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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

HG KAUAI JOINT VENTURE, LLC'S
OPPOSITION TO INTERVENOR'S
SUBMISSION OF OFFER OF PROOF
FOR RELEVANCE OF EXHIBIT NOS.
I-53, I-55, I-56, I-58, I-99;
CERTIFICATE OF SERVICE

**HG KAUAI JOINT VENTURE, LLC'S OPPOSITION TO
INTERVENOR'S SUBMISSION OF OFFER OF PROOF FOR
RELEVANCE OF EXHIBIT NOS. I-53, I-55, I-56, I-58, I-99**

HG KAUAI JOINT VENTURE, LLC, a Hawaii limited liability company ("HG Kauai"), by and through its attorneys, Dentons US LLP, responds to Intervenor's Submission of Offer of Proof for Relevance of Exhibit Nos. I-53, I-55, I-56, I-58, I-99.

Oral or documentary evidence may be received in Commission administrative hearings so long as the evidence is relevant, material, and not unduly repetitious. *See* HRS § 91-10; *see also In re Application of Maui Elec. Co., Ltd.*, 141 Haw. 249, 269, 408 P.3d 1, 21 (2017), on remand 2018 WL 1008895 ("Although parties have the right to present evidence, cross-examine

opposing evidence, and submit rebuttal evidence, considerations of relevancy, materiality, and repetition limit the presentation of evidence in contested case proceedings before an administrative agency.”); *Dependents of Cazimero v. Kohala Sugar Co.*, 54 Haw. 479, 481, 510 P.2d 89, 91 (1973); *Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 87 Hawai‘i 217, 236, 953 P.2d 1315, 1334 (1998). “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” HRE § 401. Accordingly, the Commission has the authority to set limitations in conducting the proceedings so long as the procedures sufficiently afford an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of the Petition’s impact on the Intervenor’s asserted interest. Specifically, the Commission can and should exclude evidence that is not relevant to the Petition.

Exhibit I-53: Intervenor’s claim that Exhibit I-53 is relevant is based on the author’s assertion that, due to the geological conditions in the Lihue Basin, Petitioner’s proposed well will adversely affect ground water and surface water of the area. Intervenor’s Submission of Offer of Proof for Relevance (“Offer of Proof”), at 2. This conclusion is clearly speculative and lacks essential foundational facts to establish that the Lihue Basin is connected to the proposed well at the Petition Area. According to Thomas Nance, Petitioner’s water engineer, there is no connection between Lihue Basin and the proposed well at the Petition Area, and no wells in the vicinity of the Petition Area have exhibited any decline in water levels or increases in salinity. Thus, it is both confusing and not relevant evidence.

Exhibit I-55: Whether former sugar lands **on Maui** — an area far beyond the boundaries of the Petition Area — were successfully converted to other agricultural uses is not relevant to the Petition. Intervenor alleges “[t]he report is relevant to the proposal to remove the parcel form

the agricultural district and the agricultural resources that will be foreclosed should the Commission decide to grant the petition,” however, Exhibit I-55 is not a study of the Petition Area or its agricultural resources. Thus, the report is irrelevant, and should be excluded.

Exhibit I-56: There is nothing in the record to suggest that HoKua Place is intended to be designed for or marketed to second-home or investment buyers. Jacob Bracken, Petitioner’s representative, testified that housing to be developed at HoKua Place is intended to be offered for sale to Kauai’s local families and workforce. Thus, Intervenor’s purported use of the housing study, *e.g.*, to demonstrate “off-island and on-island demand for second homes and real estate investments,” is not relevant.

Exhibit I-58: The need for affordable housing **on Maui** —again, an area beyond the boundaries of the Petitioner Area — is not relevant to the Petition. In addition, Exhibit I-58 focuses on the HRS § 201H-38 process for affordable housing projects.¹ Petitioner has not applied for a boundary amendment under the § 201H-38 process², thus, reference to the 201H process are irrelevant and could be confusing to the parties, the public, and the Commissioners.

Additionally, HRS § 91-10(3) provides: “Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence.” Intervenor’s counsel, Mr. Lance Collins, authored Exhibit

¹ HRS § 201H-38 provides a process whereby an affordable housing project may be granted exemptions from any statutes, ordinances and rules of any governmental agency relating to planning, zoning, and construction standards that do not negatively affect the health and safety of the general public. Typical exemptions have included Development Plan designation and zoning district requirements (*e.g.*, allowing an apartment building in a residential district), parking requirements (*e.g.*, providing fewer stalls than required by the Land Use Ordinance), relief from parking dedication requirements, and subdivision requirements (*e.g.*, street design, and overhead utilities instead of underground utilities in a rural area).

² Note: HRS § 201H-38 still requires the Commission to approve a district boundary amendment for an affordable housing project on land in the Agricultural District.

I-58. Admission of Mr. Collins' article is hearsay testimony which denies Petitioner the opportunity to properly cross-examine the author. In addition, it is not coupled with other reliable, probative, or substantial evidence to support the findings, which would defeat the hearsay objection. *Chock v. Bitterman*, 5 Haw.App. 59, 678 P.2d 576 (1984), certiorari denied 67 Haw. 685, 744 P.2d 781 (Admission of hearsay testimony was not reversible error but only because such testimony was coupled with other reliable, probative and substantial evidence to support findings).

Exhibit I-99: Petitioner withdraws its objection to Exhibit I-99.

DATED: Honolulu, Hawai'i, March 19, 2021.

/s/ Janna Wehilani Ahu
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