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**IN THE CIRCUIT COURT OF THE THIRD CIRCUIT**

**STATE OF HAWAII**

PUNA PONO ALLIANCE, a	)	Civil No. 15-1-0034
Hawai`i non-profit association, <i>et al.</i> ,	)	(Hilo) (Declaratory Judgment)
	)	
Plaintiffs,	)	PLAINTIFFS' MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT; MEMORANDUM
vs.	)	IN SUPPORT OF MOTION; NOTICE OF
	)	HEARING and CERTIFICATE OF SERVICE
PUNA GEOTHERMAL VENTURE,	)	
a Hawai`i Partnership, <i>et al.</i> ,	)	<u>Hearing:</u> Thursday, July 21, 2016
	)	<u>Time:</u> 8:00 a.m.
Defendants.	)	<u>Judge:</u> Hon. Greg K. Nakamura
_____	)	Trial date not set

**PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs Puna Pono Alliance, Jon Olson and Hillary E. Wilt move this honorable Court for an order granting partial summary judgment declaring the enactment of Hawai`i County Code § 14-114 was authorized by Hawai`i Revised Statutes (HRS) § 46-17.

The grounds for this motion are that HRS § 46-17 resolves any Defendants' claim that County Code § 14-144 is preempted by State law.

This motion is premised upon Rules 7 and 56 of the Hawai`i Rules of Civil Procedure, the supporting memorandum filed herewith, and the entire record herein.

DATED: Hilo, Hawai`i, \_\_\_\_\_, 2016.

\_\_\_\_\_  
Gary C. Zamber  
Attorney for Plaintiffs

**IN THE CIRCUIT COURT OF THE THIRD CIRCUIT**

**STATE OF HAWAII**

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

**MEMORANDUM IN SUPPORT OF MOTION**

Plaintiffs Puna Pono Alliance, Jon Olson and Hillary E. Wilt seek partial summary judgment declaring that the enactment of Hawai`i County Code § 14-114 was authorized by Hawai`i Revised Statutes (HRS) § 46-17.

Hawai`i Rules of Civil Procedure (HRCP) Rule 56 requires that parties moving for summary judgment must show the absence of any genuine issue as to material facts and that under applicable principles of law they are entitled to judgment. *See also First Hawaiian Bank v. Weeks*, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989), and *GECC Financial Corp. v. Jaffarian*, 79 Hawai`i 516, 521, 904 P.2d 530, 535 (App. 1995).

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

**Section 14-113. Definitions.**

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

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

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

**Section 14-114. Restrictions.**

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

Defendant Puna Geothermal Venture (PGV) operates a Kapoho geothermal facility where, from time to time, it drills deep wells in attempts to locate a geothermal energy resource. PGV claims County Code § 14-114 is preempted by State law<sup>1</sup> – a claim that is contradicted by provisions of HRS § 46-17:

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

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

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

(Emphasis supplied.)

County Code § 14-114 is consistent with noise rules adopted by the Department of Health (DOH) under the authority of HRS Chapter 342F, specifically the following:

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<sup>1</sup> On April 14, 2015, this Court considered separate motions to dismiss filed by PGV and the County of Hawai`i and decided that Plaintiffs’ first amended complaint stated a claims for declaratory relief as to the enforceability of County Code § 14-114. The Court further said that for resolution of the preemption issue it would be best to have the State as a party. Plaintiffs’ second amended complaint then added DLNR as a party.

In answering the second amended complaint, both PGV and the County asserted preemption as an affirmative defense to the enforceability of County Code § 14-114. The State did not assert preemption as an affirmative defense.

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

Hawai`i Administrative Rules (HAR) § 11-46-13 (emphasis supplied).

HRS § 46-17 says counties may make laws regulating excessive noise, if the laws are not inconsistent with a DOH noise rule. The DOH noise rule most relevant to Code § 14-114, HAR § 11-46-13, says a County law may afford more protection to the public than the state. *State v. Ewing*, 81 Hawai`i 156, 160-63, 914 P.2d 549, 553-56 (App. 1996), held an ordinance prohibiting public use of a device to reproduce excessively loud sound was not preempted by state statute and regulations regarding noise pollution.

The fact that regulating noise is a primary focus of Code § 14-114 is illustrated by PGV's memorandum supporting its March 3, 2015, motion to dismiss the Plaintiffs' first amended complaint.<sup>2</sup> *See, e.g.*, pages 2 (citing DOH noise standards), 4 (citing noise limits in PGV's County permit), and 5 (citing noise requirements in its DLNR drilling permit) and Exhibit K (a November 12, 2014, letter to the Hawai`i County Council from DLNR's Chair William Aila<sup>3</sup> saying, in relevant part, "we recognize that *noise may be construed as a public nuisance and one of the main reasons for the Hawaii County Council to consider this measure*" – emphasis supplied) and Exhibit L (a letter from the County Planning Director dated February 13, 2015, approving noise limiting measures and noting that he will follow up with PGV to ensure "execution of the stated noise mitigation plans are implemented throughout the duration of the KS-16 drilling project").

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<sup>2</sup> Pursuant to Rule 201(d) of the Hawai`i Rules of Evidence, this court may take judicial notice of its own records. *See also State v. Akana*, 68 Haw. 164, 165, 706 P.2d 1300, 1302 (1985).

<sup>3</sup> Mr. Aila was writing to the County Council with regard to its 2012 Bill 292 that became Ordinance 12-151, effective December 5, 2012, and was codified as Article 19 (including § 14-114, the County law that is the subject of this litigation.)

HRS § 46-17 explicitly authorizes a county to enact such an ordinance within a limitation that “in any case of conflict between a statute or rule and an ordinance, the law affording the most protection to the public shall apply” and a further provision that the ordinance not be inconsistent with any DOH noise rule.

The only DOH noise rule relevant to HRS § 46-17 is HAR § 11-46-13 that says “in any case of conflict between the statute or rule and ordinance, the law which affords the most protection to the public shall apply.”

The County night drilling ban satisfies both the statutory and regulatory criteria of affording more protection to the public than State statutes or rules.

Therefore, this Court should enter partial summary judgment declaring enactment of Hawai`i County Code § 14-114 was a legislative act authorized by HRS § 46-17 and, as such, is not preempted by State law.

DATED: Hilo, Hawai`i, \_\_\_\_\_, 2016.

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GARY C. ZAMBER  
Attorney for Plaintiffs

**NOTICE OF HEARING**

Please take notice that the foregoing motion will come on for hearing at 8:00 a.m., on Thursday, the 21<sup>st</sup> day of July, 2016, or as soon thereafter as the parties may be heard, before the Hon. Greg K. Nakamura in his courtroom at Hale Kaulike, 777 Kilauea Avenue, Hilo, Hawai`i.

**CERTIFICATE OF SERVICE**

I CERTIFY that a copy of the foregoing was on this date duly served by desposit with the U.S. Postal Service, first class postage prepaid, addressed to:

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

Attorney for Defendant Puna Geothermal Venture

and

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

Attorney for Defendant County of Hawai`i

and

Cindy Y. Young, Esq.  
Deputy Attorney General  
Department of the Attorney General  
465 South King Street, Room 300  
Honolulu, HI 96813

Attorney for Defendant State of Hawai`i

DATED: Hilo, Hawai`i, \_\_\_\_\_, 2016.

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GARY C. ZAMBER  
Attorney for Plaintiff