

DEPARTMENT OF THE
CORPORATION COUNSEL 205

MOANA M. LUTEY 6385
Corporation Counsel

CALEB P. ROWE 9520
KRISTIN K. TARNSTROM 9934
Deputy Corporation Counsel
County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793
Telephone No.: (808) 270-7740
Facsimile No.: (808) 270-7152
Email: Caleb.Rowe@co.maui.hi.us
Email: Kristin.Tarnstrom@co.maui.hi.us

Attorneys for Applicant
COUNTY OF MAUI

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case
Regarding the Continuation of Revocable
Permits (RPs) for Tax Map Key Nos. (2) 1-
1-001:004 & 050; (2) 2-9-014:001, 005,
011, 012 & 017; (2) 1-1-002:002 (por.) and
(2) 1-2-004:005 & 007 for Water Use on
the Island of Maui to Alexander &
Baldwin, Inc. (A&B) and East Maui
Irrigation Company, LLC (EMI) for the
remainder of the 2021 RPs, if applicable,
and for their continuation through the end
of 2022

DLNR File No.: CCH-LD-21-01

NON-PARTY COUNTY OF MAUI'S REPLY
IN SUPPORT OF APPLICATION TO BE
ADMITTED AS A PARTY; CERTIFICATE
OF SERVICE

**NON-PARTY COUNTY OF MAUI'S REPLY IN
SUPPORT OF APPLICATION TO BE ADMITTED AS A PARTY**

Petitioner SIERRA CLUB OF HAWAII ("Sierra Club") has failed to rebut any of the reasoning set forth by the County of Maui ("County") as to why it should be allowed to intervene as of right, or, in the alternative, should be allowed to participate in these proceedings. Sierra Club's first argument, that the County does not have jurisdiction over the property and thus, does

not qualify for intervention as of right under Hawaii Administrative Rules [“HAR”] § 13-1-31(b)¹, is based on an overly narrow interpretation of the term “jurisdiction” as used in the rule. Appellant seems to believe that the term “jurisdiction” is limited to zoning, thus citing Stop H-3 Ass'n v. State Dep't of Transp., 68 Haw. 154, 158, 706 P.2d 446, 449 (1985), which established that the State has zoning and land use jurisdiction over conservation districts. Sierra Club cites no authority for the position that the term “jurisdiction” as used in HAR § 13-1-31(b) is limited in that manner, and ignores the other forms of “jurisdiction” which the County does possess over the license areas at issue in this case. For example, even in conservation districts, “any land use permitted...is subject to...applicable statutes, ordinances, rules, and regulations of the...**county** governments” and requires that “the permittee shall obtain a **county** building or grading permit or both for the use prior to final construction plan approval.” HAR §§ 13-5-42 (a)(1); 13-5-42 (a)(21) (emphasis added). Similarly, even within conservation districts, nonconforming uses and structures “shall be subject to development standards set forth in this chapter, **and** other requirements as applicable, including but not limited to a **county** building permit, shoreline setback, and shoreline certification.” HAR § 13-5-7 (emphasis added). Plaintiff also, for reasons that are unclear, cites Kunimoto v. Kawakami, 56 Haw. 582, 545 P.2d 684 (1976), which provides that the state can initiate eminent domain proceedings over county owned property for the purposes of school construction, and is completely irrelevant to the question under consideration.

¹ The following persons or agencies shall be admitted as parties: (1) All government agencies whose jurisdiction includes the land in question shall be admitted as parties upon timely application. (2) All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application

Sierra Club next argues that HAR § 13-1-31(b)(2) is also inapplicable because the County cannot “demonstrate that it will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public.” Their basis for this argument is that “the Sierra Club has repeated *ad nauseum* that it does not seek to reduce the amount of water available to Maui County for its current domestic users or the Kula Agricultural Park.” *Sierra Club’s Memorandum in Opposition to Maui County’s Application to be Admitted as a Party* (“Memo in Opp.”), p. 2. While the County appreciates the Sierra Club’s support of its needs, the Sierra Club is neither the fact finder, nor the decision maker in this proceeding and the BLNR is not bound by the positions taken by the Sierra Club. The County has a clear and obvious interest in continuing to receive water for domestic and agricultural use, and that interest will be unquestionably affected by the outcome of these proceedings. The fact that Sierra Club does not oppose the County’s interest does not make its interests any less relevant or important. Further, there is no requirement in HAR § 13-1-31(b)(2) that there be a party adverse to the interests of the party seeking admission, only a showing that the party’s interests will be directly and immediately affected by the outcome.

Sierra Club next argues that the County should not even be allowed permissive admission under HAR § 13-1-31(c). In support of this argument, Sierra Club again argues that, because it does not oppose the County’s continued access to water, “it is hard for the County to justify how it has a substantial interest in the matter” and “protection of its interests are assured.” *Memo in Opp.*, p. 3. As with its arguments under HAR § 13-1-31(b)(1), Sierra Club seems to conflate a “substantial interest” as used in HAR § 13-1-31(b)(2) with a requirement that that interest be diametrically opposed by one of the parties. The clear language of the rule, however, does not include any such requirement, nor does Sierra Club provide any support for that position. Instead,

Sierra Club makes broad factual pronouncements without any supporting documentation to argue that, because the County had previously joined certain motions in proceedings on purely legal issues such as whether environmental impact statements are necessary prior to approval of the revocable permits at issue², or whether the permits require a Contested Case Hearing³, the County will not add anything to these proceedings. In doing so, Sierra Club conveniently ignores the fact that the County has presented substantial evidence both before the Circuit Court⁴ and the Commission on Water Resources Management⁵ in cases regarding east Maui water resources. Further, Sierra Club ignores that the County is in the best position to provide evidence regarding its public trust uses including information on drought conditions and resulting mitigation measures, the number of public trust end users, the total amount of water used from all sources, the fluctuations between source usage, and future domestic use based on anticipated demographic changes and population growth. Despite Sierra Club's arguments to the contrary, none of this information is provided for in "what A&B has been providing to BLNR for the past several quarters."⁶ *Memo in Opp.*, p. 3.

For the foregoing reasons, as well as any that may be adduced at the hearing on this Motion, Movant County of Maui respectfully requests that this Court allow it to intervene in this action.

² See Healoha Carmichael v. Board of Land and Natual Resources, Civil No. 15-1-0650-04

³ See Sierra Club v. Board of Land and Natural Resources, Civil No. 20-0001541

⁴ See Sierra Club v. Board of Land and Natual Resources, Civil No. 19-1-00190-01.

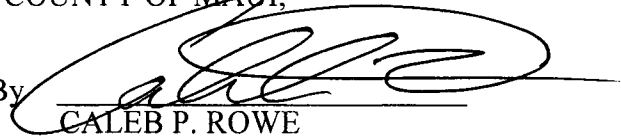
⁵ See Petition to Amend Interim Instream Flow Standards, CCH-MA13-01

⁶ Sierra Club is presumably referring to quarterly reports submitted by Alexander and Baldwin, Inc. and East Maui Irrigation, LLC to the BLNR which only reflect water deliveries, and not total water usage.

DATED: Wailuku, Maui, Hawaii, November 5, 2021.

MOANA M. LUTEY
Corporation Counsel
Attorneys for Applicant
COUNTY OF MAUI,

By

A handwritten signature in black ink, appearing to read 'Caleb P. Rowe', is written over a horizontal line. The signature is stylized and cursive.

CALEB P. ROWE
KRISTIN K. TARNSTROM
Deputies Corporation Counsel

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on this date a true and correct copy of the foregoing document,
was duly served upon the following individuals at their last known address as follows by email
and by depositing same via U.S. Mail, postage pre-paid at the last known address:

DAVID KIMO FRANKEL, ESQ.
1638-A Mikahala Way
Honolulu, Hawaii 96816

(davidkimofrankel@hawaiiantel.net)

Attorney for Plaintiff
SIERRA CLUB

DAVID SCHULMEISTER, ESQ.
TRISHA H. S. T. AKAGI ESQ.
MALLORY T. MARTIN, ESQ.
Cades Schutte
Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813

(dschulmeister@cades.com)

(takagi@cades.com)

(mmartin@cades.com)

Attorneys for Defendants
ALEXANDER & BALDWIN, INC. and
EAST MAUI IRRIGATION COMPANY, LLC

LAUREN K. CHUN, ESQ. (lauren.k.chun@hawaii.gov)
MELISSA D. GOLDMAN, ESQ. (melissa.d.goldman@hawaii.gov)
Deputy Attorneys General
Department of the Attorney General, State of Hawaii
465 South King Street Room 300
Honolulu, Hawaii 96813

Attorneys for Defendants
BOARD OF LAND AND NATURAL RESOURCES

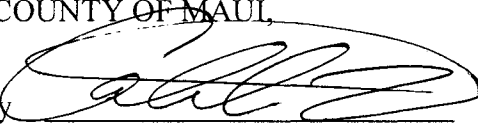
SUZANNE D. CASE (Suzanne.Case@hawaii.gov)
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Hearings Officer

DATED: Wailuku, Maui, Hawaii, November 5, 2021.

MOANA M. LUTEY
Actin Corporation Counsel
Attorneys for Applicant
COUNTY OF MAUI,

By



CALEB P. ROWE
KRISTIN K. TARNSTROM
Deputies Corporation Counsel