



LAND USE COMMISSION
STATE OF HAWAII

2021 JUN 24 A 8:46

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In The Matter Of The Application Of	)	DOCKET NO. SP06-400
	)	
WILLIAM HORNEMAN ON BEHALF OF	)	DECISION AND ORDER
HAWAIIAN CEMENT	)	APPROVING TIME EXTENSION
	)	TO SPECIAL USE PERMIT AND
To Operate And Expand A Quarry And Base	)	CERTIFICATE OF SERVICE
Course Operation On Approximately 79.2	)	
Acres Of Land Within The State Land Use	)	
Agricultural District At Mā`alaea, Maui,	)	
Hawai`i, Tax Map Key: 3-6-04: 7	)	
_____	)	

DECISION AND ORDER APPROVING TIME EXTENSION TO SPECIAL USE PERMIT

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.

June 24, 2021 by

A handwritten signature in black ink, consisting of several loops and a trailing line.

Executive Officer



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DECISION AND ORDER APPROVING TIME EXTENSION TO SPECIAL USE PERMIT

On June 8, 2021, the County of Maui filed a request on behalf of Hawaiian Cement ("Applicant") for a fifteen-year time extension to the life of the State Land Use Commission ("LUC") Special Use Permit ("SP") issued in County Docket No. SUP1 2006/0001 (LUC Docket No. SP06-400) with the County of Maui Department of Planning ("DP"), pursuant to section 205-6, Hawai'i Revised Statutes ("HRS"), and sections 15-15-95 and 15-15-96, Hawai'i Administrative Rules ("HAR").

The LUC held a hearing on June 9, 2021 via ZOOM interactive conference technology, to consider the complete record of the Maui Planning Commission's ("MPC") proceedings on the Applicant's request, public testimony, and the oral arguments presented by the parties in this proceeding.

A motion was made and seconded. A friendly amendment was then made to the motion to add a new Condition to require consultation with the State Department of Land and Natural Resources-Division of Forestry and Wildlife (“DOFAW”) and U.S. Fish and Wildlife Service (“USFWS”) on any issues with Hawaiian yellow-faced bees in the Petition Area. The friendly amendment was accepted by the movant and seconder.

Following deliberations by the Commissioners, a vote was taken on the motion. There being a vote tally of 8 ayes, the motion carried.¹

FINDINGS OF FACT

1. On November 24, 2020, the MPC conducted a hearing on the Applicant’s request. There was no public testimony. After due deliberation, the MPC voted to approve the Applicant’s request for a 15-year time extension and to delete Condition Numbers 10 and 16 of the Decision and Order Approving Special Permit dated December 4, 2006.
2. The MPC found that the landowner, Pōhakulepo Recycling, LLC had received approval by the MPC in 1997 for a State Land Use Commission SP authorizing a base course production, composting, and recycling facility on a 14.8-acre portion of the subject property. The concrete recycling and green waste composting facility are also permitted by a County Conditional Use Permit (“CUP”) issued by the Maui County Council. Subsequent time extensions for the SUP were granted by the MPC.
3. The Planning Commission also found that in 2008, the Applicant requested that the original 14.8-acre area be consolidated with a 64.4-acre expansion area, making the total area for the operation 79.2-acres and covered under a single consolidated SP. In addition,

¹ As of June 2021, there are 8 sitting Commissioners out of a possible 9 seats.

because the quarry and base course operation were not permitted uses in the underlying County “Agricultural” zoning district, and because the expansion area was larger than 15 acres, a consolidated CUP was also sought.

4. Most recently in 2010 and 2011, the LUC, County Council, and MPC approved time extensions for all three permits for the consolidated 79.2-acre site. All three permits had an expiration date of December 15, 2019.
5. On June 20, 2019, the Applicant submitted an application for an *Amendment to Permit Terms, Conditions & Time Stipulation* to the DP for 15-year extensions for SUP1 2006/0001 (SP06-400) and CUP 2006/0001.
6. Pursuant to Condition 1 of the 2011 SP approved by the LUC, the Applicant must submit a request for an extension at least on-hundred twenty (120) days prior to its expiration.
7. Pursuant to §19.40.090 MCC, The Applicant met the criteria for a CUP permit renewal and on September 2, 2020, the Planning Director approved the Applicant’s request for a 15-year time extension to December 15, 2035.
8. As quarry and concrete recycling operations were ongoing, the Applicant requested that the SUP1 and CUP also be extended for a period of 15 years from December 15, 2019 to December 15, 2035. The MPC met on November 24, 2020 to address the time extensions for these two permits and granted them.
9. The expiration dates for all three permits necessary for quarry operations were approved by the MPC on November 24, 2020 to extend till December 15, 2035.
10. The LUC has jurisdiction to approve special use permits and amendments thereto for areas greater than 15 acres.

11. Since the subject land is greater than 15 acres (79.2 acres), a CUP is required in addition to a SP. The SP returns to the jurisdiction of the LUC, and the MPC makes a recommendation on the SP to the LUC.
12. On June 8, 2021, the LUC received copies of the MPC's decision and the record on the request which included the MPC's agenda minutes for the November 24, 2020 meeting.
13. Upon review of the record, the LUC staff noted that after due deliberation, the Planning Commission clarified that all of the remaining 23 conditions previously imposed by the LUC were included as part of its decision to approve the Applicant's request for a 15-year time extension to the life of the Special Use Permit and deletion of Condition Numbers 10 and 16.
14. On June 9, 2021, the LUC met via ZOOM interactive conference technology to consider the Applicant's request. Bryan Esmerelda, Karlyn Fukuda and Dave Gomes appeared on behalf of the Applicant. Michael Hopper, Esq., Paul Fasi and Jordan Hart appeared on behalf of the DP. Alison Kato, Esq., Aaron Setogawa and Rodney Funakoshi were also present on behalf of the State Office of Planning ("OP").
15. At the hearing, the Commission received oral and written testimony from Lucienne de Naie. Ms. de Naie stated that she was speaking on behalf of the Sierra Club Maui Group ("SCMG") and shared the concerns of her organization about cultural resources in the Pōhakea Stream gulch area and the potential threat to federally listed species of endangered "yellow-faced bees" in the vicinity. After questioning, the Commission found Ms. de Naie's testimony to be reasonable and compelling such that further review of measures to protect the yellow faced bees was warranted.

16. The Applicant's representative described its request and argued why the Applicant's request for a 15-year time extension to the life of the Special Permit to December 15, 2035 should be granted and why Condition Numbers 10 and 16 should be deleted since the archaeological Site T-9 had been determined to be a natural boulder field which had been confirmed by an Archaeological Inventory Survey ("AIS") and an Archaeological Monitoring Plan ("AMP").
17. The Applicant described how the excavated quarry materials were vital to the construction industry on Maui and why a 15-year time extension request was justifiable based on the estimated remaining aggregate materials that could be extracted from the quarry in the coming 23 years depending on demand.
18. The Applicant also described how the project's AIS and AMP correspondence had been transmitted to the State Historic Preservation Division ("SHPD"). However, Applicant's witness, Michael Dega described how a dated, acknowledgement confirmation notice from SHPD had not been included in its recent application to support the deletion of Condition Nos. 10 and 16.
19. The DP stated that it supported the 15-year time extension and had no objection to deleting Condition Numbers 10 and 16.
20. OP stated that it had recommended approval of the time extension request as transmitted by the County of Maui, pursuant to the MPC's recommendation for approval, dated April 29, 2021. OP also recommended approval of the MPC's recommendation to delete Conditions 10 and 16.
21. With respect to Condition Number 10, OP noted that the Applicant had clarified whether the State Historic Preservation Division ("SHPD") formally agreed that Site T-9 was not

marked for preservation as represented by the Applicant. The Applicant, as part of its compliance report, included a letter from the SHPD dated April 1, 2008, in which the SHPD did not require the preservation of Site T-9 but recommended the presence of a full-time archaeological monitor for the proposed ground altering activities on the parcel. The Applicant also referenced an excerpt from the revised AIS which had been prepared for the expansion area and subsequently accepted by the SHPD, in which Site T-9 was determined, following a thorough inspection, to be a naturally occurring, unmodified boulder field with no evidence of human alteration or uses. Based on the findings of the survey, Site T-9 was no longer considered an archaeological site, did not warrant archaeological data recovery, and no longer warranted implementation of measures to prevent accidental encroachment.

22. The Commission found during deliberations that because the required SHPD correspondence confirming the 2006 AIS and AMP actions in the Petition Area had not been included in the current Petition to support the deletion of Condition Nos. 10 and 16.
23. The LUC has considered Article XII, Section 7, of the Hawai'i State Constitution and finds that the Project is in compliance and non-violative therewith.
24. The LUC has considered the responsibilities and obligations under, Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission and Ka Pa'akai O Ka 'Āina v. Land Use Commission and finds the Project to be consistent and non-violative therewith.
25. The LUC found during deliberations on the 15-year time extension that a valid permit was needed to allow the quarry to legally maintain its operations without lapsing to support the Maui construction industry.

26. The existing SP permit expired on December 15, 2019 and SP Condition 1 allowed for further extensions by the LUC “*upon timely request for extension filed at least one-hundred twenty (120) days prior to its expiration...*” Petitioner filed the extension request on June 20, 2019 and therefore met the filing deadline to request a permit extension.
27. The LUC has considered Article XI, section 1, of the Hawai'i State Constitution and finds that the Project is in compliance and non-violative therewith.
28. The LUC, in deliberations, questioned the County regarding the process for approving further extensions of time. The Commission found that the LUC is the approving authority for extensions.
29. The LUC finds good cause for granting the request for a 15-year extension for the permit; but the application does not contain sufficient evidence in the record to support deletion of Condition Nos. 10 and 16.

RULINGS ON PROPOSED FINDINGS OF FACT

Any of the findings of fact submitted by Petitioner or other parties not already ruled upon by the Commission by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

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.

CONCLUSIONS OF LAW

1. HAR §15-15-70(a) states the following:
"Any party may make motions before, during, or after the close of a hearing."
2. The LUC has jurisdiction over this matter pursuant to HRS §205-6, and HAR §§15-15-95 and 15-15-96.
3. The Project constitutes a use that would promote the effectiveness and objectives of HRS Chapter 205, HRS, and complies with HRS §205-6(d).
4. The Project is consistent with the "overarching purpose" of HRS Chapter 205 which is to "protect and conserve natural resources and foster intelligent, effective, and orderly land allocation and development." *Kaua'i Springs v. Planning Commission*, 130 Haw. 407, 312 P.3d 283 (2013).
5. Article XI, section 1, of the Hawai'i State Constitution requires the State to conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and to promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
6. Article XII, Section 7, of the Hawai'i State Constitution requires the State to protect Native Hawaiian traditional and customary rights. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua'a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.
7. The State, Counties and their agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised Native Hawaiian rights to the extent feasible.

Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission, 79 Hawai'i 425, 903, P.2d 1246, certiorari denied, 517 U.S. 1163, 116 S.Ct. 1559, 134 L.Ed.2d 660 (1996).

8. The LUC is empowered to preserve and protect customary and traditional rights of Native Hawaiians. *Ka Pa'akai O Ka'Aina v. Land Use Commission*, 94 Hawai'i 31.
9. HAR §15-15-70(m) states the following:

"Orders granting, denying or otherwise disposing of motions, including motions to amend decisions and orders relating to district boundary amendments and to special permits, shall be signed by the chairperson or any vice chairperson, or the presiding officer, or the hearing officer, as the case may be."

ORDER

The LUC, having duly considered the complete record of the Planning Commission's proceedings on the Applicant's request and the oral arguments presented by the parties in this proceeding, and a motion having been made at a meeting conducted on June 9, 2021 via ZOOM interactive conference technology, and the motion having received the affirmative votes required by HAR §15-15-13, and there being good cause for the motion,

HEREBY ORDERS that Condition Number 1 of the Order Amending Decision and Order Approving Special Use Permit dated December 18, 2006, be amended as follows:

1. *That the LUC Special Use Permit shall be valid until December 15, 2035, subject to further extensions by the LUC upon a timely request for extension filed at least one-hundred twenty (120) days prior to its expiration. The appropriate Planning Commission shall make a recommendation to the LUC and may require a public hearing on the time extension.*

IT IS FURTHER ORDERED that Condition Numbers 10 and 16 of the Decision and Order Approving Special Use Permit dated December 4, 2006, be retained.

IT IS FURTHER ORDERED that Condition 12 of the Decision and Order Approving Special Use Permit dated December 4, 2006, be amended as follows:

12. *That upon cessation of the Pohakea Quarry operations the Applicant, including the owner of the land, shall prepare and timely implement a closure plan to revegetate the site or other measures to reduce erosion prior to the expiration of the SUP. The closure plan shall be reviewed and approved by the DP.*

IT IS FURTHER ORDERED THAT Condition 24 be added to the Decision and Order Approving Special Use Permit dated December 4, 2006.

24. *That the Department of Land and Natural Resources-Division of Forestry and Wildlife and the United States Fish and Wildlife Service be consulted with regard to the issue raised on Hawaiian "yellow-faced bees" in the Petition Area.*

IT IS FURTHER ORDERED THAT all other conditions to the Decision and Order Approving Special Use Permit dated December 4, 2006, are hereby reaffirmed and shall continue in effect.²

The Commission is also:

- authorizing LUC staff to make non-substantive changes to the conditions, as appropriate, regarding formatting, style, and other modifications to ensure consistency; and
- authorizing the Chair to sign the Order in this matter on behalf of the Commission.

² Condition Number 1 was amended pursuant to Order Amending Decision and Order Approving Special Use Permit dated December 18, 2006, and is further amended herein.

ADOPTION OF ORDER

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

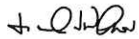
Done at Honolulu, Hawai'i, this 24th day of June, 2021, per motion on

June 22, 2021.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAI'I



Deputy Attorney General

By



JONATHAN LIKEKE SCHEUER
Chairperson and Commissioner

Filed and effective on:

Jun 24, 2021

Certified by:



DANIEL ORODENKER
Executive Officer



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the DECISION AND ORDER APPROVING TIME EXTENSION TO SPECIAL USE PERMIT was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular mail as noted:

VIA HAND-DELIVER AND EMAIL

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DATED: Honolulu, Hawaii, this 24th day of June, 2021.



DANIEL ORODENKER
Executive Officer