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Lawrence Carnicelli, Chair
c/o Michele McLean, Commission Clerk
Maui Planning Commission
2200 S. Main Street
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Re: Media Demand to Reopen Proceedings to Public In the Matter of the Application for BRE ICONIC GWR OWNER LLC, To obtain a Special Management Area Use Permit, Step 1 Planned Development Approval, and Step 2 Planned Development Approval for the Grand Wailea Resort , Docket No. SM1 2018/0011 (PD1 2019/001, PD2 2018/0003)

Dear Hearings Officer Joesting and Chair Carnicelli,

I represent three media entities: Victor Gregor Limon, a Honolulu-based independent journalist and geographer, The Hawai'i Independent, an online newspaper established in 2008, and Disappeared News, an online investigative reporting blog established in 2003, collectively "the Media."

The Media have reviewed materials in the above-mentioned case that evinces a decision to close the proceedings to the public and the conducting of prehearing proceedings without appropriate notice or access being given the press or the public.

In summary, the Media demand that the proceedings for the above-mentioned contested case be re-opened to the public without qualification or delay. Article I, Section 4 of the Hawai'i State Constitution and the First Amendment to the United States Constitution, as well as the requirements of the Charter of the County of Maui, impose upon the Maui Planning Commission and its hearings officers, an obligation to conduct contested case proceedings including prehearing conferences in a manner accessible the public and the press.

Section 13-9(2) of the Charter requires: "All meetings of boards and commissions shall be held in the county building or other publicly owned place. In the event that a publicly owned building is not available or appropriate for the meeting, the meeting can be held in another facility that is accessible to the public." *Chang v. Planning Commission of Maui County*, 64 Haw. 431, 643 P.2d 55

(1982) (“the Maui County Charter, in § 13-9, has long prohibited boards and commissions from taking any official action 'except at a meeting open to the public in accordance with the law.' The charter does not provide exceptions to this mandate, nor, again, have we found any in the network of laws affecting SMA use permit application proceedings.”)

These legal obligations cannot be dispensed with by merely delegating the powers of a board or a commission to an individual. The key requirement is that county business be conducted in a manner accessible to the public.

This obligation has not been suspended by any emergency proclamation and there is no authority in the Emergency Management Act, Chapter 127A, HRS, to suspend provisions of the Constitution or the Charter, in any event.

All of the Supplemental Proclamations suspended Chapters 91 “to the extent ... any administrative hearing may be conducted by telephone or video conference without the parties, department, or agency, being physically present in the same location[.]” However, as noted, the Charter imposes a separate requirement that meetings be accessible to the public. Moreover, Chapter 91, Haw. Rev. Stat. establishes a minimum uniform framework by which agencies conduct adjudications as required by constitutional provisions or other laws. See *Town v. Land Use Commission*, 55 Haw. 538, 524 P.2d 84 (1974) (“HAPA was adopted to 'provide a uniform administrative procedure for all state and county boards, commissions, departments or offices which would encompass the procedure of rule making and the adjudication of contested cases”) The proclamation only suspends the uniform procedures. It does not and cannot suspend the obligations imposed by the Constitution or the Charter for due process or public access.

I have previously written to the Mayor, on April 6, 2020, that any administrative hearing that cannot “be held in another facility that is accessible to the public” because of limitations related to social distancing, stay-at-home order, lack of access to internet service, lack of assistance with using new technology, etc., cannot be conducted because of the obligation imposed by the Charter. But to the extent that contested cases are nevertheless conducted, they must be open and accessible to the public and the press.

The public and the media have a qualified right of access to administrative proceedings adjudicative in nature under the First Amendment and the state constitution the same as court proceedings. See *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 US 751 (2001) (“the proceeding walks, talks, and squawks very much like a lawsuit and that its placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication.” internal

citations omitted) The caselaw is clear that the “rudiment of fair play” required by due process mandate that administrative adjudications be “fair and open.” See *Ohio Bell Tel. Co. v. Pub. Utilities Commission of Ohio*, 301 U.S. 292, 304-05 (1937)

This right of access can only be restricted if a particularized showing is established justifying a denial of access in each particular case where access is denied:

1. Whether an open proceeding is substantially likely to prejudice another transcendent interest; *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980); *Globe Newspaper v. Superior Court for Norfolk County*, 457 U.S. 596, 606-07 (1982)
2. If so, whether any alternative exists to avoid that prejudice without limiting public access; *Press-Enterprise Co. v. Superior Court of California* (Press II), 478 U.S. 1, 14 (1986); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984).
3. If not, whether the limitation of access is narrowed (in scope and time) to the minimum necessary; *Press-Enterprise Co. v. Superior Court of California* (Press I), 464 U.S. 501, 510 (1984), *United States v. Antar*, 38 F.3d 1348, 1362-63 (3d Cir. 1994)
4. Whether the limitation of access effectively avoids the prejudice it is intended to address. *Globe Newspaper*, 457 U.S. at 610; *In re Charlotte Observer*, 882 F.2d 850, 854-55 (4th Cir. 1989).

This includes both the evidentiary part of a contested case proceeding as well as any conferences or other prehearing proceedings conducted before the reception of evidence.

The only transcendental interests implicated during this emergency are relief efforts and emergency management functions. Unless a specific finding that a particular contested case must proceed to support relief efforts or emergency management functions, a contested case proceeding should be suspended until after the emergency to ensure that the proceeding is fair and open. “[G]etting the administrative work of Maui County done” is not a transcendental interest especially when to do so would put fundamental interests in jeopardy. However, to the extent a contested case proceeding is moved forward anyways, the public and the press have a right to observe the conduct of these proceedings.

Under the test developed by the Hawai'i Supreme Court in *Oahu Publications v. Abn*, 133 Haw. 482, 331 P.3d 460 (2014), the right of access is based upon two complementary considerations: logic and experience:

1. Experience: “whether the place and process have historically been open to the press and general public because a tradition of accessibility implies the favorable judgment of experience.” *Id.* (internal citations omitted)

2. Logic: “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* (internal citations omitted)

Hawai'i has recognized a long tradition of public access to judicial proceedings, “firmly embedded in our system of jurisprudence” as a “general policy of open trials.” *Id.* quoting *Gannett*

Pac. Corp. v. Richardson, 59 Haw. 224, 228, 580 P.2d 49, 54 (1978). Judicial proceedings “are open to the public The fact that they are open serves as a safeguard of the integrity of our courts.” *Id* quoting *State v. Hashimoto*, 47 Haw. 185, 200, 389 P.2d 146, 155 (1963). Likewise, administrative adjudications have a long history of public access.

The Commission's Rules themselves state its meetings will follow the requirements of Chapter 92, HRS, and be public except when an executive session under Chapter 92, HRS is allowed. Even if the governor suspended Chapter 92, HRS, the Commission Rule adopted the standards contained therein independently and therefore the suspension of Chapter 92, HRS obligations does not suspend the discrete rule adopting those standards as an independent rule of procedure. And it certainly doesn't suspend the long tradition and experience of open proceedings.

The logic prong of the *Oahu Publications* test is analyzed by looking at the six societal interests advanced by holding proceedings open to the public:

- (1) public access promotes informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system, serving an “educative” interest
- (2) public access gives assurance that the proceedings were conducted fairly to all concerned thereby promoting a perception of fairness.
- (3) public access provides significant community therapeutic value because it provides an outlet for community concern, hostility, and emotion.
- (4) public access serves as a check on the misconduct of participants by exposing the adjudicatory process to public scrutiny, thus discouraging decisions based on secret bias or partiality
- (5) public access enhances the performance of all involved, and
- (6) public observation of proceedings will discourage perjury because members of the public who might be able to contradict false testimony will not learn of that testimony unless the proceedings are open to the public.

All of these elements are present in this matter. The SMA permit application and the intervention have received widespread media attention not just in Maui but across the state. Access to this proceeding by the press and the public furthers each societal interest of the logic prong of the *Oahu Publications* test for access.

“[G]etting the administrative work of the County done” does not justify closing this case to the public and the Media therefore demand that an order be issued re-opening the proceedings to the public and that the conducting of any further proceedings or making of any further rulings be suspended until such an order has issued.

If further proceedings continue in a closed manner, the Media will take all appropriate steps available to them to rectify this injury to public access.

Very truly yours,
LAW OFFICE OF LANCE D COLLINS

A handwritten signature in black ink, appearing to read "Lance D. Collins". The signature is fluid and cursive, with a large initial "L" and a distinct "D" at the end.

LANCE D COLLINS
Attorney for Victor Gregor Limon,
The Hawai'i Independent and Disappeared News

- c: William Meheula, Esq. (for Applicant)
Bianca Isaki, Esq. (for Intervenors)
Kristin Tarnstrom, Deputy Corporation Counsel (for the Planning Director)