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Attorneys for COUNTY OF HAWAI'I PLANNING DEPARTMENT

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) 6-8-002:016 (por.)

DOCKET NO. A-06-767

COUNTY OF HAWAI'I PLANNING
DEPARTMENT'S MEMORANDUM IN
OPPOSITION TO WAIKOLOA
HIGHLANDS, INC.'S MOTION FOR
ISSUANCE OF A SUBPOENA AND
SUBPOENA DUCES TECUM AND/OR
MOTION TO QUASH SUBPOENA AND
SUBPOENA DUCES TECUM;
DECLARATION OF RONALD N.W. KIM;
EXHIBIT "A"; CERTIFICATE OF SERVICE

**COUNTY OF HAWAI'I PLANNING DEPARTMENT'S MEMORANDUM IN
OPPOSITION TO WAIKOLOA HIGHLANDS, INC.'S MOTION FOR ISSUANCE OF A
SUBPOENA AND SUBPOENA DUCES TECUM AND/OR MOTION TO QUASH
SUBPOENA AND SUBPOENA DUCES TECUM**

The County of Hawai'i Planning Department ("County"), by and through its undersigned attorneys, hereby provides its Memorandum in Opposition to Petitioner Waikoloa Highlands, Inc.'s ("Petitioner") Motion for Issuance of a Subpoena and Subpoena Duces Tecum on the bases that the requested production of documents and the witness' testimony are immaterial, irrelevant, and/or unduly repetitious to the issues at hand in this Order to Show Cause. If the State Land Use Commission ("Commission") has already issued the Subpoena and Subpoena Duces Tecum as requested by Petitioner, then the County files this Memorandum in Opposition as a Motion to Quash said subpoenas.

Petitioner appears herein in response to the Commission's Order to Show Cause as to why that certain land at Waikoloa, South Kohala, County and Island of Hawai'i, Tax Map Key No. (3) 6-8-002:016 (por.), covering approximately 731.581 acres of land ("Subject Area"), should not revert to its former land use classification or be changed to a more appropriate classification ("OSC"). The OSC stated the Commission believed Petitioner had failed to perform according to the conditions of the Commission's Findings of Fact, Conclusions of Law, and Decision and Order For A State Land Use District Boundary Amendment," dated June 10, 2008 ("D&O"), and identified twelve conditions that Petitioner may have violated or not yet met.

The Commission held a series of hearings on the OSC, with the most recent hearing occurring on October 24 and 25, 2018. At the hearings, the Commission and parties discussed the issue of whether Petitioner had fulfilled Condition 9 relating to Affordable Housing at these hearings. Petitioner asserted that the County's position was ambiguous and claimed that there was a conflict between the County's Office of Housing and Community Development ("OHCD") and Planning Department as to this issue.¹ The Commission ordered that the County provide an official written statement as to whether Petitioner had fulfilled the affordable housing condition. The County is in the process of finalizing this written statement from its Mayor and will submit this document to the Commission shortly (which states that Petitioner has not fulfilled the affordable housing condition).

At the hearings, the County orally stated the County's position that the Affordable Housing Agreement (Exhibit 8) and the Release of Affordable Housing Agreement (Exhibit 11) which Petitioner introduced and cited in support of Petitioner having fulfilled the affordable housing condition had no legal effect because the agreements were made and effectuated in violation of Hawai'i County Code § 11-5². The well-established legal premise underlying the

¹ At the hearings and in its Motion herein Petitioner's counsel asserts that it only learned that the County did not believe that Petitioner had satisfied the affordable housing requirement as of October 23, 2018. However, Petitioner's counsel had arranged for a meeting with OHCD on October 19, 2018, and Petitioner's counsel had drafted a letter which he requested OHCD to sign and submit to this Commission. Exhibit "A". On October 22, 2018, counsel for the County spoke to Petitioner's counsel on the phone and informed him that OHCD would not sign the letter and that the County did not believe that Petitioner had fulfilled the affordable housing requirement.

² Hawai'i County Code § 11-5(a)(5) provides that a developer may satisfy its affordable housing requirements by donating land to a non-profit entity without unusual site conditions that would make it difficult to build a home sufficient to accommodate the number of affordable homes a developer would have had to provide. Petitioner is claiming it satisfied this condition by conveying property to a for-profit entity, which property is encumbered by easements, odd lot configuration, and drainage issues that prevent building the number of affordable homes a developer would have had to provide.

County's position is that the government cannot be bound by actions for which government officials or agents did not have authority to commit. See *Brescia v. North Shore Ohana*, 115 Hawai'i 477, 499, 168 P.3d 929, 951 (2007) (“[e]stoppel ‘cannot be applied to actions for which the agency or agent of the government has no authority’”) (quoting *Turner v. Chandler*, 87 Hawai'i 330, 334, 955 P.2d 1062, 1066 (App.1998) and *Filipo v. Chang*, 62 Haw. 626, 634, 618 P.2d 295, 300 (1980) (other citations omitted)).

Petitioner filed the present motion on the afternoon of November 7, 2018, and requested: (1) a subpoena compelling the attendance and oral testimony of a representative from the OHCD, and (2) subpoena duces tecum to OHCD and the Office of the Mayor for files relating to the Affordable Housing Agreement, Release of Affordable Housing Agreement, the subsequent project proposed on the property which Petitioner formerly owned, and “any other matters directly relevant and material to” the OSC. The County opposes the request and/or moves to quash any subpoenas which the Commission has issued in this regard on the bases that testimony and those documents are clearly irrelevant, immaterial, and/or unduly repetitious to the matters at hand in the OSC.

As stated above, the Commission prudently exercised its discretion and authority to effectively conduct and streamline these proceedings by excluding irrelevant, immaterial, or unduly repetitious evidence when the Commission ordered that the issue of whether Petitioner had fulfilled Condition 9 would be resolved upon reviewing written documentation stating the County's position on the issue. The County's written documentation will be its official position as to this issue, so allowing further testimony or documentation regarding the Affordable Housing Agreement (Petitioner's Exhibit 8) and/or the Release of Affordable Housing Agreement (Petitioner's Exhibit 11) would clearly be irrelevant, immaterial, and unduly repetitious evidence to the OSC. Petitioner has already submitted both agreements as exhibits and the County is in the process of submitting the documentation requested by the commission. Accordingly, the requests for subpoenas should be denied or the subpoenas should be quashed because Petitioner is seeking evidence that is irrelevant and immaterial to resolve the issue of whether Petitioner had fulfilled Condition 9.

Hawai'i law is clear that the Affordable Housing Agreement and Release of Affordable Housing Agreement have no legal effect because County officers do not have the ability to act in violation of Hawai'i County Code. No amount of discovery that Petitioner might conduct will change the incontrovertible facts that the Affordable Housing Agreement and Release of

Affordable Housing Agreement are not legally effective. Further discovery will not resuscitate these documents made and effectuated in violation of Hawai'i County Code. Petitioner should not be allowed to unduly prolong these proceedings and go on a fishing expedition for evidence extraneous to that which the Commission has already ordered the County to provide in order to resolve the issue of whether Petitioner has fulfilled Condition 9.

Furthermore, given the present status of the OSC proceeding and the evidence presented to date, even if (solely for the purposes of argument) Petitioner had fulfilled Condition 9, the Commission could still validly act upon the OSC as Petitioner has not fulfilled a number of other conditions, most importantly building the backbone infrastructure for this project. The County respectfully submits that the conditions which will be dispositive of the OSC are Condition One ("Petitioner shall develop the Petition Area in substantial compliance with the representations made to the Commission. Failure to develop the Petition Area may result in reversion of the Petition Area to its former classification, or change to a more appropriate classification"), Condition 2 ("Petitioner shall develop the Petition Area and complete buildout of the Project no later than ten (10) years from the date of the Commission's decision and order. For purposes of the Commission's decision and order, 'buildout' means the completion of the backbone infrastructure to allow for the sale of individual lots"), and Condition 3 ("If Petitioner fails to complete buildout of the Project or secure a bond for the completion thereof within ten (10) years from the date of the Commission's decision and order, the Commission may, on its own motion or the request of any party or interested person, file an Order to Show Cause and require Petitioner to appear before the Commission to explain why the Petition Area should not revert to its previous Agricultural classification").³

The OSC also listed Condition 9 (Affordable Housing) as one of the conditions which the Commission believed Petitioner had violated or not yet fulfilled, but Condition 9 was only one of twelve such conditions that the Commission believed Petitioner had violated or not yet fulfilled. The evidence presented to date at the hearings on the OSC showed that Petitioner violated or had not yet fulfilled the remaining eleven conditions which do not directly relate to affordable housing. The evidence also showed that Petitioner had not substantially commenced with any physical use of the Subject Area. Accordingly, the County submits that the Commission could

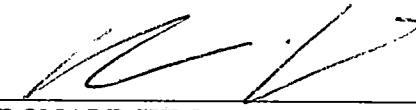
³ HRS 205-4(g) also provides that "[t]he [C]ommission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the [C]ommission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification."

act upon the OSC, find Petitioner in violation, and either revert or change the land classification whether or not Petitioner had fulfilled Condition 9. Therefore, the testimony and documents sought in the present motion are further irrelevant, immaterial, and/or unduly cumulative.

Finally, if the Commission is going to issue and/or not quash the subpoenas, then the County further objects to the subpoenas as being overbroad and burdensome, and for not allowing the County sufficient time to respond.

Dated: Hilo, Hawai'i, November 9, 2018.

COUNTY OF HAWAI'I PLANNING
DEPARTMENT

By 

RONALD KIM
Deputy Corporation Counsel
Its attorney

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)
6-8-002:016 (por.)

DOCKET NO. A06-767

DECLARATION OF RONALD N.W. KIM

DECLARATION OF RONALD N.W. KIM

I, RONALD N.W. KIM, declare the following:

1. I am an attorney duly licensed to practice law before all courts in the State of Hawai'i.
2. I am an attorney employed by the Office of the Corporation Counsel for the County of Hawai'i and am one of the attorneys assigned to represent the COUNTY OF HAWAI'I in this matter.
3. This Declaration is made upon my personal knowledge of the matters set forth herein.
4. Attached hereto as Exhibit "A" is a true and correct copy of a letter drafted by Petitioner's counsel that said counsel presented to the Office of Housing and Community Development for the County of Hawai'i.

I do declare under penalty of law that the foregoing is true and correct.

Dated: Hilo, Hawai'i, November 9, 2018.



RONALD N.W. KIM

[OHCD, COUNTY OF HAWAII LETTERHEAD]

October 23, 2018

Land Use Commission
State of Hawaii
235 South Beretania Street #406
Honolulu, Hawaii 96813

RECEIVED
2018 OCT 22 AM 9:55
COUNTY OF HAWAII
OHCD

Re: Waikoloa Highlands, Inc.
LUC Docket No. A06-767, Order to Show Cause
Tax Map Key No. (3) 6-8-002: 016 ("Petition Area")

Dear Chair Scheuer and Members of the Commission:

This will request that the State of Hawaii Land Use Commission ("**Commission**") at its meeting of October 24, 2018, defer action on the Order to Show Cause filed on July 3, 2018 in the above matter. The requested deferral is for the period of time necessary for Petitioner Waikoloa Highlands, Inc. ("**WHI**"), and the County of Hawaii ("**County**") to accomplish the following goals:

1. Continue negotiations for the identification and conveyance of real property owned by the Petitioner to a third-party developer of affordable housing, and
2. For WHI to process and obtain the necessary County land use entitlements to proceed with development of the Waikoloa Highlands subdivision at the Petition Area, to include without limitation, amendments to Rezoning Ordinance No. 13-29 and Subdivision Application No. SUB-89-000179.

The Commission's approval of this request will allow the County, through its Office of Housing and Community Development ("**OHCD**"), to continue negotiations with WHI on its unique ability to convey additional real property to a third-party developer proposing immediate development of affordable housing in the Waikoloa Village area.

As you know, the OHCD has approved WHI's full satisfaction of its affordable housing obligations under the Commission's Docket No. A06-767 and County Rezoning Ordinance No. 13-29. Those obligations were satisfied through WHI's prior conveyance of the 11.7 acres identified as Tax Map Key ("**TMK**") No. (3) 6-8-002:058 ("**Parcel 58**") to Plumeria at Waikoloa, LLC, which subsequently conveyed Parcel 58 to Pua Melia LLC ("**PML**").

EXHIBIT "A"

October 23, 2018

Waikoloa Highlands, Inc./Pua Melia LLC

PML is the current owner (the third-party developer referenced above) of the proposed HRS 201H mixed-use and affordable housing project at Parcel 58. PML has been working directly with OHCD to pursue the expedited development of its Parcel 58 project, and recently discovered that due to site constraints caused by flood control regulations, PML will need additional land to fully develop the proposed ____ units of affordable housing at Parcel 58.

The lands adjoining Parcel 58 are owned by WHI, and thus are uniquely situated for consolidation with Parcel 58. OHCD has started negotiations with WHI and PML over the potential conveyance of approximately 4 acres of land from WHI to PML to allow the PML affordable housing project to proceed.

Therefore, this will request that the Commission defer action on the OSC to allow the OHCD to assist PML in its development of the HRS 201H affordable housing portion of its project. OHCD will have a representative available for questions from the Commission on this matter at the October 24, 2018 hearing in Kona.

Sincerely,

Neil Gytoku, Housing Administrator
County of Hawai'i
Office of Housing and Community Development
c/o 50 Wailuku Drive
Hilo, Hawai'i 96720-2456

Cc:

Waikoloa Highlands, Inc.
c/o Steven Lim, Esq.
Carlsmith Ball LLP
121 Waianuenue Avenue
Hilo, Hawaii 96720

Pua Melia LLC
c/o Danny Joseph Julkowski
59-362 Kanaloa Drive
Kamuela, Hawai'i 96743

Office of the Corporation Counsel
County of Hawaii
Attention: Malia Ho (OHCD) and Ronald Kim (Planning Department)
101 Aupuni Street #325
Hilo, Hawaii 96720

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OF THE STATE OF HAWAI'I

In the Matter of the Petition of

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CERTIFICATE OF SERVICE

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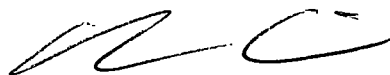
I hereby certify that a copy of the foregoing document was served upon the following by
mailing the same, postage prepaid, on November 9, 2018:

LEO ASUNCION, Director
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Dated: Hilo, Hawai'i, November 9, 2018.



RONALD KIM
Deputy Corporation Counsel