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BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

LAND USE COMMISSION
STATE OF HAWAII
2012 OCT 25 A 7:32

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 TO TAKE TESTIMONY OF
CARLA M. FLOOD VIA TELEPHONE;
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 TO
TAKE TESTIMONY OF CARLA M. FLOOD VIA TELEPHONE**

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, oppose Intervenor's motion to take testimony of Carla M. Flood via telephone for the following reasons:

Intervenors seek leave to present the testimony of one of their witnesses, Carla M. Flood, via telephone "due to medical necessity." (Motion, p. 1) However, Intervenors have not described the nature or extent of the proposed witness's medical condition. Instead, the motion rests solely on a declaration from Ms. Flood, in which she states that she is 81 years old and that she has "poor physical health." Her condition or disability is not described, and no medical evidence, such as a doctor's certificate, is provided. Without such information, the Commission cannot determine whether Ms. Flood would be able to testify in person if some special accommodation were made for her.

Moreover, Intervenors have not cited to any rule or statute that would allow any witness, regardless of age or state of health, to testify by telephone in an adjudicatory hearing before the Land Use Commission in which the parties have the right to cross-examine opposing witnesses. HAR § 15-15-68 provides that "[e]ach party shall have the right to conduct any cross-examination of the witnesses as may be required for a full and true disclosure of the facts." Doing so by telephone is virtually impossible, in that neither the cross-examiner nor the members of the Commission properly evaluate the testimony of a witness who is not physically present at the proceedings.

In an analogous situation involving administrative agency hearings on social security disability claims, the Association of Administrative Law Judges strenuously objected to a proposed rule that would have allowed telephonic testimony:

We have strongly opposed the introduction of telephone hearings (proposed rules 20 CFR §§ 404.936(c), 416.1436(c)). A telephone hearing does not provide for the due process required for a constitutional hearing, the hearing required by the Social Security Act, or the procedure provided for by the Administrative Procedure Act. A telephone hearing adversely affects the ability of the administrative law judge to ascertain the identity of the participants and to determine the credibility of either the claimant or the witnesses because their demeanor cannot [be] observed by the judge. A telephone hearing adversely affects the opportunity of the claimant to observe the judge and what is actually going on in the hearing, including undermining the claimant's ability to effectively cross-examine the testimony of expert witnesses. . . . This type of hearing is contrary to the long standing culture and tradition of the American legal system in general and Social Security disability process in particular.

Comments of the Association of Administrative Law Judges Regarding Social Security Administration Notice of Proposed Rulemaking, <http://www.aalj.org/pdf/08d003.pdf> (last visited August 10, 2011), quoted in Edwards v. Astrue, 2011 WL 3490024 (D. Conn. 2011) at *6, internal citations omitted.

The same considerations apply here. An Order to Show Cause is an adjudicatory proceeding which may lead to a drastic remedy, namely, reversion to the former land use classification. HAR § 15-15-93(b). In light of the important issues at stake in an Order to Show Cause proceeding, the Commission must make every effort to accord the responding party due process, including the right to confront witnesses and to effectively cross-examine them.

Intervenors' motion describes Ms. Flood as a "percipient witness to negotiations in the 1990s between Kaonoulu Ranch and the Kihei Community Association regarding the petitioner's representations with respect to 88 acres of

land which is the subject of this action." (Memorandum in Support of Motion, p. 1) Any such negotiations or representations are irrelevant to the issues before this Commission. This Commission must decide whether the current owner has violated commitments made during the Land Use Commission's district boundary amendment proceedings in 1995. The Commission has no legal authority to enforce representations made by the previous owner to other parties in other proceedings.

The irrelevance of Ms. Flood's proposed testimony is illustrated by Intervenors' proposed Exhibit I-11, a letter to the Maui Planning Commission dated August 22, 1998 from Ms. Flood in her capacity as the Planning and Development Chair for the Kihei Community Association. The letter itself is objectionable as hearsay, and contains hearsay-within-hearsay reflecting representations allegedly made by Henry Rice to the Kihei Community Association. Any such representations are not relevant to the issues currently before this Commission, in that they do not reflect representations made to the Land Use Commission during the district boundary amendment proceedings.

While the Commission is not bound by the common law rules of evidence, the Commission "as a matter of policy" may exclude "irrelevant[,] immaterial, or unduly repetitious evidence[.]" HAR § 15-15-63(b). Even if the Commission were to overrule evidentiary objections based on hearsay, multiple hearsay, and irrelevance, the 1998 letter and any testimony surrounding it cannot carry any persuasive weight, because it does not relate to the representations made to the


Land Use Commission by the petitioner in the district boundary amendment proceedings.

Finally, as a practical matter, it is simply not necessary to inconvenience Ms. Flood by requiring her to appear personally, given the irrelevant nature of the proposed testimony. For the same reason, it is not appropriate for the Commission to allow testimony by telephone over a party's objection, as that procedure is not provided for under the Commission's rules, prevents the Commission from observing the demeanor of the witness, and violates the opposing parties' rights to effective cross-examination.

Accordingly, the County respectfully requests the Land Use Commission to deny the Intervenors' motion. For the same reasons, County requests that the Commission exclude Exhibit I-11 on the grounds of hearsay, multiple hearsay, and irrelevance.

DATED: Wailuku, Maui, Hawaii, October 24, 2012.

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

By 
MICHAEL J. HOPPER
JANE E. LOVELL
Deputies Corporation Counsel

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served on October 24, 2012, upon the following parties, by depositing same in the U.S. Mail, postage prepaid, at their last known addresses:

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Attorney for State Office of Planning

DATED: Wailuku, Hawaii, October 24, 2012.

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

By



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 Deputies Corporation Counsel