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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of

Docket No. A94-706

KAONOULU RANCH to Amend the
Agricultural Land Use District for
Approximately 88 acres at Kaonolu,
Makawai-Wailuku, Maui, Hawai'i; Tax Map
Key Nos, (2) 2-2-02:por. 15 and 3-9-01:16

COUNTY OF MAUI, DEPARTMENT OF
PLANNING'S RESPONSE TO
PETITIONERS' MOTION TO DISMISS
THE ORDER TO SHOW CAUSE
PROCEEDING; CERTIFICATE OF
SERVICE

**COUNTY OF MAUI, DEPARTMENT OF PLANNING'S
RESPONSE TO PETITIONERS' MOTION TO DISMISS THE ORDER
TO SHOW CAUSE PROCEEDING**

Department of Planning, County of Maui ("County"), by and through its attorneys, Patrick K. Wong, Acting Corporation Counsel, and Michael J. Hopper, Deputy Corporation Counsel, submits its response to Petitioners' Motion to Dismiss the Order to Show Cause Proceeding.

In accordance with §15-15-70 and §15-15-93 of the Hawaii Administrative Rules, the County of Maui, Department of Planning (hereinafter referred to as "Department"), by and through its undersigned attorneys, submits its response to Petitioner's Motion to Dismiss.

Summary of Motion

Petitioners Piilani Promenade South, LLC and Piilani Promenade North, LLC (“Petitioners”) request that this Commission dismiss the Order to show Cause (“OSC”) proceeding in this docket. Petitioners make three basic arguments in favor of its motion: (1) That the Commission lacks the authority to complete phase 1 of the OSC proceeding based on certain sections of the Hawaii Administrative Rules (“HAR”), (2) That the Petitioners are in fact now in compliance with the conditions of the 1995 Decision and Order (“D&O”) in this docket, and (3) that the Commission cannot revert the property as Petitioners have substantially commenced use of the property. The Department will address each argument individually.

The Commission’s Authority to Conclude Phase 1 of the OSC Proceeding

Petitioners argue that HAR § 15-15-74(b) requires that the Commission enter a decision and order on this OSC proceeding within one year of September 10, 2012. Petitioners no longer appear to argue that Hawaii Revised Statutes (“HRS”) section 205-4(g) is applicable to the OSC in this case, though the issue was raised in Petitioners’ Memorandum in Opposition to Intervenors’ Motion to Conduct Phase II of Contested Case.¹

For OSC proceedings, HAR § 15-15-93(c) states that the Commission shall conduct a hearing in accordance with subchapter 7 of the Commission’s rules “where applicable”. This makes clear that not all of subchapter 7 is applicable to OSC proceedings. HAR § 15-15-74(b) requires that the Commission make a decision on district boundary amendment petitions within one year after a district boundary amendment petition is deemed a complete filing. The source notes for this rule cite to several relevant HRS sections including 91-13.5, 205-1 and 205-4. These

¹ See Petitioners’ Motion to Dismiss, p. 8. “Here, where there is no reversionary action, application of the 356-day deadline as set forth in *section 205-4(g), HRS* is inappropriate and the Court’s analysis in Bridge Aina Le’a is irrelevant.”

sections cover time limits for action on certain business or development related permits (HRS 91-13.5) as well as the one-year requirement for district boundary amendments (HRS 205-4). While a district boundary amendment is subject to these statutory time frames, an OSC to enforce compliance with conditions does not appear subject to the same requirements. As HAR § 15-15-74(b) was established to meet the statutory time frames for district boundary amendments, it would not be appropriate to apply the same deadlines to an OSC proceeding.

In any case, Petitioners requested and received a stay of Phase II the OSC proceedings from the Commission on July 12, 2013. While the stay specified that it was for Phase II of the proceedings (the “penalty” phase), there would be no reason to read the request or order as requiring the Commission to enter a written order on Phase I or have the proceedings—including Phase II—terminated automatically by rule. Entering an order on Phase I may have also set deadlines for filing appeals, requiring additional time and briefing on issues that would be rendered moot by a subsequent motion to amend and change in the proposed project, as contemplated by the order granting the stay.

In conclusion, the Department does not agree with Petitioners that the OSC proceeding must immediately terminate because the Commission is time-barred by rule from taking further action in the proceeding.

Petitioners’ Compliance with the 1995 Decision and Order

Petitioners next argue that the OSC proceeding should terminate because the property is now in compliance with the D&O, rendering the Commission’s oral decision, and the parties’ proposed Findings of Fact and Conclusions of Law incorrect. In support of this, Petitioners set forth how they are currently in compliance with the conditions of the D&O, and set forth that any future project will be in compliance with the D&O, specifically certain findings of fact set forth in

the document. See Petitioner's Motion to Dismiss pp. 11-19.

At this stage, the Department does not have enough specific information to determine what is being proposed by Petitioners. In the Department's Position Statement in response to Intervenor's Motion to Conduct Phase II and for Final Decision, the Department stated: "The Department recommends that the matter be deferred to allow Petitioner the opportunity to provide an update to the parties and the Commission of the Community meetings held and any updated project plans to see if it is in substantial compliance with the conditions of the 1995 Decision and Order."

The Department acknowledges the Petitioners' substantial efforts to meet with community stakeholders and develop plans acceptable to those stakeholders, though those efforts were ultimately unsuccessful. The Petitioners' pleadings include statements that it will now comply with the "original plan", and states that the current project will comply with many of the findings of fact from the D&O. Petitioners should have the ability to develop a project in substantial compliance with the D&O. However, because of the history of this case, including the disagreement between the Department, Commission and State Office of Planning on what constitutes substantial compliance with the conditions of the D&O, the Department would like the Commission to be aware of what will be developed going forward and provide guidance on whether it is in compliance with the D&O.

Currently, the Commission has not reviewed a site plan including number of lots, development timeline, proposed uses, and other details that would be helpful for the Commission to review. The Department would like to avoid any confusion as to what constitutes compliance with the D&O at the time Petitioners submit subdivision or other plans to the County for approval, therefore it requests that the Petitioners provide additional information to the Commission for

review, consistent with the Department's Position Statement filed in response to the Intervenors' Motion to Conduct Phase II and for Final Decision.

Substantial Commencement of the Use of the Property

Whether there has been "substantial commencement" of the use of the property is relevant only if the Commission begins proceedings to revert the property, as it will determine the process required to move forward with reversion. Since that has not been done undertaken at this time, the County reserves argument on this issue in the event the Commission moves forward with proceedings for reversion of the property.

Conclusion

The Department respectfully requests that the Commission defer action on Petitioners' Motion to allow time for Petitioners to present the Commission with more specific development plans for the property in compliance with the conditions of the 1995 D&O.

DATED: Wailuku, Maui, Hawaii, February 11, 2019.

PATRICK K. WONG
Acting Corporation Counsel
Attorney for Defendant
COUNTY OF MAUI

By:


MICHAEL J. HOPPER
Deputy Corporation Counsel

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OF THE STATE OF HAWAII

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CERTIFICATE OF SERVICE

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I hereby certify that a copy of the foregoing was served on the following on the date indicated below:

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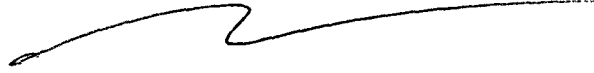
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DATED: Wailuku, Maui, Hawaii, February 11, 2019.

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