

McCORRISTON MILLER MUKAI MacKINNON LLP

CLIFFORD J. MILLER 1406-0

miller@m4law.com

JOEL D. KAM 6052-0

kam@m4law.com

JONATHAN H. STEINER 6084-0

Steiner@m4law.com

500 Ala Moana Boulevard
Five Waterfront Plaza, 4th Floor
Honolulu, Hawaii 96813

Telephone: (808) 529-7300

Facsimile: (808) 524-8293

JOHN S. RAPACZ 4408-0

rapacz@hawaii.rr.com

P.O. Box 2776

Wailuku, HI 96793

Telephone: (808) 244-6955

Facsimile: (808) 244-6956

Attorneys for Piilani Promenade South, LLC and
Piilani Promenade North, LLC

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LAND USE COMMISSION
STATE OF HAWAII
2012 OCT 26 P 4: 04

BEFORE THE 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, Hawai'i

) DOCKET NO. A-94-706
)
) PIILANI PROMENADE SOUTH, LLC
) AND PIILANI PROMENADE NORTH,
) LLC'S MEMORANDUM IN OPPOSITION
) TO MAUI TOMORROW FOUNDATION,
) INC., SOUTH MAUI CITIZENS FOR
) RESPONSIBLE GROWTH AND DANIEL
) KANAHELE'S PRE-HEARING MOTION
) ON BURDEN OF PROOF, ETC., DATED
) OCTOBER 19, 2012; CERTIFICATE OF
) SERVICE
)
)
) HEARING:
) Date: November 1 and 2, 2012
)

PIILANI PROMENADE SOUTH, LLC AND PIILANI PROMENADE NORTH, LLC'S
MEMORANDUM IN OPPOSITION TO MAUI TOMORROW FOUNDATION, INC., SOUTH
MAUI CITIZENS FOR RESPONSIBLE GROWTH AND DANIEL KANAHELE'S
PRE-HEARING MOTION ON BURDEN OF PROOF, ETC., DATED OCTOBER 19, 2012

I. INTRODUCTION

Piilani Promenade South, LLC and Piilani Promenade North, LLC (collectively, "Piilani"), by and through their attorneys, McCorriston Miller Mukai MacKinnon LLP, hereby respectfully submit their Memorandum in Opposition to Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth and Daniel Kanahele's Pre-Hearing Motion on Burden of Proof, etc. ("Motion"). In the Motion, Intervenors seek to shift the burden of proof, such that, rather than Intervenors who initiated this proceeding carrying the burden to prove that there has been a violation of the Findings of Fact, Conclusions of Law, and Decision and Order, entered by the Land Use Commission on April 13, 1995 as Doc. No. 95-049920 ("the Order"), instead, it should be Piilani's burden to prove a negative – that their proposed project does not violate the Order. Piilani respectfully submits that this is incorrect, and that Intervenors should carry the burden of both proof and persuasion, that there has been a violation of the Order.

II. DISCUSSION

A. Intervenors initiated the show cause proceeding and therefore under HAPA bear the burden of proof.

HAR § 15-15-93 does not specify who carries the burden of proof, once an order to show cause has issued. The general rule regarding the burden of proof provided in the Hawaii Administrative Procedures Act (HAPA), Hawaii Revised Statutes ("HRS") Chapter 19, must therefore control. As Intervenors point out, under HRS § 91-10(5), it is the party "initiating the proceedings" who carries the burden of proof and persuasion. The Order to Show Cause proceeding herein was initiated by Intervenors when they filed their Motion for a Hearing,

Issuance of Order to Show Cause, and Other Relief (“Motion to Show Cause”). As the party who initiated that proceeding, they carry the burden of proof throughout.

Intervenor’s attempt to argue that the current landowners initiated the instant proceeding by virtue of being successors in interest to the original petitioner, Kaonoulou Ranch, who filed the Petition for Boundary Amendment (the “Petition”) which created this docket back in 1994. This argument has no merit. First, although no one denies that Piilani, as the current owner of portions of the property subject to the Order, is a proper respondent to the show cause proceeding, Piilani did not initiate the original docket. The original docket was initiated by Kaonoulou Ranch with which Piilani has no connection. Second, what is now at issue before the Commission is not the relief sought in the Petition (as to which the Petitioner bore the burden of proof), but rather, the contention that Piilani is in violation of the Order, a proceeding which was initiated by Intervenor. Clearly, since HAR sec. 15-15-93(b) is silent on the issue, Intervenor bears the burden of proof under HRS § 91-10(5).

B. The Commission’s rules do not warrant shifting the burden of proof to the current landowners.

HAR sec. 15-15-93 does not warrant shifting the burden of proof to the landowners in this case. As Intervenor repeatedly emphasized in the Motion for Issuance of Order to Show Cause which initiated this proceeding, the Intervenor only had to make a prima facie showing of a failure to perform, just enough to give the Commission “reason to believe” that a violation may have occurred. Intervenor never had to establish, by a preponderance of evidence, that such a violation actually occurred. That proof has been left to the hearing on the Order to show cause. This is emphasized, in fact, by the procedures adopted in this case, where the Commission has bifurcated the procedure into two phases, the first to determine whether a violation of the Order has occurred, and the second to determine the appropriate remedy. Insofar as no violation has

yet been established, Piilani respectfully submits that the burden of proof must in fairness and in order to ensure due process, remain on Intervenors, as the party who initiated the proceeding to prove a violation.

This interpretation is consistent with the only line of cases cited by Intervenors in the Motion, which address the circumstances of contempt proceedings. In those proceedings, the initial burden is on the movant “**to establish by clear and convincing evidence** that the alleged contemnor violated the court's earlier order.” United States v. Roberts, 858 F.2d 698, 700 (11th Cir. 1988) (citation omitted) (emphasis added). “If the movant satisfies this burden, the burden then shifts to the defendants to show cause as to why they should not be held in contempt and sanctioned until they comply with the court's order.” Reynolds v. Alabama DOT, 10 F. Supp. 2d 1263, 1273 (M.D. Ala. 1998). In this case, Intervenors never proved that a violation had occurred, but rather, only made a minimal showing to give the Commission reason to believe that a violation may have occurred. In the Motion for Issuance of Order to Show Cause, Intervenors emphasized that the burden on a Motion for Order to Show Cause is “minimal,” which Intervenors analogized to a “reasonable suspicion” standard. See Motion for Issuance of Order to Show Cause at 19.¹ Intervenors cite no authority which allows the burden of proof to be shifted to the accused upon such a minimal showing of a violation.

Indeed, in other cases involving orders to show cause, the burden of proof does not automatically fall on the party to whom the order is directed. For example, in court initiated disciplinary proceedings, "show cause orders do not in fact shift the burden to the attorney, rather such proceedings merely provide the attorney with his constitutionally guaranteed opportunity to confront the government's evidence and rebut the same. . . . “[T]he burden of proof remain[s] at

¹ Piilani disputed that this was the applicable standard in Opposition to the Motion to Show Cause.

all times with the United States Attorney.” United States v. Nolen, 472 F.3d 362, 372 (5th Cir. Tex. 2006). See also United States v. Peele Co., 224 F.2d 667, 669 (2nd Cir. 1955) (“The issuance of an order to show cause does not shift the burden of proof.”); Riverview Packing Co. v. Reconstruction Finance Corp., 92 F. Supp. 376, 380 (D.N.J. 1950) (“An order to show cause does not shift the burden of proof.”); Morehouse v. Pacific Hardware & Steel Co., 177 F. 337 (9th Cir. 1910); Goldstein v. United States, 11 F.2d 593 (5th Cir. 1926); 60 C.J.S., Motions and orders, § 20).

C. Shifting the burden of proof to the landowners would be a violation of procedural and substantive due process.

Finally, if the Commission were to shift the burden of proof to the landowners, it would constitute an unlawful violation of due process. The Fourteenth Amendment to the United States Constitution and Article I, Section 5, of the Hawaii Constitution provide that no person shall be deprived of “life, liberty or property without due process of law[.]” Under Hawaii law, due process is an important concern when landowners’ property rights are affected by reversionary land use regulation consequences. Cf. Perry v. Planning Commission of Hawaii County, 62 Haw. 666, 682, 619 P.2d 95, 106 (1980) (In an analogous matter concerning special use permitting, “the language declared that a failure to comply with the condition could result in a reversion to a former use. Under such circumstances, due process for the permit holders is a relevant, if not a primary, consideration.”).

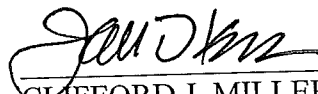
Piilani has an undeniable property interest in the rights conferred under the Order, and reversion of the property to its former land use classification would deprive Piilani all economically feasible uses of the property. Accordingly, due process in the show cause proceeding is of primary importance. Shifting of the burden of proof in the absence of any authority therefor, and in direct contradiction to the requirements of the Hawaii Administrative

Procedure Act, would constitute a violation of Piilani's right to procedural and substantive due process. See McAtee v. State, 899 So. 2d 1245, 1246 (Fla. Dist. Ct. App. 2005) (The trial court held that "the directive of the order to show cause is really placing, in terms of who has the responsibility of going forward, on the shoulders of the respondent [appellant]." In reversing, the appellate court concluded that the trial court had impermissibly shifted the burden of proof to the defendant, violating his due process rights.).

III. CONCLUSION

For the reasons discussed herein, Piilani respectfully submits that the Motion must be denied.

Dated: Honolulu, Hawai'i, October 26, 2012.



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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this date, a true and correct copy of the foregoing document was duly served upon the following party via U.S. Mail and electronic mail, addressed as follows:

TOM PIERCE, ESQ. tom@mauilandlaw.com
P.O. Box 798
Makawao, Hawai'i 96768


Bryan C. Yee Bryan.C.Yee@hawaii.gov
Deputy Attorney General
Department of the Attorney General
435 Queen Street
Honolulu, Hawai'i 96813

Jesse K. Souki, Director Jesse.K.Souki@dbedt.hawaii.gov
Office of Planning
State of Hawai'i
Leiopapa a Kamehameha, Room 600
235 South Beretania Street
Honolulu, Hawai'i 96813

William Spence, Director William.Spence@co.maui.hi.us
County of Maui, Office of Planning
250 S. High Street
Kalana Pakui Building, Suite 200
Wailuku, Hawai'i 96793

Jane Elizabeth Lovell, Esq. Jane.Lovell@co.maui.hi.us
Michael Hopper, Esq. Michael.Hopper@co.maui.hi.us
Corporation Counsel
County of Maui
200 South High Street
Kalana O Maui Building, 3rd Floor
Wailuku, Hawai'i 96793

Dated: Honolulu, Hawai'i, October 26, 2012.



CLIFFORD J. MILLER
JOEL D. KAM
JONATHAN H. STEINER

Attorneys for Piilani Promenade South, LLC and
Piilani Promenade North, LLC