

AFFIDAVIT OF JO ANNE JOHNSON WINER

I, JoAnne Johnson Winer, state as follows;

1. I am a citizen of the United States of America, a resident of the County of Maui, State of Hawaii and I am over 21 years of age.

2. As a resident of West Maui, I was elected to the Maui County Council on November 2, 1999 and served for ten years until reaching term limitations and I currently serve as Director of Transportation for the County of Maui.

3. On or about 1999, I hired Kathy Kaohu as my executive assistant to the Maui County Council. Ms. Kaohu is currently an executive assistant to Maui County Council Member Don Guzman. She also assisted me in research on issues while on the Council and on issues related to "deferral agreements."

4. On or about late in 2000, my office was contacted by West Maui resident Christopher Salem regarding questions and concerns over the proposed design for a County of Maui Capital Improvement Project for Phase IV of Lower Honoapiilani Road relating to public safety, environmental impacts and view planes, since the project ran adjacent to his property.

5. In cooperation with Austin, Tsutsumi Associates, Inc. (project consultants for Phase IV) and County Project Manager Joe Krueger, Mr. Salem volunteered his professional knowledge and expertise to help create a more sensitive and safe redesign of the Phase IV roadway improvements, which I believe are still on file with the County.

6. As a member of the Maui County Council, I approved the expenditures for this Phase IV Capital Improvement Project during our annual budget hearings as a part of

our annual budget process. During this process, I understood from the information provided that the project would begin in 2002 and the construction would take about a year.

7. I do not believe that Council members were aware at the time the funding was approved that the Department of Public Works had failed to acquire the numerous land rights and necessary easements to initiate the field construction of the Phase IV roadway upgrades. To the best of my knowledge the Phase IV Capital Improvement Project is currently stalled and I am unclear if approvals and/or funding are in place.

8. In late 2000, Mr. Salem also brought to my attention outstanding obligations owed to the County of Maui from developer contractual agreements commonly known as “3 Lots or Less” roadway improvement “Deferral Agreements.”

9. We met with Councilmember Riki Hokama to determine if his historical knowledge could help us to understand this process and how these obligations could still be outstanding. Councilmember Hokama was not aware of who was tracking these obligations and was also concerned about these obligations. He did not want to use public monies to pay for improvements that were the responsibility of either developers or owners.

10. Since Mr. Salem owned a property along Phase IV of Lower Honoapiilani Road he shared his firsthand knowledge of how this worked with us. He advised us that in accordance with terms of a “3 Lots or Less” subdivision agreement recorded on his land title by our attorneys in Corporation Counsel, the original developers deferred the cost of roadway and drainage improvements. Mr. Salem explained that this obligated

current and future property owners within the 3 Lot subdivisions to pay to the County of Maui their “pro rata” share of the Phase IV Capital Improvement Project.

11. I later learned from Mr. Salem’s ongoing inquiries and notices to our County departments, the Department of Corporation Counsel, Department of Finance, and Department of Public Works that no department was assigned to track the collection and assessment of an unknown quantity of developers contractual financial obligations owed to the County of Maui. As a result, it was unknown how many of these agreements existed or how much money might be owed to the County of Maui. I believe I also received a letter from Public Works confirming that no records were being kept by their department of these agreements.

12. Through this process I also learned that subdivisions of 4 lots or more were required by ordinance to mitigate the impacts of their developments by installing complete roadway and drainage improvements along their frontages without any form of deferral or developer exemptions available.

13. I recall receiving a copy of a letter sent from Mr. Salem to Mayor Alan Arakawa alerting the administration that public funds were likely being used to pay for private developer’s financial obligations without any form of reimbursement to the County of Maui, since deferral agreements were not being tracked.

14. From 2002 and for years thereafter, I continued to raise my concerns in annual Maui County Council budget hearings regarding how these deferral agreements actually obligated the County of Maui to pay for and incur private owner’s financial obligations.

15. Prior to my tenure as a council member, I learned that the first three phases of Lower Honoapiilani Road had been upgraded and improved as County of Maui Capital Improvement Projects with County of Maui and Federal funds. However, no funds were provided through deferral agreement collections.

16. As I came to learn over time, on these 3 phases, the County of Maui paid with public taxpayer funds the entire costs of developer's roadway frontage and financial obligations without making any attempts to notice or collect upon the development debts owed.

17. My numerous inquiries to then Department of Public Works Director Milton Arakawa, requesting a list of developer's subdivisions that were subject to assessment and collection throughout Maui County, failed to achieve any results.

18. In 2007, out of frustration, I proposed legislation to the members of Maui County Council to Title 18 that was adopted (I think it was ordinance 3513 and Bill Number 77) by Maui County Council in 2007. I believed that by doing so, it would limit the expenditure of public funds on private developer's or owners financial obligations that had been ongoing since 1974.

19. On October 12, 2009, I proposed further language to a proposed Title 18 bill that would insure that financial obligations set forth in previously executed and recorded "deferral agreements" would be assessed and collected by the County of Maui.

20. The resulting Ordinance 3731 was enacted and insured that proper advanced Notice of Intent to Collect would be sent by the director authorized to administer the developer agreement at the commencement of future funding of roadway

Capital Improvement Projects and at the time land right of way acquisition was initiated by the County of Maui.

21. Ordinance 3731 insured that developers and their heirs would be obligated to pay a pro rata share of roadway capital improvements in order to prevent those costs from being shifted to Maui County taxpayers.

22. In compliance with the adopted ordinance, I recall that Director of Public Works, Milton Arakawa, then sent letters of Notice of Intent to Collect to multiple property owners along the Phase IV Capital Improvement Project of Lower Honoapiilani Road, including Mr. Salem.

23. Director Arakawa informed property owners that the County would ask them for a payment of the pro rata share of costs of the Phase IV roadway improvements as per the terms of their deferral agreements. Director Arakawa also notified the property owners that Phase IV construction would now commence in 2012.

24. Director Arakawa, I believe also informed the affected property owners that their pro rata share would likely be determined in consultation and agreement between other property owners within their subdivision. However, I could never find any authorization within our legislation that would allow such a notice and determination.

25. It was not until November of 2010 that Public Works Director Milton Arakawa finally disclosed to the County Council that he believed there were perhaps as many as 1800 open-ended deferral agreements affecting the land title of thousands of properties in Maui County that had been executed and recorded by Corporation Counsel. This was very disturbing to many of us.

26. I was also made aware by Mr. Salem that Director Arakawa had informed

the property owners in Mr. Salem's subdivision that 5 property owners from two separate overlapping 3 Lot subdivisions were obligated to pay a pro rata share of the 3 Lots or Less Subdivision Agreement. Mr. Salem asked me if I was aware of how this could happen and I advised him that I knew of no ordinance adopted by the Maui Council that would allow two separate overlapping subdivisions of the same parcel of land to twice defer their roadway infrastructure and financial obligations and I had no explanation as to how this could even happen.

27. In early 2011, I met with Mayor Alan Arakawa and Mr. Salem and I was instructed by Mayor to work with Corporation Counsel Attorney Ed Kushi and Mr. Salem to see if there was a possible formula or process for assessment and collection of the deferred developer financial obligations that the Mayor might present for consideration to the Maui County Council. The knowledge that both Mr. Salem and I had of the subject matter was why I believe we were asked to come up with some possible suggestions to the Mayor.

28. The effort to provide input never came to fruition since Corporation Counsel advised the Mayor that our input was not needed. I was also questioned by Corporation Counsel as to why I was even involved in this matter inasmuch as I was no longer a Councilmember. I explained that I had specific knowledge of the issue and felt that I could contribute to resolving the matter to the benefit of all concerned. I am aware that after Corporation Counsel countered Mayor Arakawa's directive, Mr. Salem took it upon himself as a private citizen to meet with Council members and their assistants to draft legislation to adopt a fair and reasonable process for collection and assessment of the developer's deferred financial obligations.

29. I read what I term the "Fairness Bill," prepared with assistance from Mr. Salem in cooperation with Council Member Elle Cochran's executive assistant Jordan Molina. The bill provided what I thought could be the start to achieving a fair and responsible process for collection and assessment of developer's deferred financial obligations. Mr. Salem advised that the bill also appeared to have support from members of the Maui County Council. I do not know what happened to the legislation beyond what I was told by Mr. Salem.

30. I am unaware if the Department of Public Works or Corporation Counsel ever addressed the concerns raised by Mr. Salem regarding the five owners with two overlapping three lot subdivisions. There should be some type of response as it does not appear to be allowed under our county ordinances. If it is not legal, then how can Corporation Counsel allow it to be permitted?

31. Corporation Counsel informed Mr. Salem, and I believe, during public testimony, our County Council as well as the general public, that releasing copies of the developer contractual agreements would be "an interruption of a legitimate government function". I did not agree with this interpretation.

32. I recalled reading in a Maui News article that Public Works Director David Goode publicly stated that Corporation Counsel deemed the "Fairness Bill" illegal. From what I understood, the "Fairness Bill" was reviewed by Council Services attorneys prior to being forwarded to the County Council for consideration and no issues regarding illegality were raised.

33. I question whether or not a written memorandum was ever issued by Corporation Counsel to the members of the Maui County Council explaining why the

“Fairness Bill” was unlawful or inconsistent with the 2010 Ordinance that was approved by Corporation Counsel. This was always a part of the standard procedure when I was on the Council.

34. During my years of public service as a Council Member of the County of Maui, the attorneys in Corporation Counsel always led me to believe that the “3 Lot or Less” contractual agreements drafted and recorded by the Department were collectable debts owed to the County of Maui.

35. Why the Fairness Bill that was submitted was not considered or an alternate proposal drafted so that monies owed to the people of Maui County were able to be collected? I was disturbed with the way Mr. Salem’s integrity was questioned and how his motivation to resolve this issue was portrayed both privately and publicly during the discussions surrounding the bill.

36. I believe Mr. Salem’s efforts in seeking responsible government over the past fifteen years were on behalf of the best interests of the citizens of Maui County. From what I personally witnessed, his dedication and commitment to the youth programs of West Maui has been exemplary despite the suffering his family has endured and continues to endure by bringing these issues into the public light.

37. It was recently brought to my attention that Public Works Director David Goode advised that the County of Maui “*may or may not*” be collecting upon the developer contractual obligations previously noticed for collection to property owners by Public Works Director Arakawa. I do not agree with this position as it contradicts the intent and stated language of ordinance 3731 that was publicly adopted by our Maui

County Council. Consistent with all legislation adopted by the Maui County Council, Ordinance 3731 was reviewed and approved by Corporation Counsel and is a law.

38. I have reviewed a letter from Director Goode, which was approved by Mayor Arakawa on January 9, 2012, wherein he stated his department has completed the cataloging of all known deferral agreements and it is his intent to work with the Department of Finance and Corporation Counsel to arrive at fair formula for calculation and assessment and notify the affected land owners of their required contributions.

39. I have also reviewed a letter from Director Goode on April 16, 2012, which provided the projected revenues from collection of developer deferral agreements on affected parcels along the South Kihei Road Capital Improvement Project.

40. I also reviewed a recent document showing Mr. Salem's analysis of the developer deferral agreements on residential, commercial, and industrial properties recorded by the Department of Public Works and Corporation Counsel throughout Maui County.

41. Why are public officials not bound to follow ordinance 3731 which required that Notices of Intent to Collect deferred developer contractual financial obligations were distributed? Why does it appear that the County is shifting private obligations to the public in violation of the County Charter?

42. An additional concern is the obligation to insure that there are no unfulfilled SMA Permit obligations wherein developers have failed to complete their roadway improvement and drainage mitigations that also may end up being paid for with County funds during Capital Improvement Projects. What is being done to insure that these obligations are being met and who is tracking them?

43. During a Maui County Council Infrastructure Management meeting on February 1, 2010, Attorney Galazin of Corporation Counsel informed the Council members of the different situations in which a developer may have to pay for roadway improvements and drainage mitigations, including obligations set forth in subdivision applications and SMA Permit studies and applications.

44. As I learned during the final years of my tenure as a Council Member, the Planning Department was not tracking SMA requirements that would insure compliance of developers in completing their SMA Permit roadway and drainage mitigations. They appear to rely solely on the integrity of developers and complaints from citizens to administer developer compliance.

45. I am deeply concerned that the SMA permitting process has become a means for private developers to skirt their infrastructure and environmental mitigation responsibilities, since enforcement may be absent or selective.

46. During my latter days as of member of the Maui County Council, I became aware that developers of Olowalu Mauka subdivision had failed to complete their subdivision obligations and environmental mitigations conditioned in an SMA Major Permit issued almost 10 years prior and as a result a lawsuit was filed by a private resident who was sold a property in the developers Olowalu Mauka subdivision.

47. My understanding was that the Olowalu subdivision received final subdivision approval from the County even though there were incomplete SMA Permit conditions. This occurred during the very same time period that Mr. Salem raised his concerns that developer's "3 Lots or Less" contractual agreements executed by Corporation Counsel were not being kept track of, assessed, or collected upon. Mr. Salem

also complained that his 3 lot subdivision was being re-subdivided a second time by Developer Lot 48A, LLC in violation of the Maui County Code and the SMA Permitting process.

48. As I learned from being called as a witness in legal arbitration proceedings involving a dispute over Developer Lot 48A, LLC's obligations to pay their pro rata share of the Phase IV Capital Improvements affecting the land title of Mr. Salem's property, the County Department of Public Works signed off on Developer Lot 48A, LLC's oceanfront subdivision with what I viewed as an incomplete and unfulfilled SMA Permit during the same time period whereby the same county department granted the Olowalu subdivision approvals with unfulfilled SMA Permit obligations.

49. I also learned that the Developer Lot 48A, LLC's attorney was working for the County of Maui Department of Corporation Counsel at the same time she was employed by Lot 48A, LLC in the legal proceedings. I saw nowhere in the procurement reports that this was disclosed to the members of the Council. I also learned Developer Lot 48A, LLC's SMA Permit studies were not provided to the arbitrator and they included the disputed roadway and drainage improvements to the frontage of Mr. Salem's property along of Phase IV of Lower Honoapiilani Road.

50. When I was informed that the former land planning firm of a county official was the same SMA consultant retained by the County of Maui to complete the SMA environmental studies and permitting for Phase IV of Lower Honoapiilani Road as well as being the SMA Permit consultant for the Developer Lot 48A, LLC for the re-subdivision of the "3 Lots or Less" subdivision I became extremely concerned. This is

the same subdivision in which Mr. Salem owned an original parcel of land abutting Phase IV of Lower Honoapiilani Road. To my knowledge there was no disclosure made to this effect.

51. I witnessed Mr. Salem's vehement protest and complaints that the overlapping subdivision of the original "3 Lots or Less" subdivision by Lot 48A, LLC required developer Lot 48A, LLC to obtain a SMA Major Permit through public hearings. My belief is that the one time exemption from an SMA Major permit was exhausted on the original 3 Lots or Less Subdivision. I still question how this could happen if laws are in place to protect the rights of the public?

52. Mr. Salem further argued that the engineering valuation for the Lot 48A, LLC's SMA permit underestimated the impacts of the oceanfront subdivision and costs associated with the development to intentionally avoid environmental studies and public review. Even after my inquiries to the Planning Department about this issue and also the SMA requirements I do not believe this has ever been resolved or investigated.

53. I was made aware that deferral agreements recorded by Corporation Counsel on Mr. Salem's property along with Director Arakawa's written notice to Mr. Salem caused residential appraisers and real estate brokers to refuse to represent his property for sale.

54. I was also advised that Mr. Salem attempted to pay the County of Maui a pro-rata share of the "3 Lots or Less" subdivision agreement to try to remove the open ended lien on his property during an open escrow even though it was developer Lot 48A, LLC's obligation to do so. I was told by Mr. Salem that Corporation Counsel refused to accept his payment or remove the lien on his property to facilitate the escrow.

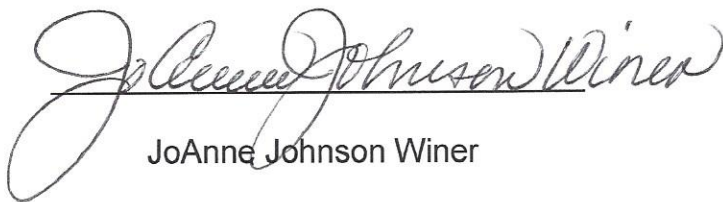
55. I remain dedicated to the people of Maui County and I truly believe that our citizens expect all public officials to protect their interests and act with integrity.

56. As a former member of the Maui County Council, I witnessed time and again where private citizens were forced to uphold the ordinances adopted by the Maui County Council to protect citizen's individual and public property rights, when this should in effect be the obligation of the County of Maui.

57. I have gone through Mr. Salem's lengthy and detailed timelines and also his analysis of what has taken place and I would agree that what he has uncovered appears to reveal a failure to enforce laws uniformly, collect monies due the County, adhere to SMA and subdivision laws and disclose possible conflicts of interest. These issues should be thoroughly investigated and resolved, which I believe Mr. Salem has attempted to do on a number of occasions.

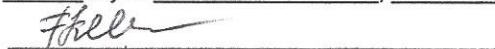
58. Mr. Salem should not be punished for shining the light on these issues but thanked for having the courage to bring them to the County in the first place.

59. I am prepared to testify under oath to the events described in this affidavit to insure that the public's trust is fairly represented.

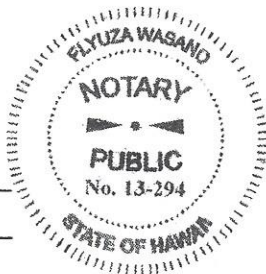

JoAnne Johnson Winer

State of Hawaii
County of Maui

Sworn to and subscribed before me on
day of AUG 11 2015



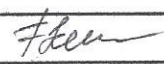
Flyuza Wasano
Notary Public, State of Hawaii
My commission expires 08/11/2017



13



Doc. Date: 8-11-15 # Pages: 14
Flyuza Wasano
Doc. Description: Second Circuit Affidavit

 8-11-15
Notary Signature Date
NOTARY CERTIFICATION