

KAHANA HUI LOT OWNERS GROUP'S NOTICE OF INTENT TO INTERVENE

Pursuant to HAR §§ 15-15-52 and 15-15-53, George Van Fischer, Michelle N. Fischer, MTR Ala Hoku, LLC, Michael Reid, Lars Wernars, Timothy J. Hehemann as Trustee and individually, Cynthia B. Hehemann as Trustee and individually, Inoka Taufu, John D. Sheveland, Wendy Laurel-Sheveland, Daniel Frank Shay, Dennis Shigeyuki Nakamura as Trustee, Marsha Shinsato Nakamura as Trustee, Cooper Byron Pitts, Linda Lyerly, James T. Kurose as Trustee, Eunice Z. Kurose as Trustee, William O. Delaney, Jr., and Karen A. Delaney ("Proposed Intervenors"), by and through their attorneys, Bays Lung Rose & Holma, hereby respectfully provides notice of intent to intervene with the Land Use Commission ("LUC" or "Commission") in connection with the above captioned matter. In accordance with HAR § 15-15-52(b), Proposed Intervenors state as follows:

I. THE PERSON'S NAME AND MAILING ADDRESS


The Proposed Intervenors' names and mailing address is as follows:

George Van Fischer, Michelle N. Fischer, MTR Ala Hoku, LLC, Michael Reid, Lars Wernars, Timothy J. Hehemann as Trustee and individually, Cynthia B. Hehemann as Trustee and individually, Inoka Taufu, John D. Sheveland, Wendy Laurel-Sheveland, Daniel Frank Shay, Dennis Shigeyuki Nakamura as Trustee, Marsha Shinsato Nakamura as Trustee, Cooper Byron Pitts, Linda Lyerly, James T. Kurose as Trustee, Eunice Z. Kurose as Trustee, William O. Delaney, Jr., and Karen A. Delaney
c/o A. Bernard Bays, Esq.
Michael C. Carroll, Esq.
Bays Lung Rose & Holma
700 Bishop Street, Suite 900
Honolulu, Hawaii 96813

II. THE NATURE AND EXTENT OF THE PERSON'S INTEREST IN THE PETITION

The Proposed Intervenors' interest in the Petition/Motion of Petitioner Maui Oceanview LP To Amend Decision and Order (Filed on November 22, 2017) ("Motion to Amend") is explained in detail in the attached Petition to Intervene. In brief, Proposed Intervenors have a substantial interest in the Motion to Amend as abutting landowners of property within an agricultural subdivision. The Proposed Intervenors represent 10 of the 16 lots within the Kahana Hui agricultural subdivision located directly adjacent to the Petition Area. The Motion to Amend substantially alters the original project scope that was approved in 2006 by, among other things, increasing density near Proposed Intervenors' properties, eliminating and/or altering large open spaces, and altering the primary design features and mitigation measures of the original project that had a "primary neighborhood commercial core" with large open areas and buffers protecting the nearby agricultural community in which Proposed Intervenors own property and reside.

DATED: Honolulu, Hawaii, November 27, 2019



A. BERNARD BAYS
MICHAEL C. CARROLL

Attorneys for Proposed Intervenors

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

IN THE MATTER OF THE PETITION OF)	DOCKET NO. A04-751
)	
MAUI LAND & PINEAPPLE COMPANY,)	PETITION TO INTERVENE IN MAUI
INC., a Hawaii corporation,)	OCEANVIEW LP'S MOTION TO AMEND
)	DECISION AND ORDER
TO AMEND THE AGRICULTURAL)	
DISTRICT BOUNDARY INTO THE)	
URBAN LAND USE DISTRICT FOR)	
APPROXIMATELY 310,440 ACRES OF)	
LAND AT MAHINAHINA AND KAHANA,)	
DISTRICT OF LAHAINA, MAUI, HAWAII,)	
TAX MAP KEY NO. 4-3-01; POR. 31 AND)	
79)	

PETITION TO INTERVENE
IN MAUI OCEANVIEW LP'S MOTION TO AMEND DECISION AND ORDER

Pursuant to HAR §§ 15-15-52 and 15-15-53, George Van Fischer, Michelle N. Fischer, MTR Ala Hoku, LLC, Michael Reid, Lars Wernars, Timothy J. Hehemann as Trustee and individually, Cynthia B. Hehemann as Trustee and individually, Inoka Taufa, John D. Sheveland, Wendy Laurel-Sheveland, Daniel Frank Shay, Dennis Shigeyuki Nakamura as Trustee, Marsha Shinsato Nakamura as Trustee, Cooper Byron Pitts, Linda Lyerly, James T. Kurose as Trustee, Eunice Z. Kurose as Trustee, William O. Delaney, Jr., and Karen A. Delaney ("Proposed Intervenors"), by and through their attorneys, Bays Lung Rose & Holma, hereby submit their petition to intervene in Maui Oceanview LP's ("Petitioner") Motion to Amend Decision and Order (Filed August 22, 2017) ("Motion to Amend").

I. INTRODUCTION

Proposed Intervenors respectfully request that the Land Use Commission ("Commission" or "LUC") grant their Petition to Intervene as the Motion to Amend seeks to

substantially alter the original project design with potentially serious negative environmental consequences that have not been assessed through a supplement EIS as required by HAR § 11-200-27. Some of the changes to the project include: (1) the density of single-family homes abutting Proposed Intervenors' property to the South has increased by 50%, from 10 lots to 15 lots; (2) the new plan calls for a commercial building near Proposed Intervenors' property and in an area that was previously reserved for open space and trails in the EIS; (3) the new plan eliminates the original project concept of having the "primary neighborhood commercial core" in the middle of the community and avoiding "strip malls"; (4) the new plan now proposes a retail center/strip mall directly on Honoapi`ilani Highway, a use that is directly contrary to the approved EIS; and (5) the new plan appears to eliminate the second access point necessary for fire vehicles and creates a potential fire hazard for access for fire and emergency vehicles.

Proposed Intervenors are the owners of 10 lots within a 16-lot agricultural subdivision directly adjoining the Petition Area, where many of the owners are actively engaged in agricultural uses. The proposed changes directly and indirectly impact the Proposed Intervenors and other lots within the agricultural subdivision. Such harms include the potential for foreign insects and plants that can impact and harm crops and other vegetation, dust and other air borne particles that negatively impact agricultural uses, human activity in close proximity to agricultural activities, noise pollution that interferes with agricultural activities, and many others. These and other potential environmental impacts have not been assessed by way of a supplemental EIS. The Commission should allow Proposed Intervenors to become a party to this proceeding so these issues can adequately be addressed.

Finally, good cause exists to allow this Petition to Intervene at this time. First, the notice of hearing was defective because Petitioner did not provide notice to Proposed Intervenors

based on their interest in the subject property under the Right to Farm Act, Petitioner did not provide notice to other parties that may hold an interest in the property, and the original Motion to Amend and accompanying notice failed to disclose the nature of the substantial changes to the project. Second, the Motion to Amend is defective because Petitioner has failed to obtain a supplemental EIS that is required for the changes that are being proposed. Accordingly, Petitioner must first prepare a supplemental EIS before seeking approval from the Commission to substantially change the scope of its project.

II. BACKGROUND

A. Parties

Petitioner is the owner of approximately 310.440 acres of land in Mahinahina and Kahana, Lahaina, Maui, Hawaii, identified as Tax Map Key (“TMK”): (2) 4-3-001:031 (por.)¹ and 4-3-001:079² (“Petition Area”), and known as the Pulelehua Project. Proposed Intervenors are abutting landowners of lots within the Kahana Hui agricultural subdivision. The Proposed Intervenors specific lots (“Proposed Intervenors’ Properties”) are identified as follows:

1. George Van Fischer, Michelle N. Fischer
165 Ala Hoku Place, Units A and B,
TMK: (2) 4-3-010:023-0001 and (2) 4-3-010:023-0002
2. MTR Ala Hoku, LLC, Michael Reid; John D. Sheveland, Wendy Laurel-Sheveland
155 Ala Hoku Place
TMK: (2) 4-3-010:022-0000
3. Lars Wernars
150 Ala Hoku Place
TMK: (2) 4-3-010:024:0000

¹ The property has since been assigned TMK 4-3-001:082 and :083.

² Parcel (2) 4-3-001:079 is owned by the County of Maui.

4. Timothy J. Hehemann as Trustee and individually, Cynthia B. Hehemann as Trustee and individually
4260 Hine Way
TMK: (2) 4-3-010:028-0000
5. Inoka Taufa
105 Ala Hoku Place
TMK: (2) 4-3-010:019-0000
6. Daniel Frank Shay
140 Ala Hoku Place
TMK: (2) 4-3-010:025-0000
7. Dennis Shigeyuki Nakamura as Trustee; Marsha Shinsato Nakamura as Trustee
120 Ala Hoku Place
TMK: (2) 4-3-010:026-0000
8. Cooper Byron Pitts, Linda Lyerly
100 Ala Hoku Place
TMK: (2) 4-3-010:027-0000
9. James T. Kurose as Trustee, Eunice Z. Kurose as Trustee
4250 Hine Way
TMK: (2) 4-3-010:029:0000
10. William O. Delaney, Jr., and Karen A. Delaney
4245 Hine Way
TMK: (2) 4-3-010:030-0000

Proposed Intervenor's Properties consist of 10 lots within a 16-lot agricultural subdivision known as Kahana Hui. Id. Kahana Hui is surrounded by the Pulelehua Project and next to the Kahana Ridge Subdivision. Id. Kahana Hui is an agricultural community and many of the owners actively engage in agricultural uses, including a nursery, palm farm, animal husbandry, organic fruit farm, laying hens, multiple landscaping firms, and several very large gardens for personal use. It is also one of the few agricultural communities in West Maui, and the only agricultural community in the Kahana area. Id.

B. The Original Approvals For Pulelehua Protected The Agricultural Uses In Kahana Hui By Designing The Project With Large Buffer Zones and Open Spaces Near Kahana Hui, And Locating the “Primary Neighborhood Commercial Core” In The Center Of The Project

On June 30, 2006, the Commission entered its Findings of Fact, Conclusions of Law, and Decision and Order (“D&O”), which amended the Petition Area’s land use classification from the Agricultural Land Use District to the Urban Land Use District. The D&O made express findings of preserving neighboring agricultural uses, including those uses of abutting landowners located within Kahana Hui. For example, paragraph 79 of the Findings of Fact contained in the D&O stated:

79. A theme of Pulelehua is to preserve surrounding agricultural lands and open space vistas by creating a compact community in an appropriate setting. Development of Pulelehua would change existing mauka views from Honoapi`ilani Highway. This greenway, as well as biking and walking trails, will be located where the existing earthen berm and ironwood trees are currently found.

See D&O ¶ 79.

In paragraph 130 of the D&O, the LUC explains that “[d]esign and construction controls [are to be] imposed on Pulelehua” to adequately “protect the public health, welfare, and safety and the public’s interests in the aesthetic quality of the landscape” and that the project “will be designed to complement the Petition Area’s natural attributes, mitigate environmental conflicts, enhance scenic amenities, and protect historic resources.”

Consistent with the D&O, the project design and layout at the time was designed to protect the agricultural properties located within Kahana Hui by, among other things, including large green spaces and buffer zones near Kahana Hui and placing the “primary neighborhood commercial core” in the center of the project and away from Kahana Hui. See page 87 of Vol. 1 of The Final Environmental Impact Statement for Pulelehua (“Pulelehua EIS”

or “EIS”), available at http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2005-08-08-MA-FEIS-Pulelehua-Vol-1.pdf. Attached as Exhibit 1 hereto is a copy of the Illustrative Master Plan that was included as part of the Pulelehua EIS. In the immediate area near Kahana Hui, there were large open spaces and trails and expansive estate lots abutting the properties along Kahana Hui. Notably, the EIS states that “[t]he park space of the Kahanaiki neighborhood will include a **wide buffer area adjacent to the Kahana Ridge subdivision. This buffer area will be maintained by the Pulelehua Home Owners’ Association (or other entity as established to maintain Pulelehua’s network of open space).** Near the airport an additional green buffer area will be created.” See Pulelehua EIS at p.27 (emphasis added).

In addition, the EIS also explained that the project was designed so the “primary neighborhood commercial core” was located “in the middle of the community to provide a town center and avoid retail ‘strip mall’ uses along Honoapi`ilani Highway. Workplace Edge/Loft uses are strategically placed near the airport to provide a buffer between homes and provide a synergy of uses.” *Id.* at p. 87. Notably, as set forth in the site plan, there were no planned retail centers along Honoapi`ilani Highway as recognized as a critical component in the EIS. Based on this design, the EIS concludes that “Pulelehua’s compact design preserves surrounding agricultural lands by concentrating needed housing in a defined area.” *Id.* at 155. The EIS explains this “critical design element” of the project in the section of the report addressing “Mitigation Measures.” The EIS states:

A critical design element of Pulelehua is the creation of a compact, holistic community, clustering housing and other uses in a specified area adjacent to existing urban uses (between the airport and residential areas makai of the highway) and thus preserving surrounding agricultural land and open space. Compact communities allow for needed housing and other services but respect and acknowledge the value of agricultural land and open spaces by limiting development to appropriate areas. Compared to traditional, sprawling, large-lot

subdivisions, Pulelehua will concentrate urban uses in a defined area, allowing more of the surrounding land to remain in agriculture or open space.

Id. at 43.

C. Petitioner's Motion To Amend Dramatically Alters The Project And Potentially Harms The Properties Located Within Kahana Hui, Including The Proposed Intervenor

On November 22, 2017, Petitioner filed its Motion to Amend Decision and Order pursuant to HAR §§ 15-15-70 and 15-15-94 ("Motion to Amend"). Petitioner requested that the LUC (1) amend the Findings of Fact, Conclusions of Law, and Decision and Order ("D&O") issued on June 30, 2006, in Docket No. A05-751 to allow Petitioner to provide 280 affordable multi-family workforce housing units for rent (inclusive of the Kapalua Mauka Commitment to provide 125 workforce housing units) in the Project consistent with the Residential Workforce Housing Policy, Chapter 2.96, Maui County Code, and the Residential Workforce Housing Agreement executed between Petitioner and the County of Maui Department of Housing and Human Concerns ("DHHC") dated March 7, 2019; (2) acknowledge Petitioner's revised layout and unit mix for Pulelehua that includes 800 affordable and market multi-family rental units and 100 single-family for sale lots; and (3) recognize Petitioner's standing to seek and obtain the amendment of the D&O as the successor-in-interest to Maui Land & Pineapple Company, Inc., a Hawaii Corporation ("MLP").

The original Motion to Amend did not disclose the extent of Petitioner's proposed revisions to the Project. Attached as Exhibit A to the Motion to Amend was the Conceptual Site Plan that did not show any of the changes to the project in the area near Kahana Hui. Attached as Exhibit 2 is a copy of the Conceptual Site Plan that was attached to the Motion to Amend.

Prior to bringing this Motion to Amend, Petitioner did not consult with the neighboring agricultural properties, including the Proposed Intervenors, about the impacts that Petitioner's revised plan would have on their properties. Additionally, upon information and belief, Petitioner did not prepare a supplemental EIS that is required for any substantive change to the project. See HAR § 11-200-27.

It was not until sometime after the Motion to Amend was filed did Petitioner file with the Commission its revised site-plan setting forth the new project. Petitioner's new site plan (dated March 15, 2019, nearly a year and a half after the Motion to Amend was filed), dramatically changes the original project layout and potentially has serious impacts on Kahana Hui that have not been evaluated. See Exhibit 3 (March 15, 2019 Site Plan). When one of the Proposed Intervenors was informed of the Motion to Amend, he went to the Commission's website and there was nothing posted that clearly showed the changes to the project scope as Petitioner had not filed its new site plan until nearly a year and a half later. See Declaration of Fischer. Upon information and belief, the March 15, 2019 site plan that set forth the changes to Petitioner's project was not posted until after the September 25-26, 2019 hearing.

The changes in the new site plan include the following:

- The density of single-family homes abutting Kahana Hui to the South has increased by 50%, from 10 lots to 15 lots. This creates substantial concerns to the agricultural uses in Kahana Hui. This change has not been assessed.
- The new plan calls for a commercial center located in close proximity to Kahana Hui in an area that was previously proposed as open space and trails. The impacts of this new commercial center have not been assessed.
- The new plan eliminates the original project concept of having the "primary neighborhood commercial core" in the middle of the community, which represents progressive community planning, and avoiding "strip malls." The new plan eliminates this concept with increased density near Kahana Hui, and appears to locate strip malls at several locations. Notably, the new plan now proposes an undesirable strip mall directly

on Honoapiʻilani Highway, a use that is directly contrary to the approved EIS. This new plan has not been assessed.

- The new plan eliminates the second access point necessary for fire vehicles and creates a potential fire hazard for access for fire and emergency vehicles. It is unclear whether the Maui Fire Department has approved this change. Under 18.16.130 of the Maui County Code, a cul-de-sac shall be as short as possible and shall not be more than 800 feet in agricultural areas and no more than 500 feet in other areas, nor serve more than 20 lots, unless approved by the Planning Director based on unusual topographical conditions. No such conditions exist as the prior plan had the necessary access points for emergency vehicles.

On September 25 and 26, 2019, the LUC held a public hearing on the Petition where it heard testimony from the public, the Petitioner, the County of Maui Department of Planning (“DP”), and the State Office of Planning (“OP”). During the hearing, deficiencies were raised with respect to Petitioner’s Proposed Amended Findings of Fact, Conclusions of Law, and Decision and Order (“Proposed Amended D&O”) and Petitioner’s lack of “meaningful community engagement.” See Order Deferring Decision-Making on Maui Oceanview LP’s Motion to Amend Decision and Order (Filed October 28, 2019). Consequently, the LUC passed a motion to defer decision-making on the Motion to Amend until December 4, 2019 to allow Petitioner to, among other things, (1) work with the parties to revise the Proposed Amended D&O; and (2) “have more meaningful community engagement in West Maui regarding [Petitioner’s] Motion to Amend D&O.” Id.

Following the deferral, Petitioner for the first time held two public meetings on November 6 and 9, 2019 to discuss the new project scope that Petitioner was proposing. In response to this information, the owners of properties at Kahana Hui raised concerns with the proposed revisions and submitted these comments to the Petitioner. By letter dated November 16, 2019, signed by 11 of the 16 lots within Kahana Hui, the owners of Kahana Hui stated:

We the undersigned residents of Ala Hoku Place hereby request that you work with the developer of Pulelehua [to] relocate the urban density homes that are currently adjacent to our Ag community. There are numerous other options within Pulelehua to locate these single-family homes.

We as a community are not opposed to additional affordable housing being created in the Kahana area. However, placing 58 urban density homes within 100 feet of an Ag community when other land is available in Pulelehua for these homes defies common sense and displays a lack of concern for the adjacent Ag property owners. There is no disputing that this project as currently designed will have a devastating effect on our homes and lives. Within our community are many Ag related businesses including a nursery, palm farm, animal husbandry, organic fruit farm, laying hens, multiple landscaping firms, and several very large gardens for personal use.

We believe the area surrounding our community would be better suited to rural densities as a transition to the Ag area from the main urban Pulelehua community. To accomplish this, we request the following:

- That no homes be placed along the south border of our subdivision so the gulch becomes a natural buffer to the development.
- That in the area east of our subdivision, that the road be moved to the mauka side of the property and that only a single row of homes on large lots a minimum of 15,000 sq. ft in size and no more than 100' deep be placed along this section of road.
- That the road improvements in this area consist of rural road standards consisting of a paved road with separate paved walk path which will decrease the impervious surface areas and eliminate the need for a point discharge storm water drainage system.
- That the area currently shown as open space mauka of the 53-acre estate parcel be used for additional large lots if needed.
- That any walk/bike paths in this area be located mauka of the new homes and roads.

With the above modifications, we believe Pulelehua will have far less impact on our community and will increase options for more affordable housing in Pulelehua. Thank you in advance for your understanding, compassion and assistance in this matter.

See Exhibit 4. The owners of properties within Kahana Hui further attempted to negotiate with the Petitioner. See Declaration of Fischer. However, Petitioner has not been willing to make any changes to the Project or concessions to address the concerns of Kahana Hui. Id. Petitioner

was not even agreeable to the most modest suggestions such as cutting down the 30-40 foot pine trees that are within 15 feet of the common property line with Kahana Hui. Id.

III. STANDARD FOR INTERVENTION

HAR § 15-15-52 governs intervention in proceeding for district boundary amendments, except proceedings pursuant to chapter 201H, HRS (the latter is not applicable here). HAR § 15-15-52(c)(2) provides that petitions for intervention may be granted as to “all persons who have a property interest in the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguished from that of the general public.” HAR § 15-15-52(f) provides that petitions for intervention shall reference to the following:

- (1) Nature of the petitioner’s statutory or other right;
- (2) Nature and extent of the petitioner’s interest in the matter, and if an abutting property owner, the tax map key description of the property; and
- (3) Effect of any decision in the proceeding on the petitioner’s interest.

HAR § 15-15-52(d) provides that “[a]ll other persons may apply for leave to intervene, which shall be freely granted, provided the commission or its hearing officer may deny an application to intervene when, in the commission’s, or hearings officer’s discretion it appears that:

- (1) The position of the applicant for intervention is substantially the same as the position of a party already admitted to the proceeding; and
- (2) The admission of additional parties will render the proceeding inefficient and unmanageable.

Petitions for intervention pursuant to subsection (d) shall also reference to the following:

- (1) Other means available whereby the petition's interest may be protected;
- (2) Extent the petitioner's interest will not be represented by or differs from that of existing parties;
- (3) Extent the petitioner's participation can assist in development of a complete record;
- (4) Extent the petitioner's participation will broaden the issue; and
- (5) How the petitioner's interest would serve the public interest.

HAR § 15-15-53 governs intervention in proceedings other than district boundary amendments or important agricultural lands designation proceedings. Under HAR § 15-15-53(b), the contents of the petition shall conform to HAR §§ 15-15-52(e) and (f), cited above.

IV. PROPOSED INTERVENORS MEET THE STANDARD FOR INTERVENTION UNDER HAR § 15-15-52(c) AND (f)

A. Nature of the Proposed Intervenors' Statutory or Other Right

HAR § 15-15-52(c) provides that petitions for intervention may be granted as to "all persons who have a property interest in the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguished from that of the general public."

Here, Proposed Intervenors have a property interest in the Petition Area pursuant to Hawaii's Right to Farm Act. Attached as Exhibits 5 and 6 are copies of the deeds in which Petitioner holds title to the Petition Area (the "Petitioner's Deeds"). The Petitioner's Deeds expressly require compliance with Land Use Conditions and the Hawaii Right to Farm Act. Proposed Intervenors' property, and all other lots within Kahana Hui, are specifically protected by the Hawaii Right to Farm Act, Hawaii Revised Statutes, Chapter 165, the purpose of which is to reduce the loss to the State of its agricultural resources by limiting the circumstances under which farming operations may be deemed to be a nuisance. The direct reference in the

Petitioner's Deeds to the Hawaii Right to Farm Act is intended to create an interest in the Petition Area in the immediately adjacent agricultural lots, including those within Kahana Hui.

Alternatively, as an abutting landowner of property within an agricultural subdivision, Proposed Intervenors will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguished from that of the general public. Kahana Hui is an agricultural community that directly abuts the Petition Area. Many of the owners actively engage in agricultural uses, including a nursery, palm farm, animal husbandry, organic fruit farm, laying hens, multiple landscaping firms, and several very large gardens for personal use. Changes to the design and density of the Petition Area directly impacts all lots within Kahana Hui, and these impacts are clearly distinguishable from that of the general public. Such harms include the potential for foreign insects and plants that can impact and harm crops and other vegetation, dust and other air borne particles that negatively impact agricultural uses, potentially harmful human activity in close proximity to agricultural activities, noise pollution that interferes with agricultural activities, and many others.

In addition, as Maui County has recently had a series of large fires, there are major concerns within the Kahana Hui community that the new project will negatively impact their community and create a potentially unsafe environment. This concern was made even greater last month when the land in the Pulelehua project burned as a result of a fire and the fire came within 30 feet of homes within Kahana Hui. The new plan appears not to have alternate access for emergency vehicles and the density of the project has substantially changed creating potential even greater fire hazards for the community.

B. Nature and Extent of the Intervenor's Interest, and if an Abutting Property Owner, the Tax Map Description of the Property

Proposed Intervenor's are the owners of the 10 lots within the Kahana Hui agricultural subdivision that directly abuts the Petition Area. The TMK descriptions of each parcels are identified in subsection II.A. above. Proposed Intervenor's have a substantial interest in the outcome of this proceeding as the new project will potentially cause substantial harm to Proposed Intervenor's property, including agricultural uses. If the motion is granted, and as explained above, Proposed Intervenor's will suffer short and long-term impacts, on-site and off-site impacts, and direct and cumulative impacts caused by the new project.

C. Effect Of Any Decision In The Proceeding on the Intervenor's Interest

As explained above, Proposed Intervenor's will be directly and indirectly harmed by the new project scope based on the uses of the Proposed Intervenor's property and the close proximity of the Petition Area.

V. PROPOSED INTERVENORS MEET THE STANDARD FOR INTERVENTION UNDER HAR § 15-15-52(d) and (g)

Proposed Intervenor's are also entitled to intervene pursuant to HAR § 15-15-52(d) and (g).

A. Other Means Available Whereby The Proposed Intervenor's Interest May Be Protected

Proposed Intervenor's do not have any other means in which their interests may be protected. This Motion to Amend involves major changes to the approved project without having the Petitioner go through the necessary steps to obtain a supplemental EIS. This is the only venue in which the Proposed Intervenor's can raise their objections to the Motion to Amend and the revised scope of the project.

B. Extent The Proposed Intervenors' Interest Will Not Be Represented By Or Differs From That Of Existing Parties

Proposed Intervenors' interest is presently not represented by any of the existing parties. Presently, the only parties to this proceeding is the Petitioner, whose interest is adverse to that of the Proposed Intervenors, and the State Office of Planning ("State") and the Planning Department for the County of Maui ("County"). The State and County's interest in promoting the interests of the community at large does not adequately protect the discrete harms and issues that Proposed Intervenors are seeking to protect. There are presently no other intervenors.

C. Extent The Proposed Intervenors' Participation Can Assist In Development Of A Complete Record

Proposed Intervenors' participation would assist in developing a complete record as to the potential impacts that the changes to the project will have on abutting landowners. If intervention is granted, Proposed Intervenors will be entitled to present further evidence on the potential negative impacts that would result from the changes to the project and enable the Commission to consider these objections with a complete record.

D. Extent The Proposed Intervenors' Participation Will Broaden The Issue

Proposed Intervenors' participation will positively broaden the issue to address the specific harms that the changes to the project will have on the adjoining landowner. This will not only allow for a complete record to be decided by the Commission; but will provide a greater perspective on the issues associated with the changes in the project.

E. How The Proposed Intervenors' Interest Would Serve The Public Interest

Granting intervention would serve the public interest. The public interest is promoted by allowing adjoining landowners to participate in land use proceedings that directly and indirectly impact their properties. Moreover, the public interest supports sustainable

agricultural uses. The new project scope will have direct and indirect impacts on the agricultural uses of the Proposed Intervenors' property that the Commission has an interest in protecting and promoting.

VI. GOOD CAUSE EXISTS FOR GRANTING THIS PETITION AT THIS TIME

While HAR §§ 15-15-52(e) and 15-15-53(a) sets a non-jurisdictional deadline for petitions to intervene to be filed within fifteen days after the date of the publication of the hearing notice, the Commission may excuse this deadline for "good cause." See HAR § 15-15-52(e). Here, good cause exists to grant intervention.

First, good cause exists because notice of the Motion to Amend was materially defective. HAR § 15-15-51 sets forth the requirements for notice of hearing for boundary amendment petitions. This rule requires, among other things, public notice published in the county and statewide. Id. (c). While captioned a Motion to Amend, the Petitioner's request is a hearing involving a boundary amendment petition, and the requirements for HAR § 15-15-51 should have been followed. In addition, the original Motion to Amend did not disclose the nature and substance of Petitioner's proposed changes to the project. The original site plan attached to the motion did not include any details about the changes to the project in the area near Proposed Intervenors' property. One of the Proposed Intervenors was informed of the Motion to Amend after it was filed and reviewed the materials that were posted on the Commission's website. See Declaration of Fischer. At the time, the information available online did not include all changes to the project scope that directly impacted Proposed Intervenors as it did not include the Project Site Plan dated March 15, 2019. See Declaration of Fischer. Upon information and belief, the March 15, 2019 site plan that set forth the changes to Petitioner's project was not posted until after the September 25-26, 2019 hearing. Further,

Petitioner did not seek comments from the community until after the hearing. It was also only after the hearing that Petitioner explained to the community the scope of the changes. Had notice been proper, Proposed Intervenors would have been able to bring this petition sooner.

Second, Petitioner failed to provide proper notice as required by HAR § 15-15-94. This section provides that if a petition seeks a modification or deletion of a condition or order, the petitioner is required to “serve a copy on all parties to the boundary amendment proceeding in which the condition was imposed or in which the order was issued, and to any person that may have a property interest in the subject property as recorded in the county’s real property tax records at the time that the motion is filed.” The Petitioner’s Deeds identify multiple parties holding interests in the Petition Area via permitted exceptions recorded against title³. It appears that none of these parties were provided notice of the Motion to Amend. Additionally, each of the farm lots within the 16-lot Kahana Hui subdivision is directly affected by the Hawaii Right to Farm Act provisions expressly set forth in the Petitioner’s Deeds. It further appears that none of the lot owners within Kahana Hui were provided notice of the Motion.

Third, Petitioner has failed to obtain a supplemental EIS in connection with the Motion to Amend rendering the Motion improper. HAR § 11-200-27 provides:

Determination of applicability. The accepting authority or approving agency in coordination with the original accepting authority shall be responsible for determining whether a supplemental statement is required. This determination will be submitted to the office for publication in the periodic bulletin. Proposing agencies or applicants shall prepare for public review supplemental statements whenever the proposed action for which a statement was accepted has been modified to the extent that new or different environmental impacts are anticipated.

³ Among the parties holding interests pursuant to recorded exceptions are Maui Electric Company, Limited, Hawaiian Telcom, Inc, the State of Hawaii through its Department of Land and Natural Resources, Hawaiian Airlines, Inc., the County of Maui through its Department of Water Supply and Department of Public Works, George Nuinui Kaae, Trustee representing the heirs of Kaae, et al, the Trustees of the Kahana Hui Land Trust.

A supplemental statement shall be warranted when the scope of an action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigation measures originally planned are not to be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.

(emphasis added.) The requirements of the thirty-day consultation, filing public notice, distribution, the forty-five day public review, comments, and response, and acceptance procedures, shall be the same for the supplemental statement as is prescribed by HRS Chapter 11-200 for an EIS. See HAR § 11-200-29.

Here, the Motion to Amend seeks to substantially alter the project and its mitigation measures thereby requiring Petitioner to obtain a supplemental EIS to evaluate and assess the environmental impacts caused by the new project. The changes to the project scope are substantial and alter the “critical design element” of the mitigation measures in the EIS in “limiting development to appropriate areas” and “preserving surrounding agricultural land and open space.” See EIS at p.43. These changes include the following:

- Proposing the construction of a commercial building near Kahana Hui and the Kapalua West Maui Airport in an area that was previously designated as open space and trails in the EIS.
- Proposing to construct a retail/strip mall along Honoapiʻilani Highway where this use was expressly disclaimed in the EIS.
- Increasing the density of the single-family homes located along Kahana Hui by 50%, from 10 lots to 15 lots.
- Eliminating and/or altering large areas of open space that was originally proposed.
- Eliminating the concept of a “primary neighborhood commercial core” proposed in the EIS and instead adopting strip malls and urban sprawl.
- Eliminating the second entrance points causing a potential hazard for lack of access for emergency vehicles.

These changes create potential environmental impacts on all issues that should be addressed in a proper supplemental EIS. These changes are substantially greater than changes that the Hawaii Supreme Court has recognized would require the preparation of a supplemental EIS. See e.g., Unite Here! Local 5 v. City & County of Honolulu, 123 Hawai'i 150, 178, 231 P.3d 423, 451 (2010) (holding that the lapse of time and external changes warranted a new EIS even though the project was unchanged in terms of size, scope, location, intensity and use). The potential impacts to the new project scope in this case include archeological, economic, drainage, design, traffic, and other environmental impacts that can only be considered through the EIS process. Because Petitioner has not gone through the steps in obtaining a supplemental EIS, the timing of this request to intervene is timely and should be considered so the Commission can properly evaluate whether the Petitioner should be ordered to obtain a supplemental EIS before seeking to alter the basic character of the project.

VII. CONCLUSION

Based on the reasons set forth herein, Proposed Intervenors respectfully requests that this Petition be granted.

DATED: Honolulu, Hawaii, November 27, 2019



A. BERNARD BAYS
MICHAEL C. CARROLL

Attorney for Proposed Intervenors

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

IN THE MATTER OF THE PETITION OF) DOCKET NO. A04-751
)
MAUI LAND & PINEAPPLE COMPANY,) DECLARATION OF
INC., a Hawaii corporation,) MICHAEL C. CARROLL
)
TO AMEND THE AGRICULTURAL)
DISTRICT BOUNDARY INTO THE)
URBAN LAND USE DISTRICT FOR)
APPROXIMATELY 310,440 ACRES OF)
LAND AT MAHINAHINA AND KAHANA,)
DISTRICT OF LAHAINA, MAUI, HAWAII,)
TAX MAP KEY NO. 4-3-01; POR. 31 AND)
79)

DECLARATION OF MICHAEL C. CARROLL

I, MICHAEL C. CARROLL, declare under penalty of law, the following:

1. I am an attorney at Bays Lung Rose & Holma and am one of the attorneys representing the Proposed Intervenors.

2. Attached as Exhibit 1 is a true and correct copy of the Illustrative Master Plan for Pulelehua that was attached behind page 6 of the Final Environmental Impact Statement for Pulelehua, Vol. 1 of 2, which was downloaded from

http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2005-08-08-MA-FEIS-Pulelehua-Vol-1.pdf.

3. Attached as Exhibit 2 is a copy of the Conceptual Site Plan that was attached to the Motion to Amend Decision and Order (Filed November 22, 2017). This document was downloaded from <https://luc.hawaii.gov/a04-751-maui-land-pineapple-company-inc-motion-of-petitioner-maui-oceanview-lp-to-amend-2006-decision-and-order/>.

4. Attached as Exhibit 3 is a true and correct copy of the Site Plan for Pulelehua (dated March 15, 2019). This document was downloaded from

<https://luc.hawaii.gov/a04-751-maui-land-pineapple-company-inc-motion-of-petitioner-maui-oceanview-lp-to-amend-2006-decision-and-order/>.

5. Attached as Exhibit 5 is a true and correct copy the Limited Warranty Deed with Reservations & Covenants recorded with the State of Hawaii, Bureau of Conveyances (“Bureau”) as Doc No. A-59980843.

6. Attached as Exhibit 6 is a true and correct copy of the Limited Warranty Deed with Reservations and Covenants that was recorded with the Bureau as Doc No. A-59980844.

DATED: Honolulu, Hawaii, November 27, 2019.



MICHAEL C. CARROLL

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

IN THE MATTER OF THE PETITION OF) DOCKET NO. A04-751
)
MAUI LAND & PINEAPPLE COMPANY,) DECLARATION OF
INC., a Hawaii corporation,) GEORGE VAN FISCHER
)
TO AMEND THE AGRICULTURAL)
DISTRICT BOUNDARY INTO THE)
URBAN LAND USE DISTRICT FOR)
APPROXIMATELY 310,440 ACRES OF)
LAND AT MAHINAHINA AND KAHANA,)
DISTRICT OF LAHAINA, MAUI, HAWAII,)
TAX MAP KEY NO. 4-3-01; POR. 31 AND)
79)

DECLARATION OF GEORGE VAN FISCHER

I, GEORGE VAN FISCHER, declare under penalty of law, the following:

1. I am the owner of the properties located at 165 Ala Hoku Place, Units A and B, TMK: (2) 4-3-010:023-0001 and (2) 4-3-010:023-0002 ("Fischer Property"). The Fischer Property is located within Ala Hoku Place a 15-lot agricultural subdivision known as Kahana Hui. Kahana Hui is surrounded by the Pulelehua Project and next to the Kahana Ridge Subdivision. Kahana Hui is an agricultural community and many of the owners actively engage in agricultural uses, including a nursery, palm farm, animal husbandry, organic fruit farm, laying hens, multiple landscaping firms, and several very large gardens for personal use. It is also one of the few agricultural communities in West Maui, and the only agricultural community in the Kahana area.

2. When I was informed about the Motion to Amend Decision and Order (Filed November 22, 2017), I went to the Land Use Commission's website and there was nothing posted that clearly showed the changes to the project scope as Petitioner had not filed his new

site plan. I reviewed the Motion to Amend (filed November 11, 2017) and the attached site plan. The information contained in the Motion to Amend did not disclose the nature of the Petitioner's proposed changes. The March 15, 2019 site plan that showed the substantial changes to the project was not posted on the Commission's website prior to the hearing date when I went online to review the Motion to Amend. It was not until after the September 25-26, 2019 hearing that I became aware of the nature of the Petitioner's proposed changes. Had I been informed of these changes previously, I would have brought this petition sooner.

3. Attached as Exhibit 4 is a true and correct copy of a letter dated November 16, 2019 and signed by 11 of the 15 lots within Kahana Hui.

4. After receiving notice of the changes to the project, the owners of properties within Kahana Hui further attempted to negotiate with the Petitioner. However, Petitioner has not been willing to make any changes to the Project or concessions to address the concerns of Kahana Hui.

DATED: Honolulu, Hawaii, November 27, 2019.



GEORGE VAN FISCHER

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

IN THE MATTER OF THE PETITION OF)	DOCKET NO. A04-751
)	
MAUI LAND & PINEAPPLE COMPANY,)	CERTIFICATE OF SERVICE
INC., a Hawaii corporation,)	
)	
TO AMEND THE AGRICULTURAL)	
DISTRICT BOUNDARY INTO THE)	
URBAN LAND USE DISTRICT FOR)	
APPROXIMATELY 310,440 ACRES OF)	
LAND AT MAHINAHINA AND KAHANA,)	
DISTRICT OF LAHAINA, MAUI, HAWAII,)	
TAX MAP KEY NO. 4-3-01; POR. 31 AND)	
79)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served on the following via hand-delivery, electronic mail or depositing in the U.S. Mail, postage-prepaid on November 27, 2019:

Rodney Funakoshi
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State of Hawaii
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Wailuku, Maui, Hawaii 96793

DATED: Honolulu, Hawaii, November 27, 2019



A. BERNARD BAYS
MICHAEL C. CARROLL

Attorney for Proposed Intervenors