

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

September 7, 2001

Committee
Report No. 01-160

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Land Use Committee, having met on August 16, 2001 and August 20, 2001, makes reference to County Communication No. 01-175, from Councilmember Jo Anne Johnson, requesting consideration of the Special Management Area (SMA) permit granted by the Maui Planning Commission (MPC) for JDI's Harbor Village project in Lahaina, Maui (TMK: 4-6-007:003, 007 and 010).

Your Committee notes that, in the communication, Councilmember Johnson alleges that procedural errors may justify the Council requesting, by resolution, the MPC's reconsideration of the SMA permit. Your Committee further notes that the MPC granted the SMA permit on January 9, 2001 (consistent with the related approval of the project by the Cultural Resources Commission (CRC) on November 2, 2000) to allow development of the Harbor Village project—a proposed shopping center set to include retail shops and a restaurant in a one-story building and a two-story building with a total of more than 18,000 square feet in floor space. In addition, your Committee notes that the project site is near Moku`ula, a culturally significant property that is planned for restoration and preservation.

By memorandum dated June 21, 2001, the Chair of your Committee transmitted copies of photographs of a *Milo* tree (provided by the Bishop Museum), Shaw Street in Lahaina (looking mauka, dated 1910), and Lahaina Town (infrared, aerial, dated 1990).

By letter dated June 22, 2001, the Chair of your Committee informed the Planning Director of your Committee's investigation of the SMA permit and requested that the Department of Planning "reasonably maintain existing conditions at the development site while the results of the Committee's investigation are still pending."

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By memorandum dated June 26, 2001, the Chair of your Committee requested that the Corporation Counsel provide a legal opinion on whether procedural flaws mandate reconsideration or rescission of the SMA permit.

By memorandum dated July 5, 2001, Councilmember Johnson transmitted various documents from the State Department of Commerce and Consumer Affairs providing information about the developer and related business entities.

By memorandum dated July 6, 2001, Councilmember Johnson transmitted a copy of a letter dated June 29, 2001, from the Director of Public Works and Waste Management, informing Councilmember Johnson that the developer had been advised of requirements to conform with the grading ordinance, and related correspondence.

By memorandum dated July 18, 2001, Councilmember Johnson transmitted a letter dated July 17, 2001, from Peter W. McKenney, providing comments and background information relating to the need for "an appropriate archaeological study" of the project site.

By memorandum dated July 31, 2001, the Chair of your Committee requested that the Corporation Counsel provide a legal opinion regarding the preparation of the Environmental Assessment (EA) for the Harbor Village project.

By memorandum dated August 2, 2001, the Chair of your Committee requested that the Corporation Counsel provide a legal opinion as to whether the SMA permit must be revoked because the developer has failed to maintain a current business-registration status.

By memorandum dated August 6, 2001, Councilmember Johnson informed your Committee that documents of possible relevance to this matter were available for review in the Public Works and Transportation Committee's file labeled PWT-11.

By memorandum dated August 7, 2001, Councilmember Johnson transmitted the following documents (some excerpted):

- Minutes of May 27, 1997 MPC meeting;

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- Minutes of September 9, 1997 MPC meeting;
- Minutes of February 17, 1998 Land Use Committee meeting;
- Land Use Committee Report No. 98-37;
- Copy of a letter dated April 28, 1998, from the Administrator of the State Historic Preservation Division to Erik Frederickson, Xamaneck Researches;
- Copy of a letter dated October 30, 1998, from Erik Frederickson, Xamaneck Researches, to JDI Limited Partners;
- "Archaeological Inventory Survey," dated January 1999, prepared by Demaris Fredericksen and Erik Frederickson, Xamaneck Researches;
- A facsimile letter dated May 13, 1999, from Friends of Moku`ula, Inc. to the Department of Planning, transmitting information on previous archaeological work done in Lahaina;
- Copy of a letter dated May 17, 1999, from the Planning Director to the applicant's consultant, noting that the CRC had asked for additional analysis regarding the proposed project's impact on the surrounding community;
- Copy of a letter dated July 9, 1999, from the applicant's consultant to the Planning Director, reporting on an on-going evaluation of the project's impact on the surrounding community;
- Copy of a letter dated July 19, 1999, from the Hawaiian Rights Division of the Office of the Hawaiian Affairs to the Planning Director, stating that the project's draft EA lacked cultural and archaeological information;
- "Final Environmental Assessment for Harbor Village," dated July 1999;

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- Copy of a letter dated August 18, 1999, from the developer's consultant to the Office of the Hawaiian Affairs, submitting additional information relating to the project's final EA;
- Copies of nine form letters from the developer to various community organizations memorializing meetings with members of the community;
- Copy of a letter dated August 19, 1999, from the developer's consultant to the Planning Director, submitting information relating to the CRC's review of the draft EA;
- The Department of Planning's report to the Maui Planning Commission dated January 9, 2001; and
- Copy of a letter dated May 23, 2001, from Donald G. Malcolm to the Mayor, urging the purchase of the project site for cultural preservation.

By letter dated August 8, 2001, the Chair of your Committee posed several questions to the Planning Director relating to the developer's compliance with requirements of the County Code and inquiring as to whether the Department of Planning supports the MPC's possible reconsideration of the SMA permit.

By facsimile testimony received August 12, 2001, Kahu Charles Kauluwehi Maxwell, Sr. expressed support for the MPC's possible reconsideration of the SMA permit and attached a letter dated June 18, 2001, from Kapiiohookalani Lyons Naone, relating to a proposed historical exhibit at the project site. The testimony raised ethical concerns about Mr. Naone's apparent dual roles as both a contractor of the developer and as a member of the CRC, which reviewed the SMA-permit application, pursuant to its authority under Section 2.88.060, Maui County Code.

By memorandum dated August 14, 2001, the Council Chair transmitted a facsimile dated August 13, 2001, from Claire Hughes, President, Native Hawaiian Chamber of Commerce, providing historical information about the project site and its environs.

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By memorandum dated August 14, 2001, Councilmember Johnson transmitted a copy of Chapter 19.52.090, Maui County Code, Regulations for Historic Districts No. 1 and 2.

By letter dated August 14, 2001, the Planning Director stated that the developer was in compliance with applicable legal requirements and that the MPC would be meeting in response to the developer's request for clarification of two issues arising from the SMA permit.

By letter dated August 14, 2001, Robin L. Nonaka, Assistant Vice President, Pacific Century Trust (Agent for the Roman Catholic Church), expressed support for the Harbor Village project.

By memorandum dated August 15, 2001, the Council Chair transmitted a facsimile letter dated August 14, 2001, from Charles K. Rose, President, Association of Hawaiian Civic Clubs, providing historical information about the project site and its environs.

By memorandum dated August 15, 2001, Councilmember Johnson transmitted the following documents:

- A letter from Alice F. Guild, providing archaeological information about the project site and its environs;
- A letter from Susan A. Lebo, Ph.D., Bishop Museum, providing archaeological information about the project site and its environs;
- A letter dated August 14, 2001, from Hawaiian Language Assistant Professor M. Puakea Nogelmeier, University of Hawai'i, to the Mayor, providing historical information about the project site and its environs;
- A letter dated July 12, 2001, from H.J. Bartels to the Mayor, providing archaeological information about the project site and its environs; and

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- A letter dated August 13, 2001, from Claire Hughes, President, Native Hawaiian Chamber of Commerce, providing historical information about the project site and its environs.

By memorandum dated August 15, 2001, Deputy Corporation Counsel Richard K. Minatoya opined that the EA for the Harbor Village project was prepared by the Department of Planning in conformance with law.

By memorandum dated August 15, 2001, Deputy Corporation Counsel Minatoya opined that the SMA permit may not be revoked for the developer's failure to maintain a current business-registration status.

By letter dated August 15, 2001, the Chair of your Committee requested that the Planning Director provide copies of all the documents in the Department of Planning's files on this matter.

By letter dated August 15, 2001, the Managing Director informed your Committee of the Department of Planning's inability to provide copies of all the documents in its files on this matter.

At its meeting of August 16, 2001, your Committee met with the Mayor, an Executive Assistant to the Mayor, the Planning Director, the Deputy Planning Director, a Staff Planner from the Department of Planning, the Deputy Director of Public Works and Waste Management, the Corporation Counsel, and a Deputy Corporation Counsel.

Your Committee received the following documents:

- Minutes of the January 9, 2001 MPC meeting (from the Planning Director);
- Written testimony dated August 16, 2001, from Buck Buchanan, raising concerns about the Archaeological Monitoring Plan for Lot 3 of the Harbor Village project, and transmitting related information;

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- “KE KUMU’ - The Official Heritage and Information Handbook 1859 - 1990,” published by The Queen’s Medical Center (from Peter W. McKenney); and
- A memorandum dated August 16, 2001, from Councilmember Johnson, transmitting a copy of a survey map relating to Mokuhinia Fish Pond, located near the project site.

Your Committee received public testimony from the following individuals:

- The Mayor, who said that the project site should be preserved as part of the Moku`ula cultural project in Lahaina, with the County government, the Federal government, the Friends of Moku`ula, Inc., and other individuals and agencies working together to fund the acquisition and preservation of the property. He said that preliminary discussions indicate that the purchase price might be about \$4 million and that the United States Department of Agriculture is interested in securing the necessary loan.
- Charles Kaupu, who opined that the MPC should reconsider the SMA permit in its entirety if the allegations about procedural improprieties are accurate. He also expressed concern about a CRC member, allegedly affiliated with the developer, voting to support the project.
- Kahu Maxwell, who summarized his previously submitted written testimony, urged the Council to ask the Board of Ethics to investigate the CRC’s actions in allowing a member affiliated with the developer to vote on the project, and urged the County to quickly proceed with condemnation of the project site.
- Keoki Freeland of the Lahaina Restoration Foundation, who stated that a review of ancient maps has revealed that the boundaries of the culturally significant Mokuhinia Fish Pond extend well into the project site. Because the CRC was not aware of that information when they considered the project, the SMA permit should be reconsidered, according to Mr. Freeland. He stated that the MPC, when considering the SMA-permit application, relied on the CRC’s guidance with respect to cultural issues.

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- Mr. McKenney, who expressed support for the Mayor's proposal to acquire and preserve the project site because of its obvious cultural significance.
- Luana McKenney, who stated that her research has indicated that the project site is located in a culturally significant area, which was particularly important to Hawaiian royalty. She said that the project site needs to be preserved to ensure that future generations are able to learn about Hawaiian culture.
- Dave Chenoweth, who stated that he lives "down the street" from the project site and that a commercial development at the site is not consistent with the West Maui Community Plan's intentions. He also stated that the draft EA included a comment from Erik Frederickson indicating that the boundaries of the culturally significant Mokuhinia Fish Pond extended into the property site, but that information was not clearly presented to the MPC.
- Buck Buchanan, who stated that the EA is not complete because it does not include the map indicating the boundaries of the culturally significant Mokuhinia Fish Pond. If the MPC and CRC are not provided with accurate, comprehensive factual information they are not able to make the best possible decisions, he said. Mr. Buchanan also expressed support for the MPC's reconsideration of the SMA permit in its entirety, in part because a parking condition recommended by the CRC was not presented to the MPC.
- James Tanaka, on behalf of Na Kupuna O Maui, who stated that the project site is part of the culturally and historically significant Moku`ula complex and should be preserved.
- Kelly Arbor, who stated that County officials were mistaken in allowing the project site to be used for business purposes, when it should have only been used for parking. The granting of a certificate of occupancy to the developer in 1998 violated the West Maui Community Plan, she said. The

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EA was improperly prepared by the developer's applicant, and consequently the EA was incomplete, according to Ms. Arbor.

- Ed Lindsey, who expressed gratitude to Peter and Luana McKenney for their recent cultural and archaeological research and to the Mayor for his interest in preserving the project site. A "cultural overlay" ordinance would protect cultural sites throughout the County, he said.

The developer's attorney (B. Martin Luna), planning consultant (Chris Hart), and principals (Steven Gatchell and Terry Lee) made a presentation to your Committee regarding the Harbor Village project. The presentation made the following points:

- The accusations of impropriety regarding the SMA permit should have been preliminarily reviewed to determine whether they have any merit in fact or law before your Committee initiated its investigation.
- Mr. Naone was hired by the developer as a cultural resources specialist only about two months ago, whereas his vote on the Harbor Village project as a CRC member occurred in November of last year, well before his affiliation with the developer. Indeed, the developer did not even consider hiring a cultural resources specialist at the time of the CRC vote. Therefore, there was no impropriety.
- The ultimate goal of your Committee's investigation appears to be the reopening of the SMA-permit application, which would be "a very drastic measure." Indeed, such an action would apparently be unprecedented. A request to reopen the application should be based on more than "unverified, unsubstantiated accusations."
- The fishpond map mentioned by several testifiers was, in fact, included in the EA and brought to the attention of both the CRC and MPC when they considered the Harbor Village project.

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- The Council lacks the authority to order the MPC to reopen the application. The developer nonetheless regards this as a serious matter because of the Council's influence over all County agencies.
- The County agencies that have assisted in the processing of the SMA permit, the Department of Planning and the Department of the Corporation Counsel, have no financial or special interest in the Harbor Village project. Your Committee should, therefore, seek those agencies' guidance in evaluating the allegations of impropriety.
- A Community Plan amendment for the Harbor Village project was unanimously approved by the Council. Building permits and a certificate of occupancy were subsequently issued to allow for business uses at the project site in accordance with established law and procedure. The staff planner assigned to this project from its initiation has been careful to ensure compliance with all applicable laws and procedures. Public opposition to the project does not mean that the SMA permit was granted in violation of law or procedure.
- The only significant issues are those relating to questions about restrictions on parking stalls and the appropriate use of driveways. Those questions, however, are clearly resolved in favor of the developer's proposed and existing use, based upon a close review of the public record and applicable law.
- The developer has endured a "horrendous" approval process over the past several years, during which the developer's honesty and integrity were questioned and dozens of members of the public testified against the project. Still, the Community Plan amendment and SMA permit necessary for the project were eventually approved, after the developer agreed to substantial changes and conditions, based on concerns raised by the public. The developer is interested in pursuing a "win-win" solution to the concerns that continue to be raised and is willing to work with the Council and the Mayor to that end.

Your Committee recessed the meeting until 9:00 a.m. on August 20, 2001.

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At its reconvened meeting of August 20, 2001, your Committee met with the Planning Director, the Deputy Planning Director, a Staff Planner from the Department of Planning, the Deputy Director of Public Works and Waste Management, the Corporation Counsel, and a Deputy Corporation Counsel.

Your Committee received the following documents:

- A facsimile letter dated August 17, 2001, from Jim Peck, providing critical comments on the County's land-use-approval processes, and
- A letter dated August 10, 2001, from Terry Ney, President and CEO, Electric Signs Maui, Inc., expressing support for the Harbor Village project.

Your Committee reviewed a brief PowerPoint presentation that exhibited the location of the project site in Lahaina and existing uses at the site. A home has been converted from residential use to retail use (surfboard rentals and refreshment sales) at the project site.

The Planning Director informed your Committee that JDI's SMA permit would be considered by the MPC on August 28, 2001 to consider the developer's request for clarification regarding the interpretation of two conditions. Your Committee notes that the MPC's August 28th meeting agenda states that the developer is "requesting confirmation of existing driveway accesses and limitation of parking stalls for the JDI Harbor Village Commercial Project."

Your Committee considered whether it would be desirable to have the MPC review the SMA in its entirety because of the following concerns: (1) the possibility that the EA was not sufficiently comprehensive or accurate regarding the project's cultural significance and compliance with applicable laws; and (2) the MPC's apparent failure to consider a parking condition proposed by the CRC was a potential flaw that raised concerns. Your Committee notes that the Department of Planning has previously acknowledged that the second concern arose from a bureaucratic error, but disputes allegations relating to the EA. The Department of Planning has not supported the view that the SMA permit should be reviewed beyond the developer's request for clarification.

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The Staff Planner provided background information on the preparation of the EA. The developer submitted a draft EA, which circulated for comments to various agencies, including the State Historic Preservation Division (SHPD) of the Department of Land and Natural Resources. The SHPD consistently indicated that the archaeological work was sufficient and that Parcel 3 of the project site was ready for construction. The Department of Planning relied on SHPD's conclusions. In addition, the CRC held five meetings, including a site inspection, to consider archaeological and cultural issues. Therefore, this project was heavily reviewed before the SMA permit was granted. The Department of Planning has always recognized that the project site is culturally sensitive, and several conditions of the SMA permit reflect that understanding. The culturally sensitive aspects of the project site were presented by the Department of Planning to the CRC and the MPC in reports that included maps.

In addition, your Committee expressed concern about the County's potentially excessive reliance on SHPD for analysis of cultural issues. The Planning Director acknowledged that the Department of Planning no longer has a cultural specialist on staff. He added, however, that many staff planners have experience and training on cultural issues and that the Department of Planning has confidence in SHPD's work.

Your Committee discussed the County's processes with respect to the preparations of EAs that are required by the Hawai'i Environmental Protection Act (Chapter 343, Hawai'i Revised Statutes). Your Committee noted that the practice of having applicants or their consultants prepare EAs did not appear to comply with State law, which states that the government agency with approval authority for a land-use application shall prepare the necessary EA. The Deputy Corporation Counsel noted that the longstanding practice of the County of Maui and other Hawai'i counties was to have applicants or their consultants prepare EAs. To seek to clarify the appropriate processes under State law, your Committee noted the desirability of obtaining a legal opinion from the State Attorney General. Your Committee requested that the Department of the Corporation Counsel prepare a draft letter to the Attorney General seeking such an opinion. Your Committee expressed the view that it is obviously important for the County to follow State law with respect to the preparation of EAs, regardless of past practices or the Department of Planning's preferences.

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Your Committee discussed the possibility that the MPC and the United States Army Corp of Engineers may not have been fully apprised of the project site's history as a wetland.

Your Committee inquired as to whether the MPC or CRC, if it reconsiders the SMA permit, has the ability to stop commercial development on the project site. The Planning Director noted that the existing use of the project site is commercial and that the MPC could probably not stop that use. With respect to future proposed commercial uses, the MPC and CRC can exercise discretion in determining whether to approve them. (For the Harbor Village project, MPC and CRC approval was required and obtained.)

Your Committee noted that, because of the public testimony and other information regarding the cultural sensitivity of the project site, condemnation or other means of purchase by a government or non-profit entity would be advisable to ensure appropriate preservation. Otherwise, some sort of commercial use will continue.

Your Committee considered a motion to recommend that the Council urge the MPC to reconsider the SMA permit for the Harbor Village project in its entirety. The motion failed. Your Committee noted that the Department of the Corporation Counsel had not found any illegality in the approval process (although elements of the process may have been flawed) and that the proposed recommendation to the MPC could establish an undesirable precedent by interjecting the Council into an aspect of County government in which it lacks jurisdiction (i.e., SMA permits).

The Chair of your Committee noted that he would write to the MPC and request that it defer consideration of issues relating to the Harbor Village project until the Council had concluded its deliberations on this matter.

Your Committee voted to recommend that the Council request that the Board of Ethics provide an advisory opinion on the CRC's conduct relating to the approval of the Harbor Village project, with particular attention to the developer's hiring of one of the CRC members who voted for the project. Your Committee notes that while Mr. Naone was not hired by the developer until after the CRC's

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vote on the Harbor Village project, he was working for the developer's consultant (Chris Hart) at the time of the vote, which created an appearance of impropriety, according to allegations made to members of your Committee.

Your Committee requested that the Chair of your Committee provide the Board of Ethics with minutes from all Cultural Resources Commission meetings on the Harbor Village project.

Your Committee deferred consideration of the matter pending further discussion.

Your Land Use Committee **RECOMMENDS** the following:

1. That the Board of Ethics be **REQUESTED** to provide an advisory opinion on the Cultural Resource Commission's conduct relating to the Harbor Village project, with particular attention to the developer's hiring of one of the CRC members who voted for the project; and
2. That copies of this committee report be **TRANSMITTED** to the Board of Ethics, the Maui Planning Commission, the Cultural Resources Commission, the Planning Director, the Director of Public Works and Waste Management, the Corporation Counsel, and the Mayor.

Adoption of this report is respectfully requested.

