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LAND USE COMMISSION
STATE OF HAWAII

2018 DEC - 7 A 7 54

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of

KAONOULU RANCH

To Amend the Agricultural Land Use
District Boundary into the Urban
Land Use District for
approximately 88 acres at
Kaonoulu, Makawao-Wailuku,
Maui, Hawaii

DOCKET NO. A94-706

INTERVENORS' MOTION TO CONDUCT
PHASE II OF CONTESTED CASE PENDING
SINCE 2012, AND FOR FINAL DECISION;
MEMORANDUM IN SUPPORT;
DECLARATION OF ALBERT PEREZ;
APPENDICES "1" – "3"; CERTIFICATE OF
SERVICE

Filed by: Maui Tomorrow Foundation, Inc.,
South Maui Citizens for Responsible Growth
and Daniel Kanahele

**INTERVENORS' MOTION
TO CONDUCT PHASE II OF CONTESTED CASE PENDING SINCE 2012,
AND FOR FINAL DECISION**

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahale (“**Intervenors**”), through their attorney, Tom Pierce Attorney at Law LLLC, hereby submit to the Hawai`i Land Use Commission (“**Commission**”) this *Motion to Conduct Phase II of Contested Case Pending Since 2012, and For Final Decision*.

Intervenors respectfully request that the Commission take the necessary steps to finalize this contested case that was initiated six years ago, in 2012.

This contested case relates to a decision and order of this Commission that was entered *almost a quarter century ago* to permit a light industrial park in Kihei, Maui.

The data and reports on which the 1995 Decision and Order were based are obsolete and have little relationship to the current conditions in the Kihei, Maui region.

Intervenors filed a motion for an order to show cause in 2012. Thereafter, the Commission issued the order to show cause, bifurcated the contested case into two phases, and held the Phase I hearing, after which the Commission ruled that the large retail shopping complex and affordable housing project being pursued by the current owners / Petitioners violated the 1995 Decision and Order.

The Commission intended to proceed to Phase II when the Petitioners requested a stay. In requesting the stay, the Petitioners expressly acknowledged to the Commission that substantial commencement of construction activities had never been initiated, and promised that no development activities would occur during the stay. *See* Appendices “1” and “2”, attached hereto.

Based on the Petitioners' representations, the Commission entered the *Order Granting Pi'ilani Promenade South, LLC, and Pi'ilani Promienade North, LLC's, Motion to Stay Phase II of the Order to Show Cause Proceeding*, on July 12, 2013 ("**2013 Stay**"). See Appendix "3", attached hereto.

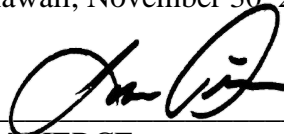
Through this Motion, Intervenors specifically request that the Commission:

- (1) Lift the 2013 Stay;
- (2) After a non-evidentiary hearing as deemed necessary by the Commission, and after full review of the record by the Commissioners, adopt findings of fact and conclusions of law with respect to Phase I of the contested case based on the previous submissions of the parties;
- (3) Hold a hearing on Phase II, which will determine whether or not the Petition Area should be reverted to its former classification as State Agriculture land; and,
- (4) Issue a final decision and order.

This motion is brought pursuant to Hawai'i Administrative Rules §§ 15-15-70 and 15-15-93, and is supported by the attached Memorandum in Support, the documents attached hereto, and the record herein.

Before filing this Motion, Intervenors sought agreement from Pi'ilani regarding stipulations that might make the procedures outlined in this Motion more efficient but were unsuccessful in such effort.

DATED: Makawao, Maui, Hawaii, November 30, 2018.



TOM PIERCE
Attorney for Maui Tomorrow
Foundation, Inc., South Maui Citizens
for Responsible Growth, and Daniel Kanahele

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MEMORANDUM IN SUPPORT

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahale (“**Intervenors**”), through their attorney, Tom Pierce Attorney at Law LLLC, hereby submit to the Hawai`i Land Use Commission (“**Commission**”) this Memorandum in Support of their *Motion to Conduct Phase II of Contested Case Pending Since 2012, and For Final Decision*.

I. INTRODUCTION

In 2012, Intervenors initiated this contested case, which still remains pending today. Through this Motion, Intervenors request finality and closure. In 2012, Intervenors requested that the Commission issue an order to show cause why the Petition Area¹ should not be reverted to its former classification based on violations of the 1995 Decision and Order. The Commission issued the order to show cause, and over the objections of Intervenors, bifurcated the case into two phases, with the first phase to determine whether there had been a violation, and the second phase to determine whether the Petition Area should be reverted. At the conclusion of Phase I in 2013, the Commission ruled that Pi`ilani’s² retail shopping complex proposal and Honua`ula’s³ affordable housing proposal violated a number of conditions of the 1995 Decision and Order, including failing to develop the Petition Area in substantial compliance with the representations made by the original petitioner. Before Phase II was initiated, the Commission, over the objections of the Intervenors, ordered that the hearing on Phase II, *i.e.*, the reverter issue, be

¹ The Petition Area is identified in Footnote 11, *infra*.

² Petitioners Pi`ilani Promenade South (“**PPS**”), LLC and Pi`ilani Promenade North (“**PPN**”) are hereinafter referred to collectively and singularly as “**Pi`ilani**”.

³ Petitioner Honua`ula Partners is referred to herein as “**Honua`ula**” or “**HP**”.

stayed. *See Order Granting [Pi`ilani's] Motion to Stay Phase II of the Order to Show Cause Proceeding*, filed 7/12/2013 (“**2013 Stay**”), attached hereto as Appendix “3”.

The 2013 Stay has now been in effect *for more than four years*. However, Pi`ilani recently announced to the Commission that it had decided to abandon its attempt to amend the 1995 Decision and Order, and to instead develop the Petition Area in “substantial compliance” with representations made by the original petitioner. Pi`ilani acknowledged that this would ultimately require the stipulation of the Intervenors to dismiss the current contested case. However, after a good faith evaluation of a number of development proposals submitted by Pi`ilani over the past months, as well as extensive discussions with numerous community groups and stakeholders, Intervenors have concluded that Pi`ilani’s revised proposals will not be capable of fulfilling the conditions of the 1995 Decision and Order which specifically called for a 123-lot light industrial project. *See Declaration of Albert Perez, Executive Director of Maui Tomorrow*, attached hereto. Moreover, the reports and data on which the 1995 Decision and Order were based are obsolete and failed to anticipate significant changes to the Kihei environment over the last two decades.

Therefore, Intervenors respectfully request that the Commission conclude the contested case through the following procedural steps: (1) lift the 2013 Stay; (2) after a non-evidentiary hearing as deemed necessary by the Commission, and after full review of the record by the Commissioners, adopt findings of fact and conclusions of law with respect to Phase I of the contested case based on the previous submissions of the parties; (3) hold a hearing on Phase II, which will determine whether or not the Petition Area should be reverted to its former classification as State Agriculture land; and, (4) issue a final decision and order.

Under Chapter 91 of the Hawai`i Revised Statutes, the Commission has the obligation to render a *final* decision within a reasonable time. After more than a *four and one-half year* stay of the contested case proceedings, Petitioners⁴ may not argue that they are entitled to further delays on finality based on further iterations of their proposed plans for the Petition Area. In fact, as discussed below, the 2013 Stay granted by the Commission was specifically conditioned on Pi`ilani's intention to timely amend the 1995 Decision and Order. *See* Pi`ilani's *Motion to Stay Phase II of the Order to Show Cause Proceeding*, filed 4/8/2013 ("**Pi`ilani Motion to Stay**"), at 3, attached hereto as Appendix "1". The contested case continues to be a live controversy, with Phase I already concluded. The Petitioners may not of their own initiative withdraw from the contested case to avoid the penalty phase of the contested case proceeding, *i.e.*, the Phase II hearing.

Nor may Petitioners argue that the issue has become moot. The show cause hearing was based on the specific development proposal that was presented and defended by the Petitioners during the Phase I hearing in 2012 and 2013. Petitioners had the opportunity to withdraw at that time before the Commission began taking evidence. Instead, the Petitioners strenuously argued that their retail shopping complex proposal and affordable housing proposal substantially complied with representations made by the original petitioner to the Commission in 1994 and 1995 when it sought to build a light industrial project. Intervenors incurred significant time and expense presenting their case to the Commission as to why that proposal violated the 1995 Decision and Order. After reviewing the evidence, the Commission agreed with Intervenors.

Nevertheless, even without the Commission's findings in Phase I, reverter is still appropriate and necessary based simply on the undisputed fact that the original petitioner failed

⁴ Pi`ilani and Honua`ula are collectively referred to as the "**Petitioners**".

to commence and/or develop the project within the express ten-year deadline established in the Commission Rules.⁵ The untimeliness of the development is further compounded by a series of actions taken by the various owners in the chain of title that are based on land speculation rather than based on a legitimate desire to initiate a development purportedly needed by the community. This type of conduct has been specifically identified by the Office of State Planning as abusive of the State land use process.⁶

Finally, it is undisputed that there has been no substantial commencement of development of the Petition Area. This has been specifically acknowledged by the Petitioners through their previous formal representations to the Commission. Specifically, Pi`ilani, in order to obtain a stay of the contested case, represented to the Commission that it had never substantially commenced development of the project and would not conduct additional development activities so long as the stay remained in effect. *See* Pi`ilani Motion to Stay at 4 (explaining “no significant grading or construction has occurred” or will occur during pendency of the stay), Appendix “1”. In a joinder in support of Pi`ilani’s Motion to Stay, Honua`ula

⁵ “**Commission Rules**” means the Hawai`i Administrative Rules (“**HAR**”) Title 15, Subtitle 3, Chapter 15. *See* HAR § 15-15-50(c)(19):

Petitioners submitting applications for reclassification to the urban district shall also represent that development of the subject property in accordance with the demonstrated need therefore ***will be accomplished before ten years after the date of commission approval***. In the event full urban development cannot substantially be completed within such period, the petitioner shall also submit a schedule for development of the total of such project in increments together with a map identifying the location of each increment, each such increment to be completed within no more than a ten-year period[.]

(Emphasis added).

⁶ *See* Part V of this Memorandum, quoting from *DW Aina Le‘a Dev., LLC v. Bridge Aina Le‘a, LLC*, which opinion references recommendations made by the Office of State Planning to the Hawai`i legislature in 1990, including the following excerpt: “[A] positive approach to comprehensive land use planning and a strong preventive measure to land speculation, necessitates this bill ***which will require that successful applicants for land use boundary amendments either ‘use it, or lose it’.***” (Emphasis added).

confirmed that it had not substantially commenced the development of its project and had no intention to do so during the pendency of the stay. *Honua`ula Partners, LLC's Joinder in [Pi`ilani's Motion to Stay]*, filed 4/16/2013 (“**Honua`ula Joinder in Motion to Stay**”), attached hereto as Appendix “2”.

Under fundamental principles of law, Petitioners are now estopped from arguing anything contrary to their earlier representations to the Commission. *See, e.g., State v. Kalaola*, 124 Hawai`i 43, 72, 237 P.3d 1109, 1138 (2010) (“The doctrine of judicial estoppel prevents parties from playing fast and loose with the court or blowing hot and cold during the course of litigation.”) (quoting *State v. Fields*, 115 Hawai`i 503, 534, 168 P.3d 955, 986 (2007) (quoting *Roxas v. Marcos*, 89 Hawai`i 91, 124, 969 P.2d 1209, 1242 (1998) (citations and some internal quotation marks omitted)).⁷

II. FACTUAL AND PROCEDURAL BACKGROUND SUMMARY

Below is a brief summary of the factual and procedural background relating to the Petition Area and this contested case. Previous filings to the Commission in this contested case, as well as documents accepted into evidence by the Commission, are available on the Commission’s website.⁸ Highlighted portions of footnotes in this Memorandum include links to pertinent documents and evidence that is part of the Commission’s record that is located on the

⁷ To the extent any activity has occurred, it has only included minimal grubbing of the land and erection of dust fencing, both in support of the nonconforming large-scale retail shopping center, and therefore not in furtherance of an *approved* development.

⁸ All exhibits referred to in this Motion were accepted into evidence by the Commission during the OSC Hearing. Unless attached hereto, these Exhibits may be reviewed on the Commission’s website at the following address: <http://luc.hawaii.gov/pending-petitions-2/motions/a94-706-kaunoulu-ranch/>.

Commission’s website. Significant factual detail is set forth in Intervenor’s initial filing to the Commission in 2012 (Motion for OSC).⁹

A. The 1995 D&O Is Based on a Development Proposal Presented Almost a Quarter Century Ago

On February 10, 1995, the Commission entered the *Findings of Fact, Conclusions of Law, and Decision and Order* (“**1995 D&O**”),¹⁰ thereby granting the proposal of the original petitioner, Kaonoulu Ranch, to construct a light industrial park within the 88 acre Petition Area.¹¹ The light industrial park would consist of 123-lots¹² which would be purchased by small business owners who would likely provide local services to the nearby hotels and retailers.¹³ The Commission’s decision approving the 1995 D&O was based on data and reports submitted by the original petitioner that fails to analyze the current development climate, land use, and market conditions.¹⁴

⁹ See detailed factual background on pages 8 to 18 of Intervenor’s [Motion for a Hearing, Issuance of Order to Show Cause, and Other Relief, filed May 24, 2012](#) (“**Motion for OSC**”).

¹⁰ The 1995 D&O is [Intervenor Exhibit I-2](#).

¹¹ A map of the Petition Area is attached to Intervenor’s Motion for OSC as Exhibit 1 (*see* link in Footnote 9, *supra*). The Petition Area was subdivided into seven parcels, as follows:

1. Parcel (2) 3-9-001-016, 30.13 acres, owned by PPN;
2. Parcel (2) 3-9-001-170, 18.52 acres, owned by PPS;
3. Parcel (2) 3-9-001-171, 19.54 acres, owned by PPS;
4. Parcel (2) 3-9-001-172, 4.9 acres, owned by PPS;
5. Parcel (2) 33-9-001-173, .92 acres, owned by PPS;
6. Parcel (2) 3-9-001-174, .86 acres, owned by PPS;
7. Parcel (2) 3-9-001-169, 13.13 acres, owned by HP

¹² See sketch of light industrial park, [Pi`ilani Exhibit 1](#).

¹³ See original petition filed by Kaonoulu Ranch, [Intervenor Exhibit I-1](#).

¹⁴ See [Pi`ilani Exhibits 2 - 6](#) (relating to original petition submissions).

B. The Petition Area Changed Hands Multiple Times After Entry of the 1995 D&O

Kaonoulu Ranch never initiated construction of the light industrial park project. Instead, it held the Petition Area until 2005, then sold the property to Maui Industrial Partners, LLC (“MIP”). See [Motion for OSC](#) at 14. MIP initiated subdivision of the Petition Area into seven lots. *Id.* In 2009, MIP, sold one of the lots to Honua`ula for an affordable housing project. *Id.* at 15. In 2010, MIP sold the remaining lots to Pi`ilani. *Id.* at 16.¹⁵ In violation of the 1995 D&O and the Commission Rules, this was done without first obtaining the consent of the Commission, and without obtaining an amendment to the 1995 D&O. In further violation of the 1995 D&O and the Commission rules, annual reports filed by the developers failed to properly inform the Commission of these activities. *Id.* at 14, 17.

C. The Current Petitioners Ignored the Conditions in the 1995 D&O

In 2012, Pi`ilani began preparing the Petition Area for construction by erecting dust barriers. Intervenors investigated and discovered that rather than a light industrial project, Pi`ilani planned to construct a “415,000 square foot development with national and local retailers which will provide a one-stop shopping experience for the Island.” [Motion for OSC](#) at 16.¹⁶ Not only were the uses different, the concept drawing for the retail shopping project was entirely different from the concept plan originally proposed by Kaonoulu Ranch.¹⁷

Intervenors additionally learned that Honua`ula was proceeding with an effort to construct multi-family dwellings on the portion of the Petition Area that it owned, even though

¹⁵ See Footnote 11 identifying the ownership of each of the lots.

¹⁶ See [Intervenors Exhibit I-19](#).

¹⁷ Compare [Pi`ilani Exhibit 1](#) (light industrial concept drawing) and [Piilani Exhibit 31](#) (retail shopping complex concept drawing).

this had never been proposed by the original Petitioner and was not a permitted use contemplated by the 1995 D&O. *Id.* at 15.

D. Initiation of the Contested Case and the 2012-2013 Show Cause Hearing

In May 2012, the Intervenors filed a motion with the Commission requesting an order to show cause be issued by the Commission as to why the land should not be reverted for failure to fulfill the conditions set forth in the 1995 D&O.

In early September 2012, the Commission issued the Order to Show Cause (“OSC”).¹⁸ The Commission also granted the Intervenors formal intervenor status.¹⁹ This initiated the administrative hearing, *i.e.*, the “contested case”, as provided by Hawai`i Revised Statutes Chapter 91.

To make the hearing more efficient, the Commission, over the objection of Intervenors, bifurcated the contested case into two parts or phases. The Commission ordered that in the first part (“**Phase I**”), the Commission would consider whether the Petitioners “violated the applicable conditions of the [1995 D&O].” In the event the Commission concluded the Petitioners violated the “representations and commitments made” by the original Petitioner, the Commission would schedule hearings on the second part (“**Phase II**”), to “determine whether reversion or other designation is the appropriate remedy.”²⁰

E. The Commission Concluded that the Petitioners Violated the 1995 D&O

Between November 2012 and February 2013, the Commission held hearings on Phase I during which the parties presented their evidence.

¹⁸ See [Order Granting Movants’ Motion for a Hearing, Issuance of Order to Show Cause, and Other Relief, filed 9/10/2012](#) (“OSC”).

¹⁹ [Order Granting Movants’ Petition to Intervene in Show Cause Hearing, filed 9/17/2012](#).

²⁰ See [Scheduling Order, filed 9/27/2012](#).

At the conclusion of the Phase I hearing, the Commission ordered the parties to prepare findings of fact and conclusions of law (“**FOF/COL**”). Thereafter, the parties submitted their respective FOF/COL.²¹

After the parties each submitted their FOF/COL, the Commission formally concluded that the current Petitioners had violated the 1995 D&O. The Commission’s website summarizes the Commission’s conclusions as follows:

On February 7, 2013, the [Commission] determined under Phase I of the Order to Show Cause proceeding that [Pi`ilani and Honua`ula] had violated Condition Numbers 5, 15, and 17 of this Commission’s Findings of [the 1995 D&O].²²

Condition 5 of the 1995 D&O required construction of a frontage road parallel to Pi`ilani Highway. Condition 15 required the Petitioners to develop the Petition Area in “substantial compliance with the representations made to the Commission.” Condition 17 required the Petitioners to timely provide proper and accurate information in annual reports.²³

Before the Commission could adopt written FOF/COL, the Petitioners requested a stay of the proceedings.

F. The Petitioners Acknowledged No Substantial Commencement of the Development in Order to Obtain a Stay of the Phase II Proceedings

In April 2013, Pi`ilani filed its Motion to Stay, attached hereto as Appendix “1”. The Motion to Stay essentially argued that a stay would further administrative efficiency because the Petitioners intended to file by not later than December 31, 2013 a motion to amend the 1995 D&O so that their current development proposal would conform and no longer be in violation.

²¹ See [Intervenors’ Proposed FOF/COL, filed 12/24/2012](#). See [Office of Planning’s Proposed FOF/COL, filed 12/21/2012](#).

²² See [Commission’s Docket Status](#).

²³ See 1995 D&O, [Intervenors Exhibit I-2](#).

All of the Petitioners further promised that they would refrain from construction activities during the course of the stay.

In the Motion to Stay, Pi`ilani made a number of important representations to the Commission, which were supported by the affidavit of the vice president of both the Pi`ilani companies.

First, Pi`ilani represented that, as of April 2013, the Petitioners ***had not conducted significant grading within the Petition Area and had never commenced any other construction activities***. Motion to Stay at 4.

Second, Pi`ilani promised that ***they would not commence any construction activities until the Commission ruled on the contemplated motion to amend***. Motion to Stay at 4.

Third, both Pi`ilani and Honua`ula emphasized that ***Honua`ula had not commenced its development project and had no intention to do so in the foreseeable future***. Motion at 5. See Pi`ilani's Motion to Stay, attached hereto as Appendix "1" and Honua`ula's Joinder in Motion to Stay, attached hereto as Appendix "2".

The Petitioners then argued that there would be no prejudice to the parties during the course of the stay and also argued that denying Pi`ilani the stay they requested would be unjust:

Given that there is and will be no construction activity on the Piilani Parcels, and also given Piilani's commitment to file the Motion to Amend and not to engage in construction on the Piilani Parcels unless and until the Commission grants the Motion to Amend, it would be unjust and inefficient to subject Piilani to Phase II of the Show Cause Hearing and the possibility of reversion of the Piilani Parcels to the Agricultural District.

Motion to Stay at 5.

Intervenors opposed the Motion to Stay, and also requested that the Commission initiate the Phase II proceeding and conclude the contested case at the earliest practicable time.²⁴

However, on July 12, 2013, the Commission granted the 2013 Stay, attached hereto as Appendix “3”, which stayed the contested case. The 2013 Stay ordered both Pi`ilani and Honua`ula to refrain from any development activities, and that if they did commence “any construction or development activities” . . . it would result in the “immediate lifting of the stay relative to their parcels and the commencement of Phase II . . .” 2013 Stay at 5. The 2013 Stay was also conditioned upon the fact that Pi`ilani had represented that it would file the motion to amend the D&O “to allow development of its proposed Pi`ilani Promenade project as depicted in its existing conceptual plan not later than December 31, 2013.” 2013 Stay at 5.

G. Pi`ilani’s Motion to Amend the 1995 D&O to Permit the Retail Shopping Complex and the Related Environmental Impact Statement

In September 2013, the Commission entered an order determining that the revised project may result in environmental impacts, and required Pi`ilani to submit an environmental impact statement (EIS).

On December 31, 2013, Pi`ilani filed its motion to amend. In addition to requesting deletion or modification of numerous conditions set forth in the 1995 D&O, Pi`ilani requested a “sub-docket number” that would apply solely to the Pi`ilani parcels thereby permitting it and Honua`ula to no longer be bound together by the terms of the 1995 D&O.

The motion to amend was accompanied by a letter, dated December 31, 2013, in which Pi`ilani requested that the hearing on the motion to amend not be scheduled for a hearing until after a hearing on the EIS for the revised project. Pi`ilani further represented to the Commission

²⁴ See [Intervenors Memorandum in Opposition to \[Pi`ilani’s Motion to Stay\]](#), filed 4/16/2013; and [Intervenors Motion to Conclude Contested Case at the Earliest Practicable Time](#), filed 4/16/2013; and [Intervenors’ Supplemental Memorandum in Support . . .](#), filed 6/3/2013.

that it anticipated that the EIS “will be ready for submission and acceptance by the Commission in mid-summer [of 2014]”.

However, it was not until three years later, in the spring of 2017 that Pi`ilani submitted the Final EIS.

On July 27, 2017, the Commission issued its FOF/COL and D&O denying the acceptance of the Final EIS due to inadequacies in the EIS.

H. After Four and One-Half Years, Pi`ilani Abandons the Retail Shopping Complex and Proposes to Instead “Substantially Comply” with the 1995 D&O

On July 5, 2018, through a status report to the Commission, Pi`ilani formerly stated as follows:

Since July 2017, Piilani and Honuaula have been meeting to discuss development of the Petition Area in light of the procedural history and non-acceptance of the EIS. After much discussion, *Piilani has decided to forego each of the Retail Project and the Mixed Use Project*, and to develop the Petition Area together with Honuaula *in substantial compliance* with the representations made to the Commission, as required by condition 15 of the [1995] D&O (the "Original Plan").

See [Status Report of \[Pi`ilani\], Successor Petitioners to Kaonoulu Ranch](#), filed 7/5/2018, at 4 (emphasis and bracketed material added).

At a hearing on July 11, 2018, the Petitioners similarly informed the Commission that they would be preparing a design that purportedly would fulfill the 1995 D&O. Additionally, Pi`ilani’s representatives stated that they would be conducting outreach with the Intervenors and with other members of the community regarding a design that would be consistent with the “Original Plan”. At this hearing, the Petitioners further acknowledged that its ability to proceed would require the agreement of the Intervenors to dismiss the pending OSC contested case proceeding.

I. Intervenor’s Meetings with Pi`ilani and Evaluation of New Proposals

After the July 11, 2018 hearing, the Intervenor’s have met on a number of occasions with the Pi`ilani’s representatives, as well as attended meetings scheduled by Pi`ilani’s representatives. *See* attached Declaration of Albert Perez, Executive Director of Maui Tomorrow. The Intervenor’s have additionally conducted their own separate meetings with community stakeholders regarding the designs being proposed by Pi`ilani, as well as conducted their own analysis of the issues at stake in this matter. *Id.*

Although the Intervenor’s appreciate Pi`ilani’s effort to conduct outreach with the community, after a good faith and comprehensive evaluation of the proposals, and after considering the limitations of the 1995 D&O as well as the current case law affecting dated boundary amendments that have never been substantially commenced, the Intervenor’s have concluded that it is unlikely that an acceptable proposal could be timely offered by the Petitioner’s that would permit the Intervenor’s to stipulate to dismiss the pending contested case.

III. THE LAW REQUIRES FINALITY OF THE CONTESTED CASE WITHIN A REASONABLE PERIOD OF TIME

A “contested case” “means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” HRS § 91-1(5). OSC hearings, such as the current one, are contested cases. *See Kaniakapupu v. Land Use Com’n*, 111 Hawai`i 124, 136, n.16 (2006) (citing *Lanai Co., Inc. v. Land Use Com’n*, 105 Hawai`i 296, 97 P.3d 372 (2004)). The Commission confirmed this was a contested case hearing when it issued the written OSC against the Petitioner’s on September 17, 2012 and identified HRS Chapter 91 and the Commission’s related rules: “[T]his Commission will conduct a hearing on this matter in accordance with the requirements of *chapter 91, HRS*, and subchapters 7 and 9 of chapter 15-15, HAR.” (Emphasis added).

Once the evidence has been received, as has already occurred here, the Commission is required to issue a written decision and order “*within a reasonable period of time*”:

Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions *within a reasonable time* to each party or to the party's attorney of record.

HRS § 91-9(c) (emphasis added). *Cf.* HAR § 15-15-82(d).²⁵

The current contested case has now been pending six years. Now that the retail shopping complex and affordable housing proposals have been abandoned by the Petitioners, and Intervenors have determined that they cannot agree to dismiss the contested case, HRS Chapter 91 requires finality of the contested case, as confirmed in *Outdoor Circle v. Harold K.L. Castle Trust Estate*, 4 Haw. App. 633, 641-42, 675 P.2d 784, 791 (1983), wherein the Commission had argued “that after it had accepted the final version of the findings of fact and voted to deny [a party’s] petition at open meetings, its adjudicatory functions were concluded.” The Hawai`i Intermediate Court of Appeals disagreed, explaining: “Administrative adjudication has been defined as ‘*any final decision*, determination or ruling by an agency affecting personal or property rights.’” *Id.* (emphasis added). Similar to *Outdoor Circle*, this Commission must issue a final decision on all remaining issues.

²⁵ HAR § 15-15-82(d) provides: “Every decision and order adverse to a party to the proceeding, rendered by the commission in a contested case, shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the commission shall incorporate in its decision a ruling upon each proposed finding so presented.”

The “Enforcement of conditions” provision of the Commission Rules referencing a “decision and order” indicates that an OSC hearing will include a *final* decision by the Commission. HAR § 15-15-93 provides in pertinent part:

(c) The commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7, where applicable. . . .

(d) Post hearing procedures shall conform to subchapter 7 or subchapter 9. ***Decisions and orders*** shall be issued in accordance with subchapter 7 or subchapter 9.

(e) The commission shall amend its ***decision and order*** to incorporate the order to show cause ***by including the reversion of the property to its former land use classification or to a more appropriate classification.***

(Emphasis added).

The right to finality may also be viewed from the perspective of when a contested case party may appeal an agency decision: “For purposes of HRS § 91-14(a), we have defined “final order” to mean ***an order ending the proceedings, leaving nothing further to be accomplished.***” *Bocalbos v. Kapiolani Medical Center for Women and Children*, 89 Hawai`i 436, 439, 974 P.2d 1026, 1029 (1999).

Intervenors are thus entitled to finality of this contested case by completing the remaining parts of the proceeding.

IV. THE CURRENT COMMISSIONERS MAY COMPLETE THE CONTESTED CASE EVEN THOUGH THEY DID NOT PRESIDE OVER THE PHASE I HEARING

The Phase I evidentiary hearing was concluded in 2013. After closing the Phase I hearing, the Commission ordered the parties to prepare their respective proposed FOF/COL. Thereafter, the parties filed their respective proposed FOF/COL, and were also given the opportunity to submit objections to the other parties’ proposed FOF/COL. All of these documents are part of the record.

Once the parties had filed their FOF/COL and objections, the Commission held a hearing. At this hearing, all the parties were permitted to argue the FOF/COL. After the argument, the Commission conducted a vote and ruled that the Petitioners had violated three conditions in the 1995 D&O. This hearing occurred on February 7, 2013. However, the Commission did not adopt the FOF/COL that day. Before a further hearing on the adoption of the FOF/COL could be scheduled, Pi'ilani sought, and obtained, the stay.

While the current Commissioners were not present at the 2012 and 2013 hearings, HRS § 91-11 of the Hawai'i Administrative Procedures Act expressly permits decision-making based on an evidentiary record that was established by different persons with authority, such as a hearings officer or, as in this case, by former commissioners of the Commission.²⁶ Section 91-11 requires the Commissioners to "personally consider the whole record or such portions thereof as may be cited by the parties." *Cf. You v. Minami*, 65 Haw. 411, 652 P.2d 632 (1982) (quoting *White v. Board of Education*, 54 Haw. 10, 501 P.2d 358 (1972)).²⁷

²⁶ **§91-11 Examination of evidence by agency.** Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, ***who shall personally consider the whole record or such portions thereof as may be cited by the parties.*** (Emphasis added).

²⁷ The *You* Court explained as follows:

In *White v. Board of Education*, 54 Haw. 10, 501 P.2d 358 (1972), we quoted from the Revised Model State Administrative Procedure Act, Fourth Tentative Draft (1961), which states that "those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, ***or reading the record or at the very least receiving briefs and hearing oral argument***" The record is clear that briefs were received and oral arguments were heard by the Board. Consequently, we hold that the absence of the transcript does not invalidate the Board's decision[.]

(Emphasis added).

In this instance, the record is available for the Commissioners to review and consider, including the evidence submitted to the former Commissioners. Importantly, one of the parties who submitted FOF/COL in Phase I is the Office of Planning, which is charged with “presenting the position of the State in all boundary change petitions and proceedings before the [Commission].” HRS 225M-2(b)(5). In light of the fact that the Commission is already in possession of the FOF/COL and objections from the Phase I hearing, it is sufficient to hold a hearing for final arguments by the parties before adopting FOF/COL that would be consistent with the Commission’s oral ruling in Phase I. Thereafter, the Commission may initiate the Phase II proceeding.

V. BECAUSE THERE WAS NO SUBSTANTIAL COMMENCEMENT OF DEVELOPMENT, THE PETITION AREA SHOULD BE REVERTED

In *DW Aina Le‘a Dev., LLC v. Bridge Aina Le‘a, LLC*, 134 Hawai‘i 187, 339 P.3d 685 (2014) (“*Aina Le`a*”), the Hawai‘i Supreme Court carefully enunciated the Commission’s power to revert property to its former classification without following the boundary amendment procedures set forth in HRS § 205–4 upon a determination that there had been no commencement of the project:

The proper procedure to be followed by the LUC in ruling on the OSC therefore depends on whether the petitioner has substantially commenced use of the land in accordance with its representations. . . .

Where the LUC issues an OSC *and seeks to revert property based on a petitioner's failure to substantially commence use of the land in accordance with its representations, the LUC is not required to follow the procedures otherwise applicable to boundary changes under HRS Chapter 205*. A reversion in such circumstances simply restores the *status quo ante*, prior to the original reclassification. Following the general procedures set forth in HRS § 205–4 would serve no purpose under these circumstances.

Indeed, as noted above, the legislative history of HRS § 205–4(g) indicates that the legislature intended to empower the LUC to void a boundary change *where*

the petitioner failed to substantially commence use of the property in accordance with its representations. S. Stand. Comm. Rep. No. 2116, in 1990 S. Journal, at 915 (“The purpose of this bill is to amend section 205–4(g), Hawaii Revised Statutes, to allow the Land Use Commission to attach a condition to a boundary amendment decision which would void the boundary amendment when substantial commencement of the approved land use activity does not occur in accordance with representations made by the petitioner.” (Emphasis added)); H. Stand. Comm. Rep. No. 1086–90, in 1990 H. Journal, at 1265 (“The purpose of this bill is to strengthen existing statutes by permitting the Land Use Commission further control over a proposed development by voiding a change in zoning if the petitioner does not make substantial commencement of the approved land use activity.” (Emphasis added)). In other words, the legislative history of HRS § 205–4(g) indicates that compliance with all of the procedures of HRS § 205–4 is unnecessary when the petitioner has not substantially commenced use of the land because the prior reclassification is simply voided. ***Thus, when the petitioner has not substantially commenced use of the land, the LUC may revert the land without following the procedures set forth in HRS § 205–4.***

Aina Le`a, 339 P.3d at 710-711 (underlined emphasis in original; bold/italicized emphasis added).

In *Aina Le`a*, significant construction activities had occurred that were legitimately in furtherance of the representations that had been made by the petitioner to the Commission. However, that is not the case here. As shown in the facts above, the Petitioners, in their effort to obtain a stay from the completion of the contested case proceedings expressly confirmed to the Commission that there had been no substantial commencement of the development, and that they would not initiate development activities during the pendency of the stay. Moreover, what little construction activities that did occur on the Petition Area (minimal grubbing and dust fences) were in an attempt to initiate construction of the nonconforming retail shopping complex, and therefore cannot be considered commencement of the light industrial project that was approved by the Commission through the 1995 D&O. Therefore, the Petitioners are judicially estopped from arguing that they have substantially commenced the “Original Plan”, as they refer to it in

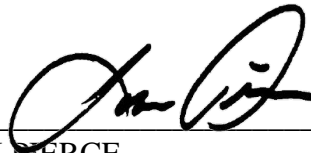
recent filings. *See, e.g., State v. Kalaola*, 124 Hawai'i 43, 72, 237 P.3d 1109, 1138 (2010) (“The doctrine of judicial estoppel prevents parties from playing fast and loose with the court or blowing hot and cold during the course of litigation.”) (quoting *State v. Fields*, 115 Hawai'i 503, 534, 168 P.3d 955, 986 (2007) (quoting *Roxas v. Marcos*, 89 Hawai'i 91, 124, 969 P.2d 1209, 1242 (1998) (citations and some internal quotation marks omitted)).

VI. CONCLUSION

For the foregoing reasons, Intervenors hereby request that the Commission:

- (1) Lift the 2013 Stay;
- (2) After a non-evidentiary hearing as deemed necessary by the Commission, and after full review of the record by the Commissioners, adopt findings of fact and conclusions of law with respect to Phase I of the contested case based on the previous submissions of the parties;
- (3) Hold a hearing on Phase II, which will determine whether or not the Petition Area should be reverted to its former classification as State Agriculture land; and,
- (4) Issue a final decision and order.

DATED: Makawao, Maui, Hawaii, November 30, 2018.



TOM PIERCE
Attorney for Maui Tomorrow
Foundation, Inc., South Maui Citizens
for Responsible Growth, and Daniel Kanahele

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of

KAONOULU RANCH

To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for approximately 88 acres at Kaonoulu, Makawao-Wailuku, Maui, Hawaii

DOCKET NO. A94-706

DECLARATION OF ALBERT PEREZ

Filed by: Maui Tomorrow Foundation, Inc.,
South Maui Citizens for Responsible Growth
and Daniel Kanahele

DECLARATION OF ALBERT PEREZ

Albert Perez states as follows:

1. I am over 18 years of age, I am a resident of the County of Maui, State of Hawai'i. I am the Executive Director of Maui Tomorrow Foundation, Inc., one of the Intervenors in the above-captioned contested case. I have personal knowledge of the matters set forth in this Declaration, and, if called upon to testify, I could and would competently testify thereto. (The abbreviations used in the Memorandum in Support are adopted herein.)

2. On or about February 1, 2018, I received an email from Lucienne de Naie, President of Maui Tomorrow, stating that Mr. Harry Lake, CEO of Koa Partners, had been brought on as an advisor and potential investor on the Pi'ilani owned portion of Petition Area, and that he was looking to get a better understanding about the project. According to the email, Mr. Lake was hoping to understand the concerns and desires of the community.

3. On or about June 28, 2018, I, along with other Maui Tomorrow Foundation representatives and other community leaders met with Mr. Lake and his associate Mr. Mitchell to hear about Koa Partners' conceptual plans. The plans included a range of land uses, but only a small amount of light industrial use. No specifics were discussed and no revised site plans were presented by the representatives. At this meeting, Maui Tomorrow and allies from the Kihei Community Association and Aha Moku Council all emphasized the need to preserve the cultural sites and cultural practices associated with the land. We stressed to Mr. Lake and his partner that the small gulch on the northern parcel was particularly important, and that we would like to see it protected by incorporating it as a feature into a proposed cultural preserve area, since several cultural sites important to the community border the gulch or are found within it.

4. On or about July 11, 2018, at a Commission hearing held on Maui about the Petition Area, I testified about Maui Tomorrow's desires, as well as the status of negotiations.

5. On the morning of September 17, 2018, I, along with others from the community, met again with Mr. Lake to discuss Koa Partners' latest conceptual plan, which included a small amount of light industrial use, but mostly non-industrial uses. Unfortunately, we were disappointed to see that there was still no consideration for cultural sites or practices. In particular, the small gulch with cultural artifacts identified above in this Declaration would still have been filled in and obliterated, and no cultural preserve area was specified for any of the 21 recorded cultural sites in the project area.

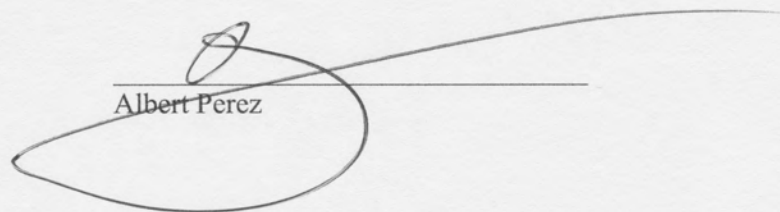
6. On the evening of September 17th, Koa Partners held a public meeting at St. Theresa's church meeting room in Kihei, Maui, which was attended by about 100 people. In the few hours between our morning meeting with them and the evening meeting with the public, Koa Partners did modify the site plan to show the small gulch, but it was treated as a landscape feature of the project, not a meaningful cultural site, and was surrounded by restaurants and other commercial establishments that would not be compatible with a cultural preserve. Significantly, the members of the public who were at the meeting roundly and loudly rejected the new plan. In particular, several members of the Hewahewa family, who are lineal descendants of the land, said that they had not been consulted, and were opposed to the plan that was presented.

7. Intervenors met together after the September 17, 2018 community meeting with Koa Partners. Based on the strong opposition expressed by the community, and based on our

own review of Koa Partners' plans, including evaluating the requirements of the 1995 D&O, we Intervenor have determined that further negotiations with Koa Partners would be unlikely to lead in timely fashion to a project that the community could support, nor to one that could meet the conditions of the 1995 D&O.

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

Executed this 30th day of November, 2018.

A handwritten signature in black ink, consisting of a large, sweeping loop that starts under the name, goes up and over the name, and then extends to the right with a long, thin tail. The signature is written over a horizontal line.

Albert Perez

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Attorneys for Piilani Promenade South, LLC and
Piilani Promenade North, LLC
60615

2013 APR - 8 P 4: 06
LAND USE COMMISSION
STATE OF HAWAII

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A-94-706
)	
KAONOULU RANCH	)	PIILANI PROMENADE SOUTH, LLC
	)	AND PIILANI PROMENADE NORTH,
To Amend the Agricultural Land Use District	)	LLC'S MOTION TO STAY PHASE II OF
Boundary into the Urban Land Use District	)	THE ORDER TO SHOW CAUSE
for approximately 88 acres at Kaonoulu,	)	PROCEEDING; DECLARATION OF
Makawao-Wailuku, Maui, Hawai'i	)	JONATHAN H. STEINER; EXHIBIT "1";
	)	CERTIFICATE OF SERVICE
)	
)	

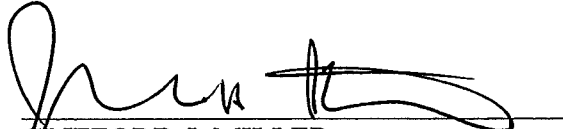
PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S
MOTION TO STAY PHASE II OF THE ORDER TO SHOW CAUSE PROCEEDING

COME NOW Piilani Promenade South, LLC ("PPS") and Piilani Promenade North, LLC ("PPN") (collectively "Piilani"), by and through its undersigned attorneys, hereby move the Land Use Commission of the State of Hawaii (the "Commission") to stay Phase II of the show cause hearing ordered by the Commission in that certain Order Granting Movants' Motion for a Hearing, Issuance of Order to Show Cause, and Other Relief dated September 10, 2012, until such time as the Commission renders a decision on a Motion to Amend the 1995 D&O, which Piilani intends to file by not later than December 31, 2013.

This Motion is brought pursuant to Hawaii Administrative Rules ("HAR") sections 15-15-1, 70 and 71, and is supported by the attached affidavit of Simon J. Honeybone, and the records and files contained in this docket.

Pursuant to HAR section 15-15-70(c), Piilani hereby requests a hearing on this motion.

Dated: Honolulu, Hawai'i, April 8, 2013.



CLIFFORD J. MILLER
JOEL D. KAM
JONATHAN H. STEINER

Attorneys for Piilani Promenade South, LLC and
Piilani Promenade North, LLC

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Piilani Promenade South, LLC (“PPS”) and Piilani Promenade North, LLC (“PPN”) (collectively “Piilani”) hereby request that the Commission stay Phase II of the pending Order to Show Cause proceeding, on the basis that Piilani has not proceeded with and will not be proceeding with any development which will violate the 1995 D&O, but instead will file a Motion to Amend the 1995 D&O.

II. BACKGROUND

In 1994 Kaonoulu Ranch (the “Original Petitioner”) filed a Petition for District Boundary Amendment to amend the Land Use District Boundary to reclassify approximately 88 acres of land at Kaonoulu, Makawao-Wailuku, Maui, Hawaii, specifically identified at the time by Tax Map Key Nos. 2-2-02: portion of 15 and 3-9-01:16 (the “Petition Area”) from the Agricultural District to the Urban District. On February 10, 1995, the Commission issued the 1995 D&O reclassifying the Petition Area to the Urban District subject to certain conditions specified therein.

In or about 2005, the Original Petitioner conveyed the Petition Area to Maui Industrial Partners, LLC (“MIP”). In or about 2009, MIP conveyed part of the Petition Area, specifically approximately 13 acres identified as TMK (2) 3-9-001:169 (“the Honua’ula Parcel”) to Honua’ula Partners, LLC. In or about 2010, MIP conveyed the remainder of the Petition Area, specifically the portion of the original Petition Area designated by TMK Nos. (2) 3-9-001:016 and 170-174 (the “Piilani Parcels”), to Piilani. Piilani is not affiliated with Honua’ula, and has separate ownership.

On May 23, 2012, Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahale (collectively, “Intervenors”) filed a Motion for a

Hearing, Issuance of Order to Show Cause, and Other Relief (the “Motion for Order to Show Cause”). In the Motion for Order to Show Cause, Intervenors contended, among other things, that the intended use of the Piilani Parcels by Piilani for the development of retail shopping complex violated Conditions 5, 15, and 17 of 1995 D&O. Condition 5 provides:

5. Petitioner shall fund, design and construct necessary local and regional roadway improvements necessitated by the proposed development in designs and schedules accepted by the State Department of Transportation and the County of Maui. Petitioner shall provide traffic signals at the intersection of Pi'ilani Highway and Ka'ono'ulu Street, and shall submit a warrant study in coordination with the Department of Transportation. Petitioner shall also install a fence and appropriate screening, i.e., landscaping, etc., along the highway right-of-way in coordination with the State Department of Transportation. Petitioner shall provide for a frontage road parallel to Pi'ilani Highway and other connector roads within the Petition area, in coordination with other developments in the area with the review and approval of the State Department of Transportation and the County of Maui.

Condition 15 provides:

15. Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. Failure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification.

Condition 17 provides, in relevant part:

17. Petitioner shall timely provide without any prior notice, annual reports to the Commission, the Office of State Planning, and the County of Maui Planning Department in connection with the status of the subject Project and Petitioner's progress in complying with the conditions imposed herein.

On September 10, 2012, the Commission granted Intervenors' Motion for Order to Show Cause, and ordered that a show cause hearing be set as to the entire Petition Area (the “Show Cause Hearing”). On September 11, 2012, the Commission entered a Prehearing Order, wherein it was stated that the Commission would first hold hearings to consider whether Piilani and Honua'ula had violated the 1995 D&O (hereinafter “Phase I”). Thereafter, if a violation was

found, the Commission would then proceed to hold hearings to determine whether reversion or other designation is the appropriate remedy (hereinafter "Phase II").

On November 1, 2, 15 and 16, 2012, the Commission heard evidence and arguments in Phase I of the Order to Show Cause. At a meeting on February 7, 2013, a majority of the members of the Commission orally passed a motion finding that Piilani's and Honua'ula's proposed uses of the Piilani Parcels and the Honua'ula Parcel would violate Conditions 5 and 15 of the 1995 D&O, and that Condition 17 had also been violated. No written order reflecting that oral motion has been entered.

As of the date of this filing, a hearing on Phase II of the Order to Show Cause has not been scheduled, nor have any exhibits, evidence, or arguments been submitted by any party to the Order to Show Cause proceeding in Phase II.

III. STAY OF SHOW CAUSE HEARING

By this motion, Piilani respectfully requests that the Commission stay Phase II of the Show Cause Hearing until such time as the Commission renders a decision on a Motion to Amend the 1995 D&O, which Piilani intends to file by December 31, 2013. A stay of the Show Cause Hearing is appropriate because, based on the Commission's finding that the development of the Piilani Promenade project would violate the 1995 D&O, Piilani will not develop the Piilani Promenade project, but will instead be moving to amend the 1995 D&O to allow for development of the Piilani Parcels in a manner to be set forth in detail in said motion. As such, there will be no construction or development which will violate the 1995 D&O, and proceeding to Phase II would be an inefficient use of the Commission's and parties' resources.

The decision of the Commission that Piilani's proposed development would be in violation of Conditions 5 and 15 of the 1995 D&O presumably was based on Piilani's proposal to construct a retail shopping complex on the Piilani Parcels, the conceptual plans for which do

not include a frontage road. The Commission presumably found that development of this specific project pursuant to Piilani's existing conceptual plans would not be in substantial compliance with the representations made to the Commission by the Original Petitioner (Condition 15), and that the failure to incorporate a frontage road into the conceptual plans constitutes a violation of Condition 5 of the 1995 D&O.

Although mass grading permits were obtained by Piilani prior to the commencement of Phase I, no significant grading or other construction has occurred. Furthermore, Based on the finding by the Commission that the proposed development would violate the 1995 D&O, Piilani has elected not to construct the proposed Piilani Promenade as depicted in its conceptual plan presented to the Commission in Phase I of the Order to Show Cause hearing. Rather, Piilani represents that it will file, pursuant to HAR §§ 15-15-70 and 15-15-94, a Motion for Order Amending the 1995 D&O (hereinafter "the Motion to Amend"). Therein, Piilani will request that the Commission bifurcate this docket to re-designate a new docket covering only the Piilani Parcels, and to release the Piilani Parcels from the conditions of the 1995 D&O, and to impose new, appropriate conditions, allowing Piilani to develop a retail/commercial and/or light industrial project. The details of the conditions which Piilani will seek to amend, and the development upon which the Motion to Amend will be based are in the process of being formulated, and will be set forth in the Motion to Amend, including all impacts from the new proposed project. Unless and until that Motion to Amend is heard, Piilani will not commence any construction activities on the Piilani Parcels without express approval of the Commission.

The Commission has the inherent authority to manage proceedings before it in a just and efficient manner. HAR sec. 15-15-01 provides, in pertinent part:

Purpose. This chapter governs the practice and procedure before the land use commission and shall be construed to secure the just and efficient determination of every proceeding. This chapter shall be liberally construed to preserve, protect, and encourage the development and preservation of lands in the State for those uses to which they are best suited in the interest of public health and welfare of the people of the State of Hawaii.

Given that there is and will be no construction activity on the Piilani Parcels, and also given Piilani's commitment to file the Motion to Amend and not to engage in construction on the Piilani Parcels unless and until the Commission grants the Motion to Amend, it would be unjust and inefficient to subject Piilani to Phase II of the Show Cause Hearing and the possibility of reversion of the Piilani Parcels to the Agricultural District. Fortunately, the Commission may easily avoid this result by suspending Phase II of the Show Cause Hearing until such time as the Commission has ruled upon the Motion to Amend. None of the other parties to the Show Cause Hearing, including Intervenors, would suffer any prejudice because Phase II of the Show Cause Hearing could be reset if Piilani should fail to file the Motion to Amend, or if the Commission should deny the Motion to Amend.

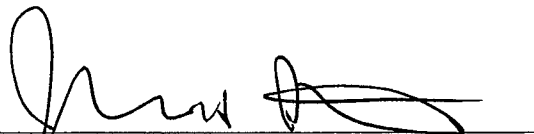
Neither Intervenors nor any other party be prejudiced with regards to the Honua'ula Parcel if Phase II of the Order to Show Cause Proceeding is stayed. In Phase I, Honua'ula's representative stated, on the record, that due to legal challenges and uncertainty in the market, Honua'ula has no present intention or plans to begin construction of the affordable housing project on the Honua'ula Parcel. See Testimony of Charles Jencks, Transcript of November 15, 2012 at 56:10-18, 58:10-16. Honua'ula has not taken any overt actions, such as seeking any permits, which would indicate an intent to begin construction of the affordable housing project on the Honua'ula Parcel. Piilani has no control over what Honua'ula will ultimately seek to do with regards to the determination in Phase II that its affordable housing project is in violation of the 1995 D&O. Piilani intends, when it files its Motion to Amend, to therein also seek to

bifurcate the docket herein, such that a new docket (or sub-docket) that is created would only apply to the Piilani Parcels.¹

IV. CONCLUSION

Based upon the foregoing, Piilani respectfully requests that the Commission grant this Motion.

Dated: Honolulu, Hawai'i, April 8, 2013.



CLIFFORD J. MILLER
JOEL D. KAM
JONATHAN H. STEINER

Attorneys for Piilani Promenade South, LLC and
Piilani Promenade North, LLC

¹ Alternatively, Piilani would not be opposed to the Commission bifurcating the docket at this time, to separate the Piilani Parcels and the Honua'ula Parcel into separate subdockets, each of which would only apply to each owners' parcel. Piilani and Honua'ula are separate entities, and the development of their parcels are not interdependent. For procedural reasons, it would appear to be more efficient to bifurcate as part of Piilani's Motion to Amend, but if the Commission would prefer to bifurcate at this time, Piilani would not object, and would be willing, if necessary, to file a motion seeking that relief.

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of) DOCKET NO. A-94-706
)
KAONOULU RANCH) DECLARATION OF JONATHAN
) STEINER
To Amend the Agricultural Land Use District)
Boundary into the Urban Land Use District)
for approximately 88 acres at Kaonoulu,)
Makawao-Wailuku, Maui, Hawai'i)
)
_____)

DECLARATION OF JONATHAN H. STEINER

I, JONATHAN H. STEINER, hereby declare that:

1. I am licensed to practice law in all courts of the State of Hawaii.
2. I am an attorney with the law firm of McCorriston Miller Mukai

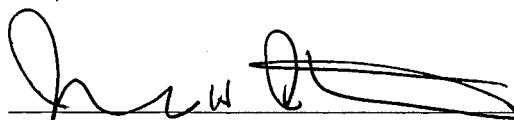
MacKinnon LLP, attorneys for Piilani Promenade South, LLC and Piilani Promenade North, LLC.

3. I have personal knowledge of the matters set forth herein except and unless stated to be upon information and belief.

4. Attached hereto as Exhibit "1" is a true and accurate facsimile copy of Simon J. Honeybone's Affidavit executed in Dallas, Texas. I understand the original is being mailed to my office from Texas, and I intend to file the original with The Land Use Commission upon receipt of the document.

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

Dated: Honolulu, Hawaii, April 8, 2013.


JONATHAN H. STEINER

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of) DOCKET NO. A-94-706
)
KAONOULU RANCH) AFFIDAVIT OF SIMON J. HONEYBONE
)
To Amend the Agricultural Land Use District)
Boundary into the Urban Land Use District)
for approximately 88 acres at Kaonoulu,)
Makawao-Wailuku, Maui, Hawai'i)
)
)
)
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)
)
_____)

AFFIDAVIT OF SIMON J. HONEYBONE

I, Simon J. Honeybone, being duly sworn on oath, deposes and says:

1. I am the Vice President of Piilani Promenade South, LLC and Piilani Promenade North, LLC ("Piilani"), and am authorized and competent to testify on its behalf.

2. I am familiar with the property owned by Piilani which is the subject of this docket, and have personal knowledge of the facts set forth in the motion to which this affidavit is attached (the "Motion").

3. I make this affidavit pursuant to Haw. Admin. Rules sec. 15-15-39.

4. I have read the Motion and hereby verify that the contents thereof are true and correct to the best of my knowledge and belief.

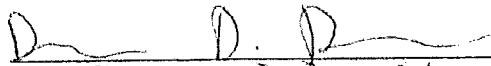
5. Piilani intends to file a motion to amend the 1995 D&O by not later than December 31, 2013, and will not undertake any construction on the parcels subject to the 1995 D&O owned by Piilani unless and until the Commission grants the Motion to Amend or otherwise allows such construction.

6. Capitalized terms used in this Affidavit have the meanings ascribed to such terms in the Motion, unless defined otherwise.

Further Affiant sayeth naught.


SIMON J. HONEYBONE

This Two page Affidavit of Simon J. Honeybone dated April 3, 2013, was subscribed and sworn to before me by Simon J. Honeybone April 8, 2013, in the Dallas County Circuit of the State of Texas.



Name: DOMINIQUE D. DONOVAN
Notary Public, State of Texas



My commission expires:
JUNE 23, 2014

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this date, a true and correct copy of the foregoing document was duly served upon the following party via certified mail, return receipt requested and electronic mail, addressed as follows:

TOM PIERCE, ESQ. tom@mauilandlaw.com
P.O. Box 798
Makawao, Hawai'i 96768

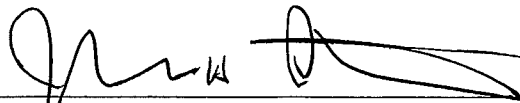
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Dated: Honolulu, Hawai'i, April 8, 2013.



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Piilani Promenade North, LLC

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LAND USE COMMISSION
STATE OF HAWAII

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60615

2013 APR 16 P 4:00

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

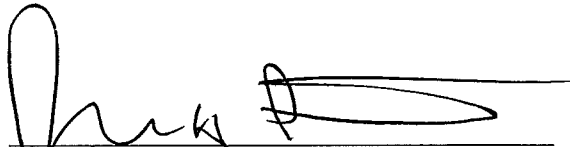
In the Matter of the Petition of)	DOCKET NO. A-94-706
)	
KAONOULU RANCH	)	HONUUA'ULA PARTNERS, LLC'S
	)	JOINDER IN PIILANI PROMENADE
To Amend the Agricultural Land Use District	)	SOUTH, LLC AND PIILANI
Boundary into the Urban Land Use District	)	PROMENADE NORTH, LLC'S MOTION
for approximately 88 acres at Kaonoulu,	)	TO STAY PHASE II OF THE ORDER TO
Makawao-Wailuku, Maui, Hawai'i	)	SHOW CAUSE PROCEEDING;
	)	CERTIFICATE OF SERVICE
)	
)	
)	
)	
)	

HONUA'ULA PARTNERS, LLC'S JOINDER IN PIILANI PROMENADE
SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S MOTION TO
STAY PHASE II OF THE ORDER TO SHOW CAUSE PROCEEDING

Honua'ula Partners, LLC ("Honua'ula"), by and through its attorneys, McCorriston Miller Mukai MacKinnon LLP, hereby joins in Piilani Promenade South, LLC and Piilani Promenade North, LLC's Motion to Stay Phase II of The Order to Show Cause Proceeding.

Honua'ula further states that it will not commence any construction or other physical development activity on the property which is the subject matter of this proceeding while any stay of this proceeding is pending, or unless and until Honua'ula give the Commission adequate notice of an intent otherwise, and an opportunity to take appropriate action. Due to multiple pending legal challenges to Honua'ula's entitlements as to this as well as the Wailea 670 project, Honua'ula does not have any immediate plans to begin development on the subject property.

DATED: Honolulu, Hawai'i, April 16, 2013.



CLIFFORD J. MILLER
JOEL D. KAM
JONATHAN H. STEINER

Attorneys for Honua'ula Partners, LLC

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this date a true and correct copy of the foregoing document was duly served upon the following parties at their last known address via U.S. Mail and electronic mail:

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Makawao, Hawai'i 96768

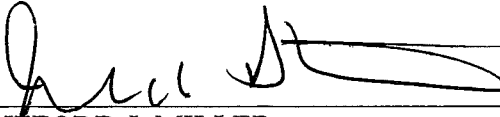
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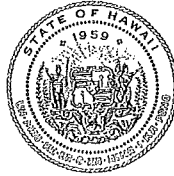
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200 South High Street
Kalana O Maui Building, 3rd Floor
Wailuku, Hawai'i 96793

DATED: Honolulu, Hawai'i, April 16, 2013.



CLIFFORD J. MILLER
JOEL D. KAM
JONATHAN H. STEINER

Attorneys for Honua'ula Partners, LLC



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In The Matter Of The Petition Of

KA'ONO'ULU RANCH

To Amend The Agricultural Land Use
District Boundary Into The Urban
Land Use District For Approximately
88 Acres Of Land At Ka'ono'ulu,
Makawao-Wailuku, Maui, Hawai'i,
Tax Map Key: 3-9-01: 16, 169, And 170
Through 174

DOCKET NO. A94-706

ORDER GRANTING PT'ILANI
PROMENADE SOUTH, LLC, AND
PT'ILANI PROMENADE NORTH,
LLC'S, MOTION TO STAY PHASE II OF
THE ORDER TO SHOW CAUSE
PROCEEDING; AND CERTIFICATE OF
SERVICE

ORDER GRANTING PT'ILANI PROMENADE SOUTH, LLC, AND
PT'ILANI PROMENADE NORTH, LLC'S, MOTION TO STAY PHASE II
OF THE ORDER TO SHOW CAUSE PROCEEDING

AND

CERTIFICATE OF SERVICE

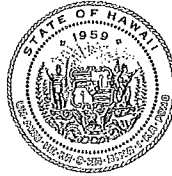
THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT
COPY OF THE DOCUMENT ON FILE IN THE OFFICE OF THE
STATE LAND USE COMMISSION, HONOLULU, HAWAII.

7/12/13
Date

BY



Executive Officer



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

2013 JUL 12 A 10:48
LAND USE COMMISSION
STATE OF HAWAII

In The Matter Of The Petition Of

KA'ONO'ULU RANCH

To Amend The Agricultural Land Use
District Boundary Into The Urban
Land Use District For Approximately
88 Acres Of Land At Ka'ono'ulu,
Makawao-Wailuku, Maui, Hawai'i,
Tax Map Key: 3-9-01: 16, 169, And 170
Through 174

DOCKET NO. A94-706

ORDER GRANTING PI'ILANI
PROMENADE SOUTH, LLC, AND
PI'ILANI PROMENADE NORTH,
LLC'S, MOTION TO STAY PHASE II OF
THE ORDER TO SHOW CAUSE
PROCEEDING; AND CERTIFICATE OF
SERVICE

ORDER GRANTING PI'ILANI PROMENADE SOUTH, LLC, AND
PI'ILANI PROMENADE NORTH, LLC'S, MOTION TO STAY PHASE II
OF THE ORDER TO SHOW CAUSE PROCEEDING

AND

CERTIFICATE OF SERVICE



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

LAND USE COMMISSION
STATE OF HAWAII

2013 JUL 12 A 10:50

In The Matter Of The Petition Of

KA`ONO`ULU RANCH

To Amend The Agricultural Land Use
District Boundary Into The Urban
Land Use District For Approximately
88 Acres Of Land At Ka`ono`ulu,
Makawao-Wailuku, Maui, Hawai`i,
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DOCKET NO. A94-706

ORDER GRANTING PI`ILANI
PROMENADE SOUTH, LLC, AND
PI`ILANI PROMENADE NORTH,
LLC'S, MOTION TO STAY PHASE II OF
THE ORDER TO SHOW CAUSE
PROCEEDING

ORDER GRANTING PI`ILANI PROMENADE SOUTH, LLC, AND
PI`ILANI PROMENADE NORTH, LLC'S, MOTION TO STAY PHASE II
OF THE ORDER TO SHOW CAUSE PROCEEDING

On April 8, 2013, Pi`ilani Promenade South, LLC, and Pi`ilani Promenade
North, LLC (collectively "Pi`ilani"), filed a Motion to Stay Phase II of the Order to Show
Cause Proceeding ("Motion to Stay"), pursuant to section 15-15-70, Hawai`i
Administrative Rules ("HAR").¹

¹ On February 7, 2013, the State of Hawai`i Land Use Commission ("Commission") found that both
Pi`ilani and Honua`ula Partners, LLC ("Honua`ula"), had violated Condition Numbers 5, 15, and 17 of
this Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed February 10, 1995,
in the subject docket. Having found that there was a failure to perform according to the conditions
imposed or to the representations or commitments made during this first phase of the Order to Show

On April 11, 2013, the County of Maui Department of Planning (“DP”) filed a Statement of No Opposition to Pi’ilani Promenade South, LLC and Pi’ilani Promenade North, LLC’s Motion to Stay Phase II of the Order to Show Cause Proceeding.

On April 12, 2013, the State of Hawai‘i Office of Planning (“OP”) filed a Response in Support of Pi’ilani Promenade South, LLC and Pi’ilani Promenade North, LLC’s Motion to Stay Phase II of the Order to Show Cause Proceeding.

On April 16, 2013, Honua`ula filed a Joinder in Pi’ilani Promenade South, LLC and Pi’ilani Promenade North, LLC’s Motion to Stay Phase II of the Order to Show Cause Proceeding.²

On April 16, 2013, Maui Tomorrow Foundation, Inc.; South Maui Citizens for Responsible Growth; and Daniel Kanahele (collectively “Intervenors”) filed a Memorandum in Opposition to Pi’ilani Promenade South, LLC’s Motion to Stay Phase II of the Order to Show Cause Proceeding (“Memorandum in Opposition”).³

Cause proceeding, the Commission would then determine in the next phase (i.e., Phase II) whether reversion of the Petition Area to its former land use classification or to a more appropriate classification is the appropriate remedy.

² Honua`ula represented that it will not commence any construction on its parcel while a stay of Phase II of the Order to Show Cause proceeding is pending, or unless and until Honua`ula provides this Commission with adequate notice to do otherwise and this Commission grants said request.

³ Intervenors inadvertently excluded Pi’ilani Promenade North, LLC, as a co-movant in the title of their Memorandum in Opposition.

On June 3, 2013, Intervenors filed a Supplemental Memorandum in Support of (1) Intervenors' Motion to Conclude Contested Case at the Earliest Practicable Time, Filed April 16, 2013, and (2) Intervenors' Memorandum in Opposition to Pi'ilani Promenade South, LLC's Motion to Stay Phase II of the Order to Show Cause Proceeding, Filed April 16, 2013.⁴

The Commission considered Pi'ilani's Motion to Stay at its meeting on June 27, 2013, at Kahului, Maui, Hawai'i. Jonathan H. Steiner, Esq., and Charles Jencks were present on behalf of Pi'ilani and Honua`ula. Jesse Souki and Rodney Funakoshi were present on behalf of OP. Michael J. Hopper, Esq., and William Spence appeared on behalf of the DP. Tom Pierce, Esq., and Irene Bowie were present on behalf of Intervenors.

At the meeting, Clayton Nishikawa and Joan Martin provided public testimony. Following the receipt of public testimony, the parties provided oral argument on Pi'ilani's Motion to Stay.

Thereafter, a motion was made and seconded to grant Pi'ilani's Motion to Stay, subject to the condition that both Pi'ilani and Honua`ula shall refrain from commencing any construction or development activities on their respective parcels

⁴ On June 12, 2013, Pi'ilani filed a Motion to Strike and Objection to Intervenors' Supplemental Memorandum in Support of (1) Intervenors' Motion to Conclude Contested Case at the Earliest Practicable Time, Filed April 16, 2013, and (2) Intervenors' Memorandum in Opposition to Pi'ilani Promenade South, LLC's Motion to Stay Phase II of the Order to Show Cause Proceedings, Filed April 16, 2013.

within the Petition Area during the stay of Phase II of the Order to Show Cause proceeding until such time that Pi`ilani files a Motion for Order Amending the Findings of Fact, Conclusions of Law, and Decision and Order filed February 2, 1995 ("Motion for Order Amending the D&O"), to reflect proposed changes to development of its parcels and requesting, among other things, the bifurcation of this docket to cover said parcels not later than December 31, 2013.⁵ The commencement of any construction or development activities by Pi`ilani and/or Honua`ula on their respective parcels prior to the filing of a Motion for Order Amending the D&O by Pi`ilani, or prior to this Commission rendering a decision on such motion, or by Honua`ula at any time subsequent thereto, shall result in the immediate lifting of the stay relative to their parcels and the commencement of Phase II of the Order to Show Cause proceeding.

Following discussion by the commissioners, a vote was taken on this motion. There being a vote tally of 7 ayes, 0 nays, and 2 excused, the motion carried.

ORDER

This Commission, having duly considered Pi`ilani's Motion to Stay and the oral and written arguments of the parties in the proceeding, and a motion having been made at a meeting on June 27, 2013, in Kahului, Maui, Hawai`i, and the motion

⁵ In its Motion to Stay which Honua`ula joined in, Pi`ilani represented that it will file the Motion for Order Amending the D&O to allow development of its proposed Pi`ilani Promenade project as depicted in its existing conceptual plan not later than December 31, 2013.

having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motion,

HEREBY ORDERS that Pi'ilani's Motion to Stay be GRANTED, subject to the condition that both Pi'ilani and Honua'ula shall refrain from commencing any construction or development activities on their respective parcels within the Petition Area during the stay of Phase II of the Order to Show Cause proceeding.

IT IS FURTHER ORDERED that this stay is subject to the condition that Pi'ilani file a Motion for Order Amending the D&O to reflect proposed changes to development of its parcels and requesting, among other things, the bifurcation of this docket to cover said parcels not later than December 31, 2013.

IT IS FURTHER ORDERED that the commencement of any construction or development activities by Pi'ilani and/or Honua'ula on their respective parcels prior to the filing of a Motion for Order Amending the D&O by Pi'ilani, or prior to this Commission rendering a decision on such motion, or by Honua'ula at any time subsequent thereto, shall result in the immediate lifting of the stay relative to their parcels and the commencement of Phase II of the Order to Show Cause proceeding.

ADOPTION OF ORDER

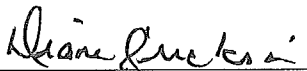
This ORDER shall take effect upon the date this ORDER is certified
by this Commission.

Done at Honolulu, Hawai'i, this 12th, day of July, 2013, per
motion on June 27, 2013.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAII



Deputy Attorney General

By 

RONALD HELLER
Chairperson and Commissioner

Filed and effective on:

7/12/13

Certified by:



DANIEL ORODENKER
Executive Officer



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In The Matter Of The Petition Of

KA'ONO'ULU RANCH

To Amend The Agricultural Land Use
District Boundary Into The Urban
Land Use District For Approximately
88 Acres Of Land At Ka'ono'ulu,
Makawao-Wailuku, Maui, Hawai'i,
Tax Map Key: 3-9-01: 16, 169, And 170
Through 174

DOCKET NO. A94-706

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the ORDER GRANTING PI'ILANI PROMENADE SOUTH, LLC, AND PI'ILANI PROMENADE NORTH, LLC'S, MOTION TO STAY PHASE II OF THE ORDER TO SHOW CAUSE PROCEEDING 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:

	HAND DELIVERED	REGULAR MAIL	CERTIFIED MAIL
JESSE SOUKI, DIRECTOR Office of Planning 235 S. Beretania Street Rm. 600 Honolulu, Hawai'i 96813	X		
BRYAN YEE, ESQ. Deputy Attorney General Hale Auhau, Third Floor 425 Queen Street Honolulu, Hawai'i 96813		X	

	HAND DELIVERED	REGULAR MAIL	CERTIFIED MAIL
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William Spence Director, County of Maui Planning Department 250 S. High St Kalana Pakui Bldg Ste 200 Wailuku, HI 96793		X	
JANE LOVELL, Esq./MICHAEL HOPPER, Esq. Corporation Counsel 200 S. High St. Kalana O Maui Bldg 3rd Flr Wailuku, HI 96793			X
McCorrison Miller Mukai MacKinnon LLP JONATHAN H. STEINER, Esq Five Waterfront Plaza, 4th Floor 500 Ala Moana Boulevard Honolulu, Hawai'i 96813			X
McCorrison Miller Mukai MacKinnon LLP JOEL KAM, Esq Five Waterfront Plaza, 4th Floor 500 Ala Moana Boulevard Honolulu, Hawai'i 96813			X

Honolulu, Hawai'i, July 12, 2013.



DANIEL ORODENKER
Executive Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was duly served upon the following parties as addressed below, by pre-paid first class mail, return receipt requested and by electronic mail, on December 1, 2018:

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Honolulu, Hawai'i 96804-2359

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Honolulu, Hawai'i 96813

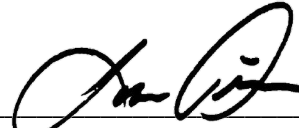
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MICHELLE CHOUTEAU MCLEAN
Director, County of Maui Planning Department
250 S. High St Kalana Pakui Bldg Ste 200
Wailuku, HI 96793

DATED: Makawao, Maui, Hawaii, December 1, 2018.

A handwritten signature in black ink, appearing to read 'Tom Pierce', is written over a horizontal line.

TOM PIERCE
Attorney for Maui Tomorrow
Foundation, Inc., South Maui Citizens
for Responsible Growth, and Daniel Kanahele