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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': (1) POSITION
STATEMENT; (2) LIST OF EXHIBITS; (3)
LIST OF WITNESSES; CERTIFICATE OF
SERVICE

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

**INTERVENORS’: (1) POSITION STATEMENT; (2) LIST OF EXHIBITS;
(3) LIST OF WITNESSES**

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**”) their position statement, list of exhibits and list of witnesses with respect to the Commission’s *Order Setting Evidentiary Hearing on Issues Presented by Petitioners’ Motion to Dismiss the Order to Show Cause Proceeding*, filed March 2019, and as requested through the Commission Chairs’ filing order sent to the parties by letter dated March 1, 2019 (“**Filing Order**”). Intervenors adopt herein abbreviations previously defined in their previous filings.

POSITION STATEMENT

The Filing Order requested that Intervenors’, the Office of Planning and the County of Maui Department of Planning serve their respective position statements on the other parties, as well as their exhibit and witness lists. Intervenors’ position statement regarding *Petitioners’ Motion to Dismiss the Order to Show Cause Proceeding*, filed February 1, 2019 (the “**Motion to Dismiss**”), is as follows.

On November 30, 2018, Intervenors served on the parties their *Motion to Conduct Phase II of Contested Case Pending Since 2012, and For Final Decision* (“**Motion to Conclude**”), which requested four actions by the Commission:¹

- (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

¹ Intervenors hereby incorporate herein by reference as part of their position statement the Motion to Conclude, as well as all other filings made to the Commission from the Motion to Conclude to present.

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.

Two months later, and at a time very close to the Commission's hearing date on Intervenors' Motion to Conclude, Petitioners filed, their Motion to Dismiss. The Commission has chosen to take the two motions out of order and hear the Motion to Dismiss first.

The substantive basis for Petitioners' Motion must be limited to the Petitioners' arguments made in the Motion to Dismiss. Those arguments consist of the following three issues, the third of which has two components:

This Motion should be granted because: (1) the Commission ***lacks the authority*** to conclude Phase I of the OSC Proceeding and commence Phase II of the OSC Proceeding; (2) the Commission's oral findings of violation in Phase I of the OSC Proceeding are ***no longer factually accurate*** and cannot serve as a basis for Phase II of the OSC Proceeding; and (3a) the Commission does ***not have the authority to enforce reversion*** or otherwise reclassify the real property at issue under Docket A94-706 (the "Petition Area") through Phase II of the OSC Proceeding because (3b) Piilani ***has substantially commenced*** use of the Petition Area.

Motion to Dismiss at 1.

1. Petitioners' lack of authority claim.

With respect to Petitioners' claim that the Commission lacks authority. This is entirely a matter of law and therefore cannot be benefited by the taking of evidence. Intervenors have previously responded to Petitioners' claims through their earlier memoranda, which are incorporated herein by reference.²

² See Intervenors' Reply to the Parties' Responses to Intervenors' [Motion to Conclude], served January 29, 2019 ("**Intervenors' 1/29/19 Reply**"); Intervenors' Memorandum in Opposition to Petitioners' [Motion to Dismiss], served February 2, 2019 ("**Intervenors' 2/2/19 MIO**").

Conclusion: *Therefore, the Commission may rule without an evidentiary hearing on Petitioners' baseless arguments that the Commission lacks authority to conclude Phase I, and may deny the Motion.*

2. Petitioners' Claim that they are entitled to additional fact finding for Phase I.

Petitioners' next baseless argument is that they are entitled to *reopen* the Phase I proceedings to permit the taking of *additional* evidence *five years* after the Commission had already concluded Phase I, and voted on the record that the actions of Petitioners violated the 1995 D&O due to, among other reasons, Petitioners' failure to develop the property in substantial compliance with the original Petitioner's representations to the Commission. This frivolous argument, that Petitioners' may reopen the Phase I evidentiary proceeding after it was closed, flies in the face of the administrative hearing process and the basic rules and policies associated with due process. If Petitioners' reality were to prevail, it would mean that anytime the Commission ruled against a petitioner, that thereafter that petitioner was entitled to a *rehearing* to try a different approach that might be more appealing to the Commission, *i.e.*, a "second bite at the apple". No procedural doctrine – either in administrative law or judicial law – supports Petitioners' arguments.

Conclusion: *Therefore, at the proposed upcoming evidentiary hearing, the Commission should not permit evidence to be offered by Petitioners claiming that they are now in substantial compliance because this issue was long ago decided, and should otherwise deny the Motion.*³

³ Intervenors also hereby incorporate their arguments set forth in Intervenors' 1/29/19 Reply and Intervenors' 2/2/19 MIO.

3(a). *Petitioners' claim that the Commission Lacks the Authority to revert.*

Similar to the other issues, this is an issue of law that does not require an evidentiary hearing. Intervenors have previously provided the law confirming that this argument by the Petitioners lacks merit.⁴ Petitioners' argument that the Commission lacks authority is based on a tortured reading of the *Aina Le`a* decision. Essentially Petitioners claim the Commission must engaged in complex mental gymnastics to understand the "true" hidden meaning of *Aina Le`a*. However, that's not how the Hawai`i Supreme Court works. As previously shown by Intervenors in their 1/29/19 Reply, through clear and direct language the Hawai`i Supreme Court in the *Aina Le`a* decision expressly confirmed the Commission's expansive and continuing power to revert land in all instances, except subject to the unique facts presented in the *Aina Le`a* case. Those facts are certainly not present here. Rather, the facts relating to the *Aina Le`a* case bear no resemblance to the current facts. As such, the Commission should not refrain from exercising its authority to revert in other instances that are presented, such as the current one, where any reasonable person can readily see there was no timely substantial commencement of the *permitted* development. Moreover, it makes no sense to conclude that the Commission somehow lost the authority to act due to the 2013 Stay for the reasons identified in Intervenors' previous filings. Such a conclusion makes no sense when 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

⁴ See Intervenors' 1/29/19 Reply and Intervenors' 2/2/19 MIO.

authorizes the Commission to “nullify” the 1995 D&O “if the petitioner fails to perform as represented to the commission within the specified period.”⁵

Conclusion: *Therefore, the Commission should conclude, as a matter of law, that it continues to have the authority to revert the Petition Area, and deny Petitioners’ Motion.*

3(b). Petitioners’ claim that they have substantially commenced development.

Petitioners have made the dubious claim that they have substantially commenced development on the Petition Area. They argue this because it would then require additional findings by the Commission before reverting the Petition Area. At the outset, Petitioners’ claim of substantial commencement belies credulity for four basic reasons which are not subject to reasonable dispute:

- (1) Nothing is evident on the ground at the Petition Area after the passage of almost a *quarter of a century* since the 1995 D&O was issued;
- (2) The original Petitioner’s representations regarding timing were so direct and unequivocal that the 1995 D&O contains a finding of fact providing that the industrial lots would be available for sale by the end of 1996;
- (3) The Commission previously concluded that all of the Petitioners’ activities up through the conclusion of the evidentiary hearing were *nonconforming* meaning that they cannot be used to support an argument of substantial compliance with respect to reverter because the law specifically requires that any development activities be consistent with the representation made

⁵ As previously explained in Intervenor’s 2/2/19 MIO, 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. *See* Intervenor’s 1/29/19 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).

by the original Petitioner and be in conformity with the decision and order;
and,

- (4) Petitioners promised that they would not engage in *any* development activities as long as the 2013 Stay was in effect, which 2013 Stay currently remains in effect, therefore, there cannot be any permitted development activities from 2013 to present that would relate to substantial commencement.⁶

The above undisputed facts lead to the following timeline, which overwhelmingly shows that Petitioners cannot overcome the lack of substantial commencement through the proposed evidentiary hearing:

- 1995:** D&O is issued. FOFs provides that Petitioner will be offering lots for sale by end of 1996.
- 1995-2005:** *No substantial commencement.* Petitioner Ka`onoulu Ranch fails to substantially commence development during entire ten-year period, the sells to MIP.
- 2006-2010:** *No substantial commencement of permitted development*
- MIP subdivides property into four (4) lots, which Commission rules in Phase I is not in substantial compliance
- MIP sells one lot to Honua`ula for workforce housing, which Commission rules in Phase I is not in substantial compliance
- MIP sells remaining lots to Pi`ilani for retail shopping, which Commission rules in Phase I is not in substantial compliance
- 2010-2013:** *No substantial commencement of permitted development.* Commission rules in Phase I that activities of current Petitioners during their entire time of ownership were not in substantial compliance
- 2013-Now:** *No substantial commencement due to 2013 Stay* of all development activities

⁶ See Intervenors' 1/29/19 Reply and Intervenors' 2/2/19 MIO.

Conclusion: *Therefore, there is no basis for an evidentiary hearing on the issue of substantial commencement before denying Petitioners' Motion to Dismiss. However, to the extent the Commission permits evidence on the issue of substantial commencement, it will necessarily mean that the Commission will have also permitted the taking of evidence with respect to Phase II of the OSC Hearing, such that at the conclusion of the hearing, the Commission may also rule in favor of Intervenors with respect to the fact that there cannot be, and has not been, substantial commencement of a legally permitted development that is substantially consistent with the original Petitioners' representations to the Commission as made in 1994 and 1995 during the boundary district petition process. And, therefore, reverter is appropriate.*

INTERVENORS' EXHIBIT LIST

This is a continuing contested case hearing. Therefore, Intervenors hereby reserve the right to use every exhibit previously accepted into evidence by the Commission during Phase I of this OSC hearing, and further request that the Commission staff assure that the official witness exhibits are available at the upcoming proposed evidentiary hearing, and that the Commission members have access to the same.

Intervenors reserve the right to call to the Commission's attention, and/or to read into the record, any and all parts of the transcripts of the previous Phase I hearings. Such transcripts are part of this current OSC proceeding and part of this record and do not need to be identified as exhibits.

Intervenors reserve the right to use each and every exhibit that any party to these proceedings identifies or offers into evidence in the upcoming proposed hearing.

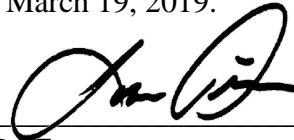
INTERVENORS' WITNESS LIST

Intervenors hereby reserve the right to call any witness identified or offered by any party to these proceedings in the upcoming proposed hearing, either for the purpose of direct, cross examination, and/or rebuttal testimony.

Intervenors hereby reserve the right to call any witness who previously testified in Phase I, or who was identified on any of the party's previous witness lists.

Intervenors hereby reserve the right to call rebuttal witnesses as deemed necessary based on the testimony or documents presented by any other party to this proceeding, including but not limited to state or county officials or employees.

DATED: Makawao, Maui, Hawaii, March 19, 2019.



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 hand delivery (HD) or pre-paid first class mail and by electronic mail (Mail), on March 20, 2019, as noted below:

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DATED: Makawao, Maui, Hawaii, March 19, 2019.

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

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