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LAND USE COMMISSION
STATE OF HAWAII

2019 MAY 22 P 3:42

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
RESPONSE TO OFFICE OF
PLANNING'S RESPONSE TO
PETITIONER'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 RESPONSE TO OFFICE OF PLANNING'S
RESPONSE TO PETITIONER'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 its 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 its response to Office of Planning’s (“**OP**”) Response to Petitioner’s Memorandum of Law Regarding the Requirement for Issuance of Proposed Findings of Fact, Conclusions of Law and Decision and Order (“**Proposed D&O**”), filed on May 21, 2019.

In its memorandum, filed on May 9, 2019, WHI argues that because these OSC proceedings were conducted as a contested case, and because two out of the eight 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 the parties to these OSC proceedings with a Proposed D&O. *See* Hawai‘i Revised Statutes (“**HRS**”) § 91-11.

In its response, OP agrees with WHI that an OSC is a contested case. OP also ultimately agrees with WHI’s conclusion that the Commission should follow the Proposed D&O procedures set forth in HRS § 91-11 prior to rendering its final Decision and Order on the OSC (“**Final D&O**”), but contends that it is unclear whether “reading” of the transcripts of the OSC hearings may serve as having effectively “heard and examined all the evidence” as required under HRS § 91-11. Nevertheless, OP argues that regardless of whether the “reading” of the OSC hearing transcripts serves as having effectively “heard and examined all the evidence” by the absent Commissioners, the Commission has the option to disqualify the votes of the two absent Commissioners and thereby avoid having to comply with the Proposed D&O procedures. OP’s rationale for this option is that the remaining six members, who attended all of the OSC hearings, constitute the required quorum and can vote on the OSC.

For the reasons set forth below, OP’s argument that reading of the transcripts of the OSC

hearings may serve as having effectively “heard and examined all the evidence” under HRS § 91-11 does not withstand scrutiny. However, WHI agrees with OP that the Commission needs six affirmative votes to revert the Petition Area under the OSC.

II. DISCUSSION

A. BECAUSE TWO MEMBERS OF THE COMMISSION DID NOT HEAR THE WITNESSES THE COMMISSION MUST SERVE A PROPOSED D&O

OP contends that it is unclear whether Commissioner’s Mahi and Wong will have “heard and examined all the evidence”, as required under HRS § 91-11, by having read the hearing transcripts of these OSC proceedings. WHI disagrees for the following reasons.

HRS § 91-11 provides that, 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.*

The Legislature intentionally replaced the words “or read” to “and examined” to ensure that each member of an agency is personally informed as to the evidence in the case, “including the **hearing of witnesses and** examination of all of the evidence in the case.” *See* Stan. Com. Rep. on H.B. No. 5 at 659, Act 103 (1961) (emphases added).

Thus, as accurately pointed out by OP in its response, HRS § 91-11 requires an additional evidentiary hearing whenever in a contested case the officials who are to render the final decision have not **heard** and examined the evidence. *See* OP’s Response at 5; *see also Trivecta v. Ushijima*, 112 Haw. 90, 108, 144 P.3d 1, 19 (2006).

The language of HRS § 91-11 is clear and unambiguous. It requires not only that the Commissioners rendering the decision “hear” the evidence, including the witnesses, but also that they “examined” the evidence. Here, it has been argued that all the Commissioners have examined the evidence by either attending the hearings on the OSC or by reading the transcripts of the OSC hearings. However, because Commissioner’s Mahi and Wong were absent from both the October 24 and October 25, 2018 hearings on the OSC, they have not “heard” the evidence and they have certainly not heard the witnesses. *See* Stan. Com. Rep. on H.B. No. 5 at 659, Act 103 (1961). Thus, because HRS § 91-11 requires both hearing of the witnesses and examining of the evidence, the Commission has not yet complied with the procedural requirements of HRS § 91-11, and cannot adopt the Final D&O until those requirements have been fully satisfied.

B. AN ORDER TO SHOW CAUSE REQUIRES SIX AFFIRMATIVE VOTES

In its response, OP argues that regardless of whether the “reading” of the OSC hearing transcripts serves as having effectively “heard and examined all the evidence” by the absent Commissioners, the Commission could disqualify the votes of Commissioners Wong and Mahi and thereby avoid having to follow the Proposed D&O procedure. OP’s rationale for this option is that the remaining six members, who attended all of the OSC hearings, constitute the required quorum and can vote on the OSC. OP further contends that a decision to revert a petition area pursuant to an order to show cause requires six affirmative votes. As explained *infra*, we agree with OP on the voting requirement.

HRS § 205-4(g) is the Commission’s sole source of statutory authority to issue an order to show cause and, assuming the necessary findings are made, to revert a property’s State Land Use District classification, and provides:

The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall

issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.

Therefore, a reversion by the Commission pursuant to an order to show cause is a “boundary amendment” under HRS § 205-4 that requires “[s]ix affirmative votes of the commission[.]” *See* HRS § 205-4(h) (“Six affirmative votes of the commission shall be necessary for any boundary amendment under this section.”); *see also* HRS § 205-1 (“Six affirmative votes shall be necessary for any boundary amendment.”).

The requirement for six votes is echoed in Hawai‘i Administrative Rules (‘HAR’) § 15-15-13(a), which provides that: “all approvals of petitions for boundary amendments under section 205-4, HRS, shall require six affirmative votes[.]” (Emphases added).

In its response, OP affirms its position on the six vote requirement for a reversion by stating that even though HRS “is silent as to the number of votes required for an [order to show cause] proceeding, however, approvals for district boundary amendments, which arguably are the reverse action of an OSC, requires six affirmative votes.” *See* OP's Response at 7. Based on the foregoing, WHI agrees with OP that the Commission needs six affirmative votes in order to revert the Petition Area under the OSC¹.

III. CONCLUSION

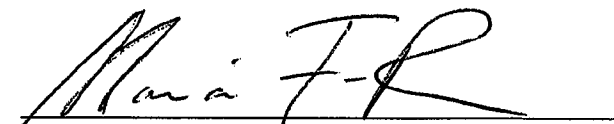
For the reasons set forth above, the Commission is required, as a matter of law, to serve the Parties with a Proposed D&O. Once served, the Commission is further required to provide the Parties with an opportunity to review, file exceptions to, and present arguments on the

¹ At the November 28, 2018 hearing, the Commission voted by a 7-1 vote on the OSC and rendered its decision to revert the Petition Area from the State Land Use (“SLU”) Rural District back to the SLU Agricultural District. Commissioner Ohigashi voted against the reversion whereas the rest of the Commissioners, including Commissioners Aaron D. Mahi and Arnold Wong voted in favor of the reversion.

Proposed D&O prior to the Commissioner rendering its decision on the Final D&O. Further, in any case, the Commission needs six affirmative votes to revert the Petition Area under the OSC.

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.

DATED: Honolulu, Hawai'i, May 22, 2019.

for 
STEVEN S.C. LIM
DEREK B. SIMON

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CERTIFICATE OF SERVICE

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I hereby certify that a filed copy of the Waikoloa Highlands, Inc.'s Response To Office Of Planning's Response To Petitioner's Memorandum Of Law Regarding The Requirement For Issuance Of Proposed Findings Of Fact, Conclusions Of Law And Decision And Order, was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular or certified mail as noted:

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DATED: Honolulu, Hawai'i, May 22, 2019.



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