

WILLIAM W.L. YUEN 1359
JANNA WEHILANI AHU 10588

DENTONS US LLP
1001 Bishop Street, Suite 1800
Honolulu, Hawai'i 96813-3689
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
Email: william.yuen@dentons.com
janna.ahu@dentons.com

Attorneys for Petitioner
HG KAUAI JOINT VENTURE, LLC



BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of:

HG KAUAI JOINT VENTURE, LLC

To Amend the Land Use District Boundary of Certain Lands Situated at Kapa'a, Island of Kauai, State of Hawai'i, consisting of approximately 96 Acres, from the Agricultural Land Use District to the Urban Land Use District, Kauai Tax Map Key 4-3-03: por 01.

DOCKET NO. A11-791

MOTION FOR PROTECTIVE ORDER; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF WILLIAM W.L. YUEN; DECLARATION OF THERESA ROCHE; EXHIBIT 1; CERTIFICATE OF SERVICE

MOTION FOR PROTECTIVE ORDER

HG KAUAI JOINT VENTURE, LLC, a Hawaii limited liability company ("HG Kauai"), by and through its attorneys, Dentons US LLP, hereby moves the Land Use Commission ("Commission") for a protective order for its financial information, in the form attached hereto as Exhibit 1.

This Motion is brought pursuant to HAR § 15-15-50(c)(9), and HAR § 15-15-70.

DATED: Honolulu, Hawai'i, November 25, 2020.

DENTONS US LLP



WILLIAM W.L. YUEN
JANNA WEHILANI AHU

Attorneys for Petitioner
HG KAUAI JOINT VENTURE, LLC

BEFORE THE LAND USE COMMISSION

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**MEMORANDUM IN
SUPPORT OF MOTION**

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Pursuant to HAR section 15-15-70.1 Petitioner requests a protective order in the form attached hereto as Exhibit 1 to limit the use and dissemination of its financial information.

II. BACKGROUND

On September 18, 2020, Petitioner received a letter from the Commission noting that the following issue would need to be addressed prior to the docket being scheduled for hearing:

- 1) The Amended Petition (p. 8) indicates a desire for a protective order under Hawai'i Revised Statutes ("HRS") Chapter 92F regarding disclosure of financial documents. Please refer to the procedure in the Hawai'i Administrative Rules ("HAR") Section 15-15-70.1.

Yuen Decl. ¶ 3. Petitioner's financial documents include, a Statement of Assets, Liabilities, and Members' Equity, and Net Profit (Loss), as well as its lines of credit with its lenders (collectively, "financial information"). Roche Decl. ¶ 3.

On November 20, 2020, Petitioner asked the Office of Planning to stipulate to a protective order, to which the Office of Planning agreed. Yuen Decl. ¶ 4. The Petitioner also asked the County of Kauai Department of Planning to stipulate to a protective order, however, the Deputy County Attorney assigned to the Department of Planning was unavailable and could not respond before the November 25, 2020 deadline. *Id.* ¶ 4. Thus, Petitioner was required to bring this Motion for a protective order.

III. ARGUMENT

The Commission requires evidence that the Petitioner has the financial ability to undertake development of the Petition Area in the manner proposed. Specifically, HAR Section 15-15-77 subsection (b)5 requires the Petitioner to show, and the Commission to find, the Petitioner has the economic ability to carry out the representations relating the proposed use or development.

Under HAR 15-15-50 subsection (c)(9) a statement describing the financial condition and a current certified balance sheet and income statement and a clear description of how the Petitioner intends to finance the proposed development is required. Financial information is highly personal, intimate, and confidential.

HAR section 15-15-70.1 states:

Any party or any person may move for a protective order to protect the confidentiality of information that is protected from disclosure under chapter 92F, HRS, **or by other law**. A motion for protective order shall specifically identify the document or information to be protected. The movant shall bear the burden of establishing that the information should be protected[.]

Emphasis added. Hawai`i citizens' right to privacy is enshrined in the Constitution of the State of Hawai`i, which states, in relevant part that “[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.” Haw. Const. art. I,

§ 6. “[T]he privacy right protected by the informational privacy prong of article I, section 6 is the right to keep confidential information which is **highly personal and intimate.**” *State of Hawai`i Organization of Police Officers (SHOPO) v. Society of Professional Journalists—University of Hawai`i Chapter*, 83 Hawai`i 378, 397, 927 P.2d 386, 405 (1996) (emphasis added). “‘Highly personal and intimate information’ that is protected by the informational prong of article I, section 6 includes ‘medical, **financial**, educational, or employment records.’” *Brende v. Hara*, 113 Hawai`i 424, 430, 153 P.3d 1109, 1115 (2007) (emphasis added). In addition, “trade secrets or other confidential research, development, or **commercial information**” are protected by the imposition of a protective order or similar protection. HRCP Rule 26(e).

Petitioner’s financial information is “highly personal and intimate” and “commercial information” that is protected by the informational prong of article I, section 6 and HRCP Rule 26. Accordingly, Petitioner has a fundamental right to privacy regarding its financial information.

In addition, Petitioner would be unduly prejudiced if this information was not protected by a protective order because the information is not public, and is directly tied to Petitioner’s financial condition. Roche Decl. ¶ 4. If Petitioner’s financial information, including the terms under which lenders have agreed to extend lines of credit to Petitioner, is not protected, it would immediately and effectively place Petitioner at a competitive disadvantage in obtaining a construction loan or other lines of credit if that information is divulged to lenders to whom Petitioner has applied for financing. *Id.* Because of the risk of great injury to Petitioner and potential to undercut its competitive edge, disclosure of financial information in this matter is a significant concern for Petitioner. *Id.*

Petitioner is willing to waive its privacy interest, and share its financial information for the purpose of complying with HAR 15-15-50 subsection (c)(9). However, that waiver is limited to the underlying proceeding and does not extend outside of the proceeding. Additionally, the State was willing to stipulate to a protective order to protect the financial information. Thus, Petitioner seeks and should be granted a protective order to limit the use of the financial information, and to prevent its dissemination beyond the parties involved in this matter.

III. CONCLUSION

Based on the arguments above, and the declarations attached, Petitioner respectfully asks the Commission to grant the Motion for Protective Order.

DATED: Honolulu, Hawai‘i, November 25, 2020.

DENTONS US LLP



WILLIAM W.L. YUEN
JANNA WEHILANI AHU

Attorneys for Petitioner
HG KAUAI JOINT VENTURE, LLC

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

In the Matter of the Petition of:

HG KAUAI JOINT VENTURE, LLC

To Amend the Land Use District Boundary of Certain Lands Situated at Kapa'a, Island of Kauai, State of Hawai'i, consisting of approximately 96 Acres, from the Agricultural Land Use District to the Urban Land Use District, Kauai Tax Map Key 4-3-03: por 01.

DOCKET NO. A11-791

**DECLARATION OF
WILLIAM W.L. YUEN**

DECLARATION OF WILLIAM W.L. YUEN

I, WILLIAM W.L. YUEN, declare and state as follows:

1. I am an attorney duly licensed to practice in this Court. I am an attorney for the law firm of DENTONS US LLP, counsel of record for Petitioner in this case. I have personal knowledge of the facts stated in this declaration. If called to testify, I could and would competently testify to the facts stated in this declaration.

2. I make the declaration in support of Petitioner's Motion for Protective Order.

3. On September 18, 2020, Petitioner received a letter from the Commission noting that the following issue would need to be addressed prior to the docket being scheduled for hearing:

1) The Amended Petition (p. 8) indicates a desire for a protective order under Hawai'i Revised Statutes ("HRS") Chapter 92F regarding disclosure of financial documents. Please refer to the procedure in the Hawai'i Administrative Rules ("HAR") Section 15-15-70.1.

4. On November 20, 2020, I asked the Deputy Attorney General representing the Office of Planning and County Attorney representing the County of Kauai Planning Department to stipulate to a protective order. The Deputy Attorney General agreed, however, the County Attorney was unavailable and could not respond before the November 25, 2020 deadline.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED: Honolulu, Hawai'i, November 25, 2020.



WILLIAM W.L. YUEN

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

In the Matter of the Petition of:

HG KAUAI JOINT VENTURE, LLC

To Amend the Land Use District Boundary of Certain Lands Situated at Kapa'a, Island of Kauai, State of Hawai'i, consisting of approximately 96 Acres, from the Agricultural Land Use District to the Urban Land Use District, Kauai Tax Map Key 4-3-03: por 01.

DOCKET NO. A11-791

**DECLARATION OF
THERESA ROCHE**

DECLARATION OF THERESA ROCHE

I, Theresa Roche, declare and state as follows:

1. I am the Manager of HG Kauai Joint Venture, LLC. I have personal knowledge of the facts stated in this declaration. If called to testify, I could and would competently testify to the facts stated in this declaration.
2. I make this declaration in support of Petitioner's Motion for Protective Order.
3. The financial documents that we will produce to comply with HAR 15-15-50 subsection (c)(9) include, a Statement of Assets, Liabilities, and Members' Equity, and Net Profit (Loss), as well as its Line of Credit with its lender (collectively, "financial information").
4. HG Kauai would be unduly prejudiced if this information is not protected by a protective order because the information is not public, and is directly tied to the financial performance of HG Kauai. If HG Kauai's financial information, including the terms under which lenders have agreed to lend to HG Kauai, is not protected, it would immediately and effectively place HG Kauai at a competitive disadvantage in obtaining a construction loan if that

information is divulged to the public. Because of the risk of great injury to HG Kauai and potential to undercut its competitive edge, disclosure of financial information in this matter is a significant concern for HG Kauai.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED: Hickory Hills, Illinois, November 24, 2020.



THERESA ROCHE

WILLIAM W.L. YUEN 1359
JANNA WEHILANI AHU 10588

DENTONS US LLP
1001 Bishop Street, Suite 1800
Honolulu, Hawai'i 96813-3689
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
Email: william.yuen@dentons.com
janna.ahu@dentons.com

Attorneys for Petitioner
HG KAUAI JOINT VENTURE, LLC

BEFORE THE LAND USE COMMISSION
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DOCKET NO. A11-791

PROTECTIVE ORDER

PROTECTIVE ORDER

In order to protect the confidentiality of confidential information obtained by the parties in connection with this case, the parties hereby agree as follows:

1. Any party or non-party may designate as "confidential" (by stamping the relevant page or other otherwise set forth herein) any document which that party or non-party considers in good faith to contain information involving trade secrets, or confidential business or financial information, subject to protection under the Hawai'i Rules of Civil Procedure or Hawai'i law ("Confidential Information").

2. Where a document or response consists of more than one page, the first page and each page on which confidential information appears shall be so designated. To avoid the cost to review all responsive documents for each form of the above "confidential

Exhibit 1

information," and to facilitate speedy discovery exchanges, the parties agree that to the extent any documents are produced and/or have been produced which inadvertently include the above-described "confidential" information, but are not so designated as "confidential," the parties will use their best efforts to meet and confer on confidentiality designation and/or the need to redact parts of the document or response (this includes written notice to the parties, pursuant to paragraph 9 below).

3. All information produced or exchanged in the course of this case (other than information that is publicly available) shall be used by the party or parties to whom the information is produced solely for the purpose of this case.

4. Except with the prior written consent of other parties, or upon prior order of this Commission obtained upon notice to opposing counsel, Confidential Information shall not be disclosed to any person other than:

- a) counsel for the respective parties to this matter, including in-house counsel and co-counsel retained for this matter;
- b) employees of such counsel;
- c) parties;
- d) employees of the parties;
- e) consultants or expert witnesses retained for this matter, provided that each such person shall execute a copy of the Certification annexed to this Order as Exhibit "A" (which shall be retained by counsel to the party so disclosing the Confidential Information and made available for inspection by opposing counsel during the pendency or after the termination of the action only upon good cause shown and upon order of the Commission) before being shown or given any Confidential Information and provided that if the party chooses a consultant or expert employed by the party itself, the party shall notify the opposing party, or designating non-party, before disclosing any Confidential Information to that individual and shall give the opposing party an opportunity to move for a protective order preventing or limiting such disclosure;
- f) any authors or recipients of the Confidential Information; and
- g) the Commission, Commission personnel, and Commission reporters.

5. Any persons receiving Confidential Information shall not reveal or discuss such information to or with any person who is not entitled to receive such information, except as set forth herein.

6. No party or non-party shall file or submit for filing as part of the Commission record any documents under seal without first obtaining leave from the Commission. Notwithstanding any agreement among the parties, the party seeking to file a paper under seal bears the burden of overcoming the presumption in favor of public access to papers filed with the Commission.

7. A party may designate as “Confidential” documents or discovery materials produced by a non-party by providing written notice to all parties of the relevant document numbers or other identification within thirty (30) days after receiving such documents or discovery materials. Any party or non-party may voluntarily disclose to others without restriction any information designated by that party or non-party as confidential, although a document may lose its confidential status if it is made public.

8. If a party contends that any material is not entitled to confidential treatment, such party may at any time give written notice to the party or non-party who designated the material. The party or non-party who designated the material shall have twenty-five (25) days from the receipt of such written notice to apply to the Commission for an order designating the material as confidential. The party or non-party seeking the order has the burden of establishing that the document is entitled to protection. Likewise, a party that contends that any material is entitled to confidential treatment, but such material has not been so designated, may at any time give written notice to any party or non-party that such material should be so designated. Any party or non-party who opposes such designation shall have fourteen (14) days from the receipt of such written notice to confirm or object to such designation.

9. Notwithstanding any challenge to the designation of material as Confidential Information, all documents shall be treated as such and shall be subject to the provisions hereof unless and until one of the following occurs:

- a) the party or non-party claims that the material is Confidential Information withdraws such designation in writing; or
- b) the party or non-party who claims that the material is Confidential Information fails to apply to the Commission for an order designating the material

confidential within the time period specified above after receipt of a written challenge to such designation; or

c) the Commission rules that the material is not confidential.

10. All provisions of this Order restricting the communication or use of Confidential Information shall continue to be binding after the conclusion of this action, unless otherwise agreed or ordered. Upon conclusion of this matter, a party in the possession of Confidential Information, other than that which is contained in pleadings, correspondence, and deposition transcripts, shall either (a) return such documents no later than thirty (30) days after conclusion of this action to counsel for the party or non-party who provided such information, or (b) destroy such documents within the time period upon consent of the party who provided the information and certify in writing within thirty (30) days that the documents have been destroyed.

11. The terms of this Order do not preclude, limit, restrict, or otherwise apply to the use of documents at the Commission hearing.

12. Nothing herein shall be deemed to waive any applicable privilege or work product protection, or to affect the ability of a party to seek relief for an inadvertent disclosure of material protected by privilege or work product protection.

13. Any witness or other person, firm or entity from which discovery is sought may be informed of and may obtain the protection of this Order by written advice to the parties' respective counsel or by oral advice at the time of any deposition or similar proceeding.

EXECUTED: Honolulu, Hawai'i, _____

DATED: November 24, 2020.

WILLIAM W.L. YUEN
JANNA WEHILANI AHU
DENTONS US LLP
Attorneys for Petitioner

DATED: November 24, 2020.

Dawn Takeuchi Apuna, Esq.
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

DATED: November 24, 2020.

Ka'āina S. Hull, Director
Kauai County Planning Department
4444 Rice Street, Suite A473
Līhue, HI 96766

DATED: November 24, 2020.

Wailua-Kapaa Neighborhood Association (CD)
Attn: Sid Jackson
340 Aina Uka Street
Kapaa, HI 96746

DATED: November 24, 2020.

Mary Alice Evans, Director
Office of Planning
State of Hawaii, Office of Planning
235 South Beretania Street, 6th Floor
Honolulu, HI 96813

DATED: November 24, 2020.

Glenda Nogami-Streufert, Chair
Planning Commission
c/o County of Kauai Planning Department
4444 Rice Street, Suite A473
Līhue, Kauai 96766

DATED: November 24, 2020.

Sierra Club – Kauai Group of the Hawaii Chapter
(CD)
Attn: Rayne Regush
Post Office Box 3412
Līhue, HI 96766

APPROVED AND SO ORDERED:

COMMISSIONER

EXHIBIT "A"

UNDERTAKING TO BE BOUND BY PROTECTIVE ORDER

RE: *In the Matter of the Petition of HG Kauai Join Venture, LLC*, Docket No. A11-791, State of Hawai`i

I have read and I understand the Protective Order ("Order"), to which a copy of this Statement is attached. I hereby agree to be bound by all the terms, conditions, and restrictions imposed by this Order.

I understand that documents and/or information, including but not limited to Confidential Information, may be disclosed to me which were produced or exchanged by a party in the course of the above-entitled action (hereinafter collectively "documents"). I acknowledge and agree that I have used and/or will use the documents (other than information that is publicly available) disclosed to me solely for the purpose of assisting counsel to evaluate the case. I further acknowledge and agree that I have not and/or will not use or disclose any of the documents disclosed to me for any other purpose unless the documents are publicly available. I have not and/or will not disclose any of the documents (other than information that is publicly available) to any person who has not been designated to receive the documents pursuant to the Order.

I further agree that, upon the final disposition of this action, I will promptly return to the counsel who supplied me with the material and/or destroy, in accordance with the Order, all documents provided to me, including all photocopies and all reproductions stored on electronic, photographic, and/or any other media; and all writing and data compilations thereof, which are in my possession, custody and/or control.

Dated: _____

(Signature)

Name

Business Address

City State Zip Code

Business Telephone Number

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DOCKET NO. A11-791

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I caused a true and correct copy of the foregoing document to be served on the following persons by U.S. mail, postage prepaid to their respective addresses:

Mary Alice Evans, Director
Office of Planning
State of Hawaii, Office of Planning
235 South Beretania Street, 6th Floor
Honolulu, HI 96813

Dawn Takeuchi Apuna, Esq.
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

Chris Donahoe, Esq.
County of Kauai County Attorney
4444 Rice Street, Suite 220
Lihue, Kauai 96766

Ka‘āina S. Hull, Director
Kauai County Planning Department
4444 Rice Street, Suite A473
Lihue, HI 96766

Sierra Club – Kauai Group of the Hawaii
Chapter (CD)
Attn: Rayne Regush
Post Office Box 3412
Lihue, HI 96766

Wailua-Kapaa Neighborhood Association (CD)
Attn: Sid Jackson
340 Aina Uka Street
Kapaa, HI 96746

Likookalani Martin
Post Office Box 564
Anahola, HI 96703

DATED: Honolulu, Hawai`i, November 25, 2020.



WILLIAM W.L. YUEN
JANNA WEHILANI AHU

Attorneys for Petitioner
HG KAUAI JOINT VENTURE, LLC