

PATRICK K. WONG 5878  
Corporation Counsel  
JANE E. LOVELL 7551  
MICHAEL J. HOPPER 8568  
Deputies Corporation Counsel  
County of Maui  
200 South High Street  
Wailuku, Maui, Hawaii 96793  
Telephone No. (808) 270-7740  
Facsimile No. (808) 270-7152

Attorneys for Department of Planning, County of Maui

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

2012 OCT 29 A 9:36  
LAND USE COMMISSION  
STATE OF HAWAII

In the Matter of the Petition of  
KAONOULU RANCH

To Amend the Agricultural Land Use  
District Boundary into the Urban Land  
Use District for approximately 88 acres  
at Kaonoulu, Makawao-Wailuku,  
Maui, Hawaii; Tax Map Key Nos. 2-2-  
02: por. of 15 and 3-9-01:16

DOCKET NO. A-94-706

DEPARTMENT OF PLANNING,  
COUNTY OF MAUI'S MEMORANDUM  
IN OPPOSITION TO INTERVENORS'  
MOTION *IN LIMINE* REGARDING  
SCOPE OF EVIDENCE;  
CERTIFICATE OF SERVICE

Hearing:  
Date: November 1 - 2, 2012  
Time: 9:30 a.m.

**DEPARTMENT OF PLANNING, COUNTY OF MAUI'S  
MEMORANDUM IN OPPOSITION TO INTERVENORS' MOTION *IN LIMINE*  
REGARDING SCOPE OF EVIDENCE**

Department of Planning, County of Maui ("County"), by and through its  
attorneys, Patrick K. Wong, Corporation Counsel, Michael J. Hopper and Jane E.  
Lovell, Deputies Corporation Counsel, opposes Intervenor's motion *in limine*  
regarding scope of evidence based on the following:

Intervenors seek to exclude County Exhibits 1, 2, and 4 on the basis that documents related to the County zoning and community plan entitlement process, other than the ordinances changing the zoning and community plan, are irrelevant to the current proceeding. Notwithstanding the fact that nearly all of the Intervenors' own exhibits would need to be excluded under this reasoning, and that Department's testimony addresses more than the zoning entitlement process, Intervenors request the extraordinary action of excluding the written testimony of the Department of Planning in its entirety. In addition, Intervenors request exclusion of "most of" the documents in the County's Request for Official Notice, despite the fact that all documents qualify for official notice under HAR § 15-15-63(k), and four of the six documents in the Request were also identified as Intervenors' exhibits. Intervenors' Motion is without merit and should be denied.

**A. The Department Of Planning Was Made An Automatic Party To This Proceeding And Is Entitled To Provide Written Testimony**

Intervenors request the unprecedented action that the Commission exclude the Planning Department's written testimony in its entirety. Intervenors' request is without basis.

The Department of Planning was made an automatic party to this proceeding and has submitted written testimony providing the Department's position on the Order to Show Cause. This is consistent with the practice in district boundary amendment proceedings and other Commission proceedings.

To the knowledge of the Department of Planning, the written testimony of the Department has never been excluded in any proceeding. The testimony is clearly relevant as it sets forth the Department's position on the proceeding. Striking the testimony would defeat the purpose of including the Department as an automatic party to this proceeding.

Without any citation to the record, the Intervenors object to Department's testimony in a footnote on page 9 of their Motion because they allege Director Spence mentioned that he was not an expert on Commission matters. However, Director Spence has provided his resume and his credentials which are more than sufficient to establish his expertise in the field of "planning and land use" in support of the Department's testimony.

**B. The Department's Testimony Is Relevant To the Proceeding**

The testimony of the Department is relevant as it directly addresses the issue of whether there has been a failure to perform either condition 15 or condition 5 of the 1995 D&O. The testimony provides information that will assist the Commission in assessing what representations were made by Petitioner in securing the district boundary amendment.

With respect to LUC conditions, the Hawaii Supreme Court has stated: "Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies . . . An

administrative agency, such as the LUC, has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed.”

Lanai Company, Inc. v. Land Use Commission, 105 Hawai'i 296, 314, 97 P.3d 372, 390 (2004).

Condition 15 requires that: “Petitioner shall develop the Property in substantial compliance with the representations made to the commission.” There is no more specific condition related to the allowed land use. In order to better advise the Commission on the representations made by the Petitioner, the Department reviewed the hearing transcripts, documents filed in the proceeding, and other relevant information. The 1995 D&O does not contain any citations to the record, unlike the Commission’s current practice that requires such citations. As such, statements made in filed documents and at the hearing by the parties and Commissioners will assist today’s Commission in assessing the representations made. In addition, all parties to this proceeding -- including the Intervenors -- have cited to the original hearing transcripts and documents filed with the Commission in their pleadings in this docket.

The Department’s testimony also provides information related to the County zoning process because the proposed M-1 light industrial zoning of the property was discussed at length during the original hearing. Finding of Fact 34 recognizes that the Department represented that it would request that the

County Council limit the commercial use of the property by condition. The Department's Testimony discusses this process as it relates to the 1995 D&O, indicating that such a condition was requested but never imposed. This is of critical importance to the Commission, as the project was referred to as a "commercial and light industrial" project throughout the process, and no references to the imposition of use limitations, other than the proposed zoning condition, were made.

**C. The Department's Request For Official Notice Is Allowed By Rule**

Intervenors request that "most of" the documents in the Department's Exhibit 2, which is a previously filed Request for Official Notice, be excluded. Intervenors do not specify which exhibits. HAR § 15-15-63(k) states:

The commission may take official notice of matters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts within the commission's specialized knowledge when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

The documents identified in the Department's Exhibit 2, which was also filed with the Commission as part of its response to the Intervenors' motion for Order to Show Cause qualify for "official notice" under the Commission's rules.

All of the documents were either filed as part of the record before the Land Use Commission, the Maui Planning Commission and County Council, or have

been adopted as legislation. The Commission is entitled to take official notice of the documents and to give them the weight that the Commission deems appropriate. Additionally, Intervenors themselves have submitted four of the six exhibits as their own exhibits, with the exception of the zoning ordinance and 1995 hearing transcript, which Intervenors quote extensively in their Motion for Order to Show Cause.

**D. Granting Intervenors' Motion Would Require Exclusion Of Nearly All of Intervenors' Own Exhibits**

The Department notes that granting the Intervenors' Motion would require the Commission to exclude all of the Intervenors' exhibits with the exception of the 1995 D&O itself. The remaining documents involve "facts regarding the 1994 and 1995 Commission proceedings" other than the D&O, and many are literally the same documents the Intervenors seek to exclude from the other parties. Many of the documents relate to the "Wailea 670" development which is not currently before the Commission and could have no bearing on whether the conditions of the 1995 D&O were breached.

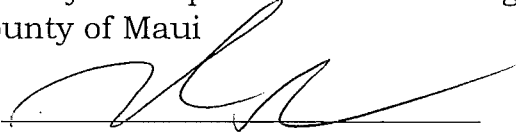
**E. Conclusion**

For the foregoing reasons, the County respectfully requests the Land Use Commission to deny the Intervenors' motion.

DATED: Wailuku, Maui, Hawaii, October 26, 2012.

PATRICK K. WONG  
Corporation Counsel  
Attorney for Department of Planning,  
County of Maui

By

A handwritten signature in black ink, appearing to read "M. Hopper", is written over a horizontal line.

MICHAEL J. HOPPER

JANE E. LOVELL

Deputies Corporation Counsel

BEFORE THE LAND USE COMMISSION

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DOCKET NO. A-94-706

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served on October 26, 2012, upon the following parties, by depositing same in the U.S. Mail, postage prepaid, at their last known addresses:

	METHOD OF SERVICE		
	<u>MAIL</u>	<u>HAND DELIVERY</u>	<u>E-MAIL</u>
DANIEL ORODENKER, ESQ. Executive Director Land Use Commission P. O. Box 2359 Honolulu, HI 96804 E-mail: <a href="mailto:daniel.e.orođenker@dbedt.hawaii.gov">daniel.e.orođenker@dbedt.hawaii.gov</a>	X		X
TOM PIERCE, ESQ. P. O. Box 798 Makawao, Hawaii 96768 E-mail address: <a href="mailto:tom@mauilandlaw.com">tom@mauilandlaw.com</a>	X		X

Attorney for Intervenors Maui Tomorrow Foundation, Inc., South Maui Citizens For Responsible Growth, and Daniel Kanahele



METHOD OF SERVICE  
MAIL    HAND DELIVERY    E-MAIL

JONATHAN H. STEINER, ESQ.  
 McCorrison Miller Mukai MacKinnon  
 P. O. Box 2800  
 Honolulu, Hawaii 96803  
 E-mail address: [steiner@m4law.com](mailto:steiner@m4law.com)

X

X

JOHN S. RAPACZ, ESQ.  
 P. O. Box 2776  
 Wailuku, Hawaii 96793  
 E-mail address: [rapacz@hawaii.rr.com](mailto:rapacz@hawaii.rr.com)

X

X

Attorneys for Pi`ilani Promenade North,  
 LLC and Pi`ilani Promenade South, LLC  
 and Honua`ula Partners, LLC

JESSE K. SOUKI, ESQ.  
 Director, Office of Planning  
 State of Hawaii  
 P. O. Box 2359  
 Honolulu, Hawaii 96804  
 E-mail: [jesse.k.souki@dbedt.hawaii.gov](mailto:jesse.k.souki@dbedt.hawaii.gov)

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BRYAN C. YEE, ESQ.  
 Deputy Attorney General  
 Department of the Attorney General  
 425 Queen Street  
 Honolulu, HI 96813  
 E-mail: [bryan.c.yee@hawaii.gov](mailto:bryan.c.yee@hawaii.gov)

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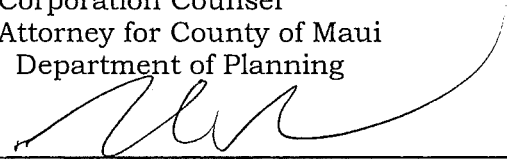
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Attorney for State Office of Planning

DATED: Wailuku, Hawaii, October 26, 2012.

PATRICK K. WONG  
 Corporation Counsel  
 Attorney for County of Maui  
 Department of Planning

By

  
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 MICHAEL J. HOPPER  
 JANE E. LOVELL  
 Deputies Corporation Counsel