CARLSMITH BALL LLP

STEVEN S.C. LIM 2505
DEREK B. SIMON 10612
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842

Attorneys for
WAIKOLOA HIGHLANDS, INC.

LAND USE COMMISSION
STATE OF HAWAII

2018 NOV -7 P 3:10

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 Hawaii, Tax Map Key No. (3) 6-8-02:016 (por.)	DOCKET NO. A06-767 **WAIKOLOA HIGHLANDS, INC.'S MOTION FOR ISSUANCE OF A SUBPOENA AND SUBPOENAS DUCES TECUM**; MEMORANDUM IN SUPPORT OF MOTION; EXHIBIT "38" – "41"; DECLARATION OF DEREK B. SIMON; CERTIFICATE OF SERVICE

WAIKOLOA HIGHLANDS, INC.'S MOTION FOR ISSUANCE OF A SUBPOENA AND SUBPOENAS DUCES TECUM

I. RELIEF SOUGHT

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, hereby respectfully requests that the STATE OF HAWAI'I LAND USE COMMISSION (the "**Commission**") issue: (1) a subpoena compelling the attendance and oral testimony of a representative of the County of Hawai'i ("**County**") Office of Housing and Community Development ("**OHCD**") at the

Commission's November 28, 2018 hearing on this Docket (the "**OSC Hearing**"); ***and*** (2) subpoenas duces tecum compelling (a) OHCD ***and*** (b) the Office of the Mayor of the County of Hawai'i to produce to the parties herein, in advance of the OSC Hearing and no later than November 16, 2018, true and correct copies of their respective files relating to the following:

1. that certain Affordable Housing Agreement by and between WHI and the County, dated December 1, 2016;

2. the June 1, 2017 conveyance of approximately 11.7 acres of land (the "**AH Parcel**") by WHI to Plumeira at Waikoloa, LLC ("**PWL**") by way of Warranty Deed, which was recorded in the State of Hawai'i Bureau of Conveyances (the "**Bureau**") on January 29, 2018, as Regular System Document No. A-66030880;

3. that certain Affordable Housing Release Agreement by and between WHI and the County, dated July 20, 2017;

4. the April 24, 2018 conveyance of the AH Parcel from PWL to Pua Melia LLC ("**PML**") by way of Warranty Deed, which was recorded in the Bureau on May 11, 2018, as Regular System Document No. A-67050158;

5. PML's proposed mixed-use development on the AH Parcel;

6. any negotiations between the County and PWL and/or PML regarding the provision of affordable housing in the Waikoloa area; and

7. any other matters directly relevant and material to the Commission's Order to Show Cause, filed July 3, 2018,

all as more particularly described in the attached Memorandum in Support of Motion.

II. GROUNDS FOR MOTION

This Motion is made pursuant to Chapter 205, Hawai'i Revised Statutes and Title 15, Subtitle 3, Chapter 15 of the Hawai'i Administrative Rules ("**HAR**") §§ 15-15-58, 15-15-69 and 15-15-70, the other authorities and arguments stated in the attached Memorandum in Support of Motion, and the pleadings and files herein.

In the event the Commission decides not to issue the subpoena and/or subpoenas duces tecum as requested herein, WHI hereby requests a hearing on this Motion pursuant to HAR § 15-15-70(c) at the Commission's next regular meeting, tentatively scheduled for November 14, 2018.

DATED: Honolulu, Hawai'i, November 7, 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 Hawaii, Tax Map Key No. (3) 6-8-02:016 (por.)	DOCKET NO. A06-767 MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On October 23, 2018, the County of Hawai'i (the "**County**") filed its Statement of Position of County of Hawai'i Planning Department on the Land Use Commission's Order to Show Cause ("**County SOP**"). Contrary to the its prior spoken and written representations to Waikoloa Highlands, Inc. ("**WHI**"), the County refused to confirm that WHI has completely satisfied Condition No. 9 of the State of Hawai'i Land Use Commission's (the "**Commission**") Findings of Fact, Conclusions of Law, and Decision and Order in Docket No. A06-767, filed on June 10, 2008 ("**D&O**"). Instead, the County now purports to have "concerns" about that certain Affordable Housing Agreement by and between WHI and the County, dated December 1, 2016 (the "**AH Agreement**"), and that certain Affordable Housing Release Agreement by and between WHI and the County, dated July 20, 2017 (the "**AH Release**").

This was all news to WHI. The parties executed the AH Agreement nearly two years ago, after which approximately 11.7 acres of WHI's land (the "**AH Parcel**")[1] – the consideration under the AH Agreement – was conveyed to an entity as directed by the County; and the parties

[1] The AH Parcel is currently identified by Tax Map Key No.: (3) 6-8-002: 057.

executed the AH Release over a year ago. At no point prior to filing its SOP had the County in any way ever questioned WHI's satisfaction of D&O Condition No. 9, or the validity of the AH Agreement and AH Release. WHI's satisfaction of D&O Condition No. 9 and the validity of the AH Agreement and AH Release are unquestionably relevant and material to the Order to Show Cause filed by the Commission on July 3, 2018 (the "**OSC**"). WHI is entitled to an opportunity to be heard at a meaningful time and in a meaningful manner on both its satisfaction of D&O Condition No. 9 and its substantial commencement of its use of the land, which necessarily requires an opportunity to review the County documents and to cross-examine the County's witnesses that supposedly supports its new-found position. WHI will be deprived of its opportunity to be heard if this Motion is not granted.

For the reasons set forth below, WHI respectfully requests that the Commission issue: (1) a subpoena compelling the attendance and oral testimony of a representative of the County Office of Housing and Community Development ("**OHCD**") at the Commission's November 28, 2018 hearing on this Docket (the "**OSC Hearing**"); ***and*** (2) subpoenas duces tecum compelling (a) OHCD ***and*** (b) the Office of the Mayor of the County of Hawai'i to produce, in advance of the OSC Hearing and no later than November 16, 2018,[2] true and correct copies of their respective files relating to the following (as described greater detail in Section IV, *infra*):

[2] By way of letter dated November 2, 2018 (received by mail on November 6, 2018), Commission Chair Dr. Jonathan Likeke Scheuer ordered that the parties identify any witnesses to be called to testify at OSC Hearing and the matters upon which they will be testifying, and to file their respective lists of witnesses and lists of exhibits with the Commission no later than 4 p.m. on November 20, 2018. At the October 25, 2018 hearing on this Docket, Chair Schueuer also ordered that parties provide supplemental briefing on a number of issues and that such supplemental briefing be filed with the Commission no later than November 19, 2018. Those issues include WHI's satisfaction of D&O Condition No. 9. In light of these deadlines, WHI is requesting that the documents requested herein be produced no later than November 16, 2018, in order to provide WHI sufficient time to include such documents in its supplemental briefing and list of exhibits.

1. the AH Agreement;

2. the June 1, 2017 conveyance of the AH Parcel by WHI to Plumeria at Waikoloa, LLC ("**PWL**");

3. the AH Release;

4. the April 24, 2018 conveyance of the AH Parcel from PWL to Pua Melia LLC ("**PML**");

5. PML's proposed mixed-use development on the AH Parcel;

6. any negotiations between the County and PWL and/or PML regarding the provision of affordable housing in the Waikoloa area; and

7. any other matters directly relevant and material to the Commission's Order to Show Cause, filed July 3, 2018.

II. BACKGROUND

After months of working collaboratively with OHCD, WHI and the County executed the AH Agreement nearly two years ago on December 1, 2016. *See* Exhibit 8 attached to WHI Statement of Position on Order to Show Cause, filed August 8, 2018 ("**WHI SOP**"). The AH Agreement required WHI to subdivide the approximately 11.7-acre AH Parcel from Tax Map Key No. (3) 6-8-002:016 (the "**Petition Area**"), and to convey the AH Parcel to PWL. The AH Agreement was executed by WHI and then County Mayor William P. Kenoi, signed "recommended for approval" by then OHCD Housing Administrator Susan K. Akiyama, and "approved as to form and legality" by Deputy Corporation Counsel Amy Self. *See id.*

In furtherance of the AH Agreement, on May 15, 2017, the County issued Final Subdivision Approval creating the AH Parcel. *See* Exhibit 9 (subdivision application dated March 22, 2017) & Exhibit 14 (SUB-17-001716) attached to WHI's SOP. On June 1, 2017, as directed by OHCD, WHI conveyed the AH Parcel to PWL by way of Warranty Deed, which was recorded in the State of Hawai'i Bureau of Conveyances on January 29, 2018, as Regular System Document No. A-66030880. *See* Exhibit 10 attached to WHI's SOP.

On July 20, 2017, the County and WHI executed the AH Release. *See* Exhibit 11 attached to WHI's SOP. The AH Release was executed by WHI and County Managing Director Wifred M. Okabe, signed "recommended approval" by current OHCD Housing Administrator Neil S. Gyotoku, and "approved as to form and legality" by Deputy Corporation Counsel Amy Self. Thus, as then determined by the County, WHI attained full satisfaction of the affordable housing requirements under D&O Condition No. 9 and Condition E of County Rezoning Ordinance No. 13-29, in accordance with Chapter 11 of the Hawai'i County Code.

However, on October 23, 2018 – ***the day before the Commission's hearing on the OSC and without <u>any</u> prior notice to WHI*** – the County filed its SOP and reversed its position on WHI's satisfaction of D&O Condition No. 9. According to the County SOP, the "County has concerns about the [AH] Agreement[.]" County SOP at 3. The County's SOP lists a number of purported defects with the AH Agreement, including: (1) that the entity contemplated to take title to the AH Parcel (PWL) was not a non-profit entity; (2) the AH Parcel was not sufficient in size to accommodate the number of affordable housing units WHI was required to provide; and (3) that PWL subsequently sold the AH Parcel to PML. *See id.* The County further notes that, although PML has submitted an application for an affordable housing project, the development proposed under PML's application does not include the number of affordable housing units that WHI is required to provide. *See id.* The County concludes by attempting to soften its complete repudiation of the AH Agreement and AH Release by noting that WHI has recently met with OHCD to discuss potential additional opportunities for the provision of affordable housing and that "those negotiations appear to be proceeding in good faith." *See id.* at 3-4.

The Commission subsequently held hearings on the OSC on October 24-25, 2018. During the October 25th hearing, the County called planner Jeff Darrow as its only witness. Mr.

Darrow testified that it was his understanding that the AH Agreement was intended to comply with D&O Condition No. 9 and Condition E under County Rezoning Ordinance No. 13-29. *See* **Exhibit 38** (Excerpt of Oct. 25, 2018 Hr. Trans.) at 27:22-24 ("My understanding it was to comply with the Condition 9 in the D&O, as well as the condition in the Change of Zone Ordinance."). And Mr. Darrow confirmed the County's new-found position that WHI has somehow not satisfied D&O Condition No. 9 notwithstanding the AH Agreement and AH Release. *See id* at 25:14-15 ("Currently our position is that they have not complied with the affordable housing requirement.").

However, Mr. Darrow made clear that he was not involved in the preparation and negotiations of the AH Agreement. *See id.* at 27:2-4 ("Q Where you involved in the negotiation over the [AH Agreement]? A I was not."). And both Mr. Darrow and the County's counsel, Ron Kim, Esq., made clear to the Commission that Mr. Darrow did not have personal knowledge as to the County's position on the intention, effect, and validity of the AH Agreement and AH Release, and that these questions should be addressed by the OHCD Housing Administrator. *See id.* at 42:15-17 (Mr. Kim: "If I may object to this question. This is beyond the witness' realm of knowledge as to all of the grounds that the County might believe that the Affordable Housing Agreement is not valid."); *id.* at 43:12-15 (Mr. Darrow: "I have to agree with counsel. I don't think I'm the right person to answer that question. I think the administrator of OHCD would be the person to answer that."). Mr. Darrow also made clear that he had no personal knowledge of OHCD's position on WHI's satisfaction of Condition No. 9, any ongoing discussion between WHI and OHCD regarding the provision of affordable housing, or that WHI's current discussions with OHCD relate to WHI voluntarily providing additional land for affordable housing. *See id.* at 43:23-44:16.

Mr. Darrow also raised two additional County concerns with WHI's satisfaction of D&O Condition No. 9. First, Mr. Darrow claimed that the AH Agreement may not satisfy D&O Condition No. 9 because the parcel to be conveyed is not supposed to have any unusual characteristics that make it difficult to develop, and WHI's project manager Joel LaPinta testified to a drainage easement encumbering the AH Parcel. *See id.* at 45:18-22. Second, Mr. Darrow claimed that the AH Agreement may not satisfy D&O Condition No. 9 because the land donated is supposed to be sufficient to accommodate the number of affordable housing units the developer is required to provide, and the AH Parcel may not be sufficient to provide the number of units WHI is required to provide under County law. *See id.* at 46:3-9.

It should also be noted that the State of Hawai'i Office of Planning's ("**OP**") testimony on WHI's compliance with D&O Condition No. 9, which came after Mr. Darrow's testimony, mirrors much of the County's testimony. *See id.* at 96:1-97:15. As OP is a party to these proceedings and its position on this issue is presented to the Commission, the County's production of the requested documents and testimony of the OHCD Administrator and/or his representative(s) are necessary for all parties to develop a full record on this OSC.

III. APPLICABLE RULES AND STATUTES

Hawai'i Administrative Rules ("**HAR**") § 15-15-58(a) provides that the"[C]ommission may subpoena witnesses as set forth in section 15-15-69." HAR § 15-15-69(b) provides, in pertinent part, that motions for the issuance of subpoenas shall:

> (1) Be in writing;
>
> (2) Specify the particular document or record, or part thereof, desired to be produced;
>
> (3) State the reasons why the production thereof is believed to be material and relevant to the issues involved; and

(4) Include a statement of the reasons why the testimony of the witness is believed to be material and relevant to the issues involved.

IV. DISCUSSION

A. SUBPOENA FOR REPRESENTATIVE OF OHCD TO APPEAR AND ORALLY TESTIFY AT THE OSC HEARING

WHI is seeking a subpoena to compel the attendance and oral testimony of a representative of OHCD at the OSC Hearing. *See id.* § 15-15-69(b)(1). WHI has significant concerns about the County's sudden and unannounced change in its position on WHI's satisfaction of D&O Condition No. 9 on the eve of the Commission's hearings on the OSC. As both Mr. Darrow and Mr. Kim made clear during the October 25th hearing on the OSC, Mr. Darrow (and the County Planning Department in general) has no personal knowledge of the negotiation, execution, performance and satisfaction of the AH Agreement and AH Release, and that testimony on those subjects should come from a representative of OHCD.

The significant issues raised by the County SOP, Mr. Darrow's testimony, and OP's Testimony include: (1) PWL's selection as the entity to take title to the AH Parcel under the AH Agreement; (2) the County's involvement in the sale of the AH Parcel from PWL to PML; (3) the number of affordable units WHI is required to provide to satisfy D&O Condition No. 9; (4) the number of affordable units proposed for PML's mixed-use development on the AH Parcel, including the determination that the AH Parcel can only accommodate 32 affordable housing units; (5) whether the County will be approving a hardware store and/or other commercial uses as a part of PML's project and whether those uses will reduce the useable land for affordable housing units on the AH Parcel; and (6) the County's knowledge of the drainage easement that purportedly traverses the AH Parcel at the time the AH Agreement and AH Release were negotiated and executed.

These issues are unquestionably relevant and material to the Commission's consideration of the OSC. *See* HAR § 15-15-69(b)(4) ("Include a statement of the reasons why the testimony of the witness is believed to be material and relevant to the issues involved."). Central to the Commission's consideration of the OSC is WHI's compliance with and/or satisfaction of the D&O Conditions, and the OSC specifically states that the "conditions of the [D&O] which may have been violated or not been met include . . . ***Condition 9 Affordable Housing***[.]" *See* OSC at 2 (emphasis added).

Also central to the Commission's consideration on the OSC is whether WHI has substantially commenced its use of the land. *See* DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC., 134 Hawai`i 187, 191, 339 P.3d 685, 689 (2014) ("***Aina Le'a***") ("Once the LUC issues an OSC, the procedures it must follow before reverting land depend upon whether the petitioner has substantially commenced use of the land."). The Hawai'i Supreme Court's decision in *Aina Lea* makes clear that a petitioner's efforts to satisfy its affordable housing obligations are directly relevant and material to whether there has been substantial commencement. *See id.* at 134 Hawai'i at 214, 339 P.3d at 712 ("Rather than holding the land undeveloped for speculative purposes—the result which the legislature sought to avoid in HRS § 205–4(g)—Bridge and DW invested a considerable amount of money and effort, by any reasonable measure, ***to develop the affordable housing. In these circumstances, Bridge and DW substantially commenced use of the land.***" (emphasis added)).

WHI should be afforded a meaningful opportunity to examine a representative from OHCD on the foregoing issues. This is particularly true here, given the fact that the County changed its position on WHI's satisfaction of D&O Condition No. 9 the day before the OSC hearings commenced without any prior notice to WHI, and the fact that OP has apparently

adopted these positions wholesale. The County (and OP) should not be permitted to raise this litany of purported defects with WHI's compliance with D&O Condition No. 9 without providing one or more witnesses for WHI to cross-examine. The County's testimony at the October 25th hearing made clear that any such witness(es) must be a representative(s) from OHCD.

Three copies of the Subpoena to the representative(s) of OHCD are attached hereto as **Exhibit 39**. *See* HAR § 15-15-69(c).

B. SUBPOENA DUCES TECUM FOR CERTAIN OHCD FILES

WHI is seeking OHCD's file or files on the following subjects: (1) the AH Parcel; (2) the AH Agreement; (3) the AH Release; (4) the conveyance of the AH Parcel from WHI to PWL; (5) the conveyance of the AH Parcel from PWL to PML; (6) PML's proposed mixed-use development on the AH Parcel; (6) any negotiations or discussions between the County and PWL and/or PML regarding the provision of affordable housing in the Waikoloa area; and (7) any other matters directly relevant and material to the OSC. *See* HAR § 15-15-69(b)(1) & (2).

For the reasons discussed in Section IV.A, *supra*, WHI should be provided a meaningful opportunity to challenge the County's new-found position that WHI has not satisfied D&O Condition No. 9. OHCD negotiated and recommended the approval of the AH Agreement and AH Release, and OHCD is involved in PML's proposed mixed-use development on the AH Parcel. The only way for WHI to question the County on its position in a meaningful manner is for the County to provide the documents that purportedly support its position. *See* HAR § 15-15-69(b)(3).

Three copies of the Subpoena Duces Tecum directed to OHCD are attached hereto as **Exhibit 40**. *See* HAR § 15-15-69(c).

C. SUBPOENA DUCES TECUM FOR CERTAIN FILES FROM THE OFFICE OF THE MAYOR

WHI is seeking the County Office of the Mayor's file or files on the following subjects: (1) the AH Parcel; (2) the AH Agreement; (3) the AH Release; (4) the conveyance of the AH Parcel from WHI to PWL; (5) the conveyance of the AH Parcel from PWL to PML; (6) PML's proposed mixed-use development on the AH Parcel; (6) any negotiations or discussions between the County and PWL and/or PML regarding the provision of affordable housing in the Waikoloa area; and (7) any other matters directly relevant and material to the OSC. *See* HAR § 15-15-69(b)(1) & (2).

For the reasons discussed in Section IV.A, *supra*, WHI should be provided a meaningful opportunity to question the County's new-found position that WHI has not satisfied D&O Condition No. 9. The Mayor executed the AH Agreement on behalf of the County. The only way for WHI to question the County on its position in a meaningful manner is for the County to provide the documents that purportedly supports its position. *See* HAR § 15-15-69(b)(3).

Three copies of the Subpoena Duces Tecum directed to the Office of the Mayor are attached hereto as **Exhibit 41**. *See* HAR § 15-15-69(c).

V. CONCLUSION

For the foregoing reasons, WHI respectfully requests that the Commission issue: (1) a subpoena compelling the attendance and oral testimony of a representative or representatives of OHCD at the November 28th OSC Hearing; ***and*** (2) subpoenas duces tecum compelling (a)

OHCD ***and*** (b) the Office of the Mayor, to produce, in advance of the OSC Hearing and no later than November 16, 2018, the documents requested herein.

DATED: Honolulu, Hawai'i, November 7, 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 Hawaii, 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., successor-in-interest to Waikoloa Mauka, LLC, the original Petitioner in Docket No. A06-767.

2. Attached hereto as **Exhibit "38"** is a true and correct copy of excerpts from the transcripts of the State of Hawai'i Land Use Commission's (the "**Commission**") October 25, 2018, hearing on this Docket, prepared by Jean McManus.

3. Attached hereto as **Exhibit "39"** are three copies of a Subpoena to an authorized representative of the County of Hawai'i's Office of Housing and Community Development to appear before the Commission on November 28, 2018, at the Commission hearing on the Order to Show Cause, filed July 3, 2018, in this Docket.

4. Attached hereto as **Exhibit "40"** are three copies of a Subpoena Duces Tecum to the Custodian of Records of the County of Hawai'i, Mayor's Office, to make available for release, copying and/or inspection all documents more fully described in Exhibit A attached thereto.

5. Attached hereto as **Exhibit "41"** are three copies of a Subpoena Duces Tecum to the Custodian of Records of the County of Hawai'i, Office of Housing and Community Development, to make available for release, copying and/or inspection all documents more fully described in Exhibit A attached thereto.

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

DATED: Honolulu, Hawai`i, November 7, 2018.

DEREK B. SIMON

LAND USE COMMISSION

STATE OF HAWAII

October 25, 2018

Commencing at 8:00 a.m.

Courtyard by Marriott

King Kamehameha's Kona Beach Hotel
Ballroom #1

75-5660 Palani Road, Kailua-Kona, Hawaii 96740

AGENDA

VI. Continued Hearing and Action (if necessary)
A06-767 Waikoloa Mauka LLC (Hawai'i)

VII. Adoption of Order - DR18-62 Kualoa Ranch, Inc.
Inc. IAL(Oahu)

VI. Adjournment

BEFORE: Jean Marie McManus, CSR #156

adjust. That occurs during the County plan, the County General Plan Amendment process.

Q Thank you.

My next question to you is, are you aware of the Decision and Order which is the subject of the Order to Show Cause today?

A Yes.

Q Are you aware of the affordable housing condition in the Decision and Order?

A Yes.

Q Do you know the County's position on whether or not Petitioner has fulfilled the affordable housing condition?

A Currently our position is that they have not complied with the affordable housing requirement.

Q Do you know whether the County believes that Petitioner is working towards fulfilling the affordable housing requirement?

A My understanding is that they are working, making a good faith effort to comply with the affordable housing requirement.

Q Thank you. Those are all the questions I have for you.

CHAIRPERSON SCHEUER: Are there questions for the witness from the Petitioner?

MR. LIM: Thank you, Mr. Chairman.

CROSS-EXAMINATION

BY MR. LIM:

Q Good morning, Mr. Darrow.

A Good morning, Mr. Lim.

Q The Commission's Decision and Order in this Docket Number, Condition 9, basically states that the Petitioner shall provide affordable housing opportunities in accordance with the applicable affordable housing requirements of the County.

Is that your understanding?

A Yes.

Q Are you aware that the Petitioner entered into an affordable housing agreement that would cover the proposed development?

A Yes.

Q And are you referring to the Affordable Housing Agreement that's been attached as Exhibit No. 8 to the Petitioner's Position Statement -- Statement of Position, excuse me -- dated December 1, 2016.

You're familiar with that document?

A Yes.

Q Were you involved in the preparation of the document?

A No.

Q Were you involved in negotiations over the document?

A I was not.

Q Who would have been the person from the County that would be responsible for that?

A This would have been the members of the Office of Housing and Community Development, as well as our Corporation Counsel, and I believe the Mayor as well, and the parties, the Applicant themselves.

Q So those would be the individuals on the signature page?

A Correct.

Q That would be Susan Akiyama, Housing Administrator at the time?

A Yes.

Q And Amy Self, Deputy Corporation Counsel at the time?

A Correct.

Q What was the purpose of that December 1st, 2016 agreement?

A My understanding it was to comply with the Condition 9 in the D&O, as well as the condition in the Change of Zone Ordinance.

Q That's the County Change of Zone Ordinance?

A Correct.

Q That was for the proposed development of approximately 386 plus or mines residential-agricultural lots, correct?

A 398 or 386?

Q 386 for the agreement.

A Okay, correct.

Q Are you also familiar with the subsequent document called the Affordable Housing Release Agreement, that's Exhibit 11, Petitioner's Exhibit 11?

A Yes.

Q July 20th, 2017 Release Agreement. And what's your position? You stated earlier that the Petitioner is in the process of satisfying the affordable housing requirements for the project.

A That's my understanding.

Q And so why was this Affordable Housing Release Agreement executed by the County?

A I can't answer that question.

Q Who can?

A I would believe that the Administrator of the Office of Housing and Community Development could answer that question.

Q Would that be Neil S. Gyotoku, Housing

Administrator?

A Correct.

Q And possibly Amy D. Self, Deputy Corporation Counsel?

A Yes.

Q Those parties signed the Affordable Housing Release Agreement, correct?

A Correct.

Q So is the County's position that if the Petitioner developed up to 386 residential-agricultural lots on the Petition Area, that the Affordable Housing Release Agreement we have been speaking about does not satisfy the affordable housing requirements of both State Land Use Commission and the County of Hawaii zoning?

A At the time the agreement was signed and released, it was the understanding that that agreement would satisfy the affordable housing requirements for both the D&O as well as the County zoning ordinances.

Q And why the change of position?

A A question has arisen on the transfer of the 11.8 acres to an entity that was not considered a nonprofit entity.

Q Are you aware that the County Office of

Housing and Community Development, which I'll call OHCD, prepared all the documents for the transfer?

A I am not aware of that.

Q Who would be aware of that?

A I would believe that the administrator of OHCD would be aware of that.

Q So because of that conveyance to a non -- to an entity that wasn't a nonprofit organization, that's why the County has changed its position?

A That's my understanding.

Q Do you know whether or not the County and its Corporation Counsel reviewed the Warranty Deed that was conveying the 11.7 acres to Plumeria at Waikoloa LLC?

A I can -- I would believe they would have. I mean, I can't testify to that fact, because I wasn't a party or a part of that transfer or agreement or deed.

But, again, that would be my understanding of the process.

Q So I guess is it fair to state that the intent of the Affordable Housing Agreement was to convey 11.7 acres to an entity that would develop affordable housing equivalent to the approximately 80 affordable housing units that would be required under

the County's Chapter 11 of the Hawaii County Code?

A That would be what my understanding the agreement would end up fulfilling.

Q And you're clear that the Petitioner here wasn't required to build any affordable housing?

A That's my understanding.

Q What was their duty under the Affordable Housing Agreement?

A The agreement that we were referring to was to transfer 11.8 acres to this entity of Plumeria LLC.

Q And did that in fact occur?

A Yes.

Q I'm going to change the subject now.

Is it correct that the Petition Area has been zoned RA-1A, residential-agriculture 1 acre minimum lot size since 1990?

A Yes.

Q Do you know what was zoned prior to that date?

A It was previously zoned unplanned.

Q Was it zoned multi-family residential and open?

A I'm sorry, I stand corrected. It was zoned unplanned and multiple-family residential as well.

Q If the Land Use Commission reverts the Petition Area to the Agricultural District, what happens to its RA-1A zoning?

A If the State Land Use Commission reverts the State Land Use designation from Rural to Agriculture, you will essentially remain -- you will essentially revert back to the way it was prior to 2005 or 2006, which the zoning at that time was RA one acre open zoning. The State Land Use was Agriculture, correct?

In 2005, up from 1990 to 2005 the State Land Use designation for this particular property was Agriculture.

In 2005 the Council, through an ordinance, placed in a condition requiring the Applicant to come to the Land Use Commission to change the State Land Use designation from Agricultural to Rural.

So this would be reverting it back to that time prior to 2000 and -- I believe prior to 2008 when the D&O was finally approved.

Q So bear with me, I'm not understanding.

So the Land Use Commission reverts the property to the State Land Use Commission Agricultural District. If I come in tomorrow with a subdivision application for, let's say, 50 lots, one

acre in size, could I process my development?

A Given the current situation with the County Zoning Ordinance, you could not.

Q Why is that?

A Because the current Zoning Ordinance, the timing conditions have lapsed.

Q Let's assume that I'm successful. If the Commission allows us to defer action on the OSC. And go back down to the County, and we're successful in getting the Rezoning Ordinance refreshed to allow us additional time, could I then apply for the subdivision and subdivide and sell lots?

A We're assuming that you've gone through that process of coming back to the Commission and Council to refresh your timing condition.

Through that process, if the State Land Use designation has reverted back to Agriculture, we look at -- the County will relook at consistency with all the plans, not just the current State Land Use zoning designation, but also the General Plan as well as the South Kohala Community Development Plan that has been implemented prior to the latest ordinance.

So the difficulty in getting the time refreshment will be the conflicts of inconsistencies with now the State Land Use designation of

Agriculture and our General Plan is currently Rural and Open consistent with the current zoning.

Q So what would be the end result? Could I proceed under my RA-1A zoning even as I refreshed it?

A I would believe that what would happen is the County would request that the Applicant change the General Plan to what it was prior, which was extensive agriculture prior to 2005 when that was changed, as well as change the zoning from RA one acre to a zoning that would be consistent with the State Land Use as well as the new General Plan that hopefully would be amended, which the more appropriate zoning at that point would be Family Agricultural one acre.

Q So staying with the same process. The Petitioner would have to go for a General Plan Amendment first, and then seek the rezoning to FA-1A instead of RA-1A?

A Correct.

Q Is that the rule at the County?

A I'm not sure what you mean by "rule".

Q Is that a practice that's always followed by the County?

A There has been, again, this discussion earlier on conflicts and inconsistencies. So I can't

say it's 100 percent, but that is the direction. We try to seek consistency with the State Land Use designation, with the General Plan, with the County zoning. So that would be our direction that we would be moving towards.

Q So bear with me. I'm going to cite you some dates.

I'll represent to you that in approximately February of 2005 the General Plan was adopted on its ten-year refreshment, and that the Petition Area was then designated to the Rural and Open Districts, correct?

A General Plan?

Q Yeah, 2005 General Plan. Change the Petition Area to Rural --

A Right, to stay consistent with the current zoning.

Q Then after that, in December of 2005, Rezoning Ordinance 05-157 was adopted which provided a ten-year extension for condition compliance to the developer. And Condition H required the processing with the State Land Use Commission of the District Boundary Amendment from Agricultural to Rural; is that correct?

A Correct.

Q At that time did the County change the zoning from RA to FA-1A?

A Did the County change the zoning?

Q Did the County require the change of zone from RA-1A to FA-1A at that time?

A No.

Q In September of 20th, 2007, County Rezoning Ordinance 07-127 was amended to further provide time extensions and a construction for a roundabout.

Did the County require the change in zoning from RA-1A to FA-1A at that time?

A I would say no, but I would like to elaborate.

The reason why we would not request that the Applicant revert the zoning from RA-1 acre to Family Agriculture one acre is because it would become inconsistent with the current State Land Use which is now Rural, as well as the General Plan, which is now Rural and Open for the subject property.

Q That's why I'm asking the question. Based upon your statement, shouldn't the County have required the FA-1A zoning in both 2005 and 2007?

A No.

Q Why is that? Because the General Plan was amended to Rural prior to those dates.

A Correct.

Q So why is that? Maybe I'm --

A If you're talking before 19, 2005.

Q No these are -- let me back up again.

If February 2005 the General Plan is adopted, changing the Petition Area to Rural and Open.

In 2005, later in the year in December, in Rezoning Ordinance 05-127 the County amends the rezoning but keeps it at RA-1A.

In 2007 an Ordinance 07-127, the County again amends the ordinance for the Petition Area and keeps the zoning RA-1A.

So why is the County keeping the zoning at RA-1A after the General Plan has been amended?

A Because it's consistent.

Q Consistent with what?

A I guess I'm not following your line of questioning. But let me -- I can understand if you were asking why the County did not ask the Applicant to come in and change the zoning from RA one acre to Family Agriculture one acre or Ag one acre prior to 2005, because it was inconsistent for 15 years, correct? I'm sorry, asking it.

CHAIRPERSON SCHEUER: To be fair, I will

need to warn you.

THE WITNESS: Thank you.

So to bring consistency in the matter, there was the General Plan, because the zoning was already RA one acre. The General Plan, through the comprehensive update in 2005, aligned the General Plan to be consistent with the current zoning, and then the ordinance in 2005 required the Applicant to go to the Land Use Commission to seek a D&O to be able to change it from Agricultural to Rural so everything would be consistent.

It wouldn't make sense at that point for the County to require the Applicant to go to FA one acre, because everything was beginning to be consistent.

Q So to wrap up this subject, is it fair to state that if the Commission reverts the Petition Area to the Agricultural District, that in order for the project to go forward and to participate with the affordable housing development, that the Petitioner will be required to go through substantial hurdles in terms of land use entitlements to include the General Plan Amendment, a refreshment of the zoning ordinance and other things?

A I would say that those steps would need to

be taken, whether the Applicant would be taking them in regards to the General Plan, that could be possibly considered through the current General Plan Amendment update, because during that time no other amendments can be done.

So the Applicant would work with the County to see if that could be a consideration in the update. And then, yes, they would have to come back in to change the zoning from RA one acre to Family Agricultural one acre to be consistent.

Q When is the County's General Plan going to be coming up for a hearing?

A I'm not sure.

Q Can you estimate it? Is it a year from now?

A I mean, that's the hope is within a year. But I mean, to be honest with you, there's been a lot of activity on this island that was unexpected, so things have been pushed back.

Q So the last General Plan was in 2005?

A Correct.

Q What was the General Plan prior to that?

A The General Plan prior for this subject property was extensive agri --

Q No, what was the date of the General Plan

prior to the 2005 version?

A I'm guessing, but I think it was 1989.

Q I think you're correct.

So that was also supposed to be a ten-year General Plan update, correct?

A I can't remember where I was in 1989.

Q Are you familiar a little bit with the Aina Le'a project?

A Yes.

Q And when the Commission reverted that project back down to Agriculture, what did the County do with the zoning for that project?

A I'm not sure if they did revert it. I mean, my understanding it's still the same.

Q Let's assume that it was reverted for a period of time.

A Okay.

Q During that period of time, did the County do anything with the zoning for that project?

A No.

Q No changes were made?

A There's been multiple -- many meetings working with the Applicant to try to get through this process.

Q When the County overhauled its zoning code

to delete the zoning categories for the Agricultural zoning for less than five acres in size, what did the County do with the properties that are still zoned A1-A2, Agriculture one-acre, two-acre, three-acre lots?

A They're still the same zoning.

Q Those would be considered nonconforming zonings?

A Yes.

Q Why wouldn't the Waikoloa Heights project be considered a nonconforming zoning?

A Because of the conditions that were placed on it.

Q Like what conditions?

A The condition to require the Applicant to go back to the Land Use Commission to revert it -- I mean, to change the State Land Use designation from Agriculture to Rural.

And additionally, the General Plan Amendment, it changed the property from Extensive Agriculture to Rural and Open.

Q The County's Position Statement stated that the Petition Area has not been -- the County's Position Statement stated that the Petition Area has not shown substantial commencement of development.

Is that correct?

A Yes.

Q Does the County of Hawaii have any definition of "substantial commencement" of use of the land in its zoning code, or in any other County rules, regulation or statutes and ordinances?

A Not that I'm aware of.

Q So the only -- going back to the Affordable Housing Agreement satisfaction. The only issue the County had with the method of satisfying the affordable housing requirement was that the conveyance was made to a for-profit company rather than nonprofit company?

MR. KIM: If I may object to this question. This is beyond the witness' realm of knowledge as to all of the grounds that the County might believe that the Affordable Housing Agreement is not valid.

CHAIRPERSON SCHEUER: Where are you trying to go?

MR. LIM: I'm just trying to -- you can obviously understand that the Petitioner is very concerned that we had an agreement. We did what was required. And now the County is saying you didn't quite do everything that you needed, even though we filled a release.

So I'm trying to determine from the witness, because they made the statement that we haven't fully satisfied the agreement.

I'm trying to determine what exactly they want us to do.

CHAIRPERSON SCHEUER: You can ask the witness if he has any further knowledge about other concerns the County has.

Q (By Mr. Lim): What else do you want the Petitioner to do to satisfy the affordable housing requirement?

A I have to agree with counsel. I don't think I'm the right person to answer that question. I think the administrator of OHCD would be the person to answer that.

Q So your position here could be right or it could be wrong?

A Again, the position that we have is that currently in looking at the release agreement and looking at Chapter 11, which is the housing code, is that there is a conflict, and that needs to be resolved.

Q Are you aware that on October 19th, as testified by Mr. LaPinta, that representatives of the Petitioner met with Neil Gyotoku, the Housing

Administrator for OHCD, along with his Corporation Counsel representative and other members of his staff?

A I was made aware through testimony.

Q Are you also aware that at that meeting that the director -- I mean Housing Administrator confirmed that the affordable housing requirements for this project had been satisfied, and that they were asking the developer to voluntarily cooperate by subdividing or contributing an additional three to four acres to assist the affordable housing developer adjacent to the property on the 11.7 acres?

A I was aware of the request for the transfer. I was not aware that the administrator had said that the affordable housing agreement was satisfied.

Q No further questions.

CHAIRPERSON SCHEUER: Office of Planning?

MS. APUNA: No questions.

CHAIRPERSON SCHEUER: Commissioners? Commissioner Okuda.

COMMISSIONER OKUDA: Thank you, Mr. Chair.

And the question, with the Chair's indulgence, can also be answered by counsel. But can you list the specific facts which show that the

Petitioner has not satisfied the affordable housing condition in the Land Use Commission's D&O? I just need a list of the facts.

MR. KIM: The main factual problems with the agreement are that it doesn't comply with its own terms or the County code.

The County cannot contract to trump its own code basically. Hawaii County Code Section 11-5 requires that if a developer is to donate land through either County or nonprofit entity in lieu of building the required affordable housing, that the conveyance be made to either the County or a nonprofit entity.

In this case the conveyance was to a LLC that was not a nonprofit, and that's evidenced by DCCA filings, and the fact that it turned around and sold the property for reported $1.5 million.

And the other problem with the property that was conveyed actually fulfilling affordable housing conditions is that the property is not supposed to have any unusual characteristics which would make it difficult to develop.

Yesterday Mr. LaPinta testified to the substantial drainage easement encumbering the property which makes it difficult to develop, and

also the regular shape of the property which makes it difficult to develop.

And finally, the land donated is supposed to be sufficient to accommodate the number of affordable housing units which the developer is required to build. And in this case the actual owner now of the property is saying that he can only build, I believe the number we had yesterday in testimony was 32 affordable housing dwellings.

So those are the problems that I see with the agreement. And the agreement, also by its own terms, the first affordable housing agreement did claim that Plumeria at Waikoloa LLC was a nonprofit, which was not true. So those are the issues with the agreement.

However, you know, I think we have a different understanding with Petitioner as to the agreement. But if we could come to the same end result, if Petitioner does go through the process in the County's eyes it would be to fulfill its affordable housing requirement.

In Petitioner's eyes it would be a gratuitous act to donate the additional three acres, then it sounds like Petitioner will be able to meet affordable housing requirements, because there will

Upon further review of Petitioner's compliance with the affordable housing Condition 9, while Petitioner relies on the County's release, it is questionable that Petitioner has satisfied Condition 9.

Condition 9 states that Petitioner shall provide affordable housing opportunities for Hawai'i residents, quote, "in accordance with applicable affordable housing requirements of the County", specifically Hawaii County Code, Chapter 11, Article 1.

Chapter 11, Article 1 requires Petitioner to earn affordable housing credits equal to 20 percent of the number of units or lot. This is consistent with Finding of Fact 47 of the Decision and Order, as well as Ordinance 13-29.

For a 398 residential lot project, Petitioner is therefore required to fulfill 80 credit or units to meet its affordable housing requirement. Based on HHFDC's letter to OP Pua Melia is proposing under its 201H application to develop 32 affordable units on 11.8 acre lot, which is 48 credits or units short of fulfilling the affordable housing requirement.

Moreover, Petitioner's witness denied that

the Pua Melia project has anything to do with the Waikoloa Project. Petitioner believes that the transfer of 11.8 acre lot, which is merely 1.6 percent of the total 731.58 acre Petition Area, which remains undeveloped and vacant, fulfills affordable housing Condition 9.

Additionally, Chapter 11, Article 1 of the Hawaii County Code requires that the transfer land be made to a nonprofit corporation. Neither Plumeria at Waikoloa LLC nor Pua Melia is a nonprofit corporation according to DCCA record. The County has since raised the issue that the land is not without unusual site conditions that make it difficult to build a home on the lot as required by Hawaii County Code Chapter 11.

In conclusion, over the past ten years, Petitioner simply has not developed the Project as Petitioner had represented it would, and haven't even substantially commenced use of the land. Petitioner has failed to comply with the D&O conditions and cannot sufficiently justify delay or assure this Commission timely development of the project in the future. Therefore, this Commission, pursuant to HRS Section 205-4(g) is authorized to revert the Petition Area to its prior classification. OP would not

CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on October 25, 2018, at 8:00 a.m., the proceedings contained herein was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

I further certify that I am not of counsel for any of the parties hereto, nor in any way interested in the outcome of the cause named in this caption.

Dated this 25th day of October, 2018, in Honolulu, Hawaii.

/s/ Jean Marie McManus
JEAN MARIE McMANUS, CSR #156

EXHIBIT 39

CARLSMITH BALL LLP

STEVEN S.C. LIM 2505
DEREK B. SIMON 10612
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842

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 Hawaii, Tax Map Key No. (3) 6-8-02:016 (por.)	DOCKET NO. A06-767 SUBPOENA FOR REPRESENTATIVE OF COUNTY OF HAWAI'I OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT

SUBPOENA FOR REPRESENTATIVE OF COUNTY OF HAWAI'I OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT

THE STATE OF HAWAI'I:

TO THE SHERIFF of the State of Hawai'i or his Deputy, any Police Officer, or any person not less than 18 years of age and not a party in the above-entitled matter.

YOU ARE COMMANDED to Subpoena **a Representative of County of Hawai'i Office of Housing and Community Development**, 74-5044 Ane Keohokalole Highway, Bldg. B, 2nd Floor, Kailua-Kona, HI 96740, to personally appear before the State of Hawai'i Land Use Commission on **November 28, 2018** at **9:00 a.m.**, at the Natural Energy Laboratory of Hawai'i

Authority, located at 73-987 Makako Bay Drive, Kailua Kona, Hawai'i 96740, to testify as a witness in connection with the above-entitled matter.

DATED: Honolulu, Hawai'i _____.

_____

Dr. Jonathan Likeke Scheuer, Chair
State of Hawai'i Land Use Commission

ACKNOWLEDGEMENT OF SERVICE

I, _____, received this Subpoena at _____ on _____.

_____

Signature

RETURN OF SERVICE

SERVICE WAS MADE AS FOLLOWS:

DATE: _____

TIME: _____

PLACE: _____

_____

_____

COMMENTS: _____ I served the above-named person.

_____ I served this subpoena on another individual. (explain).

DATED: _____, County of Hawai`i, _____.

NAME OF SERVER:

_____

_____

SIGNATURE OF SERVER

EXHIBIT 40

CARLSMITH BALL LLP

STEVEN S.C. LIM 2505
DEREK B. SIMON 10612
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842

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 Hawaii, Tax Map Key No. (3) 6-8-02:016 (por.)	DOCKET NO. A06-767 **SUBPOENA *DUCES TECUM* COUNTY OF HAWAI'I, OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT; EXHIBIT "A"**

SUBPOENA DUCES TECUM COUNTY OF HAWAI'I, OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT

THE STATE OF HAWAI'I:

TO THE SHERIFF of the State of Hawai'i or his Deputy, any Police Officer, or any person not less than 18 years of age and not a party in the above cited matter.

YOU ARE COMMANDED to Subpoena the **Custodian of Records of County of Hawai'i, Office of Housing and Community Development**, 50 Wailuku Drive, Hilo, Hawaii County, HI 96720, to have available for release, copying and/or inspection all documents as described in Exhibit A attached hereto on November 16, 2018 at 8:30 a.m. at the County of

Hawai`i, Office of Housing and Community Development, 50 Wailuku Drive, Hilo, Hawai`i County, HI 96720.

DATED: Honolulu, Hawai'i, _____.

_____

Dr. Jonathan Likeke Scheuer, Chair
State of Hawai'i Land Use Commission

EXHIBIT "A"

True and correct copies of files relating to the following:

1. that certain Affordable Housing Agreement by and between Waikoloa Highlands, Inc. ("**WHI**") and the County of Hawai'i ("**County**"), dated December 1, 2016;

2. the June 1, 2017 conveyance of approximately 11.7 acres of land (the "**AH Parcel**") by WHI to Plumeira at Waikoloa, LLC ("**PWL**") by way of Warranty Deed, which was recorded in the State of Hawai'i Bureau of Conveyances (the "**Bureau**") on January 29, 2018, as Regular System Document No. A-66030880;

3. that certain Affordable Housing Release Agreement by and between WHI and the County, dated July 20, 2017;

4. the April 24, 2018 conveyance of the AH Parcel from PWL to Pua Melia LLC ("**PML**") by way of Warranty Deed, which was recorded in the Bureau on May 11, 2018, as Regular System Document No. A-67050158;

5. PML's proposed mixed-use development on the AH Parcel;

6. any negotiations between the County and PWL and/or PML regarding the provision of affordable housing in the Waikoloa area; and

7. any other matters directly relevant and material to the Commission's Order to Show Cause, filed July 3, 2018.

ACKNOWLEDGEMENT OF SERVICE

I, _____, received this Subpoena at _____ on _____.

_____

Signature

RETURN OF SERVICE

SERVICE WAS MADE AS FOLLOWS:

DATE: _____

TIME: _____

PLACE: _____

_____

_____

COMMENTS: _____ I served the above-named person.

_____ I served this subpoena on another individual. (explain).

DATED: _____, County of Hawai`i, _____.

NAME OF SERVER:

_____

_____

SIGNATURE OF SERVER

EXHIBIT 41

CARLSMITH BALL LLP

STEVEN S.C. LIM 2505
DEREK B. SIMON 10612
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842

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 Hawaii, Tax Map Key No. (3) 6-8-02:016 (por.)	DOCKET NO. A06-767 SUBPOENA *DUCES TECUM* COUNTY OF HAWAI'I, MAYOR'S OFFICE; EXHIBIT "A"

SUBPOENA DUCES TECUM COUNTY OF HAWAI'I, MAYOR'S OFFICE

THE STATE OF HAWAI'I:

TO THE SHERIFF of the State of Hawai'i or his Deputy, any Police Officer, or any person not less than 18 years of age and not a party in the above cited matter.

YOU ARE COMMANDED to Subpoena the **Custodian of Records of County of Hawai`i, Mayor's Office**, 25 Aupuni Street, Suite 2603, Hilo, Hawaii County, HI 96720, to have available for release, copying and/or inspection all documents as described in **Exhibit A** attached hereto on **November 16, 2018** at **8:30 a.m.** at the County of Hawai'i, Mayor's Office located at 25 Aupuni Street, Suite 2603, Hilo, Hawai`i County, HI 96720.

DATED: Honolulu, Hawai'i, _____.

_____

Dr. Jonathan Likeke Scheuer, Chair
State of Hawai'i Land Use Commission

EXHIBIT "A"

True and correct copies of files relating to the following:

1. that certain Affordable Housing Agreement by and between Waikoloa Highlands, Inc. ("**WHI**") and the County of Hawai'i ("**County**"), dated December 1, 2016;

2. the June 1, 2017 conveyance of approximately 11.7 acres of land (the "**AH Parcel**") by WHI to Plumeira at Waikoloa, LLC ("**PWL**") by way of Warranty Deed, which was recorded in the State of Hawai'i Bureau of Conveyances (the "**Bureau**") on January 29, 2018, as Regular System Document No. A-66030880;

3. that certain Affordable Housing Release Agreement by and between WHI and the County, dated July 20, 2017;

4. the April 24, 2018 conveyance of the AH Parcel from PWL to Pua Melia LLC ("**PML**") by way of Warranty Deed, which was recorded in the Bureau on May 11, 2018, as Regular System Document No. A-67050158;

5. PML's proposed mixed-use development on the AH Parcel;

6. any negotiations between the County and PWL and/or PML regarding the provision of affordable housing in the Waikoloa area; and

7. any other matters directly relevant and material to the Commission's Order to Show Cause, filed July 3, 2018.

ACKNOWLEDGEMENT OF SERVICE

I, _____, received this Subpoena at _____ on _____.

_____

Signature

RETURN OF SERVICE

SERVICE WAS MADE AS FOLLOWS:

DATE: _____

TIME: _____

PLACE: _____

_____

_____

COMMENTS: _____ I served the above-named person.

_____ I served this subpoena on another individual. (explain).

DATED: _____, County of Hawai'i, _____.

NAME OF SERVER:

_____

_____
SIGNATURE OF SERVER

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 Hawaii, Tax Map Key No. (3) 6-8-02:016 (por.)	DOCKET NO. A06-767 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a filed copy of the foregoing was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular or certified mail as noted:

MICHAEL YEE, DIRECTOR Department of Planning, County of Hawai'i Aupuni Center 101 Pauahi Street, Suite 3 Hilo, HI 96720	U.S. CERTIFIED MAIL-RETURN RECEIPT REQUESTED, POSTAGE PREPAID
JOSEPH K. KAMELAMELA, ESQ. Corporation Counsel Department of the Corporation Counsel County of Hawai'i Hilo Lagoon Centre, 101 Aupuni Street, Unit 325 Hilo, HI 96720 Attorneys for County of Hawai'i Department of Planning	U.S. CERTIFIED MAIL-RETURN RECEIPT REQUESTED, POSTAGE PREPAID
LEO R. ASUNCION, JR. Director Office of Planning, State of Hawai'i 235 S. Beretania Street, Suite 600 Honolulu, HI 96813	HAND DELIVERY

DAWN TAKEUCHI APUNA, ESQ.
Deputy Attorney General
Department of the Attorney General, State of Hawai'i
425 Queen Street
Honolulu, HI 96813

Attorneys for Office of Planning, State of Hawai'i

HAND DELIVERY

Mr. Kevin C. Kellow
Manager
Waikoloa Mauka, LLC
1200 S. Brand Blvd. #202
Glendale, CA 91204

U.S. MAIL, POSTAGE PREPAID

DATED: Honolulu, Hawai'i, November 7, 2018.

STEVEN S.C. LIM
DEREK B. SIMON

Attorneys for
WAIKOLOA HIGHLANDS, INC.