

**DOCKET NO. A07-773**  
**Emmanuel Lutheran Church (a)**  
**and Waikapū Development**  
**Venture (b)**

Status Report

***STAFF***  
***REPORT***

**ACTION MEETING**

**June 7, 2023**



**Daniel E. Orodenker, Executive Officer**

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**Submitted: June 5, 2023**

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## 1. EXPLANATION OF PROCEEDING

Status and Progress Report hearings provide the Petitioner an opportunity to update the Commission on progress or problems in compliance with the representations and conditions of the decision and order.

Any decisions by the Commission should be based on good cause (or lack of) shown by Petitioner for its lack of progress and evidence put on the record. If an Order to Show Cause (“OSC”) is to be scheduled, the Commission must have reason to believe there has been failure to perform and there has not been substantial commencement.

## AUTHORITY

Pursuant to HAR 15-15-90(c) “The Commission may require the petitioner to submit periodic reports indicating what progress has been made in complying with any conditions that may have been imposed by the commission.”

Pursuant to HRS 205 and HAR 15-15-79(a): “Petitioners granted district boundary amendments shall make substantial progress within a reasonable period, as specified by the commission, from the date of approval of the boundary amendment, in developing the property receiving the boundary amendment. The Commission may act to amend, nullify, change, or reverse its decision and order if the petitioner fails to perform as represented to the Commission within the specified time period.”

Condition 19 of the 2008 Decision and Order Relating to Annual Reports “Petitioner shall timely provide without any prior notice, annual reports to the Commission, the Office of Planning and Sustainable Development, and the County of Maui Planning Department in connection with the status of the Project and Petitioner’s progress in complying with the conditions imposed herein.”

After hearing from the Petitioner and other parties, the Commission decides additional time may be needed to move forward or that there is a reason to believe that Petitioner is non-compliant with representations and conditions in the D&O and set an Order to Show Cause hearing pursuant to HAR 15-15-79 and 15-15-93(b).

The Commission, for good cause shown, may act to modify or delete any of the conditions imposed or modify the Commission’s order pursuant to HAR 15-15-94(b).

2. **BACKGROUND INFORMATION**

The proceeding before the Land Use Commission (“LUC”) is to hear a status report by Waikapū Development Venture, LLC (“WDV”). The A07-773 docket originally involved the reclassification of approximately 25.263 acres of land from the State Land Use Agricultural District to the State Land Use Urban District at Wailuku, Island of Maui, State of Hawai‘i, TMK No. 3-5-002:011.

The DBA was granted on March 7, 2008, subject to 23 conditions ([see 2008 Decision and Order](#)).

The Project was anticipated to be completed in three phases, and each phase was anticipated to take 13 months to complete. Condition 2 of the 2008 Decision and Order states

“Petitioner shall develop the Petition Area and complete construction of the Project no later than ten (10) years from the date of the decision and order. If Petitioner fails to complete Project construction within ten (10) years from the date of the decision and order, the Commission may, on its own motion or at the request of any party, file an Order to Show Cause and require Petitioner to appear before the Commission to explain why the Petition Area should not revert to its previous Agricultural classification.”

Petitioner submitted [2016 Annual Report](#)

Petitioner Submitted [2017 Annual Report](#), and the LUC received [County Comments](#)

- The 2017 Annual Report identifies that Emmanuel Lutheran Church was in the process of selling half of the Petition area to Waikapū Development Venture once the land was subdivided.
- The 2017 Annual Report states that WDV’s plan is to develop a 100% affordable and workforce housing project on that property. The WDV project is proposed to have 80 residential units that will be available for sale to qualified individuals earning within 70% to 140% of the Maui area median income.

***Please note the following portion of the background information is divided into Petitioners Motions, in this docket numerous motions were made subsequently.***

2018 Motion ELC for Time to Complete Project

On April 9, 2018, ELC filed its [Motion for Extension of Time to Complete Project](#); Memorandum in Support of Motion; Affidavit of Michael Reiley; Affidavit of William Frampton; Petitioner’s Exhibits “A” through “F” (collectively “Motion for Extension”)

On April 27, 2018, The Land Use Commission received [OPSD Response to Petitioner Emmanuel Luther Church](#)

[of Maui’s Motion for Extension of Time to Complete Project](#)

On July 11, 2019, the LUC Mailed Findings of Fact, Conclusions of Law, [Decision and Order Granting Petitioner ELC’s Motion for Extension of Time to Complete Project and Motion for Modification](#); COS

2018 WDV Subsequent Motion (1) to be a co-petitioner with Emmanuel Lutheran Church of Maui, or in the alternative (2) to become a Party herein, or in the alternative (3) to intervene

On April 12, 2018, WDV made a [subsequent motion](#) (1) to be a co-petitioner with Emmanuel Lutheran Church of Maui, or in the alternative (2) to become a Party herein, or in the alternative (3) to intervene.

On April 19, 2018, LUC Received [ELC’s Memorandum in Support](#) of Waikapu Development Venture LLC’s Motion to be co-petitioner, or in the Alternative to Become a Party, or in the Alternative to Intervene,

On April 19, 2018, the LUC received [OPSD’s Letter of No Opposition](#) to WDV LLC’s Motion

On April 26, 2018, [County of Maui- Department of Planning’s Statement of No Objection](#) to (1) Emmanuel Lutheran Church of Maui Motion for Extension of Time to Complete Project and (2) Waikapu Development Venture LLC’s Motion to be Co-petitioner; or in the Alternative to Become a Party; or in the Alternative to Intervene.

On May 1, 2018, the [County of Maui Department of Housing and Human Concerns](#) sent a comment letter in support of WDV’s Motion to support the development of affordable housing.

On June 22, 2018 the LUC sent the [Order granting Waikapu Development Venture LLC’s motion to intervene](#)

2018 ELC Motion for Modification

On October 12, 2018, ELC filed a Motion [Motion for Modification; Memorandum in Support of Motion; Affidavit of Michael Reiley; Petitioner’s Exhibit “1”](#)

On November 19, 2018, The OPSD, Submitted their response to [Emmanuel Lutheran Church of Maui's Motion for Modification](#)

On November 21, 2018, the County of Maui Planning Department filed their [Response to ELC's Motion for Modification](#)

On July 11, 2019, the LUC Mailed Findings of Fact, Conclusions of Law, Decision and [Order Granting Petitioner ELC's Motion for Extension of Time to Complete Project and Motion for Modification](#); COS

The Commission amended Condition Two of the 2008 Decision and Order to read as follows:

“Reversion of District Classification. Petitioner shall develop the Petition Area and complete the construction of the Project no later than twenty (20) years from the date of the decision and order. If Petitioner fails to complete Project construction within twenty (20) years from the date of the decision and order, the Commission may, on its own motion or at the request of any party, file an Order to Show Cause and require Petitioner to appear before the Commission to explain why the Petition Area should not revert to its previous Agricultural classification”

It was further ordered that the foregoing amendments and modifications to the 2008 D&O shall be subject to the following conditions:

1. Petitioner shall complete the initial two phases of the Updated ELC Project within six (6) years of the Commission's issuance of this Order.
  - Six years from issuance is July 11, 2025
2. Petitioner shall have a CIA of the Petition Area completed prior to Petitioner's completion of Phase 1 of the Updated ELC Project, and Petitioner shall adhere to the recommendations of said CIA.

2018 WDV Motion to Approve Sale, Motion to Allow Subdivision, and Motion to Bifurcate

On September 7, 2018, Maui County adopted [Resolution No. 18-150](#) approving with modification the affordable workforce housing project by Waikapū Development Venture LLC, pursuant to section 201H-38, Hawai‘i Revised Statutes. Which states:

“Construction of the Waikapu Development Venture LLC Affordable Workforce Housing Project ("Project") shall commence within two years of the effective date of this resolution. Commencement of construction shall mean the visible start of grading, pursuant to a valid grading permit as needed for the development of the 12.5 acres upon which the 80 residential workforce housing units shall be constructed ("Property"). Waikapu Development Venture LLC shall act in good faith and with its reasonable best efforts to complete construction of the 80 residential workforce housing units, with all related roads and infrastructure, no later than four years after the effective date of this resolution.”

On October 12, 2018, WDV made a [Motion to Approve Sale, Motion to Allow Subdivision, and Motion to Bifurcate](#)

On November 19, 2018, The OPSD, Submitted their response to [WDV’s Motion to Approve Sale; Motion to Allow Subdivision and Motion to Bifurcate](#)

On July 11, 2019, the LUC sent the [2018 Findings of Fact, Conclusions of Law, Decision and Order Granting WDV’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; COS](#)

The Decision and Order approved the sale of a portion of the Petition Area, deleted Condition 20 of the 2008 D&O, granted WDV’s Motion for Modification, amended Condition two (2) of the 2008 Decision and Order, and granted bifurcation.

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.

The Commission 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).

2018 WDV Motion for Modification

On October 26, 2018, WDV made a [Motion for Modification; Memorandum in Support of Motion](#) that requested the Land Use Commission issue an order modifying the Findings of Fact, Conclusion of Law, and Decision and Order filed on March 7, 2008. Allowing for use of the Petition Area acquired by WDV to develop workforce housing project, that was previously approved by the County of Maui.

On November 11, 2018, Waikapu Development Venture LLC’s filed their [Errata to Motion for Modification](#).

On November 19, 2018, The OPSD, Submitted their response to [Motion for Modification](#).

On November 21, 2018, the County of Maui Planning Department filed their [Response to WDV’s Motion to Approve Sale; Motion to Allow Subdivision and Motion to Bifurcate](#).

On November 27, 2018, The County of Maui Department of Planning filed their [Errata to Position Statement](#) and Statement of No Response on WDV Errata to for



## Modification

On January 31, 2019 the Land Use Commission revived the [WDV Intervenor's Draft Order for BOTH Intervenor's 2018 Motions](#)

On July 11, 2019, the LUC sent the [2018 Findings of Fact, Conclusions of Law, Decision and Order](#) Granting WDV'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; COS

The Commission granted WDV's Motion for Modification. Accordingly, the Commission amended Condition Two which reads:

“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 was 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.

After Staff contacted former Attorneys for the Petitioner regarding delinquent annual reports, the Petitioners submitted the joint [2018-2023 Annual Report](#), [Attachment 1](#), and [Attachment 2](#) on April 13, 2023. A synopsis of key sections is as follows;

Condition 1)  
Compliance with Representations  
to the Commission

At present there has not been any development of the ELC Petition Area, except to grub and clear a 10-foot-wide area that is within the ELC Petition Area

WDV intends to develop its 12.5-acre portion of the Petition area in substantial compliance with the description of the HRS 201H Project

Condition 2)  
Reversion of District  
Classification

The Annual Report states “As noted in 2018, ELC still does not have the ability to begin or complete construction by the March 7, 2018 deadline of ten years”

Due to the Covid-19 Pandemic and current economic conditions, WDV does not anticipate completing construction of the Workforce Housing Project by July 11, 2023

Condition 5)  
Highways and Roads

ELC will comply with this condition upon construction of their respective projects. Annual report states “This condition does not apply to WDV.”

On April 25, 2023, The LUC Staff sent the [2023 Status Report Letter](#) scheduling a hearing for June 7<sup>th</sup>, 2023.

On May 12, 2023, The Petitioner filed [2018-2023 AMENDED Annual Report](#), [Attachment 1](#), [Attachment 2](#), and [Attachment 3](#).

Changes from the Original Annual Report include:

Petitioner added a section including the modifications from the 2019 Order granting ELC’s Motion for Extension

Condition 2)  
Reversion of District  
Classification

Petitioner removed “As noted in 2018, ELC still does not have the ability to begin or complete construction by the March 7, 2018 deadline of ten years”, and added “ELC intends to complete construction by the March 7, 2028 deadline”

Condition 23)  
Recordation of Conditions

Petitioner added:  
WDV and ELC are completing a Second Amendment to Declaration of Conditions Applicable to an Amendment of District Boundary Amendment from Agricultural to Urban,

to reflect the conditions required by the Decision and Order for ELC's Motion for Extension of Time to Complete Project. The unrecorded Second Amendment is attached hereto [Attachment 2](#).

Condition 25)  
Initial Two Phases of the Updated ELC Project

Petitioner added:  
ELC is working towards completing the first two phases of the Updated ELC Project (i.e., fund raising and construction of a multi-purpose building) by July 11, 2025.

**3. OPSD RECCOMENDATION**

No comments received

**4. COUNTY OF MAUI RECCOMENDATION**

No comments received

**5. STAFF RECCOMENDATION**

The 2018-2023 [Annual Report](#) and Attachments raises questions about the changing scope of the Project, the status of Development, and financial fitness of the Petitioner.

Following the submittal of the 2018-2023 Annual report Petitioners filed the [2018-2023 AMENDED Annual Report](#), [Attachment 1](#), [Attachment 2](#), and [Attachment 3](#). The Amend Annual Report includes changes in phrasing.

There is no documentation in the record to show that substantial commencement has occurred.

Specific points of concern:

*Delay in Development*

According to the 2018-2023 Annual Report, at present there has not been any development of the ELC Petition Area. WDV states that it intends to develop its 12.5-acre portion of the Petition area in substantial compliance with the description of the HRS 201H Project.

WDV began extending a 12” county waterline within Waiale Road. Work commenced Aug. 2022 and is expected to be completed in June 2023.

## *Financial Capability*

ELC represented in their [2018 Annual Report](#) that they did not have the ability to complete or begin construction by the March 7, 2018, deadline of ten years. As noted in the 2018-2023 Annual Report, ELC stated they still do not have the ability to begin or complete construction by the deadline of ten years set in March 7, 2018. However, the July 11, 2019, Decision and Order gives ELC six years after the issuance (July 2025) to complete both phases of the project. The annual report states ELC has faced numerous factors, such as economic troubles, lower enrollments over a period of years, and lack of financial grants, that have made the development of the project under the proposed timeline impossible.

*The LUC Staff is particularly concerned about the financial status of the Petitioner, and funding of the Project – specifically the duration needed to meet funding goals. Progress in funding is unclear.*

*ELC sold a portion of the property to WDV with the intention to generate the necessary money to construct the ELC project.*

**The Commission should ask WDV for a clear statement of financial standing. In particular where they are in the funding of the Project and how the Petitioner plans to fund the Project development.**

WDV does not anticipate completing construction of the Workforce Housing Project by July 11, 2023. However, WDV obtained grading and road permits

on June 24, 2022 and July 11, 2022, respectively to extend a 12” county waterline within Waiale Road. Work commenced Aug. 2022 and is expected to be completed in June 2023.

*Responsibility for Conditions*

In the Annual Report under Condition 5, Highways and Roads, WDV states the Condition does not apply to them.

The Commission did not exclude WDV from this Condition in any of the Orders.

**The Commission should ask WDV, why this condition does not apply to A07-773(b).**

*Change in Project Plan*

A [Maui News article](#) indicates that WDV proposed a new design to the Maui County Council that changes the number of affordable housing units and eliminates the park features.

The original site plan that called for 68 single-family units and six duplexes (12 units) is shown in comparison to the proposed new site plan that switches out the duplexes and instead calls for 80 single-family homes, revised the scale and scope of the master plan from what was originally presented to the Commission in the 2020 Motion to Amend.

The Commission should question WDV, on why they changed the plans and explain why the project proposal meets the terms of the Condition set regarding affordable housing.

*Substantial Commencement?*

It is unclear how much money ELC and WDV has, and if Petitioner will be able to complete projects by the deadline set in the 2019 Order.

It is not stated in the annual report how much money has been spent on WDV's Portion of the Property, but the County water line work commenced Aug. 2022 and is expected to be completed in June 2023.