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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

INTERVENORS' MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION TO DISMISS THE ORDER TO SHOW CAUSE PROCEEDING, FILED 2/1/2019; CERTIFICATE OF SERVICE

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

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Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahele ("**Intervenors**"), through their attorney, Tom Pierce Attorney at Law LLLC, hereby submit to the Hawai`i Land Use Commission ("**Commission**") this *Memorandum in Opposition to Petitioners' Motion* [the "**Motion**"] *to Dismiss the Order to Show Cause Proceeding*, which was filed by Pi`ilani and joined by Honua`ula.

Intervenors adopt herein by reference *Intervenors' Motion* [filed 12/7/2018] *to Conduct Phase II of Contested Case Pending Since 2012, and for Final Decision* ("**Motion to Conclude**"). Abbreviations set forth in the Motion to Conclude are adopted herein. Intervenors also adopt herein by reference *Intervenors' Reply* [filed 1/31/2019] *to the Parties' Responses to Intervenors' [Motion to Conclude]* ("**Reply**").

I. INTRODUCTION

Petitioners' seek to dismiss this contested case, claiming the Commission lacks authority to act for failing to timely assert its authority. In order to argue this extreme position, Petitioners unapologetically argue the exact opposite of their numerous and repeated assertions made in 2013, and on which the Commission relied in granting the 2013 Stay for Petitioners' benefit. Namely, Petitioners previously represented that there had been no substantial commencement up to the date of the 2013 Stay. They additionally asserted that there would be no prejudice to Intervenors from the stay, and that the Commission would retain its authority. However, now that they reaped the benefits of six years of staying the case, but having failed to prepare an adequate environmental impact statement on which their motion to amend relied, the tune has changed.

While the tune has changed, the law and facts have not. For this reason, Petitioners' lengthy Motion, which is predominantly a recitation or revision of the arguments made in Petitioners' previous opposition filing, must be denied. Intervenors have adopted herein by reference the law and arguments set forth in their Motion to Conclude and their Reply with respect to these repetitive points made by Petitioners.

Finally, the Petitioners' Motion, as well as Petitioners' earlier opposition papers, have attempted to pre-argue issues that are not yet properly before the Commission. Intervenors' Motion to Conclude was essentially a *procedural* request that preserved argument of the *substantive* issues for later proceedings. The Motion to Conclude requested that the stay be lifted, and that the Commission then schedule a first hearing to deal with any remaining issues for Phase I, and then another hearing relating to Phase II. These additional hearings were for presentation of substantive issues thereby protecting due process and providing the opportunity for arguments and facts to be presented by the parties at the *appropriate time.* Instead of adhering to an orderly process, Petitioners are attempting to introduce evidence without the opportunity for Intervenors to object, or to cross examine the witnesses, or to submit rebuttal evidence. All such attempts to improperly introduce evidence should be stricken by the Commission on its own initiative in order to protect the record and assure accord with the Commission's Rules, as well as with doctrines of fairness.[1]

[1] Considering Petitioners have had Intervenors' Motion to Conclude since November 30, 2018, the timing of their current Motion to Dismiss, not filed until February 1, 2019, is peculiar. The Motion appears to be predominantly an attempt to improperly supplement its earlier memorandum in opposition to Intervenors' Motion to Conclude, and to maneuver the ability to have the "last word" before the Commission's hearing scheduled for February 20, 2019, by having the opportunity to file a reply Intervenors' opposition.

II. PETITIONERS' "ORIGINAL PLAN" DEVELOPMENT PROPOSAL WAS PREVIOUSLY REJECTED IN PHASE I

Petitioners argue in their Motion that Pi`ilani's recent "decision to develop the Pi`ilani Parcels in substantial compliance with the Original Plan ensures that all previous violations of the D&O have been cured . . . ." Motion at 12. As an initial point, the Petitioners cannot "cure" a violation found to have occurred six years ago by the Commission, just as a thief cannot "cure" a conviction by returning the stolen goods after being convicted. Setting that aside, the Petitioners are attempting to make the ***same arguments*** they made to the Commission back in 2012, which arguments were rejected by the Commission at the conclusion of Phase I. The only difference is the nonconforming proposed uses are now dubbed by the Petitioners as "the Original Plan."

Namely, the Petitioners are arguing that the 1995 D&O will permit a broad range of commercial uses because of the nature of the purported representations made by the original petitioner, Kaonolulu Ranch, through its original petition submitted in 1994. *See* Motion at 13-18. As a result, the Petitioners then argue, they will be in "substantial compliance" with the original petitioners' representations and therefore will meet Condition 15 of the 1995 D&O requiring substantial compliance. Motion at 13-18. Petitioners explain that the petition area "will be developed as a commercial and light industrial subdivision, sold in fee simple or leased on a long-term basis." Motion at 13. The Petitioners then attach to their Motion the declaration of Koa Partners' chief executive officer Harry Lake, who explains Koa Partners will purportedly propose a development plan that will be "in keeping with a development plan that substantially complie[s] with the representations made by the original petitioner to the [Commission] (the "Original Plan")." *Id.* ¶ 10. Mr. Lake then explains that the Original Plan may include "***affordable and senior housing***, and, generally, uses ***other than*** light industrial uses." *Id.* ¶ 12 (emphasis added).

These arguments are the exact same ones made by Petitioners during the Phase I evidentiary hearing in 2012-2013. During the Phase I hearing, the Petitioners repeatedly maintained that affordable housing and "other commercial uses" they were seeking to develop were in substantial compliance with the representations previously made by the original petitioner. For example, Petitioners argued that the retail uses they intended to develop were permissible under the 1995 D&O because the development was not limited to just "light industrial". Rather, they argued that the original petitioner had submitted a petition and exhibits describing a much broader scope of possible uses, which additional uses were purportedly thereafter approved through the 1995 D&O:

> In summary, the Petition and the Exhibits submitted in support [by Kaonoulu Ranch] all describe a concept for a project for commercial **and** light industrial uses. Nowhere therein was any representation made that no commercial or retail establishments would be included. To the contrary, it was clearly contemplated that permissible possible uses included retail and other commercial and business uses beyond the "light industrial" limitation which Movants seek to impose. While the configuration of the Project is somewhat different from the conceptual 123 lot subdivision proposed to the LUC in the Petition, the general concept remains substantially similar.

[Pi`ilani's] Memorandum in Opposition [filed 7/16/2012] *to Intervenors' Motion* ["**OSC Motion**"] *for a Hearing, Issuance of Order to Show Cause and Other Relief, filed on May 23, 2012* at 16 (emphasis in original).

In 2012, Honua`ula joined with Pi`ilani and made similar arguments:

> In summary, . . . Kaonoulu [Ranch] never represented that the project would exclude apartment use. To the contrary, it was made evident to the LUC that apartment use was a permitted use under the zoning proposed for the Property. The LUC could have but did not include a . . . condition prohibiting apartment use . . . .

[Honua`ula's] Memorandum in Opposition [filed 7/16/2012] *to [OSC Motion]* at 12.

These arguments were rejected by the Commission at the conclusion of the Phase I evidentiary hearing, as shown through the proposed findings of fact submitted by the Intervenors

and by OP. *See* Reply at 3-4 (providing references and links to the proposed FOF), and are likewise not supported by the 1995 D&O FOF. *See* Reply at 2 (providing reference and link). Yet, now, six years later, Petitioners are making the same arguments again. *Res judicata* (claim preclusion) controls, and therefore Petitioners are barred from doing so. They are not entitled to relitigate these issues. Therefore, the Motion must be denied.

III. THE MOTION IS BARRED UNDER EQUITABLE DOCTRINES

Intervenors have previously shown that the 2013 Stay preserved the status quo. As a result, the "clock stopped" with respect to any purported timing issues, and remains stopped until the 2013 Stay is no longer in effect. Reply at 13-14. This eliminates the arguments set forth in Petitioners' Motion, which essentially challenge the Commission's authority to act as a result of purported untimeliness. *See* Motion at 6-11 (providing various arguments challenging the Commission's authority). However, assuming for the sake of argument, if the status quo was *not* preserved as a result of the 2013 Stay, then the Motion must nonetheless be denied because it is barred by three different equitable doctrines that are all applicable in this instance.

A. Petitioners May Not "Have Their Cake and Eat It Too" Under the Doctrines of Waiver and Judicial Estoppel

Petitioners do not deny the fact that they requested the 2013 Stay and made repeated assertions on which the Commission relied in granting the 2013 Stay. *See* Intervenors' Reply 6-12. Those assertions included that there had been, and would not be, any substantial commencement, as well as, confirmation that the 2013 Stay would preserve the status quo, would not alter the Commission's powers to conduct Phase II at a later stage, including the power to revert, and would not prejudice the Intervenors. *Id.* The Petitioners reaped substantial benefits from their assertions in the form of a ***six year*** continuance of the contested case.

Yet now, Petitioners unapologetically assert the exact opposite of their previous assertions through their Motion. However, as Thomas, Duke of Norfolk, explained in 1538, "a man can not have his cake and eat his cake." This ancient proverb is confirmed through the legal doctrines of waiver and judicial estoppel, which both bar the Petitioners from reversing their earlier legal and factual positions to take new position that are currently more beneficial to them. *See* Reply 6-12. Therefore, under the doctrines of waiver and judicial estoppel, Petitioners' Motion must be denied.

B. Petitioners' Motion Is Barred Under the Laches Doctrine

Laches is an equitable doctrine that protects a party from a claim or a defense that should have been brought at an earlier time. "The doctrine of laches reflects the equitable maxim that equity aids the vigilant, not those who slumber on their rights." *Adair v. Hustace,* 64 Haw. 314, 640 P.2d 294, 301 (1982) (internal cites and quotes omitted)).[2] Hawai`i courts confirm that laches may be applied to contested case proceedings under the Hawai`i Administrative Procedure

[2] *Adair, supra,* further explains:

> There are two components to laches, both of which must exist before the doctrine will apply. First, there must have been a delay by the plaintiff in bringing his claim, and that delay must have been unreasonable under the circumstances. W. McClintock, Equity § 528 at 71 (2d ed. 1948). Delay is reasonable if the claim was brought without undue delay after plaintiff knew of the wrong or knew of facts and circumstances sufficient to impute such knowledge to him. 3 S. Symons, Pomeroy's Equity Jurisprudence, supra at § 917. Second, that delay must have resulted in prejudice to defendant. McClintock, Equity, supra at 72. Common but by no means exclusive examples of such prejudice are loss of evidence with which to contest plaintiff's claims, including the fading memories or deaths of material witnesses, changes in the value of the subject matter, changes in defendant's position, and intervening rights of third parties.

Act. *See, e.g., Citizens Against Reckless Development v. Zoning Board of Honolulu* (**"CARD"**), 159 P.3d 143 (Hawai`i 2007).[3] Subsequent to the *CARD* decision, the Hawai`i Supreme Court further held that the doctrine of laches applies to issues both at equity and at law.[4] Therefore, the Commission is permitted to apply the doctrine of laches and find that Petitioners' challenge to the Commission's authority is barred.

In this case, Petitioners repeatedly "slept" on their right to challenge the Commission's authority. The obligation to assert their rights ripened six years ago, in 2013, at which time it was already clear that the Petitioners were proposing that Phase II would not proceed until some indefinite time in the future, and certainly more than the 365-day period that Petitioners claim purportedly controls the Commission's authority in this instance. *See* Reply at 14-16 (providing the relevant holding from *Aina Le`a*). However, Petitioners failed to question the Commission's authority, when doing so would have been timely, and could have been made without prejudice to Intervenors, who could have, at that early stage, protected their rights. In fact, Petitioners not only failed to question the Commission's authority, as previously discussed herein and in the Reply, they repeatedly asserted that the Commission's authority would not be altered by granting the stay.

Moreover, there have been repeated *subsequent* instances over the past six years of the 2013 Stay where Petitioners continued to acknowledge the Commission's authority to render a

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[3] In *CARD*, the Hawai`i Supreme Court affirmed the circuit court's holding that a petitioner had "slept on its rights" and therefore had lost the opportunity to seek declaratory relief from the agency. The circuit court had held that where there is no mandatory deadline, the claim may still be barred under the laches doctrine. 159 P.3d at 151 (citing *inter alia* 22A Am.Jur.2d Declaratory Judgments § 185 (1988); *Small v. Badenhop,* 67 Haw. 626, 701 P.2d 647 (1985) (equity aids the vigilant)).

[4] *Ass'n of Apartment Owners of Royal Aloha v. Certified Mgmt., Inc.,* 139 Hawai'i 229, 236, 386 P.3d 866, 873 (2016) (explaining that when applying the laches doctrine, "there is no longer a good reason to distinguish between the legal and equitable character of defenses").

final decision in this contested case and failed to challenge the Commission's authority to conclude this contested case. One of the most notable such examples occurred in 2017, when Petitioners sought approval of the environmental impact statement ("**EIS**"). At the July 19 and 20, 2017, hearing to determine the adequacy of the EIS, the Petitioners did not object to Intervenors' right, as *continuing* parties to the contested case, to question witnesses involved in the preparation of the EIS. Nor, did Petitioners thereafter object to the substance, or otherwise appeal, the Commission's final written decision rejecting the EIS. *See Findings of Fact, Conclusions of Law, and Decision and Order Denying the Acceptance of a Final [EIS],* filed July 27, 2017 ("**EIS D&O**"). Importantly, the EIS D&O specifically reasserted the Commission's continuing authority to render decisions, both in Phase I and in Phase II. *See* EIS D&O ¶¶ 1-2, and footnotes 1 and 2. Because the EIS D&O was not appealed by Petitioners, the Commission's authority to act is now final and *res judicata* (claim preclusion) applies and bars such arguments by Petitioners.

Permitting Petitioners to challenge the Commission's authority at this late stage would cause significant prejudice to Intervenors. If Petitioners had made their position known in 2013, it likely would have caused the Commission to deny the 2013 Stay and proceed to Phase II. Instead, Petitioners assured the Commission that the 2013 Stay would not affect the Commission's authority or the Intervenors' ability to seek relief through a Phase II hearing. *See* Reply at 7-11 (providing previous written assurances of the Petitioners).

Because the challenges to the Commission's authority are barred under the doctrine of laches, Petitioners' Motion must be denied.

IV. ANY ACTIONS OF THE PETITIONERS AFTER THE COMMISSION'S ORAL RULING IN PHASE I ARE IRRELEVANT TO THE OSC HEARING

Petitioners' Motion also attempts to challenge the Phase I proceeding by claiming that the findings are no longer accurate as a result of subsequent actions taken by the developers. Motion at 11-19. This frivolous argument fails for any number of reasons briefly identified below.

First, the 2013 Stay specifically prohibited Petitioners from pursuing development as long as a stay was in effect. Therefore, as a matter of law, they may not argue that they have taken subsequent development actions which alter the findings.

Second, the findings in Phase I of the OSC hearing were focused on the development activities present at the time, and Phase II may now proceed based on those findings. Petitioners' sole opportunity to "cure" was if they were granted a motion to amend; however, Petitioners have formally abandoned the motion to amend process.

Finally, as set forth, *supra,* in Section II of this opposition, Petitioners' "Original Plan" proposal is nothing more than a rehash of the same arguments previously litigated in Phase I, which were ultimately found to violate the 1995 D&O. Under *res judicata* (claim preclusion), Petitioners may not relitigate the same issue again.

V. THE COMMISSION SHOULD ACT INDEPENDENTLY TO VOID THE 1995 D&O

As set forth in detail in Intervenors' Reply, at 2-6, this Commission has the power, *of its own initiative and irrespective of the pending OSC hearing*, to immediately declare the 1995 D&O void pursuant to HAR § 15-15-50(c)(19), *i.e.,* the "Ten Year" Rule, and HAR § 15-15-79, which authorizes the Commission to "nullify" the 1995 D&O "if the petitioner fails to perform as represented to the commission with the specified period." The "specified period" ended ***twenty-three years ago***, in 1996, as confirmed by FOF 22 of the 1995 D&O: "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 (emphasis added).

However, ***nothing*** happened for ten years after 1995. Reply at 2-6. Then, after failing to meet those representations, the original petitioner sold to MIP. MIP then went "dark" and failed to inform the Commission that it intended to dramatically change plans and subdivide the land, in violation of Condition 15 of the 1995 D&O, as confirmed by OP's proposed findings of fact. *Id.; see also* 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."). (Emphasis added).

Petitioners are clearly positioning the case for a potential appeal, which might come down to evaluation of administrative procedure nuances, rather than rest on the merits of this case. As a result, it is critical that if the Commission intends to revert the petition area that the Commission employ a "belts and suspenders" approach and exert its own independent authority to nullify the 1995 D&O, in addition to concluding the current contested case through a Phase II hearing.[5]

[5] Petitioners' recent filings show a clear attempt to position the case for a potential appeal. This is why their attempt to submit declarations and documents outside of an evidentiary hearing is not only improper but particularly egregious. Petitioners are attempting to taint the administrative record with facts purportedly showing substantial compliance, even though Intervenors have not had the opportunity to properly state their objections before being presented to the Commission. Intervenors have also not been afforded their due process right to cross examine, or to offer rebuttal evidence. The Commission should, of its own initiative, assert its authority and protect the record by striking the improperly offered evidence of Petitioners.

VI. CONCLUSION

For the foregoing reasons, the Commission should deny Petitioners' Motion.

DATED: Makawao, Maui, Hawaii, February 6, 2019.

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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 and by electronic mail, on January 18, 2019:

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