

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of: MAUI LANI NEIGHBORS, INC., for Declaratory Order Under §§ 15-15-98 *et seq.* of the Land Use Commission Rules and Hawai'i Revised Statutes § 91-8

Affected Landowner and Property: State of Hawai'i, by and through its BOARD OF LAND AND NATURAL RESOURCES; Lot 12-A-3 of the Maui Lani Subdivision; Subd. File No: 3.2226; TMK No: (2) 3-8-007:104

DOCKET NO. DR14-51

PETITIONERS' OPPOSITION TO COUNTY OF MAUI'S MOTION TO INTERVENE; EXHIBIT "A" – "B"; CERTIFICATE OF SERVICE

Filed by:

MAUI LANI NEIGHBORS, INC.

**PETITIONERS' OPPOSITION TO COUNTY OF MAUI'S MOTION TO INTERVENE
EXHIBIT "A" – "B"
CERTIFICATE OF SERVICE**

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PETITIONERS' OPPOSITION TO COUNTY OF MAUI'S MOTION TO INTERVENE

Maui Lani Neighbors, Inc. ("**Petitioner**" or "**MLN**"), through its attorney Tom Pierce, Attorney at Law, LLLC, submits this opposition to *The County of Maui, County of Maui Planning Commission, County of Maui Department of Planning, and William Spence as Planning Director's Petition to Intervene*, filed October 23, 2014. (Abbreviations defined in MLN's *Petition for Declaratory Order*, filed October 8, 2014, are adopted herein.)

MLN has separately filed a statement of no position with respect to the Hawai'i Department of Land and Natural Resource's ("DLNR's") petition for intervenor status. MLN anticipates that the Land Use Commission ("LUC") will grant DLNR intervenor status. Intervention by DLNR is arguably warranted because it now stands in the shoes of A&B with respect to the portion of the Petition Area that is the subject of MLN's Petition for a Declaratory Order. In addition, DLNR has identified, among others, an interest in providing a park for

Maui County. As shown below, this is the same interest identified by the County of Maui (“County”).

The LUC’s rules provide that intervention is *not* warranted where the person seeking intervention has a position that is “substantially the same as the position of a party already admitted to the proceeding.” HAR § 15-15-52(d)(1). It is for this reason that the County’s petition to intervene should be denied. The County claims it has an interest because it wants a park for Maui. County Petition at 3. That position is exactly the same as DLNR’s position. Granting intervenor status to the County will not assist the LUC. Rather, including the County as an intervenor will “render the proceedings inefficient,” which is another basis for denying intervenor status. HAR § 15-15-52(d)(2).

The County’s only other claimed interest is not an interest at all. The County claims that it should be made a party to the proceedings because it “hold[s] an interest in proper interpretation and analysis of the underlying LUC D&O,” simply because it has an obligation to enforce the LUC D&O. County Petition at 3. This is not an interest. If it were, then State Circuit Court would have a right to intervene because it also has an obligation to enforce the LUC D&O, as well. In short, this is not a legitimate basis for County intervention.

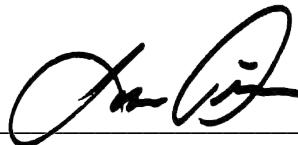
Moreover, the County’s claim of an interest because of its duty to enforce is filled with great irony. If anything, the County, as a result of its enforcement obligations, has a primary obligation to remain an unbiased observer in these proceedings. However, the County has already tainted its ability to be an independent enforcer, and at the same time shown it has no ability to be an unbiased witness before the LUC. For example, it is telling that the County does not state an interest as a governmental agency in assuring that the LUC’s conditions are fully met by landowners and developers. Instead, the County unabashedly states its true interest: it wants

the park just as badly as DLNR, and apparently it does not matter whether the park is developed in accordance with the law.

Relatedly, even if the LUC were to grant the County intervenor status, the County's testimony must be discounted. The County, in separate communications, and clearly before doing any careful analysis, has already stated its belief that there has been no violation of the conditions set forth in the LUC D&O. Moreover, it has confirmed that it no particular expertise in interpreting the LUC D&O, and it further claims that such interpretation should, instead, be left solely to the LUC. *See* Letter from Pierce to Spence, dated September 8, 2014, attached hereto as **Exhibit "A"**; and, responsive letter from Tarnstrom to Pierce (on behalf of the County of Maui Planning Director), dated September 15, 2014, attached hereto as **Exhibit "B"**.

In conclusion, the County's interests are substantially the same as DLNR's, and therefore the entire goal of the County's intervention is to repeat or join in everything that DLNR argues. The purpose of HAR § 15-15-52(d) is to assure the LUC and the other parties are not subjected to redundant arguments and testimony. Moreover, the County has already shown its complete bias in this matter. Therefore, whatever testimony the County might offer, the LUC could not trust it. For the sake of fairness and efficiency, and pursuant to HAR § 15-15-52(d), the County's petition to intervene must be denied.

DATED: Makawao, Maui, Hawai'i, November 3, 2014.



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September 8, 2014

William Spence
Director
Department of Planning
County of Maui
2200 Main Street, Suite 315
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Wailuku, Hawaii 96793

VIA U.S. MAIL & EMAIL:

planning@mauicounty.gov

**Re: *In the Matter of the Petition of A&B Properties, Inc.,*
Docket No. A10-789**

Dear Mr. Spence:

I represent Maui Lani Neighbors, Inc. (“MLN”). MLN hereby demands that you take immediate actions to stop the State of Hawai`i Department of Land and Natural Resources (“DLNR”) from violating the Findings of Fact, Conclusions of Law, and Decision and Order, (“LUC D&O”), filed June 21, 2012, by the Hawai`i Land Use Commission (“LUC”), in *In the Matter of the Petition of A&B Properties, Inc.*, Docket No. A10-789.¹

Planning Director’s Obligation under HRS Chapter 205

As the Director of the Department of Planning, you are vested with the *exclusive and affirmative obligation* to enforce decisions and orders made by the LUC, and to bring corrective actions against violators of such orders or, in general, the Land Use Law, Hawaii Revised Statutes (“HRS”) chapter 205.

Section 8-8.3 of the Maui County Charter charges you with enforcement of zoning ordinances,¹ and “such other duties and functions *as shall be required by law.*” (Emphasis added). HRS § 205–12 provides:

The appropriate officer or agency charged with the administration of county zoning laws ***shall enforce*** within each county the use classification districts

¹ The LUC D&O is also available online at <http://luc.hawaii.gov/wp-content/uploads/2013/03/A10-789-FOF-COL-DO-JUNE-2012.pdf>.

adopted by the land use commission **and the restriction on use** and the condition relating to agricultural districts under section 205–4.5 and shall report to the commission all violations.

(Emphases added.) Thus, HRS § 205-12, read in conjunction with the Maui County Charter, makes clear that you, as the Maui County Director of Planning, are charged with enforcing Land Use Commission orders and other Chapter 205 issues, generally. Moreover, “shall” means shall, and does not give you the discretion to pick and choose when you enforce. *See, e.g., Leslie v. Bd. of Appeals of Cnty. of Hawaii*, 109 Haw. 384, 394, 126 P.3d 1071, 1081 (2006), as amended (Feb. 28, 2006) (holding that “shall” is mandatory, not directory, and holding the “Director lacked discretion to accept a subdivision application without strict compliance with the code requirements.”); *Town v. Land Use Commission*, 55 Haw. 538, 543, 524 P.2d 84 (1974) (holding where the language of a statute is plain and unambiguous, and a specific requirement must be met, it is mandatory and not merely directory).

The obligation of the appropriate county agency to enforce LUC D&Os is further confirmed in *Lanai Co., v. Land use Com’n*, 105 Hawaii 296 (2004):

The power to enforce the LUC’s conditions and orders . . . lies with the various counties. HRS § 205–1252 (1993) delegates the power to enforce district classifications to the counties. HRS § 205–12 **mandates** that the “appropriate officer or agency charged with the administration of county zoning laws **shall enforce** ... the use classification districts adopted by the [LUC] and the restriction on use and ... shall report to the commission all violations.” (Emphasis added.) Pursuant to their enforcement duties under § 205–12, counties **have the responsibility to take necessary action against violators**. A.G. Opinion 70–72 (1970). Such enforcement covers **all land use district classifications and land use district regulations**. *Id.*

105 Hawaii at 319 (some emphases, ellipses and bracketed material in original, others added).

Thus, under the express statutory law, confirmed by the Hawaii Supreme Court, you have the obligation to enforce the conditions set forth in the LUC D&O. Enforcement requires you to, among other things, make a good faith investigation into the facts and law, as set forth below, render a final determination, and to take appropriate action based on your determination, which in this case should include issuing a stop work order on DLNR.

DLNR’s Violation of the LUC D&O

You and/or your attorneys are in receipt of the following documents, which provided detailed background of the facts and circumstances relating to the LUC D&O and DLNR’s violations, and which are hereby incorporated by reference: (1) the LUC D&O; (2) MLN’s Cease and Desist Letter to DLNR, dated July 12, 2014; (3) MLN’s Verified Complaint, filed September 2, 2014; (4) MLN’s Motion for Preliminary Injunction, filed September 4, 2014; and, (5) MLN’s letter, dated September 8, 2014, to the FAA and the Hawai`i Department of Transportation regarding DLNR’s violation of Condition 8 of the LUC D&O. DLNR’s many violations of the LUC D&O are briefly summarized below.

The LUC D&O includes the Property² because the Property is within the “Petition Area” covered by the LUC D&O, and therefore encumbers the Property through its conditions and other obligations placed on the landowner.

The LUC D&O is recorded on title and it runs with the land, and is binding on A&B, and on A&B’s successors and assigns, including DLNR as the new owner of the Property.

Violation of Condition 5 of the LUC D&O

Condition 5 required A&B to prepare a new traffic impact analysis report (“**TIAR**”) *before* seeking any land entitlements, including a change in zoning. Condition 5 also required A&B and/or DLNR to execute an MOA with the Hawai`i Department of Transportation (“**HDOT**”) “prior to final subdivision of the initial phase of onsite development.” The MOA was intended to establish an agreement between the Property landowner and HDOT that would “mitigate impacts to state roadway facilities caused by the Project.”

While DLNR has prepared a TIAR, it did not include a comprehensive traffic impact analysis of the entire Wai`ale project as required by the LUC. DLNR has essentially segmented its impacts from those of the Wai`ale project, which violates Condition 5. Further, we believe that neither A&B nor DLNR has ever completed the MOA with DOT that is required by Condition 5.

Violation of Condition 8 of the LUC D&O

DLNR has identified two retention basins that are planned for the Property, one which will be 5.8 acres in size, and which is intended by DLNR to be constructed and operational **by December 2014**. Because these retention basins will be located within five (5) miles of the Kahului Airport, they are subject to *FAA Advisory Circular 150/5200-33B (Hazardous Wildlife Attractants On or Near Airports)*.

The Hawai`i Department of Transportation identified this Federal Aviation Administration issue to the LUC. Thereafter, the LUC placed a specific condition on the Property in the LUC D&O: Condition 8, entitled “Hazardous Wildlife Attractants on or Near Kahului Airport.” Condition 8 requires that the landowner enter into a memorandum of agreement (“**MOA**”) with HDOT “to document hazardous wildlife attractant mitigation **prior to final subdivision approval** of the initial phase of onsite development....”

The County of Maui **has already granted final subdivision approval**, thus permitting the sale by the prior Property owner, A&B, to the current Property owner, DLNR. However, based on the information we have reviewed, the MOA required in the LUC D&O was never in fact prepared.³ The DLNR Sports Complex is currently in violation of Condition 8.

² The “Property” is a 65.378 acre parcel located in Central Maui designated by the County as tax map key number (2) 3-8-007:104.

³ On October 24, 2013, the County granted A&B final subdivision approval. Subdivision File Number 3.2226, entitled the “Maui Lani Subdivision.” The approved subdivision includes “Lot 12-A-3,” which delineates the boundaries of the 65.378 acre Property. Lot 12-A-3 has recently been designated by the County as tax map key number (2) 3-8-007:104.

Violation of Condition 16 of the LUC D&O

Condition 16 of the LUC D&O requires the landowner of the Property to address the potential impacts on the endangered Blackburn's sphinx moth and other endangered species in the Petition Area, including consulting with the DLNR, DOFAW, and the USFWS to develop mitigation measures to avoid adverse impacts to endangered species, including, if determined necessary, obtaining approval of a Habitat Conservation Plan and Incidental Take License and Permit.

We believe that DLNR has failed to fulfill this obligation by consultation with DOFAW and USFWS. We are also unaware of DLNR having prepared a habitat conservation plan or an incidental take license and permit, in violation of Condition 16.

Violation of Condition 21 of the LUC D&O

Condition 21 of the LUC D&O provides that the Wai`ale Land *shall* be developed "in substantial compliance with the representations" made by A&B's representatives during the district boundary amendment ("DBA") process. Any substantial deviation from the proposal made by A&B would be in violation of the LUC D&O.

A&B's representations to the LUC include those made in the Wai`ale Final Environmental Impact Statement ("FEIS"). The FEIS includes the Preliminary Engineering Report ("PER"), which provided assumptions on hardened surface area for the north portion of A&B's proposed master planned community, Wai`ale, and the related surface water runoff calculations. Any substantial deviation from those assumptions, or from the originally planned retention basin, would violate the terms of the LUC D&O.

A&B also represented through the Wai`ale FEIS that the impacts related to the Wai`ale project, including the retention basin, would be further evaluated during subsequent land entitlement requests. These land entitlements, are, as confirmed by A&B, at minimum: (a) a request to the County Council for an amendment to the Wailuku-Kahului Community Plan changing the designation for the Wai`ale Land from Agriculture to Project District; (b) a request to the County Council for an amendment to the Maui Island Plan; and, (c) an application to the County Council for a change in zoning for the Wai`ale Land from Agricultural District to Project District.

Other representations of A&B made to the LUC were memorialized in the D&O as Findings of Fact ("FOF").

FOF ¶ 180 refers to A&B's representations with respect to the drainage plan and retention basins for the Wai`ale project, and concludes that based on A&B's design of the retention basin and other parts of the drainage system, stormwater runoff from the Wai`ale Land would result in "a decrease in runoff from existing conditions."

FOF ¶ 180 does not account for the more than eight (8) acres of hardened surface area that would result from development of DLNR's Sports Complex because the Sports Complex design had not been created when the surface water runoff assumptions were made by A&B's engineer.

Another representation made by A&B is memorialized in FOF ¶ 122, which expressly distinguishes between “passive recreational uses” and “active recreational uses” in its discussion of the four parks designated to be included within Wai`ale.

FOF ¶ 122 identifies for “active recreation” only the southern portion of the South Wai`ale Land, not the northern portion of the North Wai`ale Land where the Property is located.

This southern portion of the Petition Area identified in FOF ¶ 122 was shown as one of the parks in the Wai`ale project in the Wai`ale FEIS, which FEIS was presented by A&B to the LUC.⁴

Finally, A&B’s representations to the LUC include those made through the oral testimony of its representatives during the hearing on the LUC petition for a district boundary amendment.

Through the oral testimony, A&B confirmed an amendment to the Wailuku-Kahului Community Plan would be necessary for the 545 acre Petition Area, which includes *all* the land within the Wai`ale project, including the Property.

A&B also confirmed an amendment to the Maui Island Plan would be necessary for the Petition Area, if the final adopted version resulted in inconsistencies with A&B’s proposed uses.

A&B also confirmed a three-phase change in zoning process would occur wherein the Petition Area would be subjected to careful scrutiny as the County Council evaluated whether to permit a change in zoning from Agricultural to Project District. *Cf.* MCC § 19.45.050 (providing the three phase processing procedure for Project District applications).

Thereafter, the LUC heard testimony from you, in your capacity as the County Planning Director, which testimony further reinforced the above representations made by A&B. You testified that an amendment to the Wailuku-Kahului Community Plan would be necessary for the Petition Area. You further testified that the Maui Island Plan was in draft form and could possibly change before adoption by the County Council. You further testified to the LUC that the Maui Island Plan expressly provided that there would be additional evaluation of the “green park areas” identified in the Maui Island Plan that would occur during the comprehensive amendment process to the 2002 Wailuku-Kahului Community Plan, which was anticipated to begin sometime after adoption of the Maui Island Plan. You further testified to the LUC that the green park areas identified in the Maui Island Plan would also be evaluated during the change in zoning process.

DLNR has failed to meet the representations made to the LUC in violation of Condition 21.

Violation of Condition 24 of the LUC D&O

DLNR as a landowner of land encumbered by the LUC D&O is required to make annual reports with the LUC in connection with the status of the development of the Property and the landowner’s progress in complying with the conditions imposed by the LUC, as required by Condition 24.

⁴ This “southern portion of the petition area” is identified in Exhibit 7 of the C&D Letter (**Exhibit “A”**).

This should happen immediately considering the fact that A&B has failed to timely submit an annual report to the LUC, and the fact that DLNR has stated its intention to break ground immediately on land encumbered by the LUC D&O.

Conclusion

Based on the foregoing, DLNR is materially violating a significant number of conditions set forth in the LUC D&O. We request confirmation *by no later than September 15, 2014* of your decision to take action against DLNR, including action to issue a stop work order. Thank you for your expedited action.

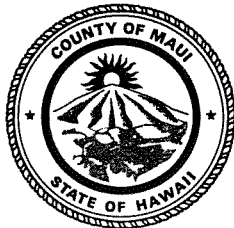
Very Truly Yours,



Tom Pierce

cc: Maui Lani Neighbors, Inc.
County attorneys Patrick Wong, Kristin Tarnstrom (via email only)
State attorneys Bill Wynhoff, Amanda Weston, Linda Chow (via email only)
Daniel E. Orodener (Executive Officer of the LUC) (via email only)

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September 15, 2014

VIA E-MAIL AND FIRST CLASS MAIL

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Re: Land Use Commission, Decision and Order
Docket No. A10-789

Dear Tom:

I am writing in response to your September 8, 2014 letter to William Spence, Director of Planning, regarding the Land Use Commission ("LUC") Decision and Order ("D&O") for Docket No. A10-798, entered June 21, 2012.

The Department of Planning has reviewed your stated concerns in relation to the State of Hawaii's Department of Land and Natural Resources' obligations under the LUC D&O. The Department has found no violations at this time, and therefore will not be taking enforcement action.

Please note that a determination of whether or not there has been a breach of an LUC D&O must be decided by the commission itself. HRS §205-4(g); *Lanai Company, Inc. v. Land Use Commission*, 105 Hawai'i 296, 317 (2004). Any action to enforce the D&O is more appropriately brought directly to the commission.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Tarnstrom", is written over the typed name.

Kristin Tarnstrom
Deputy Corporation Counsel

cc: State Attorney General, Deputies William Wynhoff, Amanda Weston, Linda Chow
Daniel E. Orodener, Executive Director, State Land Use Commission

EXHIBIT B

CERTIFICATE OF SERVICE

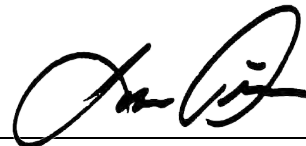
The undersigned hereby certifies that a true and correct copy of the foregoing document shall be duly served upon the following via email and United States Mail, postage prepaid, on November 4, 2014:

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DATED: Makawao, Maui, Hawai`i, November 4, 2014.



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