

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Petition Of ) DOCKET NO. DR06-32  
)  
MARK J. BENNETT, AS ATTORNEY ) ORDER GRANTING AMENDED  
GENERAL, STATE OF HAWAII ) MOTION TO DISMISS AMENDED  
) PETITION FOR DECLARATORY ORDER  
For A Declaratory Order Regarding Pre- ) AND DISMISSING AMENDED PETITION  
Condition No. 9.B. Of Land Use ) FOR DECLARATORY ORDER  
Commission's September 23, 1988 Decision )  
And Order In Docket No. A87-613 )  
\_\_\_\_\_ )

ORDER GRANTING AMENDED MOTION TO DISMISS  
AMENDED PETITION FOR DECLARATORY ORDER AND  
DISMISSING AMENDED PETITION FOR DECLARATORY ORDER

This is to certify that this is a true and correct copy of the document on file in the office of the State Land Use Commission, Honolulu, Hawaii.

AUG 16 2007 by   
Date Executive Officer

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On December 26, 2006, Brian Aburano, Deputy Attorney General, filed a Petition for Declaratory Order Regarding Pre-Condition No. 9.B of Land Use Commission's September 23, 1998 Decision and Order in Docket No. A87-613 ("Petition for Declaratory Order") on behalf of Mark J. Bennett, as Attorney General, State of Hawai'i ("AG"), pursuant to HAR §15-15-98.

On January 16, 2007, Kapolei Property Development, LLC ("KPD"), filed a timely Petition to Intervene.

On January 23, 2007, Brian Aburano, Deputy Attorney General, filed its Limited Objection to Kapolei Property Development LLC's Petition to Intervene on behalf of the AG.

On March 8, 2007, KPD filed (i) a Statement of Opposition to Petition for Declaratory Order; and (ii) a Motion to Dismiss Petition for Declaratory Order.

On March 8, 2007, Richard W. Gushman, II; Clinton R. Churchill; David A. Heenan; and R.J. Zlatoper (collectively "Campbell Estate")<sup>1</sup> filed (i) a Joinder in Intervenor Kapolei Property Development LLC's Statement of Opposition to Petition for Declaratory Order; and (ii) a Joinder in Intervenor Kapolei Property Development LLC's Motion to Dismiss Petition for Declaratory Order.

The Commission considered the Petition for Declaratory Order at its meeting on March 16, 2007, in Honolulu, Hawai'i. A motion was made, seconded, and carried to set the Petition for Declaratory Order for hearing. A motion was also made, seconded, and carried to designate the Commission's Executive Officer, Anthony J.H. Ching, to serve as the Hearings Officer in this docket. A motion was further made, seconded, and carried to grant KPD's timely Petition to Intervene. The Commission's written orders on these motions were entered on March 30, 2007.

On March 16, 2007, immediately following the meeting of the Commission, the Hearings Officer conducted a pre-hearing conference on the Petition for Declaratory Order, which was attended by all of the parties in this proceeding. At the conference, the Hearings Officer established a briefing and hearing schedule on KPD's Motion to Dismiss Petition for Declaratory Order.

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<sup>1</sup> The Trustees of Campbell Estate were already named respondents in the Petition for Declaratory Order.

On March 20, 2007, the parties filed a Stipulation Regarding Filing and Service Date of Intervenor's Motion to Dismiss.

On March 22, 2007, Brian Aburano, Deputy Attorney General, filed a Motion to Waive Assessment of Fees and Expenses and to Excuse Petitioner from any Requirement to Pay Reimbursement of Fees and Expenses on behalf of the AG, pursuant to HAR §§15-15-49 and 15-15-70 ("Motion to Waive").

On March 30, 2007, the AG filed its Memorandum in Opposition to Intervenor Kapolei Property Development LLC's Motion to Dismiss Petition for Declaratory Order.

On April 5, 2007, KPD filed its Reply Memorandum in Support of Motion to Dismiss Petition for Declaratory Order.

The Commission considered the Motion to Waive at its meeting on April 12, 2007, in Honolulu, Hawai'i. A motion was made, seconded, and carried to grant the Motion to Waive. The Commission's written order on the Motion to Waive was entered on May 7, 2007.

A hearing on KPD's Motion to Dismiss Petition for Declaratory Order was held before the Hearings Officer on April 24, 2007, in Honolulu, Hawai'i, and on May 2, 2007, the Hearings Officer filed Proposed Findings of Fact, Conclusions of Law, and Recommended Decision and Order.

On May 11, 2007, the AG filed Petitioner's Written Exceptions to and Request for Argument on Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision and Order.

On May 11, 2007, KPD filed its Brief in Support of Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision and Order with Limited Exceptions. On May 11, 2007, the Campbell Estate filed a Joinder in Intervenor Kapolei Property Development LLC's Brief in Support of Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision and Order with Limited Exceptions.

On May 15, 2007, the AG filed Petitioner's Brief in Reply to Intervenor Kapolei Property Development LLC's Brief in Support of Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision and Order with Limited Exceptions.

On May 16, 2007, KPD filed its Reply to the Petitioner's Exceptions. On May 16, 2007, the Campbell Estate filed a Joinder in Intervenor Kapolei Property Development LLC's Reply to the Petitioner's Exceptions.

The matter came on for hearing before the Commission on May 18, 2007, in Honolulu, Hawai'i. Mark J. Bennett, Esq., Attorney General, and Brian Aburano, Esq., Deputy Attorney General, appeared on behalf of the AG. Katherine G. Leonard, Esq., and Melissa Lambert, Esq., appeared on behalf of both KPD and the Campbell

Estate. At the conclusion of that hearing, the Commission requested that the AG file an Amended Petition and otherwise took the matter under advisement.

On May 23, 2007, the AG filed Petitioner's Amendment of Petition for Declaratory Order Regarding Pre-Condition 9.B. of Land Use Commission's September 23, 1998 Decision and Order in Docket No. A87-613; Amended Petition for Declaratory Order ("Amended Petition for Declaratory Order").

On June 21, 2007, the AG filed Petitioner's Response to Intervenor Kapolei Property Development LLC's Submission of Dispositive New Hawaii Supreme Court Case.

On July 2, 2007, the AG filed Petitioner's Supplemental Memorandum in Opposition to Kapolei Property Development LLC's Motion to Dismiss Declaratory Order.

On July 2, 2007, KPD filed its Amended Motion to Dismiss in Response to Petitioner's Amended Petition for Declaratory Order ("Amended Motion to Dismiss Amended Petition"). On July 2, 2007, the Campbell Estate filed its Joinder in Intervenor KPD's Amended Motion to Dismiss Amended Petition.

The Amended Motion to Dismiss Amended Petition came on for hearing before the Commission on July 13, 2007, in Honolulu, Hawai'i. Mark J. Bennett, Esq., the Attorney General, and Brian Aburano, Esq., Deputy Attorney General, appeared on behalf of the AG. Katherine G. Leonard, Esq., and Melissa Lambert, Esq. appeared on

behalf of both KPD and the Campbell Estate. A motion was made and seconded to grant the Amended Motion to Dismiss the Amended Petition on the following bases: (1) Declaratory relief was appropriate where the issue was the applicability of the law or a Commission order on prospective events but was not appropriate when referring, as in the present case, to matters already decided; and (2) Declaratory relief was not an appropriate method for appealing a case that had already concluded. There being a vote tally of 6 ayes, 1 abstention, and 2 absent, the motion carried.

#### ORDER

This Commission, having duly considered the Amended Petition for Declaratory Order, the Amended Motion to Dismiss Amended Petition for Declaratory Order, the oral and written arguments of the AG and KPD and the Campbell Estate, and a motion having been made at a Commission meeting conducted on July 13, 2007, in Honolulu, Hawai'i, and the motion having been seconded and having received the affirmative votes required by HAR §15-15-13, and there being good cause for the motion, this Commission ORDERS as follows:

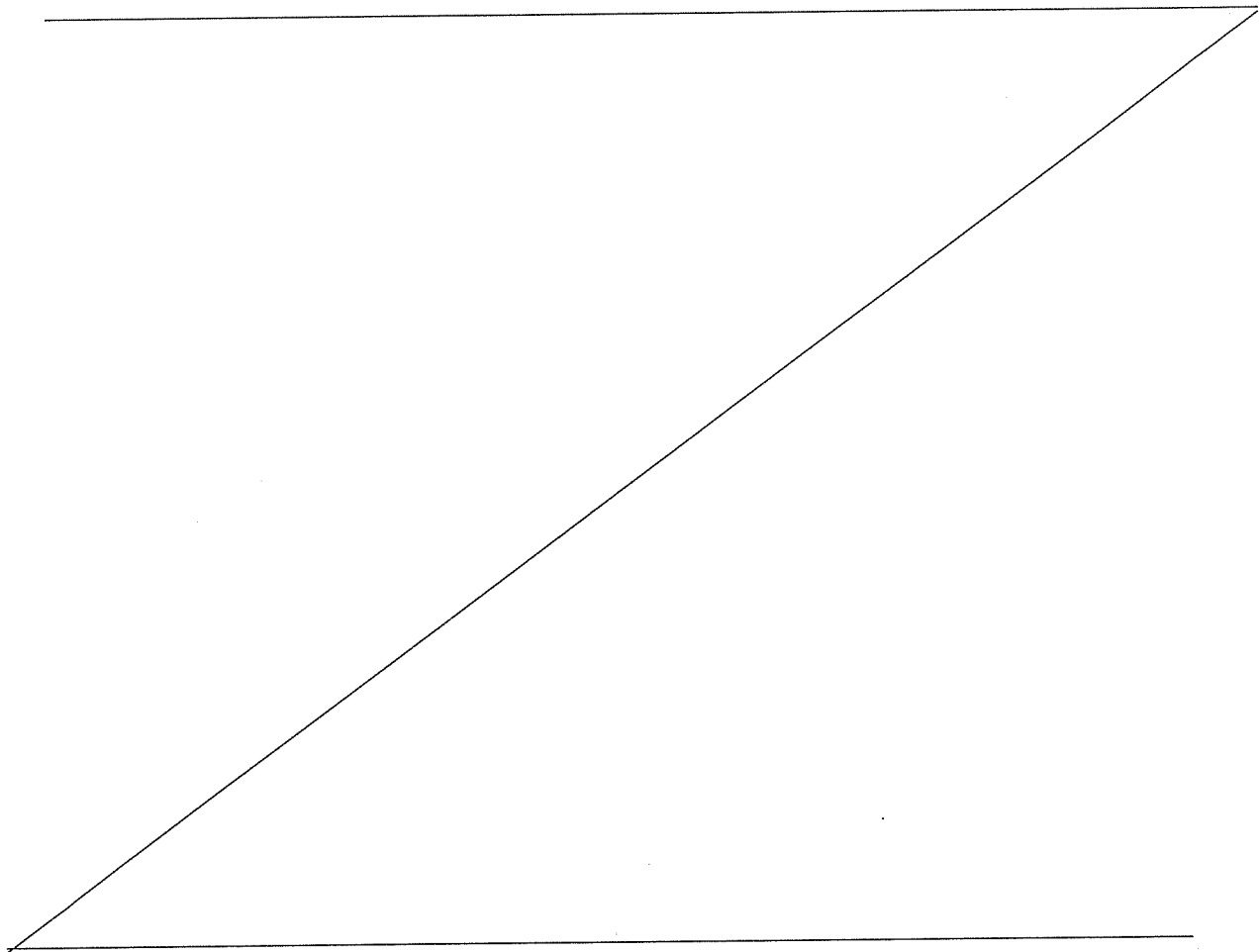
1. KPD's and the Campbell Estate's Amended Motion to Dismiss Amended Petition is GRANTED.

2. The Amended Petition for Declaratory Order filed herein on May 23, 2007, is DISMISSED, and the Commission refuses to issue a declaratory order as requested in said Amended Petition.

3. Pursuant to HAR §15-15-102, the Commission refuses to issue a declaratory order pursuant to the Amended Petition for the following reasons:

(a) A petition for declaratory relief cannot be used to challenge the validity of matters already decided, and orders already entered, by the Commission in Docket No. A87-613; and

(b) A petition for declaratory relief cannot be used as a method for appealing a previously unappealed Commission order in Docket No. A87-613.



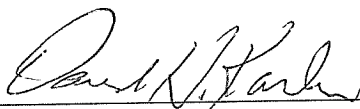


ADOPTION OF ORDER

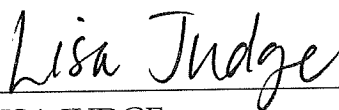
The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 16th day of August, 2007. This ORDER and its ADOPTION shall take effect upon the date this ORDER is certified and filed by this Commission.

Done at Honolulu Hawai'i, this 16th day of August, 2007, per motion on July 13, 2007.


APPROVED AS TO FORM

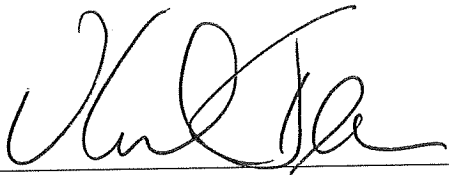
  
Special Deputy Attorney General

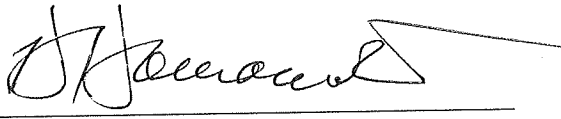
LAND USE COMMISSION  
STATE OF HAWAII


By   
LISA JUDGE  
Chairperson and Commissioner


By \_\_\_\_\_ (abstained)  
MICHAEL FORMBY  
Vice-Chairperson and Commissioner


By   
THOMAS CONTRADES  
Commissioner

By   
VLADIMIR PAUL DEVENS  
Commissioner

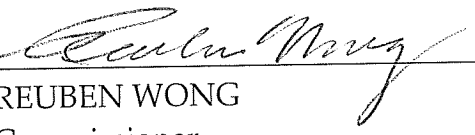
By   
HOWARD HAMAMOTO  
Commissioner

By   
DUANE KANUHA  
Commissioner

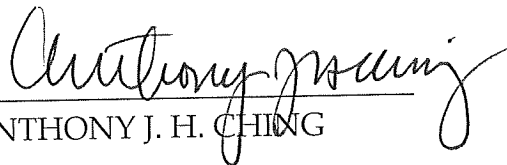
By   
RANSOM PILTZ  
Commissioner

By   
NICHOLAS TEVES  
Commissioner

Filed and effective on  
AUG 16 2007

By   
REUBEN WONG  
Commissioner

Certified by:

  
ANTHONY J. H. CHING

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\_\_\_\_\_ )

CERTIFICATE OF SERVICE

I hereby certify that the Order Granting Amended Motion to Dismiss Amended Petition for Declaratory Order and Dismissing Amended Petition for Declaratory Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular mail as noted:

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650 South King Street  
Honolulu, Hawaii 96813

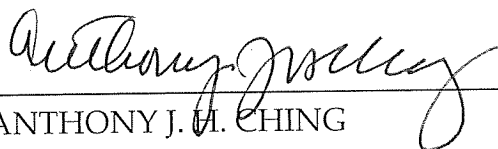
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AUG 16 2007

Dated: \_\_\_\_\_ Honolulu, Hawaii

  
\_\_\_\_\_  
ANTHONY J. H. CHING  
Executive Officer