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LAND USE COMMISSION
STATE OF HAWAII

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

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|---------------------------------------------|---|--------------------------------|
| In the Matter of the Petition of |) | DOCKET NO. A-94-706 |
| |) | |
| KAONOULU RANCH |) | PIILANI PROMENADE SOUTH, LLC |
| |) | AND PIILANI PROMENADE NORTH, |
| To Amend the Agricultural Land Use District |) | LLC'S MEMORANDUM IN OPPOSITION |
| Boundary into the Urban Land Use District |) | TO INTERVENORS' MOTION TO |
| for approximately 88 acres at Kaonoulu, |) | CONCLUDE CONTESTED CASE AT THE |
| Makawao-Wailuku, Maui, Hawai'i |) | EARLIEST PRACTICABLE TIME; |
| |) | CERTIFICATE OF SERVICE |
| |) | |
| |) | |

PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE
NORTH, LLC'S MEMORANDUM IN OPPOSITION TO INTERVENORS' MOTION
TO CONCLUDE CONTESTED CASE AT THE EARLIEST PRACTICABLE TIME

COME NOW Piilani Promenade South, LLC ("PPS") and Piilani Promenade North, LLC ("PPN") (collectively "Piilani"), by and through its undersigned attorneys, hereby submits this memorandum in opposition to Intervenor's Motion to Conclude Contested Case at the Earliest Practicable Time, filed on April 16, 2013 ("Motion to Conclude").

I. INTRODUCTION

The Motion to Conclude seeks to have the Land Use Commission ("the Commission") conduct Phase II of the Order to Show Cause proceeding. The Motion to Conclude is based upon the arguments and authorities contained in Intervenor's 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 ("Intervenor's Opposition"). This Opposition, therefore, focuses on the arguments contained in Intervenor's Opposition. Essentially, Piilani seeks to have the Commission Stay Phase II of the Order to Show Cause Proceeding, so that it can move to amend the 1995 Decision and Order. In Phase I of the proceeding, the Commission indicated that the proposed Piilani Promenade Project, if constructed, would violate the 1995 Decision and Order. Based on that determination, Piilani has determined not to proceed with that project, or any project, without first seeking to amend the 1995 Decision and Order.

Intervenor, in contrast, seek to have the Commission proceed with Phase II of the Order to Show Cause proceeding, apparently seeking to have the land subject to the 1995 Decision and Order reverted to its original classification (Agricultural), or to some other classification. Intervenor assert essentially that they have a right to this remedy, because of the fact that they started this process. Intervenor fail to consider the fact that the determination that the Piilani Promenade Project (and the Honua'ula Affordable Housing Project) would violate the 1995

Decision and Order was based not on actual construction or development, but rather on a proposed plan to develop the property. Since Piilani has now committed to seek to amend the 1995 Decision and Order rather than proceed with the Piilani Promenade Project, there is not reason to reclassify, or basis for reclassifying the land at this point. Rather, it only makes sense to instead stay Phase II pending Piilani's Motion to Amend the 1995 Decision and Order.

I. BACKGROUND

In 1994 Kaonoulu Ranch (the "Original Petitioner") filed a Petition for District Boundary Amendment to amend the Land Use District Boundary to reclassify approximately 88 acres of land at Kaonoulu, Makawao-Wailuku, Maui, Hawaii, specifically identified at the time by Tax Map Key Nos. 2-2-02: portion of 15 and 3-9-01:16 (the "Petition Area") from the Agricultural District to the Urban District. On February 10, 1995, the Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order ("1995 D&O") reclassifying the Petition Area to the Urban District subject to certain conditions specified therein.

In or about 2005, the Original Petitioner conveyed the Petition Area to Maui Industrial Partners, LLC ("MIP"). In or about 2009, MIP conveyed part of the Petition Area, specifically approximately 13 acres identified as TMK (2) 3-9-001:169 ("the Honua'ula Parcel") to Honua'ula Partners, LLC. In or about 2010, MIP conveyed the remainder of the Petition Area, specifically the portion of the original Petition Area designated by TMK Nos. (2) 3-9-001:016 and 170-174 (the "Piilani Parcels"), to Piilani. Piilani is not affiliated with Honua'ula, and has separate ownership.

On May 23, 2012, Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahale (collectively, "Intervenors") filed a Motion for a Hearing, Issuance of Order to Show Cause, and Other Relief (the "Motion for Order to Show Cause"). In the Motion for Order to Show Cause, Intervenors contended, among other things,

that the intended use of the Piilani Parcels by Piilani for the development of retail shopping complex violated Conditions 5, 15, and 17 of 1995 D&O. On September 10, 2012, the Commission granted Intervenors' Motion for Order to Show Cause, and ordered that a show cause hearing be set as to the entire Petition Area (the "Show Cause Hearing"). On September 11, 2012, the Commission entered a Prehearing Order, wherein it was stated that the Commission would first hold hearings to consider whether Piilani and Honua'ula had violated the 1995 D&O (hereinafter "Phase I"). Thereafter, if a violation was found, the Commission would then proceed to hold hearings to determine whether reversion or other designation is the appropriate remedy (hereinafter "Phase II").

On November 1, 2, 15 and 16, 2012, the Commission heard evidence and arguments in Phase I of the Order to Show Cause. At a meeting on February 7, 2013, a majority of the members of the Commission orally passed a motion finding that Piilani's and Honua'ula's proposed uses of the Piilani Parcels and the Honua'ula Parcel would violate Conditions 5 and 15 of the 1995 D&O, and that Condition 17 had been violated. No written order reflecting that oral motion has been entered.

On April 8, 2013, Piilani filed its Motion to Stay Phase II of the Order to Show Cause. Therein, Piilani represented to the Commission that Piilani (1) would file a Motion to Amend the 1995 D&O by no later than December 31, 2013, and (2) would not commence any construction or other development of the Piilani Parcels until the Motion to Amend has been heard by the Commission, or without other express approval of the Commission. Thereafter, on April 16, 2013, Honua'ula filed a Joinder in the Motion to Stay Phase II, wherein Honua'ula represented that it had no present intention to commence construction or development of the Honua'ula Parcel, and would not do so while any stay was in effect, absent notice to the Commission of its intent to do so.

Although Piilani had obtained mass grading permits (to begin the preliminary phases of construction on the proposed Piilani Promenade Project) prior to filing of the Motion for Order to Show Cause, upon the filing of that Motion, Piilani voluntarily decided not to proceed with the grading. Piilani has not begun any active development of the Piilani Parcels. Thus, while there was an intention to develop the Piilani Promenade Project, and plans were made for said project, no actual development of the land at issue has commenced.

During the hearing on Phase I of the Order to Show Cause Proceeding, the State Office of Planning took the position that, if Piilani wanted to develop a project which was different from the conceptual plan presented in the Original Petition, it needed to first seek leave to amend the 1995 D&O, by filing a Motion to Amend. Piilani and Honua'ula took the position in Phase I that its plans were not in violation of the 1995 D&O, based on representations made to the Commission when the Original Petition was heard. The Commission disagreed, however, and found that the proposed Piilani Promenade Project and the Honua'ula Affordable Housing Project, if developed, would violate Conditions 5 and 15 of the 1995 D&O. Based on that determination, neither Piilani nor Honua'ula are proceeding with any development.

II. DISCUSSION

A. A Stay is Not a *De Facto* Dismissal

Intervenors' Opposition asserts that the Stay of Phase II is the equivalent of a dismissal of this action. Rather, Piilani seeks a Stay of Phase II to allow Piilani to file a Motion to Amend. If either (1) Piilani fails to file a Motion to Amend in a timely manner; or (2) the Commission denies the Motion to Amend, then the Commission can proceed to Phase II of the Order to Show Cause Proceeding. Even if the Motion to Amend is granted, if the Commission felt it was appropriate, it could proceed to Phase II of the Order to Show Cause hearing, although in that event Phase II may be moot. In either event the request to Stay Phase II does not terminate this

action. No prejudice results to anyone, so long as no development of the Petition Area occurs during the process.

B. The Commission Has the Inherent Power to Stay Phase II

Intervenors' Opposition asserts that, once the adjudicatory function of a contested case has commenced, the Commission somehow loses the ability to manage its own docket, and cannot stay Phase II of the proceeding. Intervenors claim that once the Commission commences a contested case, it must continue and conclude the matter, and issue a final decision "within a reasonable period of time," which Intervenors argue cannot include staying the proceeding to allow Piilani to file a Motion to Amend. See Intervenors' Opposition at 3. However, Intervenors cite to no authority that precludes the Commission from taking the practical approach, and staying Phase II until it has a chance to consider Piilani's Motion to Amend. None of the rules cited by Intervenors preclude such a stay. To the contrary, Land Use Commission Rule § 15-15-34(b) states that in a quasi-judicial proceedings, "[f]or good cause shown, the commission may waive or suspend any rule" other than jurisdictional rules. This rule makes clear that the Commission has broad latitude in controlling its own docket and procedures as justice requires, even if this requires the Commission to suspend a rule. Clearly this latitude includes staying a proceeding under circumstances such as those presented in this case.

Intervenors' reliance on Outdoor Circle v. Harold K.L. Castle Trust Estate, 4 Haw. App. 633, 641-42, 675 P.2d 784, 791 (1983), is misplaced. In Outdoor Circle, at issue was whether the Commission violated the Sunshine Law, when it adopted and issued conclusions of law and a decision and order outside of an open meeting. In that case, the Commission had made its findings of fact and voted to deny a petition for a reclassification of land from urban to conservation. The Commission argued that its adoption of the conclusions of law and decision and order did not violate the Sunshine Law, because it thought its adjudicatory function was

complete after it voted on the petition. The Intermediate Court of Appeals disagreed, and found issuance of the final determination was part of the adjudicatory function. The Court ultimately held that although the Sunshine Law had been violated, the actions taken were not avoidable, because there was no proof of a willful violation. Outdoor Circle only stands for the proposition that reaching a final determination on a matter is part of the Commission's adjudicatory function. It does not preclude the Commission from staying the proceeding under the circumstance presented in this case. Piilani is not claiming that the Commission has reached a final adjudication already, but rather, is asking the Commission to stay the matter prior to final adjudication.

As Intervenors point out, the Commission is exercising its adjudicatory function in this Order to Show Cause proceeding. Thus, the Commission is serving as the administrative equivalent to a court of law. Hawaii Courts routinely grant stays of pending adjudicatory proceedings, despite the fact that there is no rule providing for same. "Every court has the authority to stay proceedings before it to insure that justice is done or as an incident of its right to provide for the efficient and economic use of judicial resources." 1 Am. Jur. 2d Actions § 68. A stay "operates merely to preserve the status quo existing on the date of its issuance and in no way addresses the merits of the parties' dispute." Id. For this reason, courts have "broad discretion to stay proceedings as an incident to its power to control its own docket."

Granting a stay in proceedings is a common procedural practice in Hawai'i, particularly if there is a possibility that a new development may accord relief or render the underlying dispute moot. While the reasoning behind granting a stay is not always enunciated, Hawaii's courts have remarked that stays are particularly appropriate to maintain the "status quo" between parties pending the resolution of a separate case involving the same subject matter, United Pub. Workers v. Shimizu, No. 26568, 3-4 (Haw. May 18, 2007) (SDO); and to "conserve[] scarce judicial

resources,” Fratinaro v. Employees’ Ret. Sys., 121 Hawai’i 462, 468, 220 P.3d 1043, 1049 (App. 2009) (citing Jou v. Nat’l Interstate Ins. Co. of Haw., 114 Hawai’i 122, 128-29, 157 P.3d 561, 567-68 (App. 2007)). A stay is appropriate where it is likely to conserve judicial and party time, resources and energy. See Bank of America, N.A. v. WRT Realty, L.P., 769 F.Supp.2d 36 (D. Mass. 2011).

In this case, Piilani plans to move to both bifurcate the 1995 D&O to separate the Piilani Parcels from the Honua’ula Parcel,¹ and to amend the 1995 D&O to allow Piilani to develop an economically viable project, after allowing the Commission, the State Office of Planning, the County of Maui, and the public, to evaluate and comment on any impacts of the proposed project. This will allow the Commission to serve the function designated to it by the State legislature, to consider the effects on State-wide issues of the proposed project. It will also allow Intervenors, and the general public, to have their views considered as to the proposed project.

Intervenors appear to assert that, by not seeking to amend the 1995 D&O before this Order to Show Cause proceeding began, Piilani’s opportunity to seek to amend somehow “vanished.” See Intervenors’ Opposition at 1. Intervenors appear to argue that, having gone through Phase I of the proceeding, and having effectively stopped Piilani from commencing construction of the Piilani Promenade Project, that Intervenors are now entitled to penalize Piilani by having the land reclassified to Agricultural. Leaving aside the fact that reclassification to Agricultural would be inappropriate because it would be contrary to the current zoning, the Kihei-Makena Community Plan, and various statewide policies, Intervenors’ position assumes too much. The adjudicatory function of the Commission is not to judge Piilani and Honua’ula as

¹ At page 6 of Intervenors’ Opposition, they assert that bifurcation of the docket would be improper. Piilani does not seek bifurcation at this time, and will therefore wait to address arguments about bifurcation when that remedy is ripe, and a motion has been filed. Piilani asserts, however, that the Commission has the authority, if it believes appropriate, to bifurcate the proceeding on its own initiative.

guilty or liable, as in a civil or criminal proceeding, but rather, to best administer the proper classification of the various land parcels, and to ensure that the Commission's decisions and orders are complied with.

In this case, Piilani had an honest, good faith belief that its proposed development of the Piilani Promenade Project was in compliance with the 1995 D&O. It therefore contested the assertion in Phase I of the proceeding that the Project would violate the conditions of the 1995 D&O. A majority of the Commission disagreed. Piilani has determined to respect that majority determination, and therefore seek to amend the 1995 D&O, as it continues to believe that its proposed project is in the best interests of the Kihei community, Maui County, and the State of Hawaii. Allowing the Motion to Amend to proceed will not prejudice Intervenors. To the contrary, if Intervenors do not like what Piilani presents in the Motion to Amend, they will have full opportunity to voice their opinions and present evidence in the Motion to Amend proceeding.

As a practical matter, staying Phase II to allow the Motion to Amend makes common sense. Once the Motion to Amend is determined, then the Commission can ascertain whether to proceed to Phase II. If, as part of the Motion to Amend, all the concerns of not only the Commission, but also Intervenors, have been satisfied. Thereafter, the Commission can determine whether proceeding with Phase II is appropriate or not.

C. Commencing Phase II Would Be A Waste of Time and Resources

If Phase II were to proceed, Piilani's primary argument would be that reclassification would not be an appropriate remedy because the violation was only based on a *proposed* use, which Piilani has determined it will not pursue until the Commission addresses its Motion to Amend. In addition, Piilani would present evidence of the fact that, under the criteria in H.R.S. Chapter 205, the Petition Area cannot and should not be reclassified. The land at issue is

properly classified as Urban, since the zoning of the property (M-1) as well as its designation within the Kihei-Makena Community Plan (LI) are both consistent with the Urban designation, and inconsistent with any other designation (Agricultural or Conservation). One possible outcome of Phase II would be that the Commission could determine that, even though it came to the conclusion that the proposed Piilani Promenade Project and the Honua'ula Affordable Housing would violate Conditions 5, 15 and 17 of the 1995 D&O, it still would not be appropriate to change the classification of the Petition Area. Thus, significant time and resources could be expended, but might result in only achieving the current status quo.

This waste of time and resources can easily be avoided, by simply staying Phase II to allow Piilani to file its Motion to Amend by not later than December 31, 2013. The Commission can then determine whether the 1995 D&O should be amended to allow Piilani to develop the Piilani Parcels, after considering the impacts of the proposed types of improvements. Because neither Piilani, nor Honua'ula, will begin to develop the Petition Area while the stay is pending, no one, including Intervenors, will be impacted.

III. CONCLUSION

Based upon the foregoing, Piilani respectfully requests that the Commission grant the Motion to Stay Phase II.

Dated: Honolulu, Hawai'i, April 23, 2013.



CLIFFORD J. MILLER
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Attorneys for Piilani Promenade South, LLC and
Piilani Promenade North, LLC

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this date, a true and correct copy of the foregoing document was duly served upon the following party via electronic mail addressed as follows:

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THE UNDERSIGNED HEREBY FURTHER CERTIFIES that on April 24, 2013, a true and correct copy of the foregoing document will be duly served via certified mail, return receipt requested, postage prepaid at the addresses referenced above.

Dated: Honolulu, Hawai'i, April 23, 2013.

Handwritten signatures of Clifford J. Miller and Jonathan H. Steiner.

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