

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In The Matter Of The Petition Of:	)	DOCKET NO. SP05-399
	)	
KAUAI ATV, LLC	)	
	)	DECISION AND ORDER
To Permit The Expansion Of Use And	)	APPROVING SPECIAL PERMIT
Placement Of Additional Structures	)	
Within A Previously County-Approved	)	
Staging Area And Expansion Of	)	
Commercial Recreational Activities	)	
Involving The Increase And Change Of	)	
Number Of Vehicles Allowed For Guided	)	
All-Terrain Vehicle Tours, Water	)	
Activities In The Waita Reservoir, Two	)	
Paintball Parks, And A Speedball	)	
Tournament Field on approximately	)	
12,437.79 acres at Koloa, Kaua`i, Hawai`i	)	

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DECISION AND ORDER APPROVING SPECIAL PERMIT

On August 27, 2004, Kauai ATV, LLC ("Applicant") submitted a Special Use Permit Application ("Application") with the County of Kaua`i Planning Department ("Planning Department") pursuant to section 205-6, Hawai`i Revised Statutes ("HRS") and sections 15-15-95 and 15-15-96 of the Hawai`i Administrative Rules ("HAR"). The Applicant proposed to amend<sup>1</sup> special use permit SP-2001-5 to allow the expansion of use and placement of additional

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<sup>1</sup> The Applicant presently operates guided ATV tours at generally the same location as the area considered for this LUC special permit pursuant to SP-2001-5, granted by the County of Kaua`i Planning Commission on November 21, 2000.

structures within previously approved staging area and expansion of commercial recreational activities involving the increase and change of number of vehicles allowed for guided all-terrain vehicle ("ATV") tours, water activities in the Waita Reservoir, two paintball parks, and a speedball tournament field. The special permit activities proposed by the Applicant occur on eleven (11) Tax Map Key Nos. (hereinafter the "Petition Area"), listed below:

<u>Tax Map Keys</u>	<u>Acreage</u>
2-7-001: 001	64.20
2-8-001: 001	782.00
2-8-001: 003	82.25
2-8-022: 028	53.37
2-9-001: 001	1,076.07
2-9-002: 001	2,371.39
2-9-002: 005	8.26
2-9-003: 001	1,417.75
2-9-003: 006	766.25
3-4-001: 001	3,772.99
3-4-006: 001	<u>2,043.26</u>
	<b>12,437.79</b>

On June 16, 2005, Applicant filed with the Land Use Commission ("Commission" or "LUC") the Joinder (the "Joinder") of Grove Farm Company, Inc. ("Grove Farm") as co-applicant to the proceedings.

Applicant represented that the uses defined in Application are restricted to specific areas within the Petition Area. The ATV tours are restricted to established cane haul roads and trails within the Petition Area. Specifically, the ATV tours are limited to the existing routes defined by the Applicant as the

'Koloa Trail', the 'Waterfall Trail', and the 'Alternative Trail' within the Petition Area. All ATV tours begin and end at the existing ATV staging area, in close proximity to the Old Koloa Mill.

The existing ATV staging area encompasses approximately 18,000 sq. ft. (150 ft. x 120 ft.) and is located on TMK: 2-9-001:1. Structures on the site consist of a steel container, tent(s), and portable toilets. The existing staging area is used for customer orientation for the ATV tours (ATV operation and safety instructions), for cleaning, maintenance and storage of vehicles at the end of each day.

The Application defines the improvements to the existing ATV staging area as follows:

Improvements to existing ATV staging Area: The proposed improvements to the existing ATV staging area consists of: 1) a former military trailer approximately 34 ft. x 7 ½ ft.; 2) a former U.S. Postal Service trailer measuring approximately 40 ft. x 14 ft., for the storage of equipment and parts; 3) a service shed for office use measuring 8 ft. x 16 ft. (This structure and the two above-mentioned structures are joined together by a wooden deck.); 4) a 20 ft. x 40 ft. mechanics aluminum dome shelter for maintenance of equipment and vehicles; and 5) a 20 ft. x 60 ft. "coverall" aluminum building for the storage of vehicles.

The Application defines the two proposed paintball fields as follows:

Mauka Paintball Park: The Mauka Paintball Park is located in the eucalyptus forest between Grove Farm's Field 704 to the west and Field 706 to the east, as designated on Grove Farm's field maps, in the location shown on Exhibit E of the Application. Applicant represented that the Mauka Paintball Park will be further identified on the ground by protective screening and other boundary markers to keep participants within the bounds of play; these markers will readily identify the extent of the park.

Makai Paintball Park: The Makai Paintball Park is located on the northern half of Grove Farm's Field 746, as designated on Grove Farm's field maps, in the location shown on Exhibit E of the Application. As in the case of the Mauka Paintball Park, Applicant represented that the Makai Paintball Park will be further delineated on the ground by protective screening and other boundary markers to keep participants within the bounds of play; these markers will readily identify the extent of the park.

The Applicant defines the proposed Speedball Tournament Field as follows:

Speedball Tournament Field: The Speedball Tournament Field will be located in the area identified on Grove Farm's field maps as the "Koloa Mill Yard", located between the Applicant's existing ATV staging area and the Old Koloa Mill. The Speedball Tournament Field will be marked by stakes, protective screening, and

other markers to indicate the playing field, spectator areas, and parking areas.

Applicant has represented that if the demand for speedball tournaments requires the addition of a second speedball tournament field, the second field will be situated immediately to the east of the first field, and similarly delineated.

The Applicant defines the proposed Waita Reservoir recreation staging area as follows:

Waita Reservoir recreation staging area: The proposed staging areas for the activities on the Waita Reservoir include a 20' x 6' floating dock, four picnic tables with roofs, and a 230 square foot storage shed, situated in the area fronting the reservoir, between Grove Farm Fields 702 and 704 of the Grove Farm field maps.

On November 23, 2004, the Planning Commission conducted a public hearing on the Application. The hearing was continued to January 11, 2005, and March 8, 2005. On March 8, 2005, the Planning Commission voted to send a favorable recommendation to the LUC for the Application subject to ten (10) conditions.

On April 6, 2005, the Commission received the Planning Commission's findings and decision as well as a copy of the record of the Planning Commission's proceedings.

On April 25, 2005, the Planning Department provided the Commission with additional information to supplement the record transmitted on April 6, 2005.

On April 29, 2005, the LUC sent a letter to the Planning Department stating that the Planning Department had forwarded the complete record of the Planning Commission's decision and supplemental materials within the required sixty days pursuant to, §15-15-95(a), HAR. However, the April 29, 2005, letter indicated that due to recent discussions with the fee landowner (Grove Farm) the LUC delayed the commencement of the forty-five day period to make a decision until certain amendments to the Special Permit amendment request application were submitted to the LUC from the fee landowner.

On May 18, 2005, the LUC received additional information from the Applicant via the Planning Department. On May 18, 2005, the LUC determined that the complete record was correctly transmitted to the LUC for its review.

The LUC has jurisdiction over the Application. Section 205-6, HRS, and Sections 15-15-95 and 15-15-96, HAR, authorizes the Commission to approve special permits for areas greater than 15 acres where application for the Commission's approval is made within 60 days after the decision is rendered on the application to the Planning Commission.

On June 16, 2005, the Commission held a hearing on the Application in Honolulu, Hawai'i. Several Commissioners expressed concerns regarding: 1) defining the scope of activities of the special permit; 2) how the ATV tours interacted with Kaumuali'i Highway; 3) if an environmental assessment was required; 4) how to define the acreage and trails of the Petition Area; 5) if the special permit required a metes and bounds description; 6) defining the Petition Area by whole TMKs; 7) including additional TMKs to the Petition Area which are impacted by the proposed special permit, as identified by LUC staff; 8) ensuring that adequate notice to adjacent landowners is made; and 9) redefining the Petition Area to exclude TMK No.: 2-8-022: 024. Based on the forgoing issues, the Commission deemed the Application incomplete.

The Applicant submitted an amended application to the Planning Department on September 6, 2005 (the "Amended Application"). The Amended Application included the Joinder of Grove Farm as co-applicant.

On September 13, 2005, the Planning Commission held a meeting on the Amended Application. The meeting was continued until September 27, 2005.

On September 27, 2005, the Planning Commission approved the Amended Application by modifying the Planning Commission's March 8, 2005, conditions of approval numbers 1 and 9 and adding a new condition of approval number 11.



On November 4, 2005, the Commission held a hearing on the Application in Kapa`a, Hawai`i. In attendance were: Walton Hong, Esq., Ollie Rivera, and David Hinazumi for the Applicant; Myles Hironaka representing the Planning Department; and John Chang, Esq. and Abe Mitsuda representing the State of Hawai`i Office of Planning ("OP").

On November 4, 2005, the Commission received written testimony of Ms. Beryl Blaich, Coordinator of Malama Maha`ulepu. Ms. Blaich indicated opposition to the ATV tours using the coastal areas of Maha`ulepu, particularly Kawailoa Bay. Ms. Blaich also requested that the special permit be restricted to six days a week such that the Applicant could offer limited and controlled public use days on the Petition Area. The Applicant represented that previously on limited occasions, the Applicant's ATV tours had traveled to Kawailoa Bay. However, the Applicant represented that ATV tours to Kawailoa Bay are no longer proposed as a component of the Application.

During the hearing of November 4, 2005, the Planning Department stated that publication and notification requirements for the Petition Area were properly addressed and accepted by the Planning Commission on September 27, 2005. The Planning Department recommended approval of the Application with the conditions as amended by the Planning Commission on September 27, 2005.

OP requested that the Applicant consider allowing other private owners of ATVs to use the Petition Area in an effort to help reduce the amount of illegal ATV trespassing on environmentally sensitive areas in other locations. After this request, OP stated its support of the Application.

Staff indicated that some portions of the ATV routes of the special permit transit the State Land Use Conservation District.<sup>2</sup> Staff recommended the addition of a condition of approval to address the fact that the Commission only has the authority to approval special permits in the State Land Use Agricultural and Rural Districts. Staff also recommended that the special permit, if approved by the LUC, should include a condition of approval which clarifies that the Commission's approval of the special permit does not constitute the approval of a special permit in the State Land Use Conservation District.

Staff also recommended that the second paragraph of the Planning Commission's condition of approval number 1 be amended to indicate that the Applicant's annual report must include a description of its compliance with each of the LUC's conditions of approval.

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<sup>2</sup> In a December 10, 2004 letter to the Petitioner's attorney, the DLNR Office of Conservation and Coastal Lands ("OCCL") indicated that ATV's transiting existing cane haul roads within the Conservation District does not constitute a *land use* regulated by OCCL, but rather an *activity* – which is outside of OCCL's jurisdiction.

## Conformance with the Special Use Permit Criteria

The Commission finds that based upon information in the record of the Planning Commission's decision, the proposed use has met the special permit criteria pursuant to Section 15-15-95 (b), HAR.

1. The Commission finds that the proposed uses of the special permit require little or no change to the existing environment and such uses can be discontinued in the future without any adverse impact to undertake future agricultural activities thereon. The ATV tour routes only occur on existing cane haul roads and trails. With the exception of the ATV staging area, minimal improvements or structures are proposed within the paintball parks, speedball tournament field and along the Waita Reservoir.

2. The Commission further finds that the proposed uses described and permitted by the special permit can be discontinued in the future without impeding future agricultural uses; therefore, the proposed use is not contrary to the objectives sought to be accomplished by Chapter 205 and 205-A, HRS.

3. The proposed use of the Petition Area will not adversely affect the surrounding properties. The additional structures proposed and activities described in the special permit will not have a significant impact on surrounding properties. There are no residential properties in close proximity to the existing ATV routes, the proposed paintball parks, speedball tournament field, and the

Waita Reservoir. The Planning Department has not received any complaints or inquires regarding the Applicant's existing ATV tour operations occurring along the cane haul roads and trails.

4. The existing and proposed activities will occur on private property and do not involve any public services; therefore, the proposed uses will not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection.

5. The increased interest in eco-tourism and resource-based activities constitute unusual trends, conditions, and needs that have arisen since the district boundaries and rules were established. The Petition Area provides a remote, and open/scenic environment for these types of outdoor commercial recreational uses.

6. The majority of the Petition Area to be utilized for the special permit activities (i.e. the cane haul roads), in its current state is not suited for actual agricultural cultivation. The cane haul roads will continue to be used for an existing agricultural function as the cane haul roads provide access to fields currently in agricultural production. The existing and proposed use of guided ATV tours does not exclude the cane haul roads for legitimate agricultural uses. The use of the Waita Reservoir for the non-motorized recreational activities

proposed by this special permit does not diminish the reservoir's agricultural utility.

7. Although the areas used for the two proposed paintball parks, speedball tournament field, and Waita Reservoir recreation staging area could be utilized for legitimate agricultural uses, the proposed uses of the special permit are temporary in nature and do not constitute permanent uses which preclude future agricultural use of the those sites.

After discussion and deliberation by the Commissioners, a motion was made and seconded to approve the Application with the addition of: 1) a condition that the Commission's approval does not constitute approval of a special permit in the State Land Use Conservation District; 2) amendment to the Planning Department's Condition No. 1 to require Applicant to provide in its annual report to the Commission a description of its compliance with each of the conditions of approval; and 3) the addition of the general condition that Applicant adhere to the representations made to the Planning Commission and the LUC.

There being a vote tally of 8 ayes and 0 nays, the motion carried.

The Commission, having considered the entire record on this matter, hereby makes the following decision and order.

## DECISION AND ORDER

Having duly considered the complete record of the Application and the oral arguments presented by the parties in the proceeding, and a motion having been made at a hearing conducted on November 4, 2005, in Kapa`a, Hawai`i, and the motion having received the affirmative votes required by Section 15-15-13, HAR, and there being good cause for the motion, the Commission hereby APPROVES the special permit granted by the Planning Commission to permit the expansion of use and placement of additional structures within a previously County-approved staging area and expansion of commercial recreational activities involving the increase and change of number of vehicles allowed for guided all-terrain vehicle tours, water activities in the Waita Reservoir, two paintball parks, and a speedball tournament field on approximately 12,437.79 acres at Koloa, Kaua`i, Hawai`i, and approximately identified on Exhibit "A," attached hereto and incorporated by reference herein, subject to the following conditions:

1. The structures for which approval is sought and referred to in the Application are approved. The use of the Waita Reservoir, involving a combined total of 128 persons per day, for the double hull canoe, sailboats, and kayak rentals, is permitted subject to the Use Plan for the reservoir proposed by Grove Farm Company, Inc. dated March 8, 2005. The Applicant's ATV tours, consisting

of single persons and multi-person vehicles, shall be limited to a maximum of 200 persons per day. The proposed Paintball Parks (Mauka and Makai Parks) shall be limited to a combined total of 100 persons per day. The proposed speedball tournaments shall be limited to no more than four events per year with a maximum of 200 persons per tournament.

After a period of one year from commencement of operations and every year thereafter, the Applicant shall provide the Planning Commission and the State Land Use Commission with an annual report of its operation to include, but not be limited to, the number of tours, customers, and customer vehicles for each of the activities allowed under the subject permit in addition to Applicant's compliance with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the State Land Use Commission. The Planning Commission reserves the right to modify or impose additional conditions if it is found that adverse effects are being generated by the proposed operations allowed under the subject amendment request.

2. As further represented, the Applicant shall provide fire extinguishers and first aid/CPR kits on at least one of the "lead" vehicles on the tour. In addition, the Applicant shall also work with the Fire Department to establish an Emergency Response Action Plan for the portions of the tour that are not public accessible.

The Applicant shall provide a revised Emergency Response Action Plan for the ATV Tours and Paint Ball operations to the Fire Department for review and comments.

3. The Applicant shall execute a written agreement stating that due care for public safety will be provided and that the Applicant agrees to indemnify, defend, and hold harmless the County of Kaua`i, its officers, agents, and employees from and against all claims or demands for damage, including claims for property damage, personal injury or death arising on or about the property in connection with the ATV tours.

4. As presented by the Applicant, the staging area will consist of washing, maintenance, and storage of ATV vehicles used in conjunction with the tour operation. No major engine repair work or underground storage of fuel shall be allowed in the staging area.

The Applicant shall resolve the requirements for the wash down area, refueling area, and individual wastewater requirements for the staging area with the Department of Health prior to any increase in ATV tour operation or commencement of the paintball operations.

5. The Applicant shall resolve and comply with all applicable requirements or conditions as recommended by the State Department of Health,



the State Department of Transportation, County Water, Fire and Public Works Departments.

6. The Planning Commission reserves the authority to impose additional conditions, modify or delete conditions stated herein, or revoke the subject permits through proper procedures should the Applicant fail to comply with the conditions of approval.

7. The Applicant is advised that prior to and/or during construction and use, additional government agency conditions, including additional conditions of the Planning Commission, may be imposed. It shall be the Applicant's responsibility to resolve those conditions with the respective agency(ies) and to resolve those additional conditions as may be imposed by the Planning Commission.

8. If historical/cultural remains such as archaeological artifacts, charcoal deposits or human burials are found during ground clearing or construction, the Applicant shall stop work in the immediate area, and shall contact the State Historic Preservation Division SHPD (Ph. No. 742-7033) and the Planning Department, to determine appropriate action.

The Applicant shall provide the State Historic Preservation Division with any historic interpretive material to be provided on the tour for its

review and approval prior to commencement of operations approved under the subject amendment request.

9. The special permit is granted for a period of five (5) years commencing upon the approval of the Special Permit by the State Land Use Commission and is subject to extension upon favorable review by the Planning Commission and the State Land Use Commission. To facilitate timely review, any application for extension shall be submitted at least three months prior to the expiration of this Special Permit.

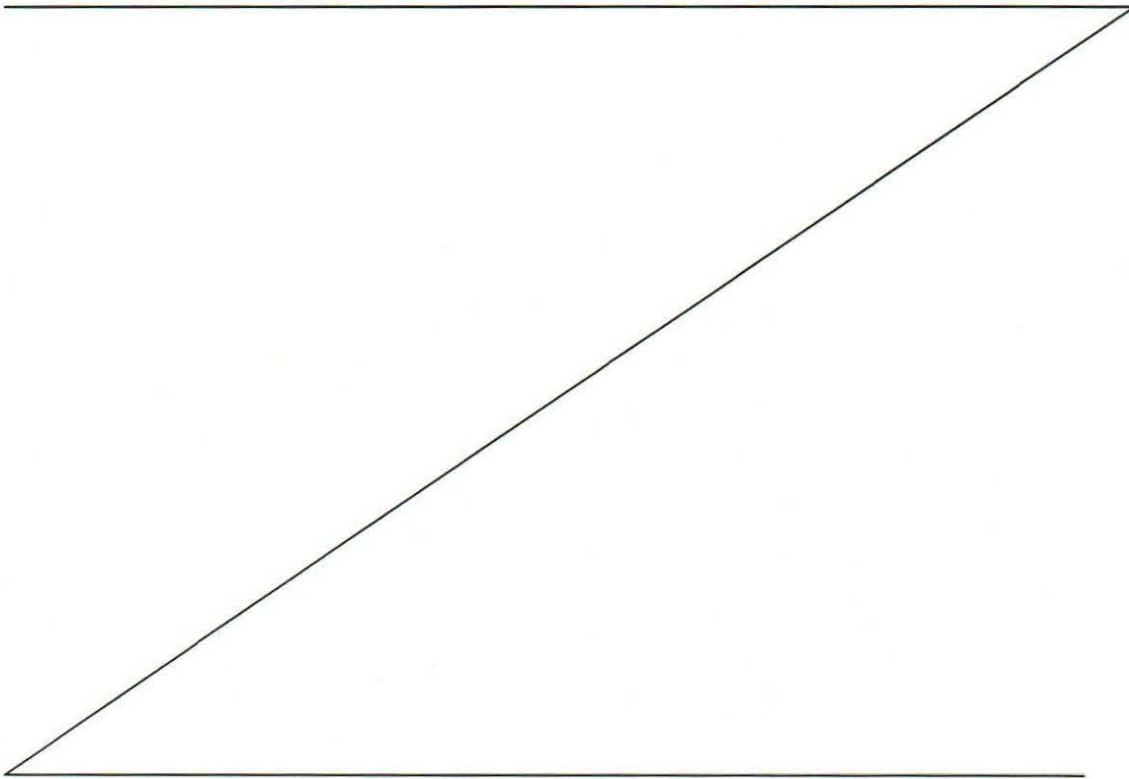
10. The Applicant and the owner of the Petition Area, Grove Farm Company, Inc., shall enter into an agreement for the maintenance of the cane haul roadways and trails used by the Applicant's tour operations. Said executed agreement shall be submitted to the Planning Department prior to commencement of operations allowed under the subject amendment request.

11. The Applicant is advised that all buildings within the staging area shall meet building setback requirements of the Kaua'i County Code 1987, as amended. This requirement shall be complied with at time of building permit application.

12. This special permit shall be restricted to only those locations and activities within the State Land Use Agricultural District as defined and represented by the Applicant to the County of Kaua'i and the State Land Use

Commission. The State Land Use Commission acknowledges that the uses defined in this special permit may transit portions of the State Land Use Conservation District on established cane haul roads and trails as activities which are not regulated by the State of Hawai`i Department of Land and Natural Resources Office of Conservation and Coastal Lands. This special permit shall not be construed as the State Land Use Commission's order granting a special permit in the State Land Use Conservation District.

13. Applicant shall operate this special permit in substantial compliance with the representations made to the Planning Commission and the State Land Use Commission.




ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 6th day of December, 2005. This ORDER and its ADOPTION shall take effect upon the date this ORDER is certified and filed by this Commission.

Done at Honolulu, Hawai'i, this 6th day of December, 2005, per motion on November 4, 2005.


APPROVED AS TO FORM

  
Deputy Attorney General

LAND USE COMMISSION  
STATE OF HAWAII

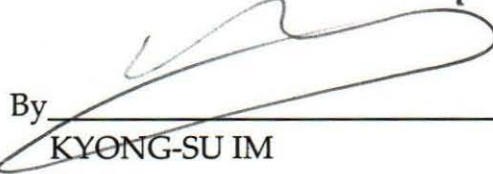
By   
RANDALL SAKUMOTO  
Chairperson and Commissioner

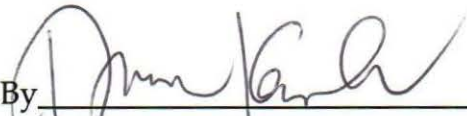
By   
STEVEN LEE MONTGOMERY  
Vice-Chairperson and Commissioner


By   
LISA M. JUDGE  
Vice-Chairperson and Commissioner

By (absent)  
THOMAS CONTRADES  
Commissioner

By   
MICHAEL D. FORMBY  
Commissioner

By   
KYONG-SU IM  
Commissioner

By   
DUANE KANUHA  
Commissioner

By   
RANSOM PILTZ  
Commissioner

Filed and effective on  
DEC - 6 2005

Certified by:

  
ANTHONY J. H. CHING

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Decision and Order Approving  
Special Permit 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:

DEL. LAURA THIELEN, Director  
Office of Planning  
P. O. Box 2359  
Honolulu, Hawaii 96804-2359

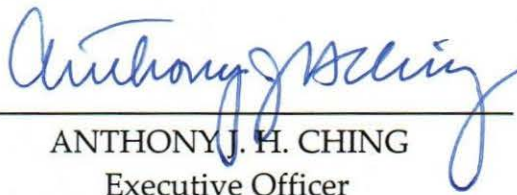
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Honolulu, Hawai'i, DEC - 6 2005.

  
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ANTHONY J. H. CHING  
Executive Officer