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and Daniel Kanahele

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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

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' REPLY TO PIILANI
PROMENADE SOUTH, LLC AND PIILANI
PROMENADE NORTH, LLC'S RESPONSE
TO INTERVENORS' PROPOSED FINDINGS
OF FACT FOR PHASE ONE; CERTIFICATE
OF SERVICE

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

**INTERVENORS' REPLY TO PIILANI PROMENADE SOUTH, LLC AND PIILANI
PROMENADE NORTH, LLC'S RESPONSE TO INTERVENORS' PROPOSED
FINDINGS OF FACT FOR PHASE ONE**

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth,
and Daniel Kanahele ("Intervenors"), through their attorney Tom Pierce, Esq., hereby submit
their response to Piilani Promenade South, LLC and Piilani Promenade North, LLC's Response
to Intervenors' Proposed Findings of Fact for Phase One, filed January 4, 2013, which has been

joined by Honua`ula Partners and the County of Maui (“Petitioners’ Objection(s)”). (As used herein, PPS, PPN and HP are collectively referred to as “Petitioners.”)

I. Reply to Petitioners’ Objection to Form

A. Petitioners’ Objection to Use of an Index

Intervenors meticulously cited the record in support of each proposed Finding of Fact and Conclusion of Law. It is common to place citations in the body of a pleading, in footnotes or in an index or appendix, depending on which vehicle best serves the interests of the reader. Here, the need to cover a host of material in support of Proposed Findings of Fact – Intervenors’ Proposed FF 1 and 2 in particular -- suggested use of an index so that Intervenors’ Proposed Findings of Fact could be read with fluidity and clarity. Intervenors can recast the citations into the body of the Proposed Findings of Fact if requested.

B. Petitioners’ Objection to Multiple Sentences in Findings

Findings often include more than one sentence, exemplified by the D&O in this case where the Commission used multiple sentences repeatedly. (See, e.g., 1-2, 5-6, 9, 11-16, 19, 21, 24-25, 28-33, 36-40, 43-44, 46, 48-52, 54, 57-58, 60, 62, 65, 67, 68-73, 78, 81, 83-84, 86, 89-91, and 96-97.) Findings commonly group related facts and statements into a singular ultimate finding of fact for clarity. Not every finding can be expressed in one sentence.

C. No Harm

Petitioners were able to surmount the purported obstacles and address Intervenors’ proposed Findings of Fact and Conclusions of Law. In any event, had the citations been integrated with each proposed Finding of Fact and Conclusion of Law, Petitioners’ and the County of Maui’s work would have been the same.

II. Select Replies to Petitioners' Objections

A. General Response

Each of Intervenor's Proposed Finding of Fact are supported by substantial and compelling evidence. In summary, Kaonoulu Ranch represented that it would develop the Property into a 123 lot light industrial park with limited commercial. Contrarily, Petitioners and Honua`ula Partners are instead developing 250 housing units and two large retail shopping centers consisting of 700,000 square feet of leasable space. The D&O is the seminal and controlling document against which Petitioners' development plans must be measured to determine whether the currently proposed housing and retail shopping center developments are in substantial compliance with the representations made to the Commission by Kaonoulu Ranch. Petitioners and the County of Maui have attempted to "cherry pick" evidence that was not accepted by the Commission in 1995. The attempt fails. Only one outcome is supportable: Petitioners are in violation of D&O Conditions 5, 15 and 17.

Most of Petitioners' Objections do not require response. Intervenor's submit the following specific replies to select number of Petitioners' Objections.

B. Intervenor's Proposed FF 4

During the boundary amendment process, Kaonoulu Ranch did more than "*propose*" to develop the property into the Kaonoulu Industrial Park as stated in D&O Finding of Fact 21 -- the Commission ordered that it be done: "Petitioner *shall develop* the Property in substantial compliance with the representations made to the Commission." (D&O Condition 15; emphasis added.)

C. Intervenor's Proposed FF 5

Intervenors correctly cited Intervenor's Exhibit 9 in support of a finding that the 1998 Kihei-Makena Community Plan requires the Property to be used for light industrial services with limited retail and commercial activities allowed to the extent they are "accessory or provide service to the predominate light industrial use." (Exhibit 9, p. 18 of the plan.)

D. Intervenor's Proposed FF 8

Intervenors agree that Wailea 670's rezoning was finalized in 2008, not 2007, and therefore requests amendment of proposed Finding 8 to replace reference to "2007" with "2008."

E. Intervenor's Proposed FF 10

Petitioners and the County of Maui object to use of the word "mall" in reference to the 300,000 square foot outlet shopping center development, yet Petitioners' own literature refers to the project as an outlet *mall*: "The location of the Maui Outlets provides an amazing opportunity to be part of a first class Outlet Mall . . ." (Intervenors' Exhibit 19, page 14.) Intervenor's ask leave to amend the index of references in support of proposed Finding of Fact 10 to include Intervenor's Exhibit 19.

F. Intervenor's Proposed FF 11 a.

Intervenors agree that Wailea 670's rezoning was finalized in 2008, not 2007, and therefore request amendment of proposed finding of fact 11 to replace reference to "2007" with "2008."

G. Intervenor's Proposed CL 2

The question the Commission must answer in this contested case hearing is whether there has been a “failure to perform a condition, representation or commitment on the part of the petitioner.” (HAR § 15-15-93.) Compliance is to be measured against the D&O. The D&O is the product of a structured process embedded in statute (HRS ch. 205) and administrative rules and regulations (HAR 15-15 *et seq.*). Those laws required the filing of a petition meeting specific requirements, the giving of public notice and a right to be heard, evidentiary proceedings and the creation a written decision and order. Once final, with no appeal, the D&O becomes, and, here, is, bedrock law with regard to (1) the subject real property, (2) the parties to the action and (3) those in privity. This is underlined by the fact that a D&O is recorded against the property that is the subject of a successful boundary amendment proceeding. (In juxtaposition: The Petitioners and the County of Maui are requesting the Commission to find the petition and its various exhibits, and evidence presented in 1994 at the boundary amendment proceeding to be the “law,” even though those matters are not expressly recorded against the property and were not accepted “whole cloth” by the Commission in 1995 through the D&O.)

Next, to suggest that Petitioners are not bound in privity with Kaonoulu Ranch flies in the face of fundamental legal principles, not to mention the fact that Petitioners are the undisputed current owners of the Property against which the D&O is recorded., which they admit.

Finally, Petitioners and the County of Maui make the spurious argument that the boundary amendment proceedings that produced the D&O were “non-adversarial” (Response, p. 21, last line); therefore, they conclude, *res judicata* does not attach to the D&O. This is at odds with the nature of the process that must be followed to secure a boundary amendment, including the filing of a petition under oath, publication of notice of the proceedings and affording the public the right to be heard, taking evidence under oath and cross-examination of witnesses, preparation of findings of fact

and conclusions of law, recording of same, a right to appeal, -- all hallmarks of a contested case hearing giving rise to *res judicata* effect.

DATED: Makawao, Hawaii, January 9, 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 Kanahale

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of INTERVENORS' REPLY TO PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S RESPONSE TO INTERVENORS' PROPOSED FINDINGS OF FACT FOR PHASE ONE; CERTIFICATE OF SERVICE has been duly served upon the following at their addresses of record via United States Mail, postage prepaid, on January 9, 2013:

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DATED: Makawao, Maui, Hawaii, January 9, 2013.



TOM PIERCE
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