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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PUNA PONO ALLIANCE, <i>et al.</i> , Plaintiffs, vs. PUNA GEOTHERMAL VENTURE, <i>et al.</i> , Defendants.) Civil No. 15-1-0034) (Hilo) (Declaratory Judgment))) PLAINTIFFS' MEMORANDUM OPPOSING) DEFENDANT PUNA GEOTHERMAL) VENTURE'S MOTION TO DISMISS) COMPLAINT, OR IN THE ALTERNATIVE,) MOTION FOR SUMMARY JUDGMENT filed) March 4, 2015; DECLARATION OF ROBERT) PETRICCI, EXHIBITS A-F; DECLARATION) OF HILLARY E. WILT; DECLARATION OF) JON OLSON; DECLARATION OF SHANA) RITSEMA; CERTIFICATE OF SERVICE)) <u>Hearing:</u> April 14, 2015) Time: 8:30 a.m.) Judge: Hon. Greg K. Nakamura) Trial date not set	CLERK L. GLASGOW	2015 APR -2 PM 12: 15 FILED CIRCUIT COURT OF THE THIRD CIRCUIT STATE OF HAWAII
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**Plaintiffs' Memorandum Opposing Defendant Puna
Geothermal Venture's Motion to Dismiss Complaint,
Or in the Alternative, Motion for Summary Judgment**

Plaintiffs Puna Pono Alliance (PPA), Jon Olson and Hillary E. Wilt oppose the motion filed by Defendant Puna Geothermal Venture (PGV) on March 4, 2015.

I. Introduction

A. The issue: *is PGV subject to Hawai'i County Code § 14-114?*

PGV operates a geothermal facility in Kapoho and, from time to time, drills wells attempting to locate geothermal resources. After PGV's especially noisy and disruptive drilling of the well known as KS-15 in 2012, the Hawai'i County Council passed a law restricting well drilling within one mile of a residence to the hours between 7:00 a.m. and 7:00 p.m.¹ Plaintiffs reside near PGV's site and would benefit from PGV's obeying this law. PGV argues the Plaintiffs cannot claim the 2012 night drilling ban applies to PGV's subsequent drilling – such as its present drilling operations for a well known as KS-16.²

PGV says it generally obeys the law, but also believes it is not subject to Code § 14-114. Therefore, the situation turns on a simple question: *is PGV subject to Code § 14-114?* If the Court declares PGV is subject to the night drilling ban, Plaintiffs reasonably assume PGV will obey the law. *See* the declaration of Robert Petricci, ¶¶ 10-15.

A. Summary of Plaintiffs' Argument

The parties' legal controversy as to whether County Code § 14-114 applies to PGV is appropriately before this Court. Relevant administrative agencies already have opined, in error, that the ban does not apply to PGV, placing the burden of filing a private action upon the Plaintiffs. Rather than show preemption, the authorities cited by PGV actually show anticipation of such a law. State statutes and regulations do not preempt the ban. In

¹ Bill 292, became Ordinance 12-151 when signed by the Mayor December 5, 2012, and was subsequently codified as Hawai'i County Code §§ 14-113 and 114.

² It is not disputed that each time PGV wants to drill a new well it must first obtain a drilling permit from the Department of Land and Natural Resources (DLNR).

fact, Hawai`i Revised Statutes (HRS) § 46-17 specifically provides for and authorizes passage of laws like Code §14-114 that afford greater protection to the public than related state restrictions.

II. PGV's Motion

PGV's motion cites Hawai`i Rules of Civil Procedure (HRCPP) Rule 12(b)(6) in seeking to dismiss the Plaintiff's first amended complaint for failure to state a claim and, alternatively, HRCPP Rule 56 for summary judgment. PGV's arguments supporting its motion are: (1) failure to state a claim; (2) lack of standing; (3) preemption and (4) failure to exhaust administrative remedies.

Rule 12(b)(6) allows dismissal "only if the claim is clearly without any merit..." *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983). The motion "is strictly limited to the allegations of the complaint, and we must deem those allegations to be true." *In re Estate of Rogers*, 103 Hawai`i 275, 281, 81 P.3d 1190, 1196 (2003). A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. *Giuliani v. Chuck*, 1 Haw. App. 379, 385, 620 P.2d 733, 737 (1980).

HRCPP Rule 56 requires parties moving for summary judgment to show an absence of any genuine issue as to material facts, and that under applicable principles of law they are entitled to judgment. *First Hawaiian Bank v. Weeks*, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989). PGV's presentation of matters outside of the Plaintiffs' first amended pleading requires the invocation of Rule 56.³ Facts alleged in the pleading as well as their logical inferences must be viewed in the light most favorable to the parties opposing summary judgment. *Fernandes v. Tenbruggencate*, 65 Haw. 226, 649 P.2d 1144 (1982).

³ HRCPP Rule 12(b)(6) includes this provision: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Plaintiffs do not object to PGV's presentation of matters outside of their pleading.

III. Applicable Law and Regulations

The **Hawai`i State Constitution**, Article XI, § 9 (as amended in 1978), provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

The **Hawai`i County Code**, Article 19, *Geothermal Drilling*, provides:

Section 14-113. Definitions.

For the purposes of this article, the following words and phrases, unless the context otherwise requires, shall be defined as indicated:

“Residence” means a building or a part thereof permitted and designed for or used for a home.

“One mile” means the measurement made from the well bore, in a straight line, without regard to intervening structures or objects, to the property line of the nearest residence.

Section 14-114. Restrictions.

Geothermal resources exploration drilling and geothermal production drilling operations being conducted one mile or less from a residence, shall be restricted to the operating hours of 7:00 a.m. – 7:00 p.m.

A. State Geothermal Laws

Hawai`i Revised Statutes (HRS) Chapter 182, titled *Reservation and Disposition of Government Mineral Rights*, includes some provisions specific to geothermal matters, such as the requirements for a State mineral lease and geothermal drilling permits.

However, Chapter 182 is not – as averred by PGV – the basis of “a statutory and regulatory scheme which preempts the 2012 efforts by the Council to prohibit nighttime drilling operations” (page 2) or a “comprehensive statewide regulation of geothermal resource development” (PGV memorandum, page 4) or “a comprehensive state statutory and regulatory scheme which was intended to be exclusive and uniform” (at page 17).⁴

⁴ Of 18 subsections in HRS Chapter 182, only 6 include the term *geothermal*: § 182-1 defines geothermal resources exploration and development; §§ 181-5 and -7 refer to mineral mining leases (including geothermal); § 181-6 governs mineral exploration on state lands (including geothermal exploration); § 182-18 governs payment of royalties to

The framework of state laws regulating geothermal development originated in Act 296 of the 1983 Legislature creating geothermal resource sub-zones, authorizing County level geothermal permitting, and setting forth additional provisions later codified in HRS §§ 205-5.1 to 5.3. PGV says (memorandum page 3) the “[a]uthority to issue Geothermal Resource Permits to regulate geothermal resource development in Hawaii was previously established in each County Planning Commission [by] HRS §205-5.1(c).”⁵ That previous framework of state laws regulating geothermal development, including § 205-5.1(c), (as stated in PGV’s memo page 3, footnote 1) *was repealed in 2012 by Act 97.*⁶

B. State Geothermal Regulations

Pursuant to authority delegated by HRS Chapter 182, Hawai`i Administrative Rules (HAR) Chapter 13-183 of the Department of Land and Natural Resources (DLNR) titled *Rules on Leasing and Drilling of Geothermal Resources* provides each geothermal well requires a unique DLNR drilling permit *and the operator must comply with all laws.*

the state for the using geothermal resources and § 182-16 addresses general excise tax on the sale of geothermal resources. Compared to the broad, specific geothermal regulatory scheme created in 1983 and repealed in 2012, Chapter 182 is light on content. Since the repeal of the former laws, there has been a vacuum of genuine regulatory structure.

⁵ “HRS § 205-5.1 authorizes the issuance of geothermal resource permits to allow geothermal development activities in geothermal resource subzones established within urban, rural, agricultural, and conservation districts by the Board of Land and Natural Resources in accordance with the procedures set forth in HRS 205-5.2. The purpose of HRS § 205-5.1 and -5.2 is to ‘assist in the location of geothermal resources development in areas of the lowest potential environmental impact.’” *Medeiros v. Hawaii County Planning Commission*, 8 Haw. App. 183, 184, 797 P.2d 59, 60 (1990)

⁶ **Query:** Is GRP-2 a subsisting authority after repeal of the law authorizing the County to promulgate Rule 11, that governs GRP-2? PGV’s memorandum (footnote 1, page 3) notes 2012 Act 97 § 12 says a “geothermal resources producer who operates in the area of the subzone on April 30, 2012” may “continue to operate *in accordance with the producer’s lease* with the board of land and natural resources” (emphasis supplied). § 12 did not grandfather the County’s permitting authority. Act 97 is available on the web at <http://1.usa.gov/1HsS2TK>. This question is not critical to resolving the controversy.

Prior to drilling, modifying, modifying use, or abandoning of any well, the operator of the well shall file with the chairperson an appropriate application for a permit to any work and shall obtain approval thereof. ... [including] (7) A statement by applicant to perform the work and thereafter to operate and maintain the well *in accordance with these rules and all other federal, state and county requirements....*”

HAR § 13-183-65 (emphasis supplied)

The operator of a lease shall *comply with all of the requirements, laws, rules, and regulations of the United States, the State and the appropriate county pertaining to the use of the premises or conduct of the operation.*

HAR § 13-183-54(b) (emphasis supplied)

DLNR regulations incorporate laws such as Code § 14-114 into the DLNR permit.⁷

IV. Material Facts

PGV’s motion submits as supporting exhibits, and relies upon: (1) the DLNR’s February 20, 1981, Geothermal Resource Mining Lease No. R-2 (*Lease R-2*); (2) the February 6, 2001, Hawai`i County Geothermal Resource Permit (*GRP-2*), and (3) the December 16, 2014, DLNR drilling permit for PGV’s new well, KS-16.

The Lease is silent on drilling hours but requires PGV (as sub-lessee) to comply with County laws (noting in particular the requirement includes laws that “may hereafter be in force.”) Code § 14-114 is such a County law. The KS-16 drilling permit, silent on drilling hours, requires PGV to comply with County laws. GRP-2, also silent on drilling hours, requires PGV to “obtain, and comply with the provisions of” a DLNR permit to drill “for each geothermal well approved under” GRP-2.

⁷ PGV’s memorandum, at page 4, erroneously says drilling permits “are issued on an administrative or ministerial basis” by DLNR. The DLNR procedure is administrative, but it is *not ministerial*. “A duty is ministerial where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion and judgment.” *Salling v. Moon*, 76 Hawai`i 273, 274 n. 3, 874 P.2d 1098, 1099 n. 3 (1994) (Hawai`i case law shows ministerial acts are nondiscretionary functions such as issuing driver’s licenses, collecting tariffs, administering pensions, etc.). DLNR has the *discretion to approve or deny* a drilling permit based on PGV’s application and its supporting material.

PGV says GRP-2 refers to drilling “during day and nighttime hours. The permit clearly authorized night time drilling activities.” However, *GRP-2 neither refers to nor authorizes night time drilling*. PGV admits (memo page 4) “[d]uring periods of drilling, Condition 22 specifically incorporates Department of Health noise rules and permit requirements.” GRP-2’s references to average day and night hourly noise limits relate to *ordinary plant operations* but, as stated in GRP-2 (page 19), drilling “shall be excluded” from those limits.⁸ If PGV maintained noise limits imposed on ordinary plant operations during night time well drilling, then Code § 14-114 would never have been enacted. By invoking those GRP-2 limits that go beyond state law in governing PGV’s ordinary plant noise, PGV concedes the County is not preempted by the state’s regulatory scheme.

GRP-2 observes (page 6) how promulgation of Department of Health noise rules resulted in PGV being “allowed to emit up to 70dBA, 24 hours per day”:

In the original Geothermal Resource Permit, the permittee agreed “not [to] exceed a general noise level of 55 dBA during the daytime [7am to 7pm) and 45 dBA at night (7pm to 7am] measured at the nearest residence.” This general noise level could be exceeded by up to 10 dBA, but not for more than 10% of the time within any 20 minute period. There was also an exception for periods of venting and drilling. These standards applied only until noise regulations were adopted by the State or County. *Because the DOH adopted regulations in 1996, those now apply, and the permittee is allowed to emit up to 70 dBA, 24 hours per day. This is unreasonably loud and the Planning Commission believes that nearby residents are justified in seeking a stricter standard.* It is also understandable that they did not expect that noise standards would be so drastically relaxed, after the permittee made representations that the noise levels would not exceed 55-45 dBA.

GRP-2, page 6 (emphasis supplied)

As GRP-2 expressly anticipated, residents disturbed in 2012 by KS-15 night time drilling took their concerns to the County Council, resulting in the night drilling ban. To paraphrase PGV’s memo, at page 11, “the soundness of their ideas was judged by their

⁸ Page 4 of PGV’s memo dwells extensively on the noise issue, and that in fact is a principal environmental concern in this case. The Department of Health rules that govern PGV’s drilling allow up to 70 dBA, twenty-four hours per day. The Planning Commission’s comments in GRP-2 admit that limit is unreasonably loud.

representatives on the County Council” and found to be worthy. It became necessary for Plaintiffs to prosecute this litigation when the responsible agencies declined (as PGV says at page 6, the Planning Director “is responsible for the enforcement of the ordinance.”)

The Petricci declaration, filed herewith, says Puna Pono Alliance (PPA) has asked DLNR to order PGV to show cause why its KS-16 drilling permit should not be revoked based on PGV’s publicly stated intent to ignore Code § 14-114. PPA asked COH Mayor Billy Kenoi to endorse the request – both DLNR and COH refused PPA’s requests.

V. Argument

Hawai`i Constitution, Article XI, § 9 allows Plaintiffs to enforce their right to a healthful environment “against any party, public or private, through appropriate legal proceedings” – such as their present action for declaratory and injunctive relief.

In this case, Code § 14-114 provides residents living near PGV the right to an undisturbed evening environment in language that is free of ambiguity or uncertainty in meaning. The Court is bound by the law’s plain, clear and unambiguous language.

“The construction or interpretation of a statute may be indulged in only in case of ambiguity or uncertain meaning. Where, as in this case, the language is plain and unmistakable, there is no room for construction – there is nothing to construe,” *Hawaiian Hotels v. Borthwick*, 35 Haw. 788, 794 (1941); and, thus, it must be given its “plain and obvious meaning.” *Hawaii Consolidated Railway v. Borthwick*, 34 Haw. 269, 272 (1937). The Court is bound by the plain, clear and unambiguous language of the statute. *University of Hawaii v. Leahi Foundation*, 56 Haw. 404, 537 P.2d 1190 (1975).

Matter of Grayco Land Escrow, Ltd., 57 Haw. 436, 455, 559 P.2d 264, 277 (1977)⁹

⁹ *Matter of Grayco* is cited in *State v. Sylva*, 61 Haw. 385, 387-88, 605 P.2d 496, 498 (1980) (“when the language is plain and unmistakable the court is bound by the plain, clear and unambiguous language of the statute”); *see also Kahalewai v. Rodrigues*, 4 Haw. App. 446, 451, 667 P.2d 839, 843 (1983) (“we find that the language of HHCA § 209(1) is ‘plain and unmistakable’ and we are ‘bound by the plain, clear and unambiguous language’ therein”); *State v. Palama*, 62 Haw. 159, 162, 612 P.2d 1168, 1170 (1980) (“[a]mbiguity exists where there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute; when the language is plain and

The controversy is whether the simple blanket restriction of County Code § 14-114 applies to PGV. Words of a law “are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.” HRS § 1-14. “Under general principles of statutory construction, courts give words their ordinary meaning unless something in the statute requires a different interpretation.” *Saranillio v. Silva*, 78 Hawai`i 1, 10, 889 P.2d 685, 694 (1995). It cannot be said that words used in Code § 14-114 are unusual or unfamiliar – they must be given their ordinary meaning.

A. Failure to state a claim

The parties have concrete adverse interests in a legal controversy. HRS § 632-1.

PGV’s supporting memorandum contends that the Plaintiffs’ amended complaint inadequately states a request for the Court to declare Code §14-114 applies to PGV.¹⁰

HRCP Rule 8(a) provides a pleading “shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks.” In this case, Plaintiffs describe a controversy involving interests of the parties and seek relief by declaratory judgment resolving the legal rights of the parties, particularly by declaring that County Code § 14-114 applies to PGV, and also pray for related injunctive relief “to assure that PGV obeys applicable laws.”

“Under Hawai`i’s notice pleading approach, it is no longer necessary to plead legal theories with precision.” *Tokuhisa v. Cutter Mgmt. Co.*, 122 Hawai`i 181, 192, 223 P.3d 246, 257 (App.2009), quoting *Leslie v. Estate of Tavares*, 93 Hawai`i 1, 4, 994 P.2d 1047,

unmistakable, the court is bound by the plain, clear and unambiguous language of the statute”), and *Chun v. Employees’ Ret. Sys.*, 61 Haw. 596, 600, 607 P.2d 415, 419 (1980) (“[t]his court is bound by the plain, clear, and unambiguous language of a statute”).

¹⁰ In this regard, PGV’s motion is comparable to similar claims in the COH motion to dismiss pending for hearing the same date. Therefore, *Plaintiffs’ Memorandum Opposing Defendant County of Hawai`i’s Motion to Dismiss Complaint filed March 5, 2015* is, by this reference, also incorporated herein in response to PGV’s instant motion.

1050 (2000) (internal quotation marks and ellipses omitted). “Hawaii’s rules of notice pleading require that a complaint set forth a short and plain statement of the claim that provides defendant with fair notice of what the plaintiff’s claim is and the grounds upon which the claim rests. Pleadings must be construed liberally.” *Id.*, quoting *Genesys Data Techs., Inc. v. Genesys Pac. Techs., Inc.*, 95 Hawai`i 33, 41, 18 P.3d 895, 903 (2001).

HRS Chapter 632, titled *Declaratory Judgments*, is a remedial law intended “to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle the party to maintain an ordinary action. ... It is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people.” HRS § 632-6. HRS § 632-1 allows a declaratory judgment even if a controversy is susceptible of relief through another remedy. A Circuit Court may “make binding adjudications of right” in civil cases if a party asserts a concrete interest in a legal right that is denied by an adversary party with a concrete interest therein, “and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.” § 632-1.

In this case, the parties have concrete interests in the controversy about legal rights and obligations set forth in Code §14-114. Plaintiffs’ first amended complaint says while the language in County Code § 14-114 “is plain, clear, unambiguous and unmistakable in its meaning” (§ 22), “PGV has publicly stated its opinion that Hawai`i County Code § 14-114 does not apply to work on KS-16 (§ 23) (PGV’s motion is premised on that opinion) and while “PGV has publicly stated that it obeys applicable laws, [it has] also stated that it will drill KS-16 at night contrary to the provisions of County Code § 14-114.” (§ 24.) The first amended complaint says that Plaintiffs’ residences near PGV’s location means they “would suffer damage, disruption, injury and even possible loss of life if PGV fails to obey applicable laws.” (§ 26.) “Plaintiffs believe County Code § 14-114 applies to PGV. Plaintiffs have publicly and actively challenged PGV’s stated intent to violate Code

§ 14-114 by drilling KS-16 at night. In the absence of enforcement by state or county authorities, it has become necessary for Plaintiffs to prosecute this action to assure that PGV obeys applicable laws.” (¶¶ 27-29.)

The first amended complaint concludes:

30. Pursuant to Hawai`i Revised Statutes Chapter 632, an actual controversy involving interests of the parties has arisen so that relief by declaratory judgment may be appropriately granted to determine and resolve the legal relations, status, rights, or privileges of the parties.

31. Plaintiffs are entitled to declaratory and injunctive relief as prayed for herein, requiring that PGV obey applicable laws.

Wherefore Plaintiffs pray the Court (a) declare County Code § 14-114 applies to PGV; (b) issue preliminary injunctive relief as prayed for herein; (c) enter final judgment in favor of the Plaintiffs against the Defendants for declaratory and permanent injunctive relief as prayed for herein; (d) award Plaintiffs costs and reasonable attorneys fees, and (e) award such further relief as the Court deems just and equitable.

The first amended complaint does not lack merit. Allegations of the complaint – that must be deemed to be true in considering the motion – provide fair notice of the Plaintiffs’ claim, with facts sufficient to support declaratory relief based on concrete adversarial interests in the controversy regarding the applicability of Code §14-114.

B. Preemption

Code §14-114 affords greater protection than state restrictions. HRS § 46-17.

PGV argues (page 2) that an extensive regulatory framework of laws “preempts the 2012 efforts by the Council to prohibit nighttime drilling operations.... Nowhere in this statutory or regulatory scheme has the Council been authorized to regulate PGV’s drilling operations in a manner which contradicts, defeats, or impedes the rights of PGV to conduct night time drilling operations authorized under its drilling permit issued by DLNR and its geothermal resource permit issued by the Planning Commission.”

However, (1) nothing in the statewide regulatory scheme addresses night drilling, (2) nothing prevents the County Council from prohibiting night drilling and (3) state law actually endorses the ordinance’s greater level of public protection.

PGV acknowledges that no reference to hours of drilling is found in the regulatory framework of laws it describes. That fact is undisputed. The ordinance in question does not enter an area the Legislature has manifested an intent to fully occupy. *Richardson v. City & County of Honolulu*, 76 Haw. 46, 66-67, 868 P.2d 1193, 1213-14 (1994) (holding an ordinance providing a mechanism for transfer of fee simple interest of leasehold property from condominium lessors to condominium lessees did not conflict with state statutes governing eminent domain proceedings).

A municipal ordinance may be preempted if “it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or ... it conflicts with state law.” *Pacific International Services Corp. v. Hurip*, 76 Haw. 209, 215, 873 P.2d 88, 94 (1994), quoting *Richardson*. No such conflicts exist in this case – in fact, HRS § 46-17 provides plain authority for including the County’s night drilling ban in the regulatory scheme.

PGV argues GRP-2 includes noise conditions referring to night time drilling but, as noted, that argument is mistakenly based on provisions that govern plant operations but expressly exclude drilling. The DLNR Lease¹¹ and GRP-2 *anticipate enactment of such new laws* and, like the DLNR drilling permit, require that such laws be obeyed. PGV’s memo, page 2, argues agencies issuing permits also “have not attempted to regulate when drilling operations may occur...” Preemption is a doctrine relating to *laws*. PGV argues side door issues by dwelling on *permits* instead of laws. Yet even in PGV’s permit-based argument, preemption of the night drilling ban is contradicted by the absence of agency references to when drilling operations may occur and, more particularly, by the presence

¹¹ As stated in the first amended complaint (¶¶ 10-11), paragraph 11 of *Geothermal Resource Mining Lease No. R-2*, dated February 20, 1981 (Exhibit H of PGV’s motion) requires that PGV “comply with all valid requirements of all municipal” law “*now in force or which may hereafter be in force*” and specifies that PGV has “the right to contest or review, by legal procedures or in such other manner as Lessee may deem suitable” promptly. (Emphasis supplied.)

of terms anticipating enactment of the 2012 ordinance. PGV's permit-based argument infers it has *vested rights* created by *final terms* of its permits.

A final discretionary action in a governmental process is the *sine qua non* for a vested right. See, e.g., *Kauai County v. Pacific Standard Life Ins. Co.*, 65 Haw. 318, 653 P.2d 766 (1982), citing *Life of the Land v. City Council*, 61 Haw. 390, 606 P.2d 866 (1980). The final discretionary action allowing PGV to drill is a DLNR drilling permit. GRP-2 and applicable DLNR rules require a new drilling permit for each well included in PGV's activity. The County's public policy restricting night drilling, Code § 14-114, was created in 2012, *two years before PGV obtained its KS-16 drilling permit in 2014*.

While PGV's long-term plan for drilling wells has been partly accomplished, a *new drilling permit for each well* is an integral part of PGV's geothermal development plan. The appearance of new law was contemplated and even anticipated by regulatory material. The material relied on by PGV is silent as to permissible hours of well drilling operations: no vested right in night time drilling existed for any undrilled wells in PGV's broad scheme of geothermal development when Code § 14-114 was enacted in 2012. The law applied only prospectively to drilling operations begun after its enactment.

State law allows the ban. Addressing preemption under applicable state law, PGV refers to HRS § 46-1.5 and cites *Richardson*, 76 Haw. at 49, 868 P. 2d at 1208, saying "local legislation enters an area that is fully occupied by general law when the legislature has expressly manifested its intent to fully occupy the area, or when it has impliedly done so" and, further, "a municipal ordinance may be preempted pursuant to HRS § 46-1.5(13) if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) it conflicts with state law." 76 Haw. at 62, 868 P.2d at 1209. As noted, no such exclusivity can be found in the existing state geothermal regulatory structure. And as for the County's regulatory structure, it has already moved beyond the state by setting noise limits for PGV's plant operations that are more restrictive than state regulations.

Examination of HRS § 46-1.5 and related authority shows the legislature intended to allow local acts such as Code § 14-114. HRS § 46-17, provides as follows:

§ 46-17 Regulation of certain public nuisances. Any provision of law to the contrary notwithstanding, the *council of any county may adopt and provide for the enforcement of ordinances regulating or prohibiting noise, smoke, dust, vibration, or odors which constitute a public nuisance. No such ordinance shall be held invalid on the ground that it covers any subject or matter embraced within any statute or rule of the State; provided that in any case of conflict between a statute or rule and an ordinance, the law affording the most protection to the public shall apply*, with the exception that:

(1) An ordinance shall not be effective to the extent that it is inconsistent with any permit for agricultural burning granted by the department of health under authority of chapter 342B, or to the extent that it prohibits, subjects to fine or injunction, or declares to be a public nuisance any agricultural burning conducted in accordance with such a permit; and

(2) *An ordinance shall not be effective to the extent that it is inconsistent with any noise rule adopted by the department of health under authority of chapter 342F.*

(Emphasis supplied)

The subpart (2) exception (an ordinance shall not be effective to the extent that it is inconsistent with any noise rule) refers to noise rules promulgated by the Department of Health (DOH) pursuant to HRS Chapter 342F¹² and pertains to this issue insofar as Code § 14-114 speaks to night drilling as a public nuisance. The most pertinent DOH noise rule is found in HAR § 11-46-13:

The council of any county may adopt and provide for the enforcement of ordinances regulating any matter relating to excessive noise. No such ordinance shall be held invalid on the ground that it covers any subject or matter embraced within any statute or rule of the State; provided that *in any case of conflict between the statute or rule and ordinance, the law which affords the most protection to the public shall apply.* (Emphasis supplied.)

¹² HRS § 342F-20, titled *Effect of laws, ordinances, and rules*, provides a “county may adopt ordinances and rules governing any matter relating to excessive noise control as provided in section 46-17, and any conflict between state and county law shall be resolved as provided in section 46-17” – thus, again, pointing to DOH noise rules.

HRS §§ 46-1.5, 46-17 and 342F-20 and HAR §11-46-13 are statewide laws and regulations most directly relevant to the night drilling ban. “Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another.” HRS § 1-16. The County was given express statutory authority by State law to restrict noise and vibration nuisances to afford *more protection to the public than related State restrictions*.

As the Planning Department noted in GRP-2 (page 6) DOH rules allow PGV to emit noise up to 70 dBA¹³ while drilling any time day or night – a limit that the Planning Commission said was “unreasonably loud” and that it “believes that nearby residents are justified in seeking a stricter standard.” The residents did so, resulting in the County Council’s enactment of Code § 14-114 affording greater protection to the public.

PGV also argues in error that the night drilling ban is flawed by lack of content.¹⁴

The ordinance is not void for vagueness. The applicable test is whether the law “give[s] [a] person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may choose between lawful or unlawful conduct.” *State v. Sun Na Lee*, 75 Haw. 80, 92, 856 P.2d 1246, 1254 (1993) (internal quotations and citation omitted). The ordinance here is specific and clear. The terms used are susceptible of ordinary understanding.

¹³ According to Gregg Vanderheiden Ph.D., of the University of Wisconsin-Madison, <http://trace.wisc.edu/docs/2004-About-dB/>, a decibel is a logarithmic unit of measure of the ratio between two numbers; in human perception of loudness, an increase of 10 db is perceived as approximately twice as loud. “Although a 6 dB reduction may not seem terribly significant, decibels are measured on a logarithmic scale, so a 6 dB decrease in power equates to a 75% reduction.” *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 381 (2008). Thus, compared to the former night noise limit of 45 dBA, the DOH rule allowing 70 dBA represents *multiple times greater noise*.

¹⁴ For example, PGV argues (page 14) that Code § 14-114 suffers a deficiency because it does not specify a penalty unlike “other articles under Chapter 14....” However, Code § 14-112, immediately before the night drilling ban, prohibits the aerial eradication of animals without specifying a penalty for violation.

State v. Ewing, 81 Haw. 156, 163, 914 P.2d 549, 556 (App. 1996) (holding an ordinance prohibiting public use of a device to reproduce excessively loud sounds was not preempted by state noise pollution statutes and regulations)

C. Standing

Plaintiffs reside near the PGV site and would benefit from PGV's obeying the law.

Living in a neighborhood where defendants planned to build high rise apartment buildings was held to be an adequate interest for the plaintiffs to have standing to pursue a declaratory judgment to interpret county ordinances in *Dalton v. City & County of Honolulu*, 51 Haw. 400, 462 P.2d 199, 200-01 (1969). PGV invokes *Dalton* and *Life of the Land, supra*, to support the specious argument that *living near* PGV (as Plaintiffs do) is somehow distinguishable from living in *very close proximity* (*Dalton*) to the site or in its *immediate vicinity* (*Life of the Land*). As PGV recognizes, Code § 14-114 illustrates the folly of nitpicking short distances when (at page 14) it avers Plaintiffs have “not even alleged that they live within a one mile radius of KS-16.” The one mile radius of Code § 14-114’s night drilling criteria pretty well establishes the requisite proximity or vicinity relevant to the standing issue, and *living near* PGV plainly satisfies that criteria.

“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice.” *Sierra Club v. Hawaii Tourism Authority*, 100 Hawai`i 242, 250–51, 59 P.3d 877, 885–86 (2002), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). *Sierra Club*, 100 Hawai`i at 252 n. 16, 59 P.3d at 887 n. 16, also held plaintiffs in an action for declaratory relief need not “wait until its concrete interests were injured” before bringing suit, but can show concrete interests that will be injured if the threat materializes.¹⁵ In this case, residents living near PGV have the right to an undisturbed evening environment protected by Code § 14-114.

¹⁵ The attached declarations of Robert Petricci, Hillary E. Wilt, Jon Olson and Shana Ritsema, show in even greater detail how the Plaintiffs are negatively impacted by night drilling and how their interests in the controversy are concrete. The plaintiffs live within the one mile radius defined by Code § 14-114.

PGV's memo, page 15, says, "Where, as here, there is no indication of legislative intent, explicit or implicit, to create a private right of action to enforce an ordinance or statute, 'implying a private right of action on the basis of legislative silence would be a 'hazardous enterprise, at best.' *Pono v. Molokai Ranch, Ltd.*, 11911aw. 164, 189, 194 P.3d 1126, 1151 (App. 2008)." However, *Pono* was abrogated by *County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 235 P.3d 1103 (2010),¹⁶ holding that Hawai'i Constitution article XI, section 9 created a private right of action for an unincorporated non-profit association to enforce environmental laws by declaratory judgment.

The constitutional provision is self-executing: the "right to enforce environmental rights does not raise practical issues of implementation." 123 Hawai'i at 413, 235 P.3d at 1125. Code § 14-114 restricts activity relating to matters that include excessive noise, a topic governed generally by HRS Chapter 342F, an environmental quality chapter titled *Noise Pollution*. By restricting noise and vibration nuisance, § 14-114 protects residents from an unhealthy environment. Article XI, section 9, provides the Plaintiffs a right to bring this declaratory action addressing the controversy over the night drilling ban as the provision "recognizes a substantive right 'to a clean and healthful environment,' ... 'as defined by laws relating to environmental quality' ... [and] provides for the enforcement of that right by 'any person' against 'any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.'" *Ala Loop*, 123 Haw. at 409, 235 P.3d at 1121 ("although the provision preserves the ability of the legislature to impose reasonable limitations on the exercise of the right, the right exists and can be exercised even in the absence of such limitations." 123 Haw. at 413, 235 P.3d at 1125). Plaintiffs have a Constitutionally created private right of action to assert protection of the environmental quality of their neighborhood by Code § 14-114.

¹⁶ In *Ala Loop*, the Planning Department said charter schools were exempt from state land use laws and did not have to obtain special permits. 123 Haw. at 394-95, 235 P.3d at 1106-07. The Ala Loop association disagreed with that interpretation.

PGV refers to the private attorney general doctrine in its argument on standing, but that doctrine is more aligned with the issue of awarding attorney's fees. *Sierra Club v. Department of Transportation of State of Hawai'i*, 120 Hawai'i 181, 218, 202 P.3d 1226, 1263 (2009), describes the "private attorney general doctrine as a judicially-created exception to the American Rule, and notes the doctrine 'is an equitable rule that allows courts in their discretion to award [attorney's] fees to plaintiffs who have vindicated important public rights'" (quoting *Maui Tomorrow v. BLNR*, 110 Hawai'i 234, 244, 131 P.3d 517, 527 (2006), and defining three factors: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision." *Ibid.*)

PGV's extensive argument on details of the private attorney general doctrine as an alternative basis for litigation (and *vis a vis* standing) is obviated by Article XI, § 9.

D. Administrative remedies

DLNR and COH have declared (erroneously) that the ban does not apply to PGV.

Plaintiffs' believe PGV should be well aware of the fact that on January 20, 2015, before filing this litigation – when PGV declared it would not obey Code § 14-114, but before it began drilling KS-16 – PPA asked the DLNR to revoke the KS-16 permit based on PGV's declared intent to ignore County law. Curiously, PGV leaves it to Plaintiffs to tell the Court that fact, rather than raising it in their motion. Plaintiffs believe PGV is aware of the fact due to exhibits attached to the Petricci declaration, filed herewith. A January 28, 2015, DLNR letter to PPA, Petricci declaration Exhibit C, said "the bulk of your inquiry deals with a County of Hawaii ordinance, which is enforced at the county level, as such we defer to the appropriate authority to interpret their own rules (in this case it's the County of Hawaii Planning Department)", and further said "we have conducted our own inquiry both with PGV and with the County of Hawaii. Both parties are in agreement that Hawaii County Ordinance No. 12-151 does not apply to this

particular project.” The declaration of Robert Petricci, PPA’s President, says he was told by PGV’s Mike Kaleikini¹⁷ that DLNR communicated with PGV about PPA’s request, but Mr. Kaleikini declined Mr. Petricci’s request for a copy of the communication.

PPA also asked Mayor Kenoi to endorse the request to DLNR, and in response the Mayor wrote “[w]e believe that the county’s ordinance prohibiting nighttime drilling within one mile of a residence does not apply to operations under PGV’s current permit, which was granted prior to this prohibition taking effect....” It is evident from those exhibits that DLNR and COH considered the issue in this controversy and mistakenly decided the night drilling ban does not apply to PGV. Unlike this litigation seeking an interpretation of the applicability of a general law, the doctrine of exhaustion of administrative remedies applies where a claim is cognizable in the first instance by an administrative agency alone. *Kellberg v. Yuen*, 131 Haw. 513, 527, 319 P.3d 432, 446 (2014). “An aggrieved party need not exhaust administrative remedies where no effective remedies exist.” *Hokama v. University of Hawaii*, 92 Hawai`i 268, 273, 990 P.2d 1150, 1155 (1999), quoted in *Kellberg*, 131 Haw. at 531, 319 P.3d at 450, further noting “futility refers to the inability of an administrative process to provide the appropriate relief” (citations omitted).

The doctrine of exhaustion of remedies in the field of administrative law holds that where a remedy is available from an administrative agency, that remedy must be exhausted before the courts will act to afford relief.

“Judicial review of agency action will not be available unless the party affected has taken advantage of all the corrective procedures provided for in the administrative process.”

Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 93, 734 P.2d 161, 169 (1987) (quoting B. Schwartz, *Administrative Law* § 8.30, 502 (2d ed. 1984)).

Where, however, no administrative procedures are provided for an aggrieved party to seek a remedy, the aggrieved party may apply directly to the

¹⁷ Mr. Kaleikini’s declaration attached to PGV’s motion says he began work as a PGV employee on January 25, 1991, in the capacity of Plant Manager, and since November of 2012 he has been employed by Ormat Technologies, Inc. (the manager for PGV partnership’s General Partner Orpuna, LLC) as its Director For Hawaiian Affairs.

court for relief. *Northern Boiler Co. v. David*, 105 N.E.2d 451 (Ohio App.1951). The statute, ordinance or regulation under which the agency exercises its power must establish “clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties.” *Rosenfield v. Malcolm*, 65 Cal.2d 559, 566, 55 Cal.Rptr. 505, 509, 421 P.2d 697, 701 (1967). Where the administrative machinery is not provided, the power of the court is not ousted by a claim of failure to exhaust administrative remedies. *Matson Terminals v. California Employment Comm'n*, 24 Cal.2d 695, 151 P.2d 202 (1944). Examination of the record in this case indicates that no administrative recourse was afforded to Plaintiffs.

Pele Defense Fund v. Puna Geothermal Venture, 9 Haw. App. 143, 151-52, 827 P.2d 1149, 1154 (1992) (issue of material fact as to whether condition of GRP-2 remained unsatisfied precluded summary judgment in favor of PGV and plaintiffs were not barred by exhaustion of administrative remedies doctrine from seeking judicial determination of issue)¹⁸

PGV’s recommended path of agency petitions for a declaratory judgment would be a cumbersome method of ultimately leading to judicial review of the results in this Circuit Court. *See Lingle v. Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO*, 107 Haw. 178, 185, 111 P.3d 587, 594 (2005) (circuit courts have jurisdiction to review orders disposing of petitions for declaratory rulings.) That circuitous path might make a slight modicum of sense if the agencies’ opinions as to the applicability the night drilling ban were unknown. That, however, is not the case. No law required DLNR to hear PPA’s request for an order to show cause. It was entirely within DLNR’s discretion to deny that request – as it did.¹⁹ Both DLNR and COH plainly declared their positions

¹⁸ *Kona* held the Hawai`i County Charter specifically provided administrative procedures whereby the planning director’s issuance of an SMA permit was appealable to the county Board of Appeals; no such circumstances exist in this case (where there was no involvement of an administrative agency in the enactment of Code § 14-114.)

¹⁹ An exhaustion of remedies argument could have merit if DLNR was legally required to hold a hearing on PPA’s request. *See Bush v. Hawaiian Homes Commission*, 76 Hawai`i 128, 134, 870 P.2d 1272, 1278 (1994) (a legally required hearing results in a contested case under HRS Chapter 91), cited in *Lingle*, 107 Haw. at 184, 111 P.3d at 593. In that case, proceeding pursuant to Chapter 91 would have been necessary.

on the applicability of Code § 14-114 to PGV and it is not necessary to pursue that inquiry further by a superfluous administrative petition that would ultimately be reviewed in this Court. PGV's recommendation to the contrary would only cause delay and complication in the course of seeking a resolution of the controversy. It is evident there are no mandatory administrative remedies to exhaust. The agencies involved (DLNR and COH) have already considered the issue and declared their position.

VI. Conclusion

This judicial proceeding for a declaratory judgment pursuant to Chapter 632 is the appropriate remedy for the controversy involving the County's night drilling ban.

A Circuit Court "may enter judgment for the non-moving party on a motion for summary judgment where there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law." *Konno v. County of Hawai'i*, 85 Hawai'i 61, 76, 937 P.2d 397, 412 (1997). PGV moved for summary judgment on the premise of there being no genuine issues of material fact – and the Plaintiffs agree with that premise.

As a matter of law, PGV is not exempt from County Code § 14-114.

This Court should deny PGV's motion and enter partial summary judgment declaring § 14-114 applies to PGV.

DATED: Hilo, Hawai'i, April 2, 2015.



GARY C. ZAMBER
Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PUNA PONO ALLIANCE, a) Civil No. 15-1-0034
Hawai`i non-profit association, *et al.*,) (Hilo) (Declaratory Judgment)
)
Plaintiffs,) DECLARATION OF ROBERT PETRICCI,
) EXHIBITS A-F
vs.)
)
PUNA GEOTHERMAL VENTURE,)
a Hawai`i Partnership, *et al.*,)
)
Defendants.)
_____)

DECLARATION OF ROBERT PETRICCI

1. I am the President of the Puna Pono Alliance, a Plaintiff in this litigation.
2. Facts set forth herein are stated upon my personal knowledge and I am competent to so testify under oath.
3. Plaintiff Puna Pono Alliance (PPA) is an unincorporated Hawai`i nonprofit association organized pursuant to Hawai`i Revised Statutes (HRS) Chapter 429 and duly certified by the Internal Revenue Service, conducting activities in the County of Hawai`i, State of Hawai`i, with members including persons residing and owning real property near the Puna Geothermal Venture (PGV) facility located in Kapoho, Puna, Hawai`i.
4. Attached hereto as Exhibit A is a true and correct copy of a December 17, 2013, Internal Revenue Service letter determining PPA is exempt from Federal income tax under section 501(c) (4) of the Internal Revenue Code.
5. I have been a resident of the area where PGV operates a geothermal energy generating facility in Kapoho for more than thirty years; I am familiar by experience with PGV's operations and their impacts upon the community.

6. I have gotten to know Mike Kaleikini, director of Hawaiian Affairs for Ormat, PGV's parent company, and we often communicate.

7. Attached hereto as Exhibit B is a true and correct copy of what appears to be a May 31, 2013, letter to Thomas L. H. Yeh, attorney for PGV, from the Planning Director of the County of Hawai'i that was recently given to me by Mr. Kaleikini in response to my request.

8. I only recently learned of the possible existence of the May 31, 2013, letter to Mr. Yeh and my repeated attempts to get a copy from the County were unsuccessful.

9. My only knowledge of the authenticity of Exhibit B relates to the fact that it is a copy of what I received from Mr. Kaleikini; however, my Exhibit B appears to be the same document as Exhibit F of the Declaration of Thomas L.H. Yeh submitted with the PGV motion to dismiss (a Planning Director letter dated May 31, 2013, saying Ordinance No. 12-151 does not apply to PGV.)

10. From time to time PGV drills deep wells attempting to locate geothermal energy resources.

11. When PGV drilled geothermal well KS-15 in 2012, the twenty-four hour a day drilling operations created so much noise and disturbance that a broad outpouring of community opposition was the result; the situation was part of what led to PPA becoming a formal community organization supporting remedial legislation and better oversight.

12. In 2012 the Hawai'i County Council passed Bill 292, effective December 5, 2012, as Ordinance 12-151, restricting the drilling of geothermal wells at night within one mile of a residence.

13. PPA members actively supported Bill 292 based on impacts they suffered from noise and disturbance caused by twenty-four hour a day drilling operations on PGV's well KS-15; the community initiated and supported the idea of the legislation as a result of the KS-15 drilling operations to prevent such future disturbances; no other operator of a geothermal facility exists in Hawai'i County to be subject to the law.

14. When PGV publicly announced it would drill well KS-16, it also stated its opinion that the Hawai`i County night drilling ban does not apply to work on KS-16.

15. Mike Kaleikini has stated in public meetings that PGV obeys laws but PGV will drill KS-16 at night contrary to the night drilling provisions of County Code § 14-114, claiming the County of Hawai`i Planning Department agrees with PGV that Code § 14-114 does not apply to PGV's present drilling; the foregoing facts may or may not be true, but the resulting community impression is that PGV believes it is drilling legally.

16. The reasonable expectation of the community, based on the above, is that if this litigation leads to a declaratory ruling that the night drilling ban applies to PGV, then PGV will obey the law.

17. PPA's members residing near the PGV site may suffer damage, disruption, injury and even loss of life if PGV fails to obey applicable laws; PPA believes Code § 14-114 applies to PGV; PPA and its members have publicly and actively challenged PGV's stated intent to drill KS-16 at night.

18. PPA asked the Department of Land and Natural Resources (DLNR) to revoke the drilling permit to PGV for KS-16 based on PGV's declared intent to violate the night drilling ban, and PPA asked the mayor of the County of Hawai`i to support the request, but to no avail; absent any enforcement by state or county authorities, it became necessary to prosecute this action to assure that PGV obeys the law.

19. Mr. Kaleikini told me PGV had received a letter from DLNR regarding PPA's request, but when asked to provide a copy of the DLNR letter he declined.

20. Attached hereto as Exhibit C is a true and correct copy of PPA's January 20, 2015, letter to the DLNR asking for revocation of PGV's KS-16 drilling permit.

21. Attached hereto as Exhibit D is a true and correct copy of DLNR's January 28, 2015, response to PPA's request.

22. Attached hereto as Exhibit E is a true and correct copy of PPA's January 21, 2015, letter to Mayor Billy Kenoi asking him to support PPA's request to DLNR.

23. Attached hereto as Exhibit F is a true and correct copy of Mayor Kenoi's February 13, 2015, response to PPA's letter.

I, Robert Petricci, declare under penalty of law that the foregoing is true and correct.

DATED: Pahoa, Hawai'i, March 31, 2015


ROBERT PETRICCI

DECLARATION OF ROBERT PETRICCI, EXHIBIT A

December 17, 2013, Internal Revenue Service letter determining PPA is exempt from
Federal income tax under section 501(c) (4) of the Internal Revenue Code

INTERNAL REVENUE SERVICE
P. O. BOX 2508
CINCINNATI, OH 45201

DEPARTMENT OF THE TREASURY

Date: DEC 17 2013

PUNA PONO ALLIANCE
PO BOX 492668
KEAAU, HI 96749

Employer Identification Number:
46-1597949
DLN:
17053246314003
Contact Person:
JASON T SAMMONS ID# 31616
Contact Telephone Number:
(877) 829-5500
Accounting Period Ending:
December 31
Form 990 Required:
Yes
Effective Date of Exemption:
May 24, 2013
Contribution Deductibility:
No
Addendum Applies:
No

Dear Applicant:

We are pleased to inform you that upon review of your application for tax-exempt status we have determined that you are exempt from Federal income tax under section 501(c)(4) of the Internal Revenue Code. Because this letter could help resolve any questions regarding your exempt status, you should keep it in your permanent records.

Please see enclosed Publication 4221-NC, Compliance Guide for Tax-Exempt Organizations (Other than 501(c)(3) Public Charities and Private Foundations), for some helpful information about your responsibilities as an exempt organization.

Contributions to you are not deductible by donors under section 170(c)(2) of the Code.

Sincerely,



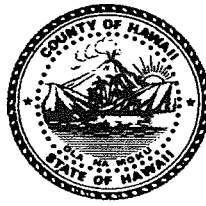
Director, Exempt Organizations

Enclosure: Publication 4221-NC

DECLARATION OF ROBERT PETRICCI, EXHIBIT B

May 31, 2013, letter to Thomas L. H. Yeh, attorney for PGV, from the Planning Director of the County of Hawai'i that was recently provided by Mike Kaleikini

William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

West Hawai'i Office
74-5044 Ane Keohokalole Hwy
Kailua-Kona, Hawai'i 96740
Phone (808) 323-4770
Fax (808) 327-3563

County of Hawai'i
PLANNING DEPARTMENT

East Hawai'i Office
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720
Phone (808) 961-8288
Fax (808) 961-8742

May 31, 2013

Thomas L. H. Yeh
Law Offices of Yeh & Moore
85 W. Lanikaula Street
Hilo, HI 96720

SUBJECT: Geothermal Resource Permit (GRP2)
Puna Geothermal Venture (PGV)
Ordinance No. 12-151 (Bill 292)

Dear Mr. Yeh:

Receipt of your letter dated December 28, 2012 concerning the above is acknowledged. You have asked us to review your request for interpretation as to the effect which Ordinance No. 12-151 has on GRP2, issued to PGV on February 6, 2001.

I have reviewed the subject ordinance and the terms of GRP2, as well as the record relating to the intent of the Council when it adopted Bill 292 and opinions on the matter from the Corporation Counsel. Based upon this review, it is determined that Ordinance No.12-151 does not prohibit or prevent PGV from conducting geothermal resource exploration drilling or geothermal production drilling operations between the hours of 7:00 p.m. and 7:00 a.m. within a mile of the nearest residence, so long as such activities are conducted pursuant to the terms and conditions of GRP2.

Please let me know if you have further questions regarding the above. Thank you for your patience in this matter.

Sincerely,

BJ LEITHEAD TODD
Planning Director

JUN - 4 2013

DECLARATION OF ROBERT PETRICCI, EXHIBIT C

PPA's letter to the DLNR asking for revocation of PGV's KS-16 drilling permit



Puna Pono Alliance
PO Box 492668
Kea`au, HI 96749
web: <http://punapono.com>
email: info@punapono.com

January 20, 2015

Carty Chang, P.E., Acting Chairperson
Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl St.
Honolulu, HI 96813

Re: Puna Geothermal Venture

Aloha Mr Chang:

This letter asks you to require that Puna Geothermal Venture (PGV) show cause why its December 16, 2104, permit to drill well KS-16 should not be revoked.

A prior DLNR permit authorized PGV to drill well KS-15 in 2012. That drilling work caused continual disturbances of nearby residents and complaints about noise, light, dust, fear of toxic exposure, etc. As a result, the Hawai`i County Council passed, and the mayor signed, the ordinance that resulted in Hawai`i County Code § 14-114 that provides: “Geothermal resources exploration drilling and geothermal production drilling operations being conducted one mile or less from a residence, shall be restricted to the operating hours of 7:00 a.m. – 7:00 p.m.”

PGV has announced plans to start drilling well KS-16 and also stated its opinion that the night drilling ban of Code § 14-114 does not apply to PGV. Nothing in the law supports such an opinion, as Code § 14-114 is a simple and unambiguous prohibition with no exceptions.

Hawai`i Administrative Rules (HAR) Chapter 13-183, entitled *Rules on Leasing and Drilling of Geothermal Resources*, regulates geothermal activity in Hawai`i, such as well drilling, for purposes that include “[m]inimizing or preventing degradation of the environment” and “[p]reventing injury to life and property.” HAR § 13-183-1(c)(3) and (4).

PGV operates its facility in Pohoiki pursuant to Geothermal Resources Mining Lease No. R-2 dated February 20, 1981. Paragraph 11 of the Lease requires that PGV obey local “laws and regulations pertaining to the leased lands and Lessee’s operations hereunder, *now in force or which may hereafter be in force*” (Emphasis supplied.) HAR § 13-183-26 provides that a mining lease may be revoked if a lessee fails to comply with any terms of the lease, law, or rules.

HAR §13-183-65 requires PGV to obtain a DLNR permit prior to drilling any well. PGV obtained a DLNR drilling permit, issued on December 16, 2014, for well KS-16 that includes, in paragraph 3, a requirement that PGV must comply with County law.

HAR § 13-183-65(d) provides that after notifying PGV to appear to show cause why the permit should not be suspended or revoked, you may order revocation or suspension of the KS-16 drilling permit if drilling “is not being done in accordance with conditions of the permit or these rules...” PGV’s drilling at night in violation of Code § 14-114 would accord with neither the permit requirement that PGV must comply with County law nor the HAR § 13-183-54(b) requirement that PGV must comply with all county “requirements, laws, rules and regulations ... pertaining to the use of the premises or the conduct of the operation.”

Because PGV has announced its intent to violate the drilling permit and applicable rules, we ask that you please proceed pursuant to § 13-183-65(d) by ordering PGV to show cause why the permit should not be revoked for that reason. Because our membership includes community residents that would be affected by PGV’s violation of the law, we also request notice of your order and the opportunity to appear in any related proceeding.

We will be happy to provide any further information you may wish in this matter.

Sincerely

A handwritten signature in black ink, appearing to read 'Robert Petricci', written in a cursive style.

Robert Petricci
President

Copy: Gov. David Y. Ige

DECLARATION OF ROBERT PETRICCI, EXHIBIT D

DLNR's response to PPA's request.

DAVID Y. IGE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

JAN 28 2015

CARTY S. CHANG
ACTING CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

FIRST DEPUTY

WILLIAM M. TAM
INTERIM DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Robert Petricci
Puna Pono Alliance
P.O. Box 492668
Kea'au, Hawaii 96749

Mr. Petricci:

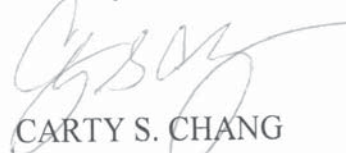
Puna Geothermal Venture (PGV)

In response to your letter dated January 20, 2015, requesting the Department require PGV to show cause why its permit to drill well KS-16 should not be revoked, we offer the following comments:

First and foremost, the bulk of your inquiry deals with a County of Hawaii ordinance, which is enforced at the county level, as such we defer to the appropriate authority to interpret their own rules (in this case it's the County of Hawaii Planning Department).

Since the Department has a vested interest in this project, we have conducted our own inquiry both with PGV and with the County of Hawaii. Both parties are in agreement that Hawaii County Ordinance No. 12-151 does not apply to this particular project. When Bill 292 was passed, the Council was clear that it was both their intent and understanding that the bill's restrictions would not apply to activities that were already allowed under an existing Geothermal Resource Permit.

Sincerely,


CARTY S. CHANG
Acting Chairperson

c: Mike Kaleikini, PGV
Duane Kanuha, County of Hawaii, Planning Department

DECLARATION OF ROBERT PETRICCI, EXHIBIT E

PPA's letter to Mayor Billy Kenoi asking him to support PPA's request to DLNR



Puna Pono Alliance
PO Box 492668
Kea`au, HI 96749

web: <http://punapono.com>
email: info@punapono.com

January 21, 2015

Mayor Billy Kenoi
Hawai`i County Building
25 Aupuni Street
Hilo, HI 96720

Re: Puna Geothermal Venture

Aloha Mayor Kenoi:

We ask you to support requiring Puna Geothermal Venture (PGV) to comply with County law. In 2012 the County Council passed and you signed Bill 202 that became Ordinance 12-151, effective December 5, 2012, subsequently codified as Hawai`i County Code § 14-113. The law prohibits geothermal well drilling at night within a mile of a residence. PGV has announced it will begin drilling a new well, identified as KS-16, and further says that it will disregard the requirements of Hawai`i County Code § 14-113.

When PGV drilled well KS-15 in 2012, the drilling work caused continual disturbances of nearby residents and complaints about noise, light, dust, fear of toxic exposure, etc. As a result of community concerns, the County Council passed the ordinance that resulted in the law providing “Geothermal resources exploration drilling and geothermal production drilling operations being conducted one mile or less from a residence, shall be restricted to the operating hours of 7:00 a.m. – 7:00 p.m.”

Although PGV has said the drilling of KS-16 is not affected by the night drilling ban, nothing in the law supports such an opinion – Code § 14-114 is a simple and unambiguous prohibition with no exceptions.

Hawai`i Administrative Rules (HAR) Chapter 13-183, entitled *Rules on Leasing and Drilling of Geothermal Resources*, regulates geothermal activity in Hawai`i, such as well drilling, for purposes that include “[m]inimizing or preventing degradation of the environment” and “[p]reventing injury to life and property.” HAR § 13-183-1(c)(3) and (4).

PGV operates its facility in Pohoiki pursuant to Geothermal Resources Mining Lease No. R-2 dated February 20, 1981. Paragraph 11 of the Lease requires that PGV obey local “laws and regulations pertaining to the leased lands and Lessee’s operations hereunder, *now in force or which may hereafter be in force*” (Emphasis supplied.) HAR § 13-183-26 provides that a mining lease may be revoked if a lessee fails to comply with any terms of the lease, law, or rules.

HAR §13-183-65 requires PGV to obtain a DLNR permit prior to drilling any well. PGV obtained a DLNR drilling permit, issued on December 16, 2014, for well KS-16 that includes, in paragraph 3, a requirement that PGV must comply with County law.

We have requested that the Board of Land and Natural Resources require PGV to show cause why its drilling permit should not be revoked. HAR § 13-183-65(d) provides that after notifying PGV to appear to show cause why the permit should not be suspended or revoked, the Board may order revocation or suspension of the KS-16 drilling permit if drilling “is not being done in accordance with conditions of the permit or these rules...” (See attached letter.)

PGV’s drilling at night in violation of Code § 14-114 accords with neither the permit requirement that PGV must comply with County law nor the HAR § 13-183-54(b) requirement that PGV must comply with all county “requirements, laws, rules and regulations ... pertaining to the use of the premises or the conduct of the operation.”

Because PGV has announced its intent to violate the drilling permit and applicable rules, we ask that you please endorse our request pursuant to § 13-183-65(d) that BLNR order PGV to show cause why the permit should not be revoked for that reason. Because our membership includes community residents that would be affected by PGV’s violation of the law, we will continue to pursue an appropriate resolution of PGV’s disregard of County law.

We will be happy to provide any further information you may wish and would appreciate an opportunity at your first convenience to meet with you in person about these matters.

Sincerely



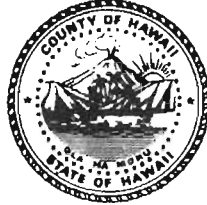
Robert Petricci
President

Copy: Chair Carty Chang
Gov. David Y. Ige

DECLARATION OF ROBERT PETRICCI, EXHIBIT F

Mayor Kenoi's response to PPA's letter

William P. Kenoi
Mayor



Walter K.M. Lau
Managing Director

Randall M. Kurohara
Deputy Managing Director

County of Hawai'i Office of the Mayor

25 Aupuni Street, Suite 2603 • Hilo, Hawai'i 96720 • (808) 961-8211 • Fax (808) 961-6553
KONA: 74-5044 Ane Keohokalole Hwy., Bldg. C • Kailua-Kona, Hawai'i 96740
(808) 323-4444 • Fax (808) 323-4440

February 13, 2015

Mr. Robert Petricci, President
Puna Pono Alliance
P.O. Box 492668
Kea'au, HI 96749

Dear Mr. Petricci:

Mahalo for taking the time to inform us about the Puna Pono Alliance's concerns regarding Puna Geothermal Venture's (PGV) plans to drill a new well under their existing permit. We believe that the county's ordinance prohibiting nighttime drilling within one mile of a residence does not apply to operations under PGV's current permit, which was granted prior to this prohibition taking effect. When Bill 292 was passed, the Council was clear that it was both their intent and understanding that the bill's restrictions would not apply to activities that were already allowed under an existing permit. In other words, the bill could not retroactively prohibit what had already been permitted, and the Council understood that.

Please know that the Planning Department is working with PGV on the implementation of proper sound abatement measures during drilling. PGV will install sound blankets around the drill rig, mufflers on the drilling equipment, and modify and insulate valves and pipes to decrease noise. In addition they will add shields to the lighting to minimize light exposure.

Mahalo for the opportunity to comment regarding PGV plan to drill well KS-16.

Aloha,

Billy Kenoi
MAYOR

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PUNA PONO ALLIANCE, a) Civil No. 15-1-0034
Hawai`i non-profit association, *et al.*,) (Hilo) (Declaratory Judgment)
)
Plaintiffs,) DECLARATION OF HILLARY E. WILT
)
vs.)
)
PUNA GEOTHERMAL VENTURE,)
a Hawai`i Partnership, *et al.*,)
)
Defendants.)
_____)

DECLARATION OF HILLARY E. WILT

1. Facts set forth herein are stated upon my personal knowledge and I am competent to so testify under oath.
2. I have been a resident of Leilani Estates, living less than one mile from the Puna Geothermal Venture (PGV) geothermal energy generating facility, since 2008.
3. I own my home and I am qualified for benefits from the Hawai`i County relocation fund, and am on their waiting list (the benefits are available only to people living in a home they own that is located within a mile of PGV.)
4. When the grinding/droning noise of the drilling and other invasively noisy PGV operations are banging away, I'm reminded of the different but loud & frightening jet engine sound on August 7th of last year.
5. That was when Iselle hit the island and PGV thought it was a fine idea to stay in operation; I was trapped in my home due to fallen trees, unable to leave, and was knocked unconscious by a clearly dangerous amount of hydrogen sulfide gas.
6. There were others that lost consciousness and many, many more that suffered ill health effects due to this gassing; neither the county nor PGV did a sufficient

job of even notifying the public of the gas explosion, let alone provide any outreach, support or any contact whatsoever to follow up after the event.

7. It would almost seem that the entire event is trying to be swept under the rug; prior to Iselle I did have some basic concerns about the PGV, but since that time and having done my homework, and if history is any demonstration, I do not trust PGV to be proactive, to be accountable, to use effective monitoring or notification systems to ensure the public's safety during regular or drilling operations.

8. Being asleep at night during drilling, when the risks are elevated, causes concern about another gas escape from drilling while we are sleeping and less prepared to try to avoid further injury.

9. PGV has even acknowledged there are risks associated with drilling. And INDEED, the noise is obtrusive and disruptive – it is like living in an industrial zone.

10. PPA and two concerned citizens, including myself, filed this lawsuit due to the fact that the law is not being honored.

11. PGV seems to think it's a fine idea to drill 24/7 even when the public and governing bodies created a law to prevent it; it seems PGV and the County prefer to regard community complaints, concerns, public demonstration and outcry as bogus stuff made up by a fringy hippy community; I guess that would be much easier than acknowledging the disturbances and hazards PGV inflicts upon the community.

12. The near constant noise/hum/vibration coming from PGV's drilling operations is an on-going nuisance; considering my location, the drilling noise is very intrusive; when I was walking my dogs on February 24th in the early evening on Kahuakai near Makamae towards Kuponu and the noise was incredibly loud, definitely louder closer to that end of Leilani (during that walk I met a woman visiting a relative on Nohea Street and she expressed sympathy for those of us living here due to the noise.)

13. I have made specific complaints about daytime noise on Tuesday March 10, when the noise was very loud. Worse though, that night, technically the following day on

March 11th around 4am it was probably the loudest I have heard it thus far, with a vibrational hum to match. It woke me up from my sleep and even ear plugs couldn't eliminate the vibration.

14. Earlier in that evening of March 11th I was sitting on my lanai, the place where I spend the most time at my house, to have dinner and I had to move inside the noise was so obnoxious.

15. The following night, March 12th, 1:00 a.m., I was not awoken by the noise but I heard it loud and clear at my place.

16. On March 13th I woke up at roughly 230 am and there was no geothermal noise or vibration that I could detect. Its getting to the point that NOT hearing the noise is becoming a much welcomed and noticeable reprieve.

17. In the early hours of March 26th I was awake at 4:30 AM and heard loud and disruptive operational noise from PGV; the noise seems louder late at night.

18. I speak to my neighbors and know some of the folks who are being negatively impacted by these drilling operations. What I'm starting to see is that much the way the H₂S gas behaves, i.e., it follows unpredictable pathways and can affect some folks and not others, similarly the noise and vibration associated with the drilling travels in unique and unpredictable pathways. Some people are really bothered by it and others not so much.

19. Years ago when I first moved onto this property I noticed steam coming from a puka in my back yard, time passed the puka moved and no more steam. Living on the east rift zone we have to be aware if the dynamism, the volcanic aliveness of this land. Well, no one would challenge me that I saw actually saw steam and that the puka moved. But if I say I heard loud geothermal drilling operations and felt its vibrations it seems many discredit what I experienced, or at least don't care.

20. The weather patterns, the time of day, the topography, proximity, the underground topography your house is on, and probably other factors, are all going to

affect how one experiences the geothermal drilling. Just because some of us hear and feel these drilling operations, while others do not, does not invalidate our experience.

21. Also, everyone lives differently, some play the radio or sit inside and watch TV all day. Sometimes a neighbor is doing chainsaw or other loud tool work. There are a lot of older retired folks in Leilani and that demographic tends to have less keen hearing.

22. I suspect those factors, in addition to their location may account for some residents not hearing it.

23. When I'm at home I prefer natural sounds and having good hearing, and considering my location, the drilling noise is very intrusive.

I, Hillary E. Wilt, declare under penalty of law that the foregoing is true and correct.

DATED: Pahoa, Hawai'i, March 31, 2015


HILLARY E. WILT

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PUNA PONO ALLIANCE, a Hawai`i non-profit association, <i>et al.</i> ,)	Civil No. 15-1-0034 (Hilo) (Declaratory Judgment)
)	
Plaintiffs,)	DECLARATION OF JON OLSON
)	
vs.)	
)	
PUNA GEOTHERMAL VENTURE, a Hawai`i Partnership, <i>et al.</i> ,)	
)	
Defendants.)	
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DECLARATION OF JON OLSON

1. Facts set forth herein are stated upon my personal knowledge and I am competent to so testify under oath.
2. Since 1981 I have been familiar by experience with geothermal operations in lower Puna and their impacts upon the community.
3. Since 1989 I have lived in the immediate area where Puna Geothermal Venture (PGV) operates a geothermal energy generating facility in Kapoho and for 23 years I have lived in my present home, located about 100 yards from the PGV boundary.
4. I experienced the blowout of PGV's well KS-8 at 11:00 PM on June 12, 1991, when the well exploded, the blowout preventer was blown off of the well head and the well ran wild for four and a half days; we were forced off of our property for five days; that was a demonstration of the dangers of night drilling.
5. In terms of anxiety, PGV represents a constant threat; they have repeatedly demonstrated a lack of knowledge of the geology they are dealing with; they don't know what's down there; PGV's lack of knowledge presents a threat to nearby residents.
6. I don't want to be asleep when the next one happens.

7. PGV has been playing nice this time, muffling the exhaust from pneumatic tools, etc., and the impact at my home is less than it was with KS-15; however, there is disruptive noise and the potential of catastrophic failure is always there.

8. My interests in the controversy over the night drilling ban are (1) my home is adjacent to PGV's site and (2) I am affected by disruptive noise from night drilling and (3) I am anxious about another night emergency situation occurring while I am asleep.

I, Jon Olson, declare under penalty of law that the foregoing is true and correct.

DATED: Pahoa, Hawai'i, March 31, 2015.



JON OLSON

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PUNA PONO ALLIANCE, a) Civil No. 15-1-0034
Hawai`i non-profit association, *et al.*,) (Hilo) (Declaratory Judgment)
)
Plaintiffs,) DECLARATION OF SHANA RITSEMA
)
vs.)
)
PUNA GEOTHERMAL VENTURE,)
a Hawai`i Partnership, *et al.*,)
)
Defendants.)
_____)

DECLARATION OF SHANA RITSEMA

1. Facts set forth herein are stated upon my personal knowledge and I am competent to so testify under oath.
2. As a member of the Puna Pono Alliance, I am among those people whose interests in the issues in this lawsuit are being protected by the organization.
3. I am a resident of Lanipuna Gardens, living less than one mile from the Puna Geothermal Venture (PGV) geothermal energy generating facility, since 2014.
4. I own the property and home on Hinalo Street where I reside with my four children; I have lived in lower Puna since 2005.
5. The noise from PGV’s drilling operations is loud and constant; it literally has caused me to have a headache as a result of the disturbance.
6. After being disturbed by two particularly loud nights of drilling operations, I made calls to the PGV complaint line that at first went unanswered
7. On the third try I received a call back from PGV’s Mike Kaleikini and when I told him the geothermal was loud he said “then why did you move there”.

8. There are a lot of people living in this area, and I told Mike many people got sick when the geothermal blew out during the hurricane; he seemed agitated but he eventually agreed.

9. Being concerned about another blow out from drilling at night, while we are asleep, is part of the problem.

10. Last week the geothermal was roaring all night long and my youngest son didn't sleep well and said it really bothered him.

11. I definitely notice when they are working at night and it is such a relief when they are not.

I, Shana Ritsema, declare under penalty of law that the foregoing is true and correct.

DATED: Pahoa, Hawai'i, March 31, 2015.

A handwritten signature in black ink, appearing to read 'S. Ritsema', written over a horizontal line.

SHANA RITSEMA

CERTIFICATE OF SERVICE

I CERTIFY that on this date a copy of the foregoing was duly served by personal delivery to:

Thomas L.H. Yeh, Esq.
85 W. Lanikaula Street
Hilo, HI 96720

Attorney for Defendant Puna Geothermal Venture

and

Laureen Martin, Esq.
Office of the Corporation Counsel
101 Aupuni Street, Unit 325
Hilo, HI 96720

Attorney for Defendant County of Hawai`i

DATED: Hilo, Hawai`i, April 2, 2015.



GARY C. ZAMBER
Attorney for Plaintiff