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LAND USE COMMISSION
STATE OF HAWAII

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May 23, 2017

BY HAND DELIVERY

Land Use Commission
State of Hawaii
State Office Tower
Leiopapa A. Kamehameha Building
235 South Beretania St., Rm. 406
Honolulu, Hawaii 96804

Re: Docket No. SP09-403: Statement of Position on Intervenor Ko Olina
Community Association and Maile Shimabukuro's Motion to Deny and Remand

Dear Chair Aczon and Commissioners:

This letter is in response to the letter from Mr. Calvert G. Chipchase, Esq., attorney for Ko Olina Community Association and Maile Shimabukuro (collectively, "**KOCA**"), dated May 23, 2017 in regards to KOCA's Motion to Deny and Remand ("**Motion**"). In the Motion, KOCA contends that denial is a necessary prerequisite to remand, citing HAR § 15-15-96(a),¹ and provides this Commission with a proposed order denying the applications. Such an order is inappropriate not only given the ultimate intention to remand the matter to the Planning Commission, but also given the procedural defects that all parties agree occurred.

Denial and remand are mutually exclusive resolutions that cannot co-exist. As the Department of Environmental Services, City and County of Honolulu ("**ENV**") discussed in its Response to the Motion ("**Response**"), denial divests the Land Use Commission of jurisdiction over the matter as denial of an application is appealable to the circuit court. Response at 3-4. KOCA's insistence that the Commission can only remand once it has denied the application would lead to the absurd result of potentially simultaneous litigation before both the circuit court and the Planning Commission. As such, KOCA's interpretation of HAR § 15-15-96(a) cannot

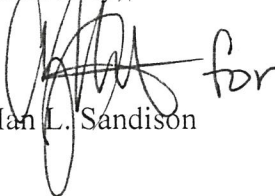
¹ Coincidentally, KOCA did not make this same contention in its *Brief in Support of Remand with Instructions*. See *Intervenors Ko Olina Community Association and Maile Shimabukuro's Brief in Support of Remand with Instructions* at 10 ("[T]he LUC should remand the 2008 Application to the Planning Commission pursuant to HAR § 15-15-96(a). This rule provides in part that 'upon determination by the LUC, the petition may be remanded to the county planning commission for further proceedings.'") (brackets omitted).

stand. *See Dines v. Pacific Inc. Co., Ltd.*, 78 Haw. 325, 337, 893 P.2d 176, 188 (1995) (“Statutory construction dictates that an interpreting court should not fashion a construction of statutory text that effectively renders the statute a nullity or creates an absurd or unjust result.”)

Moreover, any action, other than remand, would be inappropriate given the procedural defects acknowledged in this matter. As KOCA correctly noted in the Motion, “the Planning Commission’s failure to comply with its own Rules renders the Decision invalid.” Motion at 7; *see also E & J Lounge Operating Co., Inc. v. Liquor Com’n of City*, 118 Haw. 320, 349 189 P.3d 432, 461 (2008) (holding that the failure of the city liquor commission to comply with the requirement that a commissioner not present at a previous stage of the hearing become familiar with the record before voting made the decision legally ineffective).

Thus, although the Commission may be in receipt of the complete record of the proceedings - as argued by KOCA - it is not in receipt of a valid, legally effective decision. Under HAR § 15-15-96(a), Land Use Commission action is triggered “after receipt of the **county planning commission’s decision** and the complete record of the proceeding[.]” Emphasis added. As KOCA put forth in the Motion and as dictated by case law, the current decision before the Commission is legally ineffective. As such, the Commission cannot be said to be in receipt of the county planning commission’s decision and therefore the Commission cannot act to approve, approve with modification, or deny the application. The only proper disposition available to the Commission is to remand for further proceedings.

Sincerely,

 for
Ian L. Sandison

cc: All Parties