

LAND USE COMMISSION  
STATE OF HAWAII

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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' **REPLY** TO THE PARTIES'  
RESPONSES TO INTERVENORS' MOTION  
TO CONDUCT PHASE II OF CONTESTED  
CASE PENDING SINCE 2012, AND FOR  
FINAL DECISION; AND,

INTERVENORS' **MOTION TO STRIKE**  
PORTIONS OF THE PETITIONERS'  
RESPONSES ATTEMPTING TO  
IMPROPERLY SUBMIT EVIDENCE;

CERTIFICATE OF SERVICE

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

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**INTERVENORS' REPLY TO THE PARTIES RESPONSES TO  
INTERVENORS' MOTION TO CONDUCT PHASE II OF CONTESTED CASE  
PENDING SINCE 2012, AND FOR FINAL DECISION AND,  
INTERVENORS' MOTION TO STRIKE PORTIONS OF THE PETITIONERS'  
RESPONSES ATTEMPTING TO IMPROPERLY SUBMIT EVIDENCE**

Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahela (“**Intervenors**”), through their attorney, Tom Pierce Attorney at Law LLLC, hereby submit to the Hawai'i Land Use Commission (“**Commission**”) this *Reply in Support of Their Motion* [the “**Motion**”] *to Conduct Phase II of Contested Case Pending Since 2012, and For Final Decision.* (Abbreviations defined in Intervenors' Motion are adopted herein.)

**I. INTRODUCTION**

This memo first provides a reply to the four pleadings filed by the parties in response to Intervenors' Motion. The Office of Planning and the County do not challenge the process proposed by Intervenors and merely encourage another status conference before initiating the process proposed in Intervenors' Motion.

In contrast, the Petitioners take the extreme position of attacking the Commission's authority and power to conduct hearings necessary to conclude the contested case and render a final decision in this contested case. As shown below, the Petitioners, through their initial efforts to obtain the 2013 Stay and to be permitted to pursue a Motion to Amend, made representations that constituted clear, unequivocal, intentional and voluntary waiver of all such claims, including the claim of substantial commencement. And for that reason, the attacks on the Commission's authority may be rejected.

This memo also shows that even if those arguments were not waived, that the substantive law is contrary to the arguments posed by the Petitioners.

Finally, this memo also acts as a motion to strike portions of the Petitioners' pleadings and the documents attached thereto, which if permitted to remain would taint these proceedings



since have been submitted outside of the prescribed rules of procedure for evidentiary proceedings before this Commission, which assure a fair and orderly process for the taking of evidence.

**II. THE OFFICE OF PLANNING AND COUNTY RESPONSES DO NOT CHALLENGE THE PROCESS PROPOSED BY INTERVENORS' MOTION OR THE LAW AND FACTS PRESENTED BY INTERVENORS**

The Office of Planning's response and the County Department of Planning's response do not find fault with the law or facts or procedural requests set forth in Intervenor's Motion. Instead, both merely encourage the Commission to give the Petitioners a third status hearing. However, as previously explained in the Motion, and as supported by the declaration of Albert Perez, another status hearing will not change things, nor will further delays. Despite repeated opportunities, and more than sufficient time, Pi'ilani has failed to submit a design to Intervenor or the community that substantially complies with the 1995 D&O conditions. Nor, after almost a quarter of a century, should Pi'ilani be permitted to pursue a development based on the 1995 D&O, and the outdated conditions therein, which were based on reports that failed to accurately predict the significantly different environmental, economic, and traffic realities that currently exist in Kihei, Maui, Hawai'i, as well as a failure to adequately address cultural issues, based on the current laws.

**III. PETITIONERS DO NOT CONTEST THAT UNDER THE COMMISSION'S "TEN YEAR" RULE THE 1995 D&O IS VOID *AB INITIO***

Related to the above discussion of the outdated conditions in the 1995 D&O, the Petitioners do not challenge the portion of Intervenor's Motion identifying that this Commission has the power to immediately declare the 1995 D&O void pursuant to HAR § 15-15-50(c)(19). That section provides that the development of a petition area "*will be accomplished before ten*

*years after the date of commission approval.*” See Intervenor’s Motion at 3-4 (providing full text of the rule).

The 1995 D&O confirmed consistency with this “ten year rule” by explaining that the proposed industrial lots would be available for sale to third parties within approximately one year of approval: “Petitioner anticipates that the Project will be available for sales in the fourth quarter of 1996 and that the entire Project can be marketed by the year 2000, assuming the orderly processing of necessary land use approvals and avoidance of undue delays.” 1995 D&O FOF 22, at 6.

After securing the 1995 D&O, Kaonoulu Ranch filed consecutive annual reports with the Commission through 2005. These annual reports are required by law and the filing requirement is specified in Condition 17 of the 1995 D&O. In these annual reports, Kaonoulu Ranch indicated a continuing intent to develop the land as represented, but noted that development had not proceeded as planned and as represented to the Commission. Then, at the conclusion of the ten year period, in 2005, and without prior notice to the Commission, Kaonoulu Ranch sold the entire 88 acre parcel to Maui Industrial Partners (“MIP”).

Although MIP was managed by a sophisticated developer,<sup>1</sup> it failed to file the required annual reports for calendar years 2006, 2007, 2008 and 2009. The Commission found in Phase I of this contested case that this omission violated Condition 17 of the 1995 D&O. See Intervenor’s Proposed FOF ¶ 17. This, and other violations, were fully confirmed by Pi’ilani, when it requested a stay of the contested case proceedings. See Pi’ilani’s Motion to Stay at 3 (explaining, “At a meeting on February 7, 2013, a majority of the members of the Commission

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<sup>1</sup> Charles Jencks was the simultaneous managing agent for Maui Industrial Partners, Wailea 670, and Honua‘ula Partners.

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.”).

During the years 2006 to 2009, while MIP had gone “dark” in terms of reporting to the Commission, it strayed dramatically from Kaonolulu Ranch's proposal and went through a County subdivision process for the 88 acre parcel that resulted in four large lots. MIP thereafter sold one of the lots to Honua`ula and the other three to the Pi`ilani entities. Honua`ula proposed development of its lot into a 250 unit affordable housing project, which was part and parcel of a larger, 1,400 unit golf course development of 650 acres in Wailea also owned by Honua`ula. MIP sold the three remaining parcels to the Pi`ilani entities for development into large shopping center complexes.

In Phase I of this contested case, the Commission found that MIP's decision to create a four lot subdivision was inconsistent with the representations made by the original petitioner. *See OP's Proposed FOF* ¶ 45 (“The Petitioner's current proposal to subdivide the Petition Area into 4 rather than 123 lots, and then lease space rather than sell lots, is not in substantial compliance with the Petitioner's original representations in 1994.”). *See generally OP's Proposed FOF* at 8-10. Additionally, the Commission found Honua`ula and Pi`ilani to be in violation of Condition 15 of the 1995 D&O for failure to substantially comply with the original petitioner's representations. *See OP's Proposed FOF* ¶¶ 22-47 (providing testimony from agencies, including OP, explaining that Pi`ilani's retail shopping proposal was “clearly a different project” from the initially proposed light industrial complex); ¶¶ 48-61 (providing in ¶ 60 that Honu`ula's housing proposal “is substantially different than the project proposed in 1994 and is not in substantial compliance with the Petitioner's representations in 1994”).



Setting aside the above violations determined by the Commission in Phase I, the project, which is not yet designed twenty five years after it was proposed to the Commission, clearly violates the ten year rule, HAR § 15-15-50(c)(19). Nor has there been any effort by the Petitioners to comply with the second sentence of this section, which provides: “In the event full urban development cannot be substantially completed within such [10 year] 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.”

We are now *25 years* removed from when Kaonoulu Ranch filed its Petition with the Commission on July 6, 1994 and there has never been a supplemental incremental development plan proposed by the owners to the Commission in compliance with HAR 15-15-79. In fact, as confirmed by OP, Petitioners’ motion to amend was even untimely. *See OP’s Proposed FOF ¶ 44* (“Petitioners have had enough time since 2005 to file a Motion to Amend and receive a decision from the Commission. Any current marketing difficulties resulting from a delay for consideration of a Motion to Amend would be due to Petitioner’s failure to file a timely Motion to Amend.”).

The above history also highlights Petitioners’ failure to comply with HAR § 15-15-79, which reads, in pertinent part, as follows:

**Performance Time.** (a) Petitioners granted district boundary amendments *shall* make substantial progress within a reasonable period, as specified by the commission, from the date of approval of the boundary change, in developing the redistricted area. The commission may act to amend, *nullify*, change or reverse its decision and order if the petitioner fails to perform as represented to the commission within the specified period.

(Emphasis added).

As previously noted in Intervenors’ Motion, 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 intention to initiate the development proposed by Kaonoulu Ranch in 1994 and 1995. This type of activity based on land speculation spurred by the entitlements has been specifically identified by the Office of State Planning as abusive of the State land use process “which require[s] that successful applicants for land use boundary amendments either *‘use it, or lose it’.*” *Aina Le ‘a*, 339 P.3d at 710.

As the above analysis shows, the law permits the Commission in this instance to declare the 1995 D&O to be null and void due to the undisputed failure to fulfill the requirements of the 1995 D&O within the time limits prescribed by the Commission Rules.

#### **IV. THE PETITIONERS’ ARGUMENTS ARE BARRED BASED ON THEIR PRIOR REPRESENTATIONS**

The Commission may swiftly dispose of the Petitioners’ various arguments suggesting that the Commission has lost its power to enforce, as well as the premature argument that they have substantially commenced construction. As shown below, the Petitioners intentionally and voluntarily waived their right to make such claims when they requested the 2013 Stay, and they are otherwise judicially estopped from bringing such spurious and contradictory arguments five years after the fact.

##### **A. Petitioners’ Arguments Are Barred Under the Doctrine of Waiver**

The Commission granted the 2013 Stay based on clear unequivocal representations made by the Petitioners while seeking the stay. “Waiver” is defined as “*intentional relinquishment of a known right*”, a “*voluntary relinquishment of some rights,*” and “*the relinquishment or refusal to use a right.*” *Uncle John's of Hawaii v. Mid-Pacific Restaurants*, 71 Haw. 412, 417, 794 P.2d 614, 617 (1990) (italics added; citing various cases). In their effort to obtain a stay, rather than continue through the OSC proceedings, the Petitioners made statements, admissions, promises,



and gave assurances that, in sum, were clear, intentional, unequivocal, and voluntarily waiver of the arguments that they now attempt to make.

Moreover, the earlier representations made by Petitioners created the sole legitimate basis under which the Commission was permitted to grant the stay, thereby modifying the standard procedures for the OSC hearing, which would have required completion of Phase II soon after the conclusion of Phase I. Specifically, under the Commission Rules, the Commission only had the power to enter the 2013 Stay after obtaining the Petitioners' waiver to arguments they might otherwise be able to make at a later date that might prejudice other parties: "Any procedure in an order to show cause hearing may be modified or *waived by stipulation of the parties . . .*" HAR 15-15-93(c) (emphasis added).

Petitioners' clearly and unequivocally made such waiver through their written representations to the Commission. Some of these representations were previously identified to the Commission in Intervenors' Motion. *See* Intervenors' Motion, § F, at 9-10. *See also* Appendices 1, 2 and 3, attached thereto (providing copies of Pi'ilani's Motion to Stay, Honu'ula's Joinder, and the Commission's 2013 Stay Order). The representations set forth in those previously referenced documents include the following:

1. That at the time the OSC hearing commenced, there had been no substantial commencement of the project;
2. That they would not commence any work while the stay was pending;
3. That the Intervenors would not suffer any prejudice from the stay;
4. That the stay of all of the contested case proceedings, including the Phase II evidentiary hearing was contingent upon amendment of the 1995 D&O; and,
5. That the Commission had the "inherent authority" to grant the requested stay because it would "secure the *just* and efficient determination" of the contested case for *all* parties involved.

*Id.*

However, additional representations were made by the Petitioners through additional papers they filed after Intervenors' filed a competing motion to Petitioners' Motion to Stay. At that time, Intervenors filed a motion to conclude the proceedings at the earliest practicable time ("First Motion to Conclude"),<sup>2</sup> and a supplement ("Intervenors' Supplement").<sup>3</sup> In all instances below, Honua`ula joined with Pi`ilani in opposing those motions, including the representations made therein by the Petitioners.

**B. The Petitioners Represented Intervenors Would Suffer No Prejudice from the Stay Because the Stay "Preserved the *Status Quo*"**

Pi`ilani's current arguments prejudice Intervenors' rights by essentially challenging their ability to seek or obtain relief, notwithstanding the fact that they prevailed in Phase I. However, the Petitioners repeatedly represented that granting the 2013 Stay would *not* prejudice

Intervenors:

- "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."<sup>4</sup>
- "[T]he request to Stay Phase II does not terminate this action. *No prejudice results to anyone*, so long as no development of the Petition Area occurs during the process."<sup>5</sup>

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<sup>2</sup> See Intervenors' Motion to Conclude Contested Case at the Earliest Practicable Time, filed 4/16/2013 ("**Intervenors' First Motion to Conclude**").

<sup>3</sup> See Supplemental Memorandum [filed 6/3/2013] in Support of (1) Intervenors' Motion to Conclude Contested Case at the Earliest Practicable Time [filed 4/15/2013]; and (2) Intervenors' Memorandum in Opposition to Piilani Promenade South, LLC's Motion to Stay Phase II of the Order to Show Cause Proceeding [filed 4/16/2013] ("**Intervenors' Supplement**").

<sup>4</sup> Pi`ilani's Motion to Stay at 5, attached to Intervenors' Motion as Appendix 1 (emphasis added).

<sup>5</sup> [Pi`ilani's] Memorandum in Opposition [filed 4/23/2013] to Intervenors' First Motion to Conclude, ("**Petitioners' First Opposition**") at 5-6 (emphasis added).

- “A stay operates merely *to preserve the status quo existing on the date of its issuance* . . .” Petitioners’ First Opposition at 7 (quoting 1 Am. Jur. 2d Actions § 68; emphasis added).”

As these direct quotes show, the Petitioners waived the right to take any position that would prejudice Intervenor as a result of the delay associated with the 2013 Stay.

**C. The Petitioners Specifically Opposed Entering Written Findings of Fact**

Pi`ilani proclaims that the Commission has lost the power to enter findings of fact. In support of this extreme position, Pi`ilani parses its Motion to Stay, arguing that it “pertained to the Phase II proceedings only,” and that “Pi`ilani did not request that the Commission delay, extend, or toll any action as to the Phase I Findings.” Pi`ilani MIO at 9. However, the record establishes this is not true. The record shows that Pi`ilani did oppose Intervenor’s request “[t]hat a hearing be set at the earliest practicable time *to render written findings*, conclusions and a decision and order as to phase one . . . .” First Motion to Conclude at 1 (emphasis added). The record shows that generally the Petitioners encouraged the Commission to conserve its resources and avoid further hearings on Phase I because the 2013 Stay would preserve the status quo. *See* direct quotes from Petitioners’ pleadings in previous section. Moreover, the Petitioners specifically opposed Intervenor’s request that the Commission enter findings of fact:

[Intervenor] essentially *seek[] to compel the Commission to enter Finding of Fact and Conclusions of Law as to Phase I* of the Order to Show Cause proceeding. Whether and when to enter such *is wholly within the discretion of the Commission*, particularly in light on the pending Motion to Stay Phase II.<sup>6</sup>

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<sup>6</sup> *See [Pi`ilani’s] Motion to Strike and Objection to Supplemental Memorandum [filed 6/3/2013] in Support of (1) Intervenor’s Motion to Conclude Contested Case at the Earliest Practicable Time [filed 4/15/2013]; and (2) Intervenor’s Memorandum in Opposition to Piilani Promenade South, LLC’s Motion to Stay Phase II of the Order to Show Cause Proceeding [filed 4/16/2013] (“Petitioners’ Second Opposition”) at 3.*



As these direct quotes show, the Petitioners waived the right to challenge the Commission's authority and power to enter written findings of fact relating to Phase I.<sup>7</sup>

**D. The Petitioners Represented the Stay Would Not Affect the Commission's Powers**

The Petitioners are now challenging the Commission's ability to pursue the contested case to its conclusion or use its authority to revert the land based on purported time limits in HRS Chapter 205. However, this is directly contrary to the Petitioners' previous assertions:

- "Intervenors claim that once the Commission commences a contested case, it must continue and conclude the matter, and issue a final decision "*within a reasonable period of time,*" which *Intervenors argue cannot include staying the proceeding* to allow Piilani to file a Motion to Amend. However, Intervenors cite to *no authority that precludes the Commission from taking the practical approach*, and staying Phase II until it has a chance to consider Piilani's Motion to Amend." Petitioners' First Opposition at 6 (internal cite omitted, emphasis added).
- "Once the Motion to Amend is determined, then the Commission can ascertain whether to proceed to Phase II." Petitioners' Second Opposition at 3.

*See also*, previous section quoting Petitioners' assertion that the 2013 Stay would "preserve the status quo".

As these direct quotes show, the Petitioners waived the right to challenge the Commission's authority and power to conclude the contested case and revert the land.

**E. The Petitioners Represented That There Had Been No Substantial Commencement of the Development**

The entire purpose behind Petitioners' request for the 2013 Stay was to permit it to file a motion to amend the 1995 D&O. To do so, it was critical that the Petitioners establish to the Commission that Petitioners up to that date had never substantially commenced the development. That is because a motion to amend a decision and order is only appropriate where the proposed

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<sup>7</sup>Notably, Petitioners do not challenge Intervenors' analysis of HRS § 91-11, which specifically permits the Commission to enter written findings, even though the membership did not personally preside over the Phase I hearing. *See* Intervenors' Motion at 15-17.

development is *prospective* in nature. Thus, it would be incumbent on the developer to come to the Commission *prior* to commencement of a nonconforming development, *i.e.*, with “clean hands”. Put another way, if there had been any substantial commencement of Petitioners’ development, it would have been an abuse of discretion by the Commission to permit the Petitioners to seek to amend the 1995 D&O. That is because the Commission may not use the motion to amend process to mitigate nonconforming uses once they have commenced.

The Petitioners clearly recognized this when they presented the concept of the motion to amend to the Commission in 2012 and 2013. To that end, the Petitioners made specific, unequivocal representations that there had been *no substantial commencement* of the development:

- “Contrary to the Intervenor’s assertion, the public is not being harmed by the procedural posture of the proceeding [to stay], since both Piilani and Honua’ula Partners, LLC have committed *not to take any action to develop the Subject Property* until the Commission addresses the pending motions.” Petitioners’ Second Opposition at 3.
- “Intervenor fails to consider the fact that the determination that the Piilani Promenade Project (and the Honua’ula Affordable Housing Project) would violate the 1995 Decision and Order *was based not on actual construction or development, but rather on a proposed plan to develop the property.*” *Id.* at 2-3 (emphasis added).
- “Honua’ula represented that it had *no present intention to commence construction or development* of the Honua’ula Parcel, and would not do so while any stay was in effect, absent notice to the Commission of its intent to do so.” *Id.* at 4 (emphasis added).
- “Piilani *has not begun any active development* of the Piilani Parcels. Thus, while there was an *intention* to develop the Piilani Promenade Project, and plans were made for said project, *no actual development of the land at issue has commenced.*” *Id.* at 5 (emphasis added).
- “In this case, Piilani had an honest, good faith belief that its *proposed* development of the Piilani Promenade Project was in compliance with the 1995 D&O. It therefore contested the assertion in Phase I of the proceeding that the Project would violate the conditions of the 1995 D&O. *A majority of the Commission disagreed.* Piilani has determined *to respect that majority determination . . . .*” *Id.* at 9 (emphasis added).

As the above direct quotes from the Petitioners' pleadings illustrate, the Petitioners waived their right to argue they had substantially commenced the development prior to the OSC hearing commencing.

**F. Petitioners' Arguments Are Barred Under the Doctrine of Judicial Estoppel**

The above direct quotes from the Petitioners' pleadings to the Commission confirm that the Petitioners' current arguments are barred under the doctrine of waiver. Additionally, they are barred under the doctrine of judicial estoppel, which "prevents parties from playing fast and loose with the court or blowing hot and cold during the course of litigation." *State v. Kalaola*, 124 Hawai'i 43, 72, 237 P.3d 1109, 1138 (2010) (quoting, *inter alia*, *State v. Fields*, 115 Hawai'i 503, 534, 168 P.3d 955, 986 (2007) (citations and some internal quotation marks omitted)).

As shown above, the Petitioners gave assurances and commitments through multiple pleadings aimed at inducing the Commission to grant the 2013 Stay and permit the Motion to Amend. Yet, now the Petitioners seek to argue the exact opposite in an attempt to attack the contested case proceeding that has been prolonged specifically as a result of the Petitioners' requests, and also to now argue substantial commencement, even though their ability to obtain the 2013 Stay and to be permitted to file the Motion to Amend required that there be no substantial commencement. Pursuant to the doctrine of judicial estoppel, the Petitioners are barred from taking contradictory positions from their earlier ones, especially where, as here, the Petitioners were directly responsible for the delay in the contested case proceedings, which they now seek to challenge based on time limitations.

**V. EVEN IF PETITIONERS' CONTRADICTIONARY ARGUMENTS ARE NOT BARRED, THEIR ARGUMENTS NONETHELESS LACK MERIT**

As shown above, under the doctrines of waiver and judicial estoppel, the Petitioners are barred from making arguments that are different from their stipulations and arguments made to



the Commission in order to secure the 2013 Stay. However, for the sake of argument, even if the Commission were required to consider the Petitioners' arguments, it may be readily shown that they are not supported by the law.

**A. The 2013 Stay Preserved the Status Quo**

All of Petitioners' procedural arguments in their current opposition rest on the assumption that the delay has nullified the Commission's powers. However, as so persuasively argued by the Petitioners in 2013, the Commission's decision to order a stay of the proceedings preserved the status quo: "A stay operates merely *to preserve the status quo existing on the date of its issuance . . .*" Petitioners' First Opposition at 7 (quoting 1 Am. Jur. 2d Actions § 68)." As shown previously in this memo, the Commission's ability to grant the stay in the first place required it to obtain from the Petitioners sufficient waivers to confirm that Petitioners would not later use the delay caused by the stay as a sword against the Commission or the other parties. "Any procedure in an order to show cause hearing may be modified or *waived by stipulation of the parties . . .*" HAR 15-15-93(c) (emphasis added).

Now the Petitioners attempt to obfuscate what the courts deem to be a fundamental principle of a stay of proceedings. The Commission should take its guidance from the courts, which will not permit such perverse outcomes as now suggested by the Petitioners, *i.e.*, that the delay they specifically requested acted to nullify the Commission's powers because of purported statutory time limits. As one example, the Commission may take guidance from the Ninth Circuit Court of Appeals and its decision in *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753 (9th Cir. 2015). The appeal related to giving deference to an administrative agency by permitting the agency to evaluate the claims first. The key issue in that appeal was whether the federal district court should have dismissed the case without prejudice, thereby permitting the party to refile after adjudication by the agency, or, instead, should have stayed the proceedings. The *Astiana*

Court explained that “prudence dictates that a court should *stay proceedings* rather than dismissing them when there is a possibility that the *running of the statute of limitations* during administrative proceedings could affect the parties' rights. *Id.* at 762 (internal quotes and citations omitted). The Court explained that a stay of proceedings avoids parties later claiming they prevailed based on time limitations, because the purpose of deferring or staying is not to enable “gotcha litigation tactics”. *Id.* at 763 n.6.

**B. Petitioners Admit the Issue of Substantial Commencement Is Premature, and Therefore the 365 Day Rule Is Inapplicable at this Stage of the Proceedings**

Over the course of five pages of its opposition, Pi'ilani engages in a contorted reading of HRS § 205-4 and the Commission Rules, as well as an egregiously flawed analysis of one of the important holdings in the *Aina Le'a* case. This is all done in an effort to argue that the Commission lost its power to enforce through this contested case 365 days after issuing the Order to Show Cause, on September 10, 2012. Pi'ilani MIO at 5-11. However, a proper reading of the *Aina Le'a* case succinctly disposes of Pi'ilani's spurious arguments, as shown through the brief analysis below.

First, Pi'ilani admits in its opposition that in this contested case, the “analysis of whether substantial commencement of the use of the land has occurred *is premature*.” Pi'ilani MIO at 8 (emphasis added). In other words, Pi'ilani admits that the Phase II hearing requested by Intervenors will be required before the Commission may properly begin examination of the “substantial commencement” issue.

However, notwithstanding this admission, and notwithstanding the unique procedural history of this case, Pi'ilani goes on at length to make the baseless argument that under HRS 205-4(g) the Commission lacks the power to conclude the contested case because it was purportedly obligated by law to render its decision on the OSC within 365 days. Pi'ilani MIO at

6. Pi'ilani fails to acknowledge to the Commission that the *Aina Le`a* Court flatly rejected this *same* argument made by the two petitioners in the *Aina Le`a* case, and succinctly explained that HRS § 205-4 is irrelevant where there has been no substantial commencement, and that in such instance, the Commission "simply voids" the reclassification from, e.g., Agriculture to Urban:

To the extent [the petitioners] argue that the LUC must comply with the general requirements of HRS § 205-4 anytime it seeks to revert property, they are mistaken. The express language of HRS § 205-4(g) and its legislative history establish that *the LUC may revert property without following those procedures, provided that the petitioner has not substantially commenced use of the property in accordance with its representations. In such a situation, the original reclassification is simply voided.*

Thus, once the LUC issues an OSC, the relevant considerations to be taken into account by the LUC and the procedures it must follow *turn on whether the petitioner has substantially commenced use of the land in accordance with its representations.* When the LUC reverts property before the petitioner has substantially commenced use of the land, the LUC may do so without following the procedures otherwise applicable under HRS § 205-4.

*Aina Le`a*, 339 P.3d at 707 (emphasis added).<sup>8</sup>

Therefore, the 365 day issue raised by the Petitioners is, at minimum, premature. The Intervenors have proposed a process for concluding the contested case that protects all parties, and assures a proper record. The Commission must first adopt findings to complete Phase I. Thereafter, the Commission must initiate the penalty phase, *i.e.*, Phase II. As shown above, the record before the Commission confirms that the Petitioners already resolved this issue close to five years ago when they assured the Commission that there had been no substantial commencement of the development of the Petition Area. The Commission was persuaded by the Petitioners' representations.

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<sup>8</sup> See also Intervenors' Motion at 17-18 (providing additional relevant quotes directly from *Aina Le`a*).



Thus, at this stage, the first issue is whether the *legally permitted* development had substantially commenced. Not until after that has occurred will the Commission be able to evaluate the scope of its enforcement powers under *Aina Le`a*. While Intervenors seek a Phase II hearing, it is already apparent, based on the above discussion of waiver and judicial estoppel, that the Petitioners are not at this late stage permitted to argue they substantially commenced construction, considering they argued the opposite five years ago in order to induce the Commission to grant the 2013 Stay. However, the issue may be properly disposed of by the Commission at the commencement of the Phase II proceedings.

**C. Petitioners' Arguments Regarding Findings of Fact are Premature**

Intervenors' Motion requested a hearing regarding adopting the findings of fact relating to Phase I. Pi'ilani improperly attempts to pre-argue that issue on pages 10 and 11 of their opposition memo. While the arguments therein are clearly spurious, Pi'ilani may bring them when the Commission is actually conducting a hearing on adopting findings of fact. At that time, Intervenors will respond.

**D. Petitioners' Attempt to Improperly Present Arguments and Evidence Regarding Substantial Commencement Is Premature and Must Be Stricken**

The Petitioners attempt to submit evidence purportedly showing substantial commencement, notwithstanding the fact that Petitioners long ago waived their right to make such a claim as a result of their former representations to the contrary, and upon which the Commission relied in order to grant the 2013 Stay and to permit Petitioners to file their Motion to Amend. Even if the Commission in the future determines it necessary to permit Petitioners to attempt to make a case of substantial commencement, it cannot be done at this current stage of the proceedings where the 2013 Stay remains in effect.

Therefore, Intervenor strenuously object to the Petitioners' improper attempt to present evidence. The Petitioners' attempt to submit this evidence before the Phase II hearing commences is in violation of HAR § §15-15-63, 64, 65, and 68 which sections specifically control the timing of, and admission of, evidence in this contested case, among other Commission Rules.

Upon establishing proceedings for Phase II, the first question for the Commission will be whether there is any obligation to hear evidence, in light of the clear and unequivocal former representations of the Petitioners claiming that there had been no substantial commencement. Petitioners reaped substantial benefits from those representations: (1) they received the 2013 Stay they requested; (2) they received the right to seek to amend the 1995 D&O; and (3) they obtained the ability to delay this contested case for five years.

Even if the Commission later determines that it will permit the taking of evidence for Phase II, before that occurs Intervenor are entitled to a reasonable time to conduct discovery on the Petitioners relating to the Phase II issue. Moreover, before any evidence may be accepted or considered by the Commission members, Intervenor are first entitled to their right to make timely objections before it is received into evidence, to cross examine the witnesses, and to be prepared and able to submit rebuttal testimony or documents.

Therefore, Intervenor hereby move the Commission to strike the following portions of Petitioners' opposition documents, which portions attempt to introduce or argue evidence relating to the purported substantial commencement of a purportedly legally conforming project:

- Pages 12 through 23 of Pi'ilani's opposition memo;
- Declaration of Darren T. Unemori;
- Exhibits "A" to "I", attached to the Declaration of Darren T. Unemori;
- Declaration of Kenneth F. Gift;

- Exhibit “J”, attached to the Declaration of Kenneth F. Gift;
- Declaration of Robert D. Poyner;
- Exhibits “K” and “L” attached to the Declaration of Robert D. Poyner;
- Pages 6 through 10 of Honua`ula’s opposition memo;
- Declaration of Charles Jencks; and,
- Exhibit “1” attached to Declaration of Charles Jencks.

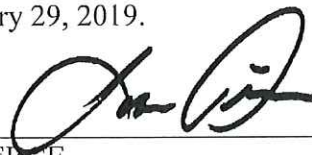
Intervenors will suffer substantial prejudice in the contested case unless these documents are stricken. To the extent the Commission subsequently determines that such evidence is permissible, the Petitioners may seek to admit it at such time when the appropriate protective evidentiary procedures are in place, as required by the Commission’s Rules.

**VI. CONCLUSION**

For the foregoing reasons, the Commission should grant Intervenors’ Motion and initiate the following actions:

- (1) Lift the 2013 Stay of the contested case proceeding;
- (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, January 29, 2019.




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



**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 certified mail, return receipt requested and by electronic mail, on January 18, 2019:

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DATED: Makawao, Maui, Hawaii, January 29, 2019.

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

TOM PIERCE  
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for Responsible Growth, and Daniel Kanahela