

*Pre-decisional Document*

**DOCKET NO. A15-798 WAIKAPŪ  
PROPERTIES ET AL.**

**MOTION TO AMEND  
CONDITIONS 1, 4, AND 8(B) OF  
THE DECISION AND ORDER FILED  
ON FEBRUARY 27, 2018**

***STAFF  
REPORT***

**ACTION MEETING  
October 5, 2022**



**Daniel E. Orodenker, Executive Officer**

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**Submitted: September 27, 2022**

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## 1. BACKGROUND INFORMATION

On February 26, 2018, the Commission filed Findings of Fact, Conclusions of Law, and Decision and Order approving Waikapū Properties, LLC's ("Petitioner") - Waikapū Country Town ("Project") subject to 32 conditions ("2018 D&O").

On September 20, 2019, Maui County Council approved Petitioner's Change of Zone request by Ordinance 4998 (2019) subject to 27 conditions.

The Commission received timely annual reports from Petitioner in 2019, 2020, and 2021. Comments were received on the 2020 annual report from the County of Maui. At that time, the County, noted substantial entitlement work being completed with the County, including the filing of a State Special Permit (less than 15 acres) for a Wastewater Reclamation Facility.

On July 2, 2021, Petitioner filed a *Motion for Modification of Condition 8(b) of Decision and Order filed on February 26, 2018* ("2021 Motion"), a Memorandum in Support of Motion, and Appendices 1-2. Appendix 1 comprised the section of the 2018 Order containing the conditions on the Project. Appendix 2 contained the 27 Conditions of Zoning required of the Petitioner by the County of Maui.

On September 10, 2021, the Office of Planning and Sustainable Development ("OPSD") filed its Response to Petitioner's Motion ("OPSD Response") and OPSD Exhibit 1 (DOT review letter).

On September 13, 2021, the Petitioner filed a *Stipulation of the Parties on Petitioner's Motion for Modification* dated July 2, 2021 ("Stipulation").

On March 8<sup>th</sup>, 2022, The Land Use Commission issued Order Granting Motion for Modification of Condition 8(b) of Decision and Order Filed on February 26, 2018.

The Land Use Commission continues to receive timely annual reports from the Petitioner. Comments were received on the 2022 annual report from the County of Maui. The County's comment reads as follows:

The Department notes the status report on the Petition Area on page 2 of the Report. Item 3 regarding "*consultations with the State of Hawaii and Maui County regarding the formation of a development agreement concerning workforce housing and land for educational facilities in exchange for centralized wastewater treatment services and funding of regional roadway improvements*" will be closely watched over the upcoming year and is currently in review by the County of Maui. The Department continues to hold the State Land Use Commission Special Permit application for the 12-acre wastewater treatment plant pending resolution of any development agreement.

On July 19<sup>th</sup>, 2022, The Petitioner filed a Motion to Amend Conditions 1, 4 and 8(b) of the 2018 D&O; Memorandum in Support of Motion; Exhibit "1"; Attachment "A";

Declaration Of Michael Atherton; Certificate of Service (“2022 Motion”).

## **2. EXPLANATION OF PROCEEDING BEFORE THE LAND USE COMMISSION**

The proceeding before the Land Use Commission (“Commission”) is to consider the Motion to Amend Conditions 1, 4, and 8(b) of the 2018 D&O, filed by Waikapū Properties, LLC, MTP Land Partners, LLC, Williams. Filios-Trustee of the William S. Filios Separate Property Trust dated April 3, 2000, and Wai‘ale 905 Partners, LLC (collectively “Petitioner”), on July 19<sup>th</sup>, 2022.

Hawai‘i Administrative Rules (“HAR”) §15-15-70(a) provides that “[a]ny party may make motions before, during, or after the close of a hearing.”

Pursuant to HAR §15-15-94, a petitioner who desires to have a modification or deletion of a condition that was imposed by the Commission, or a modification of the Commission’s order shall file a motion in accordance with HAR §15-15-70, including proper service and affidavits or declarations if the motion requires the consideration of facts not appearing in the record.

If good cause is shown, the Commission may modify or delete any of the conditions imposed or modify the Commission’s order (HAR §15-15-94(b)). “Good cause” can mean “a substantial reason amounting in law to a legal excuse,” and that it will also depend on the specific circumstances of an individual case. Determining “good cause” is at the discretion of the Commission.

Pursuant to HRS §91-10(5), the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

The Commission has discretion based on the facts presented in the case to consider other factors, including (1) whether the need for the condition still exists; (2) whether an alternative method for ensuring compliance exists that protects the public trust; or (3) whether compliance with the condition would create an undue hardship.

Given the brief history of this docket, staff has prepared a brief chronology of the significant events relating to the docket in the next section.

## **3. SUMMARY OF THE PETITIONER’S MOTION TO AMMEND**

The Petitioner’s 2022 Motion before the Commission is to consider the Motion to Amend Conditions 1, 4, and 8(b) of the 2018 D&O.

The amendments will allow Petitioner to:

1. increase the size of the school site made the subject of the Educational Contribution Agreement for Waikapū County Town, undated but executed as of January 31, 2017, and
2. increase the number of Residential Workforce Housing Units to be provided in the Project in lieu of providing direct funding and/or participating in the construction of: (1) traffic improvements; and (2) private or public wastewater facilities.

The Petitioner's Motion proposes changing language in the three conditions.

Note: the original conditions are as follows, and the Petitioner's proposed changes are added, and located inside the brackets with underlined text

**Condition 1 Education Contribution Agreement:**

Petitioner shall contribute to the development, funding, and/or construction of school facilities in compliance with the Educational Contribution Agreement for WAIKAPU COUNTRY TOWN, undated but executed as of January 31, 2017, entered into by Petitioner and the DOE [as may be amended]. Petitioner shall ensure that prospective buyers, purchasers, and subsequent owner builders of lots are given notice of the requirement to pay the Central Maui District Impact Fee in accordance with the *Educational Contribution Agreement*, [as may be amended]. Such notice shall be recorded and shall run with the land.

**Condition 4 Wastewater:**

Petitioner shall participate in the funding and/or construction of adequate private or public wastewater source, storage, and transmission facilities to accommodate the proposed uses for each portion of the Petition Area. The private wastewater source, storage, and transmission facilities shall be in accordance with the applicable standards and requirements of the Department of Health and/or the County of Maui. If applicable, the public wastewater source, storage, and transmission facilities shall be controlled or operated by the County of Maui. If the private wastewater source, storage, and transmission facilities are located outside the Petition Area and within the State and County agricultural districts, Petitioner shall apply for a State Special Permit in accordance with the provisions of HRS Chapter 205. [Alternatively, Petitioner may, pursuant to separate agreement with the County of Maui, provide additional residential workforce housing units in the Project in lieu of participating in the funding and construction of adequate private or public wastewater facilities to accommodate the proposed uses for each portion of the Petition area.] If Petitioner participates in a regional wastewater system which is controlled or operated by the County of Maui, [or alternatively provides additional residential workforce housing units in the Project in lieu of participation.] Petitioner may request to be released from this condition applicable to private wastewater source, storage, and transmission facilities.

**Condition 8(b) Transportation- Highways:**

Petitioner shall mitigate all Project-generated traffic impacts as recommended and/or

required by the State Department of Transportation and the County of Maui. [\[Alternatively, Petitioner may, subject to agreement with State Department of Transportation and the County of Maui, provide additional residential workforce housing units in the Project in lieu of providing funding or constructing traffic improvements to mitigate the traffic related impacts of the Project.\]](#) Petitioner shall initiate, coordinate, and meet with State Department of Transportation Highways Division and the County of Maui to agree upon the regional pro-rata share and to develop a Memorandum of Agreement with the State Department of Transportation, Highways Division, and another Memorandum of Agreement with the County of Maui. The Memoranda of Agreement shall be executed prior to submittal of a subdivision application to the County of Maui.

**4. SUMMARY OF COUNTY POSITION STATEMENT**

The County of Maui has no objections, and supports the Petitioner’s Motion to Amend conditions 1, 4 and 8(b) of the 2018 Decision and Order.

The Department of Planning of Maui understands that the covenants shall not become effective until the conditions of the Change in Zoning are also amended to reflect the terms of the public and Private Partnership Agreement (Exhibit 1, in the 2022 Motion.

**5. SUMMARY OF OPSD POSITION**

OPSD recommends approval of Petitioner’s Motion to Amend conditions 1, 4 and 8(b) of the Decision and Order dated February 26, 2018.

OPSD’s response is based on the representations and documents filed by the Petitioner, including comments received from the Department of Transportation ("DOT") on potential impacts to their facilities, programs, statutes, and regulations applicable to the proceedings.

OPSD’s Exhibit 1 is email correspondence of review and comments by DOT dated August 24, 2022. The DOT states “The Petitioner will still be required to enter into a separate Traffic Memorandum of Agreement with HDOT, and the proposed modification to the D&O does not bind or obligate HDOT in any way.” The DOT has no objections to the Motion.

**6. STAFF RECOMMENDATION**

Questions:

1. Petitioner should explain how they see this proposal working, which agencies would be responsible for verifying compliance, and how that will be reported to the Commission.
2. Petitioner’s Declaration of Michael Atherton mentions the loss of the Waiale Project as part of the good cause argument for the proposed amendments.

- Petitioner should elaborate on what this is referring to.
3. The County should be asked to explain specifically how these tradeoffs provide the public with a better outcome, and specifically affordable housing
    - a. How will the County determine the pro rata share for wastewater and traffic mitigation in light of the “loss of the Waiale Project”?
  4. Has the County or OPSD done any analysis to verify Petitioner’s opportunity cost figures for the additional residential workforce housing units proposed in Petitioner’s Exhibit A?
  5. OPSD or DOT should explain its statement that the modified conditions do not bind or obligate DOT in any way. Does this mean that DOT may choose not to fund or construct any necessary traffic improvements or mitigation for the Project where in lieu work force housing units are constructed?
    - a. How will DOT determine the pro rata share for traffic mitigation in light of the “loss of the Waiale Project”?
  6. OPSD should explain specifically how these proposed tradeoffs provide the public with a better outcome.

Staff believes the Petitioner has shown “good cause” for its Motion and provided a Stipulated Agreement that has the support of OPSD, State DOT, and the County of Maui.

The amended language contained in Petitioner’s Motion is acceptable.

Should the Commission wish to approve the request to modify the language of Condition 8(b) a motion can be made to **amend Conditions 1, 4, and 8(b) of the Commission’s 2018 Decision and Order by adopting the Petitioner’s proposed language**

**And that**

**All other conditions of the 2018 Decision and Order shall remain in full force and effect.**

**Reasons in support of such a motion:**

- Modifying the language will allow Petitioner to concurrently work towards subdivision approval and reaching an agreement with State DOT and the County on required infrastructure – which should result in delivery of needed housing more efficiently.
- The modification still requires Petitioner to secure Memoranda of Agreement with the State and County prior to getting initial subdivision approvals.
- The modification should provide consistency between the LUC’s Decision and Order and County of Maui Change of Zoning conditions.
- This could expedite construction of needed housing on Maui while protecting the public’s need to have Project-generated traffic impacts agreed upon prior to subdivision approval.
- Petitioner has provided good cause for the Motion.