

LAND USE COMMISSION
STATE OF HAWAII

2019 JUL 11 P 1:51

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In The Matter Of The Petition Of

EMMANUEL LUTHERAN CHURCH OF
MAUI

To Amend The Land Use District
Boundary Of Certain Lands Situated At
Wailuku, Island Of Maui, State Of
Hawai'i, Consisting Of 25.263 Acres From
The Agriculture District To The Urban
District, Tax Map Key No. (2) 3-5-002: 011

DOCKET NO. A07-773

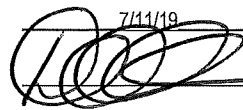
FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER
GRANTING WAIKAPŪ DEVELOPMENT
VENTURE, LLC'S (1) MOTION TO
APPROVE SALE OF A PORTION OF THE
PETITION AREA; (2) MOTION TO
ALLOW FOR SUBDIVISION OF PETITION
AREA; (3) MOTION TO BIFURCATE;
AND (4) MOTION FOR MODIFICATION;
AND CERTIFICATE OF SERVICE

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
GRANTING WAIKAPŪ DEVELOPMENT VENTURE, LLC'S (1) MOTION TO
APPROVE SALE OF A PORTION OF THE PETITION AREA; (2) MOTION TO ALLOW
FOR SUBDIVISION OF PETITION AREA; (3) MOTION TO BIFURCATE; AND (4)
MOTION FOR MODIFICATION

AND

CERTIFICATE OF SERVICE

This is to certify that this is a true and correct
copy of the document on file in the office of the
State Land Use Commission, Honolulu, Hawai'i

7/11/19 by 
Executive Officer



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MOTION FOR MODIFICATION

On October 12, 2018, WAIKAPŪ DEVELOPMENT VENTURE, LLC

("WDV" or "Intervenor"), filed (1) Motion to Approve Sale of a Portion of the Petition

Area; (2) Motion to Allow for Subdivision of Petition Area; and (3) Motion to Bifurcate;

Memorandum in Support of Motion; Affidavit of William Frampton; and Exhibits 1 to 3

(collectively "WDV's Three-Part Motion"), pursuant to Hawai'i Revised Statutes

Docket No. A07-773/Emmanuel Lutheran Church of Maui

Findings Of Fact, Conclusions Of Law, And Decision And Order Granting Waikapū Development
Venture, LLC's (1) Motion To Approve Sale Of A Portion Of The Petition Area; (2) Motion To Allow
For Subdivision Of Petition Area; (3) Motion To Bifurcate; And (4) Motion For Modification

("HRS") Chapter 205 and Chapter 15-15 of the Hawai'i Administrative Rules ("HAR") §§ 15-15-70 and 15-15-94. In WDV's Three-Part Motion, WDV requested that the Land Use Commission, State of Hawai'i ("Commission"), issue an order modifying the Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed March 7, 2008 ("2008 D&O"), to (1) allow for the sale of a portion of the Petition Area; and (2) allow for the subdivision of the Petition Area. Upon such subdivision and sale, WDV also requested that the pending docket be bifurcated, and the portion of the Petition Area sold to WDV be released from the pending docket.

On October 26, 2018, WDV filed a Motion for Modification; Memorandum in Support of Motion; Affidavit of William Frampton; and Exhibits A to F (collectively "WDV's Motion for Modification"), pursuant to HRS Chapter 205 and Chapter 15-15 of HAR §§ 15-15-70 and 15-15-94. In the Motion for Modification, WDV requested that the Commission issue an order modifying the 2008 D&O to allow for use of a portion of the Petition Area for an HRS Chapter 201H workforce housing project that was recently approved by the County of Maui.

The Commission, having examined the testimony, evidence, and arguments of counsel presented during the hearings, along with the pleadings filed by all parties herein, hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

PROCEDURAL MATTERS

1. On March 7, 2008, the Commission filed the 2008 D&O, granting the reclassification of the Petition Area, consisting of approximately 25.263 acres of land and identified as TMK No. (2) 3-5-002: 011, from the State Land Use Agricultural District to the State Land Use Urban District, subject to 23 conditions of approval.

2. On January 2, 2018, Emmanuel Lutheran Church of Maui, a Hawai'i non-profit corporation ("ELC" or "Petitioner"), submitted a letter to the Commission explaining that there had been delays in completing the project approved under the 2008 D&O ("Original ELC Project"), the reasons for the delays, and the proposed subdivision and sale of a portion of the Petition Area to WDV to allow for WDV's development of affordable workforce housing pursuant to HRS Chapter 201H within approximately half of the Petition Area. ELC further informed the Commission that ELC and WDV would be returning to the Commission to request the necessary approvals for both projects to proceed.

3. On April 9, 2018, ELC filed a Motion for Extension of Time to Complete Project ("ELC's Motion for Extension"), seeking a ten-year extension to Condition No. 2 of the 2008 D&O.¹

¹ ELC's Motion for Extension is addressed under a separate order.

4. On April 12, 2018, WDV filed its Motion to be Copetitioner, or in the Alternative to Become a Party, or in the Alternative to Intervene (“WDV’s Motion for Intervention”).

5. On April 19, 2018, ELC filed its Memorandum in Support of WDV’s Motion for Intervention.

6. On April 19, 2018, the Office of Planning, State of Hawai‘i (“OP”), filed its Response to WDV’s Motion for Intervention, stating that OP had no objections to said motion.

7. On April 26, 2018, the Department of Planning, County of Maui (“County”), filed its Statement of No Objection to WDV’s Motion for Intervention.

8. On May 9, 2018, the Commission held a hearing on WDV’s Motion for Intervention in Kahului, Maui, Hawai‘i, and voted to grant WDV intervenor status. On June 22, 2018, the Commission issued its Order Granting Waikapū Development Venture LLC’s Motion to Intervene.

9. On October 12, 2018, ELC filed a Motion for Modification (“ELC’s Motion for Modification”), seeking approval of an Updated ELC Project, which was of a more modest scale than the Original ELC Project and would be developed within approximately half of the Petition Area, with the other half being identified for

development of WDV's Waikapū Affordable Workforce Housing Project.²

10. On October 12, 2018, WDV filed WDV's Three-Part Motion.

11. On October 26, 2018, WDV filed WDV's Motion for Modification.

12. On November 15, 2018, WDV filed its Errata To Motion for Modification; Memorandum in Support of Motion; Affidavit of Counsel; and Exhibit A (collectively "WDV's Errata").

13. On November 19, 2018, OP filed its Response to WDV's Three-Part Motion and its Response to WDV's Motion for Modification.

14. On November 21, 2018, the County filed its Position Statement on WDV's Three-Part Motion.

15. On November 27, 2018, the County filed its Errata to Position Statement and Statement of No Position on WDV's Errata.

16. On November 29, 2018, the Commission continued its hearing on ELC's Motion for Extension,³ and further considered ELC's Motion for Modification, WDV's Three-Part Motion, and WDV's Motion for Modification at the Malcolm Center in Kihei, Maui, Hawai'i.

17. Peter A. Horovitz, Esq., and William Frampton appeared on behalf

² ELC's Motion for Modification is addressed under a separate order.

³ The Commission initially considered ELC's Motion for Extension on May 9, 2018, but deferred action on the matter for six months.

of WDV. Jennifer A. Lim, Esq., Dr. Michael Reiley, and Leif Sjostrand appeared on behalf of ELC. Michael Hopper Esq., Deputy Corporation Counsel, was present representing the County together with Deputy Planning Director Joseph Alueta and Planner Tara Furukawa. Deputy Attorney General, Dawn T. Apuna, Esq., and Lorene Maki appeared on behalf of OP.

18. Commissioners Scheuer, Cabral, Mahi, Okuda, Aczon, Ohigashi and Wong were present. Commissioner Ohigashi was excused at the lunch recess and not present to consider WDV's Motion:

19. In considering WDV's Three-Part Motion, the Commission first took up WDV's Motion to Approve Sale of a Portion of the Petition Area.⁴

20. The County expressed support for the sale of a portion of the Petition Area to WDV.

21. OP stated that it had no objections to the sale of a portion of the Petition Area to WDV.

22. ELC stated that it had no comments on the sale of a portion of the Petition Area to WDV.

⁴ Following action by the Commission on ELC's Motion for Extension but prior to consideration of WDV's Three-Part Motion, Tom Blackburn Rodrigues requested an opportunity to provide public testimony on behalf of Go Maui, Inc. As there were no objections by the parties to Mr. Blackburn Rodrigues' request, the Commission heard his late testimony in favor of WDV's Waikapū Affordable Workforce Housing Project.

23. Commissioner Cabral moved to approve the sale of a portion of the Petition Area to WDV. Commissioner Aczon seconded the motion.

24. There being a vote tally of 6 ayes, 0 nays, and 2 excused, the motion passed.⁵

25. The Commission next took up WDV's Motion to Allow for Subdivision of Petition Area.

26. The County stated that it supported WDV's Motion to Allow for Subdivision of Petition Area.

27. OP stated that it had no objections to WDV's Motion to Allow for Subdivision of Petition Area.

28. ELC stated that it supported WDV's Motion to Allow for Subdivision of Petition Area.

29. Commissioner Mahi moved to approve WDV's Motion to Allow for Subdivision of Petition Area. Commissioner Wong seconded the motion.

30. There being a vote tally of 6 ayes, 0 nays, and 2 excused, the motion passed.

31. The Commission then considered WDV's Motion for Modification.

32. In support of WDV's Motion for Modification, WDV provided oral

⁵ There are currently eight sitting members on the Commission. The Kaua'i seat is presently vacant. Docket No. A07-773/Emmanuel Lutheran Church of Maui Findings Of Fact, Conclusions Of Law, And Decision And Order Granting Waikapū Development Venture, LLC's (1) Motion To Approve Sale Of A Portion Of The Petition Area; (2) Motion To Allow For Subdivision Of Petition Area; (3) Motion To Bifurcate; And (4) Motion For Modification

testimony from William Frampton.

33. The County expressed support for WDV's Motion for Modification.

34. OP had no objections to WDV's Motion for Modification.

35. ELC had no objections to WDV's Motion for Modification.

36. Commissioner Mahi moved to approve WDV's Motion for Modification, provided that WDV's Waikapū Affordable Workforce Housing Project shall be developed within four years. Commissioner Aczon seconded the motion.

37. There being a vote tally of 6 ayes, 0 nays, and 2 excused, the motion passed.

38. The Commission next considered WDV's Motion to Bifurcate.

39. WDV described the basis for its Motion to Bifurcate and the need for WDV to be granted its own docket number in this matter.

40. The County expressed support for WDV's Motion to Bifurcate.

41. OP stated that it supported WDV's Motion to Bifurcate.

42. ELC stated that it supported WDV's Motion to Bifurcate.

43. Commissioner Cabral moved to approve WDV's Motion to Bifurcate to split the Petition Area into two portions, with the understanding that both bifurcated properties shall be subject to the condition requiring the completion of a Cultural Impact Assessment ("CIA") prior to commencement of construction on either

property and the adherence of WDV to the recommendations of the CIA.

Commissioner Wong seconded the motion.

44. There being a vote tally of 6 ayes, 0 nays, and 2 excused, the motion passed.

DESCRIPTION OF THE PETITION AREA

45. The Petition Area is located in Wailuku, Maui, Hawai'i, and consists of approximately 25.263 acres of land, identified by Tax Map Key No. (2) 3-5-002: 011.

46. ELC is the current fee owner of the Petition Area. WDV is under contract with ELC to purchase approximately 12.5 acres within the Petition Area shortly after final subdivision approval is issued by the County approving the subdivision of the Petition Area into two large lots (approximately 12.76 acres to be retained by ELC and approximately 12.50 acres to be conveyed to WDV).

DESCRIPTION OF PROJECT APPROVED UNDER THE 2008 D&O

47. Originally, ELC sought reclassification of the Petition Area to allow for the development of the Original ELC Project, which consisted of a new campus for Petitioner's church and school.

48. The Original ELC Project consisted of approximately 52,000 square feet of structures for the new school campus, which included a preschool building, 18

classrooms for grades K through 8, a multi-purpose complex, and other buildings

Docket No. A07-773/Emmanuel Lutheran Church of Maui

Findings Of Fact, Conclusions Of Law, And Decision And Order Granting Waikapū Development Venture, LLC's (1) Motion To Approve Sale Of A Portion Of The Petition Area; (2) Motion To Allow For Subdivision Of Petition Area; (3) Motion To Bifurcate; And (4) Motion For Modification

accessory to school functions. The Original ELC Project was also to include a 450-seat sanctuary for religious and school-related functions.

49. At full buildout, the Original ELC Project would have accommodated approximately 450 students.

50. The Original ELC Project was to be completed in three phases. Phase 1 was to include the construction of necessary infrastructure, a preschool building, twelve regular classrooms, and a multi-purpose complex for art, music, and athletics. Phase 1A was to include an administration building and another building to accommodate a library, computer lab, and science room. Phase 2 was to include the 450-seat sanctuary and additional classrooms. At the time, it was anticipated that each phase would take approximately 13 months to complete.

51. Although the Petition Area is approximately 25.263 acres in size, the Original ELC Project was planned to be developed within an envelope of approximately half that size, with the remainder to be reserved for open space and unidentified future improvements.

UPDATED ELC PROJECT, DEVELOPMENT TIMELINE, AND COST ESTIMATES

52. Upon the completion of the subdivision process to split the Petition Area into two large lots, ELC will sell one of those lots to WDV. ELC will develop the Updated ELC Project on the portion of the Petition Area it retains. WDV will develop the workforce housing project authorized under County of Maui Resolution No. 18-150.

53. Consistent with the Original ELC Project, the Updated ELC Project will provide a new campus for Petitioner's church and school. However, the Updated ELC Project has been scaled down and will be developed in three phases, with the possibility of a fourth phase.

54. ELC has not obtained cost estimates or determined projected start and completion years for Phase 4 because Phase 4 is too speculative at this time.

55. Under the 2008 D&O, ELC was required to complete construction of the Original ELC Project within ten years of March 7, 2008, or by March 7, 2018.

56. Following the Commission's issuance of the 2008 D&O, ELC obtained a rezoning of the Petition Area to allow for development of the Original ELC Project.

57. Shortly after the rezoning, ELC had significant transitions within its internal leadership, including deaths of key members, which negatively affected its ability to timely develop the Original ELC Project. ELC's current efforts are now led Dr. Michael Reiley, Pastor Joshua Schneider, and David Hobus. Leif Sjostrand, one of ELC's long-standing members and a senior estimator at Goodfellow Bros., is also involved in developing the Updated ELC Project.

58. The Great Recession also adversely affected ELC's ability to develop the Original ELC Project. ELC's Kahului campus was placed on the market in 2009, but eventually taken off after a year due to a lack of buyer response and a drop in appraised value from a high of \$5.6 million to a low of \$3.5 million in 2012, which

represented a 37.5% reduction. The Great Recession also resulted in a significant reduction in ELC's enrollment numbers, from 175 students in 2008 to as low as 120 students.

59. ELC's current student enrollment is at approximately 137 students, with the goal of returning to the 175 to 180 enrollment range. ELC is in the process of seeking accreditation, which will further strengthen the school's marketability, increase its enrollment numbers, and open funding and scholarship opportunities.

60. The mortgage encumbering the Petition Area also affected ELC's ability to develop the Original ELC Project, as many grant funding opportunities either require an applicant's property to be unencumbered or take the property's existing encumbrances into consideration when awarding funds.

61. A time extension from the current deadline of March 7, 2018, will allow for the opportunity for development of the Updated ELC Project and the Waikapū Affordable Workforce Housing Project.

62. ELC has been active on Maui for more than 50 years. ELC's preschool was started in 1972.

63. ELC will use the proceeds from the sale of a portion of the Petition Area to WDV to pay off the mortgage currently encumbering the Petition Area. Remaining proceeds will also be used to fund the planning and development of the Updated ELC Project.

64. Condition 20 of the 2008 D&O prohibits the sale of the Petition Area or any portion thereof without prior Commission approval.

65. Earlier fundraising efforts by ELC had been hampered by the existing debt on the Petition Area. Certain grants are not accessible for properties that are subject to debt, such as a mortgage.

66. ELC has engaged with local and national individuals skilled in fundraising and grant writing for schools to begin the process of fundraising for the Updated ELC Project.

67. ELC's denomination, the Lutheran Church Missouri-Synod, has approved the head of its national Gift Planning Office, Michael Fisher, to work with ELC free-of-charge for 18 months to develop and execute gift planning strategies for the Updated ELC Project. Beginning in December 2018, Mr. Fisher will hold six different sessions in Hawai'i to assist ELC with gift planning. There is an executed Memorandum of Understanding in place between ELC and Mr. Fisher.

68. Chris Hart & Partners, Inc., conducted a CIA for the Petition Area prior to the 2008 D&O. Based on that CIA, the Commission found and concluded in the 2008 D&O that the Original ELC Project would not have any adverse effects on Native Hawaiian traditional and customary rights that would require protection under Article XII, Section 7, of the Hawai'i State Constitution.

69. Notwithstanding the Commission's previous findings and conclusions in the 2008 D&O, ELC and WDV have committed to conducting an additional CIA for the Petition Area.

CONCLUSIONS OF LAW

1. Pursuant to HAR § 15-15-94(b), “[f]or good cause shown, the [C]ommission may act to modify or delete any of the conditions imposed or modify the [C]ommission’s order.”

2. WDV has demonstrated good cause to amend the 2008 D&O to approve the sale of a 12.5-acre portion of the Petition Area to WDV.

3. WDV has demonstrated good cause to allow for the subdivision of the Petition Area as a necessary step in the sale of a portion of the Petition Area.

4. WDV has demonstrated good cause to modify the 2008 D&O to allow for the use of a 12.5-acre portion of the Petition Area for its Waikapū Affordable Workforce Housing Project.

5. WDV has demonstrated good cause to bifurcate the subject docket, and to allow the portion of the Petition Area to be sold to WDV to be released from the docket.

6. Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

ORDER

This Commission, having duly considered WDV's Three-Part Motion and Motion for Modification, the oral and written testimony of WDV, ELC, OP, and the County, and motions having been made and seconded at a meeting on November 29, 2018, in Kihei, Maui, Hawai'i, and the motions having received the affirmative votes required by HAR § 15-15-13(a), and there being good cause for the motions,

HEREBY ORDERS that WDV's Motion to Approve Sale of a Portion of the Petition Area be GRANTED.

Accordingly, Condition No. 20 of this Commission's 2008 D&O shall be deleted in its entirety.

IT IS ALSO ORDERED that WDV's Motion to Allow for Subdivision of Petition Area be GRANTED.

IT IS FURTHER ORDERED that WDV's Motion for Modification be GRANTED.

Accordingly, Condition No. 2 of this Commission's 2008 D&O as it applies to Intervenor shall be amended as follows:

2. Reversion of District Classification. Intervenor shall develop the 12.5-acre portion of the Petition Area and complete the construction of the Workforce Housing Project no later than four (4) years from the date of this Order. If Intervenor fails to complete the development within four (4) years from the date of

this Order, the Commission may, on its own motion or at the request of any party, file an Order to Show Cause and require Intervenor to appear before the Commission to explain why the land should not revert to its previous Agricultural classification.

IT IS FURTHER ORDERED that WDV's Motion to Bifurcate is GRANTED.

Accordingly, this docket is henceforth bifurcated into Docket No. A07-773(a) consisting of the findings, conclusions, and conditions applicable to that portion of the Petition Area retained by ELC and into Docket No. A07-773(b) consisting of the findings, conclusions, and conditions applicable to that 12.5-acre portion of the Petition Area to be acquired by WDV.

IT IS ALSO FURTHER ORDERED that Intervenor's description of the HRS 201H Waikapū Affordable Workforce Housing Project in its Application for Affordable Workforce Housing Subdivision (Exhibit E to WDV's Motion for Modification) is hereby considered to be Intervenor's representations to the Commission for all purposes, including the application of Condition No. 1 of the 2008 D&O.

IT IS ALSO FURTHER ORDERED that the foregoing amendments and modifications to the 2008 D&O as it applies to Intervenor shall be subject to the following condition:

1. Intervenor shall have a CIA of the Petition Area completed prior to commencement of construction on either bifurcated property of the Petition Area, and Docket No. A07-773/Emmanuel Lutheran Church of Maui Findings Of Fact, Conclusions Of Law, And Decision And Order Granting Waikapū Development Venture, LLC's (1) Motion To Approve Sale Of A Portion Of The Petition Area; (2) Motion To Allow For Subdivision Of Petition Area; (3) Motion To Bifurcate; And (4) Motion For Modification

Intervenor and Petitioner shall adhere to the recommendations of said CIA.

IT IS ALSO FURTHER ORDERED that Intervenor shall record an amendment to the existing Declaration of Conditions Applicable to an Amendment of District Boundary From Agricultural to Urban, recorded in the Bureau of Conveyances of the State of Hawai'i as Document No. 2008-076764, to reflect the amendment to Condition No. 2, the deletion of Condition No. 20, and the addition of the new condition stated above.

All other conditions to this Commission's 2008 D&O filed March 7, 2008, shall continue in full force and effect and shall further apply to Intervenor in Docket No. A07-773(b).

ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 11th day of July, 2019. This ORDER may be executed in counterparts. This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, Hawai'i, this 11th day of July, 2019, per motions on November 29, 2018..

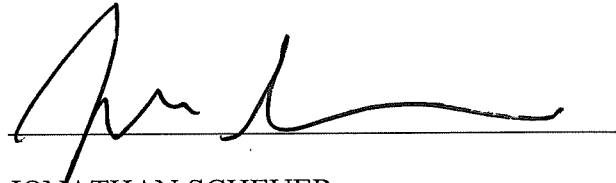
APPROVED AS TO FORM

LAND USE COMMISSION

STATE OF HAWAI'I

Randall S. Ashiyama

Deputy Attorney General



JONATHAN SCHEUER

Chairperson and Commissioner



NANCY CABRAL

Vice Chair and Commissioner



AARON MAHI

Vice Chair and Commissioner



EDMUND ACZON

Commissioner

Excused

DAWN N. CHANG

Commissioner

Vacant Seat

Kauai County

Commissioner

Excused

LEE OHIGASHI

Commissioner



GARY OKUDA

Commissioner



ARNOLD WONG

Commissioner

Filed and effective on: July 11th, 2019

Certified by:



DANIEL ORODENKER

Executive Officer



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OF THE STATE OF HAWAII

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CERTIFICATE OF SERVICE

I hereby certify that a certified copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER GRANTING WAIKAPŪ DEVELOPMENT VENTURE, LLC'S (1) MOTION TO APPROVE SALE OF A PORTION OF THE PETITION AREA; (2) MOTION TO ALLOW FOR SUBDIVISION OF PETITION AREA; (3) MOTION TO BIFURCATE; AND (4) MOTION FOR MODIFICATION was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

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Attorney for Petitioner
WAIKAPU DEVELOPMENT VENTURES, LLC.

Dated: Honolulu, Hawaii, 7/11/19.

A handwritten signature in black ink, appearing to read 'D. Orodenger', written over a horizontal line.

DANIEL ORODENKER
Executive Officer