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BEFORE THE LAND USE COMMISSION OF THE
STATE OF HAWAII

In the Matter of the Petition of:) DOCKET NO. A11-791
)
HG KAUAI JOINT VENTURE, LLC) INTERVENOR'S REPLY TO
To Amend the Land Use District Boundary of) PETITIONER'S OPPOSITION TO
Certain Lands Situated at Kapa'a, Island of) SUBMISSION OF OFFER OF PROOF FOR
Kauai, State of Hawai'i, consisting of) RELEVANCE OF EXHIBIT NOS. I-53, I-55,
approximately 96 Acres, from the Agricultural) I-56, I-58, I-99; CERTIFICATE OF SERVICE
Land Use District to the Urban Land Use)
District, Kauai Tax Map Key 4-3-03: por 01.) Hearing Dates: March 10-11 & 24-25, 2021

INTERVENOR'S REPLY TO PETITIONER'S OPPOSITION TO SUBMISSION OF OFFER
OF PROOF FOR RELEVANCE OF EXHIBIT NOS. I-53, I-55, I-56, I-58, I-99¹

Intervenor LIKO MARTIN (Intervenor) respectfully submits this reply to Petitioner HG KAUAI JOINT VENTURE, LLC's (Petitioner) opposition to Intervenor's offer of proof for the relevance of exhibit nos. I-53, I-55, I-56, and I-58, filed March 19, 2021 (HG Opp.). This submission is filed pursuant to the Commission's oral orders at its meeting on March 10 and 11th, 2021 and Hawai'i Revised Statutes (HRS) §91-10.

I. ARGUMENT

A. Petitioner's opposition do not address relevance, materiality, or undue repetition.

Petitioner contends the Commission "can and should exclude evidence that is not relevant to the Petition" but failed to explain how Exhibit Nos. I-52, I-55, I-56, and I-58 are irrelevant to the

¹ Petitioner withdrew opposition to Exhibit I-99, which is therefore not further addressed. HG Opp. at 4.

determination of the action. HG Opp. at 1 citing Hawai'i Rules of Evidence (HRE) Rule 401 (“‘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.”). As discussed further *infra*, Petitioner’s opposition to Intervenor’s exhibits are premised on alleged non-conformities with the Hawai'i Rules of Evidence, which do not govern admissibility in these proceedings. HRS §91-10, titled “Rules of evidence, official notice” provides in relevant part: “any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence . . .” *Id.*(1). *Dependents of Cazimero v. Kobala Sugar Company*, 54 Haw. 479, 510 P.2d 89 (1973) held this clause did not permit an agency decisionmaker to “exclude any evidence that he believes should be excluded.” *Id.*, 54 Haw. at 481, 510 P.2d at 91 (footnote omitted). *Cazimero* explained:

[[F]or in our view, the first eight words of this statute must be liberally construed. Prior to its passage by the Legislature of this state in 1961, the Administrative Procedure Act was scrutinized by the Judiciary Committee of the House of Representatives. House Journal, 1st Legislature, SC Rep. No. 8,653 (1961). At page 659, it issued the following comment on our present HRS § 91-10(1):

. . . This subsection has been amended from subsection 10(1) of the Revised Model Act with the intent that the agency shall receive any oral or documentary evidence and that the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence (emphasis supplied).

The Revised Model State Administrative Procedure Act of 1961 provided that the rules of evidence to be followed in contested agency cases were to be the same as those applied in non-jury civil cases. 8 Its drafters stated that this was a compromise between allowing agencies to receive any testimonial offer and limiting them to an application of the common law rules of evidence. Handbook of the National Conference of Commissioners on Uniform State Laws, 216 (1961).

We are left with the conclusion that when our legislators departed from the compromise position they moved in the direction of one of the extreme standards avoided by the revisors of the Model Act. The language of the Judiciary Committee indicates that the direction chosen was towards the admission of any and all evidence limited only by considerations of relevancy, materiality and repetition.

Id., 54 Haw. at 482-83, 510 P.2d at 91-92; *quoted by In re Waiola O Moloka'i, Inc.*, 103 Hawai'i 401, 442-43, 83 P.3d 664, 705-06 (2004) (holding “HRS § 91-10(1) (1993), which sets forth the rules of evidence applicable to contested-case hearings, does not provide for the exclusion of otherwise relevant evidence on grounds of prejudice or potential compromise of the trier of fact's impartiality.”). “HRS § 91-10(1) provides only for the ‘exclusion of irrelevant, immaterial, or unduly repetitious evidence . . .” *Waiola*, 103 Hawai'i at 443, 83 P.3d at 706. Petitioner applies the wrong standards in opposing this Commission’s consideration of Exhibit Nos. I-52, I-55, I-56, and I-58.

Exhibit No. I-53 consists in the article by Scot K. Izuka et al, “Effects of Irrigation and Rainfall Reduction on Ground-water Recharge in the Lihue Basin, Kauai, Hawai‘i” U.S. Geological Survey Scientific Investigations Report Number 2005-5146 (2005). Petitioner opposes admission on Exhibit I-53 on the basis that the opinion of witness, Thomas Nance, opposes the opinions of Intervenor’s witnesses, Dr. Adam Asquith and Matt Rosener, P.E. HG opp. at 2. Petitioner’s objection concedes relevance because their opposition is premised on a dispute as to truth or credibility. That is, Petitioner’s reliance on Nance’s contrary opinion demonstrates the relevance and materiality of Exhibit I-53.

Exhibit I-55 consists in the report *Mālama ‘Āina: A Conversation about Maui’s Farming Future*, a project of the Maui Tomorrow Foundation, prepared by Jennifer Pell (Oct. 2016). Petitioner opposes admission of Exhibit I-55 because it is “not a study of the Petition Area or its agricultural resources.” HG opp. at 3. Petitioner’s opposition does not dispute that its witnesses have alleged the infeasibility of agriculture on this parcel based on soil conditions and windy conditions, amongst others. *See e.g.* Petitioner Exh. 16 at 2 (Rietow presentation). Petitioner’s objection goes to the weight of the evidence and not its relevance to this Commission’s determination of the action.

Exhibit I-56: consists in excerpts from the *Hawai‘i Housing Planning Study, 2019*, prepared by SMS Research & Marketing Services, Inc. for the Hawai‘i Housing Finance and Development Corp. (Dec. 2019). Petitioner opposes Exhibit I-56 on the basis that its witness, Jacob Bracken, testified “HoKua Place is intended to be offered for sale to Kauai’s local families and workforce.” HG Opp. at 3. First, Petitioner fails to address other information in Exhibit I-56 relevant “housing needs and housing market trends[.]” Intervenor’s Submission of Offer of Proof, at 3. Second, Petitioner’s intentions for the project do not foreclose evidence establishing that the project entails impacts on housing needs beyond Petitioner’s alleged intentions. The latter is relevant to the Commission’s considerations in these proceedings. *See* HRS §205-17(3)(F) (consideration of “provision for housing opportunities for all income groups, particularly the low, low-moderate, and gap groups”); HAR §15-15-77(b)(3)(F); HRS §205A-2(c)(5)(C)(iii) (providing a policy of consideration if a development is important to the State's economy). Third, Petitioner’s proffered evidence itself discusses a significant “home stay” industry, an offshore buyer market, and the significant percentage of non-owner occupants of condominiums and single-family homes on Kaua‘i. Petitioner Exhibit 30 at 7, 18 (Cassiday report).

Exhibit I-58 consists in a book chapter, Lance Collins, Ph.D., “Fast-Tracking the Luxury Housing Crisis in West Maui,” in *Social Change in West Maui* (North Beach West Maui Benefit Fund,

Lahaina 2019). Petitioner objects to Exhibit I-58 on several bases, including hearsay. HG opp. at 4. Pursuant to HRS §91-10, “the rules of evidence in administrative hearings, unlike those applicable to judicial proceedings, allow admission of hearsay evidence.” *Price v. Zoning Bd. of Appeals*, 77 Hawai'i 168, 176, 883 P.2d 629, 637 (1994) citing *Shorba v. Board of Educ.*, 59 Haw. 388, 397, 583 P.2d 313, 319 (1978) (footnote and other citations omitted).

B. Petitioner is not deprived of an opportunity to cross-examine or provide rebuttal evidence relating to Exhibit I-58.

Petitioner contends it would be deprived of its rights to cross-examination and rebuttal pursuant to HRS §91-10(3) upon admission of Exhibit I-58. HG opp. at 3-4. “Cross-examination” is defined as the “questioning of a witness at a trial or hearing by the party opposed to the party in whose favor the witness has testified.” *Black's Dictionary* at 458. Petitioner's contention, however, is directed at a document and not a witness and it is not possible to cross-examine a document.

Petitioner effectively seeks a ruling requiring all authors of all documents must be presented for cross-examination. This is not required in contested case proceedings, as opposed to judicial court proceedings in which a sponsoring witness is one way of allowing certain documents to come into evidence. Petitioner itself has submitted documents and information whose authors are either not identified or made available for cross-examination. *See e.g.* Petitioner Exh. 38 (Title Guaranty's Status Report); Petitioner Exh. 4 final environmental impact statement (FEIS)), appendix B (Peter Young, Ho'okuleana, LLC's sustainability plan); Petitioner Exh. 4, appendix D (David Craddick, Kaua'i County Department of Water letters); Petitioner Exh. 4, appendix F & G (Honua Engineering, preliminary engineering reports); Petitioner Exh. 4, appendix K (Reginald David, Biological Surveys).

Petitioner's contention that it would be deprived of rights to provide rebuttal evidence also lacks merit. HG opp. at 3-4 quoting HRS §91-10(3). “Rebuttal” is defined as: “1. In-court contradiction of an adverse party's evidence. 2. The time given to a party to present contradictory evidence or arguments.” *Black's Dictionary* at 1458. “Rebuttal evidence” is defined to be “[e]vidence offered to disprove or contradict the evidence presented by an opposing party. Rebuttal evidence is introduced in the rebutting party's answering case; it is not adduced, e.g. through cross-examination during the case-in-chief of the party to be rebutted.” *Id.* at 677. Here, Petitioner had full notice of the submission of Exhibit I-58, filed on February 10, 2021, and themselves should have filed a rebuttal exhibit to contest documentary evidence under the Commission's deadline for such exhibits on February 17, 2021. Petitioner's failure to provide rebuttal evidence does not relate to relevance

or materiality. The remedy would be for Petitioner to seek leave to offer rebuttal evidence late, not exclude relevant, material evidence of Intervenor.

Petitioner's arguments relating to the subjects addressed in Exhibit I-58 could be made in regard to the weight the Commission should give the exhibit. However, Petitioner did not demonstrate Exhibit I-58 is irrelevant, immaterial, or unduly repetitious. Petitioner's opposition does not relate to the evidentiary standard for admission in these proceedings.

II. CONCLUSION

For the foregoing reason, Intervenor LIKO MARTIN (Intervenor) respectfully requests admission of Exhibit Nos. I-53, I-55, I-56, I-58, and I-99 over Petitioner's objections.

DATED: Honolulu, Hawai'i

March 22, 2021



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