

McCORRISTON MILLER MUKAI MacKINNON LLP

CLIFFORD J. MILLER 1406-0

miller@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

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A-94-706
)	
KAONOULU RANCH	)	PIILANI PROMENADE SOUTH, LLC
	)	AND PIILANI PROMENADE NORTH,
To Amend the Agricultural Land Use District	)	LLC'S MEMORANDUM IN OPPOSITION
Boundary into the Urban Land Use District	)	TO MAUI TOMORROW FOUNDATION,
for approximately 88 acres at Kaonoulu,	)	INC., SOUTH MAUI CITIZENS FOR
Makawao-Wailuku, Maui, Hawai'i	)	RESPONSIBLE GROWTH and DANIEL
	)	KANAHELE'S PRE-HEARING MOTION
	)	<i>IN LIMINE</i> REGARDING SCOPE OF
	)	EVIDENCE; CERTIFICATE OF SERVICE
)	
	)	<u>Hearing:</u>
	)	Date: November 1 and 2, 2012
	)	Time: 10:00 a.m.
)	
)	

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 IN LIMINE REGARDING SCOPE OF EVIDENCE

I. INTRODUCTION

Piilani Promenade South, LLC ("PPS") and Piilani Promenade North, LLC ("PPN") (collectively "Piilani"), by and through their attorneys, McCorriston Miller Mukai MacKinnon LLP, submit this Memorandum in Opposition to Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth and Daniel Kanahele's Pre-Hearing Motion in Limine Regarding Scope of Evidence, dated October 24, 2012 ("Motion in Limine"). While Piilani agrees that the evidence presented to the Commission should be limited to material relevant to the Order to Show Cause, Piilani disagrees entirely with Intervenors' application of that rule to the evidence offered by Piilani. The Motion in Limine should be denied as to the exhibits and proposed testimony submitted by Piilani.

II. DISCUSSION

A. Material Presented to the Commission in Support of the Petition for Land Use District Boundary Amendment by Kaonoula Ranch is Relevant.

The Motion in Limine seeks to exclude Piilani Exhibits 2 – 6, all of which consist either of materials submitted to the Commission as part of the Original Petitioner's request for a boundary amendment, or testimony to the Commission as part of that request. Piilani respectfully submits that the materials submitted to the Commission by the Original Petitioner Kaono'ula Ranch are directly relevant to the issue of whether Condition 15 of the Decision and Order has been violated. Condition 15 of the Order provides as follows:

*15. Petitioner shall develop the **Property in substantial compliance with the representations made to the Commission.** Failure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification. (Emphasis added.)*

The materials submitted by the Original Petitioner which Intervenor seek to preclude contain the representations made to the Commission. It is those representations which the development must substantially comply. This evidence is clearly relevant.¹

B. Exhibits Regarding the Change in Zoning Proceedings and Other Entitlements are Relevant

At the hearings before the Commission on the Petition, the issue of whether the amount of retail use in the subject property could be limited was discussed. The County of Maui Department of Planning indicated at that time that it would seek to limit the percentage of retail use when the zoning was changed. The Commission then determined not to place any limitations on the amount of retail verses industrial use in the conditions contained in the Order. Thereafter, the 1999 zoning of the project area was done following recommendations from the Maui Planning Commission by the Maui County Council after numerous public hearings in Kihei and Wailuku. As noted above, during the LUC hearings, the Maui Planning Department stated that as part of the ACIZ proceedings a request would be made to restrict the amount of commercial activities allowed within the light industrial districts similar to what was done in Kahului Industrial Park. The Maui Planning Commission heard a proposal for a limitation on the amount of commercial/retail within the project and denied that request. The same request was made to the Maui County Council as a limitation on the amount of commercial proposed, and that request was denied as well. Clearly the possibility of commercial and retail use on the Property was raised during the LUC hearings but the LUC nevertheless deferred to the County of Maui to address those concerns through zoning. The Maui Planning Commission and the Maui County Council both considered, but declined to condition any change in zoning on any

¹ Ironically, two of Intervenor's exhibits, I-1 and I-3, are materials submitted to the Commission as part of the original Petition, and would be excluded under the rationale in the Motion in Limine. In fact, much of the material in Intervenor's Exhibit I-3 is identical to that which they seek to exclude.

percentage use of the Property for commercial. Many of the exhibits which Intervenors seek to exclude directly address this point (see e.g. Piilani Exhibits 7 & 8).

The other exhibits which Intervenors object to are also relevant, or may be relevant as rebuttal depending on testimony of various witnesses. Piilani Exhibit 10, which the Motion in Limine mischaracterizes as a County Letter regarding meeting County zoning conditions, is actually a copy of the 2005 Annual Report, along with evidence that this report was submitted to the Commission. It is relevant to the issue of compliance with the condition requiring filing annual reports. Piilani Exhibit 15 relates to preliminary subdivision approval, and is relevant to the details of the project which will be built on the property. Piilani Exhibits 23, 25, 26, and 27 relate to whether the proposed development complies with the current zoning and the Kihei-Makena Community Plan. Intervenors have attempted to assert both of these issues into this proceeding, and these exhibits rebut Intervenors' evidence.

Piilani Exhibit 37, which is a rebuttal exhibit, exemplifies the inconsistency in Intervenors' positions herein. Piilani submitted that exhibit as a full and complete copy of Intervenors' Exhibit I-10, which were excerpts of the Update to Traffic Analysis of Julian Ng. Piilani has no idea why Intervenors have submitted this incomplete exhibit, and so have submitted the complete copy of the same exhibit for rebuttal purposes, as necessary. Similarly, Exhibits 38-44 were submitted as rebuttal exhibits, to be used to rebut anticipated testimony from Intervenors' witnesses. A determination as to whether they are relevant and proper should not be made until they are offered in evidence.

Finally, Exhibits 35 and 36 are communications directly relevant to condition 5 of the Order. Intervenors have asserted, and Piilani disputes, that the Condition requires construction of a frontage road. Condition 5 only mandates a frontage road in consultation with and if

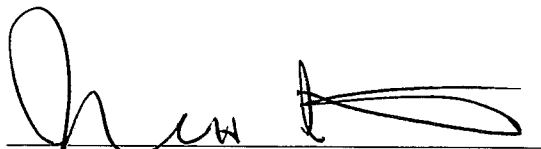
required and approved by the State Department of Transportation and the County of Maui. Exhibits 35 and 36 are directly relevant to whether such roads are feasible. Intervenors' own named expert Victoria Huffman has opined that a frontage road would be beneficial, and these exhibits prove that her testimony is at odds with the position of the State Department of Transportation.

As pointed out by the Department of Planning, County of Maui's Memorandum in Opposition to Intervenors' Motion *In Limine* Regarding Scope of Evidence, in which Piilani joins, many of the exhibits which Intervenors seek to exclude are either the same exhibits, or cover the same subject matters as the exhibits submitted by Intervenors. Intervenors are unfairly attempting to exclude "irrelevant" evidence submitted by the other parties, while at the same time attempting themselves to introduce evidence on the same subjects. This is fundamentally unfair, and should not be allowed by the Commission. The Motion in Limine should be denied in its entirety.

III. CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Department of Planning, County of Maui's Memorandum in Opposition to Intervenors' Motion *In Limine* Regarding Scope of Evidence, the Motion in Limine should be denied.

Dated: Honolulu, Hawai'i, October 30, 2012.

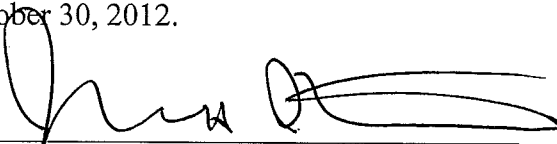


CLIFFORD J. MILLER
JOEL D. KAM
JONATHAN H. STEINER

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

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 30, 2012.



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

Attorneys for
Piilani Promenade South, LLC and
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