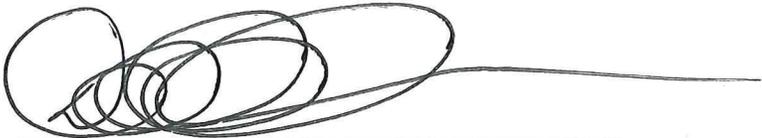


LUC Docket No. DR15-53
KA `OHANA O KALAUPAPA
Petition for Declaratory Order

Staff Report

Action Hearing
October 16, 2015

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal tail extending to the right.

Daniel E. Orodener, Executive Officer

Submitted: October 13, 2015

TABLE OF CONTENTS

| <u>Sections.</u> | <u>Page No.</u> |
|--|-----------------|
| 1. Introduction..... | 3 |
| 2. Courses of Action for Declaratory Rulings | 4 |
| 3. Explanation of Hearing Process | 5 |
| 4. Proposed Motion..... | 7 |
| 5. Memorandum from Deputy Attorney General | 8 |

1. INTRODUCTION

On September 9, 2015, Ka `Ohana O Kalaupapa (“Petitioner”)¹, by and through its attorney, Tom Pierce, Attorney at Law, LLLC, filed a Petition for Declaratory Order (“Petition”), Exhibits 1 to 17, and a Certificate of Service.

On September 16, 2015, the Commission mailed the Declaratory Order filing notice to the Parties and others.

On September 28, 2015, the Office of Planning (“OP”) filed OP’s State of Hawai`i’s Response to Petition for Declaratory Order; Exhibits A to B, and a Certificate of Service.

On September 29, 2015, the Commission received written public testimony from Clarence “Boogie” Kahilihiwa on behalf of Ka `Ohana O Kalaupapa, which included a Petition of Support signed by residents of Kalaupapa, family members, and long-time friends of the community.

On October 6, 2015, the Department of Land and Natural Resources, State Parks Division, filed a No Comment letter.

On October 8, 2015, the LUC mailed the Meeting Agenda and Hearing Notice for the October 16, 2015, meeting to be held in Honolulu, island of O`ahu, Hawai`i; to the Parties and the O`ahu, Maui, and Statewide mailing lists.

¹ Ka `Ohana O Kalaupapa is a Native Hawaiian organization under the National Historic Preservation Act (Public Law 89-665) and a Hawai`i non-profit corporation and tax exempt public charity under Section 501(c)(3) of the Internal Revenue Code – for the purposes of conducting educational, charitable, and preservation activities relating to Kalaupapa and its community.

2. COURSES OF ACTION ON DECLARATORY RULINGS

Section 15-15-100, Hawai'i Administrative Rules (HAR) provides the alternative actions required of the Commission for a petition for declaratory order². The Commission must consider at this time whether it will (1) deny the Petition, (2) issue a declaratory order, or (3) set the matter for hearing³.

Pursuant to Section 15-15-100, HAR, the Commission may also dismiss a petition for declaratory order, without notice or hearing, if it deems that the petition fails in material respect to comply with the declaratory order requirements of subchapter 14, HAR.

Pursuant to Section 15-15-100, HAR, the Commission, for good cause, may deny a petition for declaratory order if any one of the four criteria is met. Based on review of the current Petition, staff has made the following assessment of its conformance to the stated criteria:

1. The question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future.

The question of whether a proposed use is permissible within the State Agricultural District is not speculative or hypothetical as it involves a currently proposed use subject to a 65-year lease with the Department of Land and Natural Resources (DLNR) and a Department of Health (DOH) Executive Order providing Petitioner a physical location for the proposed use. The Petition appears to present a sufficient factual basis to determine whether these issues warrant review and action by this Commission.

2. The Petitioner's interest is not of the type which confers sufficient standing to maintain an action in a court of law.

The Petitioner has membership and organizational standing. Petitioner is a Native Hawaiian non-profit organization and a tax-exempt public charity under Section 501(c)(3) of the Federal Internal Revenue code. The Kalaupapa Memorial Act of 2009 directed the Secretary of the Interior to authorize Petitioner to establish a memorial within the boundaries of Kalaupapa National Historic Park. The Petitioner has negotiated a 65-year lease in concept with DLNR and is authorized through an Executive Order from DOH to locate the proposed project in a specific physical location. Therefore, the Petitioner is an interested party that may be affected by the issue raised in the Petition as well as by the applicability of the statutory provisions, rules and orders.

3. The issuance of the declaratory order may adversely affect the interests of the State, the commission, or any of the officers or employees in any litigation which is pending or may be reasonably be expected to arise.

There is no existing or anticipated litigation with respect to the proposed project at Kalaupapa.

4. The Petitioner requests a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission.

² Section 15-15-100(a), HAR, requires the Commission to act on the Petition within 90 days after it is submitted. The Petition was submitted to the Commission on September 9, 2015. Therefore, the 90-day timeframe expires on December 8, 2015.

³ Pursuant to Section 15-15-100(b), HAR, if the matter is set for hearing, the Commission is required to render its findings and decision within 120 days after the close of the hearing or, if post hearing briefs are filed, 45 days after the last brief is filed, unless a different time period is stated at the hearing.

The issues raised in the Petition relate to statutory provisions and their interpretation under Section 205-4.5, HRS, and Sections 15-15-23 and -25, HAR. The proposed project lies within the County of Kalawao⁴ which is under the jurisdiction and control of the State Department of Health as expressed in Chapter 326, HRS. Nothing in Chapter 326, HRS, excludes the County of Kalawao from the requirements of Chapter 205, HRS, nor authorizes the Department of Health to decide matters relating to the County of Kalawao arising under Chapter 205, HRS. Therefore, Chapter 205, HRS, is applicable to the lands within the County of Kalawao and the Commission has jurisdiction to interpret the applicability of 205-4.5, HRS, with respect to the proposed use.

3. EXPLANATION OF HEARING PROCESS WITH STAFF RECOMMENDATION

On September 9, 2015, Petitioner filed its Petition for Declaratory Order (“Petition”), Exhibits 1 to 17, and a Certificate of Service. The Petition requests a declaratory order from the Land Use Commission that the proposed Kalaupapa Memorial (“Project”) is a permitted use under Section 205-4.5, Hawai‘i Revised Statutes (HRS). In addition, the Petitioner, as a Hawai‘i non-profit and public charity under Section 501(c)(3) of the Federal Internal Revenue Code, has requested a waiver of the Declaratory Order filing fee.

The proposed Project would establish a memorial within the boundaries of Kalaupapa National Historic Park on the island of Moloka‘i, Hawai‘i; to honor and perpetuate the memory of those individuals who were forcibly relocated to Kalaupapa Peninsula from 1866 to 1969.

At its meeting on October 16, 2015, the Commission is scheduled to take action on the following:

1. Determining whether the Commission will waive the filing fee for the Declaratory Order.

Section 15-15-45.1 (a), HAR, provides for fees to be charged for Declaratory Orders. Section 15-15-45.2, HAR, provides that the fees are non-refundable. However, Section 15-15-34, HAR, allows the Commission to waive any of its rules for good cause shown and in order that strict enforcement of a procedural rule would not impose a hardship.

The Petitioner is a Hawaiian non-profit organization and a tax-exempt public charity under Section 501(c)(3) of the Federal Internal Revenue code.

The Petitioner represents a legally recognized non-profit organization seeking to construct a public memorial on public lands. Good cause exists to waive the Commission’s filing fees in this instance so that the organization’s limited funds can be utilized to further the proposed Project.

2. Determining whether the Commission has jurisdiction to render a decision in this matter.

Section 326-34(a), HRS, sets out the geographic and jurisdictional extent of the County of Kalawao. The County of Kalawao is distinct from and not a part of Maui County. The State Department of Health (DOH) has been given limited jurisdiction over Kalawao: to appoint and pay a sheriff, to adopt rules, and the director of DOH serves as mayor. Nothing in Chapter 326, HRS, excludes the County of Kalawao from the requirements of Chapter 205, HRS. Therefore, Chapter 205, HRS, is applicable to all lands within the

⁴ The County of Kalawao consists of lands on the northern coast of the island of Molokai that includes the peninsula of Kalaupapa, the Kalaupapa National Historic Par, and is under the jurisdiction and control of the State Department of Health.

County of Kalawao. Neither DOH nor the County of Kalawao has jurisdiction over matters relating to Chapter 205, HRS.

Section 15-15-98, HAR, provides that the Commission may issue a declaratory order as to the applicability of any statutory provision, or rule, or order of the Commission. The question being posed to the Commission with respect to permissible uses within the State Agricultural District is clearly within the Commission's jurisdiction.

Both the Petitioner and OP have provided factual background information describing the jurisdiction of DOH with respect to the County of Kalawao. In addition, information has been provided clearly showing that the Commission has jurisdiction to decide this matter as it relates to Chapter 205, HRS.

Pursuant to Chapter 205, HRS, the Commission should answer the question posed by the Petitioner regarding whether the proposed use is a permissible use under Section 205-4.5, HRS.

3. Determining whether the proposed use is permitted under Section 205-4.5, HRS.

Section 205-2, HRS, sets forth permissible uses on all agricultural lands. Section 205-4.5, HRS, sets forth a more restrictive list of permissible uses on lands classified by the Land Study Bureau (LSB) as A and B.⁵ If a use is permissible in Section 205-4.5, HRS, on A or B lands (the most productive); then consistent with the structure of Chapter 205, HRS, such a use would also be permissible on lands classified C, D, E, or U.

Petitioner's Exhibit 15 provides a map show the LSB classification for the project area; the proposed project site appears to be either Class C, D, or E.

The proposed memorial would consist of a 10-foot wall containing the names of the approximately 8,000 Kalaupapa residents who died at Kalaupapa. The proposed memorial would be located within the Old Baldwin Boys Home site, which is listed on the National Register of Historic Places. The wall would be an improvement to an existing historic site.

Section 205-4.5(a)(8) states as follows:

“Within the agricultural district all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be restricted to the following permitted uses:

(8) Retention, restoration, rehabilitation, or improvement of buildings or sites of historic or scenic interest.”

The proposed memorial would be considered a permissible use on LSB rated A or B lands pursuant to Section 205-4.5(a)(8), HRS; and therefore the proposed use would also be considered a permissible use on

⁵ The Overall Productivity Ratings from the Detailed Land Classification System, developed by the Land Study Bureau, group soils into land types based on soil and productive capabilities. In developing this system the LSB evaluated several land types based on factors including soil profile, slope, erosion, and rainfall to determine its overall or general productive capacity and not for any specific crop. Under this system, lands are classified into one of five categories from “A” to “E” with A being the most productive and E being least productive. Lands rated “U” are unclassified.

LSB rated C, D, or E lands. The Commission's rule, Section 15-15-25(b), HAR, is consistent with an interpretation that the requested use is a permitted use⁶. No State Special Permit would be required.

The Commission should render a declaratory ruling that the proposed Kalaupapa memorial is a permissible use in the State Agricultural District pursuant to Sections 205-2 and 205-4.5, HRS.

4. PROPOSED LANGUAGE FOR A MOTION

Move to find that based on the particular facts presented in this case the Petitioner's proposed Kalaupapa Memorial: is currently in the State Agricultural District; is an activity related to and will occur on property on the National Register of Historic Places; and is a permitted use under Section 205-4.5(a)(8), HRS, and under Section 15-15-25(b), HAR.

⁶ As identified in the attached memorandum (page 2 of 2) from the deputy Attorney General, Section 15-15-25(b), HAR, provides that "permissible uses within the agricultural district on land with soil classified as overall (master) productivity rating class of C, D, E, or U, shall be those uses as set forth in sections 205-2, 205-4.5, and 205-5, HRS, and also those uses compatible to the activities described in 205-2(d)."

DAVID Y. IGE
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PRIVILEGED AND CONFIDENTIAL
ATTORNEY/CLIENT COMMUNICATION

CAUTION –this memorandum contains confidential information and attorney/client communications and should not be released to the public or other third parties. Nor should they be discussed or referred to in public or with third parties.

October 12, 2015

MEMORANDUM

TO: Land Use Commission

FROM: Diane Erickson
Deputy Attorney General
Administration Division

RE: DR 15-53, Ka 'Ohana O Kalaupapa

This memorandum provides legal advice regarding certain aspects of the above-referenced Petition for Declaratory Order.

1. The Commission has authority to decide this matter.

The Commission may make declaratory rulings as to the applicability of any statutory provision or of any rule or order of the Commission (HAR § 15-15-98(a)) Ka 'Ohana O Kalaupapa is seeking a declaratory ruling that the proposed Kalaupapa Memorial described in its petition is a permitted use under HRS chapter 205, particularly, sections 205-2 and 205-4.5(a)(8).

Based upon the facts presented, the Commission has jurisdiction. Ka 'Ohana O Kalaupapa has a sufficient interest in the land that is the subject of the petition to invoke the Commission's jurisdiction. Under the federal Kalaupapa Memorial Act of 2009, the Petitioner is designated as the entity that the Secretary of the Interior shall authorize to establish a memorial within Kalaupapa National Historic Park on the Island of Moloka'i. Ka 'Ohana O Kalaupapa has

been approved by the State Board of Land and Natural Resources for a 65-year lease for the property that is the subject of the petition, and the State Department of Health, which has authority to do so, has designated a specific location at Kalaupapa for the petitioner to conduct business associated with the construction and management of the Kalaupapa Memorial. In addition, the petition for declaratory ruling involves the applicability of a statute administered by and within the jurisdiction of the Commission.

2. Commission's options.

a. The bases for summarily denying the petition set out in HAR § 15-15-100(a) do not exist in this case, i.e., the relief sought is not speculative or hypothetical; petitioner would likely have sufficient standing to be able to bring an action in court; the issuance of a declaratory order will not adversely affect the interest of the State or the Commission; and the statute upon which petitioner requests a declaratory ruling is administered by and under the jurisdiction of the Commission.

b. There is a small likelihood that if the Commission set this matter for further hearing additional useful, relevant information might be submitted to the Commission.

c. The Commission, as noted above, has authority to decide this matter and can decide that there is enough evidence in the record upon which the Commission can make a decision to determine that the proposed use is a permitted use on the subject property within the meaning of HRS §§ 205-2 and 205-4.5(a)(8). Although HRS § 205-4.5(a) is stated as a limitation on the kinds of activity that can be pursued on lands rated by the Land Study Bureau's (master) productivity rating A or B, there is no prohibition of engaging in those same activities on soils rated as C, D, E, or U. Thus, the Commission can conclude that activities permitted by HRS § 205-4.5 are permitted on C, D, E and U rated lands such as the property which is the subject of the petition.

More importantly, **the Commission's rule, HAR § 15-15-25(b), is consistent with an interpretation that the requested use is a permitted use.** That section provides:

- (b) Permissible uses within the agricultural district on land with soil classified as overall (master) productivity rating class of C; D, E, and U, shall be those uses as set forth in sections 205-2, 205/4.5, and 205-5 HRS, and also uses compatible to the activities described in 205-2(d).

Option c is within the Commission's authority and legally defensible, so long as reasons are put on the record.

If the Commission decides that the use IS permitted, it should give reasons. Some reasons include: (1) the subject property is currently in the agricultural land use district; (2) the proposed activity (a memorial to Kalaupapa residents) is related to and will occur on property of historic interest since it will be located at the Old Baldwin Boys Home site, which is on the National Register of Historic Places; (3) the proposed use is reasonable and appropriate, given the nature of the use to memorialize individuals who were forcibly relocated to the area which is now a National Historic Park; (4) the proposed activity is limited and passive, and will not adversely affect the rest of the property; (5) the proposed memorial structure will occupy less than 10% of the 5.9 acre site of the Old Baldwin Boys Home site, which is within a park comprised of 10,725 acres; (6) access will be provided via a pedestrian walkway that will direct visitors to the memorial and will not encourage use beyond the area of the proposed memorial; and, most importantly, (7) **the use is a permitted use pursuant to HAR § 15-15-25(b).**