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LAND USE COMMISSION
STATE OF HAWAII

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PIILANI PROMENADE NORTH, LLC

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A94-706
)	
KAONOULU RANCH	)	PIILANI PROMENADE SOUTH, LLC
	)	AND PIILANI PROMENADE NORTH,
To Amend the Agricultural Land Use District	)	LLC'S MEMORANDUM IN OPPOSITION
Boundary into the Urban Land Use District	)	TO INTERVENORS' MOTION TO
for approximately 88 acres at Kaonoulu,	)	STRIKE PORTIONS OF THE
Makawao-Wailuku, Maui, Hawai'i	)	PETITIONERS' RESPONSES
	)	ATTEMPTING TO IMPROPERLY
	)	SUBMIT EVIDENCE, FILED
	)	JANUARY 31, 2019; CERTIFICATE OF
	)	SERVICE
)	
)	

PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE
NORTH, LLC'S MEMORANDUM IN OPPOSITION TO INTERVENORS'
MOTION TO STRIKE PORTIONS OF THE PETITIONERS' RESPONSES
ATTEMPTING TO IMPROPERLY SUBMIT EVIDENCE, FILED JANUARY 31, 2019

Petitioners PIILANI PROMENADE SOUTH, LLC and PIILANI PROMENADE
NORTH, LLC (collectively, "Piilani"), successors-in-interest to KAONOULU RANCH, a
Hawai'i limited partnership, with regard to the real property that is the subject matter of Docket
No. A94-706 (the "Petition Area"), as referenced above, submit to the State of Hawai'i Land Use

Commission (the “Commission”) their Memorandum in Opposition to Intervenors’ improper request to strike certain portions of Piilani’s evidentiary record, file January 31, 2019 (the “Request to Strike”). The Request to Strike is procedurally improper and otherwise without merit. Accordingly, the Commission should refuse to consider the Request to Strike, but if it does, the Commission should deny the Request to Strike for the following reasons.

I. ANALYSIS

A. The Request to Strike Is Procedurally Improper and the Commission Should Refuse to Consider the Request to Strike

The Hawai‘i Administrative Rules (“HAR”) requires that *all* motions made to the Commission be in writing and “[b]e accompanied by a memorandum in support of the motion, if the motion involves a question of law[.]” HAR § 15-15-70(b)(1), (4).

Intervenors’ Request to Strike is improperly styled as a “Motion to Strike,” and is devoid of any actual motion as required by HAR § 15-15-70. Intervenors cite no rule that authorizes, much less supports, their Request to Strike. There thus exists no motion before the Commission stating the grounds for the motion or setting forth the relief or order sought. HAR § 15-15-70(b)(2)-(3). Accordingly, the Commission should refuse to consider the Request to Strike as it is submitted in blatant violation of the Commission’s rules governing motions.

B. Piilani’s Submissions Do Not Violate Any Rules

Intervenors argue that Piilani’s submission of supporting declarations and its arguments set forth in pages 12 to 23 of its Memorandum in Opposition to Intervenors’ Motion to Conduct Phase II of Contested Case Pending Since 2012, and for Final Decision, Filed December 3, 2018, filed January 10, 2018 (the “Memorandum in Opposition”), violates HAR §§ 15-15-63, 64, 65, and 68. Request to Strike at 17. Intervenors’ assertions are without authority or merit.

HAR §§ 15-15-64 and -68 were repealed on November 3, 2013 and therefore are inappropriate bases for the Motion to Strike. Piilani has not violated HAR § 15-15-63—the evidence produced is not “irrelevant, immaterial, or unduly repetitious” and is probative of whether Piilani substantially commenced use of the Petition Area, an issue that was raised by the Intervenors in their Motion. HAR § 15-15-63(b). Moreover, the declarations and supporting evidence were introduced as part of the motions practice governed by HAR § 15-15-70, which explicitly permits and requires “facts not appearing of record to be supported by affidavits or declarations.” HAR § 15-15-70(c). To the extent that there is a conflict between the HAR §§ 15-15-63 and -70, HAR § 15-15-70 should be favored as it is the specific rule addressing the motions practice before the Commission. Richardson v. City & Cty. of Honolulu, 76 Hawai‘i 46, 55, 868 P.2d 1193, 1202 (1994) (“[W]here there is a ‘plainly irreconcilable’ conflict between a general and a specific statute concerning the same subject matter, the specific will be favored.”).

As to HAR § 15-15-65, that section states: “[t]o avoid unnecessary cumulative evidence, the presiding officer may limit the number of witnesses or the time for testimony upon a particular issue.” Again, even if this section applied to this case—and it does not—Piilani has not presented “unnecessary cumulative evidence.” For evidence to be “cumulative,” “it must be substantially the same as other evidence that has already been received.” *State v. Pulse*, 83 Hawai‘i 229, 247, 925 P.2d 797, 815 (1996) (citation omitted). Piilani previously provided the Commission with a brief summary of its use of the Petition Area in its Status Report of Piilani Promenade South, LLC and Piilani Promenade North, LLC, Successor Petitioners to Kaonoulu Ranch, filed July 5, 2018 (“2018 Status Report”). *See* 2018 Status Report, at 5-6. However, the arguments presented in Piilani’s Memorandum in Opposition, and the declarations from Darren

T. Unemori, Kenneth F. Gift, and Robert D. Poynor, with the corresponding exhibits, are more comprehensive than the two-page summary that was presented in the 2018 Status Report. Moreover, the declarations and corresponding exhibits are necessary to support the factual statements made in Piilani's Memorandum in Opposition in accordance with HAR § 15-15-70.

Contrary to Intervenors' baseless arguments, under the Commission's rules, Piilani had a right to respond to the Intervenors and dispute the arguments raised in the Motion. *See* HAR § 15-15-70(c) (setting a deadline to "file counter affidavits and memorandums in opposition to the motion and of the authorities relied"). In fact, had Piilani failed to respond to the Intervenors' arguments in its Memorandum in Opposition, Intervenors may have argued that Piilani waived its right to maintain that it substantially commenced use of the Petition Area. HAR § 15-15-70(g) ("Failure to serve or file memoranda in opposition to a motion or failure to appear at the hearing may be deemed a waiver of objection to the granting or denial of the motion.").

Moreover, substantial commencement of the use of the Petition Area is necessarily a fact-based inquiry. As the Hawai'i Supreme Court explained "a determination of whether a party has substantially commenced use of the land *will turn on the circumstances of each case[.]*" DW Aina Le'a Development, LLC v. Bridge Aina Le'a, LLC, 134 Hawai'i 187, 214 n.16, 339 P.3d 685, 712 n.16 (2014) (emphasis added). To provide the factual circumstances to the Commission to establish substantial commencement, Piilani was required to submit affidavits or declarations establishing the requisite the facts. *See* HAR § 15-15-70(c) ("If a motion requires the consideration of facts not appearing of record, *it shall be supported by affidavits or declarations.*" (Emphasis added)). Thus, Piilani did not violate the Commission's rules by

submitting the declarations, and was actually required under the Commission's rules to provide the declarations to support its factual statements.

C. Piilani Suffers Prejudice If the Argument, Declaration, Supporting Evidence Is Stricken From the Record

In contrast, Piilani will suffer substantial prejudice if the Commission grants the Request to Strike. Piilani had to respond to Intervenor's arguments related to substantial commencement of use of the Petition Area or risk an argument that it had waived its right to object. To that end, Piilani was required to provide support for its factual statements, and because facts are necessary to any inquiry into substantial commencement of use of the land, Piilani submitted declarations to the Commission. Such declarations are specifically permitted under the Commission's rules, *see* HAR § 15-15-70; and Piilani has not violated HAR §§ 15-15-63, -64, -65, or -68. Under these circumstances, the exclusion of the declarations and arguments in Piilani's Memorandum in Opposition, which were proffered in direct response to the Intervenor's Motion, would constitute an abuse of discretion and would prejudice Piilani. *See, e.g., Nelson v. Univ. of Hawaii*, 97 Hawai'i 376, 386, 38 P.3d 95, 105 (2001) (“[W]e hold that the trial court *abused its discretion in excluding Nelson's proffered rebuttal evidence* with respect to her publications and that the *exclusion of such evidence prejudiced Nelson with respect to her claims.*” (Emphases added).).

HAR § 15-15-1 mandates that the rules “be construed to secure the just and efficient determination of every proceeding.” Excluding the declarations and arguments in Piilani's Memorandum in Opposition, which were proffered in direct response to the Intervenor's Motion, would also violate this mandate by precluding Piilani from introducing material facts into evidence, thereby undermining the Commission's ability to render a just and efficient determination.

D. Piilani Did Not Waive Their Right to Maintain Substantial Commencement

The Intervenors argue that “Petitioners long ago waived their right to make such a claim [of substantial commencement].” Request to Strike at 16. Their argument is without merit because Piilani never waived its right to assert that it substantially commenced use of the Petition Area. As Intervenors’ state, “Waiver is generally defined as an ‘*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-Pac. Restaurants, 71 Haw. 412, 417, 794 P.2d 614, 616 (1990) (emphases added). Intervenors present vague blanket statements that Piilani waived its rights, but provide no actual statements of waiver by Piilani demonstrating an intentional and voluntary relinquishment of its rights.

In fact, Piilani’s current position is consistent with its earlier position. As discussed in Piilani’s Memorandum in Opposition, grading or construction is not synonymous with “use of the land.” Bridge Aina Le’a, LLC, 134 Hawai’i at 214, 339 P.3d at 712 (recognizing “preparation of plans and studies” and infrastructure work as considerations of whether substantial commencement of use of the land occurred). Piilani has shown that it substantially commenced use of the Petition Area through its efforts and expenditure of funds to fulfill bond obligations for improvements and infrastructure, as well as to fund plans and studies. Piilani’s prior statements as to the proposed construction under its earlier plans is not contrary to its current position that substantial commencement of the Petition Area occurred prior to the filing of the Order Granting Piilani Promenade South, LLC and Piilani Promenade North, LLC’s Motion to Stay Phase II of the Order to Show Cause Proceeding, filed July 12, 2013. Moreover, any such statements cannot be considered to constitute an intentional and voluntary

relinquishment of its right to argue that substantial commencement of use of the Petition Area occurred.

II. CONCLUSION

Based upon the foregoing, Piilani respectfully requests that the Commission refuse to consider Intervenors' request to strike certain evidence properly submitted by Piilani and deny Intervenors' request. Even if considered, however, Piilani requests that the Commission deny Intervenors' Motion to Strike Portions of the Petitioners' Responses Attempting to Improperly Submit Evidence, Filed January 31, 2019.

DATED: Honolulu, Hawai'i, February 5, 2019.



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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) CERTIFICATE OF SERVICE
Agricultural Land Use District Boundary)
into the Urban Land Use District for)
Approximately 88 acres at Kaonoulu,)
Makawao-Wailuku, Maui, Hawai'i; Tax)
Map Key Nos. (2) 2-2; por. 15 and)
3-9-01:16)
_____)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document will be duly served upon the following persons by electronic mail ("**EM**"), or by mailing said copy, postage prepaid, first class, in a United States post office ("**M**") or by hand delivery ("**HD**") in the manner indicated, addressed as set forth below:

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