

CARLSMITH BALL LLP

STEVEN S.C. LIM 2505  
DEREK B. SIMON 10612  
ASB Tower, Suite 2100  
1001 Bishop Street  
Honolulu, HI 96813  
Tel No. 808.523.2500  
Fax No. 808.523.0842

Attorneys for  
WAIKOLOA HIGHLANDS, INC.

LAND USE COMMISSION  
STATE OF HAWAII

2019 MAY -9 P 2: 18

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition Of

WAIKOLOA MAUKA, LLC

To Amend the Agricultural Land Use District  
Boundary Into the Rural Land Use District for  
Approximately 731.581 Acres in South Kohala  
District, Island of Hawaii, Tax Map Key No.  
(3) 6-8-02:016 (por.)

DOCKET NO. A06-767

WAIKOLOA HIGHLANDS, INC.'S  
MEMORANDUM OF LAW REGARDING  
THE REQUIREMENT FOR ISSUANCE  
OF PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
DECISION AND ORDER; CERTIFICATE  
OF SERVICE

**WAIKOLOA HIGHLANDS, INC.'S MEMORANDUM OF LAW REGARDING THE  
REQUIREMENT FOR ISSUANCE OF PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECISION AND ORDER**

**I. INTRODUCTION**

Pursuant to the State of Hawai'i ("State") Land Use Commission's (the "Commission") directive at the Commission's May 7, 2019 meeting on the Order to Show Cause, filed July 3, 2018 (the "OSC"), Waikoloa Highlands, Inc. ("WHI"), as successor-in-interest to Petitioner Waikoloa Mauka, LLC to that certain parcel of land consisting of approximately 731.581 acres and currently identified by Tax Map Key ("TMK") No. (3) 6-8-002: 016 (the "Petition Area"), by and through its legal counsel, Carlsmith Ball LLP, hereby respectfully submits this

Memorandum of Law Regarding the Requirement for Issuance of Proposed Findings of Fact, Conclusions of Law and Decision and Order (“**Proposed D&O**”).

The Commission held hearings on the OSC on October 24, 2018, October 25, 2018, and November 28, 2018. At the November 28, 2018 hearing, the Commission voted on the OSC and rendered its decision to revert the Petition Area from State Land Use (“**SLU**”) Rural District back to SLU Agricultural District. However, only six (6) out of eight (8) Commissioners were present at the first two hearings held on the OSC on October 24 and October 25, 2018. *See* Oct. 24, 2018 Hr. Tr. at 2; Oct. 25, 2018 Hr. Tr. at 2. Both Commissioners Aaron D. Mahi and Arnold Wong were absent from those hearings, but nevertheless voted in favor of the reversion at the Commission’s November 28, 2018 hearing.

According to the Commission’s agenda for the May 7, 2019 meeting, the Commission intended to adopt its final Decision and Order on the OSC (“**Final D&O**”) at the May 7th meeting. However, after hearing WHI’s opposition to the adoption of the Final D&O and request to be served with a Proposed D&O by the Commission, the Commission approved a motion to defer adoption of the Final D&O and ordered the Parties to provide supplemental briefing on the legal requirement for the Commission to follow the Proposed D&O procedures of Hawai‘i Revised Statutes (“**HRS**”) § 91-11 prior to voting on the Final D&O.

For the reasons set forth below, the Commission is required, as a matter of law, to serve the Parties with a Proposed D&O. Once served, the Commission is further required to provide the Parties with an opportunity to review, file exceptions to, and present arguments on the Proposed D&O prior to the Commissioner rendering its decision on the Final D&O.

**First**, it is settled law that the Commission’s proceedings on the OSC were conducted as a contested case. Therefore, the contested case requirements of Chapter 91, HRS must be

followed.

**Second**, because these OSC proceedings were conducted as a contested case, and because two (2) out of the eight (8) members of the Commission did not attend all hearings on the OSC and did not hear and examine all the evidence prior to rendering their decision to revert the Petition Area, the Commission is required to serve WHI with a Proposed D&O. *See* HRS § 91-11. Once served, all of the Parties, including WHI, must then be afforded an opportunity to review, file exceptions to, and present arguments on the Proposed D&O prior to the Commission taking action on the Final D&O. *See id.*

**Finally**, this requested Memorandum of Law and the Commission's attempt to adopt the Final D&O without adhering to the requirements of HRS § 91-11 further highlights WHI's objections about the rules and procedures, or lack thereof, that have been utilized by the Commission throughout these proceedings.

## II. DISCUSSION

### A. THESE OSC PROCEEDINGS WERE CONDUCTED AS A CONTESTED CASE

Hawai'i Administrative Rules ("HAR") § 15-15-93(d) requires the Commission to issue a Decision and Order on the OSC in accordance with Subchapter 7 (Agency Hearing and Post Hearing Procedures) or Subchapter 9 (Post Hearing Procedures for Hearings Before the Commission). HAR § 15-15-82(d) requires that "[e]very decision and order **adverse** to a party to the proceeding, rendered by the Commission in a **contested case, shall be accompanied by separate findings of fact and conclusions of law.**" (Emphases added).

*Kaniakapupu v. Land Use Comm'n*, 111 Hawai'i 124 (2006), and *Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai'i 296, 97 P.3d 372 (2004), before it, settled a petitioner's right to a contested case proceeding upon the Commission issuing an Order to Show Cause:

The Commission concedes that, “. . . if the [Commission] . . . issues an order to show cause . . . a contested case [will] be conducted.”

*Kaniakapupu*, 111 Hawai‘i at 136 n.16 (citing *Lanai Co.*, 105 Hawai‘i at 97 P.3d 372).

Therefore, the Commission’s proceedings on the OSC were conducted as a contested case, and the contested case requirements of Chapter 91, HRS must be followed.

B. HRS § 91-11 REQUIRES THE COMMISSION TO SERVE A PROPOSED D&O IF ALL MEMBERS OF THE COMMISSION HAVE NOT HEARD AND EXAMINED ALL OF THE EVIDENCE

HRS § 91-11 provides that that:

Whenever in a contested case **the officials of the agency who are to render the final decision have not heard and examined all of the evidence**, the decision, if adverse to a party to the proceeding other than the agency itself, **shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision**, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

(Emphases added).

In other words, when the members of the Commission rendering the final decision have not heard and examined all of the evidence, and the final decision is adverse to the petitioner, a Final D&O cannot be voted on by the Commission until a Proposed D&O has been served on the parties. *See id.* The parties must then be given an opportunity to file exceptions to, and present arguments on, the Proposed D&O. *See id.* This is consistent with the concerns identified by the legislature in the legislative history of HRS § 91-11:

The words “or read” has been changed to “and examined” as to officials who are to render the decision. **The reason for the change is to insure that each member of an agency rendering a decision will be personally informed as to the evidence in the**

**case including the hearing of witnesses and examination of all of the evidence in the case; otherwise there should be a proposed decision given to the parties.** After the proposed decision has been served upon the parties and an opportunity afforded to each party adversely affected to file exceptions and present arguments to the officials who are to render the decision, the final decision can be made.

Stan. Com. Rep. on H.B. No. 5 at 659, Act 103 (1961) (emphases added).

Only once these procedural mandates have been fulfilled can the Commission proceed with adopting the Final D&O.

C. BECAUSE TWO (2) MEMBERS OF THE COMMISSION DID NOT HEAR AND EXAMINE ALL THE EVIDENCE, THE COMMISSION MUST SERVE A PROPOSED D&O

As explained *supra*, if the members of the Commission rendering an adverse decision have not **attended all of the hearings** and **examined all of the evidence**, the Commission must serve a Proposed D&O. *See* HRS § 91-11. Here, only six (6) out of eight (8) Commissioners were present at the first two hearings held on the OSC on October 24 and October 25, 2018. *See* Oct. 24, 2018 Hr. Tr. at 2; Oct. 25, 2018 Hr. Tr. at 2. Both Commissioners Aaron D. Mahi and Arnold Wong were absent from those hearings, but nevertheless voted in favor of the reversion at the Commission's November 28, 2018 hearing. Thus, because neither Commissioner Mahi nor Commissioner Wong "heard and examined all the evidence," HRS § 91-11 requires the Commission to serve the Parties with a Proposed D&O, and afford the Parties with an opportunity to file exceptions to and present arguments on the Proposed D&O, **before** the Commission votes on any Final D&O.

To date, WHI has not been served with a Proposed D&O. The Commission also has not set any deadlines for filing exceptions to the Proposed D&O or set a hearing where the Parties can present arguments on the Proposed D&O. Thus, the Commission has not yet complied with the procedural requirements of HRS § 91-11, and cannot vote on the Final D&O until those

requirements have been fully satisfied.

D. THE COMMISSION HAS NOT ADOPTED THE ADMINISTRATIVE RULES NECESSARY FOR CONDUCTING ORDER TO SHOW CAUSE PROCEEDINGS

As WHI previously noted for the record during the OSC hearings and in WHI’s written statements on the OSC,<sup>1</sup> the lack of Commission rules and procedures specific to Order to Show Cause proceedings have rendered these OSC proceedings “kapulu” and defective from the start. The Commission has not only failed to promulgate necessary rules to implement certain HRS provisions applicable to Order to Show Cause proceedings in general, but has also engaged in impermissible rulemaking in violation of Chapter 91, HRS by making up rules during these OSC proceedings.

Finally, the Commission’s concurrent processing during the pendency of these OSC proceedings of a proposed amendment to the administrative rule concerning the central issue of this OSC – the definition of “substantial commencement of the use of the land”<sup>2</sup> – also highlights the need for the Commission to adopt specific rules and procedures for Order to Show Cause proceedings.

III. CONCLUSION

The legal requirements of HRS § 91-11 must be followed in this contested case by the Commission before any action is taken on a Final D&O. WHI hereby reserves all of its objections made to date during these OSC proceedings, and further reserves its right to submit further motions and briefings through the conclusion of these OSC proceedings.

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<sup>1</sup> See Waikoloa Highlands, Inc’s Second Supplemental Statement of Position on Order to Show Cause and Memorandum of Law, filed on November 19, 2018, at 8-10.

<sup>2</sup> Proposed amendment to HAR § 15-15-93.

DATED: Honolulu, Hawai'i, May 9, 2019.

for   
STEVEN S.C. LIM  
DEREK B. SIMON

Attorneys for  
WAIKOLOA HIGHLANDS, INC.

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CERTIFICATE OF SERVICE

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I hereby certify that a copy of the foregoing was served upon the following by either hand  
delivery or depositing in the U.S. Postal Service by regular or certified mail as noted to the  
following parties on the date below:

MICHAEL YEE, DIRECTOR  
Department of Planning, County of Hawai'i  
Aupuni Center  
101 Pauahi Street, Suite 3  
Hilo, HI 96720

U.S. MAIL, POSTAGE PREPAID

JOSEPH K. KAMELAMELA, ESQ.  
Corporation Counsel  
Department of the Corporation Counsel  
County of Hawai'i  
Hilo Lagoon Centre,  
101 Aupuni Street, Unit 325  
Hilo, HI 96720

U.S. MAIL, POSTAGE PREPAID

Attorneys for County of Hawai'i Department  
of Planning

MARY ALICE EVANS  
Director  
Office of Planning, State of Hawai'i  
235 S. Beretania Street, Suite 600  
Honolulu, HI 96813

HAND DELIVERY



DAWN TAKEUCHI APUNA, ESQ.  
Deputy Attorney General  
Department of the Attorney General, State of  
Hawai'i  
425 Queen Street  
Honolulu, HI 96813

HAND DELIVERY

Attorneys for Office of Planning, State of  
Hawai'i

Kevin C. Kellow  
Manager  
Waikoloa Mauka, LLC  
1200 S. Brand Blvd., # 202  
Glendale, CA 91204

U.S. MAIL, POSTAGE PREPAID

DATED: Honolulu, Hawai'i, May 9, 2019.

for   
STEVEN S.C. LIM  
DEREK B. SIMON

Attorneys for  
WAIKOLOA HIGHLANDS, INC.