

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 15 P 2:39

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 TO AN AUTHORIZED  
REPRESENTATIVE OF THE STATE OF  
HAWAII OFFICE OF PLANNING;  
MEMORANDUM IN SUPPORT OF  
MOTION; EXHIBITS "43" - "44";  
DECLARATION OF DEREK B. SIMON;  
CERTIFICATE OF SERVICE

WAIKOLOA HIGHLANDS, INC.'S MOTION FOR ISSUANCE OF A SUBPOENA TO AN  
AUTHORIZED REPRESENTATIVE OF THE STATE OF HAWAI'I OFFICE OF PLANNING

**I. RELIEF SOUGHT**

WAIKOLOA HIGHLANDS, INC. ("**WHI**"), as successor-in-interest to Petitioner  
Waikoloa Mauka, LLC to that certain parcel of land consisting of approximately 731.581 acres  
and currently identified by Tax Map Key No. (3) 6-8-002: 016, hereby respectfully requests that  
the STATE OF HAWAI'I LAND USE COMMISSION (the "**Commission**") issue a subpoena  
compelling the attendance and oral testimony of a representative or representatives of the State

of Hawai'i Office of Planning at the Commission's November 28, 2018 hearing on this Docket.

**II. GROUNDINGS 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 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 28, 2018.

DATED: Honolulu, Hawai'i, November 15, 2018.



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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.)

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MEMORANDUM IN SUPPORT OF MOTION

**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION**

At the State of Hawai'i Land Use Commission's (the "**Commission**") October 25, 2018 hearing on the Order to Show Cause filed by the Commission on July 3, 2018 (the "**OSC**"), Waikoloa Highlands, Inc. ("**WHI**") called State of Hawai'i Office of Planning ("**OP**") planner Rodney Funakoshi as a witness. After WHI provided its offer of proof as to why Mr. Funakoshi's testimony was directly relevant to the Commission proceedings on the OSC, Commission Chair Jonathan Likeke Scheuer acknowledged but did not to act upon WHI's request. Continued proceedings on the OSC are presently set to resume on October 28, 2018, at which time WHI will again renew its request to examine a representative or representatives from OP. The subpoena requested herein is intended to ensure that such a representative is both made available for examination and sufficiently prepared to respond WHI's questions.

**II. 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 a subpoena shall:

(1) Be in writing;

...

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

HAR § 15-15-69(c) requires that three original copies of the subpoena requested be submitted together with this Motion.

### **III. DISCUSSION**

Since the October 25th hearing and in preparation for the November 28th hearing on the OSC, WHI made several attempts to obtain OP's agreement to make a representative available for examination, thereby avoiding the necessity of this Motion. *See* Simon Decl. at ¶¶2-5; **Exhibit 43**, attached hereto. On November 14, 2018, at approximately 1:40 p.m., counsel for OP informed WHI's counsel via telephone that OP would be declining WHI's request for a representative to be made available for questioning at the November 28th hearing. *See* Simon Decl. at ¶6.

In light of OP's position, WHI respectfully requests that the Commission issue a subpoena compelling the attendance and oral testimony of a representative or representatives of OP at the November 28th hearing. *See* HAR § 15-15-69(b)(1). As previously set forth in WHI's request to OP, *see* Exhibit 43, WHI is seeking to elicit testimony from a representative or representatives of OP regarding OP's position on the following issues germane to the OSC:

1. all past, present and pending Commission proceedings on Status Reports or similar Commission actions relating to potential non-performance by petitioners with the conditions of approval for their respective Decisions and Orders ("D&O"); and
2. all past, present and pending Commission proceedings on OSCs or other similar Commission actions that have resulted in, or may result in, reclassification or reversion of D&O district boundary amendments.



See HAR § 15-15-69(b)(4). Three copies of the requested subpoena to the representative(s) of OP are attached hereto as **Exhibit 44**. See HAR § 15-15-69(c).

WHI's questions on each docket falling within the parameters set forth above will focus on the approval date of the respective D&O, a short description of the proposed project, the current development status of the project and the current status of any Status Report, OSC reversion action or other enforcement action by the Commission, and OP's position on the same. See HAR § 15-15-69(b)(1)&(4). WHI's line of questioning seeks to understand what distinguishes WHI from other petitioners that have not been so aggressively targeted for an OSC and/or a reversion, and have been afforded an opportunity to bring their projects into compliance with their respective D&Os. *See id.*

OP is a mandatory party to all Commission proceedings on boundary amendments, including subsequent enforcement proceedings. See HRS § 205-4. Therefore, OP is deeply familiar with and has taken positions on all of the issues that WHI seeks to illicit testimony on. In fact, a representative from OP is the only witness that could provide responses to the questions noted above. Absent examining Commission staff, WHI has no other means to obtain this information.

#### IV. **CONCLUSION**

For the foregoing reasons, WHI respectfully requests that the Commission issue a subpoena compelling the attendance and oral testimony of a representative or representatives of OP at the November 28th OSC Hearing.

DATED: Honolulu, Hawai'i, November 15, 2018.



---

STEVEN S.C. LIM  
DEREK B. SIMON

Attorneys for  
WAIKOLOA HIGHLANDS, INC.

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

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(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, the original Petitioner in Docket No. A06-767 (this “**Docket**”).

2. On November 7, 2018, I left a voicemail with counsel for the State of Hawai‘i Office of Planning’s (“**OP**”) requesting to discuss an issue related to this Docket.

3. OP’s counsel returned my telephone call and left a voicemail in response on November 7, 2018.

4. I returned OP’s counsel’s November 7, 2018 voicemail on November 8, 2018, again indicating that I wished to discuss an issue related to this Docket.

5. Attached hereto as **Exhibit “43”** is a true and correct copy of an email exchange between myself and Counsel for OP discussing WHI’s request to examine a representative of OP at the State of Hawai‘i Land Use Commission’s (the “**Commission**”) November 28, 2018 hearing on this Docket.

6. On November 14, 2018, at approximately 1:40 p.m., Counsel for OP informed me via telephone that OP was unwilling to voluntarily make a representative available for examination by WHI at the Commission's November 28, 2018 hearing on this Docket.

7. Attached hereto as Exhibit "44" are three copies of the Subpoena to an authorized representative of OP to appear before the Commission on November 28, 2018, at the Commission's hearing on this Docket.

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

DATED: Honolulu, Hawai'i, November 15, 2018.



---

DEREK B. SIMON





## Derek B. Simon

---

**From:** Derek B. Simon  
**Sent:** Monday, November 12, 2018 12:38 PM  
**To:** Apuna, Dawn T  
**Cc:** Steven S.C. Lim  
**Subject:** Re: Waikoloa Highlands - Request for Representative of OP for Examination

Dawn:

As a preliminary matter (the OP answers may lead to inquiry on more matters), our questions will relate to OP's positions on the following:

1. All past, present and pending LUC proceedings on Status Reports or similar LUC actions relating to potential non-performance by Petitioners with D&O conditions of approval; and
2. All past, present and pending LUC proceedings on OSCs or other similar LUC actions which resulted in, or which may result in reclassification or reversion of D&O district boundary amendments.

Our questions on each D&O noted will ask OP for the approval date of the D&O and a short description of the proposed project, the current status of development of the land, and the current status of any Status Report, enforcement or OSC reversion action by the LUC. The relevance of this line of questioning is to understand what distinguishes Waikoloa Highlands, Inc. from other petitioners that have not been so aggressively targeted for an OSC and/or a reversion.

Please let me know if you have any questions regarding this request.

Thanks,  
Derek

--

Sent from my iPhone

On Nov 11, 2018, at 9:19 PM, Apuna, Dawn T <[dawn.t.apuna@hawaii.gov](mailto:dawn.t.apuna@hawaii.gov)> wrote:

Hi Derek,

Are there specific questions you have for OP? I believe Steve mentioned questioning Rodney Funakoshi regarding past OP positions on other OSCs? Is this part of your intended questioning of OP? Let me get back to you on whether we will have an OP representative at the Nov. 28th hearing.

Thank you.  
Dawn

Dawn T. Apuna

Deputy Attorney General

State of Hawaii

586-1195

---

**From:** Derek B. Simon <[dsimon@carlsmith.com](mailto:dsimon@carlsmith.com)>

**Sent:** Sunday, November 11, 2018 3:47:37 PM

**To:** Apuna, Dawn T

**Cc:** Steven S.C. Lim

**Subject:** Waikoloa Highlands - Request for Representative of OP for Examination

Dawn,

This is in follow up to my voicemails of last week. At the conclusion of the Commission's October 25<sup>th</sup> hearing, WHI requested an opportunity to examine Rodney Funakoshi or another representative from OP regarding OP's position on the OSC. At that time, Chair Scheuer did not directly rule on WHI's request.

Can you please advise as to OP's position on making one or more of its representatives available for examination at the November 28<sup>th</sup> hearing? Please let me know if you have any questions or would like to discuss this request further over the phone.

Many thanks,

**DEREK B. SIMON**  
**Associate | Carlsmith Ball LLP**

<image001.jpg>

1001 Bishop Street, Suite 2100  
Honolulu, HI 96813  
Tel: 808.523.2589 Fax: 808.523.0842  
**Honolulu** · Hilo · Kona · Maui · Los Angeles

[www.carlsmith.com](http://www.carlsmith.com)

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(3) 6-8-02:016 (por.)

DOCKET NO. A06-767

SUBPOENA FOR REPRESENTATIVE OF  
THE STATE OF HAWAI'I OFFICE OF  
PLANNING

**SUBPOENA FOR REPRESENTATIVE OF THE STATE OF HAWAI'I**  
**OFFICE OF PLANNING**

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 the State of Hawai'i**  
**Office of Planning, 235 S. Beretania Street, Suite 600, Honolulu, Hawaii 96813**, 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



and address the matters set forth in Exhibit A, attached hereto.

DATED: Honolulu, Hawai'i \_\_\_\_\_.

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

Exhibit "A"

State of Hawai'i Office of Planning's ("OP") position on the following:

1. all past, present and pending State of Hawai'i Land Use Commission (the "Commission") proceedings on Status Reports or similar Commission actions relating to potential non-performance by petitioners with the conditions of approval for their respective Decisions and Orders ("D&O"); and

2. all past, present and pending Commission proceedings on OSCs or other similar Commission actions that have resulted in, or may result in, reclassification or reversion of D&O district boundary amendments.

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: \_\_\_\_\_, City & County of Honolulu, \_\_\_\_\_.

NAME OF SERVER:

\_\_\_\_\_

\_\_\_\_\_  
SIGNATURE OF SERVER

CARLSMITH BALL LLP

STEVEN S.C. LIM 2505  
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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



and address the matters set forth in Exhibit A, attached hereto.

DATED: Honolulu, Hawai'i \_\_\_\_\_.

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

**Exhibit "A"**

State of Hawai'i Office of Planning's ("**OP**") position on the following:

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2. all past, present and pending Commission proceedings on OSCs or other similar Commission actions that have resulted in, or may result in, reclassification or reversion of D&O district boundary amendments.

ACKNOWLEDGEMENT OF SERVICE

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\_\_\_\_\_  
Signature

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\_\_\_\_\_

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\_\_\_\_\_ I served this subpoena on another individual.  
(explain).

DATED: \_\_\_\_\_, City & County of Honolulu, \_\_\_\_\_.

NAME OF SERVER:

\_\_\_\_\_

\_\_\_\_\_  
SIGNATURE OF SERVER

CARLSMITH BALL LLP

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Kailua Kona, Hawai'i 96740, to testify as a witness in connection with the above-entitled matter



and address the matters set forth in Exhibit A, attached hereto.

DATED: Honolulu, Hawai'i \_\_\_\_\_.

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

Exhibit "A"

State of Hawai'i Office of Planning's ("OP") position on the following:

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Signature

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(explain).

DATED: \_\_\_\_\_, City & County of Honolulu, \_\_\_\_\_.

NAME OF SERVER:

\_\_\_\_\_

\_\_\_\_\_  
SIGNATURE OF SERVER

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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

U.S. CERTIFIED MAIL-RETURN RECEIPT  
REQUESTED, POSTAGE PREPAID

Attorneys for County of Hawai'i Department  
of Planning

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

HAND DELIVERY

Attorneys for Office of Planning, State of  
Hawai'i

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 15, 2018.



---

STEVEN S.C. LIM  
DEREK B. SIMON

Attorneys for  
WAIKOLOA HIGHLANDS, INC.