpose:

Sanctions for civil contempt are designed either to compel the contemnor into compliance with an existing court order or to compensate the complainant for losses sustained as a result of the contumacy. Coercive sanctions seek to induce future behavior by attempting to coerce a recalcitrant party or witness to comply with an express court directive.

United States v. Dowell, 257 F.3d 694, 698-99 (7th Cir. 2001) (internal citations and quotes omitted).

The Commission should not let HP evade scrutiny simply because it purports to be a creator of affordable housing, (which is undeniably a laudable goal). However HP must still be a law abiding citizen, like others. If HP is permitted to evade the show cause hearing based on its insubstantial motion, it will simply encourage other developers to take their chances and then make placating offers to the Commission if and when they are caught. As the following section shows, HP has shown no good cause for its bad behavior and should not now be rewarded by a one-plus year reprieve from the show cause hearing that it then hopes will simply evaporate.

V. HP HAS UNCLEAN HANDS AND SHOULD NOT BE REWARDED WITH THE SPECIAL RELIEF IT REQUESTS

Rather than make its case at the show cause hearing, HP attempts to derail due process and argue now, without an opportunity for cross examination, that it has done nothing wrong, and therefore it should be exempted from the show cause hearing process. In support, it boldly represents to the Commission that there has been absolutely no development effort whatsoever by HP on the workforce housing, *see* HP's Motion at 5. Yet, when it was seeking a zoning change for the controversial Wailea 670 project to build 1,150 homes, it boldly represented to the Maui County Council over five years ago that affordable housing units were imminent, and that "the civil design work is underway and reviewed by the County of Maui" for the workforce housing project on the Honua`ula Parcel (see full quotation of Charlie Jencks testimony, *infra*). It is plain that HP and its representatives say what the decision-makers want to hear; however, follow through is questionable.

"The doctrine of 'unclean hands' will not allow a party to profit by his own misconduct. The concept is based upon 'considerations that make for the advancement of right and justice' and will not be invoked when to do so would work injustice and wrong." *Shin v. Edwin Yee, Ltd.*, 57 Haw. 215, 231, 553 P.2d 733, 744 (1976) (citing *Jones v. Jones*, 30 Haw. 565 (1928)) (internal citation omitted). "A court's decision to apply an equitable doctrine of relief, such as the 'unclean hands' doctrine, is a matter within its discretion. *7's Enterprises, Inc. v. Del Rosario*, 111 Hawai'i 484, 489, 143 P.3d 23, 28 (2006) (citing *Ueoka v. Szymanski*, 107 Hawai'i 386, 393, 114 P.3d 1125, 1133 (2006)). Therefore, the Commission should deny HP's Motion which is an attempt to evade the show cause hearing. A full discussion of the relevant facts follows.

In support of its Motion, HP represents to the Commission as follows:

First, although Honua`ula desires to construct 250 affordable housing units on the Honua`ula Parcel, it is not clear when construction activities will commence. No construction is presently occurring on the Honua`ula Parcel, and no construction activities are planned in the near future. ***No county building, grading or other building permits that maybe necessary for construction of the desired affordable housing units have been obtained.*** No firm estimates or timeframes for when the construction of the desired affordable housing units will commence have been established.

HP's Motion at 5 (emphasis added). HP's latest representation runs counter to the ones it has made to other government decision-makers over the last five years. HP and its predecessor in interest have intended to use the Honua`ula Parcel for employee housing for at least five years, dating back to 2007. Based on those representations, among others, in 2008, through Ordinance 3554, the Maui County Council granted Honua`ula its requested change in zoning for Wailea 670, including the right to build 1,400 residential units. Condition 5 of the conditions attached to Ordinance 3554 expressly identifies the Honua`ula Parcel and requires as follows:

That Honua`ula Partners, LLC, its successors and permitted assigns, shall provide workforce housing in accordance with Chapter 2.96, Maui County Code (the "Residential Workforce Housing Policy"); ***provided that, 250 of the required workforce housing units shall be located at the Kaonoulu Light Industrial Subdivision and completed prior to any market-rate unit,*** that 125 of those workforce housing units shall be ownership units, and that 125 of those units shall be rental units. ***In addition, construction of those workforce housing units shall be commenced within two years,*** provided all necessary permits can be obtained within that time frame. . . .

(Emphasis added). A true and correct copy of relevant excerpts of Ordinance 3554 and Condition 5 are attached hereto as **Exhibit A**.

The County Council passed the Wailea 670 development based on representations from HP and its agents. On October 18, 2007, at the Council Land Use Committee meeting conducting hearings on the Wailea 670 rezoning, Councilmember Michael

Victorino, summarized those representations with respect to the 250 workforce housing units proposed for the Honua`ula Parcel. His comments – essentially an argument in favor of approval of the workforce housing within the Petition Area based on a risk/benefit analysis -- were made in response to citizen testimony concerned about whether the workforce housing was appropriate at the Kaonoulu Industrial Park location:

"The affordable housing component, let me make one correction in all of this so that everybody's clear. I want to be really clear. The affordable component that's going to -- or was proposed to be built outside of . . . [Wailea 670] was done for the *purpose of immediacy, in other words it can be done right away, we don't have to wait three or four years*, and it was available land that could be developed because the infrastructure was there.

It is away from . . . [Wailea 670], but that wasn't the plan, but it seemed to evolve into that. It seems to have evolved. And it was a suggestion by the developer to one of our Members who asked the question. So I only defend the point to make sure that we get the facts as facts, that *that was done for the -- purpose of immediacy. In other words, we could do something right now. In the next year or two, we could have housing, rentals available for the people to move in, the working people. Our people. Okay?"*

Minutes of Land Use Committee, Maui County Council, Oct. 18, 2007 (emphasis added). A true and correct copy of relevant excerpts from the minutes is attached hereto as **Exhibit B**.

Later in the same meeting, HP's representative, Charlie Jencks, confirmed Councilmember Victorino's summary, and represented that HP was already diligently developing the workforce housing in order to bring it online soon:

The Workforce Housing Ordinance allows us to build housing off site, but yet at a previous meeting, I said to this Committee if this Committee wants me to build all the housing on property, that's exactly what I'll do.

However, *if you like the idea of getting something done and addressing a specific need that exists today*, yes . . .

So trying to address that need -- and I'm not trying to segregate people, but hey, *the land exists today, the civil design work is underway and reviewed by the*

County of Maui, it's something we could -- we could achieve and address a specific need.

Minutes of Land Use Committee, Maui County Council, Oct. 18, 2007 (emphasis added).

See **Exhibit B**, attached hereto.

In 2007 and 2008, Maui Industrial Partners (“MIP”) still owned the Petition Area. However, MIP sold the property to HP on August 20, 2009. Among other encumbrances, HP agreed to purchase and accept the Honua`ula Parcel subject to the 1995 Order, which shows on title. HP clearly had constructive and actual notice of the conditions in the 1995 Order. HP, a savvy business entity with knowledgeable and experienced representatives, consultants and attorneys, knew, or should have known *before* and at the time of purchasing the property that the Condition 5 of Ordinance 3554 was inconsistent with – or, at minimum *could be inconsistent with* -- conditions in the Commission’s 1995 Order. Yet HP chose to do nothing during the following three years. In fact, it appears that HP may have failed to file annual reports with the Commission during some of that period. When it did file an annual report, it failed to identify to the Commission the newly proposed use of the property for workforce housing. On May 23, 2011, HP filed a fifteenth annual report, accompanied by a letter from representative Charles Jencks stating: “The attached report describes the transition in ownership as well [as] the current status of the project *and its compliance with conditions described within Docket No. A94-706.*” (Emphasis added). A true and correct copy of the letter and the fifteenth annual report is attached hereto as **Exhibit C**.

HP’s omission of the workforce housing use violates two clear and unambiguous conditions in the 1995 Order aimed at assuring early notice of changes of landowners and changes of use, which often go hand in hand. Condition 16 of the 1995 Order provides

that "Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Property, *prior to development of the Property.*" This condition is obviously intended to give the Commission notice of new owners but also to assure that uses do not change without appropriate requests being made to the Commission. Condition 17 of the 1995 Order provides that the "Petitioner shall timely provide without any prior notice, annual reports to the Commission, the Office of State Planning, and the County of Maui Planning Department in connection with the status of the subject Project . . . [and] indicating that the terms of the condition(s) are progressing satisfactorily" In light of a trail of what appear to be intentional or grossly negligent omissions, HP may not now plead for an exception from the show cause hearing.

VI. ANY MOTION TO AMEND THAT COULD BE FILED BY HP WOULD BE UNTIMELY GIVEN THE COMMISSION'S SHOW CAUSE ORDER

HP's initiates its Motion with the odd request that the Commission assert jurisdiction over it:

[HP] . . . hereby moves the [Commission] to: (i) substitute [HP] for the original petitioner in this docket, Kaonoulu Ranch (the 'Original Petitioner'), with respect to the portion of the original Petition Area designated by TMK No. (2) 3-9-001:169 (the "[HP] Parcel'), *and formally recognize [HP] as a party to this docket.*

HP's Motion at 1-2 (emphasis added). Considering the Commission has been for months asserting jurisdiction over HP, and HP has been for months submitting to the Commission's jurisdiction without objection, the request is nonsensical. However, below is an explanation of the underlying motive behind the request.

HP apparently realizes it must overcome the Condition 20 set forth in the 1995 Order, which provides as follows:

20. The Commission may fully or partially release the conditions provided herein as to all or any portion of the Property *upon timely motion* and *upon the provision of adequate assurance of satisfaction of these conditions by the Petitioner*.

1995 Order at 31 (emphasis added). A motion under this condition would clearly be untimely where it is brought after the Petitioner has taken action that may violate the conditions in the 1995 Order, as here, and the Commission has questioned that action, as here, and required a show cause hearing, as here. HP is attempting to overcome the fact that the Commission has already asserted jurisdiction over it, including issuing an order to show cause directly against HP, and requiring HP to appear at a show cause hearing. Through its “please formally recognize us as a party” request, HP is attempting to turn back the clock and establish a different procedural posture. First, HP wants to be in a position where the Commission has yet to assert jurisdiction over it. Second, it does not want to be shown to be a party to a pending contested case, namely the show cause proceeding. HP’s effort fails on both counts.

With respect to jurisdictional issue (and assuming *arguendo* that it makes any difference in outcome),⁶ HP is requesting that the Commission *now* assert jurisdiction over it. HP’s Motion at 2. However, HP already submitted to the Commission’s jurisdiction by appearing at the initial proceeding filed by Intervenors, and the Commission already asserted its jurisdiction over HP. See Order Granting Movants’ Motion for a Hearing, Issuance of Order to Show Cause, and Other Relief, filed Sept. 10, 2012 (“**Show Cause Order**”) (wherein the Commission expressly identifies HP as an unobjecting, participating party, and an expressly recognized party due to its being a

⁶ Intervenors submit the timing of jurisdiction over HP makes no difference. Even if HP had filed a motion to amend prior to Intervenors’ motion for an order to show cause, denial would be required on other grounds, discussed *infra*.

successor in interest to Kaonoulu Ranch);⁷ see also Order Granting Movants' Petition to Intervene in Show Cause Hearing, filed Sept. 17, 2012 (showing that HP, *as a party*, participated in the underlying hearing). Moreover, the *show cause* rule, HAR § 15-15-93 automatically grants the Commission jurisdiction over HP in any show cause hearing. *See* HAR § 15-15-93(b) (granting the Commission the jurisdiction and authority to issue an order to show cause “upon the party or person bound by the conditions [imposed], representations, or commitments [made by the petitioner]”). Jurisdiction over HP has already been established. HP cannot unring the bell through its Motion.

Similarly, HP cannot simply walk away from the pending contested case, show cause hearing. No statute, rule or procedural policy will permit HP, now obligated by the LUC's recent show cause order, to evade its obligation to show cause why and how it is in compliance with the 1995 Order. HP is, in essence, asking the Commission to be dismissed from the hearing and process established by the Show Cause Order. However, it is fundamental that no party, once jurisdiction is asserted by a court or administrative agency, may be dismissed without the other parties' consent. On this point, the Commission may find helpful guidance in Rule 12 of the Hawaii Rules of Civil Procedure, which is relevant here, where the Commission is acting in a quasi-judicial capacity in a contested case headed towards an evidentiary hearing. Rule 12 requires a defendant to show at the earliest stage of the case why the plaintiff is not entitled to proceed to a trial *on the merits*. Once that opportunity has passed, the opportunity to be

⁷ Page 8 of the Commission's Order expressly enunciates this fact: “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 Pi'ilani and Honua'ula, *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. . . .”

dismissed from a case is limited and ordinarily requires the plaintiff's agreement. For example, where a defendant chooses to engage in the case at the early stage, rather than object to jurisdiction, the defendant ordinarily waives the right to claim lack of personal jurisdiction. *See, e.g., Hanalei, BRC Inc. v. Porter*, 7 Haw. App. 304, 310, 760 P.2d 676, 680 (1988).

After Intervenors filed and served on HP their motion to show cause, HP never claimed the Commission lacked jurisdiction over it. Moreover, HP defended itself at the hearing on Intervenors' motion and clearly subjected itself to the Commission's jurisdiction. Finally, the Commission issued the Show Cause Order which initiated a contested case, in which HP is obligated to show cause why it is in compliance with the 1995 Order. Like plaintiffs in a court case, Intervenors here are entitled *now* to a hearing on the merits on the issue of whether HP is in violation of the 1995 Order, and HP is not permitted to evade its obligation already set forth in the Show Cause Order. This may be seen from reviewing the Commission's definition of a contested case: "'Contested case' means a proceeding in which legal rights, *duties*, or privileges of specific parties *are required by law to be determined* after an opportunity for agency hearing." HAR § 15-15-03 (emphasis added). Here, HAR § 15-15-93(b) clearly establishes the obligation of HP to explain why it is in compliance with its duties or obligations established in the 1995 Order. HP is required to show this at a show cause hearing. HAR § 15-15-03(c). (It is notable that this section provides that any procedure at the hearing may be modified or waived only "by stipulation of the parties . . .").

The Commission must therefore deny the request made by HP that it somehow be identified as a party and subject to the Commission's jurisdiction *now*.

VII. CONCLUSION

For the foregoing reasons, the Commission must deny HP's Motion.

DATED: Makawao, Maui, Hawaii, September 25, 2012.

A handwritten signature in black ink, appearing to read "Tom Pierce", written in a cursive style.

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 shall be duly served upon the following parties as addressed below, via certified mail, return receipt requested and electronic mail, on April 16, 2013:

Jonathan H. Steiner
Joel D. Kam
McCorriston Miller Mukai MacKinnon LLP
P.O. Box 2800
Honolulu, HI 96803-2800

steiner@m4law.com

John S. Rapacz
Attorney At Law
P.O. Box 2776
Wailuku, HI 96793

rapacz@hawaii.rr.com

**Attorneys for Pi'ilani Promenade North, Pi'ilani Promenade South and
Honua'ula Partners LLC**

Bryan C. Yee
Deputy Attorney General
Dept. of the Attorney General
425 Queen Street
Honolulu, HI 96813

Bryan.C.Yee@hawaii.gov

Attorney for Office of Planning

Jane E. Lovell
Michael Hopper
Corporation Counsel
200 S. High St.
Wailuku, HI 96793

Jane.Lovell@co.maui.hi.us

Attorneys for Department of Planning, County of Maui

DATED: Makawao, Maui, Hawaii, April 15, 2013.



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