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STATE OF HAWAII

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BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition of)	DOCKET NO. A06-767
)	
WAIKOLOA MAUKA, LLC)	OFFICE OF PLANNING'S RESPONSE
)	TO PETITIONER'S MEMORANDUM
To amend the Agricultural Land Use District)	OF LAW REGARDING THE
Boundary Into the Rural Land Use District)	REQUIREMENT FOR ISSUANCE OF
for Approximately 731.581 in South Kohala)	PROPOSED FINDINGS OF FACT,
District, Island of Hawaii, Tax Map Key No.)	CONCLUSIONS OF LAW AND
(3) 6-8-002:016 (por.))	DECISION AND ORDER;
)	CERTIFICATE OF SERVICE
)	
)	

**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**

The Office of Planning, State of Hawaii ("OP"), provides the following response to
Petitioner Waikoloa Mauka, LLC's successor-in-interest, Petitioner Waikoloa Highlands, Inc.'s
("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").

I. Introduction.

Petitioner has raised procedural questions which give rise to the issue of whether the Land Use Commission (“LUC”/“Commission”) has acted properly under provisions of the Hawaii Administrative Procedures Act, as enacted by Hawaii Revised Statutes (“HRS”) Chapter 91 (“HAPA”/“HRS Chapter 91”). HAPA was adopted to “provide a uniform administrative procedure for all state and county boards, commissions, departments or offices which would encompass the procedure of rule making and the adjudication of contested cases.” *1961 Hawaii House Journal Standing Committee Reports, Standing Committee Report No. 8*. Additionally, Hawaii Administrative Rules (“HAR”) § 15-15-34(a) states in part, “the commission expects all persons and parties to comply with ... chapter 91, HRS, so that the commission will have a full and complete record upon which it can render its decision.”

Specifically, Petitioner argues that: (1) HRS § 91-11 requires the serving of a proposed D&O to the Parties and the opportunity to file exceptions and present argument by the Parties to the Commission prior to decision-making; and (2) the lack of OSC administrative rules and the concurrent processing of OSC-related administrative rules render these OSC proceedings defective.

II. HRS § 91-11 Requires the Serving of a Proposed D&O Draft Upon the Parties and the Opportunity to File Exceptions and Present Argument by the Adversely Affected Parties if the Commissioners Have Not “Heard and Examined” all of the Evidence.

A. An OSC Is a Contested Case.

A “contested case” is defined as “a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” *HRS § 91-1*. Petitioner, as landowner of the Petition Area, has a clear property interest in the potential reversion or reclassification of the property by the Commission under the OSC.

HAR § 15-15-93(c) requires that the Commission conduct a hearing on an order to show cause. Therefore, the OSC proceeding, in which Petitioner has legal rights as a specific and interested party entitled by law to have a determination of those rights through a hearing, is a contested case.

B. An OSC Is Subject to HRS Chapter 91, Including HRS § 91-11 Requiring the Serving of a Proposed D&O, Filing of Exceptions and Argument.

As a contested case, the OSC proceedings are subject to HRS Chapter 91. HAR § 15-15-13(d) states that “In contested cases, commission members who have not heard and examined all of the evidence may vote only after the procedures set forth in section 91-11, HRS, have been complied with.” HRS § 91-11, states:

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.

In simplest terms and as applied to an OSC proceeding, if any commissioners have not heard and examined all of the evidence, the Commission is required to provide a draft D&O to the parties and opportunity to any adversely affected party to file exceptions and present argument to the Commission prior to decision-making on the OSC.

The issue here is whether Commissioners Aaron D. Mahi and Arnold Wong will have “heard and examined all the evidence” by reading the hearing transcripts *in lieu* of being present at the hearings to hear all the evidence, and therefore, the Commission is not required under HRS

§ 91-11 to provide a draft D&O and opportunity to the adversely affected parties to file exceptions and present argument.

C. It is Unclear Whether Transcripts Read By Absent Commissioners Serves As Having “Heard and Examined All of the Evidence” For Purposes of HRS § 91-11.

Based on the Commission’s past practices, terminology and legislative history, it is unclear whether Commissioners Mahi and Wong will have “heard and examined all the evidence” by reading the hearing transcript *in lieu* of being present at the hearing to hear all the evidence. The Commission chair routinely has asked commissioners who have been absent from LUC contested case hearings to self-certify that they have read the transcripts and examined all the evidence prior to decision-making. In those cases, the self-certified commissioners have then been allowed to vote on the contested case.

The Commission’s routine practice assumes that a commissioner may *read* the transcript and examine the evidence in satisfaction of having “heard and examined” all of the evidence. HRS Chapters 91 and 205 are silent as to whether the reading of the transcript may serve or substitute for being present to hear the evidence. Arguably, this practice may be based on HRS § 91-9(f), which provides that for contested cases, “[i]t shall not be necessary to transcribe the record unless requested for purposes of *rehearing* or court review.” (Emphasis added). This provision may imply that the transcribed record may be used for “rehearing” by absent commissioners. Moreover, as an all volunteer nine-person Commission that regularly takes part in contested cases which could involve major projects or intervenors and which could span multiple days and volumes of testimony and evidence, it is practical for the Commission to allow absent commissioners to read transcripts in their absence.

The legislative history, as pointed out by Petitioner, provides that the Legislature purposefully replaced “heard *or read*” with “heard *and examined*” in HRS § 91-11 to ensure 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” prior to decision-making. *Stan. Com. Rep. on H.B. No. 5 at 659, Act 103 (1961)*. *Cariaga v. Del Monte Corp., 65 Haw. 404, 407, 652 P.2d 1143, 1146 (1982)*. In other words, 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 all of the evidence. *Trivecta v. Ushijima, 112 Hawaii 90, 108, 144 P.3d 1, 19 (2006)*. However, the legislative history and *Trivecta* do not specifically address whether the reading of the transcripts by absent members does or does not deem those members as having effectively “heard and examined all of the evidence” or “personally informed as to the evidence”.

As there is some uncertainty in the statutes and administrative rules, the rights of parties may be affected, and since the Commission strives to “have a full and complete record upon which it can render its decision,” it may be prudent to treat the absent Commissioners as not having “heard and examined all the evidence”, and the Commission thus should serve a draft D&O upon the parties and provide opportunity to the adversely-affected parties to file exceptions and argument to the Commission prior to decision-making.

D. A Quorum of the Commission Excluding the Absent Commissioners May Vote on the OSC Without Requiring a Draft D&O, Filing of Exceptions and Argument Before the Commission.

Regardless of whether the reading of transcripts serves as having effectively “heard and examined all the evidence” by the absent commissioners, if only the Commissioners that were present at all the OSC hearings vote on the OSC decision, to the exclusion of the absent

Commissioners, the Commission is not required to comply with HRS § 91-11, i.e., serving of a proposed D&O to the parties, and providing opportunity to file exceptions and argument by the adversely-affected parties. In *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 652 P.2d 1143 (1982), the Hawaii Supreme Court specifically addressed the question of “whether the final order of [a] board is legally valid where it is only signed by a majority of its members who in fact heard the evidence; the remaining member, who did not hear the evidence, abstained from participating in the final order.” *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 408, 652 P.2d 1143, 1147.

The Court, in recognizing that HRS § 91-11 is unclear as to whether the “the officers of the agency who are to render the final decision” refers to all members of the agency or only to members of the agency who actually render the final decision,” examined the ambiguity “with reference to the whole system of law of which it is part,” and in *pari materia*¹. *Id.* at 65 Haw. 404, 409, 652 P.2d 1143, 1147. HRS § 92-15 states in pertinent part:

Whenever the number of members necessary to constitute a quorum to do business, or the number of members necessary to validate any act, of any board or commission... a majority of all the members to which the board or commission is entitled shall constitute a quorum to do business, *and the concurrence of a majority of all the members to which the board or commission is entitled shall be necessary to make any action of the board or commission valid...*

(Emphasis added.) Thus, in reading HRS §§ 91-11 and 91-15 together, the *Cariaga* Court found that where a majority of the membership of a Board has heard the evidence, no proposed decision is required if the final order is concurred with by the majority. Similarly, for LUC decisions, HAR § 15-15-13(a) provides that “Unless otherwise provided by law, a majority of all the members to which the commission is entitled shall constitute a quorum to do business, and

¹ Laws in *pari materia*, or upon same subject matter, shall be construed with reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another. HRS § 1-16.

the concurrence of a majority of all the members to which the commission is entitled shall be necessary to make a commission decision valid.”

Here, a quorum of the statutory entitled nine-member Commission is a minimum of five members. Chapter 205, HRS, is silent as to the number of votes required for an OSC proceeding, however, approvals for district boundary amendments, which arguably are the reverse action of an OSC, requires six affirmative votes. *HRS § 205-4(h) and HAR § 15-15-13(a)*. There are currently eight members serving on the Commission with one vacancy. If Commissioners Mahi and Wong abstain from voting on the OSC, the remaining six members who have attended all of the OSC hearings on this matter, constitute a quorum and may vote on the OSC without the Commission being subject to HRS § 91-11. The Commission therefore would not be required to serve a proposed D&O to the parties and provide opportunity to the adversely-affected parties to file exceptions and provide argument to the Commission prior to decision-making.

III. The Lack of, or Concurrent Processing of, Administrative Rules Relating to the OSC Process Do Not Render these OSC Proceedings Defective.

Petitioner contends that the lack of OSC administrative rules and the concurrent processing of OSC-related proposed administrative rules render these OSC proceedings defective.

First, while it is unclear whether Commissioners Mahi and Wong will have “heard and examined all the evidence” by reading the hearing transcript under HRS § 91-11, the entire OSC proceeding is not rendered defective by this uncertainty. If the Commission treats the absent Commissioners as not having “heard and examined all the evidence,” such that the Commission will serve a proposed D&O to the Parties and allow the filing of exceptions and argument before the Commission prior to the OSC decision-making, the Parties are afforded the best opportunity

of a fair and full process under HRS § 91-11. Alternatively, if the Commission does not serve a proposed D&O to the Parties, and does not allow the filing of exceptions and argument before the Commission prior to the OSC decision-making, but disqualifies Commissioners Mahi and Wong from decision-making, there need not be a clarification through administrative rule or otherwise on the issue of whether reading the transcript qualifies as having “heard and examined all the evidence.” Thus, in implementing one of these two alternatives, this OSC proceeding is not compromised or rendered defective by a lack of administrative rules specific to the issue of whether reading the transcript satisfies having “heard and examined all the evidence.”

Secondly, the concurrent processing of OSC-related administrative rules has no effect or bearing on the existing and currently effective HAR Chapter 15-15, or the Commission’s ability to execute the currently effective rules. Only after proper notice and hearings, the Governor’s approval and the filing of the proposed rules with the Lieutenant Governor, will any proposed rules under HAR Chapter 15-15 be effective and may override current rules. *HRS § 91-4*. According to the LUC’s website, the proposed rules are still pending and there is no indication that they have been approved by the Governor or filed with the Lieutenant Governor. The rules remain pending and therefore are not effective and have no effect on the current OSC proceedings.

IV. Conclusion.

In conclusion, while it is unclear that absent Commissioners who have read the transcripts are considered to have “heard and examined all the evidence” for purposes of HRS § 91-11, the Commission has two options: (1) treat the absent Commissioners as if they have not “heard and examined all the evidence,” and serve the proposed D&O to the Parties and provide opportunity for filing exceptions and presenting argument to the Commission; or (2) do not serve

the proposed D&O to the Parties and do not provide opportunity for filing exceptions and presenting argument to the Commission, but disqualify the absent Commissioners from decision-making. And, by following one of these two options, the lack of administrative rules or concurrent pending administrative rules do not render this OSC proceeding defective.

DATED: Honolulu, Hawai'i, May 21, 2019.

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To Amend The Agricultural Land Use)	
District Boundary Into The Rural Land Use)	
District For Approximately 731.581 Acres)	
Of Land At South Kohala, Island Of Hawaii,)	
State of Hawaii, Tax Map No: (3) 6-8-02: 16)	
(por.))	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular mail.

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DATED: Honolulu, Hawai'i, May 21, 2019.



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