

**LUC Docket No. SP14-404**  
**Jas Glover, Ltd**  
**Hilo, Hawai`i**

***Staff Report***

Action Meeting  
November 20, 2014



---

**Daniel E. Orodener**  
**Executive Officer**

**Submitted: November 19, 2014**

# TABLE OF CONTENTS

<b><u>Section.</u></b>	<b><u>Page No.</u></b>
<b>1. Explanation of Process</b>	<b>3</b>
<b>2. Procedural Matters</b>	<b>4</b>
<b>3. Description of the Property and Surrounding Areas</b>	<b>6</b>
<b>4. Summary of Proposed Use</b>	<b>8</b>
<b>5. Summary of Significant Comments by Reviewing Agencies</b>	<b>9</b>
<b>6. Impacts Upon the Resources of the Area</b>	<b>12</b>
<b>7. Adequacy of Public Facilities and Utilities</b>	<b>14</b>
<b>8. Conformance with the Special Permit Criteria</b>	<b>15</b>
<b>9. Planning Commission Recommendation</b>	<b>18</b>
<b>10. Petitioner's Submittal &amp; Request dated 11/14/2014</b>	<b>20</b>
<b>11. Staff Recommendations</b>	<b>22</b>

## 1. EXPLANATION OF PROCESS

**\*\*\*SPOILER ALERT!!! – This section and any action the Commission may take to address it will likely render the remaining sections of the Staff Report moot at this time.**

Section 205-6, HRS, and Section 15-15-96(a), HAR, provide the alternative actions that may be taken by the LUC in its consideration of the Special Permit application. The LUC may approve, approve with modification, or deny the Application. The LUC may impose additional restrictions as may be necessary or appropriate in granting the approval.

However, any modifications or additional restrictions must be based on the record as developed by the County of Hawai`i, Windward Planning Commission (WPC). The LUC may also remand the Application to the Planning Commission for further proceedings if they determine that consideration of new information, relevant to the application, is warranted.

On November 18, 2014, the Department of Defense – Hawai`i Army National Guard (DOD) sent an advance e-mail (with hard copy letter to follow) that provided some new information that is relevant to the application. This new information references a Final Archaeological Inventory Survey and Monitoring Plan, Phase I, Keaukaha Military Reservation (KMR) on DOD property which abuts the subject property in the proposed Special Permit. Three new historic sites have been identified that may be close to the DOD/Glover property line. In addition, the DOD indicates that independent surveyors hired by DOD have reported a property line discrepancy between their parcel and the Glover parcel. DOD has requested assistance of DLNR in resolving the overlapping property lines. DOD requests that the area not be developed until after the property line discrepancy is resolved and adequate measures will be taken to protect the newly identified archaeological sites. This issue relates to public trust resources.

Petitioner Glover is also asking the LUC to amend conditions that the County has imposed. Specifically these conditions are related to the protection of public trust resources associated with threatened and endangered flora and fauna; and, whether the USFWS is the appropriate agency to review and approve any mitigation efforts to protect them. Petitioner Memorandum in Support of Approval of Special Permit filed November 14, 2014, provides argument on this matter. It is not clear why Petitioner did not provide these arguments at the WPC during deliberations and discussion of conditions.

On November 19, 2014, the Petitioner was informed of and provided a copy of the DOD letter. The Executive Officer discussed the issue with our deputy Attorney General who felt that this represented new information related to public trust resources, had not been considered by the WPC, and warrants a remand to the WPC. After discussion with the Executive Officer, Petitioner appears to agree that the issue introduces new information regarding potential public trust resources that was not considered by the WPC. Therefore, the Petitioner will either ask for the LUC to remand the Special Permit back to the WPC or not object to the LUC's doing so.

***Staff Recommends:*** *the Commission remand the Special Permit SP14-404 to the Windward Planning Commission for consideration and resolution of issues raised by the Department of Defense regarding public trust resources and any other issues that may be necessary.*

## 2. PROCEDURAL MATTERS

On February 4, 2013, the LUC mailed a comment letter to the County of Hawai`i (“County”) recommending that the Special Permit application proposal for quarrying a 10.5-acre parcel in Hilo by Jas Glover, Ltd. should be directed to the LUC for review and action. As noted in our letter, the proposed use was actually part of a much larger series of active quarrying operations taking place on a 140-acre parcel by Jas Glover, Ltd.

On March 7, 2013, the County approved a 10.5 acre SP with a condition requiring Glover to file for a new SP for the remaining 85+ acres not covered by permits, within one year.

On March 5, 2014, the Petitioner filed an application for a Special Permit with the County for rock quarrying operations on 85.338 acres of a 140.368 acre parcel.

On March 20, 2014, the LUC received a request from the County for comments on a new Special Permit application by Jas Glover, Ltd. (“Petitioner”) for proposed quarrying use on 85.338 acres on a 140-acre parcel. This covered only new, unquarried areas of the 140 acre parcel instead of including any of the existing less than 15-acre Special Permits currently on the parcel.

On April 4, 2014, the LUC mailed a comment letter to the County of Hawai`i regarding the new proposed Special Permit request by Jas Glover, Ltd. That letter clarified our position and understanding with the Petitioner, that in return for not contesting their previous application for the 10.5-acre Special Permit; the Petitioner would apply for a new Special Permit for the entire 140-acre parcel to include all the existing quarrying operations under a single Special Permit. In addition, our letter noted that a draft Archaeological assessment had only recently been submitted to the State Historic Preservation Division (SHPD) for review and that any decision-making on the application would be premature until SHPD had reviewed and provided a concurrence letter. (County’s Exhibit 12)

On April 15, 2014, the LUC received OP’s comment letter to the County of Hawai`i on the proposed Special Permit. OP’s letter concurred with the LUC’s recommendation that the proposed Special Permit should consolidate the existing Special Permits with the current request; and, that no determination of acceptability of the Archaeological assessment by SHPD has been made. In addition, OP recommended that the State Department of Transportation should be consulted on possible impacts and access requirements, and, that the County impose a condition requiring the applicant to reclassify the parcel into the Rural or Urban District prior to expiration of the permit since the site is unlikely to ever return to an agricultural use. (County’s Exhibit 15)

On May 28, 2014, the LUC received comments from Petitioner in response to the LUC’s April 4, 2014 comments. Petitioner explains that their application is only for the unquarried portion of the 140-acre parcel because that is all that was required by the County’s approval of their previous 10.5-acre Special Permit; no mention of the prior agreement with LUC or the clear statement in the County’s approval as represented by Petitioner that “...the LUC was amenable towards supporting the issuance of this 10.15-acre Special Permit application with the stipulation that a Special Permit application be submitted for all quarrying activities, existing and proposed, within the 140-acre

property.” (County’s Exhibit 33, see page 2 of attached Windward Planning Commission approval letter).

On June 17, 2014, the LUC mailed the County of Hawai`i clarifying our position and pointing out discrepancies with the previously approved 10.5-acre Special Permit as it relates to the current Special Permit under consideration. The LUC recommended five separate issues that the Planning Department and Planning Commission should have the Petitioner address prior to any decision-making. (County’s Exhibit 35)

On July 3, 2014, the County’s Windward Planning Commission conducted a hearing on the Special Permit application pursuant to public notice to surrounding property owners and lessees of record within 500 feet of the property. There was no public testimony on the application. After due deliberation at its hearing the Planning Commission voted to approve the application subject to 15 conditions and forward a recommendation for approval to the LUC. (County’s Exhibit 44)

In early July 2014, five commissioners resigned from the LUC, prior to implementation of Act 230 (SLH 2014) requiring public disclosure of financial disclosure statements. This resulted in a temporary lack of quorum for purposes of conducting business. Some pending applications that required action within specific timeframes were in jeopardy of being automatically approved due to inability of LUC to take action.

On August 1, 2014, the LUC received from the Planning Commission Approval and Recommendations to the LUC. The Planning Commission recommended approval by the Commission subject to 15 conditions. (County’s Exhibit 46)

On September 12, 2014, the LUC received a letter from Petitioner agreeing to waive the LUC’s 45-day requirement to take action on the Special Permit application and requesting the LUC to consider the application within the next 90 days.

On November 7, 2014, the LUC received the required Special Permit filing fee from Petitioner.

On November 10, 2014, the LUC mailed the agenda and meeting notice to the Parties and the Statewide, Hawai`i island, and Maui island mailing lists.

On November 14, 2014, Jas Glover, Ltd. filed Petitioner’s Memorandum in Support of Approval of Special Permit and Exhibits 1-4. The memorandum contains argument by Petitioner in support of their request that the LUC amend certain conditions (Conditions No. 7, 8, and 9) of approval as set by the County and add a new condition.

### **3. DESCRIPTION OF THE PROPERTY AND SURROUNDING AREAS**

The area subject of the application is located at Waiākea, South Hilo, island of Hawai`i. The site consists of an approximately 85.338 acres of land within a larger parcel identified as Tax Map Key (“TMK”) 2-1-013: portion 004 (“Property”) that is approximately 140.368 acres. The Property is owned by Kamehameha Schools who has authorized Jas W. Glover, Ltd. (“Petitioner”) as lessee to file the Special Permit application (County’s Exhibit 1).

The Property is located southeast of the Hawai`i National Guard Site and Hilo International Airport, and approximately 3,000 feet southwest of the County of Hawai`i’s Sewer Treatment Plant. The State of Hawai`i owns the access road that leads from the County-maintained Leilani Street to the quarry site. Kamehameha Schools and its lessees have temporary rights of access via this road until such time as a more formal access is developed by the State.

The Property is partially forested and partially being actively quarried for rock and aggregate. There have been five previous Special Permits to establish quarries on the Property (all slightly less than 15 acres); four of which are currently valid and cover approximately 55 acres. The areas of the Property that have not been quarried are forested with both native and non-native vegetation.

The Property is within the State Agricultural District; identified as Important Agricultural Land, Extensive Agriculture and Industrial under the County’s General Plan Land Use Pattern Allocation Guide (“LUPAG”); zoned Agricultural (A-5a) under the County Zoning Code; and, A-40a in the Hilo Community Development Plan. The Property is not located within the County’s Special Management Area (“SMA”).

Adjacent lands are zoned Agricultural (A-5a and A-20a) and Light Industrial (ML-20). Surrounding uses include the Hawai`i County transfer station and landfill sites, existing quarry operations, a skeet range and vacant State-owned lands. The Hilo Airport runway is located to the North; and the Hawai`i National Guard Military Reservation is located to the southeast.

The Property is located within Zone X, outside the 500-year flood hazard area.

The U.S. Department of Agriculture, Soil Conservation Service, classifies the soils on the Property as Paipai series (rPae) and Lava Flows, Pahoehoe (rLW). Paipai series consists of well-drained, thin, extremely stony organic soils over fragmental `A`ā lava. Permeability is rapid, runoff is slow and erosion hazard is slight. Lava Flows, Pahoehoe have no soil covering and is typically bare of vegetation.

The Land Study Bureau’s detailed land classification classifies the Property as overall (master) productivity rating class E or Very Poor. The Agricultural Lands of Importance to the State of Hawaii classification system classifies the Property as “Unclassified” and “Other Important Agricultural Lands.”

A flora and fauna study of the 85-acre proposed Special Permit area has not been conducted. Except for the southernmost portion of the proposed Special Permit area, that

has been quarried in the past under a lapsed Special Permit, the area proposed to be quarried is forested with native and non-native species.

An “Archaeological Assessment Survey” for the 90-acre quarry site dated September 2013 was prepared and submitted with the application. Though no cultural resources were identified within the Project area, it is possible that some archaeological features might be hidden under the undisturbed, thick vegetation. SHPD has recommended that an archaeological monitoring plan be prepared by Petitioner and submitted for review and approval of SHPD prior to any ground clearing or grading activities (County’s Exhibit 18). The Petitioner has indicated that a “Draft Archaeological Monitoring Plan” dated June 2014, was submitted to SHPD for its review (County’s Exhibit 38). However, there is no documentation provided that SHPD has reviewed and approved the plan.

#### **4. SUMMARY OF PROPOSED USE**

The Petitioner proposes to establish a new quarry site on approximately 85.338 acres of land that is a portion of a larger 140.368-acre parcel. The material to be quarried is aggregate and basaltic “blue rock” with very little cinder for commercial applications. The material will be removed and either processed on site or transported to the Petitioner’s Hilo operations site on Leilani Street. This application is tied into a condition of approval from Special Permit No. 2012-000145. (County’s Exhibit 1)

Petitioner proposes to conduct the quarrying during normal working hours between 6:00 a.m. and 6:00 p.m., Monday through Friday. However, they have attempted to hedge their bets by indicating that work may occur at other times and days, depending upon demand. The number of proposed employees ranges from 2-8, although additional employees may be required as production facilities are added. (County’s Exhibit 3, page 2)

Petitioner projects that during normal operations; there will be between 15 and 50 truckloads of material on the access road per day. Dust mitigation measures will conform to State Department of Health regulations.



## 5. SUMMARY OF SIGNIFICANT COMMENTS BY REVIEWING AGENCIES <sup>1</sup>

On March 18, 2014, the County of Hawai'i Planning Department sent out a memorandum to County, State, and Federal agencies requesting comments on the Special Permit application for Jas W. Glover, Ltd.

### County Agencies

#### Department of Environmental Management (DEM)

The DEM had no comments in letter dated March 20, 2014 (County's Exhibit 6).

On March 27, 2014, DEM sent a second comment letter indicating a need to clarify whether the access road being referred to was the access to the Hilo Wastewater Treatment Plant. That road is too narrow to accommodate rock hauling vehicles and would require an upgrade of the roadway (County's Exhibit 10).

#### Department of Water Supply ("DWS")

The DWS stated no objections, as applicant does not intend to utilize County Water Service (County Exhibit 14 and 21).

#### Police Department

The Police Department does not anticipate any significant impacts to traffic or public safety concerns (County Exhibit 7).

#### Department of Public Works (DPW)

DPW stated no objections to the request; noting that the property is in designated Zone X on the Flood Insurance Rate Map (FIRM) and deemed to be outside the 500-year floodplain (County Exhibit 13).

### State Agencies

#### LUC

The LUC provided comments on April 4, 2014 (County's Exhibit 12). We referenced our earlier comments on Jas Glover's request for a Special Permit (SPP 12-000145) on the same parcel for a less than 15-acre portion for quarrying operations. At that time we raised concerns that four (4) other less than 15-acre Special Permits have been used in this same parcel and that this practice is contrary to the intent of Chapter 205, HRS, the State Land Use Law. In addition, we discussed with the applicant their intent to quarry the remainder of the parcel in the future. We discussed and felt it had been agreed to

---

<sup>1</sup> Agency comments are based on the record provided by the County with the Special Permit application.

with applicant's representative that the next Special Permit request for the parcel would seek to include all the existing Special Permits and the remaining unquarried areas. The Planning Commission's approval for that less than 15-acre Special Permit included a paragraph quoting the applicant acknowledging that the next Special Permit they submitted was to include all quarrying activities, existing and proposed, within the 140-acre property. We noted that although an Archaeological Assessment had been forwarded to SHPD; no letter from SHPD was included showing acceptance of the study and any proposed mitigation measures.

The LUC provided additional comments on June 17, 2014 (County's Exhibit 35). We reiterated our concerns about the past practice of "parceling" of less than 15-acre Special Permits on the property and requested that the Planning Department and the Planning Commission make sure that the applicant address several issues prior to any decision-making. These issues included:

- i. Verify status of compliance with conditions for each of the Special Permits within the 140-acre site.
- ii. Identify termination dates for each Special Permit and license agreement with landowner – Kamehameha Schools.
- iii. Discuss the Erosion Control and Site Restoration Plans for each of the Special Permits.
- iv. Status of the Archaeological Monitoring Plan for SPP 12-000145.
- v. A discussion of any perceived legal problems with having a single State Special Permit covering all the existing Special Permits and the proposed new Special Permit for the remainder of the 140-acre property.

#### Office of Planning ("OP")

OP provided comments on April 11, 2014 (County's Exhibit 15). OP identified the following issues:

- i. The application does not contain an assessment of impacts applicable to Chapter 205A objectives and policies. Lack of SHPD determination of acceptability of the included Archaeological Assessment.
- ii. The State Department of Transportation (DOT) should be consulted to determine any impacts with the airport and "Clear Zone Easement," and access requirements on the easement road.
- iii. Concurrence with the LUC's recommendation for consolidating the Special Permits.
- iv. Recommends the County consider imposing a condition that applicant seek reclassification of the parcel from the State Agricultural District to the Rural or Urban District prior to expiration of the Special Permit given the anticipated long-term industrial use and the sites unlikely return to agricultural use.

#### Department of Land and Natural Resources – State Historic Preservation Division (SHPD)

SHPD provided comments on April 15, 2014 (County's Exhibit 18). SHPD concurs with the recommendations of the two Archaeological Assessment surveys for the parcel (a 50-acre survey in 2013 and a 90-acre survey in 2014) that no historic properties were identified in the surveys. SHPD concurs that a qualified archaeological monitor be

present during initial ground clearing and grubbing. In addition, SHPD requests to review and approve an archaeological monitoring plan for initial ground clearing and grubbing activities; with such a monitoring plan SHPD believes no historic properties will be affected.

#### Department of Land and Natural Resources (DLNR)

DLNR's Engineering Division verified that the subject property was located within Zone X of the Federal FIRM map where the National Flood Insurance Program does not have any regulations for developments (County's Exhibit 17).

#### Department of Health

The Wastewater Branch found no wastewater/environmental health concerns with regulatory implications (County's Exhibit 9).

#### **Federal Agencies**

##### US Fish and Wildlife Service (USFWS)

The USFWS provided comments on April 11, 2014 (County's Exhibit 16). They indicated that the project site is not near any proposed or designated critical habitat; however, several threatened or endangered species may be in the vicinity – a mammal, birds, and listed plant species.

USFWS recommended the incorporation of conservation measures into the project:

- i. To minimize impacts on the Hawaiian hoary bat – woody plants greater than 15 feet tall should not be removed or trimmed between June 1 and September 15; and no use of barbed wire for fencing.
- ii. To avoid impact to Hawaiian hawks – no use of heavy equipment or clearing of brush or trees during March through September; and conduct surveys for nests prior to any clearing activity.
- iii. To minimize impacts on seabirds – all outdoor lights should be shielded and directed downward; and, nighttime operations should be avoided from September 15 through December 15.
- iv. Work should be avoided during Nēnē breeding season, October through March; if work must be conducted then a biologist should do a Nēnē survey prior to initiation of any work; and, all on site personnel should be apprised that Nēnē may be in the vicinity of the area.
- v. Conduct a survey by a qualified botanist to determine if listed plant species are found within the project site; and, if listed plants are found then contact USFWS to get assistance in complying with the Endangered Species Act (ESA). This may require an incidental take permit and/or a habitat conservation plan.

## 6. IMPACTS UPON THE RESOURCES OF THE AREA

### Archaeological and Historic Resources

Two archaeological assessments have been completed (one covering a 50-acre portion of the parcel in 2013 and the other covering the remaining 90-acre portion in 2014). SHPD reviewed the assessments and provided a letter dated April 15, 2014 (County's Exhibit 18) with recommendations so that no historic properties will be affected by the proposed permit.

SHPD recommends that a qualified archaeological monitor be present during initial ground clearing and grubbing; and, that applicant produce an archaeological monitoring plan pursuant to Section 13-279, Hawai'i Administrative Rules (HAR) to be reviewed and approved by SHPD prior to the initial ground clearing and grubbing activities.

### Flora and Fauna

According to the applicant, there were no indications of listed species in the flora or fauna comments in either of the archaeological surveys done for the property. In addition, the applicant refers to statements by the County of Hawai'i in two of the previous Special Permits within the parcel to the effect that "...the project site is not a habitat for endangered species of flora or fauna" (County's Exhibit 31, page 1-2). This appears to be the basis for applicant concluding "...that there are no valued cultural, historical, or natural resources on the Project Site" and "...it does not appear that any resources or rights will be adversely affected or impaired by the proposed action" (County's Exhibit 3, page 11).

The County Planning Department (PD) reports that no reviewing agencies have identified any specific important habitat associated with endangered species and that the project site is not in close proximity to or contain any proposed or designated critical habitat. However, there is a possibility that the project site could provide habitat for the Hawaiian hoary bat, the Hawaiian hawk, the Hawaiian petrel, the Newell's shearwater, and the Nēnē. PD recommends a flora and fauna survey prior to commencing quarry operations in coordination with U.S. Fish and Wildlife Service; and, that a qualified biologist conduct Nēnē and Hawaiian hawk nest surveys prior to vegetation clearing and beginning quarry activities (County's Exhibit 40, page 6-9).

### Air Quality

According to the applicant, tanker trucks will be brought in for dust mitigation measure along the access road and the applicant will conform to State Department of Health (DOH) regulations (County's Exhibit 3, page 11).

PD dust generated during quarry operations will be mitigated by watering down the roadway and compliance with DOH regulations.

## Visual Resources

There are no dwellings or urban developments within the immediate area. A condition will be added to insure that the applicant restores the area to a state that would blend with the surrounding topography of the area once quarry is completed (County's Exhibit 40, page 11).

## 7. **ADEQUACY OF PUBLIC FACILITIES AND UTILITIES**

### Roadways

The State of Hawai'i owns the access road that leads from the County-maintained Leilani Street to the quarry site. Kamehameha Schools and its lessees have temporary rights of access via this road until such time as a more formal access is developed by the State.

According to the applicant, during normal production, the traffic impact on the access road will be between 15 and 50 truckloads of material per day. The material will be removed and either processed on site or transported to the applicant's Hilo operations site on Leilani Street. Normal quarry production hours would be from 6:00 a.m. to 6:00 p.m., Monday through Friday (County's Exhibit 40, page 1)

PD concludes that the access road is adequate for its intended purpose, which is to accommodate traffic associated with quarry operations and not to support general vehicular access (County's Exhibit 40, page 4)

### Water

The Property is not serviced by a County water system. According to the applicant, the quarrying operation does not require a connection to the County water system. The County Department of Water Supply has no objections as their existing water system will not be affected (County's Exhibit 14). As needed, tanker trucks will be brought in for dust mitigation measures along the access road (County's Exhibit 39, page 7).

### Drainage

The only discussion relating to drainage is in the context of the County evaluating the site during its review of the Special Permit SPP 12-000145 (County Exhibit 32, page 1) for compliance with the State's Coastal Zone Management Act Chapter 205A, HRS. In a letter to the State Office of Planning, the applicant quotes the County's earlier evaluation that "...the subject property is located over one mile to the nearest shoreline and does not contain any streams or waterways that empty into the sea and therefore will not cause any beach erosion..." (County's Exhibit 32, page 7). Otherwise, there is no specific discussion regarding drainage within or from the property; but there are also no specific comments or issues raised about drainage either.

### Wastewater/Solid Waste

The Property is not serviced by the County sewer system. According to the applicant, portable restrooms will be brought to the property (County's Exhibit 39, page 7). No discussion of solid waste collection services to the project site.

### Police, Fire, and Medical Services

Police and Fire Department comments do not identify any specific objections to the proposed use. The quarrying operation is not expected to adversely impact these services.

## 8. CONFORMANCE WITH THE SPECIAL PERMIT CRITERIA

The following summarizes the Hawai`i County Planning Department's analysis as adopted by the Windward Planning Commission as to how the proposed quarrying operation addresses the Special Permit guidelines for determining an "unusual and reasonable" use in the State Land Use Agricultural District.

The grounds for approving a Special Permit are based on Rule 6-6 in the Planning Commission Rules of Practice and Procedure. The Planning Commission shall not approve a Special Permit unless it is found that:

*The proposed use is an unusual and reasonable use of land situated within the State Land Use Agricultural District and would promote the effectiveness and objectives of Chapter 205, Hawai`i Revised Statutes (HRS), as amended.*

The County has found the following (County's Exhibit 46, pages 2-8):

- A. Such use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations.
  - i. *Due to poor soil quality that is not conducive to agricultural activities; therefore will not adversely affect the preservation and agricultural use of the County's prime agricultural lands.*
- B. The desired use would not adversely affect surrounding property.
  - i. *There are no dwellings or urban developments within the immediate area. The surrounding properties include County of Hawai`i landfill sites, other quarrying operations, vacant lands owned by the State and Kamehameha Schools, the County's wastewater treatment plant, the Hilo Airport, a skeet range, and the Hawai`i National Guard training facility.*
  - ii. *Dust generated by the quarry operations will be mitigated by watering down roadways and complying with Department of Health regulations.*
  - iii. *The area will be restored to a state that will blend in with surrounding topography.*
  - iv. *Applicant will adhere to all required measures to minimize traffic, dust and noise.*
  - v. *The Planning Department is not aware of any complaints generated by the ongoing quarrying operations in the area.*
- C. The use would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, and school improvements and police and fire protection.
  - i. *The applicant has represented that they have temporary rights of access to the property until such time as more formal access is developed by the State.*
  - ii. *The access road is adequate for its intended purpose which is to accommodate traffic associated with quarry operations not general vehicular access.*

- iii. *The applicant will bring in tanker trucks to water down the roadway.*
- iv. *Portable restrooms will be brought to the property.*

D. Unusual conditions, trends and needs have arisen since the district boundaries and rules were established.

- i. *There are many areas in the County where lands within the Agricultural District are not in active agricultural productivity. Because quarrying is resource-based, sites are restricted by location of the mineral resource.*
- ii. *Existing quarrying activities are occurring on portions of the subject property and in the near vicinity of the project.*
- iii. *There is no record of any agricultural uses on the subject property for decades.*

E. The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

- i. *The subject property is rated “E” or “Very Poor” for agricultural productivity by the Land Study Bureau (“LSB”) and as Other Important Agricultural lands by the Agricultural Lands of Importance to the State of Hawai‘i (“ALISH”) maps. The soils in the area are not suitable for many types of agricultural uses.*
- ii. *Surrounding parcels are also in quarry use and industrial-related activities.*

F. The use will not substantially alter or change the essential character of the land and the present use.

- i. *The area is already used for quarry activities.*

G. The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design Plans.

- i. *The subject request is not contrary to the General Plan Land Use Pattern Allocation Guide (LUPAG) Map which designates the property as Extensive Agriculture, Important Agricultural Lands and Industrial.*
- ii. *The project would complement several goals and policies of the General Plan.*
- iii. *Quarries must be established in locations where there is an abundance of raw materials. As evidenced by the issuance of Special Permits for other quarries within the subject property, this area contains the raw materials essential to the construction industry.*
- iv. *The basic nature of quarrying activities means that natural resources and the natural environment will be compromised. The Planning Department has not identified any specific important habitat for endangered species or proposed or designated critical habitat.*
- v. *There is a possibility that the project site could provide a potential habitat for the Hawaiian hoary bat, the Hawaiian Hawk, the Hawaiian petrel, the Newell’s shearwater, and the Nēnē. To avoid and minimize potential*



*significant adverse impacts on these species, a condition of approval will require faunal and floral surveys of the proposed quarry site prior to commencing operations in coordination with the U.S. Fish and Wildlife Service.*

H. The proposed use is not contrary to the objectives sought to be accomplished by Chapter 205A, HRS, relating to the coastal zone management program.

- i. The subject property is located over one mile from the nearest shoreline and does not contain streams or waterways that empty into the sea; therefore the activity will not cause beach erosion or affect marine resources, coastal ecosystems, and coastal recreational opportunities.*
- ii. The property will not affect coastal hazards.*
- iii. The property is located outside the Special Management Area (SMA) and tsunami evacuation zone.*
- iv. There is no designated public access to the shoreline areas or mountain areas over the property.*

I. The request will not have a significant adverse impact to traditional and customary Hawaiian Rights.

- i. An Archaeological Assessment of the southern 50-acre portion of the subject property was conducted in September 2012. An Archaeological Assessment of the northern 90-acre portion of the subject property was conducted in September 2013.*
- ii. Both assessments found no archaeological features and no cultural resources or modern structures located within the subject property.*
- iii. The Department of Land and Natural Resources – State Historic Preservation Division (SHPD) issued a letter dated April 15, 2014 (County’s Exhibit 18) stating they had reviewed both assessments and agreed with the conclusions and recommended archaeological monitoring during initial ground clearing and grubbing. A condition will require implementation of a SHPD-approved Archaeological Monitoring Plan during ground clearing and grubbing. Also, applicant must notify SHPD should any unidentified sites or remains be encountered and a clearance from SHPD prior to resuming any quarry activities.*
- iv. The U.S. Fish and Wildlife Service (USFWS) identified five threatened or endangered species that may be in the vicinity of the subject property (County’s Exhibit 16) and recommended that a qualified biologist conduct Nēnē and Hawaiian Hawk nest surveys prior to vegetation clearing and beginning quarry activities in unquarried sections of the property.*
- v. A flora and fauna study of the subject property has not been conducted. A condition will require floral and faunal surveys (including nest surveys) prior to vegetation removal.*
- vi. Conducting these surveys prior to the start of quarry activity of forested areas will ensure the surveys accurately reflect any endangered or threatened species present in the area at the time.*

## 9. PLANNING COMMISSION RECOMMENDATION

On July 3, 2014, the County's Windward Planning Commission conducted a hearing on the Special Permit application and after due deliberation voted to approve the application subject to 15 conditions and then forwarded a recommendation for approval to the LUC. (County's Exhibit 44 and 46).

1. The applicant, its successors or assigns shall be responsible for complying with all stated conditions of approval.
2. Prior to commencing construction of any structures, Final Plan Approval for those structure(s) shall be secured from the Planning Department in accordance with Chapter 25-2-70 (Zoning Code). Plans shall identify any proposed structures and parking associated with the proposed quarry operation.
3. Quarrying activities shall be limited to the hours of 6:00 a.m. to 6:00 p.m. daily. Work may occur at other times depending on demand, except from September 15 to December 15.
4. Prior to commencement of quarry activity on any previously un-quarried land, a Site Restoration and Revegetation Plan, which assures the site will be left in a nonhazardous condition, shall be submitted for review and approval by the Planning Director. The Plan shall include photographs of the area and a topography map of the project site and its related surroundings. This Plan shall be reviewed by Kamehameha Schools, the Natural Resources Conservation Service and the Department of Public Works and their comments submitted to the Planning Director for review and approval.
5. Adequate dust control mitigation measures shall be implemented for the duration of the quarry operation in accordance with Department of Health requirements. An adequate supply of water shall be made available for dust control.
6. Prior to commencing any land alteration activity on any un-quarried portions of the property, the applicant shall secure approval by the Department of Land and Natural Resources-State Historic Preservation Division (DLNR\_SHPD) of an Archaeological Monitoring Plan to ensure that no historic sites are inadvertently damaged or destroyed. This plan will call for "on-call monitoring" in conjunction with DLNR-SHPD. A copy of the approved plan shall be provided to the Planning Department.
7. To protect any Hawaiian hoary bats in the vicinity of the property, barbed wire fencing shall not be used in the permit area and woody vegetation over 15 feet in height shall not be removed during bat breeding season of June 1<sup>st</sup> to September 15<sup>th</sup> without first conducting surveys for bat nests and coordinating with US Fish and Wildlife Service if nests are found. Surveys shall be conducted by a qualified biologist.
8. To protect any Hawaiian hawk and Hawaiian goose in the vicinity of the property, vegetation clearing and beginning quarry activities shall not occur in the

unquarried areas of the permit area during hawk breeding season of March to September and goose breeding season of October to March without first conducting surveys for hawk and goose nests and coordinating with US Fish and Wildlife Service if nests are found. Surveys shall be conducted by a qualified biologist.

9. Prior to removing vegetation on any un-quarried portions of the property, the applicant shall conduct a flora study and submit to the U.S. Fish and Wildlife Service (USFWS) for review and approval. The applicant shall implement any mitigation measures required by USFWS and provide a copy of the approved study and mitigation plan to the Planning Department.
10. No retail sale of quarrying materials is allowed from the project site. Removal of the materials shall be limited to licensed commercial haulers or by licensed contractors.
11. Should any remains of historic sites, such as rock walls, terraces, platforms, marine shell concentrations or human burials, be encountered, work in the immediate area shall cease and the DLNR-HPD shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the DLNR-SHPD when it finds that sufficient mitigative measures have been taken.
12. Within ninety (90) days after termination of the quarry operation or abandonment of the project site, appropriate documentation which demonstrates compliance with the Site Restoration and Revegetation Plan shall be submitted to the Planning Department.
13. Comply with all applicable laws, rules, regulations and requirements of other affected agencies.
14. An extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances:
  - A. The non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence.
  - B. Granting of the time extension would not be contrary to the General Plan or Zoning Code.
  - C. Granting of the time extension would not be contrary to the original reasons for the granting of the permit.
  - D. The time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year).
15. Should any of these conditions not be met or substantially complied with in a timely manner, the Planning Director may initiate procedures to revoke this permit.

## **10. PETITIONER'S SUBMITTAL & REQUEST dated November 14, 2014**

On November 14, 2014, Jas Glover, Ltd. filed Petitioner's Memorandum in Support of Approval of Special Permit and Exhibits 1-4. The memorandum contains argument by Petitioner in support of their request that the LUC amend certain conditions (Conditions No. 7, 8, and 9) of approval as set by the County and the addition of a new condition.

### Regarding Applicant's Misrepresentation of LUC's Position

On page 2 of Glover's Memorandum, they discuss the Special Permit SPP 12-000145 for a 10.15-acre parcel that the LUC had commented on unfavorably to the County Planning Department and Windward Planning Commission. Glover asserts that they came to an agreement between themselves, the County, and the LUC; that Glover would apply for a Special Permit for the balance of the unpermitted, unquarried areas within one year of the Planning Commission approval of SPP 12-000145. This was subsequently made one of the conditions of approval by the Planning Commission that has resulted in the Special Permit application currently before the LUC.

The LUC, in its letter dated April 4, 2014 to the Planning Department (County's Exhibit 12, page 1-2) made clear that our understanding was that Glover would apply for a new Special Permit that would cover all the existing and planned quarrying operations within the 140-acre parcel. In addition, the Windward Planning Commission in their own letter of approval for Special Permit SPP 12-000145, quoted the applicant representing that the LUC supported its application with the stipulation that they would apply for a new Special Permit for all quarrying activities, existing and proposed, within the 140-acre property (County's Exhibit 12, page 2; County's Exhibit 35, page 1; County's Exhibit 3, page 58).

Glover in its response (County's Exhibit 33) to the LUC's comments (County's Exhibit 12) fails to respond to the issue that the new Special Permit should be covering all quarrying activities on the 140-acre parcel. Glover's response (County's Exhibit 36, page 2) to the LUC additional comments (County's Exhibit 35) indicates that they would apply for a Special Permit for a larger area including the areas covered by the existing special permits provided that would not be required to surrender any vested legal rights. However, they provide no specific discussion to identify any vested rights they believe might be jeopardized by an all-inclusive Special Permit; nor any discussion of the nature of those legal rights.

The Commission should request the applicant to explain these vested legal rights and why they would be jeopardized by a Special Permit that would cover the entire 140-acre property and all existing and planned quarry uses.

### Glover Request for LUC to Amend Conditions 7, 8, 9, 10

The County Planning Department in their background report for the Special Permit (County Exhibit 39, page 6) indicated that a floral and fauna study of the 85-acre permit area has not been conducted and that the permit area is forested with native and non-native invasive species. The Planning Commission noted in their recommendation that there is the possibility that the project site could provide a potential habitat for the Hawaiian hoary bat, the Hawaiian hawk, the Hawaiian petrel, the Newell's shearwater, and the Nene; and, that to avoid and minimize potential significant adverse impacts upon these animal and endangered plants, conditions of

approval will require flora and fauna surveys in coordination with USFWS (County's Exhibit 46, pages 6-7).

Glover believes that the USFWS does not have regulatory jurisdiction to review and approve any flora or fauna surveys and/or mitigation plans; and that the County is the agency that should be responsible to review and approve any such studies (Petitioner's Memorandum in Support, pages 3-5). Glover represents that they are fully committed to taking appropriate measures to protect any endangered plant or animal species on the parcel; and then outlines some of the actions they are willing to take. In summary, Glover believes the proposed amended conditions would provide the same degree of protection to endangered species as the conditions currently recommended by the Windward Planning Commission.

**Staff Recommends** – Staff disagrees with Petitioner's contention that USFWS do not have legal regulatory jurisdiction in the matter. The authority to review and approve studies and mitigation plans are often delegated to the agency with either the regulatory authority and/or the expertise. In this case, the USFWS not only responded with comments on the proposed permit, have the subject expertise, have offered assistance in coordination, and have legal regulatory authority under the Federal Endangered Species Act (ESA). Should the Commission remand this Special Permit back to the Planning Commission; the Petitioner will have another opportunity to work with both the County and USFWS on crafting conditions that are acceptable to all parties while still providing the level of protection to public trust resources.

#### Glover Request for LUC to Add a new Condition 16

##### Proposed New Condition 16

16. The applicant will submit annual status reports to the Planning Department and the Land Use Commission.

##### Staff Recommendation on Proposed New Condition

**Staff Recommends** – the following language be added that is more specific and standard to LUC Special Permits than the language proposed by Petitioner in its Memorandum in Support.

*That the Applicant shall timely provide without any prior notice, annual reports to the LUC and the Planning Department in connection with the status of the quarrying operations and the Applicant's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the LUC.*

## 11. STAFF RECOMMENDATIONS

Section 205-6, HRS, and Section 15-15-96(a), HAR, provide the alternative actions that may be taken by the LUC in its consideration of the Special Permit application. The LUC may approve, approve with modification, or deny the Application. The LUC may impose additional restrictions as may be necessary or appropriate in granting the approval. However, any modifications or additional restrictions must be based on the record as developed by the County of Hawai'i, Windward Planning Commission. The LUC may also remand the Application to the Planning Commission for further proceedings if they determine that consideration of new information, relevant to the application, is warranted.

These conditions have been approved by the Windward Planning Commission and recommended for approval by the LUC. If the LUC is inclined to approve the Application, staff recommends that the LUC consider the following amendments and additions to the conditions approved by the Planning Commission (additions underscored; deletions crossed out):

**STAFF RECOMMENDATIONS are pending the anticipated remand of deliberations of this Special Permit back to the Windward Planning Commission, and review of any changes that may result.**