



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition of)	DOCKET NO. A07-773 (b)
)	
WAIKAPŪ DEVELOPMENT VENTURE,)	
LLC.)	FINDINGS OF FACT, CONCLUSIONS OF
)	LAW, DECISION AND ORDER, AND
To Amend the Agricultural Land Use District)	CERTIFICATE OF SERVICE GRANTING
to the Urban Land Use District for)	MOTION FOR EXTENSION OF
Approximately 25.263 Acres of Land Situated)	TIME TO COMPLETE PROJECT AND
at Wailuku, Island of Maui, State of Hawai'i.)	NOTIFICATION OF AMENDMENT TO THE
Tax Map Key: (2) 3-5-002: 011.)	HRS 201H WAIKAPŪ AFFORDABLE
_____)	HOUSING PROJECT

FINDINGS OF FACT.
CONCLUSIONS OF LAW, DECISION AND ORDER,
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.

Jan 22, 2024

BY 

DANIEL E. ORODENKER
Executive Officer



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OF THE STATE OF HAWAII

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FINDINGS OF FACT.
CONCLUSIONS OF LAW, DECISION AND ORDER GRANTING THE 2023 MOTION
FOR EXTENSION OF TIME TO COMPLETE PROJECT AND NOTIFICATION OF
AMENDMENT TO THE HRS 201H WAIKAPŪ AFFORDABLE PROJECT

Petitioner Waikapū Development Venture, limited liability company (“Petitioner” or “WDV”) filed a Motion to amend the Decision and Order issued by the Land Use Commission (“LUC” or “Commission”), on March 7, 2008 (“2008 D&O”), which was amended in the 2019 Decision and Order which granted the completion and construction of the Petitioner’s Project with the construction deadline of July 11, 2023. The Petitioner’s Motion for Extension of Time to Complete Project and Notification of Amendment to the HRS 201H Waikapū Affordable

Housing Project (“2023 Motion”) requests to further amend Condition 2 of the Commission’s 2008 D &O to extend the completion of construction deadline to September 7, 2027.

The Commission, having heard and examined the testimony, evidence, and argument of counsel for the Petitioner and other Parties presented during the hearing, along with the pleadings filed herein, and public testimony received, makes the following Findings of Fact, Conclusions of Law and Decision and Order Granting the Petitioner’s 2023 Motion.

PROCEDURAL HISTORY

1. On March 7, 2008, the Commission filed the 2008 Decision and Order, granting the reclassification of the Petition Area, consisting of approximately 25.263 acres of land, and identified as TMK No. (2) 3-5-002: 011, from the State Land Use Agricultural District to the State Land Use Urban District, subject to 23 conditions of approval for the construction of a church and school facilities.
2. On January 2, 2018, Emmanuel Lutheran Church of Maui, a Hawai‘i non-profit corporation (“ELC”), submitted a letter to the Commission explaining that there had been delays in completing the project approved under the 2008 D&O and the reasons for the delays, and the proposed subdivision and sale of a portion of the Petition Area to WDV to allow for WDV’s development of affordable workforce housing pursuant to HRS Chapter 201H within approximately half of the Petition Area. ELC further informed the Commission that ELC and WDV would be returning to the Commission to request the necessary approvals for both projects to proceed.

3. On April 9, 2018, ELC filed a Motion for Extension of Time to Complete Project (“ELC’s Motion for Extension”), seeking a ten-year extension to Condition No. 2 of the 2008 D&O.¹
4. On April 12, 2018, WDV filed its Motion to be Co-Petitioner, or in the Alternative to Become a Party, or in the Alternative to Intervene (“WDV’s Motion for Intervention”).
5. On June 22, 2018, the Commission issued its Order Granting WDV’s Motion to Intervene.
6. On October 12, 2018, ELC filed a Motion for Modification (“ELC’s Motion for Modification”), seeking approval of an Updated ELC Project, which would be developed within approximately half of the Petition Area, with the other half being identified for development of WDV’s Waikapū Affordable Workforce Housing Project.
7. On October 12, 2018, WDV filed a Motion to Approve Sale of a Portion of the Petition Area; Motion to Allow for Subdivision of Petition Area; and Motion to Bifurcate.
8. On October 26, 2018, WDV filed their Motion for Modification.
9. On July 11, 2019, the Commission issued its Findings of Fact, Conclusions of Law, Decision and Order Granting WDV’s Motion to Approve Sale of a Portion of the Petition Area; Motion to Allow for Subdivision of Petition Area; Motion to Bifurcate; and Motion for Modification (“2019 D&O”).

¹ ELC’s Motion for Extension is addressed in the Findings of Fact, Conclusions of Law, and Decision and Order Granting Petitioner’s Motion for Extension of Time to Complete Project and Motion for Modification and Certificate of Service dated July 11, 2019.

10. On April 13, 2023, WDV submitted the 2018-2023 Annual Report, Attachment 1, and Attachment 2, which includes the status of the ELC project.
11. On April 25, 2023, the Land Use Commission sent the 2023 Status Report Letter, in response to the 2018-2023 Annual Report and scheduled a status report hearing for June 7, 2023, which was continued until October 18, 2023.
12. On May 12, 2023, WDV filed the 2018-2023 Amended Annual Report, Attachment 1, Attachment 2, and Attachment 3, which includes the status of the ELC Project.
13. On May 25, 2023, the Agenda for the June 7, 2023, hearing was posted to the LUC Website and mailed to the Statewide and Maui County mailing and email lists.
14. On June 6, 2023, WDV filed their 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, and Certificate of Service (“2023 Motion”). The 2023 Motion was not heard at the June 7, 2023, status report hearing, it was scheduled for hearing on October 19, 2023.
15. On June 7, 2023, the Commission held the in person hearing for the status and progress report and action (if necessary) in response to the 2018-2023 annual report for A07-773 (a) and (b) submitted by WDV.
16. On June 13, 2023, the Commission received the Joint Request for Time Extension to provide responses to the 2023 Motion from the Office of Planning and Sustainable Development (“OPSD”) and the County of Maui Planning Department.
17. On July 12, 2023, OPSD filed the Response to Petitioner’s Time Extension.

18. On October 9, 2023, the Agenda for the October 18-19, 2023, hearing was posted to the LUC Website and mailed to the Statewide and Maui County mailing and email lists.
19. On October 12, 2023, the County of Maui Planning Department filed their Position Statement and Exhibits 1-3. The Land Use Commission received written public comment from the County of Maui Department of Housing and Human Concerns Director Lori Tsuhako.
20. On October 12, 2023, the signed Staff Report was posted to the Land Use Commission website and made available at the Land Use Commission Office for public review.
21. On October 17 and 18, 2023, the Land Use Commission received public comments from Lena Kamai, Linda Schatz, Tom Cook, Lena Kamai (revised), and Kerri Abarra. The public comments were posted to the Land Use Commission website for review and public access.
22. On October 18, 2023, the Commission held an in-person meeting for the status and progress report for A07-773(a) Emmanuel Lutheran Church of Maui and A07-773(b) Emmanuel Lutheran Church of Maui- Waikapū Development Venture LLC.
23. On October 19, 2023, the Commission held an in-person meeting to consider WDV's 2023 Motion.
24. A Motion to incorporate the record from the October 18, 2023, Continuation of Status Report proceeding unanimously passed, which incorporates that record into the record for the 2023 Motion brought forth by Waikapū Development Venture [Tr. 10/19/2023; pg. 6-7].

25. At the hearing, the Petitioner stood on its Motion and pleadings, and provided an additional PowerPoint². There being no objections to the Petitioner's exhibits, the Commission admitted the exhibits into the record [Tr. 10/19/2023; pg. 20-21].
26. The County of Maui provided three exhibits³ that were attached to the County's Position Statement submitted to the Commission on October 12, 2023, and public testimony from County of Maui Department of Housing and Human Concerns Director Lori Tshako. There being no objections to the County of Maui's exhibits, the Commission admitted the exhibits into the record [Tr. 10/19/2023; pg. 21].
27. OPSD had no additional exhibits to admit and stood on their Response to the Petitioner's Motion filed with the Commission on July 12, 2023, which includes Attachment One from the State of Hawai'i Department of Transportation.
28. During the first opportunity for public testimony two members of the public provided oral testimony. Glenn Adolpho and Cheryl Adolpho testified in support of the Petitioner's 2023 Motion.
29. Petitioner proceeded with its case in-chief, calling Trisha Kehaulani Watson, J.D., Ph.D., to answer questions from the Commissioners regarding the cultural impact assessment.
30. The County of Maui Deputy Corporation Counsel Michael Hopper provided the County's position in support of the Petitioner's 2023 Motion and recognition of the representations made in the modification to the Petitioner's Project in its 201H

² The PowerPoint presentation was filed with the Commission on October 20, 2023, which was stamped, and posted to the LUC website.

³ The October 19, 2023, transcripts indicate the County of Maui submitted four exhibits, however, the Commission only received three exhibits which do not include the Public Testimony from the Department of Housing and Human Concerns.

application [Tr. 10/19/2023; pg. 41-43]. The County of Maui is supportive of additional time to complete the Project [Tr. 10/19/2023; pg. 50].

31. OPSD Deputy Attorney General Bryan Yee provided the State’s position in support of the Petitioners Motion and has no objection to an extension for an additional two years [Tr. 10/19/2023; pg. 51-53].

32. Commissioners questioned each of the Parties on their arguments. Areas of concern were raised with respect to good cause, cultural impact analysis, ‘ōpe‘ape‘a (Hawaiian hoary bat), the Traffic Impact Analysis Report (“TIAR”), timelines and additional time, and impacts on operations at the County level due to the Lāhainā Fire that took place around August 8, 2023.

OFFICE OF PLANNING AND SUSTAINABLE DEVELOPMENT (“OPSD”) POSITION

33. OPSD’s written Response to Petitioner’s Motion for Extension of Time to Complete Project and Notification of Amendment to The HRS 201H Waikapū Affordable Housing Project filed on July 12, 2023, stated OPSD supports the Petitioner’s Motion for the following reasons:

- a. The proposed modifications do not significantly alter the nature of the Project, or its impact to the surrounding area;
- b. The ethnographic study provided by the Petitioner found no adverse impacts to cultural resources or practices; and
- c. Petitioner is making efforts to continue with the development of the Project and the County of Maui is supportive of the Project.

34. During the hearing, OPSD’s position of support included no objection to an extension of an additional two years [Tr. 10/19/2023; pg. 51-53].

COUNTY OF MAUI DEPARTMENT OF PLANNING POSITION

35. On October 12, 2023, the County of Maui filed their position statement on Petitioner’s Motion for Extension of Time to Complete Project and Notification of an Amendment to the HRS 201H Waikapū Affordable Housing Project along with three exhibits. The County of Maui supports the Petitioner’s Motion for the following reasons [Maui County Position filing and Tr. 10/19/2023; pg. 41-43]:

- a. External events such as the COVID pandemic, wildfire, and the changes to the economy that resulted in increased interest rates, higher cost for financing, and a higher cost of materials;
- b. The County’s need for affordable housing, which was exacerbated by the Lāhainā wildfire; and
- c. WDV’s continued progress on offsite infrastructure.

36. During the hearing, the County of Maui Department of Planning stated its support for additional time to complete the Project [Tr. 10/19/2023; pg. 50].

FINDINGS BY THE COMMISSION

37. Petitioner has invested over 5 million dollars at the time of the October 18, 2023, Status Report, and secured a county subsidy of 10.65 million dollars [Tr. 10/18/2023; pg. 82].

38. In 2018, Maui County Resolution 18-150 passed which approved the 201H project and the County entitlements. The approved project description was a hundred percent

residential workforce housing consisting of 80 units on 74 lots, 68 single-family, with 6 duplex dwellings for 12 units. The 12 duplexes were intended to go to the low-income group. Below moderate-income group were designated 12 units, 40 units were designated for the moderate-income group, and 16 units for the above moderate. [Tr. 10/18/2023; pg. 83].

39. Petitioner’s Motion requested an extension until September 7, 2027, which will be the same completion of construction deadline the Petitioner will ask Maui County for in their proposed 201H amendment application [Tr. 10/19/2023; pg.24].

40. The represented changes to the 201H project consist of changing all planned duplexes to single family dwelling units, which will be marketed to the low-income group, and the removal of the park which will not reduce the total amount of greenspace, due to added yard measurements [Tr. 10/18/2023; pg. 83-85].

41. The County subsidy placed a \$10,650,000 appropriation in the County's Fiscal year 2024 Budget [Tr. 10/18/2023; pg. 86]. The fiscal year runs from July 1, 2023, to June 30, 2024, within that time frame, the Petitioner will need to sign the grant agreement in order to move forward with the funding request [Tr. 10/18/2023; pg.99].

42. Petitioner completed their ethnographic study [Tr. 10/18/2023; pg. 53], with respect to Condition two of the 2019 Decision and Order which reads:

“...that both bifurcated properties shall be subject to the condition requiring the completion of a Cultural Impact Assessment (“CIA”) prior to commencement of construction on either property and the adherence of WDV to the recommendations of the CIA.”

43. Maui County is supportive of additional time and the timeline proposed by Petitioner, due to the fires that took place in Maui, and the impact to the County of Maui government operations [Tr. 10/19/2023; pg.50].

44. The County of Maui's Department of Housing and Human Concerns is in support of the Project [Tr. 10/18/2023; pg.97].

45. Following discussion, the parties provided closing arguments on Petitioner's Motion. Thereafter, a motion was made and seconded to approve Petitioner's Motion for Extension of Time to complete the Project from September 7, 2024 to September 7, 2029 and notification of amendment to HRS 201H Waikapū Affordable Housing Project filed on June 6, 2023, as described by the Petitioner including their updated description of the 201H project, which will constitute their representation for purposes of Condition 2 [Tr. 10/19/2023; pg.58].

46. The Commission, in discussion on its motion to approve Petitioner's Motion for Extension of Time to complete the Project from September 7, 2024 to September 7, 2029 and notification of amendment to HRS 201H Affordable Housing Project filed on June 6, 2023, as described by the Petitioner including their updated description of the 201H project, which will constitute their representation for purposes of Condition 2 of the 2019 D&O, identified the following reasons for approval:

- a. Petitioner has invested over 5 million dollars, and secured a County subsidy of 10.65 million, which is in the fiscal year 2024 budget;
- b. Petitioner provided evidence of good cause and intent to proceed with the development of the Project; and

- c. Petitioner has demonstrated significant progress since the June 7, 2023, Status report.

RULINGS ON 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. HRS §205-1(c) authorizes the Commission to “adopt rules guiding its conduct[.]”
2. As defined in HAR §15-15-03,

“Proceeding” means any matter brought before the commission over which the commission has jurisdiction and shall include, but not be limited to:

- (1) Petitions for district boundary amendment;
- (2) Petitions for special permit;
- (3) Proceedings for the adoption, amendment, or repeal of rules under sections 91-3 and 205-7, HRS;
- (4) Petitions for declaratory orders under section 91-8, HRS;
- (5) An investigation or review instituted or requested to be initiated by the commission; and

(6) All other matters in the administration of chapter 205, HRS.

3. Pursuant to HAR §15-15-70(a), any party may make a motion before, during, or after the close of hearing.
4. Pursuant to HAR §15-15-94(a), if a petitioner desires to have a modification or deletion of a condition that was imposed by the Commission, or modification of the Commission's order, the petitioner 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.
5. HRS §91-10(5) provides "Except as otherwise provided by law, 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."
6. HAR §15-15-59(a), provides that "...Unless otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence and the burden of persuasion."
7. Pursuant to HAR §15-15-94(b), for good cause shown, the Commission may act to modify or delete any of the conditions imposed or modify the Commission's order.
8. The courts have recognized that an agency, acting as factfinder, has the discretion to determine the credibility of a witness and weigh the evidence before it.⁴

⁴ *State v. Pioneer Mill Co., Ltd.*, 64 Haw. 168, 179, 637 P. 2d 57, 65 (1996) (citing *Territory v. Adelmeyer*, 45 Haw. 144, 163, 363 P.2d 979, 989 (1961)); *State v. Eastman*, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996); *Sierra Club v. D.R. Horton-Schuler Homes, LLC*, 136 Hawai'i 505, 52, 364 P.3d 213, 230 (2015); *In re Gray Line Hawaii, Ltd.*, 93 Hawai'i 45, 52-53, 995 P.2d 776, 783-784 (2000); and *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015)).

DECISION AND ORDER

The LUC, having duly considered the written and oral arguments presented by the Applicant, Maui County, the Office of Planning and Sustainable Development, and members of the public, and a motion having been made and seconded at the meeting on October 19, 2023, held at the Maui Arts & Cultural Center, Alexa Higashi Room 1 Cameron Way, Kahului, HI 96732, 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 Petitioner's motion for extension of time to complete the project from September 7, 2027⁵ be extended to September 7, 2029, and the notification of the of HRS 201H, Waikapu Affordable Housing Project, filed on June 6, 2023, as described by Petitioner, including their updated description of the 201H project which shall constitute their representation for the purposes of Condition 2, in the 2019 D&O, be GRANTED for the following reasons:

Pursuant to HRS Chapter 205 and the Commission Rules under HAR chapter 15-15, upon consideration of the Commission decision-making criteria under HRS §205-17 and based upon the preponderance of the evidence and good cause shown, the Commission determines and concludes that the Motion for Extension of Time to Complete Project and Notification of Amendment to the HRS 201H Waikapū Affordable Housing Project being requested by the Petitioner is, reasonable.

The Petitioners have shown a preponderance of evidence and good cause for amending the time to complete project and notification of amendment to the HRS 201H Waikapū Affordable Housing Project.

⁵ The transcripts of the October 19, 2023, hearing, states Motion made for the extension of time to complete the project from 9/7/2024. However, the Petitioners 2023 Motion to amend Condition 2 to extend the completion of construction deadline to September 7, 2027. Staff corrected the Motion to reflect the correct date requested by Petitioner.

The additional two year extension is also justified by the Lāhainā fire that took place around August 8, 2023, that has put an incredible burden on the government operations, infrastructure, and housing in County of Maui.

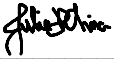
ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and grant the foregoing ORDER on Jan 22, 2024. This ORDER may be executed in counterparts. This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, Hawai'i, this day of Jan 22, 2024, per motion on October 19, 2023.

APPROVED AS TO FORM

LAND USE COMMISSION



STATE OF HAWAI'I

JULIE CHINA, ESQ
Deputy Attorney General

By Dan V. Giovanni

DAN GIOVANNI
Chairperson and Commissioner

Filed and effective on:

Jan 22, 2024

Certified by:



DANIEL E. ORODENKER
Executive Officer



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Tax Map Key: (2) 3-5-002: 011.) HOUSING PROJECT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER GRANTING THE 2023 MOTION FOR EXTENSION OF TIME TO COMPLETE PROJECT AND NOTIFICATION OF AMENDMENT TO THE HRS 201H WAIKAPŪ AFFORDABLE HOUSING 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:

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Dated Jan 22, 2024
Honolulu, Hawai'i.



DANIEL E. ORODENKER
Executive Officer