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LAND USE COMMISSION
STATE OF HAWAII
2018 APR 19 P 3:36

**BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII**

In the Matter of the Petition of:

EMMANUEL LUTHERAN CHURCH OF MAUI

To Amend the Land Use District Boundary of Certain Lands Situated at Wailuku, Island of Maui, State of Hawai'i, Consisting of 25.263 Acres from the Agriculture District to the Urban District, Tax Map Key No. 3-5-002:011.

DOCKET NO. A07-773

PETITIONER EMMANUEL LUTHERAN CHURCH OF MAUI'S MEMORANDUM IN SUPPORT OF WAIKAPU DEVELOPMENT VENTURE LLC'S MOTION TO BE COPETITIONER, OR IN THE ALTERNATIVE TO BECOME A PARTY, OR IN THE ALTERNATIVE TO INTERVENE, FILED APRIL 12, 2018; CERTIFICATE OF SERVICE

MEMORANDUM IN SUPPORT OF WAIKAPU DEVELOPMENT VENTURE LLC'S MOTION TO BE COPETITIONER, OR IN THE ALTERNATIVE TO BECOME A PARTY, OR IN THE ALTERNATIVE TO INTERVENE

I. INTRODUCTION

Pursuant to Hawai'i Administrative Rules ("HAR") §§ 15-15-52, 15-15-53, and 15-15-70, Petitioner Emmanuel Lutheran Church of Maui, a Hawai'i nonprofit corporation ("Petitioner"), hereby submits this Memorandum in Support of Waikapu Development Venture LLC's ("WDV") Motion to be Copetitioner, or in the Alternative to Become a Party, or in the Alternative to Intervene ("WDV's Motion") in Docket No. A07-773, filed April 12, 2018. As

explained below, Petitioner fully supports WDV's Motion, and respectfully requests that it be granted.

II. BACKGROUND

On April 9, 2018, Petitioner filed its Motion for Extension of Time to Complete Project in Docket No. A07-773 ("**Motion**"). The Motion seeks an order modifying the State of Hawai'i Land Use Commission's ("**Commission**") Findings of Fact, Conclusions of Law, and Decision and Order, filed March 7, 2008 ("**D&O**"), to amend Condition No. 2 to allow for a ten (10) year extension of time, from March 7, 2018 to March 7, 2028, to complete the construction of Petitioner's project, as amended. The Motion is anticipated to be heard by the Commission at its May 9, 2018 hearing.

As explained in the Motion, subsequent to the Commission's May 9, 2018, hearing, and in due time, Petitioner will return to the Commission to seek relief from certain other D&O Conditions and related modifications to the D&O. Petitioner will request modifications in order to develop a modified version of Petitioner's project within an approximately 12.763-acre portion of the Petition Area ("**Proposed Lot A-2**"). WDV, as the party under contract with Petitioner to acquire approximately 12.5 acres of the Petition Area ("**Proposed Lot A-1**"), will request the Commission's approval of a modification to the D&O to allow for the development of a 100% affordable housing project, to be known as the Waikapu Affordable Workforce Housing Project, within its portion of the Petition Area.

In addition, Petitioner and WDV will also ask the Commission to recognize WDV as the successor-in-interest to Proposed Lot A-1, and request either a release of the Petition Area from Commission jurisdiction (in light of the fact that both parcels will be under fifteen (15) acres) or,

in the alternative, to bifurcate Docket No. A07-773 so that there will be two separate Dockets that are geographically distinct. The Commission will also be asked to formally discharge Condition No. 18 related to the sale of all or any portion of the Petition Area.

As the future fee owner of a portion of the Petition Area and the developer of the Waikapu Affordable Housing Project, WDV should be recognized as a co-petitioner, admitted as a party, or granted intervenor status in these future proceedings. Petitioner fully supports WDV's Motion.

III. JUSTIFICATION FOR GRANTING WDV'S MOTION

A. STANDING AS A CO-PETITIONER AND PARTY

Pursuant to the purchase and sale agreement between WDV and Petitioner, WDV would have standing to initiate a boundary amendment request. Under HAR § 15-15-46 (standing to initiate boundary amendments), any person with a property interest in the property sought to be reclassified has standing to pursue a district boundary amendment. As such, it is appropriate that WDV be permitted to participate in the instant and anticipated future proceedings in this Docket on the same footing as a Petitioner.

The Commission's Rules confirm that fee ownership is not required in order to be recognized as having sufficient standing to pursue a district boundary amendment. A purchase contract and the authorization of the fee owner is sufficient.

(c) The following information shall also be provided in each petition for boundary amendment:

(5) The petitioner's property interest in the subject property. The petitioner shall attach as exhibits to the petition the following:

(A) A true copy of the deed, lease, option agreement, development agreement, or other document conveying to the petitioner a

property interest in the subject property or a certified copy of a nonappealable final judgment of a court of competent jurisdiction quieting title in the petitioner;

(B) If the petitioner is not the owner in fee simple of the subject property, or any part thereof, written authorization of all fee owners to file the petition and a true copy of the deed to the subject property;

HAR § 15-15-50(c)(5). It would be an odd thing indeed if an option agreement, development agreement, or other contract provided sufficient standing to seek a district boundary amendment, but the same such contractual rights were deemed insufficient to provide standing to participate as a co-petitioner or party in a motion proceeding.

WDV's contractual rights to purchase approximately half of the Petition Area are a protectable property interest. "These interests—property interests—may take many forms' because courts have long recognized that 'property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.' A property interest does not need to be 'tangible' to be protected by the due process clause. Rather, a protected property interest exists in a benefit—tangible or otherwise—to which a party has 'a legitimate claim of entitlement.'" *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai'i 249, 260, 408 P.3d 1, 12 (2017) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 571–72, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Sandy Beach Def. Fund v. City Council of City & County of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989)) (internal citations omitted). WDV clearly has "a legitimate claim of entitlement" to a portion of the Petition Area, as it is under contract to purchase fee simple title to Proposed Lot A-1 upon completion of the subdivision process by the County of Maui.

B. STANDING AS AN INTERVENOR

WDV also has standing to participate as an intervenor under HAR § 15-15-52(c)(2).¹

Persons who may intervene upon timely application include: . . .

(2) All persons who have a property interest in the land, or 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.

HAR § 15-15-52(c)(2). WDV has a significant interest in the land that is the Petition Area because WDV is under contract to purchase 12.5 acres of the Petition Area. Furthermore, WDV's interest will be directly and immediately affected by actions that the Commission may take in this Docket. *Id.* Accordingly, in the furtherance of due process, WDV should be afforded the opportunity to have its interests represented and advocated before the Commission.

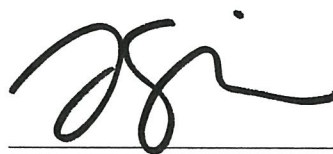
In addition, Petitioner and WDV's positions are not substantially the same, as they are pursuing two distinct development projects within the Petition Area, and it is anticipated that the Commission may wish to hear facts and be provided evidence offered by each party. *See* HAR § 15-15-52(d). Finally, the admission of WDV would not render proceedings in this Docket inefficient or unmanageable. The range of interests and issues to be addressed by WDV is related to its ability to pursue the Waikapu Affordable Workforce Housing Project within a portion of the Petition Area. WDV is not requesting the opportunity to participate in these proceedings in order to thwart or delay ELC's efforts. *See* WDV's Motion at ¶5 (noting that WDV's participation "will be helpful to the [Commission] . . . as it deliberates [the] Motion and future actions that will come before the [Commission] on this Docket.").

¹ Under HAR § 15-15-53 (intervention in other than district boundary amendment proceeding or important agricultural lands designation proceeding), the contents of a petition to intervene shall conform to HAR §§ 15-15-52(e) and 15-15-52(f).

As the developer of the Waikapu Affordable Housing Project, WDV is best positioned to assist the Commission in making the needed findings and conclusions by offering written submissions, arguments, and testimony that, for all practical purposes, should be offered by WDV. If WDV's Motion is denied, Petitioner would be forced to advocate on WDV's behalf, and WDV's involvement would, in essence, be limited to providing witness testimony. Limiting WDV's involvement to witness testimony would ultimately be detrimental to the Commission's decision making efforts, could render future proceedings inefficient or defective, and would place an unnecessary burden on Petitioner. Simply put, there are two distinct parties involved in developing the Petition Area, both of whom wish to fully participate in any proceedings before the Commission, and both of whom should have their respective interests adequately and independently represented.

IV. CONCLUSION

Petitioner respectfully requests that the Commission grant WDV's Motion, and recognize WDV as a co-petitioner and admit WDV as a party in the proceedings in this Docket. In the alternative, if the Commission cannot yet allow WDV to participate as a co-petitioner, Petitioner requests that the Commission grant WDV intervenor status.



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EMMANUEL LUTHERAN CHURCH OF
MAUI

Dated: Honolulu, Hawai'i, April 19, 2018.

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DOCKET NO. A07-773

CERTIFICATE OF SERVICE

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I hereby certify that a copy of the foregoing was served on the following by the methods indicated next to their names on April 19, 2018, to their last known addresses as shown below:

Patrick Wong, Esq. Corporation Counsel County of Maui 250 South High Street Wailuku, HI 96793	[Via U.S. Mail, postage prepaid]
Michael Hopper, Esq. Corporation Counsel County of Maui 250 South High Street Wailuku, HI 96793	[Via U.S. Mail, postage prepaid]
William Spence, Planning Director Maui Planning Department County of Maui 2200 Main Street One Main Plaza, Suite 315 Wailuku, HI 96793	[Via U.S. Mail, postage prepaid]
Dawn T. Apuna, Deputy Attorney General Office of the Attorney General State of Hawaii 425 Queen Street Honolulu, Hawaii 96813	[Via Hand Delivery]

Leo Asuncion, Director Office of Planning State of Hawaii 235 South Beretania Street, 6th Floor Honolulu, HI 96813	[Via Hand Delivery]
Waikapu Development Venture, LLC c/o Peter A. Horovitz, Esq. 2073 Wells Street, Suite 101 Wailuku, HI 96793	[Via U.S. Mail, postage prepaid]

DATED: Honolulu, Hawaii, April 19, 2018.



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