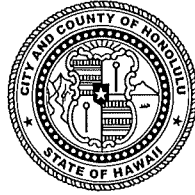


DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU

530 SOUTH KING STREET, ROOM 110 • HONOLULU, HAWAII 96813
PHONE: (808) 768-5193 • FAX: (808) 768-5105 • INTERNET: www.honolulu.gov



KIRK CALDWELL
MAYOR

DONNA Y. L. LEONG
CORPORATION COUNSEL

PAUL S. AOKI
FIRST DEPUTY CORPORATION COUNSEL

May 23, 2017

BY HAND DELIVERY

Land Use Commission
State of Hawai`i
State Office Tower
Leiopapa A Kamehameha Building
235 South Beretania Street, Room 406
Honolulu, Hawai`i 96804-2359

2017 MAY 23 P 4: 01
LAND USE COMMISSION
STATE OF HAWAII

Re: *In re Application of Department of Environmental Services, City and County of Honolulu*, Docket No. SP09-403: Response to Intervenor Ko Olina Community Association and Maile Shimabukuro's letter request dated May 23, 2017

Dear Chair Aczon and Commissioners:

The Department of Environmental Services, City and County of Honolulu ("ENV") objects to Intervenor Ko Olina Community Association and Maile Shimabukuro's (collectively "KOCA") attempt to speak on ENV's behalf, including providing the Commission with a draft of the stipulation, without seeking, much less obtaining, ENV's consent.

As established in its Response to KOCA's Motion to Deny and Remand, ENV asserts that the Land Use Commission ("LUC" or "Commission") can and should remand this matter to the Honolulu Planning Commission ("Planning Commission") without acting to approve, approve with modifications, or deny the petition. Hawaii Administrative Rules ("HAR") § 15-15-96(a) states that "[u]pon determination by the commission, the petition may be remanded to the county planning commission for further proceedings." ENV submits that this is a separate, independent alternative which can only logically apply in cases where the Commission does not otherwise approve, approve with modifications or deny the petition because any one of the latter three decisions would be the LUC's final, appealable decision on the matter. The finality of the decision is established by Hawaii Revised Statutes ("HRS") § 205-6(e) and HAR § 15-15-96(c), which provide that these decisions shall be appealable to the circuit court. Thus, once the decision to approve, modify or deny is made, the LUC would no longer have jurisdiction over the petition.

KOCA suggests that the parties can waive HAR § 15-15-96(b) (which prohibits consideration by the LUC of the same SUP for one year). However, the parties cannot waive this rule and thereby create LUC jurisdiction. Therefore, notwithstanding the parties ostensible waiver of HAR § 15-15-96(b), the LUC's denial and remand would create the absurd result of divesting the LUC of jurisdiction and precluding the LUC from considering the Planning Commission's amended decision.

KOCA's letter does not address the finality of these decisions or the fact that the LUC is divested of its jurisdiction upon making a final decision.

HRS § 205-6(e) requires the LUC to act to approve, approve with modification, or deny the petition. HAR § 15-15-96(a) provides for the same decision-making options, but adds that "[u]pon determination by the commission, the petition may be remanded to the county planning commission for further proceedings." This power to remand is not linked to the power to approve, deny or modify the petition. The LUC's decision on the application is related to the substance of the petition, whereas a decision to remand is related to the sufficiency of the proceeding before the Planning Commission. Therefore, a remand would only be proper, when applied *in pari materia* with HRS § 205-6(e), if the record is deemed incomplete due to a procedural deficiency requiring further action by the Planning Commission.

ENV respectfully requests that the LUC consider and rule on the substance of the parties' arguments before deciding on the proposed form of the order, especially because ENV has not been given the opportunity to present its final form to the Commission. Accordingly, ENV requests that the Commission remand, without denying, the Applications to the Planning Commission to complete the record of the proceeding below by demonstrating compliance with Planning Commission Rule § 2-75 and by issuing a single, consolidated Findings of Fact, Conclusions of Law, and Decision and Order for the consolidated Applications.

Very truly yours,



Dana Viola
Deputy Corporation Counsel

Cc: All parties