

LAW OFFICE OF LANCE D. COLLINS
Lance D. Collins 8246
Post Office Box 782
Makawao, Hawai'i 96768
lawyer@maui.net
808.243.9292

LAW OFFICE OF BIANCA ISAKI
Bianca Isaki 9977
1720 Huna St. 401B
Honolulu, Hawai'i 96817
bianca.isaki@gmail.com
808.927.5606

LAW OFFICE OF RYAN D. HURLEY
Ryan D. Hurley 9526
Post Office Box 19205
Honolulu, Hawai'i 96817
ryan@rdhlawhi.com
808.738.7610
Attorneys for Petitioner FRIENDS OF MĀHĀ‘ULEPU

BEFORE THE KAUA‘I PLANNING COMMISSION
COUNTY OF KAUA‘I
STATE OF HAWAI‘I

In the Matter of the Petition of:) Permit Nos. Z-IV-2015-8, PDU-2015-7, V-2015-1,
) SMA(U)-2015-6
FRIENDS OF MĀHĀ‘ULEPU)
) PETITIONER FRIENDS OF MĀHĀ‘ULEPU’S
To revoke Class IV Zoning Permit Z-IV-2015-) OBJECTION TO EX PARTE CONDUCT AT
8, Project Development Use Permit PDU-) THE COMMISSION’S MARCH 12, 2024
2015-7, Variance Permit V-2015-1 and Special) HEARING AND RP21 LLC AND COCO
Management Area Use Permit SMA(U)-2015-) PALMS HUI LLC’S NEW EVIDENCE;
6 issued to Coco Palms Hui, LLC for use at) DECLARATION OF ELIZABETH
Wailua, Kaua‘i , Tax Map Keys 4-1-003: 004) OKINAKA; DECLARATION OF BRIDGET
(por.), 005, 007, 011, and 017 and 4-1-005:) HAMMERQUIST; EXHIBIT “A”;
014 and 017) CERTIFICATE OF SERVICE
)
_____)

PETITIONER FRIENDS OF MĀHĀ‘ULEPU’S OBJECTION TO EX PARTE CONDUCT
AT THE COMMISSION’S MARCH 12, 2024 HEARING AND RP21 LLC AND COCO
PALMS HUI LLC’S EXHIBIT “31”

Petitioner FRIENDS OF MĀHĀ‘ULEPU, a non-profit organization based on Kaua‘i

("Petitioner"), submits this objection to unlawful ex parte communications with the Commission in violation of Hawai'i Revised Statutes (HRS) §91-13, or in the alternative, violations of Hawai'i Revised Statutes (HRS) §§ 92-3, -4, and -7 ("Sunshine Law") that occurred during Commission executive session deliberations on Petitioner's petition to revoke the above-referenced permits at its March 12, 2024 hearing on its agenda item H-2 as well as the Commission's acceptance of new evidence, an Exhibit "31" from Respondents RP21 LLC and COCO PALMS HUI LLC's (collectively, "Developers") that was never filed or provided to Petitioner in advance of the hearing in violation of HRS §91-10(3) and constitutional due process.

I. March 12, 2024 hearing procedures

At its March 12, 2024 hearing, after the Commission took public testimony and heard Petitioner's arguments, the Commission received Developers' Exhibit "31".¹ This Exhibit "31" had not been served on Petitioner nor otherwise, to Petitioner's knowledge, filed in compliance with Commission filing rules. Kaua'i County Rule (KC) §1-3-2. At that time, Developers also provided, for the first time, a copy to Petitioner's attending representative, who is legally blind. Despite being there all morning, alongside Developer's counsel, this was Petitioner's first awareness of Exhibit "31". Declaration of Bridget Hammerquist at ¶4.

Furthermore, the Commission's Counsel, Laural Barzilai, then asked the attorney representing the Developers if they had extra copies for the public to view. They did not appear to respond, nor did they appear to have extra copies available for the public.² After receiving Developer's Exhibit "31" the Commission immediately discussed the matter. Petitioner and the public had no meaningful opportunity to review or respond to Developer's exhibit "31".

After arguments from the Parties, the Commission stated it was entering executive session to deliberate regarding item H-2 pursuant to HRS §§ 92-4 and 92-5(a)(4) to consult with their counsel "on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities" as it pertained to item H2.³

After the commencement of the executive session, Petitioner's officers, members, and other persons in attendance at the hearing observed Alison Neustein in the same room where the

¹ Kaua'i Planning Commission, at approximately 5:08:50-5:09:24 minutes, Lihu'e, Kaua'i on March 12, 2024, videorecording available at: http://kauai.granicus.com/player/clip/2659?view_id=2&redirect=true, ("3/12/2024 videorecording")

² 3/12/2024 videorecording at approximately: 5:09:28 5:09:34 minutes.

³ 3/12/2024 videorecording at approximately: 5:50:00-7:38:28 minutes.

Commission members were conducting their executive session, including seeing Neustein talking with the Commission members for approximately ten minutes. *See* Declaration of Elizabeth Okinaka (“Decl. of Okinaka”) at ¶¶ 4-5; *see also* Exhibit “A” attached. After the Commission and Neustein observed FOM member Elizabeth Okinaka photographing them, Neustein left the Commission room and appeared to be leaving the building until Okinaka informed the Commission attorney that she had complained to the State Office of Information Practices (OIP). Decl. of Okinaka at ¶ 6.

Neustein is an employee of the State Department of Land and Natural Resources (DLNR) Land Division who has been reporting to the Board of Land and Natural Resources (BLNR) on Developers’ applications for use of State public trust land for their resort project. *See* Developer exh. 7 at 7 (4/14/2023 DLNR signed submittal); exh. 8 at 13 (12/7/2023 DLNR signed submittal), exh. 9 at 3 (1/12/2024 DLNR signed submittal); Petitioner exh. 18 at 7 (4/14/2023 DLNR signed submittal); exh. 27 at 13 (12/7/2023 DLNR signed submittal). Developers’ non-compliance with DLNR procedures was a substantive portion of the Commission’s deliberations on Item H-2 prior to going into executive session.⁴



Exhibit “A” (photograph taken by Elizabeth Okinaka, approximately 3:28 a.m. Mar. 12, 2024).

When the Commission reconvened in the open meeting, the Commission did not produce

⁴3/12/2024 videorecording at approximately 5:15:00-5:40:00 minutes.

a recording and transcript of Neustein’s statements or provide opportunities for Petitioners to cross-examine those statements or for rebuttal evidence to those statements. HRS §§ 91-10, -13. Rather, the Commission attorney stated Neustein attended of her own volition, the Commission brought her in as a resource to explain the DLNR process, and disclosure of their discussion “would defeat the purpose” of their private deliberations with their attorney pursuant to HRS § 92-5(a)(4). The Commission attorney also stated that Elizabeth Okinaka had complained to OIP due to the inclusion of Neustein in their executive session.

The commission attorney invited Neustein to present a summary of her discussion. Neustein stated she came to talk about DLNR’s transfer of leases and easements and noted Petitioners’ “question” about tax clearances and how they relate to leases. Neustein discussed matters specific to Developers’ and their predecessors’ disputed Coco Palms project entitlements and notices of default.⁵

The Commission attorney invited questions from the Commission and asked if Neustein had fairly summarized her private presentation to the Commission. After fielding Commission questions, Petitioner raised objections to Neustein’s representations.⁶ Neustein was permitted to extend her presentation to the Commission. Petitioner raised further objection to the procedures by which Neustein was afforded a special private audience with the Commission and sought to explain why Neustein’s presentation was inaccurate. Still, the Commission chair and attorney did not allow Petitioner to continue speaking.⁷

II. Objection to March 12, 2024 procedures

A. Neustein’s inclusion in the executive session was unlawful.

Neustein was apparently discussing matters substantive to the Commission’s deliberations during the executive session and without disclosing her statements to Petitioner. These are violations of HRS §§ 91-10 (rights to cross-examination and to submit rebuttal evidence), 91-13 (ex parte communications), 92-3 (open meetings), 92-4 (executive meetings), and 92-7 (notice).

Neustein provided prohibited ex parte communications with the Commission in violation of HRS §91-13. Petitioner was not provided with meaningful notice that Neustein would be providing testimony, nor an opportunity to cross-examine her statements. The Commission talked

⁵ 3/12/2024 videorecording at approximately 7:40:00 minutes.

⁶ 3/12/2024 videorecording at approximately 7:44:37 minutes.

⁷ 3/12/2024 videorecording at approximately 7:47:00 minutes.

over Petitioner's efforts to rebut Neustein's statements and thus violated procedures required under HRS §91-10.

The Commission provided no notice that it would be considering Neustein's statements prior to their open meeting on their agenda in violation of HRS §92-7, and did not receive her statements in an open meeting in violation of HRS §92-3. No exemption under HRS §92-5 permits non-Commission members to attend executive sessions for purposes of providing. None of the enumerated exceptions under HRS §92-5(a) allow the Commission to receive substantive information to assist their decision-making on a land use permit issued under deliberation:

- (1) To consider and evaluate personal information relating to individuals applying for **professional or vocational licenses** cited in section 26-9 or both;
- (2) To consider the **hire, evaluation, dismissal, or discipline** of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held;
- (3) To deliberate concerning the authority of persons designated by the board to conduct **labor negotiations or to negotiate the acquisition of public property**, or during the conduct of such negotiations;
- (4) To consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities;
- (5) To investigate proceedings regarding **criminal misconduct**;
- (6) To consider sensitive matters related to **public safety or security**;
- (7) To consider matters relating to the **solicitation and acceptance of private donations**; and
- (8) To deliberate or make a decision upon a matter that requires the **consideration of information that must be kept confidential** pursuant to a state or federal law, or a court order.

HRS §92-5(a) (bold emphasis added). Neustein's private presentation could not be allowed to assist the Commission's "duties" in regard to public land transaction issues raised in the petition to revoke permits under HRS §92-5(a)(4). "[A]n attorney is not a talisman, and consultations in executive sessions must be purposeful and unclouded by pretext." *Civil Beat Law Ctr. for Pub. Interest, Inc. v. City of Honolulu*, 144 Hawai'i 466, 489, 445 P.3d 47, 70 (2019). The Commission could not have private deliberations with Neustein under the pretext of consultation with their attorney. To read HRS §92-5(a) exceptions otherwise would swallow the whole purpose of the Sunshine Law and is contrary to its purpose and requirement that its "provisions requiring open meetings shall be liberally construed" and "provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings." HRS §92-1.

B. Consideration of Developers' new evidence is a procedural violation.

The Commission's acceptance and consideration of the Developer's new evidence, exhibit "31", that was not served on Petitioner nor filed in accord with Commission filing rules, also violates HRS §91-10. Developer's provision of the exhibit to Petitioner's legally blind representative at the hearing, midway through the Developer's arguments and after public testimony and Petitioner's arguments, did not cure their violation. Petitioner was deprived of a meaningful opportunity to protect their rights.

III. Remedy for objection

The Commission should void its March 12, 2024, action on Item H-2 and issue an Order to Show Cause in order to properly allow for evidence and to repair improper ex parte communications. KC §1-12-5. At a minimum, that Order should include the matter for hearings with proper notice to the parties, produce and/ or subpoena Neustein to require her to appear for cross-examination at one of those hearings, provide sufficient time for assembly of rebuttal evidence and rebuttal witnesses at a second hearing, after which the Commission would decide the matter. KC §§1-12-6, -7, & -8. Developers should be ordered to properly serve Exhibit "31" on Petitioner if it is to be considered at these future hearings.

DATED: Honolulu, Hawai'i

March 18, 2024

/s/ Bianca Isaki
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI

/s/ Ryan D. Hurley
LAW OFFICE OF RYAN D. HURLEY, LLC
RYAN D. HURLEY

DATED: Makawao, Hawai'i

March 18, 2024

/s/ Lance D. Collins
LAW OFFICE OF LANCE D. COLLINS
LANCE D. COLLINS
Attorneys for Petitioner FRIENDS OF
MĀHĀ'ULEPU

BEFORE THE KAUA'I PLANNING COMMISSION

COUNTY OF KAUA'I

STATE OF HAWAII

In the Matter of the Petition of:) Permit Nos. Z-IV-2015-8, PDU-2015-7, V-2015-1,
) SMA(U)-2015-6
FRIENDS OF MĀHĀ'ULEPU)
) DECLARATION OF ELIZABETH OKINAKA
)

DECLARATION OF ELIZABETH OKINAKA

I, ELIZABETH OKINAKA, declare under penalty of law that the following is true and correct.

1. I make this declaration based upon my personal knowledge, information, and belief.

2. I am member of Petitioner organization, FRIENDS OF MĀHĀ'ULEPU, a non-profit corporation ("Friends of Māhā'ulepu" or "Petitioner"), who has filed a petition to revoke Class IV Zoning Permit Z-IV-2015-8, Project Development Use Permit PDU-2015-7, Variance Permit V-2015-1 and Special Management Area Use Permit SMA(U)-2015-6, as amended by the Planning Director's December 31, 2018 letter ("permits") for use at Wailua, Kaua'i, Tax Map Keys (TMK) 4-1-003: 004 (por.), 005, 007, 011, and 017 and 4-1-005: 014 and 017 ("property") issued to Applicant COCO PALMS HUI, LLC ("CPH") ("petition").

3. I attended the Kauai Planning Commission meeting that was held on March 12, 2024, at the Līhu'e Civic Center, Moikeha Building, Meeting room 2A-2B at 4444 Rice Street, Līhu'e Kaua'i, Hawai'i.

4. During agenda item H2, the Commission went into executive session, at which time non-commission members were asked to leave the meeting room. During the executive session, I, as well as other members of FOM and other persons in attendance, witnessed the Department of Land and Natural Resources Kauai land agent, Alison Neustein, inside the meeting room, sitting at the table and talking with commissioners for approximately 10 minutes.

5. Attached as Exhibit "A" is a true and correct copy of a picture I took of Alison Neustein at the commission table speaking with Commissioners during the executive session at approximately 3:28 PM on March 12, 2024.

6. After the Commissioners and Neustein witnessed me taking pictures, Neustein left

the room and appeared to be leaving the building when I approached the county counsel, Laura Barzilai, and informed her that I had called the Office of Information Practices (OIP).

DECLARANT FURTHER SAYETH NAUGHT

DATED: Kōloa, Hawai'i

March 16, 2024



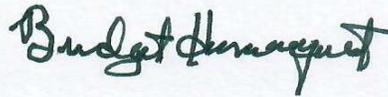
ELIZABETH OKINAKA
DECLARANT

4. At the March 12 Hearing, I sat in the same room as Mauna Kea Trask, one of the attorney representatives of RP21 LLC and COCO PALMS HUI LLC, for several hours, watching public testimony related to our matter. During this time, I did not see nor did the Developers attorney, Mr. Trask, present Developers Exhibit "31" to me or anyone else from FOM until after public testimony and my arguments on behalf of FOM depriving FOM and the public of a meaningful opportunity to review, comment and rebut Developers exhibit "31".

DECLARANT FURTHER SAYETH NAUGHT

DATED: Kōloa, Hawai'i

March 16, 2024



BRIDGET HAMMERQUIST
DECLARANT

Exhibit “A”



BEFORE THE KAUA'I PLANNING COMMISSION

COUNTY OF KAUA'I

STATE OF HAWAII

In the Matter of the Petition of:) Permit Nos. Z-IV-2015-8, PDU-2015-7, V-
) 2015-1, SMA(U)-2015-6
FRIENDS OF MĀHĀ'ULEPU)
) CERTIFICATE OF SERVICE
)
_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, a copy of the foregoing was filed pursuant to Kaua'i Planning Commission Rule §1-3-3 and emailed pursuant to the parties' agreement to the following:

CALVERT G. CHIPCHASE 7757
MAUNA KEA TRASK 8418
KEOLA WHITTAKER 11200
cchipchase@cades.com
mtrask@cades.com
kwhittaker@cades.com

Attorneys for COCO PALMS HUI, LLC & RP21 COCO PALMS, LLC

DATED: Honolulu, Hawai'i March 18, 2024

/s/ Bianca Isaki
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI

/s/ Ryan D. Hurley
LAW OFFICE OF RYAN D. HURLEY, LLLC
RYAN D. HURLEY

DATED: Makawao, Maui, Hawai'i March 18, 2024

/s/ Lance D. Collins
LAW OFFICE OF LANCE D. COLLINS
LANCE D. COLLINS
Attorneys for Petitioners FRIENDS OF
MĀHĀ'ULEPU