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LAND USE COMMISSION  
STATE OF HAWAII

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A-94-706
	)	
KAONOULA RANCH	)	HONUUA'ULA PARTNERS, LLC'S
	)	MEMORANDUM IN OPPOSITION TO
To Amend the Agricultural Land Use District	)	PETITION TO INTERVENE IN SHOW
Boundary into the Urban Land Use District	)	CAUSE HEARING; CERTIFICATE OF
for approximately 88 acres at Kaonoulu,	)	SERVICE
Makawao-Wailuku, Maui, Hawai'i	)	
	)	
	)	
	)	

HONUUA'ULA PARTNERS, LLC'S MEMORANDUM IN OPPOSITION  
TO PETITION TO INTERVENE IN SHOW CAUSE HEARING

Honua'ula Partners, LLC ("Honua'ula"), by and through its attorneys, McCorrison Miller Mukai MacKinnon LLP, submit this Memorandum in Opposition to Movants' Petition to Intervene in Show Cause Hearing, dated August 29, 2012 (the "Petition"). Intervention by

Movants is not appropriate because (i) none of the Movants have established, or even alleged, a legitimate injury in fact or other interest in the proceeding clearly distinguishable from the general public, (ii) this proceeding does not involve claims based on alleged environmental harms and therefore liberalized rules of standing do not apply, and (iii) Hawaii Administrative Rules (“HAR”) sec. 15-15-52(d) relating to permissive intervention at the Commission’s discretion does not apply. In addition, not only are Movants’ interests indistinguishable from the general public, but they are also indistinguishable from one another and therefore to allow all three Movants to intervene would clearly be inappropriate.

I. MOVANTS HAVE NO RIGHT TO INTERVENE.

Movants rely upon HAR sec. 15-15-52(c)(2) as one basis for intervention. See Petition at 5-6. That section provides, in pertinent part, that “[a]ll persons . . . who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public” may intervene upon timely application. HAR § 15-15-52(c)(2) (emphasis added). None of the Movants, however, have established or even alleged any interest in the proceeding “clearly distinguishable from that of the general public.” In fact, based on the Petition, it appears that Movants’ interests are completely indistinguishable from the public generally.

Movants argue that “Maui Tomorrow . . . is dedicated to the responsible planning and sound management of Maui’s natural and cultural resources, including assuring that the Island of Maui is developed in an orderly fashion in accordance with all applicable federal, state and local planning and environmental laws,” and that the purposes of South Maui Citizens for Responsible Growth is “to advance, defend, and communicate the principles of responsible growth in South Maui[.]” Petition 7-8. Movants state that “[b]oth organizations’ supporters, and/or members,

and/or constituents, and/or beneficiaries . . . include residents of Kihei, Maui, Hawaii in relatively near proximity to Landowners' proposed development." Id. at 8. Movants also state that the members, constituents or beneficiaries of both organizations (i) travel the roads fronting the property and are affected by traffic, (ii) include parents of children who will attend a future school nearby the property, (iii) include workers and entrepreneurs who would benefit from more meaningful and higher paying jobs and opportunities, (iv) include Kihei residents affected by urban sprawl, and (v) include persons who abide by state and county land use laws. Id. at 9. Finally, Movants state that "Mr. Kanahale shares all of the same circumstances" as the supporters, members, constituents and beneficiaries of Maui Tomorrow and South Maui Citizens for Responsible Growth. Id. at 10.

First, Movants have provided no supporting declarations or affidavits from any individual members of either organization, much less one with an interest clearly distinguishable from the general public. In the complete absence of any factual foundation to support intervention, the Petition must be denied. In addition, based on the Petition, the purposes, membership and interests of Maui Tomorrow and South Maui Citizens for Responsible Growth are clearly no different from the public generally. Every resident of Maui has an interest in "responsible planning and sound management" of Maui's resources and in "responsible growth in South Maui." Every resident of Maui also has an interest in traffic, schools, jobs, preventing urban sprawl and in the rule of law. Accordingly, Movants have demonstrated no interest "clearly distinguishable from that of the general public" and therefore the Petition should be denied.

## II. LIBERALIZED RULES OF STANDING ARE NOT APPLICABLE HERE.

At different points in the Petition, Movants contend that the Commission should relax standing requirements because this proceeding involves "environmental concerns." See Petition

4, 7. Honua‘ula objects to Movants’ characterization of this proceeding as involving environmental concerns and contends that Movants have misrepresented the record in this regard. Movants alleged no violations of environmental rules or requirements in the original Motion for Issuance of an Order to Show Cause. Furthermore, the Petition itself characterizes the essential issues involved in this proceeding as whether the current owners have complied with condition 5 of the original Decision and Order (“D&O”) relating to traffic issues, and condition 15 relating to representations made by the original petitioner. Accordingly, there is no basis for the Commission to relax any standing rules or requirements in this proceeding.

Movants also cite Pub. Access Shoreline Hawaii by Rothstein v. Hawai‘i County Planning Commission by Fujimoto, 79 Hawai‘i 425, 431, 903 P.2d 1246, 1252 (1995) (“PASH II”) for the proposition that the Commission should relax standing requirements. However, Movants’ reliance on PASH II is misleading. In that case, standing was based on the unrefuted testimony, under oath, by members of the community group Public Access Shoreline Hawaii that they had customarily gathered ‘ōpae (shrimp) on the property. Pub. Access Shoreline Hawaii by Rothstein v. Hawaii County Planning Comm’n by Fujimoto, 79 Hawai‘i 246, 253, 900 P.2d 1313, 1320 (App. 1993) (“PASH I”); see also PASH II, 79 Hawai‘i at 434, 903 P.2d at 1255 (“We agree with the ICA’s thorough assessment of PASH’s standing.”). The court determined that such testimony “was sufficient to show that the gathering of opae from the anchialine ponds on the ahupua`a of Kohanaiki [was] customarily and traditionally exercised by native Hawaiians and by PASH’s native Hawaiian members.” PASH I, 79 Haw. at 253. Therefore, the relevant holding in PASH I was that “a native Hawaiian who has exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands of an ahupua`a has an interest in a proceeding for the approval of an SMAP

for the development of lands within the ahupua`a which are clearly distinguishable from that of the general public.” PASH I, 79 Hawai`i at 252, 900 P.2d at 1319.

Here, none of the Movants allege that any of them have ever used the property for gathering or cultural practice, much less such activities that were customarily and traditionally exercised there for subsistence, cultural, and religious purposes. Furthermore, although the Petition contains a vague and completely unsupported reference made “upon information and belief” of some unidentified person that archaeological sites are located on or near the property, the mere passing mention of these “archaeological sites” is also insufficient to confer standing. In PASH I, although the court determined that the community group had standing, the court held that the interest of a separate appellant, Pilago, in the protection of cultural sites was not clearly distinguishable from that of the general public and therefore that Pilago was not entitled to standing. Unlike the community group, Pilago did not claim to have exercised any cultural or religious activities on the property. Id. at 254, 900 P.2d at 1321. The court stated, “Pilago did not assert that he or other native Hawaiians had engaged in any activities that might be protected under article XII, § 7. Therefore, Pilago did not show that his interest is ‘personal,’ i.e., that it is clearly distinguishable from that of the general public.” Id. Likewise, the completely unsupported allegation that archaeological sites may be located on or near the property is woefully inadequate to demonstrate that the interests of Kanahale or any other Movant is clearly distinguishable from that of the general public.

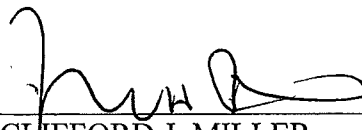
### III. HAR SEC. 15-15-52(d) IS INAPPLICABLE.

Finally, Movants rely upon HAR sec. 15-15-52(d) relating to permissive intervention at the Commission’s discretion as a basis for intervention here. That rule, however, does not apply to the instant circumstances. Intervention in this proceeding is governed by HAR sec. 15-15-53

relating to “Intervention in other than district boundary amendment proceedings.” In contrast, HAR sec. 15-15-52(d) relates to permissive intervention in proceedings for district boundary amendments.

Furthermore, even if HAR sec. 15-15-52(d) were applicable, the Commission should refuse to allow all three Movants to intervene because their interests are indistinguishable from one another. Allowing multiple parties, all of which have admittedly the same interests, see Petition 7-9, only increases the likelihood of inefficiency in the proceedings.

Dated: Honolulu, Hawai‘i, SEP - 4 2012.



CLIFFORD J. MILLER  
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JONATHAN H. STEINER

Attorneys for Honua‘ula Partners, 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 certified mail, return receipt requested and electronic mail, addressed as follows:

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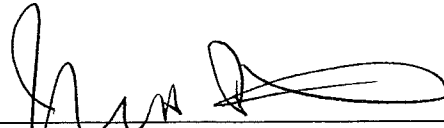
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SEP - 4 2012

Dated: Honolulu, Hawai'i, \_\_\_\_\_.

A handwritten signature in black ink, appearing to read 'Clifford J. Miller', written over a horizontal line.

CLIFFORD J. MILLER

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