

TITLE MC-12
DEPARTMENT OF PLANNING
SUBTITLE 02
MAUI PLANNING COMMISSION
CHAPTER 201
RULES OF PRACTICE AND PROCEDURE

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SUBCHAPTER 1

AUTHORITY, PURPOSE AND DEFINITIONS

§12-201-1 Title. The rules and regulations in this chapter shall be known as the "Rules of Practice and Procedure for the Maui Planning Commission" (hereinafter referred to as the "Rules"). [Eff 7/25/93] (Auth: HRS §46-5) (Imp: HRS §91-2)

§12-201-2 Authority. The rules herein are established pursuant to the provisions of section 8-8.4 of the Maui County Charter and chapter 91 of the Hawaii Revised Statutes ("HRS"). [Eff 7/25/93] (Auth: HRS §46-5) (Imp: §HRS 91-2)

§12-201-3 Purpose. These rules and regulations govern practice before, and procedures of the Maui planning commission of the County of Maui and set forth general rules applicable to proceedings before the Maui planning commission. [Eff 7/25/93] (Auth: HRS §46-5) (Imp: HRS §91-2)

§12-201-4 Construction. (a) These rules and regulations shall be construed to secure the just and efficient determination of proceedings before the Maui planning commission. These rules and regulations should be read in conjunction with the provisions of the Hawaii Revised Statutes, the Charter of the County of Maui and the Maui County Code. If there is a conflict between state law, the Charter, or the Maui County Code and the provisions herein, state law, the County Charter or the Maui County Code shall govern.

(b) If there are conflicts between the general provisions herein and specific rules of any other chapters, the specific rules shall govern. [Eff 7/25/93] (Auth: HRS §46-5) (Imp: HRS §91-2)

§12-201-5 Definitions. The following definitions shall apply for all matters before this commission:

"Agency" means any agency, board, commission, department or officer of the county or state government, including the commission.

"Agency hearing" refers only to a hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14, Hawaii Revised Statutes.

"Applicant" means a person who seeks permission or authorization which the commission may grant under statute,

ordinance or other authority; and a person seeking relief not otherwise designated in these rules and regulations.

"Commission" means the Maui planning commission.

"Contested case" means a proceeding in which legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

"County" means the County of Maui.

"Department" means the department of planning of the County.

"Director" means the director of planning of the County or the director's authorized representative.

"Geothermal development activities" means exploration, development, or production of electrical energy from geothermal resources, or as otherwise defined in section 205-5.1, HRS.

"Government record" means information maintained by an agency in written, auditory, visual, electronic or other physical form, or as otherwise defined in chapter 92F, Hawaii Revised Statutes, as amended.

"Hearing officer" means any person or persons, including the entire commission designated and authorized by the commission to conduct a contested case hearing, to take testimony, and to submit proposed findings of fact and conclusions of law with recommendations to the commission on matters that are within the jurisdiction of the commission.

"Intervenor" means a person who petitions to intervene in a contested case hearing and is admitted as a party.

"Mayor" means the mayor of the County of Maui.

"Meeting" means the convening of the commission for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the commission has supervision, control, jurisdiction, or advisory power.

"Party" means any person named or admitted as a party.

"Person" means any agency, individual, partnership, firm, association, community group, trust, estate, private corporation, or other legal entity, whether or not incorporated, including governmental departments or agencies.

"Proceeding" means any matter brought before the commission over which the commission has jurisdiction.

"Six months" means one hundred eighty days, for the purposes of subchapter 7 of these rules. [Eff 7/25/93, am and comp 5/5/12] (Auth: HRS §§46-5, 205A-22, 205A-41, 205-6, Maui County Charter §§8-8.4, 8-8.6) (Imp: HRS §§91-1, 91-2)

12-201-6 (Reserve)

12-201-7 (Reserve)

12-201-8 (Reserve)

12-201-9 (Reserve)

12-201-10 (Reserve)

SUBCHAPTER 2

ORGANIZATION AND PARLIAMENTARY RULES

§12-201-11 Office. The office of the commission is at Wailuku, Maui, Hawaii. [Eff 7/25/93] (Auth: HRS §§46-5, 91-2) (Imp: HRS §91-2)

§12-201-12 Communications. Unless otherwise specifically directed, all communications to the commission shall be either: (a) directed to the office of the commission at the planning department of the County of Maui, 2200 Main Street, Suite 315, Wailuku, Hawaii 96793; or (b) submitted via a system authorized by the County to allow for the submission of electronic documents. [Eff 7/25/93; am and comp 04/18/19] (Auth: HRS §§46-5, 91-2) (Imp: HRS §91-2)

§12-201-13 Organization. The commission shall elect a chairperson and vice-chairperson from among its members. Their terms shall be for one year beginning April 1 of each year. The chair and vice chair shall be elected by the members of the commission after the new commission members have been impaneled beginning April 1 of each year. If the term of office of the commissioner who is chair has not expired on March 31, he or she shall continue as acting chair until the impaneled commission holds its first meeting on or after April 1. If the term of office of the commissioner who is chair has expired on March 31, the vice chair shall be the acting chair until the newly composed commission holds its first meeting on or after April 1. If both commissioners term expire on March 31, the remaining commission members may elect an acting chair until a new chair is elected. [Eff 7/25/93] (Auth: HRS §46-5) (Imp: HRS §91-2)

§12-201-14 Meetings. (a) All meetings of the commission shall be conducted in accord with the provisions of chapter 92, HRS, as amended.

(b) The commission may meet and exercise its powers anywhere within its jurisdiction. All meetings shall be open to the public except as provided in sections 92-4 and 92-5, HRS, as amended.

(c) The commission shall base the parliamentary procedures for conducting its meetings on the most recent revised edition of Robert's Rules of Order. If there is a conflict between the provisions herein and Robert's Rules, the provisions herein shall apply.

(d) Except as provided in section 92-6, HRS, as amended, the commission shall allow all interested persons an opportunity to submit data, views, arguments or present testimony on any agenda item. The commission may provide for the recordation of all presented oral testimony. A reasonable time limit may be placed on such testimony from the public which in any event shall be not less than three minutes per person.

(e) Regular meetings shall be held at least once a month on the second or fourth Tuesdays of each month at the planning department conference room, first floor of the Kalana Pakui Building, 250 South High Street, Wailuku, Hawaii. The regular meeting may be held elsewhere and on a different day or time when necessary to enable the commission to effectively conduct its business.

(f) Special meetings may be called by the chairperson, the director, or a majority of the commission members at any time and place as scheduled.

(g) Emergency and executive meetings shall be held pursuant to the provisions of chapter 92, Hawaii Revised Statutes, as amended.

(h) Executive meetings closed to the public may be held by the commission upon affirmative vote of a majority of members to which the commission is entitled. The meeting closed to the public shall be limited to matters specifically allowed by law and the reason for holding such a meeting shall be publicly announced and the vote of each member on the question of holding the meeting closed to the public shall be recorded and entered into the minutes of the meeting.

(i) Public hearing shall be noticed and held as required by law, subject to the following:

- (1) Notice of a public hearing shall be published as required by law. Such notice shall also be available at the commission's office;
- (2) The time and place for the hearing shall be fixed by the commission in accordance with existing legal requirements, provided that in the absence of specific requirements, the commission shall give due regard to the convenience of the interested parties;
- (3) The commission chair shall conduct the public hearing;
- (4) The public hearing shall afford interested persons a reasonable opportunity to be heard and to present evidence and argument either for or against the application request. Any person may also present written testimony prior to the public hearing and such testimony shall be part of the hearing record;
- (5) A public hearing may be continued from time to time. If the time, date and place for the resumption of the hearing is announced at the original or subsequent hearing, no additional public notice will be required. If

the continuance is indefinite all parties shall be served with notice of the hearing and a new public notice shall be published in the same newspaper used for publication of the original notice. Notice shall be served and publication completed at least ten days before the hearing is scheduled to resume; and

- (6) Minutes of the public hearing shall be kept in writing and shall be made a part of the hearing record. The hearing record shall be available to the public at the department of planning.

(j) Social, informal gatherings of two or more members of the commission where official business is not discussed shall be considered chance meetings and not subject to these rules. [Eff 7/25/93] (Auth: HRS §46-5) (Imp: HRS §§91-2, 92-4, 92-5)

§12-201-15 Quorum. A majority of all members to which the commission is entitled shall constitute a quorum to transact business, and the concurrence of a majority of all members to which the commission is entitled shall be necessary to take any action. [Eff 7/25/93] (Auth: HRS §46-5) (Imp: HRS §92-15)

§12-201-16 Minutes. (a) The commission shall keep written minutes and may provide for the audio recordation or court reporter to transcribe minutes of all meetings. The written minutes shall give a true reflection of the matters discussed at the meeting and the views of the participants. The minutes shall include, but need not be limited to:

- (1) The date, time and place of the meeting;
- (2) The members of the commission recorded as either present or absent;
- (3) The substance of all matters proposed, discussed, or decided; and a record, by individual member, of any votes taken; and
- (4) Any other information that any member of the commission requests be included or reflected in the minutes.

(b) The written minutes shall be public records and shall be available within thirty days after the meeting, except where such disclosure would be inconsistent with section 92-5, HRS, as amended, provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purposes of the executive meeting. It shall not be necessary to transcribe the audio recording unless requested for the purpose of rehearing or judicial review. Any person shall be entitled to a copy of the full transcript of the audio recordation or the court reporter's

transcript provided that he or she pays the costs incurred in the preparation of the record. [Eff 7/25/93] (Auth: HRS §46-5) (Imp: HRS §92-9)

§12-201-17 Commission records. (a) Commission records which are "government records" as defined in chapter 92F, HRS, as amended, shall be disclosed according to the provisions of that chapter. All costs required by any law, rule or ordinance shall be paid by the requesting party.

(b) Copies of government records printed or reproduced for persons other than governmental agencies shall be given to any person provided the fees or cost in the Hawaii Revised Statutes or any rules pursuant thereto and/or the Permanent Ordinances of the County of Maui are paid. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS Chapter 92F)

§12-201-18 Computation of time. In computing any period of time under the rules herein, by notice, or by any order or regulation of the commission, the time begins with the day following the act, event, or default, and includes the last day of the period unless it is a Saturday, Sunday or legal state holiday in which event the period runs until the end of the next day which is not a Saturday, Sunday, or state holiday. When the prescribed period of time is ten days or less, Saturdays, Sundays, or state holidays within the designated period shall be excluded in the computation. [Eff 7/25/93] (Auth: §HRS 91-2) (Imp: HRS; §91-2)

§12-201-19 Appearance before the commission. (a) Any person or party to a proceeding before the commission shall appear in his or her own behalf or as an authorized representative of any person, and an officer or employee of the department or any agency may represent the department or agency in any proceeding before the commission. All attorneys who appear on behalf of any person or party before the commission shall be licensed to practice in the State of Hawaii.

(b) Any person or party who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the commission, by such act represents that he or she is legally authorized to do so and shall comply with all applicable state and county laws and the rules and regulations of this commission, and further, he or she shall maintain the respect due to the commission and shall never deceive or knowingly present any false statements of fact or law to the commission. The commission may at any time require any person appearing before the commission in a

representative capacity to provide authority and qualification to act in such capacity. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-20 Formal requirements for filing of documents. (a) Time and place. All documents required to be filed with the commission in any proceeding shall be either: (1) filed as paper documents with the office of the commission at Wailuku, Maui, Hawaii, within the time limit prescribed by law on business days between 7:45 a.m. and 4:30 p.m. or as otherwise ordered by the commission; or (2) submitted via a system authorized by the County to allow for the submission of electronic documents. Unless otherwise ordered, the date on which the documents are received shall be regarded as the date of filing.

(b) Format for paper documents.

(1) Form and size. Documents shall be bound and typewritten upon paper 8-1/2 x 11 or 8-1/2 x 14 inches in size. Tables, maps, charts, exhibits, or appendices may be larger and shall be folded to that size where practical. The impression shall be double spaced, except that footnotes and quotations in excess of a few lines may be single-spaced. Copies shall be clear and permanently legible.

(2) Title and number. Petitions, pleadings, briefs, and other documents shall show the title of the proceeding before the commission and the name and address of the person or attorney.

(3) Signatures. The original of each application, petition, complaint, answer, or amendment shall be signed in ink by each party or each party's counsel or authorized representative. If such party is a corporation or association, the pleading may be signed by an officer thereof.

(c) Copies for paper documents. Unless otherwise required by these rules or the commission, there shall be filed with the commission an original and fifteen copies of each pleading or amendment thereof. Additional copies shall be provided if the chairperson of the commission or the director so requests.

(d) Extensions of time. Whenever a party is required to file a pleading within the period prescribed or allowed by these rules, by notice given hereunder or by an order or regulation, the chairperson of the commission, or in the absence of the chairperson, the vice chairperson, or in the absence of the vice chairperson, the director may:

(1) For good cause before the expiration of the prescribed period, with or without notice to the parties, extend such period.

- (2) Pursuant to a stipulation between all of the parties, extend such period.
- (3) Permit the act to be done after the expiration of a specified period where the failure to act is clearly shown to be the result of excusable neglect. All requests for continuances, except for stipulations, shall be by written motion, unless made during the course of a hearing.
- (e) Amended pleading. All pleadings may be amended at any time prior to hearing. Amendments offered prior to hearing shall be served on all parties and filed with the commission. All parties shall have the opportunity to answer and be heard on amendments filed after hearing commences, and the commission shall decide whether such amendments shall be allowed.
- (f) Retention of documents by the commission. All documents filed with or presented to the commission shall be retained in the paper or electronic files of the commission. However, the chairperson of the commission may permit the withdrawal of original documents upon submission of properly authenticated copies to replace said original documents.” [Eff 7/25/93; am and comp 04/18/2019] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-21 Service; effective date. (a) By whom served. The director shall cause to be served all orders, notices, and other papers issued by the commission together with any other papers required by law to be served by the commission. Every other paper shall be served by the filing party.

(b) Upon whom served. All papers served by either the commission or any other party shall be served upon all counsel of record at the time of such filing and upon all parties not represented by counsel or upon their designated agents, in fact or by law. Any counsel entering an appearance subsequent to the initiation of the proceeding shall so notify all other counsel then of record and all parties not represented by counsel.

(c) Service upon parties. The final order and any other paper required to be served by the commission upon a party shall be served upon such party or upon his or her representative authorized to receive service of such papers.

(d) Method of service. Service of papers shall be made by first-class certified mail, return receipt requested, or other means authorized by law.

(e) When service completed. Service by mail shall be regarded as complete when deposited in the United States mail properly addressed and stamped. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §§91-9.5, 91-11, 91-12)

§12-201-22 Officers and their duties. (a) Presiding officer. The chairperson shall be the presiding officer of the commission and the vice-chairperson shall act as the presiding officer in the absence of the chairperson. The presiding officer shall:

- (1) Open all meetings of the commission at the appointed hour by taking the chair and calling the meeting to order;
- (2) Call for the approval of the minutes of any preceding meetings when a quorum is present;
- (3) Maintain order and proper decorum;
- (4) Announce the business before the commission;
- (5) Review all matters properly brought before the commission, call for votes upon the same and announce the results;
- (6) Appoint all hearings officers and any committee chairpersons with the approval of a majority of the members;
- (7) Authenticate by his or her signature all acts of the commission as may be required by law, unless delegated to the planning director;
- (8) Do and perform such other duties as may be required by law, or such as may properly appertain to such office; and
- (9) Make known all rules of order when so requested and to decide all questions of order, subject to an appeal to the commission.

(b) Clerk. The planning director, or a person designated by the director, shall serve as clerk of the commission and shall be responsible, directly or through staff members, to provide the following services:

- (1) To receive, submit, and coordinate all matters properly brought before the commission in consultation with the chairperson;
- (2) To provide the agenda support materials for all meetings;
- (3) To read bills, resolutions, and other matters to the commission, if so required;
- (4) To authenticate and forward at once to the proper parties all communications, including decision and orders of the commission and all other matters, either directly or through a committee, as the case may be;
- (5) To deliver immediately to the chairperson of the appropriate committee all petitions, resolutions, bills, or other matters, as may be duly referred to such committee;
- (6) To serve in all matters as ex-officio clerk of the commission and to do and perform all clerical duties and services pertaining to such position as the commission

shall from time to time direct, and such as shall by law or these rules, or rules hereafter adopted, be assigned or such as properly pertain to such position; and

- (7) To have charge of all records of the commission and be responsible for the same. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §§91-2, 92-3)

§12-201-23 Committees. The commission may appoint the necessary standing and select committees to discharge its responsibilities and functions. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-24 Voting. (a) All matters shall be determined by an affirmative vote of a majority of all the members to which the commission is entitled.

(b) Whenever the commission is ready to vote on any question the chairperson shall state the question, put the question to a vote, and announce the results to the commission. The clerk shall call the roll if a roll call vote is taken.

(c) Unless a present member is disqualified from voting pursuant to section 12-201-25 herein, their silence or refusal to vote shall be recorded as an affirmative vote. [Eff 7/25/93, am and comp 6/26/03] (Auth: HRS §91-2) (Imp: HRS §92-15)

§12-201-25 Disclosure of conflict. Whenever a conflict of interest or other ethical question is raised by anyone regarding any member of the commission, the affected member shall promptly make a full disclosure of the circumstances to the commission. If the commission member has a financial interest in any matter that may be affected by an action of the commission that member shall be disqualified from voting in all actions relating to such matters. [Eff 7/25/93] (Auth: HRS 91-2) (Imp: HRS §91-2)

§12-201-26 Motions. (a) Motions and amendments by commissioners may be verbal, but shall be reduced to writing if requested by the chairperson.

(b) No motion shall be received and considered by the commission until the same has been seconded.

(c) After a motion is stated or read by the chairperson, it shall be deemed in the possession of, and shall be disposed of by vote of the commission. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-27 Question of order. A question of order may be raised at any stage of the proceedings, except during a calling of the roll when the ayes and noes are called for. Such question shall be decided by the chairperson, without debate, subject to an appeal to the commission. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-01-28 Attendance. No member shall be absent for the service of the commission, unless the member is sick or otherwise unable to attend and has so advised the chairperson prior to the meeting. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-29 Findings of fact, conclusions of law, decision and order; effective date. (a) In all matters where the commission is the final authority all parties admitted to the proceeding shall be served with findings of fact, conclusions of law, decision and order. Unless otherwise indicated in the order, the effective date of a decision and order shall be the date of service.

(b) Where there has been no other person admitted as a party to the proceedings and where the decision is not adverse to the party, the director is authorized to issue said findings of fact, conclusions of law, decision and order pursuant to the action taken by the commission, which issuance shall have the same force and effect as if signed by the individual commissioners.

(c) Where there has been another person admitted as a party to the proceedings or where a decision adverse to a party has been rendered, the findings of fact, conclusions of law, decision and order shall be signed by the commissioners voting in favor of such adverse decision.

(d) If a commissioner is unable to sign the absent commissioner's vote and signature shall be accounted for by the director certifying that commissioner's vote in a document attached to the decision and order. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §§91-2, 91-11)

§12-201-30 Restrictive covenants. The commission may require a fee owner to record a covenant on the title to a property where the commission is the final authority. The covenant shall grant the County of Maui explicit authority to enforce the use provisions of the document. [Eff 7/25/93] (Auth: HRS §§46-5, 91-2) (Imp: HRS §91-2)

§12-201-31 Transmittal of recommendations. For all actions which the commission does not have final authority, its recommendations shall be transmitted to the final authority within a reasonable period of time and as prescribed by law. [Eff 7/25/93] (Auth: Charter §8-8.6)

§12-201-32 Appeals. Final decisions of the commission may be appealed pursuant to chapter 91, HRS, as amended. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-14)

§12-201-33 Removal from proceeding. Any person(s) willfully disrupting or otherwise compromising the conduct of the hearing shall be removed from the hearing room. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-201-34 Maximum time period for decision. Except for state administered permit programs delegated, authorized, or approved under federal law, the commission shall review and make a decision on applications within one hundred twenty days from the later of: (1) the date the application is deemed complete by the director, or (2) the closing of public hearing on the application, provided that, if a contested case proceeding is conducted pursuant to subchapter 4 of these rules, the decision shall be rendered within the time specified by section 12-201-82. This time period shall be extended in the event of a national disaster, state emergency, or union strike, which would prevent the authority from reviewing and making a decision within the specified time period. [Eff 11/13/00] (Auth: HRS §91-2) (Imp: HRS §§91-2, 91-13.5)

§12-201-35 (Reserve)

§12-201-36 (Reserve)

§12-201-37 (Reserve)

§12-201-38 (Reserve)

SUBCHAPTER 3

PETITION TO INTERVENE

§12-201-39 Petition to intervene. All proceedings in which action by the commission will result in a final determination of the legal rights, duties or privileges of a specific party or parties, and which is appealable pursuant to section 91-14, HRS, as amended, is a contested case. Petitions to intervene in such proceedings may be filed in accordance with the provisions of this subchapter. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-201-40 Petition filing. (a) Petitions to intervene shall be in conformity with section 12-201-20 herein and shall be filed with the commission and served upon the applicant no less than ten days before the first public hearing date. Untimely petitions will not be permitted except for good cause, but in no event will intervention be permitted after the commission has taken the final vote on the matter before it.

(b) The petition to intervene shall be accompanied by a filing fee in the amount established in the county budget. [Eff 7/25/93, am 5/26/01] (Auth: HRS §91-2) (Imp: HRS 91-2)

§12-201-41 Intervenors. (a) All departments and agencies of the state and the county shall be admitted as parties upon timely application for intervention.

(b) All persons who have a property interest in land subject to commission action, who lawfully reside on said land, or can demonstrate they will be so directly and immediately affected by the matter before the commission that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application for intervention.

(c) All other parties may apply to the commission for leave to intervene as parties.

(d) Leave to intervene shall be freely granted, provided that the commission or its hearing officer, if one is appointed, may deny an application to intervene when in the commission's or hearing officer's sound discretion it appears that:

- (1) The position or interest of the applicant for intervention is substantially the same as a party already admitted to the proceeding;
- (2) The admission of additional parties will render the proceedings inefficient and unmanageable; or

(3) The intervention will not aid in development of a full record and will overly broaden issues.

(e) Upon admission of any intervenor, the department of planning shall be automatically admitted as a party to the contested case. [Eff 7/25/93, am and comp 11/29/10] (Auth: Charter §§8-8.4, 13-2(15)) (Imp: HRS §91-9)

§12-201-42 Multiple intervenors. If more than one intervenor is admitted to a contested case proceeding, the hearing officer and/or commission may require intervenors to assign responsibilities between themselves for the examination and cross-examination of witnesses. The hearing officer or commission shall have the right to impose reasonable subject matter, as well as time, limitations on examination and cross-examination of witnesses, whether or not parties are represented by counsel. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-43 Contents of petition to intervene. (a) The petition shall contain the following:

- (1) The nature of petitioner's statutory or other right to intervene;
- (2) The nature and extent of petitioner's interest in the proceedings and, if an abutting property owner, the tax map key number of the abutting property; and
- (3) The effect of any decision in the proceeding on petitioner's interest.

(b) If applicable, the petition shall also make reference to the following:

- (1) Other means available whereby petitioner's interest may be protected;
- (2) Extent petitioner's interest may be represented by existing parties;
- (3) Extent petitioner's interest in the proceeding differs from that of the other parties;
- (4) Extent petitioner's participation can assist in development of a complete record;
- (5) Extent petitioner's participation will broaden the issue(s) or delay the proceedings; and
- (6) How the petitioner's intervention would serve the public interest. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-44 Opposition to intervention. If any party opposes the petition for intervention that party shall file, within five days after

being served, his or her motion opposing the petition on the commission, all other parties and the intervenor. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-45 Hearing on petition to intervene. All petitions to intervene shall be heard and ruled upon prior to the commission taking final action on an application. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-46 Appeal from denial of intervention. A person whose petition to intervene has been denied may appeal such denial to the circuit court pursuant to chapter 91-14, HRS, as amended. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2, 91-14)

§12-201-47 (Reserve)

§12-201-48 (Reserve)

§12-201-49 (Reserve)

§12-201-50 (Reserve)

§12-201-51 (Reserve)

SUBCHAPTER 4

PROCEDURES WHERE INTERVENTION IS GRANTED

§12-201-52 Purpose. If the petition to intervene is granted by the commission, this subchapter and subchapters 2, 3 and 5 shall govern the contested case procedures before the commission. Subchapters 3, 4 and 5 shall not be applicable where the commission does not have final authority over any matter. These procedures may be modified or waived by the parties with the consent of a proper majority of the commission or hearing officer, as the case may be. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-201-53 Pre-hearing procedures; mediation. (a) All parties to a contested case proceeding shall participate in mediation pursuant to section 12-201-68 prior to any prehearing conference and the initiation of the contested case proceeding.

(b) All parties to a contested case proceeding shall be prepared for a pre-hearing conference and a contested case proceeding within a reasonable time after the mediation conference as determined by the hearing officer. [Eff 7/25/93, am 5/26/01] (Auth: HRS §91-2) (Imp: §91-9)

§12-201-54 Hearing officer's powers. (a) In all contested case proceedings a hearing officer shall be appointed. If more than one person is appointed a presiding officer shall be selected.

(b) The hearing officer or presiding officer, as the case may be, shall have the power to administer oaths, receive and rule on questions of evidence, set the dates for and hold prehearing conferences to formulate or simplify the issues, rule upon all objections or motions which do not involve a final determination of the proceeding, receive offers of proof, fix the length, form and time for the filing of briefs, dispose of any other matter that normally and properly arises in the course of a hearing, and take lawful action deemed necessary for the orderly and just conduct of a hearing. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-201-55 Notice of hearing. Unless otherwise provided by law, the notice of hearing will be served on all parties and persons on the mailing list for this purpose at their last recorded address as required by HRS §§91-9 and 91-9.5. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §§91-9, 91-9.5)

§12-201-56 Transcripts. A transcript of the proceedings shall be available for public review at the commission's office. If any party desires a copy of a transcript the cost shall be borne by that party. [Eff 7/25/93, am 5/26/01] (Auth: HRS §91-2) (Imp: §91-9)

§12-201-57 Limiting testimony. To avoid unnecessary or cumulative evidence, the hearing officer may limit the number of witnesses or the time for testimony upon a particular issue. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-201-58 Order of procedure. In hearings on applications and petitions, the applicant shall open and close. Intervenors shall be heard in such order as the hearing officer directs. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-59 Co-counsel. Where a party is represented by more than one counsel, they may allocate witnesses between them, but only one counsel shall be permitted to cross-examine a witness or to state any objections or to make closing arguments. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-201-60 Cross-examination. Each party shall have the right to conduct such cross-examination of the witnesses as may be required for a full and true disclosure of the facts and shall have the right to submit rebuttal evidence. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §§91-9, 91-10)

§12-201-61 Subpoenas. (a) Requests for the issuance of subpoenas requiring the attendance of witnesses or the production of documents or records shall be presented to the hearing officer in writing, and shall state the reasons why the testimony or documents required are material and relevant. Only parties or the hearing officer or presiding officer may request the issuance of a subpoena.

(b) All subpoenas shall be presented to the hearing officer not less than ten calendar days before the scheduled hearing, unless otherwise ordered.

(c) No subpoena shall be issued unless the requesting party has complied with this section, gives the name and address of the subpoenaed witness or a complete description of the documents sought to be produced. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §§91-9, 92-16)

§12-201-62 Fees and mileage. Witnesses summoned by subpoena shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State of Hawaii. Such fees and mileage shall be paid by the party at whose instance the witness appears. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §92-16)

§12-201-63 Oath. Witnesses shall be placed under oath or affirmation prior to testifying. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §92-16)

§12-201-64 Consolidation. The commission, upon its own initiative or upon motion, may consolidate for hearing or for other purposes, or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues which are the same or closely related if it finds that such consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-65 Substitution of parties. Upon motion and for good cause, the commission may order substitution of parties, except that in the case of death of a party, substitution may be ordered without the filing of a motion. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-66 Motions. (a) Time. Motions may be made before, during or after a contested case hearing.

(b) Form; contents. All motions other than those made during a hearing shall be made in writing, shall state the relief sought and be accompanied by an affidavit or legal memorandum setting forth the grounds upon which motion is based. The hearing officer shall set the time for hearing the motion. All motions and memoranda shall conform to the provisions of section 12-201-20.b and c of these rules.

(c) Service of motions. The moving party shall serve a copy of all motions on all other parties and shall file the original and fifteen copies with proof of service at the commission's office.

(d) Memorandum in opposition. A memorandum in opposition or counter affidavit shall be served on all parties no less than two days before the hearing date. The original and fifteen copies with proof of service shall be filed at the commission's office. The

hearing officer may extend or shorten the times herein for good cause.

(e) Waiver. Failure to serve or file a memorandum in opposition to a motion or failure to appear at the hearing without good cause may be deemed a waiver of objection to the granting or denial of the motion. A party who does not oppose the motion shall notify the hearing officer and opposing counsel or party promptly. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-67 Discovery. The parties to a contested case may request discovery in a manner consistent with the provisions of rules 26 through 32, 34, 36 and 37, Hawaii Rules of Civil Procedure. The hearing officer will allow utilization of the discovery process where appropriate and where such would not unreasonably delay the proceedings. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-68 Mediation, informal settlements and arbitration.

(a) All parties to a contested case proceeding shall participate, in good faith, in one mediation conference. The length of the mediation conference shall be determined by the mediator. The cost of the mediation conference shall be borne by the department. Additional mediation conferences may be convened on a voluntary basis, the cost of which shall be shared by the parties of the contested case. The mediation conference shall be held within thirty days of the granting of an intervention by the commission. The parties may mutually agree to extend this time.

(b) A mediator shall be selected jointly by the parties or appointed by the commission if the parties fail to agree. The mediator shall not be the person appointed as the hearing officer for the contested case proceeding.

(c) The mediator may facilitate voluntary resolution of issues among the parties or assist the parties in simplifying, clarifying or reducing issues of the contested case proceeding. No agreement shall be reached which results in an improper delegation of powers of the commission or prevents the commission from making the final decision regarding the permit application.

(d) Upon motion by a party, the commission may waive the mandatory mediation for good cause shown by the movant.

(e) In addition to the foregoing, the parties may, at any time before or during the contested case, hold informal conferences or engage in arbitration for the purpose of submission and consideration of facts, arguments, or offers of settlement, as the nature of the proceedings, time and public interest may permit, so long as no agreement is reached which results in an improper delegation of powers of the commission or prevents the commission from making

the final decision in the matter. The parties shall disclose to the commission any agreement or resolution reached by the parties.

(f) The mediator and the parties shall not disclose to the hearing officer or the commission the substance of discussions or action taken at the mediation conference, except that the mediator and the parties shall disclose any agreement or resolution reached by the parties. Rejected offers of settlement or proposals shall not be admissible in evidence against any counsel or person. [Eff 7/25/93, am 5/26/01, am and comp 4/16/06] (Auth: HRS §91-2) (Imp: §91-2)

§12-201-69 Evidence. (a) Form and admissibility. The hearing officer shall not be bound by the rules of evidence, but may exercise his or her own discretion with a view to doing substantial justice.

(b) Ruling. The hearing officer shall rule on the admissibility of all evidence. Such rulings may be reviewed by the commission in determining the matter of the merits.

(c) Objections and exceptions. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

(d) Offer of proof. An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

(e) Exhibits. Exhibits shall conform to the provisions of subsections 12-201-20.b and c, where applicable, and shall be filed with the hearing officer.

(f) Authority records. If any matter contained in a document on file as a government record is offered in evidence such document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of such document are specifically identified and otherwise competent, relevant and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy thereof shall be presented as an exhibit, unless otherwise ordered by the hearing officer.

(g) Official notice. Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts within the authority's specialized knowledge when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

(h) Additional evidence. The hearing officer may require the production of further evidence upon any issue. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-201-70 Correction of transcript. Motions to correct the transcript will be acted upon by the hearing officer or the commission, as the case may be. Motions shall be filed within seven days after receipt of the transcript unless otherwise directed and shall be served on all parties. Such motions shall certify the date when the transcript was received. If no objections are received within ten days after date of service, the transcript will, upon approval of the commission, be changed to reflect such corrections. If objections are received, the motion will be acted upon with due consideration to the stenographic transcript of the hearing. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-71 (Reserve)

§12-201-72 (Reserve)

§12-201-73 (Reserve)

§12-201-74 (Reserve)

§12-201-75 (Reserve)

SUBCHAPTER 5

POST HEARING PROCEDURES WHERE INTERVENTION IS GRANTED

§12-201-76 Briefs. The hearing officer may fix the time for the filing of briefs. Exhibits may be reproduced in an appendix. A brief of more than twenty pages shall contain a subject index and table of authorities. Requests for extension of time to file briefs must be made to the hearing officer in writing, and a copy thereof served upon or mailed to the other parties to the proceeding. When a matter is to be submitted on concurrent briefs, extensions will not be granted unless a stipulation is filed by the parties. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-77 Recommendations of hearing officer. (a) Submission of recommendations. Upon completion of the contested case the parties may submit proposed findings of fact, conclusions of law, decision and order within the time limit determined by the hearing officer or presiding officer. Said proposals shall be served on all other parties.

(b) The hearing officer shall prepare and submit to the commission the record of the hearing and a report setting forth proposed findings of fact, conclusions of law, decision and order.

(b) Contents of record. The record shall include the application, notice of hearing, motions, rulings, orders, a transcript of the hearing, documentary evidence, the proposed findings and objections, the report of the hearing officer, and all other matters placed in evidence.

(c) Service of hearing officer's report. The hearing officer's report and proposed findings of fact, conclusions of law, decision and order shall be served upon all parties. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-78 Exceptions to hearing officer's report and recommendations. (a) File; form; copies; time; service. Within ten working days after service of the report and proposed findings of fact, conclusions of law, decision and order, a party may file with the commission a statement of exceptions and a memorandum in support thereof. Copies shall be served upon each party to the proceeding.

(b) Contents of exceptions. The exceptions shall:

(1) Set forth specifically the grounds for each exception.

- (2) Identify the objectionable portions of the hearing officer's report and proposed findings of fact, conclusions of law, decision and order; and
 - (3) Identify the portions of the record relied upon by page citation.
- (c) Waiver. Grounds not stated and identified in the statement of exceptions are waived. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-79 Memorandum in support of hearing officer's report and recommendations. (a) File; form; copies; time; service. Within ten working days after service of the statement of exceptions, a party may file with the commission a memorandum in support of the hearing officer's recommendations. Copies shall be served upon each party to the proceeding.

(b) Contents of memorandum in support. The memorandum in support shall:

- (1) Answer specifically the points to which exceptions were taken;
- (2) State the facts and reasons why report and recommendations must be affirmed; and
- (3) Designate by page citation the portions of the report record relied upon. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-80 Oral argument. The commission may direct or permit the presentation of oral argument with the applicant opening and concluding the argument. Not more than one hour on each side of the proceeding will be allowed for argument without special leave of the commission. If more than one party is participating as an applicant or intervenor, those parties shall divide the hour between them. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-81 Commission action. (a) If the entire commission served as the hearing officer, the commission may render its decision at the conclusion of the hearing. Alternatively, the commission may request the parties submit proposed findings of fact, conclusions of law, decision and order and additional memoranda and may allow for further oral argument.

(b) If a hearing officer comprised of less than the entire commission heard the matter, and if no statement of exceptions is filed as herein provided, the commission may proceed to reverse, modify or adopt the recommendations of the hearing officer.

(c) Upon the filing of the exceptions and briefs together with the briefs in support, the commission may render its decision forthwith upon the record; or if oral argument has been allowed, after oral argument; or may reopen the docket and take further evidence or may make such other disposition of the case that is necessary under the circumstances. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §§91-2, 91-11)

§12-201-82 Issuance of findings of fact, conclusions of law, decision and order. (a) Every decision and order adverse to a party to the proceeding rendered by the commission shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceedings has filed proposed findings of fact, the commission shall incorporate in its decision a ruling which addresses such findings. Such decision and order shall be rendered within sixty days from the presentation of oral argument by the parties.

(b) The final decision and order shall inform the parties thereto of the right to appeal such decision and order pursuant to section 91-14, HRS, as amended. [Eff 7/25/93, am 11/13/00] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-83 Service of findings of fact, conclusions of law, decision and order. The final findings of fact, conclusions of law, decision and order shall be served by mailing certified copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a certified copy thereof. When a party to the proceeding has appeared by counsel or a representative, service upon such counsel or representative shall be deemed to be service upon the party. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-12)

§12-201-84 Reconsideration. (a) Any person admitted to the proceedings as a party may file a written petition with the commission requesting reconsideration of the commission's final decision and order or ruling. Such petition for reconsideration must be filed within ten days after service of said final order or ruling. Within thirty days of receipt of a timely filed petition the matter shall be scheduled for hearing, and notice of the hearing shall be sent to all parties.

(b) The petition for reconsideration must demonstrate some reason why the commission should reconsider its prior decision and must set forth facts or law of a strongly convincing nature such as would induce the commission to reverse its prior decision. Reconsideration may be justified if:

- (1) There has been an intervening change in the controlling law;
 - (2) New evidence is available; or
 - (3) There is need to correct clear error.
- (c) Where the petitioner seeks reconsideration based on the availability of new evidence that evidence:
- (1) Must be previously undiscovered even though due diligence was exercised;
 - (2) It must be admissible and credible; and
 - (3) It must be of such a material and controlling nature as will probably change the outcome and is not merely cumulative or tending only to impeach or contradict prior evidence. [Eff 7/25/93, am and comp 12/20/04) (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-85 Appeals. Parties to proceedings before the commission may obtain judicial review of decisions and orders issued by the commission in the manner set forth in chapter 91-14, Hawaii Revised Statutes. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-14)

§12-201-86 (Reserve)

§12-201-87 (Reserve)

§12-201-88 (Reserve)

§12-201-89 (Reserve)

§12-201-90 (Reserve)

SUBCHAPTER 6

PROCEDURES TO ADOPT RULES AND REGULATIONS AND DECLARATORY RULINGS

§12-201-91 Authority. All rules and regulations of commission shall be adopted by the commission and approved by the mayor in accordance with chapter 91, HRS, as amended. [Eff 7/25/93] (Auth: HRS Chapter 91)

§12-201-92 Petition and procedures for adoption, amendment, or repeal of rules and regulations. (a) The commission may adopt, amend, or repeal any of its rules by following the procedures outlined herein, except that the commission need not formally file a petition and need only submit a draft of the proposed changes.

(b) Any interested person may petition the commission requesting the adoption, amendment, or repeal of any provision of these rules and regulations.

(c) Filing of petition.

(1) Any person seeking the adoption, amendment, or repeal of any provision of these rules and regulations shall file a petition with the department on a form provided by the department, which petition shall include or be accompanied by the following information and documentation:

(A) A statement of the nature of the applicant's interest;

(B) A draft of the proposed rule or amendment or a designation of the provisions sought to be repealed;

(C) Statement of the reasons in support of the petition; and

(D) A public hearing and notice fee of \$250.

(2) Upon receipt of all required fees, information, and documentation, the director shall certify that the applicant's petition is complete and shall refer the petition to the commission.

(d) Disposition of petition. The petition shall be considered submitted to the commission as of the first meeting it is properly placed on the agenda. Within thirty days after submission, the commission shall either deny the petition in writing and state the reasons for such denial or initiate proceedings for action according to the provisions herein.

(e) Public hearing; notice. When the commission proposes to adopt, amend, or repeal a rule, it shall schedule a public hearing by giving at least thirty days notice. Notice shall include a statement of

the substance of the proposed rule, and the date, time, and place where interested persons may be heard. Notice shall be published at least once in a newspaper of general circulation in Maui County and pursuant to section 1-28.5, Hawaii Revised Statutes, and shall be mailed to all persons who have made a timely, written request to the commission for advanced notice of its rule making proceedings.

(f) Scope. All interested persons shall be given the opportunity to submit data, views, or written or oral argument relating to the proposed adoption, amendment or repeal of a rule. The commission shall incorporate in the record and consider all written or oral submissions regarding the proposed rule.

(g) Decision. The commission may make its decision at the public hearing or announce then the date it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency shall, if requested to do so by an interested person, issue a concise statement of reasons for and against its determination.

(h) Mayoral approval. The adoption, amendment, or repeal of these rules shall be subject to mayoral approval in accordance to chapter 91 of the HRS.

(i) Emergency rules. If the commission finds an imminent peril to public health or safety requires adoption, amendment, or repeal of a rule upon less than thirty days notice of hearing, and states its reasons in writing, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing as practicable.

(j) Filing; effect. Upon mayoral approval, certified copies of all rules shall be filed in the office of the county clerk and shall become effective ten days thereafter.

(k) Emergency rules; effect; notice. Emergency rules shall be effective upon filing, but for not longer than one hundred twenty days without renewal. The commission shall publish a copy of the emergency rule at least once in a newspaper of general circulation in Maui County and pursuant to section 1-28.5, Hawaii Revised Statutes, within five days of filing herein. [Eff 7/25/93, am 11/13/00] (Auth: HRS §91-2) (Imp: HRS §§1-28.5, 91-3, 91-4, 91-6)

§12-201-93 Declaratory rulings. a) Applicability. Any interested person may petition the commission for a declaratory order as to applicability of any statutory provision or of any rule or order of the department or the commission.

(b) Filing of petition.

(1) Any person seeking a declaratory ruling shall file a petition with the department on a form provided by the department. The petition shall include or be accompanied by the following information and documentation:

- (A) The name, address, and telephone number of the petitioner;
 - (B) A statement of the nature of petitioner's interest, including reasons for the submission of the petition;
 - (C) A designation of the specific provision, rule or order in question;
 - (D) A complete statement of facts;
 - (E) A statement of the position or contention of the petitioner; and
 - (F) A memorandum of points and authorities, including any legal authorities, containing a full discussion of the reasons in support of such position or contention.
- (2) Upon receipt of all required information and documentation, the director shall review the petition for completeness and refer the petition to the commission.
- (c) Disposition of petition.
- (1) The commission may for good cause refuse to issue a declaratory ruling where:
- (A) The question is speculative or purely hypothetical and does not involve existing facts, or facts which can reasonably be expected to exist in the near future;
 - (B) The applicant's interest is not of the type which would give him standing to maintain an action if he were to seek judicial relief;
 - (C) The issuance of the declaratory ruling may adversely affect the interests of the County, the commission, the department or any of their officers or employees in any litigation which is pending or may reasonably be expected to arise; or
 - (D) The matter is not within the jurisdiction of the commission.
- (d) Where any question of law is involved, the commission may refer the petition to the corporation counsel. The commission may also refer the petition to other agencies where it deems it necessary or desirable.
- (e) The commission shall promptly notify the applicant of the disposition of the petition.
- (f) Status of orders. Orders disposing of petitions shall have the same status as other agency orders. Orders shall be applicable only to the factual situation alleged in the petition or set forth in the order. They shall not be applicable to different factual situations or where additional facts not considered in the order exist. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-7)

§12-201-94 Validity. If any portion of the foregoing rules or the applicability thereof to any person, property or circumstance is held invalid for any reason, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application, and to this end these rules are declared to be severable. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-201-95 Effective date. These rules shall become effective upon their approval by the mayor of the County of Maui and ten days after filing with the county clerk.

§12-201-96 (Reserve)

§12-201-97 (Reserve)

§12-201-98 (Reserve)

§12-201-99 (Reserve)

§12-201-100 (Reserve)

SUBCHAPTER 7

APPLICATION FOR GEOTHERMAL DEVELOPMENT ACTIVITIES PERMIT

§12-201-101 Purpose and authority. (a) This rule governs application for a geothermal development activities permit ("permit"), pursuant to authority conferred by section 205-5.1, Hawaii Revised Statutes ("HRS"), as amended, upon the commission to determine whether proposed geothermal development activities should be allowed. The commission is the issuing authority for geothermal development activities permits in geothermal resource sub zones located within agricultural, rural, and urban State land use districts in the County.

(b) The commission's approval of an application for a permit shall not in any way abrogate nor supersede the provisions of chapters 182 and 183, HRS, and rules promulgated thereunder. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-102 Contents of application. Any person who desires to conduct geothermal development activities on land that is located within a geothermal resource subzone and located within either the agricultural, rural, or urban State land use districts shall apply to the commission for a permit. An application for a permit shall be filed with the department of planning and shall include the following:

(a) Non-refundable filing and processing fee, established in the County budget.

(b) Original hard copy and one (1) hard copy of:

(1) Application form;

(2) Written and appropriate graphic descriptions of the property and the proposed geothermal development activities including, but not limited to:

(A) A description of the property for which a permit is being requested to include the property's real property tax map key number(s) and a description of the property's location within the County;

(B) A written statement describing the scope of the planned activities and presenting the applicant's reasons for requesting the permit;

(C) A written description of the power generation technology to be used in the proposed geothermal development activity;

(D) A preliminary plot or site plan of the property, drawn to scale, showing all existing and proposed uses and locations of structures including, but not

- limited to, drilling sites, wells, access roadways, water sources, waste water collection and disposal systems, the geothermal steam and/or brine collection and disposal systems, power plant(s), and electrical power distribution systems;
- (E) Preliminary elevation drawings of the proposed temporary and permanent structures;
 - (F) The proposed locations and elevations and depths of all superstructures and drilling rigs, bottom hole locations, casing program, proposed well completion program, size and shape of drilling sites, and location of all existing and proposed access roads;
 - (G) Areas of potential temporary and/or permanent surface disturbance, including, but not limited to, offsite support facilities, such as borrow pits for roads, substations, staging and storage areas, and maintenance facilities;
 - (H) A written description of the methods for disposing of well effluent and other waste products associated with the geothermal development activity;
 - (I) A geologist's report on the site and surrounding area's surface and subsurface geology, nature and occurrence of known or potential geological hazards and geothermal resources, surface and ground water resources, topographic features of the land, and drainage patterns;
 - (J) Pre-exploration meteorological, ambient air quality and noise level measurements that demonstrate the potential effects on surrounding properties through air quality and noise impact analysis;
 - (K) A written description of applicable mitigation measures proposed to be taken for the affected environment, including, but not limited to, the protection, prevention and/or control of:
 - (i) Archaeological and historic resources;
 - (ii) Soil erosion and drainage patterns;
 - (iii) Surface and ground water contamination;
 - (iv) Damage to fish and wildlife or other natural resources;
 - (v) Air and noise emissions;
 - (vi) Hazards to public health and safety;
 - (vii) Socio-economic impact(s);
 - (viii) Impact(s) on public infrastructure and services;

- (ix) Visual impact analysis from public rights-of-way;
 - (x) Analysis of habitat and migration patterns of native species which are present in the project area; and
 - (xi) Temporary impacts related to traffic and noise during project construction.
- (L) A written assessment of cultural impacts and mitigation measures, as applicable;
- (M) Statement(s) addressing how the proposed activity would mitigate or reconcile:
- (i) Any effects to residents or surrounding properties in the areas of health, environment and socio-economic activities; and
 - (ii) The burdening of public agencies to provide support infrastructure such as roads, sewers, water, drainage, school and related services, and police and fire protection.
- (N) Preliminary provisions and/or plans for the monitoring of environmental effects such as noise, and air, and water quality, during each proposed phase of the project (exploration, development, and production) demonstrating how the applicant intends to comply with these rules, applicable rules of the State's department of health, and applicable rules of the State board of land and natural resources;
- (O) A preliminary plan of action for emergency situations which may threaten the health, safety, and welfare of employees and other persons in the vicinity of the proposed project site including, but not limited to, procedures to facilitate coordination with appropriate Federal, State and County officials and the evacuation of affected individuals;
- (P) Preliminary timetable(s) and/or schedule(s) for each proposed phase of the project;
- (Q) A listing of any active land uses and State and/or County special use permits or County conditional permits on the affected property(ies);
- (R) Other pertinent information or data which the director may require to support the application for a permit and the protection of the environment; and
- (S) Consistency with applicable community plans.
- (c) Graphic representations suitable for both staff analysis and public presentation, including the depiction of the project

boundaries, reference points (roadways, shoreline, etc.), existing and proposed structures and appurtenances.

(d) List of owners and lessees of the subject parcel(s) and those as recorded on real property records of the County's real property tax division whose properties fall within five hundred feet of the parcel(s) upon which the permit activity is proposed.

(e) As determined by the director, applicable provisions of Maui County Code, chapter 19.510, General Application Procedures, item "D" Content of Application, shall apply which are not in conflict with section 205-5.1, HRS, Geothermal Resources. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)]

§12-201-103 Properly filed application. Within fifteen business days of receipt of an application, the director shall review the application to determine if it is complete in that it includes the supporting data required pursuant to section 12-201-102. The applicant shall be notified in writing of the director's determination of application completeness and acceptance within seven calendar days of the determination being made. If the application is incomplete, the director shall provide the applicant with a written statement that identifies the portions of the application determined to be incomplete. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1; MCC §19.510.010(c)(1)) (Imp: HRS §91-9)

§12-201-104 Notice of acceptance and availability. (a) Within ten business days of receipt of the director's written determination that the application has been deemed complete and accepted, the applicant shall publish in a newspaper of general circulation, a notice of acceptance and availability.

(b) The notice shall be on a form prescribed by the director and shall inform the public of the application's filing, acceptance and availability for review and comment. Information contained in the notice shall include, but not be limited to, the following information:

- (1) Applicant's name, telephone number and mailing address;
- (2) Date of director's acceptance of the application;
- (3) Tax map key parcel(s) affected by the proposed geothermal activity;
- (4) Proposed use of the property;
- (5) Existing use of the property;
- (6) Existing State land use designation, community plan designation and County zoning;
- (7) Availability of application for public review at the department, including the department's website link for accessing the application document online;

- (8) Location map showing the parcel(s) location(s) relative to generally referenced locational landmarks; and
- (9) Deadline for receipt of comments. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-105 Posting of signs for public notification. (a) Within ten days of being notified of the acceptance of an application, the applicant shall post a sign on the subject property notifying the public of the following:

- (1) The nature of the application;
 - (2) The proposed use of the property;
 - (3) The size of the property;
 - (4) The tax map key(s) of the property;
 - (5) That the public may contact the department for additional information; and
 - (6) The address and telephone number of the department.
- (b) The sign shall remain posted until the application has been granted, denied, or withdrawn. The applicant shall remove the sign promptly after such action.

(c) Notwithstanding any other provisions of law, the sign shall be not less than nine square feet and not more than twelve square feet in area, with letters not less than one inch high. No pictures, drawings, or promotional materials shall be permitted on the sign. The sign shall be posted at or near the property boundary adjacent to a public road bordering the property and shall be readable from said public road. If more than one public road borders the property, the applicant shall post the sign to be visible from the more heavily traveled public road. The sign shall, in all other respects, be in compliance with chapter 16.13, Maui County Code. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-106 Posting of application on department of planning's website. The application permit shall be posted on the department's website starting from the date of publication of the notice of acceptance and availability for a period of at least thirty calendar days. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-107 Public and agency comment period. From the date of publication of the notice of acceptance and availability, public and agency comments will be received by the department for a period of thirty calendar days. Comments received via U.S. Postal Service shall be postmarked no later than the 30th calendar day following the publication of the notice of acceptance and availability. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-108 Responses to comments received during the public and agency comment period. (a) Within seven calendar days of the closing of the comments received, the department shall provide to the applicant all written comments received during the thirty day comment period.

(b) The applicant shall be responsible for providing written responses to all substantive comments received during the thirty day comment period. "No comment" letters shall not require a written response. A copy of each response letter sent to a commenting party shall be provided to the department.

(c) Director's report. Upon receipt of all responses from the applicant, the director shall prepare a written report for the commission commenting on the adequacy of the applicant's written responses. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-109 Hearing and notification. (a) The director, upon completion of the written report, on behalf of the commission with notice to the applicant, shall set a date for a public hearing on the next available commission agenda. The commission shall conduct a public hearing within seventy-five calendar days from the closing date of the thirty day public and agency comment period.

(b) Promptly after the director fixes a date for the public hearing and at least thirty calendar days before the date of the public hearing, the applicant shall mail a notice of the hearing to all owners and recorded lessees of the subject property, as shown on real property tax records at the County real property tax division, of parcels that fall within five hundred feet of the perimeter boundary of the property for which a permit is being requested, any owners/lessees within the subject parcel(s), and to other interested persons or groups as may be determined by the director. The mailing of the notice shall be by certified mail, return receipt requested. Such notice shall be reviewed and approved by the department and include:

- (1) Name of the applicant;
- (2) Description of project location and a map of the property(ies) involved;
- (3) Nature of the proposed geothermal development activities; and
- (4) Date, time, and place of the hearing.

(c) Notice shall be considered validly given for the purpose of these rules, if the applicant has made a good faith effort to comply with subsection (b).

(d) In addition to said notice, and at least thirty calendar days prior to the date of the initial hearing, the department shall

publish the notice of the hearing in a newspaper of general circulation in the County. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-110 Mediation. (a) Upon appropriate request for mediation from any party who submitted comment at the initial public hearing, the commission shall order the requesting party or parties, the applicant, and the appropriate agencies to submit to the mediation process.

(b) Persons entitled to request mediation. Any person, including interested government agencies, who submitted comment at the initial public hearing may, upon appropriate request, seek mediation of issues raised by that person at the initial public hearing.

Upon receipt of an appropriate request, the commission shall require the parties to participate in mediation. All appropriate requests for mediation shall be consolidated in a single mediation conference. The commission shall not be a party to the mediation, and shall not be permitted to attend mediation conferences. The department of planning shall be a party to the mediation unless it declines participation in writing.

(c) "Appropriate request" is defined herein as a written request, stating party(ies) name, address, phone number, and signature of the person requesting mediation, interest in the matter, the specific issues raised at the initial public hearing related to the permit, and any supporting documentation to support request for mediation. A request will not be considered appropriate if not filed in a timely manner, pursuant to subsection (d).

(d) Time for submission of request. The original and fifteen copies of the request for mediation shall be filed with the commission within five business days after the close of the initial public hearing and one copy of the request shall be served on the applicant.

(e) Appointment of a mediator. At the initial public hearing, the commission shall appoint a primary and three back-up mediators.

(f) Qualifications of mediator. No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by the written consent of all parties to the mediation. Prior to accepting an appointment, the prospective mediator shall disclose any circumstances likely to create a presumption of bias or prevent the prompt completion of the mediation. Upon receipt of such information, the chairperson shall either replace the mediator or immediately communicate the information to the parties for their comments. In the event the parties are unable to agree as to whether the mediator shall serve, or in the event the appointed mediator becomes unable or unwilling to serve, the chairperson will appoint

another mediator. The mediator shall not be an employee of any County agency or its staff.

(g) Selection of mediator. A mediator shall be appointed by the commission.

(h) Notice of mediation conference. The applicant and any person submitting a timely request for mediation shall be notified by the commission of the date, time, and place of the first mediation conference by depositing such notice in the mail to the return address stated in the application and in the request for mediation. The notice shall be mailed no later than ten business days before the start of the mediation conference.

(i) Mediation conference. The initial mediation session shall be held within thirty calendar days after the appointment of the mediator. The mediator shall fix the time and place of each subsequent mediation session. The conference shall be held within the County unless all parties and the mediator agree otherwise. The mediation period shall not extend beyond thirty calendar days after the initial mediation session, except by order of the commission. Mediation shall be confined to the issues raised at the public hearing by the respective party or parties requesting mediation.

(j) Authority of mediator. The mediator shall attempt to help the parties reach a satisfactory resolution of their dispute, but shall not have authority to impose a settlement upon the parties. The mediator may conduct joint and separate meetings with the parties and make oral and written recommendations for settlement.

(k) Privacy. The mediator and the parties shall not disclose to the commission nor to others not party to the mediation, the substance of discussions or action taken at the mediation conference, except that the mediator and the parties shall disclose any agreement or resolution reached by the parties. Rejected offers of settlement or proposals shall not be admissible in evidence against any counsel or person.

(l) Confidentiality. Confidential information disclosed to a mediator by any party in the course of the mediation shall not be divulged by the mediator to anyone, including other parties to the mediation. All records, reports, or other documents received by a mediator while serving in such capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any administrative proceedings or judicial forum.

(m) The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, administrative, or other proceeding:

(i) Views expressed or suggestions made by any other party with respect to a possible settlement of any disputed issue;

- (ii) Statements or admissions made by any other party, inclusive of any expert or consultant opinions, reports, or communication, in the course of mediation proceedings;
 - (iii) Proposals made or views expressed by the mediator; and
 - (iv) The fact that the other party had or had not indicated willingness to accept a proposal for settlement made by the mediator.
- (n) Stenographic record. There shall be no stenographic record or electronic recordation of the mediation process.
- (o) Recommendation of mediator. The mediator shall submit a written report containing recommendations to the commission, based upon any mediation agreement reached between the parties or stating that no agreement was reached, for consideration by the commission in its final decision. The written report of the mediator shall be filed with the commission and served on all parties to the mediation within ten calendar days of the close of the mediation conference. The contents of the written report, including rejected offers of settlement and proposals, shall not be admissible in evidence against any counsel or person.
- (p) Second public hearing. If there is no mediation agreement, or if the mediation agreement does not resolve all issues submitted for mediation, the commission may, in its sole discretion, hold a second public hearing to receive additional comment related to the unresolved mediation issues. The second public hearing, if to be conducted, shall be held within thirty calendar days after receipt of the mediator's report. Within ten calendar days after the second public hearing, the commission may receive additional written comments on the unresolved mediation issues raised at the second public hearing by any party.
- (q) If a second hearing is held, the commission shall consider the comments raised at the second hearing before rendering its final decision. The commission shall then determine whether a permit shall be granted for geothermal development activities described in the application.
- (r) Expenses. The applicant and any party requesting mediation shall each bear their respective costs, fees, and expenses, including the cost of the mediation. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-111 Criteria for issuance of geothermal development activities permit. The commission shall grant a permit if it finds that the applicant has demonstrated that:

- (1) The proposed geothermal development activities would not have unreasonable adverse health, environmental, or

- socio-economic effects on residents or surrounding property;
- (2) The proposed geothermal development activities would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection; and
 - (3) There are reasonable measures available to mitigate the unreasonable adverse effects or burdens referred to above. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-112 Action. (a) The commission shall not take final action on the permit within the five day period after the close of the initial public hearing. Unless there is mutual agreement to extend the period of time for the commission's action, the commission shall take action on a properly filed and complete application within six months of the date a complete application is filed. The six month period shall begin at the date of publication of the notice of acceptance and availability pursuant to section 12-201-104. The time limit may be extended by agreement between the applicant and the commission.

- (b) The commission's action shall:
 - (1) Grant the permit as requested by the applicant based upon the satisfaction of criteria set forth in section 12-201-111 and stating the reasons therefore, subject to performance, reporting and other appropriate conditions imposed by the commission;
 - (2) Grant the permit as may be modified from the applicant's request and stating the reasons therefore, subject to performance, reporting, and other appropriate conditions imposed by the commission;
 - (3) Grant the permit in phases or increment dependent upon the timely and progressive completion of a precedent phase or increment and stating the reasons therefore, subject to performance, reporting, and other appropriate conditions imposed by the commission; or
 - (4) Deny the permit and state the reasons why the application failed to meet the criteria stated in section 12-201-111.

(c) The director, on behalf of the commission shall issue official written notification to the applicant of the commission's action including any performance, reporting, and other appropriate conditions imposed by the commission. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-113 Requirements prior to initiating construction.

(a) Prior to initiating construction of an approved project or any phase of an approved project, the applicant shall submit to the director a compliance reporting documenting the applicant's efforts in addressing conditions attached to the permit.

(b) Within twenty business days of receipt of the applicant's compliance report, the director shall provide one of the following:

(1) A written acceptance of the compliance report confirming the applicant's compliance with the conditions of the permit; or

(2) A written response requesting additional information be provided to evidence compliance with conditions attached to the permit.

(c) If the director requests additional information, the permittee shall provide such information to the department of planning for further review. Upon satisfactory receipt of the requested additional information, the director shall then issue the written acceptance of the compliance report.

(d) Receipt of written acceptance of the compliance report shall be required in order to proceed with construction of the geothermal development activity. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-114 Amendments to and determinations of permit terms and conditions. (a) Any person who has been issued a permit may request the commission to amend or determine any terms or conditions placed upon such permit.

(b) Any person seeking to amend or determine a permit term or condition shall file an application with the department of planning in a form provided by the department of planning, the content of which shall include:

(1) The term or condition to be amended or determined;

(2) The reasons for the requested amendment, or determination;

(3) A filing fee as established in the County budget; and

(4) Any other information and documentation requested by the director.

(c) The director shall refer to the commission, within forty-five calendar days of receipt of the application to amend or determine terms or conditions of a permit for commission review and action. Requests for amendment to terms and conditions shall be placed on the commission agenda as a communication item unless a mediation process was initiated pursuant to section 12-201-110. In such an instance, the application to amend or determine terms or conditions shall be posted as a public hearing item and processed in accordance with section 12-201-109.

(d) The requirement for public hearing for an application to amend or determine terms or conditions may be waived and the matter may then be posted as a communication item on the commission's agenda if a written waiver of public hearing is submitted by all persons requesting mediation at the initial public hearing. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-115 Time extensions. (a) Applications for time extensions on permits shall be filed with the director.

(b) A written request for a time extension shall state the length of time extension desired.

(c) Unless otherwise provided, any application for a time extension must be filed not less than sixty calendar days prior to the expiration date of the time condition, provided that the director, for good cause, may waive such sixty day requirement.

(d) The director shall have the authority to grant via administrative action, any request for time extension.

(e) If the director is not able to act on a properly filed time extension request prior to the deadline for a time extension, the geothermal development activities allowed by the permit may be continued by the director. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-116 Appeals of public hearing. (a) Any decision made by the commission pursuant to a public hearing or hearings under this rule may be appealed directly on the record to the intermediate appellate court for final decision and shall not be subject to a contested case hearing. Sections 91-14(b) and (g), HRS, as amended, shall govern the appeal, notwithstanding the lack of a contested case hearing on the matter. The commission shall provide a court reporter to produce a transcript of the proceedings at all public hearings under this rule for purposes of an appeal.

(b) For the purposes of an appeal from a decision from a public hearing, the record shall include:

- (1) The application for the permit and all accompanying supporting documents, including but not limited to; reports, studies, affidavits, statements, and exhibits;
- (2) Staff recommendations from County agencies submitted to the commission in consideration of the application;
- (3) Oral and written public testimony received at the public hearings;
- (4) Written transcripts of the proceedings at the public hearings;

- (5) The written recommendation received by the commission from the mediator with any mediation agreement;
- (6) A statement of relevant matters officially noticed by the commission and/or any of its members at the public hearings;
- (7) The written decision of the commission issued in connection with the application and public hearings; and
- (8) Other documents required by the commission. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-117 Enforcement of permit and conditions pursuant to notice of violation. (a) The director is the enforcement authority to enforce these rules in conformance with section 205-13, HRS. The director shall use his discretion as to the ways and means of investigating and prosecuting alleged violations of this subchapter. Any person who violates any provision under section 205-4.5, HRS, or any regulation established thereto may be fined up to \$5,000, and any person who violates any other provision of Section 205-5.1, HRS, or any regulation established relating thereto, may be fined up to \$1,000.

(b) If any person cited for violation under this chapter fails to remove such violation within six months of such citation and the violation continues to exist, such person may be subject to a citation for a new and separate violation. There may be a fine of not more than \$5,000 for any additional violation.

(c) Prior to the issuance of any citation for a violation, the director shall notify the violator and the mortgagee, if any, of such violation, and the violator or the mortgagee, if any, shall have not more than sixty days to cure the violation before citation for a violation is issued.

(d) Any development pursuant to section 205-5.1, HRS, as amended, that has not received a required permit pursuant to this part or complied with conditions established with such a permit, shall be removed or the violation shall be corrected by immediate application for and subsequent granting of the appropriate permit or other means as determined by the director. No other State or County permit or approval shall be construed as permit approval pursuant to this part.

(e) Issuance of notice of violation and order.

- (1) The alleged violator shall be notified by the director by certified or registered mail of an alleged violation of this rule, any permit issued pursuant thereto, or any condition of a permit approval. The notice of violation and order shall include, but not be limited to, the specific section of this rule which has been violated, the

nature of the violation, and the remedy(ies) available. The notice of violation and order may also require that the violative activity cease, or that the violative development be removed, that a civil fine be paid, in accordance with subsections (a) and (b) in addition to the foregoing and any other penalties.

- (2) The notice of violation and order shall state that the order shall become final sixty calendar days after the date of its mailing, unless written request for a hearing is mailed or delivered to the department within thirty calendar days. The order shall also advise that the director's action may be appealed to the planning commission. The planning commission shall have exclusive jurisdiction over all appeals arising from this section. Nothing in this section shall prevent the alleged violator from seeking to negotiate a settlement or resolve a dispute.
- (3) If the alleged violator seeks a negotiated settlement with the director, the director, in consultation with the corporation counsel, may negotiate a settlement agreement with the permittee, that provides for cure of the violation, set any fine, and inspection of the parcel by the director. The hearing shall be stayed pending negotiations. Upon settlement, the hearing shall be waived. The proposed settlement shall be forwarded to the commission for review and comment.
- (4) Any request for a hearing shall be in writing and delivered, or mailed and postmark dated, to the department within thirty calendar days, as stated on the notice. Upon receipt of a request for a hearing, the director shall specify a time and place for the permittee subject to the order to appear and be heard.
- (5) The director, in consultation with the corporation counsel, may institute a civil action in any court of competent jurisdiction for the enforcement of any settlement agreement or order issued pursuant to this section.
- (6) Nothing in this section shall prohibit the director, through the corporation counsel, from filing an order or motion directly with a court in the event that public health, safety, and welfare may be at risk. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-118 Enforcement of conditions, representations, or commitments; order to show cause. (a) The commission, on its own motion, may issue an order to show cause, or

the director may file a petition with the commission for an order to show cause, upon a showing that there has been a failure to perform a condition, representation, or commitment on the part of a permit holder. The director shall serve a copy of the petition for an order to show cause upon the permit holder. The petition for order to show cause shall state:

- (1) The permit in question;
- (2) The condition, representation, or commitment that has not been performed or satisfied;
- (3) Concisely and with particularity the facts, supported by an affidavit, giving rise to a belief that a condition, representation, or commitment has not been performed or satisfied;
- (4) A description and a map of the property affected;
- (5) The specific relief requested; and
- (6) Any other information that the commission requires for an adequate investigation into the matter.

(b) The commission may request the assistance of the director and department staff in the investigation of any alleged breach of a condition, representation, or commitment.

(c) Whenever the commission has reason to believe that there has been a failure to perform according to conditions imposed, or representations or commitments made, the commission shall issue and serve upon the permit holder an order to show cause why the permit should not be revoked, amended, or modified, as the case may be. The commission shall serve the order to show cause in writing at least thirty days before the hearing. The order to show cause shall include:

- (1) A statement of the date, time, place, and nature of the hearing;
- (2) A description and a map of the property to be affected;
- (3) A statement of the legal authority under which the hearing is to be held;
- (4) The sections of the statutes, ordinances, or rules involved; and
- (5) A statement that any party may retain counsel if the party so desires.

(d) The commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 8 of these rules, where applicable. Any procedure in an order to show cause hearing may be modified or waived by stipulation of the parties and informal disposition may be made in any case by stipulation, agreed settlement, consent order, or default. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

SUBCHAPTER 8

HEARINGS ON APPEALS OF NOTICES OF VIOLATION AND ON ORDERS TO SHOW CAUSE

§12-201-119 Purpose. This subchapter governs procedures before the commission for the hearing of appeals of notices of violation and orders to show cause. These procedures may be modified or waived by the parties with the consent of the chairperson. The hearings shall not be public hearings but contested cases in accordance with chapter 91, HRS. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-120 Parties. The director and the parties served shall be parties to the proceedings. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-121 Contents of the notice of appeal from a notice of violation. The notice of appeal shall:

- (1) Identify the party or parties taking the appeal;
- (2) Designate the notice of violation appealed from, and provide a copy of the notice of violation attached as an exhibit;
- (3) Have affixed to the notice of appeal proof that service of the notice of appeal was made on all parties to the appeal. Administrative staff for the commission shall permit a notice of appeal to be filed without the proof of service, but the person who filed the notice of appeal shall file the proof of service within seven days after the filing of the notice of appeal;
- (4) Set forth a concise statement setting forth the nature of the appeal, the facts material to consideration of the appeal presented, the alleged error committed by the director, and any relevant statutes, ordinances, or administrative rules pertaining to the matter under appeal;
- (5) Provide the following information:
 - (A) Documents identifying the owner of the subject parcel of land;
 - (B) Owner's name, address, and, telephone numbers;
 - (C) Agent's name, address and telephone numbers, if applicable;
 - (D) Tax map key number of the parcel and its street address, if available; and

- (E) Map identifying the site, adjacent roadway, and landmarks. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-122 Service of the notice of appeal. The alleged violator shall serve a file-marked copy of the appeal in accordance with section 12-201-21, rules of practice and procedure for the Maui planning commission. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-123 Notice of hearing. The commission shall give written notice of hearing to all parties in accordance with section 91-9.5(b), HRS. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-124 Record. (a) For the purpose of commission decisions, the record shall include:

- (1) All pleadings, motions, and intermediate rulings;
- (2) Evidence received or considered, including oral testimony, exhibits, and matters officially noticed by the commission;
- (3) Offers of proof and rulings thereon;
- (4) Proposed findings and exceptions;
- (5) Report of the officer who presided at the hearing; and
- (6) Staff memoranda submitted to the commission in connection with its consideration of the case.

(b) It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.

(c) No matters outside the record shall be considered by the commission in making its decision except as provided in this chapter. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-125 Hearing procedure. Unless otherwise stipulated by the parties, and subject to orders of the commission, which may alter the sequence of presentation of a case when necessary, hearings under this subchapter shall proceed as follows:

- (1) The director may make an opening statement. The other party may also make an opening statement, either immediately after the director's statement or at the beginning of the other party's case.
- (2) After the opening statement or statements, the director shall produce the evidence in support of the director's case;

- (3) The other party may then produce the evidence in support of the party's case;
- (4) The parties may then respectively offer rebutting evidence only; and
- (5) When the presentation of evidence is concluded, the director may present final arguments, followed by the other party, and then the director in rebuttal, which shall be limited to matters raised in the other party's final argument. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-126 Failure to appear. In the event of a party's failure to appear before the commission after proper notice has been served upon the party, or when a party or a party's representative leaves the hearing while the hearing is in progress, the commission may proceed with such hearing without the party's presence. Failure of a party or a party's representative to appear before the commission after proper notice has been served, or the unauthorized departure of a party or a party's representative during a hearing, shall constitute waiver of a party's right to be heard in person or through counsel and of the party's right to present evidence and argument. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-127 Failure of witness to appear. In the event of a witness' failure to appear before the commission to testify as a witness after being subpoenaed, the commission may continue the hearing and request that a contempt citation be issued by the circuit court to compel such witness to appear before the commission. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-128 Evidence. (a) Any oral or documentary evidence may be received by the commission. However, the commission may exclude irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The commission shall give effect to the rules of privilege recognized by law.

(b) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original.

(c) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence.

(d) The commission may take notice of judicially recognizable facts. In addition, the commission may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

(e) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. [Eff 5/5/12] (Auth: HRS §§91-2, 91-10, 205-5.1) (Imp: HRS §91-9)

§12-201-129 Disclosure. (a) Any party may, by written demand, timely filed with the commission, and served upon any other party, request of any other party to the proceeding, the full disclosure of:

- (1) The identity of all witnesses to be called by the other party, unless prohibited by law; and
- (2) All exhibits, including, but not limited to copies of documents, photographs, and other tangible evidence to be introduced by the other party at the hearing.

(b) All demands for disclosure shall continue in effect for the duration of the proceeding and the party to whom the demand is directed shall be under a continuing duty to disclose the information requested when it becomes available.

(c) The information requested shall be disclosed to the requesting party at least seven business days before the hearing. Failure to comply with disclosure requirements may result in the exclusion of evidence subject to the disclosure request. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-130 Discovery. No party shall be permitted to conduct discovery via depositions, or interrogatories, requests for admissions, production of documents, or subpoena duces tecum. Nothing in this section shall limit the ability of the commission to use its subpoena power to do an investigation. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-131 Limiting testimony. To avoid unnecessary cumulative evidence, the chair may limit the number of witnesses and the time for testimony upon a particular issue. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-132 Removal from proceeding. Any person or persons who willfully disrupt a hearing or otherwise compromise the conduct of the hearing shall be removed from the hearing room. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-133 Co-counsel. Where a party is represented by more than one counsel, counsel may allocate witnesses between them, but only one counsel for a party may examine or cross-examine a witness or state any objections or make closing arguments. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-134 Subpoenas. (a) Requests for the issuance of subpoenas requiring the attendance of witnesses shall be presented to the chair in writing, and shall state the reasons why the testimony is material and relevant.

(b) Requests for the issuance of subpoenas shall be presented to the chair not less than ten calendar days before the scheduled hearing, unless otherwise ordered.

(c) No subpoena shall be issued unless the requesting party has complied with this section and gives the name and address of the witness. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-135 Fees and mileage. Witnesses summoned by subpoena shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State of Hawaii, and such fees and mileage shall be paid by the party requesting the subpoena. After notice and opportunity to be heard, the commission may also assess any party to any proceeding before the commission a reasonable fee or require reimbursement for court reporter expenses, and any other reimbursements for hearing expenses as determined by the commission. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-136 Oath. Witnesses shall be placed under oath or affirmation before testifying. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-137 Joint or consolidated appeals of a notice of violation. If two or more parties are entitled to appeal from a notice of violation and their interests are such as to make joinder practicable, they may file a joint notice of appeal and thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the commission upon the commission's own motion, upon motion of a party, or upon stipulation of the parties to the several appeals, if the consolidation will be conducive to the proper dispatch of business and to the ends of justice and will not unduly delay the proceedings. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-138 Substitution of parties. Upon motion and for good cause, the commission may order substitution of parties, except that in the case of death of a party, substitution may be ordered without the filing of a motion. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-139 Transcripts. Should any of the parties request transcripts or appeal the decision of the commission, the commission, after notice and opportunity to be heard, shall fairly allocate the transcription costs. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-140 Correction of transcript. Motions to correct a transcript shall be filed within seven working days after receipt of the transcript, unless otherwise directed, and shall be served on all parties. Such motions shall certify the date when the transcript was received. If no objections are received within ten days after date of service, the transcript will, upon approval of the commission, be changed to reflect such corrections. If objections are received, the motion will be acted upon with due consideration to the stenographic transcript of the hearing. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-141 Submission of proposed findings. A proceeding shall stand submitted for decision by the commission after the taking of evidence, and the presentation of such oral argument as may have been allowed. A party to the proceeding may submit to the commission proposed findings of fact, conclusions of law, and decision and order within ten days of the close of the hearing and

shall serve copies of said proposals on all parties. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-142 Standard of review for appeals of notices of violation. Unless otherwise provided by law, the commission may affirm the notice of violation or the commission may reverse the notice of violation if the substantial rights of the appellant may have been prejudiced because the notice of violation is:

- (1) Based on a clearly erroneous finding of material fact or erroneous application of the law; or
- (2) Arbitrary or capricious in its application; or
- (3) A clearly unwarranted abuse of discretion. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-143 Order to show cause proceedings, revocation or modification of conditions, orders, or permit. If the commission finds by a preponderance of the evidence that there has been a failure to perform a condition, representation, or commitment on the part of the permit holder, the commission may revoke, amend, or modify the permit, or allow the permit holder a reasonable opportunity to correct or remedy the failure. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-144 Issuance of decision and order. (a) Every decision and order adverse to a party to the proceeding shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the commission shall incorporate in its decision a ruling that addresses such findings.

(b) If the commission affirms a notice of violation issued by the director, the appellant shall pay any penalty imposed by the director at the office of the department within ten calendar days of the receipt of the commission's findings of fact, conclusions of law, decision and order. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-145 Reconsideration of decision and order. The decision and order of the commission shall be final and no motions for reconsideration shall be accepted by the commission. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-146 Service of decisions and orders. Decisions and orders shall be served by mailing certified copies to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a certified copy thereof. When a party to a proceeding has appeared by a representative, service upon the representative or counsel shall be deemed to be service upon the party. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

§12-201-147 Appeals; record. (a) Any party aggrieved by the final decision and order of the commission arising from a notice of violation or order to show cause may seek judicial review in accordance with section 91-14, HRS. Any order to stay the enforcement of the commission's decision shall be by an order of the circuit court pursuant to section 91-14, Hawaii Revised Statutes.

(b) Any party requesting judicial review shall serve a copy of the request upon the commission and all other parties in accordance with the Hawaii Rules of Civil Procedure.

(c) Unless the commission has been notified in writing of a party's request for judicial review within the time permitted for requesting judicial review, the commission, after the time for requesting judicial review has passed, may cause exhibits to be returned to the party introducing the exhibits, or order the disposal or destruction of the exhibits if the party does not wish its return, the party cannot be contacted, or if it is impractical or illegal to return such exhibits to the party. [Eff 5/5/12] (Auth: HRS §§91-2, 205-5.1) (Imp: HRS §91-9)

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