DO NOT CIRCULATE
CONFIDENTIAL PRE-DECISIONAL DOCUMENT

LUC Docket No. A15-798
Waikapū Properties LLC, et.al.
LUC Determination As Accepting Authority
and
that an EIS is Warranted

Staff Report

Action
April 29, 2015

_____
Daniel Orodenker, Executive Officer

Submitted: April 24, 2015

TABLE OF CONTENTS

Sections. **Page No.**

1. Introduction……... 3

2. Filing History..... 4

3. Explanation of Hearing Process with Staff Analysis and Recommendation..... 5

4. Proposed Language for a Motion 8

5. FOR COMMISSIONERS REFERNCE:
Comparison of EA and EIS Review Requirements 9

Introduction

Any project that's proposed is looked at to see whether it "triggers" the need to conduct a detailed analysis of impacts to natural and cultural resources, physical infrastructure, and government programs and facilities. This is referred to as Chapter 343 compliance (of the Hawai`i Revised Statutes – State laws) and may require production of either an Environmental Assessment (EA) or Environmental Impact Statement (EIS).

If a project triggers the need to conduct an EA or EIS; the next question is which government agency will be the accepting authority. The Hawai`i Supreme Court has ruled that an EA/EIS should be done at the earliest practicable time or when the first regulatory permit is required. For most projects seeking a land use district boundary amendment from the State Land Use Commission (Commission) this would mean the Commission would be the first before any county permitting could move forward. One exception to that is when a county General Plan or Community/Development Plan amendment is necessary (it is one of the triggers for Chapter 343). In such cases, an applicant could decide to ask the county to be the accepting authority. We've seen applicants go with the Commission sometimes and a county at others. In this case the applicant has decided to ask the Commission to be the accepting authority rather than the County of Maui.

Until 2014, if a project triggered Chapter 343, HRS, the applicant would have to first produce an EA. If the EA found that the project would have significant effects, then they would also have to conduct a more detailed EIS. In 2014, the law was changed to allow applicants to request of an accepting authority the ability to go directly to preparing an EIS when it could reasonably be determined that a proposed project would likely have significant effects.

In this case, the Commission has been asked to: (1) agree to be the accepting authority for the applicant's EIS, and (2) agree that based on the information they have presented that their project will likely have significant effects and they should go directly to preparing an EIS rather than an EA. Staff has provided an analysis of applicant's motion and recommendations for Commission action.

2. Filing History

On April 16, 2015, Waikapū Properties LLC, MTP Land Partners LLC, William S. Filios, Trustee of the William S. Filios Separate Property Trust dated April 3, 2000, and Waiale 905 Partners LLC ("Petitioner") filed its Petition for District Boundary Amendment, and Exhibits 1-18. In addition, Petitioner filed Petitioner's Motion to Designate the Land Use Commission as Approving Agency [1] for an Environmental Statement under HRS Chapter 343 and For Authority to Prepare Environmental Impact Statement; Memorandum in Support of Motion; and Appendix 1.

On April 21, 2015, the Commission mailed the Meeting Notice and agenda notice for the April 29, 2015 meeting to be held in Kahului, Maui to the Parties, the Statewide and Maui mailing lists. The Meeting Notice and Agenda where also filed with the Lieutenant Governor's office and posted electronically to the Commission website.

On April 23, 2015, Petitioner filed an Affidavit of Notice of Filing Petition, and Exhibits 1-3.

[1] The Petitioner's Motion calls the Commission "the approving agency," however, the correct terminology is the accepting authority.

3. Explanation of Hearing Process with Staff Analysis and Recommendation

At its meeting on April 29, 2014, the Commission is scheduled to take action on the following requests contained in Petitioner's Motion:

1. Determining whether the Commission will be the accepting agency for the EIS for the Project.

   There is no "trigger" for automatic Commission action pursuant to Chapter 343, Hawai`i Revised Statutes (HRS); meaning that a petition for a State land use district boundary amendment does not, by itself, require either an EA or EIS, unless it involves the State Conservation District. However, an EA or EIS will be required in this case because the Project will involve the use of State or County of Maui lands [2]; and an amendment to the Wailuku-Kahului Community Plan (pursuant to Section 343-5 (a) (1) and (6), HRS and Section 11-200-6 (b) (1) (A) and (2)(A), Hawai`i Administrative Rules (HAR).

   Staff Analysis and Recommendation

   The "accepting authority" is an agency that issues an approval prior to actual implementation of an action and that agrees to process the Hawai`i Environmental Policy Act (HEPA) review for the applicant's proposed action.

   The use of State or county lands is a geographical category trigger described under Section 343-5(a)(1), HRS and Section 11-200-6 (b) (1) (A), HAR. And, an amendment to an existing county community plan is an administrative category trigger described under Section 343-5(a)(6), HRS and Section 11-200-6 (b) (2) (A), HAR.

   Petitioner has stated that "(F)iling of the Petition is the earliest practicable time for an accepting agency to determine whether an EIS shall be required to assess the Project pursuant to HRS Chapter 343" (see pg. 3 of Petitioner's Memorandum in Support of Motion).

   Such a determination prior to any government approval is pursuant to Sierra Club vs. Office of Planning, 109 Hawai`I 411, 126 P.3d 1098 (2006). The Commission must determine whether an EA or EIS for a Project is required, and if so, then review and approve the EA or EIS before conducting any hearings leading to a decision and order on a petition for land use district boundary amendment. This is also why the LUC will not accept a petition as properly filed for processing until any Chapter 343, HRS compliance is complete.

   As this Project triggers the requirement for HEPA review; and the petition filed with the Commission is "the earliest practicable time" in the sequence of seeking governmental approvals for the Project; then the Commission is the appropriate agency to review and accept any Chapter 343, HRS compliance for this Project.

[2] The Project will require connections to, and repair and improvements of, wastewater transmission lines and water service lines operated by the County of Maui.

2. Determining whether Petitioner should proceed directly to preparing an environmental impact statement preparation notice (EISPN).

   Routinely, in petitions for district boundary amendments involving reclassification of lands that trigger Chapter 343, HRS compliance; the Commission determines whether an EA is sufficient through its issuance of an Anticipated Finding of No Significant Impact (AFONSI) or that the Petitioner should instead prepare the more extensive EIS. However, in 2012 (Act 172, SLH 2012), the Legislature amended Section 343-5, HRS, with a new subsection (e) that provides:

   > "…..if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, the agency may authorize the applicant to choose not to prepare an environmental assessment and instead prepare an environmental preparation notice as provided by rules."

   The question before the LUC is whether to authorize the applicant/Petitioner to forgo preparation of an EA and instead proceed to producing an EISPN which will precede a draft EIS.

<u>Staff Analysis and Recommendation</u>

The State Department of Health, Office of Environmental Quality Control (OEQC) is the agency with the responsibility to oversee compliance with Chapter 343, HRS. OEQC has yet to promulgate specific rules to provide guidance to agencies deciding or being asked to decide whether an applicant should go directly to preparing an EIS rather than to first prepare an EA (OEQC rules last amended in 1996) [3]. Currently guidance comes directly from the statutory language quoted in the previous paragraph and defers to the "judgment and experience" of an agency; and from OEQC's Citizens Guide (updated in October 2014).

OEQC has identified thirteen administrative criteria for significance for agencies in determining that an action may have a significant impact on the environment (Section 11-200-12, HAR). When an agency determines that an applicant may proceed directly to EIS preparation; OEQC recommends that the agency clearly identify what elements of the significance criteria influenced their decision.

The Petitioner has specifically stated that "…an EIS should be required to assess the impacts of the Project on the environment and to identify mitigative measures which can be incorporated to lessen the impact on the environment that will arise from this Project." (Petitioner's Memorandum, page 6) The significance criteria identified by Petitioner were: (1) Agricultural land will be lost; (2) Economic and social welfare will be impacted; (3) Population and public facilities will be affected; (4) Scenic vistas and view planes will be impacted; and (5) Energy consumption will be increased. (Petitioner's Memorandum, pgs. 4-6)

Clearly there are statutory triggers for requiring compliance with Chapter 343, HRS – the use of State or county lands, and required amendments to county general or community plans. In addition, based on Petitioner's statement and staff experience, there are several OEQC significance criteria (from Section 11-200-12 (b), HAR) met, as the Petition:

1. Involves an irrevocable commitment to loss or destruction of a natural or cultural resource
   - For this proposed Project the impacts would likely be to agricultural lands, historic sites
4. Substantially affects the economic or social welfare of the community or State

[3] OEQC is currently updating the administrative rules addressing EIS processes under Chapter 11-200, HAR. These draft rules are open for public comment and review.

- For this proposed Project the impacts would likely be to provision of public services – roads, water, sewer, fire, police, education; affordable housing.

6. Involves substantial secondary impacts, such as effects on public facilities
    - For this proposed Project the impacts would likely be to local and highway traffic, water and wastewater facilities, and schools.
12. Substantially affects scenic vistas and viewplanes identified in county or state plans or studies
    - Impacts to unobstructed views of the West Maui Mountains.
13. Requires substantial energy consumption
    - The Project will create over 1,400 residences with approximately 8,000 residents that will cause a substantial increase in energy consumption.

The size and scope of the proposed Project, in the judgment and experience of Commission staff, may have a significant impact on the environment. Therefore, pursuant to Chapter 343-5(e), HRS, the Commission should direct the applicant to proceed directly to a comprehensive EIS that starts with the preparation of an EIS preparation notice (EISPN).

4. Proposed Language for a Motion

Move to approve Petitioner's motion as follows:

1) To identify the Land Use Commission as the "accepting authority" to process and review applicant's proposed actions pursuant to Chapter 343, HRS, as the Petition to amend land use district boundaries represents the earliest practicable time to determine whether an environmental impact statement (EIS) shall be required;

2) That the proposed Project requires the use of State or county lands (pursuant to Section 343-5(a)(1), HRS); will require a county community plan amendment (pursuant to Section 343-5(a)(6); and may have a significant impact on the environment as it may (i) involve an irrevocable commitment or loss or destruction of a natural or cultural resource; (ii) substantially affect the economic or social welfare of the community or State; (iii) involves substantial secondary impacts; (iv) substantially affects scenic vistas and viewplanes and, (v) require substantial energy consumption; and,

3) Direct the Petitioner to proceed directly to the preparation of an environmental impact statement preparation notice (EISPN) because the Commission has reviewed the Petition and draft EISPN and based on its judgment and experience, informs the applicant that under Chapter 343-5(e), HRS, the proposed action may have significant effects requiring the preparation of a full environmental impact statement.

5. FOR COMMISSIONERS REFERENCE: Comparison of Environmental Assessment and Environmental Impact Statement Requirements

EA and EIS Comparisons

The action before the Commission is to determine whether, based on its judgment and experience, the proposed action will likely have a significant effect, and that an EIS will be required. The following comparisons between an EA and EIS are provided for your information. Table A provides a comparison of the time frames associated with the EA and EIS review processes. Table B compares the requirements for an EA and EIS.

In discussion with representatives for Petitioner, they have represented a concern that if they follow the EA path and impacts of their project are found to be significant, as they expect them to be; then they will have spent considerable time going through the EA review process and still have to go through the EIS review process. They asked to take advantage of the statutory change made by the Legislature in 2012 that allows an agency to authorize an applicant to go directly to preparing an EIS when its determined that a proposed action will likely have a significant effect.

In summary, both documents are required to provide similar disclosures with the following additional requirements for an EIS:

- Development alternatives;
- Relationship to land use plans, policies, and controls vs. listing of permits and approvals needed;
- Descriptions of short-term and long-term effects;
- Descriptions of irreversible and irretrievable commitment of resources;
- Discussion of unavoidable environmental effects;
- Summary of unresolved issues; and
- Various response and verification requirements.

Both documents provide discussion of the anticipated impacts and proposed mitigation measures for a proposed project. But, the EIS provides a more extensive disclosure of direct, indirect, and cumulative impacts through various technical studies that may be subject to two (2) public review periods. This distinction does not preclude the disclosure of various technical studies in the DEA if warranted by consultation comments and project scope.

TABLE A: Comparison of EA and EIS Review Process	
EA Public Review Process	**EIS Public Review Process**
Early consultation – no specific time frame	Pre-consultation – no specific time frame
DEA comment period – 30 days	EISPN consultation period – 30 days
FEA preparation – no time frame	DEIS consultation period – 45 days
	FEIS preparation – no time frame
Litigation: Within 30 days after publishing of the FONSI.	Litigation: Within 120 days after action/approval for a project with applicable Chapter 343, HRS requirements that was not completed. Within 60 days after the publishing of the EISPN. Within 60 days after the acceptance of an FEIS.

Table B: Comparison of EA and EIS requirements, Chapter 343, HRS	
EA Content Requirements	**EIS Content Requirements**
Agency submittal letter/anticipated determination.	Table of contents.
Identification of approving agency.	A summary of the FEIS.
Identification of agencies consulted.	A needs/purpose statement.
General description of the action's technical, economic, social, and environmental characteristics; time frame; and funding/source.	Project description (site and regional maps, statement of objectives, general description of technical/economic/social/environmental characteristics, use of public funds or lands, phasing/timing of action, summary technical data, and historic perspective).
Summary description of the affected environment, (suitable and adequate regional, location and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps).	Development alternatives including, no action, other alternatives such as different actions/locations/designs, and postponing action pending further studies.
Identification and summary of impacts.	Site and regional environmental settings.
Proposed mitigation measures.	Relationship to land use plans, policies, and controls.
Alternatives considered.	Discussion of indirect, direct, and cumulative impacts.
Discussion of findings and reasons supporting the agency anticipated determination.	Descriptions of short-term and long-term effect.
List of all required permits and approvals (Federal, State, and County).	Descriptions of irreversible and irretrievable commitment of resources.
Written comments and responses to the early consultation provisions.	Discussion of unavoidable environmental effects.
Discussion of findings and reasons supporting the agency determination.	Proposals for mitigative measures and/or actions.
Written comments and responses to the DEA public review comments.	Summary of unresolved issues.
	Listing of government agencies, organizations and individuals consulted in the FEIS preparation.
	Reproductions of all comments received and responses sent.
	Verbatim changes specified in the responses sent.
	Incorporation of substantive comments received on the DEIS.
	Formatting of the document to distinguish changes made in the DEIS.
	Signature of applicant on the FEIS to indicate documents were prepared under the signatory's direction.