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LAND USE COMMISSION
STATE OF HAWAII

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BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition Of

WAIKOLOA MAUKA, LLC

To Amend the Agricultural Land Use District
Boundary Into the Rural Land Use District for
Approximately 731.581 Acres in South Kohala
District, Island of Hawaii, Tax Map Key No.
(3) 6-8-02:016 (por.)

DOCKET NO. A06-767

WAIKOLOA HIGHLANDS, INC.'S
SUPPLEMENTAL STATEMENT OF
POSITION ON ORDER TO SHOW
CAUSE AND REVERSION OF PETITION
AREA; EXHIBITS "18" – "37";
DECLARATION OF NATALIA
BATICHTCHEVA; DECLARATION OF
DEREK B. SIMON; CERTIFICATE OF
SERVICE

**WAIKOLOA HIGHLANDS, INC.'S SUPPLEMENTAL
STATEMENT OF POSITION ON ORDER TO SHOW CAUSE**

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I. INTRODUCTION

Pursuant to Hawai'i Administrative Rules (“**HAR**”) § 15-15-55, Waikoloa Highlands, Inc. (“**WHI**”), as successor-in-interest to Petitioner Waikoloa Mauka, LLC (“**WML**”) to that certain parcel of land consisting of approximately 731.581-acres and currently identified by TMK No. (3) 6-8-002: 016 (the “**Petition Area**”), by and through its legal counsel, Carlsmith Ball LLP, hereby respectfully submits this Supplemental Statement of Position¹ on Order to Show Cause (the “**OSC**”) issued by the State of Hawai'i Land Use Commission (the “**Commission**”) on July 3, 2018.² The OSC is presently scheduled to be heard by the Commission on October 24-25, 2018 (the “**OSC Hearing**”).

The orderly development of the Project was delayed by the alleged fraud and gross mismanagement of a former director of WHI and WML, Stefan Martirosian. That unfortunate phase has now passed, and the courts will deal with Mr. Martirosian. With its new Project development team and financing commitment, WHI is ready, willing, and able to timely develop the Project, and is ultimately just asking the Commission for an opportunity to do so.

As explained in greater detail below, the Commission should defer final action on the OSC to allow Petitioner time to process amendments to the County of Hawai'i (the “**County**”)

¹ WHI filed its initial Statement of Position on Order to Show Cause with the Commission on August 8, 2018. This pleading is intended to supplement, and *not* amend, the Statement of Position and, therefore, should not be construed as an amended pleading pursuant to HAR § 15-15-43. WHI understands that a similar supplemental statement of position was filed and accepted by the Commission on August 30, 2018 in the OSC proceedings on Docket No. A05-755, Hale Mua Properties, Inc. The evidentiary hearing on that docket was held two weeks later on September 13, 2018, approximately the same amount of time between the filing of this Supplemental Statement of Position and the OSC Hearing.

² The Commission reclassified the Petition Area from the State Land Use (“**SLU**”) Agricultural District to the SLU Rural District by Findings of Fact, Conclusions of Law, and Decision and Order in Docket No. A06-767, filed on June 10, 2008 (“**D&O**”). The reclassification was sought to allow for the development of a 398-lot residential development (the “**Project**”).

entitlements for the Project, as the Commission has means to ensure that the Project is timely developed moving forward without resort to a reversion. At the September 6, 2018 hearing on WHI's Motion to Continue Hearing of Order to Show Cause, filed July 24, 2018 (the "**Continuance Hearing**"), WHI presented a draft Joint Stipulation to Continue Hearing on Order to Show Cause (the "**Proposed Stipulation**"). See Exhibit 18, attached hereto. The Proposed Stipulation would give WHI approximately a year to first address a new zoning ordinance for the Petition Area with the County and then return to the Commission to amend the D&O accordingly. The Proposed Stipulation represents a reasonable, good-faith alternative to defer action on the OSC that would both allow WHI to demonstrate that it is competent and committed to developing the Project, and allow the Commission to preserve its enforcement powers under the OSC.

Alternatively, if the Commission is unwilling to defer immediate action on the OSC under the terms of the Proposed Stipulation or a similar process, the Commission should not revert the Petition Area's SLU Rural District classification for the following reasons. **First**, WHI has substantially commenced its use of the Petition Area under the particular circumstances of this Project, which proposes the subdivision and sale of approximately 398 undeveloped rural-agricultural lots. As explained below, WHI and, previously WML, have spent approximately \$1,278,186.02 to develop the Project since WML purchased the Petition Area, has continued with its development efforts to the present date, has satisfied its affordable housing obligation under the D&O by irrevocably conveying a parcel of land for the development of affordable housing, and continues working towards the satisfaction of other D&O Conditions.

Second, even assuming *arguendo* that the Commission concludes that WHI has failed to substantially commence its use of the Petition Area, good cause exists to maintain its Rural

District classification. WHI's timely development of the Project was delayed by the alleged fraud and gross mismanagement of a former director of WHI and WML, Stefan Martirosian. WHI's affiliates have taken criminal and civil action against Mr. Martirosian both in the United States and abroad. Mr. Martirosian has absolutely no current involvement with or ownership interest in the WHI, its affiliates, the Petition Area, or the Project, and the Commission has sufficient authority to find that Mr. Martirosian's past misdeeds provide good cause to maintain the Petition Area's SLU Rural District classification.

Third, the unique rural characteristics of the Petition Area, its entitlements history, and the Project make a reversion unreasonable, unnecessary, and inconsistent with the legislative intent behind Hawai'i Revised Statutes ("HRS") § 205-4(g). If the Petition Area was reverted, a substantially similar project could be developed within the SLU Agricultural District, and the reversion would only serve to (a) increase the costs of developing the Project and thus the purchase price for the ultimate purchasers, (b) further and possibly indefinitely extend the development timeline, and (c) completely disregard the County's decades long planning and vision for the Waikoloa area and, in particular, the Petition Area as a rural-agricultural subdivision.

Fourth, the circumstances before the Commission also do not involve speculative land-banking by WHI. If that were its intentions, WHI would have not spent considerable sums of money on subdivision plans, traffic and drainage plans, and irrevocably conveyed an approximately 11-acre parcel of land for the development of affordable housing. Therefore, a reversion would not further the legislative intent behind HRS § 205-4(g).

Fifth, the Commission should not revert the Petition Area's SLU District classification

because the Petition Area and the Project are exactly what the Legislature had in mind when it created the Rural District – low-density development on lands poorly suited for agriculture that provide a transition between the SLU Agricultural District and the Urban District.

For forgoing reasons, as more fully explained below, the Commission should not revert the Petition Area’s SLU Rural District classification.

II. DISCUSSION

A. WHI HAS PRESENTED THE COMMISSION WITH A REASONABLE, GOOD-FAITH ALTERNATIVE TO MERIT DEFERRAL OF IMMEDIATE ACTION ON THE OSC

At the Continuance Hearing, WHI presented the Commission, the State Office of Planning, and the County Planning Department with the Proposed Stipulation. *See* Exhibit 18. Under the Proposed Stipulation, WHI proposed that the Commission’s hearing on the OSC be deferred until the sooner of: (1) WHI receiving final approval from the County for amendments to zoning Ordinance No. 13-29, which is the most recent zoning ordinance for the Petition Area; or (2) the Commission’s first scheduled meeting in September of 2019, or any date thereafter as determined by the Commission. *See id.* at 1-2.

The proposed deferral of action on the OSC was subject to the following conditions and reservations: (1) WHI would not conduct any land development activities on the Petition Area from the date the Proposed Stipulation was approved by the Commission through the conclusion of the OSC proceedings; (2) if no action was forthcoming, the Proposed Stipulation would terminate under its own terms, and without further action of the parties, on December 31, 2019; and (3) during the pendency of the OSC proceedings, WHI would be permitted to (a) pursue further land use permitting at the State and County levels, (b) proceed with environmental and

engineering studies for the Petition Area, (c) carry out fire prevention measures on the Petition Area, and (d) establish a dry land forest nursery within the Petition Area. *See id.* at 2. The Proposed Stipulation further provided that it did not waive WHI's right to argue in the eventual OSC proceedings that WML and WHI have "substantially commenced" their use of the Petition Area in accordance with the representations made to the Commission. *See id.* at 2-3 (citing *DW Aina Le 'a Dev., LLC v. Bridge Aina Le 'a, LLC*, 134 Hawai'i 187, 339 P.3d 685 (2014)). WHI also agreed to return to the Commission to provide regular status updates at a frequency the Commission deemed appropriate. *See Exhibit 19* (Sept. 6, 2018 Hr. Tr.) at 42:8-10, 49:10-13, 54:13-18, attached hereto.

At the Continuance Hearing, WHI explained to the Commission that the basic concept of the Proposed Stipulation was to give WHI approximately one year³ to first address amendments to the current zoning ordinance for the Petition Area with the County and then return to the Commission to amend the D&O accordingly. *See id.* at 21:2-23. The issues related to the Petition Area's zoning that need to be addressed include offsite road improvements, including the proposed roundabout, the timing, number and size of the Project's phases, and other related matters. *See id.* at 21:8-12. While WHI acknowledged that going to the County first was unusual in the ordinary course, doing so under the specific circumstances surrounding the Project made the most sense because the original entitlements history for the Petition Area began with its RA-1a zoning being approved first by the County in 1990 (amended in 1995 and then again in 2005 to require the district boundary amendment action by the Commission), followed by the

³ WHI explained to the Commission that it was requesting a year because, in its estimation, WHI would need several months to prepare the application on the zoning amendment, and approximately eight to ten months to obtain approval of an amendment to the Petition Area's zoning from the County Council. *See id.* at 19:5-10, 39:2-7. At the Continuance hearing, the County confirmed WHI's approximate timeframe of up to a year to obtain an updated zoning ordinance for the Petition Area. *See id.* at 53:17-19.

Commission's approval of the reclassification to the Rural District in 2008. Another more practical reason for going to the County first is that, until WHI knows what the County will approve and want to include in an amended zoning ordinance, it would be difficult to request the Commission to amend the D&O with any specificity. *See id.* at 21:22-19:4.

The Proposed Stipulation provided the Commission with a reasonable, good-faith alternative to defer action on the OSC, and WHI strongly believes that the plan of action set forth under the Proposed Stipulation is in the best interests of all parties involved. The Proposed Stipulation would allow WHI to demonstrate to the Commission that it is competent and committed to developing the Project, allow the Commission to preserve its enforcement powers under the OSC, allow the Office of Planning opportunity to provide continued input in the process, and allow the County sufficient time to discharge its role in implementing the Project through amendments to the rezoning ordinance.

Although the parties were not able to come to an agreement on the Proposed Stipulation in its proposed form,⁴ the County indicated that it “could agree to the concept of [the Proposed Stipulation],” *id.* at 26:5-12, and WHI continues to believe that it provides a workable framework for getting the Project back on track. At the Continuance Hearing, counsel for WHI explained that WHI has a brand new development team,⁵ and that the principals of WHI have assumed development control of the Project and are now much more aware of their obligations

⁴ WHI explained that it was not able to present the Proposed Stipulation to all of the parties until just before the Continuance Hearing because it had not been able to meet with the County until two days prior the hearing to discuss items to be addressed in a new zoning ordinance. *See id.* at 19:3-13. That delay resulted in further delay for counsel to get WHI's approval to propose the Proposed Stipulation to the parties.

⁵ WHI's development team presently consists of Natalia Batichtcheva, Joel LaPinta and WHI's present counsel, Carlsmith Ball LLP. Ms. Batichtcheva serves as WHI's secretary, chief financial officer, and director. Mr. LaPinta is a commercial and investment real estate broker and developer with over 30 years of experience in Hawaii, and has completed – both personally and as an employee of a real estate investment and management company – residential subdivisions in Hawaii. A copy of Mr. LaPinta's curriculum vitae was attached as Exhibit 6 to WHI's Statement of Position on Order to Show Cause, filed August 8, 2018.

to the Commission under the D&O, as well as the serious nature of the OSC. *See id.* at 14:18-23, 17:9-10, 57:17-23. WHI repeatedly emphasized then, and again represents here, that with its new development team and Project financing commitment, it is ready, willing, and able to proceed with the Project. *See id.* at 42:13-14, 49:10-13, 58:15-16.

WHI has secured sufficient funding to complete the Project. Attached hereto as **Exhibit 20** is a copy of commitment letter from Armbusinessbank CJSC (“**ABB**”) to Arch, Ltd., WHI’s grandparent company (the “**Commitment letter**”). As set forth in the Commitment Letter, ABB has committed to lending \$45,000,000 to Arch, and has consented to the transfer of those funds from Arch to WHI for the specific purpose of developing the Project on the Petition Area. *See id.* The Commitment Letter demonstrates that WHI has the current financial capacity to complete the Project. *See* HAR § 15-15-50 (requiring petitions for district boundary amendments to include “a clear description of the manner in which the petitioner proposes to finance the proposed use or development.”).

The course of action in the Proposed Stipulation and the Commission’s deferral of final action on the OSC provides the best opportunity for the parties to attain the mutual goal of moving forward with timely development of the Project. In the interim, the Petition Area will remain subject to the Commission’s potential sanctions under the Order to Show Cause if, in the end, the Petitioner fails to fulfill its commitment to proceed on a timely basis.

In the event the Commission elects not to defer action on the OSC, the following discussion further demonstrates that WHI has substantially commenced its use of the Petition Area and that good causes exists to maintain the Petition Area’s SLU Rural District classification.

B. WHI HAS SUBSTANTIALLY COMMENCED ITS USE OF THE PETITION AREA

The Commission may revert a property to its prior or a more proper SLU classification *without* following the procedures set forth in HRS § 205-4 *only if* the petitioner has not “substantially commenced [its] use of the land.” *DW Aina Le ‘a Dev., LLC v. Bridge Aina Le ‘a, LLC*, 134 Hawai‘i 187, 213, 339 P.3d 685, 711 (2014) (“*Aina Le ‘a*”) (“Thus, where the petitioner has substantially commenced use of the land, the LUC is required to follow the procedures set forth in HRS § 205-4 that are generally applicable when boundaries are changed.”). HRS § 205-4(g) does not define “substantial commencement”;⁶ however, “[i]n drafting HRS § 205-4(g), the legislature did not require that the use be substantially *completed*, but rather that it be substantially *commenced*.” *Id.* at 214, 339 P.3d at 712 (emphases in original). “[A] determination of whether a party has substantially commenced use of the land *will turn on the circumstances of each case, not on a dollar amount or percentage of work completed*.” *Id.* at 214, 339 P.3d at 712 n.16 (emphasis added). As discussed below and previously discussed in the Statement of Position, based on the specific circumstances of this Project consisting of subdivided but undeveloped lots, Petitioner has substantially commenced use of the Petition Area.

1. Evidence of Substantial Commencement

Attached hereto as Exhibit 22 (Summary) and Exhibits 22a through 22e (Supporting Detailed Accountings), are line-item tables of WML’s and WHI’s expenditures on the Project

⁶ The Commission is currently in the process of amending its rules, which proposes amendments to HAR § 15-15-93 to include a definition of “substantial commencement” that includes the requirement of “construction.” WHI submitted a comment letter to the Commission, objecting to the proposed amendment on the grounds that it (a) exceeds the Commission’s authority under HRS Chapter 205, (b) is contrary to the Hawai‘i Supreme Court’s decision in *Aina Le ‘a*, and (c) is the product of a rule-making process that has not meaningfully attempted to obtain and consider input from the stakeholders who will be most significantly affected by the proposed amendment, including present petitioners, the development and planning communities, and County planning agencies. See Exhibit 21, attached hereto.

since WML purchased the Petition Area, which to date total \$1,278,186.02. WHI continues to pursue the necessary land use approvals and Project plans to date, and incur further expenses related to that work.

While the *Aina Le'a* court held that mere financial expenditures are not controlling on the determination of “substantial commencement” of a project, in the particular circumstances of this case, these expenditures by WML and WHI constitute substantial commencement of the Project. The expenditures resulted in the subdivision plans and specifications, which fulfill a significant portion of the total development actions required for the Project, leaving only the County’s approval⁷ of the final construction plans, the Petitioner’s posting of the subdivision bond, and the County’s issuance of the final subdivision approval to complete the Project and allow commencement of sales of the rural-residential lots.⁸

2. WHI’s Satisfaction of D&O Condition No. 9 Relating to Affordable Housing

As previously discussed in the Statement of Position, WHI has satisfied D&O Condition No. 9 relating to affordable housing. On December 1, 2016, WHI executed an Affordable Housing Agreement (the “**AH Agreement**”) with the County of Hawaii (the “**County**”). See Exhibit 8 attached to the Statement of Position. The AH Agreement required WHI to subdivide an approximately 11.8 acres lot (the “**AH Lot**”) from the Petition Area, and to convey the AH Lot to Plumeria at Waikoloa LLC (“**PWL**”) within 180 days of the AH Agreement. On May 15, 2017, the County issued final Subdivision Approval creating the AH Lot. See Exhibit 9 (Subdivision Application dated March 22, 2017) & Exhibit 14 (SUB-17-001716) attached to the

⁷ Subject to the prior approval of the amendment of rezoning Ordinance No. 13-29 by the County of Hawaii, and the amendment of the D&O by the Commission.

⁸ Depending on the final marketing strategy for the lot sales, there could be State DCCA and federal CFPB requirements to register the subdivision prior to marketing and sale of the lots.

Statement of Position. On June 1, 2017, by Warranty Deed, WHI conveyed said land to PWL at no cost. *See* Exhibit 10 attached to the Statement of Position.⁹ That Warranty Deed was recorded in the Bureau on January 29, 2018, as Regular System Document No. A-66030880. On July 20, 2017, the County and WHI executed the Affordable Housing Release Agreement. *See* Exhibit 11 attached to the Statement of Position.

Thus, as determined by the County, WHI has taken irrevocable action by conveying its real property to PWL at no cost, thereby attaining full satisfaction of the affordable housing requirements for the Project under D&O Condition No. 9. *See Aina Le ‘a*, 134 Hawai‘i at 210, 339 P.3d at 708 (“In general . . . enforcement of these conditions is left to the counties under HRS § 205-12, 10 and not the [Commission].”). This fact alone should constitute substantial commencement of use of the Petition Area.

However, the propriety of WHI’s satisfaction of D&O Condition No. 9 was publicly questioned by Patricia Tummons in her July 2018 article for Environment Hawai‘i (the “**EH Article**”). *See* Environmental Hawaii, Vol. 29, No. 1 (July 2018).¹⁰ WHI assumes that the Commission is aware of the EH Article, and wishes to set the record straight.

The EH Article notes that the AH Parcel was once encumbered by a mortgage and that the mortgage was eventually released on May 11, 2018. *See id.* The EH Article then makes the

⁹ Although the Warranty Deed was not recorded until January 29, 2018, the actual conveyance, as required by the Agreement, was completed relatively within the time contemplated by the Agreement.

¹⁰ The EH Article includes numerous other inaccuracies. For example, the EH Article repeatedly refers to Mr. Martirosian as the owner of the Petitioner Area and claims that WHI’s counsel represents Mr. Martirosian. *See, e.g., id.* at 8 (“So where was Martirosian, the land-owner?”); *id.* (“But wherever Martirosian may be, if and when the order to show cause takes place, he will be represented by counsel before the LUC. Attorney Steve Lim of Carlsmith Ball now counts Martirosian as a client.”). As discussed in detail below, Mr. Martirosian has never personally owned the Petition Area or any other lands in Waikoloa owned by WHI or WML, including the AH Parcel. Mr. Martirosian has no management role or ownership interest in WHI or any of its affiliates, is not personally represented by Mr. Lim, and has not been involved in the Project in any capacity since at least May 2016. Nevertheless, the EH Article repeatedly refers to Mr. Martirosian as the landowner.

inferential leap that, “thanks to the county affordable housing agreement [with WHI], the last obstacle to Martirosian holding clear title to more than 2,800 acres of Waikoloa Land was cleared away.” *Id.* at 10. That conclusion and the inferences drawn therefrom are simply not correct and are unfairly prejudicial to WHI.¹¹

Attached hereto as **Exhibit 23**, is a signed affidavit from Paul J. Sulla Jr., Esq. (the “**Sulla Affidavit**”), who is referenced and purportedly quoted in the EH Article. Mr. Sulla is the manager of PWL, the entity that WHI conveyed the AH Parcel to pursuant to the County-approved AH Agreement. *Id.* at ¶2. Neither Mr. Sulla nor PWL have any affiliation with WHI, its affiliates, or the Project.

As explained in the Sulla Affidavit, PWL paid no money to WHI for the conveyance of the AH Parcel. *Id.* at ¶4. The Sulla Affidavit notes that the AH Parcel was at one point encumbered by a mortgage in favor of 77 Holdings, LLC (“**77 Holdings**”), but after contacting 77 Holdings’ manager, Mr. Sulla was informed that the 77 Holdings mortgage had been paid off and the manager subsequently provided Mr. Sulla with a release of that mortgage, which was recorded as Document No. A-55340074. *See id.* at ¶¶5-6.

Mr. Sulla was never aware of a mortgage in favor of Aclaime Debt Partners, LLC encumbering the AH Parcel; however, because he was never notified of such a mortgage by his escrow company, he assumes that it was released prior to closing. *See id.* at ¶7. Finally, the Sulla Affidavit notes that upon PWL’s subsequent conveyance of the AH Parcel to Pua Melia LLC – a transaction that WHI was not a party to – no money was paid from the transaction, or by any party to the transaction, to WHI, WML, or their creditors, officers, directors,

shareholders, or employees. *Id.* at ¶¶8-9.

Therefore, despite the numerous misstatement of facts and negative inferences contained in the EH Article, WHI did not improperly benefit from the AH Agreement or its conveyance of the AH Parcel to PWL.

3. WHI Continues Working Towards Satisfying D&O Condition No. 11

WHI has engaged ASM Affiliates (“**ASM**”) to assist with satisfying D&O Condition No. 11 in consultation with the Department of Land and Natural Resources, State Historic Preservation Division (“**SHPD**”). D&O Condition No. 11 provides that “Petitioner shall consult and comply with all SHPD recommendations in regards to the treatment of Site 22.”

On August 8, 2018, fieldworkers from ASM conducted a field inspection at the Petition Area to further assess and document Site 22, a complex of rock walls with the dominant features being two bi-faced, core-filled walls. Thereafter, ASM completed and submitted SHPD’s Preliminary Site Information Form for Requesting Hawai’i State Inventory of Historic Places (“**SIHP**”) Numbers, a copy of which is attached hereto as **Exhibit 24**. WHI is currently waiting for SHPD to assign a SIHP number for Site 22. Once a SIHP number has been assigned, ASM will consult with SHPD for SHPD’s treatment recommendation for Site 22. WHI’s archaeologist anticipates that SHPD’s treatment recommendation will be that no further work is required, thus allowing the Project’s subdivision plan to proceed. The Commission will be provided with SHPD’s treatment recommendation once it has been issued.

4. The Petition Area Has Been Cleared as a Formerly Used Defensive Site

The Petition Area is located within the former Waikoloa Maneuver Area (“**WMA**”), which lands were used as a live-fire target and assault training area during World War II training

for the Iwo Jima invasion. The Munitions Response Sites specific to the Petition Area are identified as being within Sectors 2 and 5, Areas E and P.

At the former WMA (including the Petition Area), the U.S. Army Corps of Engineering conducted a 3-phase engineering evaluation/cost analysis (Phase I in 1997, Phase II in 2001 and Phase III in 2006) for the purpose of characterizing the ordnance and explosives hazard risk and for field inspection data management. Within the Petition Area, the subsequent Removal Action-Construction work resulted in the identification and disposal of four munitions and explosives of concern. Therefore, as of December 9, 2015, the entire Petition Area (excluding the “trash” exception areas, which are areas that could not be physically accessed and are located along the northwestern boundary of the Petition Area) has been cleared and is available for development. See Exhibit 25, attached hereto.

C. EVEN IF THE COMMISSION FINDS THAT WHI HAS NOT SUBSTANTIALLY COMMENCED ITS USE OF THE PETITION AREA, GOOD CAUSE EXISTS TO MAINTAIN THE PETITION AREA’S SLU RURAL DISTRICT CLASSIFICATION

Even assuming *arguendo* that the Commission finds that WHI (and previously WML) has not substantially commenced its use of the Petition Area, for the following reasons and those previously set forth in the Statement of Position, good cause exists to maintain the Petition Area’s present SLU Rural District classification.

1. Stefan Martirosian’s Fraud, Gross Mismanagement, and Breach of Fiduciary Duties to WML and WHI Constitute Good Cause to Excuse WHI’s Failure to Timely Development the Project
 - a. The Commission has sufficient authority to find that Mr. Martirosian’s alleged fraudulent acts provide good cause

At the Continuance Hearing, Commissioner Okuda expressed concern regarding whether

the various allegations against Mr. Martirosian could provide good cause given that no judgment has been rendered and no court has found these allegations to be true.¹² *See* Exhibit 19 at 37:6-11 (“So even getting away from the issue of whether or not an agency of the State of Hawaii is bound by a finding or judgment of a foreign court, the bottom line is we're not even dealing with that, so these are just allegations, and for purposes of this record, they're still unproven allegations; correct?); *id.* at 37:18-23 (“Do you agree that the Land Use Commission should not be making decisions, not only in this case, but any other case, based on allegations, but we have to make our decision based on evidence that's recognized by the statutes and the cases as set forth in the cases and the statutes of Hawai'i?”). Commissioner Okuda further questioned whether Mr. Martirosian’s fraudulent acts and mismanagement, as alleged, could constitute good cause in the absence of any statute, regulation, or case law explicitly recognizing such acts as grounds for good cause. *See id.* at 38:16-20 (“Can you point to any authority, statutory or case, that indicates fraud or mismanagement or stupidity of a member of an applicant discharges or excuses compliance with a condition imposed by the Land Use Commission?”).

WHI concedes that it could not find a case, statute, or regulation *specifically* establishing that allegations of fraud, gross mismanagement of a project, and breaches of fiduciary duties committed by a corporation’s agent against the corporation constitute good cause to excuse the corporation’s failure to meet its obligations under a D&O issued by the Commission. However, that should not be surprising.

Nowhere in HRS Chapter 205 or the Commission’s rules, including HAR § 15-15-93, is there an enumeration of any specific grounds for finding good cause. Further, WHI is not aware

¹² To the extent that the Commission is concerned that this is post hoc justification for failing to timely complete the Project, _____.

of any case law establishing what constitutes good cause for avoiding a reversion by the Commission pursuant to an OSC, which underscores how rare the Commission acts upon an OSC and the truly radical remedy that a reversion represents when pursued over the objection of the landowner.

That is not to say, however, that the Commission is without sufficient authority to find, based upon the evidence and testimony presented, that Mr. Martirosian's fraudulent acts and gross mismanagement of the Project constitute good cause under the circumstances. HRS § 205-4(g) and HAR § 15-15-93 both clearly vest the Commission with discretion to both issue an OSC and determine whether good cause exists.

Fundamentally, the concept of "good cause" is not rigid or formulaic; rather, it is intended to be flexible to address the facts and circumstances of each particular case. As the Hawai'i Supreme Court has explained:

[T]he term "good cause" has been defined to mean "*a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.*" "Good cause" also "*depends upon the circumstances of the individual case, and a finding of its existence lies largely in the discretion of the officer or court to which [the] decision is committed.*"

...

As a general rule, "good cause" means a substantial reason; one that affords a legal excuse

...

Thus, "[good cause] is a *relative and highly abstract term*, and its meaning must be determined not only by verbal context of [the] statute in which [the] term is employed[,], *but also by context of action and procedures involved in [the] type of case presented.*"

Doe v. Doe, 98 Hawai'i 144, 154, 44 P.3d 1085, 1095 (2002) (emphasis added) (citations

omitted). In other words, what constitutes “good cause” depends upon the facts and circumstances of each particular case (*i.e.*, its meaning is dictated by context) and whether it exists is within the discretion of the decision maker. WHI respectfully submits that, based upon the evidence and testimony that has been and will be presented to the Commission, good cause exists to maintain the Petition Area’s SLU Rural District classification.

b. WHI has put credible, substantiated allegations before the Commission

The allegations WHI has put before the Commission are neither naked nor baseless.¹³ Vitoil Corporation (“**Vitoil**”), WHI’s parent company, has taken civil action against Mr. Martirosian in California. *See* Exhibit 2 attached to the Statement of Position. Exhibit 2 to WHI’s Statement of Position included a copy of the Complaint for Damages and Declaratory Relief, filed on July 16, 2018 with the Superior Court of the State of California for the County of Los Angeles (the “**Complaint**”). The Complaint lays out in detail Mr. Martirosian’s elaborate scheme to defraud Vitoil through a sham real estate transaction. *See generally id.*

Exhibit 2 also included a summary of Mr. Martirosian’s fraudulent activities underlying his criminal prosecution in Armenia. The summary explains how Mr. Martirosian set up a scheme funneling money through the U.S. movie industry to defraud Arch Ltd. (“**Arch**”), Vitoil’s parent company and WHI’s grandparent company, out of tens of millions of dollars. Mr. Martirosian has been extradited from Russia to Armenia to face these fraud-related charges. *See*

¹³ Nothing in WHI’s filings or its counsel’s statements at the Continuance Hearing should be construed to mean that WHI does not fully stand behind the allegations of fraud and mismanagement against Mr. Martirosian. WHI’s counsel’s statements during the Continuance Hearing were only intended to explain to the Commission that there has not yet been a conviction or judgment rendered against Mr. Martirosian. *See, e.g.*, Exhibit 19 at 15:17-25 (“[W]e request that the Commission consider that all references in [WHI’s] pleadings and hearing testimony and argument regarding a person named Stephan Martirosian, the former director of [WML and WHI], are merely allegations of misconduct and not representations of fact as Mr. Martirosian, although he’s in jail in Russia, has not been convicted of any crimes to date.”).

Exhibit 26 (Martirosian Extradition Documents, Translated to English), attached hereto.

Moreover, WHI's allegations set forth in its Statement of Position were supported by a sworn declaration from WHI's president Natalia Batichtcheva. Ms. Batichtcheva and/or Valery Grigoryants will also be called to testify – under oath – at the OSC Hearing. Absolutely nothing in the record calls either Ms. Batichtcheva's or Mr. Grigoryants's credibility into question, or otherwise gives the Commission reason to question the veracity of their statements and representations to the Commission.

- c. Mr. Martirosian has absolutely no involvement with WHI, its affiliates, or the Project

At the Continuance Hearing, the Commission raised concerns regarding whether Mr. Martirosian still had any involvement with or ownership interests in WHI or the Project, and requested WHI to provide further documentation confirming that Mr. Martirosian no longer has any such involvement or interest. *See* Exhibit 19 at 39:2-40:21. The following provides a complete picture of WHI, its affiliated entities, and their officers and shareholders, and demonstrates that Mr. Martirosian has been dismissed and has absolutely no current involvement with WHI or the Project.

Mr. Martirosian has no ownership interest in the Petition Area, WHI, or its affiliates. The Petition Area is owned entirely by WHI, as successor-in-interest to WML, the original Petitioner in this Docket. *See* Exhibit 1 (Quitclaim, Release and Assumption Agreement from WML to WHI) attached to the Statement of Position. WHI is wholly owned by Vitoil. *See* **Exhibit 27** (Resolution of Board of Directors of Arch Authorizing Stock Transfer) & **Exhibit 28** (Corporate Structure Organizational Chart), attached hereto. Arch is the parent company of Vitoil and was previously the majority shareholder (80%) of WHI; however, on December 28, 2017, Arch

transferred the entirety of its ownership interest in WHI to Vitoil as a capital contribution, thereby making Vitoil WHI's sole shareholder. *See* Exhibit 27; Exhibit 28. Arch is currently owned by Davies Partners Limited, which is owned by Vitaly Grigoryants. *See* Exhibit 28. Mr. Martirosian has never held any ownership interest in Arch. *See* **Exhibit 29** (Arch's Statement Regarding Stefan Martirosian), attached hereto. Thus, Mr. Martirosian has no ownership interest in WHI, Vitoil, Arch, or the Petition Area.

Mr. Martirosian is also not involved in the management or operations of WHI, Vitoil, Arch, or the Project. In fact, Mr. Martirosian has been in jail in eastern Europe since October 2017 after one of WHI's affiliates (Pulham Holdings, Ltd.) filed fraud claims with the Prosecutor's Office of the Republic of Armenia. *See* Exhibit 26. Mr. Martirosian previously acted as the director of WHI from January 1, 2015 until May 9, 2016, when WHI's shareholders voted unanimously to dismiss Mr. Martirosian as an officer of WHI and appointed Ms. Batichtcheva to serve as WHI's secretary, chief financial officer, and director.¹⁴ *See* Exhibit 5 (WHI Shareholders' Resolution, dated May 9, 2016) attached to the Statement of Position. Ms. Batichtcheva continues to serve WHI in these capacities today.

Ms. Batichtcheva also serves as the secretary, chief financial officer, and director of Vitoil. *See* **Exhibit 31** (Vitoil Shareholders' Resolution, dated June 19, 2017), attached hereto. Mr. Martirosian previously held these positions with Vitoil until he tendered his resignation on June 19, 2017. *See* **Exhibit 32** (Resignation of Stefan Martirosian), attached hereto.

Mr. Ovasafyan Aykaz and Mr. Roberto Rodriguez are the current director of Arch, Mr. Valery Grigoryants is the vice president of Arch, and Mr. Vitaly Grigoryants (Valery's brother)

¹⁴ Prior to WHI taking title to the Petition Area, Mr. Martirosian also served as the manager and secretary of WML. Mr. Martirosian resigned from these positions on June 19, 2017. *See* **Exhibit 30**, attached hereto.

is the president of Arch. See Exhibit 33 (Arch's Letter of Authorization) & Exhibit 34 (Arch's Certificate of Incumbency), attached hereto. Mr. Martirosian is not currently and never has been involved in the management of Arch. See Exhibit 29. Therefore, Mr. Martirosian has no involvement with or ownership interest in WHI, Vitoil, Arch, the Petition Area, or the Project.

2. The Unique History of the Project, Petition Area, and its Entitlements Makes a Reversion Unreasonable and Unnecessary Under the Circumstances

The history of this Project and the circumstances surrounding its entitlements are very unusual for the Commission. Generally, when a petitioner comes to the Commission to reclassify vacant, undeveloped land, they are seeking to have their land reclassified from the SLU Conservation or Agricultural Districts into the Urban District, and thereafter obtain a rezoning from the respective County Council. Often, the purpose of the reclassification is to allow for urban or near-urban density uses that would not otherwise be permitted on land within the SLU Agricultural or Rural Districts. Therefore, reclassification by the Commission is almost always the necessary first step in order for the development to proceed.

Here, the circumstances are much different. The Petition Area has long been zoned for urban uses by the County of Hawaii, and has held its present RA-1a (Rural-Agricultural, one-acre minimum) zoning classification for 28 years, having been rezoned back in 1990 (from Multiple-Family Residential 1.5 and Open for the former golf area). See Cnty. Ord. 90-160. The Petition Area was only later reclassified by the Commission from the SLU Agricultural District into the Rural District in 2008 as a condition of the County's 2005 amendment to the rezoning conditions encumbering the Petition Area. See Cnty. Ord. 05-157.

Prior to the Commission's 2008 reclassification of the Petition Area to the Rural District,

in February 2005, the County amended its General Plan Land Use Planning Allocation Guide (“**LUPAG**”) to redesignate the Petition Area from Intensive Agriculture to Rural and Open. *See* Cnty. Ord. 05-25. The amendment to the General Plan’s designation of the Petition Area was specifically intended to bring the Petition Area’s General Plan LUPAG designation into consistency with the Petition Area’s zoning. *See* **Exhibit 35** (Excerpts of County Communication No. 45.30, dated June 4, 2004) at 12, attached hereto (noting that the rationale for the designation was that “[t]he proposed Waikoloa Highlands Estates Subdivision area is designated for rural-agricultural and open uses. The residential-agricultural uses will be consistent with the proposed Rural designation[.]”).

In light of the County planning and zoning designations, the path forward for developing the Petition Area would likely involve one of two scenarios in the event that the Commission were to revert its SLU District classification: (1) WHI could once again petition the Commission to reclassify the Petition Area back into the SLU Rural District; or (2) WHI could pursue a substantially similar project under the SLU Agricultural District classification. As explained below, neither of these options makes sense in light of the Commission’s ability to control further development of the Project without a SLU reversion, including under the framework of the Proposed Stipulation.

First, requiring Petitioner to return back to the Commission to again reclassify the Petition Area back into the SLU Rural District would be a complete waste of time and resources for the Commission, the Office of Planning, the County, and WHI. The Petition Area is already classified Rural and the Commission has numerous to options ensure that the Project is timely developed moving forward, including under the Proposed Stipulation and/or through the imposition of new or modified conditions.

Second, because the Project proposes subdivided lots at least one acre in size, the Petition Area could still be developed as a substantially similar project. However, in order to develop the Petition Area under a SLU Agricultural Classification, WHI may need to obtain a General Plan amendment to redesignate the Petition Area back to its former Intensive Agriculture designation and/or have it rezoned to the appropriate County agricultural zoning district (*i.e.*, FA-1a (Family-Agriculture, one-acre minimum lot size)). Both of these entitlement actions, if necessary, would be extremely costly and time consuming, and would not result in a project substantially different from the one already approved by the Commission. Moreover, if the Commission were to revert, the Petition Area would arguably no longer be subject to the Commission's jurisdiction or the conditions of approval under the D&O.

Thus, under either scenario, the net result of a reversion by the Commission would be (a) the same or substantially similar project, (b) at a substantially higher cost to WHI, thereby increasing the purchase price to ultimate purchasers, (c) with a longer development timeframe, and (d) possibly without any oversight or regulation by the Commission. That result is anathema to the Commission's purpose, would ultimately only serve to punish WHI, and would not advance any compelling state interest other than exercising the Commission's enforcement powers under HRS § 205-4(g), which could better be accomplished under the terms of the Proposed Stipulation or numerous other options at the Commission's disposal.

D. PROJECT-SPECIFIC LAND USE SHOULD BE IMPLEMENTED THROUGH LONG-TERM PLANNING AND ZONING AT THE COUNTY LEVEL, NOT DICTATED THROUGH ENFORCEMENT PROCEEDINGS BY THE COMMISSION

As discussed above, for over thirty years the County – both in its planning documents and zoning ordinances – has determined that the proposed rural-residential subdivision Project is

an appropriate development for the Petition Area, and the Petition Area is already adjacent to existing and planned developments with higher densities. WHI is committed to developing the Project, or one substantially similar, on the Petition Area, even if the Commission reverts its SLU District classification.

If the Commission reverts the Petition Area and WHI were to elect to proceed with development without returning back to the Commission, it may be required to obtain amendments to the County General Plan and/or the current zoning ordinance, as discussed above. The practical effect of doing so would, in essence, be a violation of the Home Rule principle by overriding County-level planning and zoning decisions through these OSC enforcement proceedings.

That is not how long-term planning and zoning is intended to be accomplished at either the State or County level. “There can be no question after [*Lum Yip Kee, Ltd. v. City & County of Honolulu*, 70 Haw. 179, 767 P.2d 815 (1989) and *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989)] ***that land use plans are paramount in the land use regulatory scheme in Hawai'i.***” David L. Callies et. al., *The Lum Court, Land Use, and the Environment: A Survey of Hawai'i Case Law 1983 to 1991*, 14 U. Haw. L. Rev. 119, 123 (1992) (emphasis added).

Project-specific planning and zoning decisions should be made by the County. “In Hawai'i's land use system the legislature's statutory districts,” *i.e.*, the SLU Districts, “***constitute more of a general scheme***, and, presumably, ***by delegating authority to zone to the counties, the legislature intended that specific zoning be enacted at the county level.***” *Save Sunset Beach Coal. v. City & County of Honolulu*, 102 Hawai'i 465, 482, 78 P.3d 1, 18 (2003) (emphases

added).

County zoning is required by law to be accomplished “within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county.” HRS § 46-4. This is particularly true in Hawai'i County. *See* DAVID L. CALLIES, *REGULATING PARADISE* 54 (2nd ed. 2010) (“Hawai'i County, on the other hand, clearly means for its zoning . . . to conform to its planning schemes—in this case, its General Plan[.]” (citing Hawai'i County Charter §3-15)). In this case, the County amended both its General Plan and the Petition Area's zoning to allow for the development of the Project. The Commission should not disturb those plan-driven land-use decisions, which are clearly within the County's Home Rule purview, simply to punish WHI for failing to timely develop the Project, and particularly where the Commission has other options for ensuring that the Project is timely developed, including under the framework set forth in the Proposed Stipulation.

E. WHI HAS NOT ENGAGED IN SPECULATIVE LAND BANKING

In *Aina Le 'a*, the Hawai'i Supreme Court explained that the legislative intent behind HRS § 205-4(g) was to “deter speculators who obtained favorable land-use rulings and then sat on the land for speculative purposes.” *Aina Le 'a*, 134 Hawai'i at 214, 339 P.3d at 712. WHI's failure to complete the buildout of the Project within the ten-year time period provided for under Condition No. 2 is not the result of speculative land-banking, and a reversion under these circumstances with frustrate the legislative intent behind the Commission's reversion powers.

If WHI was engaged in speculative land-banking, WHI and WML would not have spent the considerable funds on the subdivision plans, traffic and drainage plans, and irrevocably conveyed the land for the AH Lot, as discussed above.

Moreover, at the Continuance Hearing, Commissioner Okuda noted that in *Aina Le 'a* the Hawai'i Supreme explained that

The Senate Committee on Energy and Natural Resources specifically noted that “[v]acant land with the appropriate state and county land use designation is often subjected to undesirable private land speculation and uncertain development schedules[.]” and that “[s]uch speculation and untimely development inflates the value of land, increases development costs, and frustrates federal, state, county, and private coordination of planning efforts, adequate funding, public services, and facilities.” S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915.

Aina Le 'a, 134 Hawai'i at 211–12, 339 P.3d at 709–10 (emphases added); *see also* Exhibit 19 at 64:12-22 (quoting the same). Under the unique circumstances of this case, reversion of the Petition Area to the SLU Agricultural District would actually promote, rather than inhibit, these deleterious effects of speculative land-banking.

First, if the Commission reverts the Petition Area, the development schedule will be even more uncertain than it presently is. WHI has demonstrated its willingness and ability to timely proceed with the Project, even under the cloud of this OSC and with continued oversight and enforcement from the Commission, to ensure the Project development schedule is maintained. **Second**, as discussed above, reverting the Petition Area will very likely inflate the cost of developing the Project because additional entitlements will need to be sought from the Commission and/or the County. **Third**, as discussed above, a reversion would be contrary to the County's zoning and planning for the Petition Area for over thirty years, which would certainly frustrate the coordination of State and County planning efforts.

Thus, under these circumstances, a reversion would be inconsistent with and frustrate the legislative intent behind the Commission's reversion powers under HRS § 205-4(g). *See*

Kanahele v. Maui Cnty. Council, 130 Hawai‘i 228, 244, 307 P.3d 1174, 1190 (2013) (“An agency’s interpretation of a statute is palpably erroneous when it is inconsistent with the legislative intent underlying the statute.”) (emphasis added) (citing *Gillan v. Gov’t Emps. Ins. Co.*, 119 Hawai‘i 109, 119, 194 P.3d 1071, 1081 (2008)); *Methven-Abreu v. Hawaiian Ins. & Guar. Co., Ltd.*, 73 Haw. 385, 392, 834 P.2d 279, 284 (1992) (the “primary duty in interpreting and applying statutes is to ascertain and give effect to the legislature’s intention to the fullest degree.”) (quoting *Kang v. State Farm Mut. Auto. Ins. Co.*, 72 Haw. 251, 254, 815 P.2d 1020, 1022 (1991)).

F. THE SLU RURAL DISTRICT IS THE MOST APPROPRIATE DISTRICT FOR THE PETITION AREA

Even assuming *arguendo* that the Commission finds that the Petition Area’s SLU Rural classification should be reverted under the circumstances, it nevertheless should not be reverted back to the Agricultural District because the Rural District is the most appropriate District. The SLU Rural District was created to bridge the gap between the SLU Urban and Agricultural Districts and to address “the hardship caused to land owners *who wish to develop lands included in agricultural districts but where such lands are not at all suitable for agricultural uses.*” S.C. Rep. No. 762 (1963) (emphases added). Maintaining the Petition Area’s present Rural District classification furthers both of these purposes.

First, the Petition Area is not suitable for intensive agricultural uses, as demonstrated by its various soil classifications and low annual rainfall. The Land Study Bureau (“**LSB**”) land classification system¹⁵ classified the Petition Area’s soil with an “E” rating; Class E soils are

¹⁵ The LSB rating system is based on the agricultural productivity of soils throughout the State, accounting for characteristics such as texture, slope, salinity, erodibility, and rainfall. The productivity ratings are used to designate each area as Class A, B, C, D, or E, with Class A representing the most productive soils and Class E representing the least productive soils.

considered “very poor” for agricultural production and are only marginally suitable for agricultural uses. See Exhibit 36 (LSB Map), attached hereto. The vast majority of the Petition Area is “unclassified” under the Agricultural Lands of Importance to the State of Hawaii (“ALISH”) classification system, with only a small portion of the Petition Area classified as “Other Lands.”¹⁶ See Exhibit 37 (ALISH Map), attached hereto. Unclassified lands are not considered agriculturally important lands, while the “Other Lands” classification means that the land does not qualify as Prime or Unique, but is still of Statewide or local importance for the production of food, feed, fiber, and forage crops. In addition, the Waikoloa area is considered to have a dry climate with low annual rainfall between 10 to 15 inches, thereby further confirming that the Petition Area is not suitable for agricultural uses.

The Commission has already found that the Petition Area is not suited for intensive agricultural uses. See D&O FOF ¶41 (noting that the “Waikoloa Area is considered dry with a low annual rainfall of 10 to 15 inches.”), ¶42 (Petition Area’s LSB “E” rating), ¶43 (Petition Area’s ALISH classifications), ¶79 (“The soils profile indicate that the Petition Area is unsuitable for intensive agricultural uses because of shallow and rocky soil conditions.”), ¶147 (finding that both Waikoloa Village and the Petition Area “involve development on land that is not well suited for small farm or agricultural uses.”); D&O FOF ¶13 (“The Petition Area’s soil classifications and low annual rainfall make it unsuitable for intensive agricultural use.”). And the Commission has already acknowledged that the “Petition Area historically has not been used for active agricultural production.” D&O COL ¶37.

¹⁶ The State of Hawaii Department of Agriculture established three ALISH categories: Prime; Unique; and Other. Lands that do not fall into one of the three ALISH categories are listed as Unclassified. “Prime” land is the best suited for the production of food, feed, forage, and fiber crops. “Unique” land is used for the production of specific high-value food crops. “Other” land does not qualify as Prime or Unique, but is still of Statewide or local importance for the production of food, feed, fiber, and forage crops. Soils without any ALISH classification are not considered agriculturally important lands.

While WHI recognizes that the SLU Agricultural District can include lands of marginal agricultural value, *see* HAR § 15-15-19(3), that does not make it the most appropriate SLU District for the Petition Area. The County of Hawaii appears to agree, as it designated the Petition Area as Rural in the 2005 General Plan amendment, just prior to the Commission's reclassification of the Petition Area to the Rural District in 2008.

Second, the Petition Area is a reasonable transition area between the higher-density, urban developments at Waikoloa Village, and the surrounding undeveloped open and agricultural lands. *See* Exhibit 3a (Zoning Map) & Exhibit 3b (LUPAG Map) attached to the Statement of Position. In other words, the Petition Area is precisely the type of land that the Legislature had in mind when it created the Rural District.

III. CONCLUSION

For the foregoing reasons, WHI respectfully requests that the Commission defer immediate action on the OSC to allow the Petitioner to proceed with amendments to the Project's land use entitlements under the framework set forth in the Proposed Stipulation. If the Commission is unwilling to defer action on the OSC, the Commission should not order a reversion because WHI has substantially commenced its use of the Petition Area and good cause exists to not revert the Petition Area to its former SLU Agricultural District classification. WHI reserves the right to file supplemental statements of position and supporting evidence as needed.

DATED: Honolulu, Hawai'i, October 12, 2018



STEVEN S.C. LIM
DEREK B. SIMON

Attorneys for
WAIKOLOA HIGHLANDS, INC.

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition Of

WAIKOLOA MAUKA, LLC

To Amend the Agricultural Land Use District
Boundary Into the Rural Land Use District for
Approximately 731.581 Acres in South Kohala
District, Island of Hawai'i, Tax Map Key No.
(3) 6-8-02:016 (por.)

DOCKET NO. A06-767

DECLARATION OF DEREK B. SIMON

DECLARATION OF DEREK B. SIMON

I, DEREK B. SIMON, declare and state as follows:

1. I am an attorney with Carlsmith Ball LLP, attorneys for Waikoloa Highlands, Inc. (“WHI”), successor-in-interest to Waikoloa Mauka, LLC (“WML”), the original Petitioner in Docket No. A06-767.

2. Attached hereto as **Exhibit 18** is a true and correct copy of a draft Joint Stipulation to Continue Hearing on Order to Show Cause, which WHI presented to the State of Hawai'i Land Use Commission (the “**Commission**”) at its September 6, 2018 hearing regarding Docket No. A06-767.

3. Attached hereto as **Exhibit 19** is a true and correct copy of the transcript from the Commission's September 6, 2018 hearing regarding Docket No. A06-767.

4. Attached hereto as **Exhibit 21** is a true and correct copy of a letter submitted by WHI to the Land Use Commission, dated September 14, 2018, which provided comments on the Commission's proposed amendments to its Rules.

5. Attached hereto as **Exhibit 22** and **Exhibit 22a** through **Exhibit 22e** are true and correct copies of the line-item tables of WML's and WHI's expenditures on the Project up to this date, prepared by my office based upon documents provided by WHI.

6. Attached hereto as **Exhibit 23** is a true and correct copy of a signed declaration from Paul J. Sulla, Esq., dated October 10, 2018.

7. Attached hereto as **Exhibit 24** is a true and correct copy of the State of Hawai'i Department of Land and Natural Resources, State Historical Preservation Division's ("SHPD") Preliminary Site Information Form for requesting Hawai'i State Inventory of Historic Places numbers, completed and filed with SHPD on August 8, 2018 by SM Affiliates, who has been retained by WHI.

8. Attached hereto as **Exhibit 25** is a true and correct copy of a map showing that the Waikoloa Maneuver Area, which includes the Petition Area. Exhibit 25 was provided to my office by the United States Army Corps of Engineers.

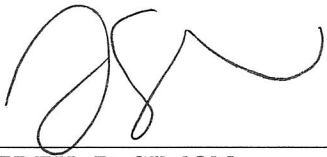
9. Attached hereto as **Exhibit 35** is a true and correct copy of excerpts of County of Hawai'i (the "**County**") Communication No. 45.30, dated June 4, 2004, which my office obtained from the County's online database.

10. Attached hereto as **Exhibit 36** is a true and correct copy of a map showing the Land and Study Bureau classifications of the Petition Area, which was generated by my office using Arc GIS.

11. Attached hereto as **Exhibit 37** is a true and correct copy of a map showing the Agricultural Lands of Importance to the State of Hawaii classifications of the Petition Area, which was generated by my office using Arc GIS.

I, DEREK B. SIMON, do declare under the penalties of perjury that the foregoing is true
and correct.

DATED: Honolulu, Hawai'i, October 12, 2018.



DEREK. B. SIMON