

DOCKET NO. A07-773
Waikapū Development Venture(b)

Motion for Extension of Time and Notification
of Amendment to Waikapū Affordable
Housing Project

***STAFF
REPORT***

ACTION MEETING
October 19, 2023



Daniel E. Orodenker, Executive Officer

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1. EXPLANATION OF PROCEEDING

The proceeding before the Land Use Commission (“Commission”) is to consider the Motion for Extension Time to Complete Project and Notification of Amendment to the HRS 201H Waikapū Affordable Housing Project, filed by WAIKAPŪ DEVELOPMENT VENTURE, LLC. (“Petitioner”), on June 6, 2023.

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 15-15-79, which provides

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 Hawai‘i Revised Statute (“HRS”) 205-4 Amendments to district boundaries involving land areas greater than fifteen acres. 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.

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.

Also given the exacerbation of the housing crisis as a result of the Lāhainā fire, it is imperative that projects on Maui move forward as quickly and transparently as possible. Encouragement of developments should be a priority in proceedings.

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 Waikapū 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) Waikapū 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 Waikapū 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

On September 7, 2018, Maui County adopted [Resolution No. 18-150](#) approving with modification the affordable

Allow Subdivision, and
Motion to Bifurcate

workforce housing project by Waikapū Development Venture LLC, pursuant to section 201H-38, Hawai‘i Revised Statutes. Which states:

“Construction of the Waikapū 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"). Waikapū 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, Waikapū 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.

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.

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

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

On June 7th, 2023, the LUC held a status report hearing for A07-773 Waikapū Development Venture, LLC (b) at the hearing the Commission brought up the following issues to be presented on at the following status report hearing:

- 1) Interviewees in the study provided by Honua Consulting**
 - a. evidence that the interviewees have knowledge and experience in traditional and customary practice relevant to Article 12 and Ka Pa’akai, and reason why they were selected
- 2) Funding from the County Council**
 - a. timeline for determination of funding
- 3) Go/no go decisions**
 - a. County Subsidy
 - b. 201-H Amendment
 - c. Two-lot subdivision
 - d. Subdivision Infrastructure plans and permitting
 - e. House plan development
 - f. Subdivision infrastructure improvements; County waterline and County sewer
 - g. Construction loans
- 4) Elimination of park/ green space**
- 5) Impacts on climate change**
- 6) Design of housing-** use of photovoltaic energy
- 7) Information/citation of the Market Study** that identifies people want single-family homes
- 8) Copies of the agreements with the County**
- 9) Updates to the TIAR**

The Commission asked Emmanuel Lutheran Church for the following information

- 1) Need for an independent annual report**
- 2) Ability to meet the deadlines** of conditions that

- are applicable to both projects
- 3) Understanding of applicability of Condition no.5** relating to highways and roads
- 4) Financial capability** to pay for improvements
- 5) Status of updated plans**

2023 WDV Motion for Extension of Time and to Complete Project and Notification of Amendment to the HRS 201H Waikapū Affordable Housing Project

On June 6, 2023, [WDV filed a Motion for Extension of Time](#) to Complete Project & Notification of Amendment to the HRS 201H Waikapū Affordable Housing Project; Memo in Support of Motion; Attachment 1; Declaration of Terrance Michael Keoni Gomes; COS

WDV requests that the Commission issue an order modifying Condition 2 of the D&O to extend the completion of construction deadline for the Project to September 7, 2027.

The County placed a \$10,650,000 appropriation in the County's FY24 Budget for the Project. The appropriation is contingent upon the Maui County Council approving an extension of the completion of construction deadline for the Project.

WDV is working with Maui County Department of Housing and Human Concerns to address the 201H Amendments to include:

1. An extension of the completion of construction deadline for an additional three (3) years, from September 7, 2024, to September 7, 2027; and
2. Modifications to the project layout to remove a road and the pocket park so that the six (6) duplexes may be converted to 12 single-family dwellings, as shown on Attachment 1.

On June 13, 2023, OPSD and County of Maui Planning Department filed a [joint request for extension of time](#).

On July 12, 2023, [OPSD filed their response](#) to Petitioners Time Extension.

On October 12, 2023, the County of Maui filed their Position Statement and Exhibits 1-3.

Link breakdown on website:

1. [Position Statement and Exhibits 1-2](#)
2. [Exhibit 3 Part 1](#) (Pages 1-67)
3. [Exhibit 3 Part 2](#) (Pages 68-135)

The LUC also received public testimony from the County of Maui's Director of [Housing and Human Concerns](#).

3. OPSD POSITION

On June 13, 2023, OPSD filed their [response to Petitioners Motion for Extension of Time to Complete Project and Notification of Amendment to the HRS 201H Waikapū Affordable Housing Project](#), which is in support of the Petitioners Motion.

The response lists a few reasons why OPSD is in support of the Motion; the need for affordable housing, WDV's efforts to move forward, and the results of the Ethnographic Study. OPSD recommends the LUC approve the Motion.

OPSD raised concerns and commented on the Projects Chapter 343 compliance and possible exemption.

OPSD also stated that the proposed modifications to the Project do not significantly alter the nature of the Project or its impact to the surrounding area.

OPSD commented on the Ethnographic Survey completed by Honua Consulting prior to the start of WDV's work on the County water line main in August 2022. OPSD also states that the project adheres to the guidelines provided by the State of Hawai'i Supreme Court in Ka Pa'akai O Ka'Aina case. However, OPSD did not explain why the ethnographic Survey is sufficient.

4. COUNTY OF MAUI POSITION

On October 12, 2023, the County of Maui Planning Department ("CMPD") filed their [Position Statement and Exhibits 1-2](#), [Exhibit 3 Part 1](#) (Pages 1-67), and [Exhibit 3 Part 2](#) (Pages 68-135). The County of Maui Planning Department supports the proposed construction completion time extension and the project modifications.

The County of Maui Planning Department lists multiple reasons in support of the Motion; the need for affordable housing, progress on construction of offsite infrastructure, and the changes to the economy after the imposition of Condition Number 2.

Maui County Planning Department notes that County Council approval of the modified Chapter 201 H construction deadline is still pending.

CMPD raised concerns and commented on the Projects Chapter 343 compliance and possible exemption.

Public Testimony from County of Maui Department of Housing & Human

Concerns: The Department of Housing and Human Concerns supports the Motion for Extension of Time and Modification to Complete the HRS 201H Waikapū Affordable Housing Project.

5. STAFF ANALYSIS

During the first part of the 2023 Status Report WDV, there were several topics that need to be followed up on, *see History section 2023 Status Report*.

During a meeting with WDV and LUC Staff, WDV indicated that they are willing to update the TIAR, but it was not clear if the study will include impacts from ELC. If clarity is provided by both WDV and ELC on this matter during the status report, the Commission may include a condition to reflect the outcome of the status report hearing.

Specific points of concern:

Traffic Impact Report/ Study (“TIAR”)

During a meeting with WDV and LUC Staff on September 14, 2023, WDV indicated that they are willing to update the TIAR.

It was not clear if the study will include impacts from ELC.

If clarity is provided by both WDV and ELC on this matter during the status report, the Commission may include a condition to reflect the outcome of status report hearing.

Financial Capability

LUC Staff notes the work on subsidizing the project. Considering the devastating fire in Lahaina on August 4th, 2023, LUC Staff is concerned about the availability of funding for the project, as County funds may be prioritized elsewhere.

The Commission should ask WDV for a clear statement of financial standing. Where they

are in discussions with the County regarding security of funding.

Chapter 343 Environmental Review

OPSD, County of Maui, and WDV should clarify the Projects compliance with Ch.343 and indicate whether Maui County Council has granted or will grant the Project an exemption.

Otherwise, the likelihood of WDV meeting the extended deadline requested is unlikely.

Ethnographic Survey

OPSD, County of Maui, and WDV should be questioned on the sufficiency of the ethnographic survey in regard to the guidelines provided by the State of Hawai'i Supreme Court in Ka Pa'akai O Ka'Aina case.

Modifications to the Plan

OPSD should be questioned on their **reasoning for their statement about the proposed modifications to the Project** not significantly altering the nature of the Project or impacting the surrounding area.

Should the Commission find the status report and the information provided by the parties amount to good cause to grant the Motion to Amend, it may attach conditions to its approval. It is suggested that if the Motion is granted it include the following:

1. That the petitioner commences construction and the project be completed by specific dates;
2. Completion of the updated TIAR by a certain date.
3. Evidence of funding be submitted in the next annual report.
4. ANY other conditions that the Commission deems necessary based on the evidence presented.