

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)	DOCKET NO. DR89-14
WAIKAPU MAUKA PARTNERS)	WAIKAPU MAUKA PARTNERS
For a Declaratory Order to)	
Determine Whether the Dwellings)	
to be Built in Petitioner's)	
Proposed Subdivision of State)	
Agricultural District Land)	
Classified as "E" by the Land)	
Study Bureau Situated at)	
Waikapu, Maui, Hawaii, are)	
Permissible as Accessory Uses)	
_____)	

DECLARATORY ORDER

PETITIONER'S INTEREST

Petitioner is Waikapu Mauka Partners, a Hawaii general partnership, which filed a Petition for Declaratory Order pursuant to section 91-8, Hawaii Revised Statutes, and §15-15-98, Subchapter 14 of the Hawaii Land Use Commission Rules. Petitioner owns real property situated in Waikapu, Maui, Hawaii, said property being approximately 623 acres, more specifically identified as portions of Maui Tax Map Key: 3-6-02:2, and 3-6-04: 2, 4 & 5. The property is within the State Land Use Agricultural District and is community planned agricultural by the County of Maui. The property is rated "E" by the Land Study Bureau, and more specifically "E73", "E95", and "E98" in terms of Overall Productivity Rating.

Petitioner proposes to subdivide the 623 acres into two lots for golf courses, approximately four lots for internal

roads/streets, a 10-acre community farm and the balance for approximately 100 two-acre farm lots.

The 10-acre community farm will be owned by the owners of the farm lots, prorata, and be operated and maintained by a not-for-profit organization. The community farm will grow, cultivate, and propagate foliage, grasses, flowers, trees and authentic/rare Hawaiian plants for sale to the golf courses and the general public. The costs, expenses and maintenance of the community farm operation will be assessed to and paid by the farm lot owners, prorata.

In addition to and in conjunction with the community farm operations, a minimum area of 2,000 square feet on each of the 100 farm lots will be reserved, by formal easement, license or reservation, in favor of the said not-for-profit organization, to plant, cultivate and propagate plants and/or trees to supplement the community farm's inventory.

The question presented to the Land Use Commission ("LUC") is: Whether the dwellings to be built in Petitioner's proposed subdivision of State Agricultural District land classified as "E" by the Land Study Bureau situated at Waikapu, Maui, Hawaii, are permissible as accessory uses.

PROCEDURAL HISTORY

1. Petitioner filed its Petition for Declaratory Order and Memorandum in Support on June 14, 1989.

2. The Office of State Planning of the State of Hawaii filed its Memorandum in Opposition to Waikapu Mauka

Partners' Petition For Declaratory Order in Land Use Commission
Docket No. DR89-14 on June 26, 1989.

3. The County of Maui filed its County of Maui's
Memorandum In Opposition To Petitioner's Petition For
Declaratory Order on June 30, 1989.

4. The LUC conducted a hearing on the subject
Petition on June 30, 1989.

5. Representatives of the Petitioner, the Office of
State Planning and the County of Maui, as noted in the minutes
of the meeting, appeared at the hearing. There were no
intervenors to the proceeding.

APPLICABLE PROVISIONS

A) Hawaii Revised Statutes:

1) §205-2. Districting and Classification of
Lands.

* * *

. . . Agricultural districts shall include
activities or uses as characterized by the
cultivation of crops, orchards, forage, and
forestry; farming activities or uses related
to animal husbandry, aquaculture, game and
fish propagation; aquaculture, which means
the production of aquatic plant and animal
life for food and fiber within ponds and
other bodies of water; wind generated energy
production for public, private and commercial

use; services and uses accessory to the above activities including but not limited to living quarters or dwellings, mills, storage facilities, processing, facilities, and roadside stands for the sale of products grown on the premises; wind machines and wind farms; agricultural parks; and open area recreational facilities, including golf courses and golf driving ranges, provided that they are not located within agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating A or B.

These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

* * *

2) §205-4.5 Permissible uses within the agricultural districts. (a) Within the agricultural district all lands with soil classified by the land study bureau's detailed land classification as overall

(master) productivity rating class A or B shall be restricted to the following permitted uses:

* * *

(c) Within the agricultural district all lands, with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

3) §205-5. Zoning.

* * *

(b) Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the land use commission shall be permitted. Other uses may be allowed by special permits issued pursuant to this chapter. The minimum lot size in agricultural districts shall be determined by each county through its zoning ordinance, subdivision ordinance or other lawful means; provided that the minimum lot

size for any agricultural use shall not be less than one acre, except as provided herein. If the county finds that unreasonable economic hardship to the owner or lessee of land cannot otherwise be prevented or where land utilization is improved, the county may allow lot sizes of less than the minimum lot size as specified by law for lots created by a consolidation of existing lots within an agricultural district and the resubdivision thereof; provided that the consolidation and resubdivision do not result in an increase in the number of lots over the number existing prior to consolidation; provided further that in no event shall a lot, which is equal to or exceeds the minimum lot size of one acre be less than that minimum after the consolidation and resubdivision action. The county may also allow lot sizes of less than the minimum lot size as specified by law for lots created or used for public, private

and quasi-public utility purposes and for lots resulting from the subdivision of abandoned roadways and railroad easement.

B) Maui County Code

1) Chapter 19.04

General Provisions & Definitions

i) 19.04.160 Building. "Building" means any structure built for the support, shelter, housing, occupancy, storage or enclosure of persons, animals, chattels or property of any kind.

2) Chapter 19.30

AGRICULTURAL DISTRICT

Sections:

19.30.010 Generally.

19.30.020 Use regulations.

19.30.030 Area regulations.

19.30.040 Yards.

19.30.010 Generally. The purpose of this chapter is to provide areas for agricultural development which would be in keeping with the economic base of the county and which will be in keeping with the regulations of the land use commission.

19.30.020 Use regulations. As provided by the regulations of the land use commission, except as otherwise provided, the following land use and building uses are compatible and permitted within this district. Should any amendments be made to the regulations of the land use commission, such amendments shall be deemed to be included within this section. Except as otherwise provided, uses not expressly permitted are prohibited.

A. Growing of crops, including but not limited to flowers, foliage, fruits, forage and timber;

B. Game and fish propagation;

C. Raising of livestock, including but not limited to poultry, bees, fish, or other domestic animals;

D. Farm dwellings, farm buildings, or activities or uses related to farming and animal husbandry;

E. Public institutions and buildings;

F. Public and private "open land" types of recreational uses, including

parks, playgrounds, country clubs and golf courses but not including dragstrips, private airports and drive-in theaters, and commercial, recreational facilities, such as but not limited to miniature golf courses and golf driving ranges;

G. Public, private and quasi-public utility lines, but not including offices or yards for equipment, material, vehicle storage, repair, or maintenance;

H. Retention, restoration, rehabilitation, or improvement of buildings or sites of historic or scenic interest;

I. Commercial excavation or extraction of natural building materials or minerals;

J. Churches and temples;

K. Roadside stands for the sale of agricultural products grown on the premises;

L. Signs related to permitted uses only;

M. Buildings and uses, including but not limited to mills, storage and

processing facilities, and maintenance facilities that are normally considered direct accessory to the above permitted uses.

19.30.020 Area regulations.

A. Minimum lot area shall be two acres and minimum lot width shall be two hundred feet, it being the intent hereof to establish the minimum lot size in accordance with Section 205-5 of the Hawaii Revised Statutes.

* * *

19.30.040 Yards. There shall be a front yard of twenty feet, side yard of ten feet and rear yard of fifteen feet for any building or structure other than fences, walls and barricades not more than six feet in height.

C) Land Use Commission Rules

1) §15-15-03. Definitions. As used in this chapter:

"Accessory building or use" means a subordinate building or use which is incidental to and customary with a permitted use of the land.

* * *

"Dwelling" means a building designed or used exclusively for single family residential occupancy, but not including housing trailer, multi-family dwelling, mobile home, hotel or motel.

* * *

- 2) §15-15-19. Standards for determining "A" agricultural district boundaries. In determining the boundaries for the "A" agricultural district, the following standards shall apply:

* * *

- (3) It may include lands surrounded by or contiguous to agricultural lands and which are not suited to agricultural and ancillary activities by reason of topography, soils, and other related characteristics;

* * *

- 3) §15-15-23. Permissible uses; generally. Except as otherwise provided in this chapter, the following land and building uses are compatible and permitted within the following land use districts, except when applicable county ordinances or

regulations are more restrictive. Except as otherwise provided in this chapter, uses not expressly permitted are prohibited.

* * *

- 4) §15-15-25. Permissible uses within the "A" agricultural district.

* * *

(b) Permissible uses within the agricultural district land classified by the land study bureau's detailed land classification as overall (master) productivity rating class of C, D, E and U shall be those uses permitted in A and B lands as set forth in section 205-4.5, HRS, and also those uses set forth in section §205-2, HRS.

POSITION OF THE PARTIES

Petitioner contends that based on the proposed community farm operation together with the supplemental agricultural activity which will occur on each of the farm lots, that the dwellings to be built on said farm lots be deemed permitted accessory uses in accordance with and pursuant to the requirements of §205-2, HRS §15-15-25(b), Land Use Commission Administrative Rules (hereafter "LUC Rules"), and §19.30.020(M) of the Maui County Code.

The Office of State planning argues that while the LUC has the authority to declare the dwellings to be accessory to the community farm lot, it is not a matter of sound policy to do so, nor would such a declaration be consistent with the definition of "accessory use" contained in §15-15-03 of the LUC Rules.

JURISDICTION

Jurisdiction of the LUC to consider the request of Petitioner is authorized under §91-8, HRS, and §15-15-98, LUC Rules.

FINDINGS OF FACT

1. The land upon which Petitioner proposes its community farm and farm lot development is rated "E" by the Land Study Bureau of the State of Hawaii. Moreover, said Land Study Bureau has designated Petitioner's land to have "Overall Productivity Ratings" of "E73", "E95", and "E98" (reference Land Study Bureau Bulletin No. 7, May 1967).

2. Said designations of "E73", "E95", and "E98" result in "Selected Crop Productivity" ratings of "e". Said "Selected Crop Productivity" ratings range from "a" representing the highest yield per acre of selected crops (pineapple, vegetables, sugarcane, orchards, grazing, and forage operations), to "e" being the lowest yield per acre of selected crops.

3. Said overall productivity ratings indicate that Petitioner's land is designated as non-commercial forest land

(i.e., land which is incapable of yielding usable crops of industrial wood because of adverse site conditions), and also that said land is not suited for machine tillability.

Petitioner's land is designated from nonstoney to rocky.

4. That due to the topography and specifically the slope of Petitioner's land, there is no portion of Petitioner's land in the "least difficult" slope category (0-10% slope). The majority (87%) of Petitioner's land is in the "more difficult" to cultivate category (11-20% slope), with the balance of Petitioner's land being in the "unsuitable" for cultivation category. Petitioner's land is uniquely unsuitable for traditional productive agriculture.

5. That based on the above factors regarding soil conditions, overall productivity potential, and topography slope, intensive and complete agricultural activity and operations encompassing the entire acreage proposed for the community farm and farm lots would not be economically feasible for Petitioner or for any other person or entity.

6. §205-2, HRS, permits dwellings on agricultural lands not classified as "A" or "B", provided said dwellings are accessory to agricultural activity.

7. §205-5, HRS, authorizes the LUC to determine what uses are accessory to the permitted agricultural use described in §205-2, HRS.

8. Agricultural District lands may include lands "which are not used for, or which are not suited to

agricultural and ancillary activities by reason of topography, soils and other related characteristics." [§205-2, HRS; §15-15-19(3), LUC Rules].

9. Golf courses are permissible uses in agricultural district lands not classified as "A" or "B" [§205-2, HRS; §19.30.020(F), Maui County Code]. Petitioner is currently constructing two (2) golf courses on the subject land.

10. Said golf courses will require a supply of source of foliage, grasses, flowers and trees. The proposed community farm will produce and supply an inventory of said agricultural products to meet the needs of said golf courses and, in addition, the needs and/or demands for said products by the general public.

11. Petitioners represent that there will be agricultural activity on each of the proposed farm lots to supplement the community farm's operations and resulting inventory.

12. Further, Petitioner testified that it will specifically plant, cultivate and propagate rare and/or authentic Hawaiian plants and trees on its community farm and farm lots, including but not limited to Hawaiian hibiscus and sandalwood.

13. §15-15-03 of the LUC Rules defines an accessory building or use as "a subordinate building or use which is incidental to and customary with a permitted use of the land."

14. Agricultural activity will occur on each of the proposed farm lots. The owners of said farm lots will also prorata, own and be responsible for the costs, expense and maintenance of the proposed community farm.

15. The adjoining community of Waikapu, Maui, Hawaii, can be described as rural in setting, said community being surrounded by pineapple and sugarcane production.

16. The subject land is currently not in agricultural use. The subject land has been used for minimal grazing, but has never been in pineapple nor sugarcane production. Petitioner's proposed subdivision and use of the land will not adversely affect the current level or intensity of agricultural activity associated with the subject land. To the contrary, Petitioner's proposed intensive community farm operation together with the agricultural activity on each of the farm lots will create and sustain agricultural activity on the subject land not otherwise feasible.

CONCLUSIONS OF LAW

Based on the foregoing FINDINGS OF FACT, the LUC concludes as follows:

1. §205-2, HRS, permits dwellings on agricultural district land classified "E" by the Land Study Bureau, which dwellings are accessory to specified permitted uses. The land Petitioner proposes to subdivide and develop is classified "E" by the Land Study Bureau.

2. Based on the specified and unique characteristics associated with Petitioner's land (i.e., Overall Productivity Rating, Selected Crop Productivity Rating, Non-commercial Forestry designation, Machine Tillability, Stoniness and Slope), viewed together with Petitioner's proposed agricultural activity, the LUC concludes that the construction of dwellings on the proposed farm lots in this particular instance is compatible with the agricultural activity proposed herein by Petitioner. Accordingly, the LUC concludes that the use of Petitioner's land for dwelling purposes, in this unique instance, is accessory to the specified permitted agricultural activity as herein represented by Petitioner.

RULING ON PROPOSED FINDINGS OF FACT OR CONCLUSIONS OF LAW

Any proposed findings of fact or conclusions of law submitted by the Petitioner or other parties not already ruled upon by the LUC by adoption herein, or rejected by contrary findings or conclusions 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; and findings of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

ORDER

FOR GOOD CAUSE APPEARING, it is hereby ordered that the foregoing declaratory ruling be issued, addressing the subject matter of the Petition concerning dwellings as

permissible accessory uses. The LUC notes that this ruling is intended to specifically apply to this particular project based upon the unique facts, merits, circumstances, and location, of this property and project and is not a declaration that similar projects will be routinely permitted on agricultural district lands classified "E". Also, this declaratory order is based upon the LUC's interpretation of its administrative rules. The LUC refrains from interpreting or ruling on whether the proposed farm lots are accessory uses under the Maui County Code.

DOCKET NO. DR89-14 - WAIKAPU MAUKA PARNTERS

Done at Honolulu, Hawaii, this 29th day of August 1989,
per motions on June 30, 1989 and August 25, 1989.

LAND USE COMMISSION
STATE OF HAWAII

By (absent)
RENTON L. K. NIP
Chairman and Commissioner

By (opposed)
LAWRENCE F. CHUN
Vice Chairman and Commissioner

By (absent)
ALLEN K. HOE
Commissioner

By *Sharon R. Himeno*
SHARON R. HIMENO
Commissioner

By *Teofilo Phil Tacbian*
TEOFILO PHIL TACBIAN
Commissioner

By (abstain)
TORU SUZUKI
Commissioner

By *Robert S. Tamaye*
ROBERT S. TAMAYE
Commissioner

By *Frederick P. Whittemore*
FREDERICK P. WHITTEMORE
Commissioner

By *Allen Y. Kajioka*
ALLEN Y. KAJIOKA
Commissioner

Filed and effective on
August 29, 1989

Certified by:

Edward Leida
Executive Officer

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

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Agricultural District Land)	
Classified as "E" by the Land)	
Study Bureau Situated at)	
Waikapu, Maui, Hawaii, are)	
Permissible as Accessory Uses)	

CERTIFICATE OF SERVICE


I hereby certify that a copy of the Declaratory Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

HAROLD S. MASUMOTO, Director
Office of State Planning
State Capitol, Room 410
Honolulu, Hawaii 96813

CERT. CHRISTOPHER L. HART, Planning Director
Planning Department, County of Maui
200 South High Street
Wailuku, Hawaii 96793

CERT. EDWARD S. KUSHI, JR., ESQ., Attorney for Petitioner
Ing, Kushi & Ige
Wells Street Professional Center
2145 Wells Street, Suite 204
Wailuku, Hawaii 96793

DATED: Honolulu, Hawaii, this 29th day of August 1989.



ESTHER UEDA
Executive Officer

DOCKET NO. DR89-14 - WAIKAPU MAUKA PARTNERS

A copy of the Land Use Commission's Declaratory Order was served upon the following by regular mail on August 29, 1989.

Mr. Tom Shigemoto
Planning Director
County of Kauai
4280 Rice Street
Lihue, Hawaii 96766

Mr. Wayne Boteilho
Maui County Council
200 South High Street
Wailuku, Hawaii 96793