

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

July 8, 2008

Committee
Report No.

08-74

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

Chair and Members:

Your Land Use Committee, having met on June 18, 2008, makes reference to County Communication No. 04-233, from the Planning Director, transmitting a proposed bill entitled "A BILL FOR AN ORDINANCE TO AMEND THE KIHEI-MAKENA COMMUNITY PLAN AND LAND USE MAP FROM PARK TO CONSERVATION FOR PROPERTY SITUATED AT KIHEI, MAUI, HAWAII". The purpose of the proposed bill is to enact a Community Plan Amendment for the Frederic W. Constant single-family residence located on approximately 0.252 acres in Kihei, Maui (TMK: (2) 2-1-06:006) to provide consistency with the State Land Use designation (Conservation District) and existing use of the property.

Your Committee notes that the Maui Planning Commission held a public hearing on the application on February 10, 2004.

Your Committee further notes that at its meeting of February 10, 2004, the Maui Planning Commission, after reviewing the findings presented in the document entitled "MAUI PLANNING DEPARTMENT'S REPORT TO THE MAUI PLANNING COMMISSION FEBRUARY 10, 2004 MEETING" (Department's Report) and the conclusions and recommendation presented in the document entitled "MAUI PLANNING DEPARTMENT'S RECOMMENDATIONS REPORT TO THE MAUI PLANNING COMMISSION FEBRUARY 10, 2004 MEETING", voted to recommend approval of the proposed Community Plan Amendment.

Your Committee notes that the Council (2003-2005 Council term) referred County Communication No. 04-233 to its Planning and Land Use Committee at the Council meeting of September 21, 2004.

At its meeting of January 21, 2005, the Council (2005-2007 Council term) referred County Communication No. 04-233 to its Land Use Committee (County Communication No. 05-13).

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At its meeting of February 23, 2005, the Committee met with the Planning Director; the Planning Program Administrator, Current Planning Division, Department of Planning; the Administrative Planning Officer, Department of Planning; the Deputy Director of Public Works and Environmental Management; a Deputy Corporation Counsel; and Rory Frampton, Chris Hart & Partners, Inc., applicant's land use consultant.

There was no public testimony.

Mr. Frampton provided the Committee with copies of the following: an enlarged aerial photograph of the subject property in relation to the Ahihi-Kinau Natural Area Reserve, the Makena State Beach Park, and the coastline; depictions of the existing land use designations for the subject property in the context of surrounding land use designations; and photographs of the site.

Mr. Frampton provided an overview of the application, noting that, in February 1974, the State Board of Land and Natural Resources (BLNR) issued a Conservation District Use Application (CDUA) permit to construct a new residence at the subject property to replace a residential structure. The existing residence was constructed under this 1974 CDUA permit. In 1985, the Kihei-Makena Community Plan was adopted and designated the property and a large tract surrounding it as Park. He further explained that the Community Plan matrix indicates that the designation was made on the basis of the State's intent to acquire the land as part of the Makena La Perouse State Park, and that the property is one of four kuleanas in the area that were specifically excluded from the Ahihi-Kinau Natural Area Reserve. Mr. Frampton informed the Committee that the State has since revised the boundary of the Makena La Perouse State Park so that it now stops at the southern end of Big Beach, omitting the subject property.

Mr. Frampton further informed the Committee that the applicant had replaced the cesspool with a state-of-the-art septic tank and leach field to mitigate any impacts to near-shore waters. In addition, an ultraviolet disinfection system has been installed for the swimming pool, rather than using chlorine, to minimize such impacts. He also advised that, under the Conservation District Rules, the maximum floor area for the property is 3,500 square feet, and the applicant has already reached that limit, so no further expansion would occur without a BLNR hearing and environmental assessment.

He explained that, because the State Land Use District classification is Conservation, the R-3 zoning is moot. He also explained that the main renovation consisted of adding one bedroom on the side of the property facing the road.

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The Committee discussed the sequence of events surrounding the issuance of two notices of warning in February 2003 and March 2003, respectively, and the subsequent completion of construction. The Committee expressed concerns over the continued construction despite the notices of warning and the conditions of the CDUA approval, as reflected in Exhibit 17 to the Department's Report. The Committee noted particular concerns that such activity occurred in this pristine area.

The Administrative Planning Officer advised that no fines were assessed because the applicant tried to rectify the problem by filing for the correct permits. He further advised that the applicant had been allowed to enclose the construction that had already begun when the notices of warning were issued.

The Administrative Planning Officer noted that some confusion may have resulted from the question of who has authority to regulate applicable permits in the Conservation District. The Committee questioned whether the State Department of Land and Natural Resources (DLNR) is the only regulatory agency that has any authority in the Conservation District.

The Planning Director clarified that there is no dispute that the property is within the Special Management Area (SMA) and requires SMA approval. He informed the Committee that the applicant disputed whether a building permit was required, apart from those permits obtained from DLNR. He further clarified that the Department's position is that consistency with the Community Plan is a prerequisite to an SMA assessment, and that, therefore, the Community Plan must first be amended. The Administrative Planning Officer further advised that the County has authority to regulate in the SMA.

The Administrative Planning Officer informed the Committee that the rock wall facing Makena Road had been constructed prior to Mr. Constant's purchase of the property.

The Committee questioned whether a County building permit and building inspections were required in the Conservation District and the appropriate department to enforce any such requirements. The Committee further probed the basis for not issuing fines in this case and questioned what the applicable fines would have been.

The Planning Director advised that the Department prefers that violations be remedied over imposing fines.

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The Committee noted the presence of a pool on the property, located approximately 38 feet from the shoreline. The Committee questioned whether a valid shoreline certification had been received. The Committee further noted the presence of a historic site on the property and a comment from the State Historic Preservation Division, Department of Land and Natural Resources (SHPD), that an acceptable preservation plan for the site is needed.

The Administrative Planning Officer advised that an updated shoreline certification was not required. He further advised that it was his understanding that the issuance of a building permit in the Conservation District is within DLNR's jurisdiction.

Mr. Frampton informed the Committee that a preservation plan for site 5121 (the rock wall) had not yet been completed. He also advised that the rock wall had been designated a historic site because it is over 50 years old. The Committee requested that the applicant finalize the preservation plan before the Committee again considered the subject request.

The Committee deferred the matter pending further discussion.

By correspondence dated October 10, 2005, Paul Mancini, Esq., Mancini, Welch & Geiger LLP, transmitted a copy of the following: (1) a letter of survey dated September 26, 2005, from Bruce R. Lee, President, Newcomer-Lee Land Surveyors, Inc., to Frederic Constant, stating that on September 13, 2005, a survey was performed of the newly constructed pool location, relative to the 25-foot shoreline setback of the certified shoreline, dated August 14, 1986, and attaching a copy of the survey plat; and (2) a "Preservation Plan for State Site 5121, a Stone Wall Bordering a Single Parcel Measuring Approximately 0.25 Acres, Kanahena Ahupua`a, Makawao (Kula) District, Maui Island, Hawai'i [TMK (2) 2-1-006:006]", prepared by Christopher M. Monahan, Ph.D., dated September 2005 (the Preservation Plan).

By copy of correspondence dated November 28, 2005, from Melanie Chinen, Administrator, SHPD, to Michael Dega, Ph.D., Scientific Consultant Services, SHPD, Ms. Chinen provided comments concerning the site, and approved the Preservation Plan.

By correspondence dated January 20, 2006, the Chair of the Committee advised the applicant that his application would be scheduled as soon as it was feasible.

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By correspondence dated February 6, 2006, the Chair of the Committee transmitted a copy of correspondence dated December 6, 2005, from Paul Mancini, Esq., Mancini, Welch & Geiger LLP, to the staff of the Committee, transmitting a copy of the November 28, 2005 correspondence from SHPD.

At its meeting of February 15, 2006, the Committee met with the Planning Director; the Administrative Planning Officer, Department of Planning; the Deputy Director of Public Works and Environmental Management; a Deputy Corporation Counsel; Frederic Constant, the applicant; Christopher Hart, Chris Hart & Partners, Inc., applicant's land use consultant; and Paul Mancini, Esq., Mancini, Welch & Geiger LLP, applicant's attorney.

There was no public testimony.

Mr. Hart provided background information on the application. He noted that it had been determined that the SMA application could not proceed because of the inconsistency between the Community Plan designation and the State Land Use District classification. He further noted that DLNR had issued a right-to-construct permit to the applicant. Mr. Hart informed the Committee that the Preservation Plan had been completed and that DLNR had approved the plan.

The Administrative Planning Officer advised that the Community Plan had designated the subject property as Park in anticipation of the State including the property in its park lands. He further advised that the Department and the Maui Planning Commission had no objections to the proposed Community Plan Amendment.

The Administrative Planning Officer noted that the CDUA permit to extend and renovate the existing 2,759 square-foot single-family residence was approved on December 24, 2002. The single-family residence had been allowed under a 1974 CDUA permit.

The Committee noted that the subject property is located in a highly sensitive area. The Committee discussed the issuance of the two notices of warning without any fines being assessed. The Committee questioned the authority under which the Department could adopt a policy of seeking compliance rather than fines. The Committee also discussed the chronology of the applicant's request for an SMA assessment and Community Plan Amendment, the applicant's receipt of a CDUA permit,

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the issuance of the notices of warning, and the completion of the renovation and extension of the residence.

The Committee discussed the 1986 shoreline certification. The Committee questioned whether there had been any modifications to the shoreline since 1986. The Administrative Planning Officer informed the Committee that he believed the SMA rules allow for the applicant to use a pre-existing certified shoreline if the shoreline is fixed, and that a determination concerning the shoreline certification requirement is triggered during the SMA permit process. The Committee also questioned the shoreline setback requirement applicable to the property and whether the swimming pool conforms to the requirement.

The Committee further questioned when the rock wall was built and whether it was permitted when built.

The Administrative Planning Officer informed the Committee that the County does not issue building permits in the State Conservation District, but that the applicant had received a building permit from the State. The Committee requested a copy of the building permit.

Mr. Hart provided an explanation concerning the chronology of events. He confirmed that no stop-work order had been issued by the County or the State. The Committee requested a copy of the 1988 CDUA permit.

The Committee deferred the matter pending further discussion.

By correspondence dated March 20, 2006, the Chair of the Committee requested that Christopher Hart, Chris Hart & Partners, Inc., provide a copy of the CDUA permit and the building permit issued by the State; and confirm the distance of the pool to the shoreline, the date the pool was built, whether there are any other structures within 40 feet of the shoreline, and if so, when such structures were built.

By correspondence dated March 20, 2006, the Chair of the Committee requested that the Director of Public Works and Environmental Management advise whether there had been any modifications to the shoreline since the shoreline certification was done on August 14, 1986, when the rock wall was built, and whether it was permitted when built.

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By correspondence dated March 21, 2006, the Chair of the Committee requested the following information from the Planning Director: whether the shoreline fronting the property is fixed, and if so, whether the applicable rules allow the use of the 1986 certified shoreline map; whether there have been any modifications to the shoreline since 1986; the current setback requirement for the property, whether any structures are within that setback, and the applicable setback requirement at the time such structures were constructed; and why a stop-work order was not issued in this instance.

By correspondence dated March 21, 2006, the Chair of the Committee requested that the Department of the Corporation Counsel advise the Committee of the Department of Planning's authority to adopt a policy of seeking compliance rather than fines; and if so, whether such a policy complies with the enforcement provisions of Chapter 205A, Hawaii Revised Statutes (HRS). The Chair noted that the Committee had questioned the Department's authority to allow a violation to be cured by an after-the-fact permit without any fines being assessed, when the applicant proceeds to construct after receiving notices of warning.

By correspondence dated March 21, 2006, the Chair of the Committee requested that the Chair, BLNR, transmit a copy of the construction plans and specifications provided in connection with the CDUA, as referenced in Paragraph No. 7 of Exhibit 17 to the Department's Report.

By correspondence dated March 30, 2006, the Chair of the Committee advised that a copy of the construction plans provided in connection with the CDUA for the subject property, dated March 11, 2003, had been transmitted by DLNR, Office of Conservation and Coastal Lands, and was available for review.

By correspondence dated April 19, 2006, the Director of Public Works and Environmental Management responded that DLNR is responsible for the determination of a shoreline, and that there is no KIVA record of a building permit being issued for a rock wall.

By correspondence dated April 27, 2006, the Chair of the Committee requested that the Chair, BLNR, advise the Committee whether any modifications or changes had been made to the shoreline fronting the subject property since the shoreline certification was done on August 14, 1986.

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By correspondence dated May 3, 2006, June 23, 2006, and September 6, 2006, the Chair of the Committee requested that Christopher Hart, Chris Hart & Partners, Inc., provide a response to his inquiry dated March 20, 2006.

By correspondence dated May 10, 2006, Samuel J. Lemmo, Administrator, Office of Conservation and Coastal Lands, DLNR, advised that the Department's records do not indicate that any modifications or changes were permitted on the shoreline structure fronting the subject property since August 14, 1986.

By correspondence dated June 23, 2006, the Chair of the Committee requested that the Planning Director provide a response to his inquiry dated March 21, 2006.

By correspondence dated August 9, 2006, the Planning Director responded that the shoreline is fixed and the pre-existing certified shoreline map can be used; that the Department is unaware of any modifications to the shoreline since 1986; that the current shoreline setback is 40 feet from the certified shoreline, and that it is unclear whether the required setback when the pool was built was 40 feet or 20 feet; and that the Department placed enforcement on hold once the applicant began working to resolve the violation.

By correspondence dated September 6, 2006, Christopher Hart, Chris Hart & Partners, Inc., transmitted his correspondence dated September 5, 2006, providing a detailed chronology of the permitting process for the subject property, confirming that the pool is in compliance with the 25-foot required shoreline setback, providing information relating to the Jacuzzi and sea wall, and providing supporting documentation relating to his response.

By correspondence dated September 11, 2006, Christopher Hart, Chris Hart & Partners, Inc., noted that a written response to the March 20, 2006 inquiry was delivered on September 6, 2006.

At its meeting of October 18, 2006, the Committee met with the Planning Director; the Administrative Planning Officer, Department of Planning; the Deputy Director of Public Works and Environmental Management; a Deputy Corporation Counsel; and Christopher Hart, Chris Hart & Partners, Inc., applicant's land use consultant.

The Committee received a copy of a shoreline structure inventory for the subject property from Councilmember Anderson.

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There was no public testimony.

Mr. Hart provided background information on the application. He noted that the dwelling on the subject property was permitted at the time it was constructed by the State, and that it was built at a time when a single-family home was exempt in the SMA; therefore, the construction of the dwelling did not require County oversight. He informed the Committee that the applicant had applied to the State in 2002 for permission to renovate the home to add a 500-square-foot bedroom, to demolish 100 square feet of the dwelling, and to construct a swimming pool. The State granted the applicant's request conditioned on an SMA exemption. The applicant requested an SMA assessment from the County, but the County was unable to provide the assessment because the Community Plan designation was inconsistent with the State Land Use District classification. Mr. Hart indicated that the applicant subsequently applied for a Community Plan Amendment from Park to Conservation. He noted that the Jacuzzi on the property, which is located within the shoreline setback area, was approved by the State because it was considered a minor structure which was allowed in this location.

The Committee questioned why the Department of the Corporation Counsel had not responded to a March 21, 2006 request, and requested that a written response be transmitted.

The Deputy Corporation Counsel provided a brief overview of Federal authority regarding the Coastal Zone Management Act and the authority this Act provides the states to manage shorelines. He noted that the State, in turn, provides the County with authority over penalties for violating SMA regulations. He further stated that the County Charter provides the planning commissions with final authority on SMA matters.

The Deputy Corporation Counsel advised that State law allows the Planning Director to impose a penalty for an SMA violation that is equivalent to the cost of returning an area to its condition before the SMA violation. He further advised that if the Planning Director finds that there is no damage to the ecology, then no monetary fine would be imposed.

The Committee expressed concern that the Deputy Corporation Counsel's analysis did not include the application of the County's SMA rules. A Committee member strongly disagreed with the Deputy Corporation Counsel's analysis, and strongly

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objected to the applicant's construction on the property despite the issuance of two notices of warning by the Department of Planning.

The Administrative Planning Officer provided additional information on the history of the application. He noted that Mr. Hart was not involved in the original application procedures and that the applicant's attorneys had been made aware that the Department of Planning required an SMA assessment. He noted that, although the applicant initially filed an appeal of the Director's decision, he did not pursue the appeal and instead completed construction on the property. He further stated that the applicant had contacted the Department of Planning following the second notice of warning, but the Planner assigned to the matter at the time is no longer with the County, so information on what the applicant was told is not available. He noted that if the applicant is granted his request for the Community Plan Amendment, then the applicant will be subject to the DLNR permitting process, and at that point, the County could do an SMA assessment and impose conditions on the project. He also noted that he was unable to find any State permit or exemption for the Jacuzzi on the subject property.

The Administrative Planning Officer also indicated that he conducted a site visit, and that at the time of his visit, the applicant's farm workers from California were vacationing on the property. He noted that there was a sign at the front of the property providing a number to call for information on the property.

Mr. Hart indicated that the dwelling is not used as a rental, but that the applicant does want to sell it.

The Committee discussed what would happen if the Council did not take action on the application.

The Committee deferred the matter pending further discussion.

By correspondence dated October 19, 2006, the Chair of the Committee renewed the request for a response from the Department of the Corporation Counsel to the Committee's March 21, 2006 inquiry.

At its meeting of January 5, 2007, the Council referred County Communication No. 04-233 to your Land Use Committee (County Communication No. 07-5).

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By correspondence dated March 1, 2007 and November 20, 2007, the Chair of your Committee requested that the Department of the Corporation Counsel respond to the Committee's March 21, 2006 inquiry.

By correspondence dated April 5, 2007, the Chair of your Committee requested that the Department of Planning advise whether, under the new Administration, it would continue to follow the prior Administration's policy of seeking compliance rather than fines.

By correspondence dated September 24, 2007 and November 20, 2007, the Chair of your Committee requested that the Department of Planning respond to its April 5, 2007 request.

By correspondence dated March 17, 2008, the Department of the Corporation Counsel responded to the Committee's March 21, 2006 request. In summary, the Department opined that, "In this case, the [Planning] Director's decision to not issue a notice of violation imposing a fine, but to require Mr. Constant to apply for and obtain a community plan amendment prior to processing of an SMA assessment, is within the Director's discretion."

By correspondence dated June 16, 2008, the Planning Director responded to your Committee's April 5, 2007 request, noting that general issues relating to issuance of fines could be discussed more broadly in other contexts. The Planning Director advised that the Department does not believe it is in the public interest to issue a fine in this circumstance at this time. He opined that the application should be reviewed on its merits, and that the issuance or nonissuance of a fine should have no bearing on that decision.

At its meeting of June 18, 2008, your Committee met with the Planning Director; a Planner, Department of Planning; the Deputy Director of Public Works; a Deputy Corporation Counsel; Frederic Constant, the applicant; and Paul Mancini, Esq., Mancini, Welch & Geiger LLP, the applicant's attorney.

There was no public testimony.

The Planning Director provided a brief overview of the application.

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Your Committee discussed the processing of the SMA application and the earlier determination that the Community Plan designation needed to be amended before an SMA assessment could be done.

The Deputy Director of Public Works advised that, because the property is in the State Conservation District, it is not within the Department's jurisdiction to require a building permit.

Your Committee reiterated its concerns over the sequence of events leading to the completion of improvements at the property.

The Planning Director emphasized that, had such events occurred under the present Administration, there would likely have been a different response.

Your Committee discussed its alternatives in making a recommendation on the application.

Your Committee recommended that certain housekeeping revisions be incorporated into the proposed bill. Your Committee voted to recommend passage of a revised proposed bill incorporating your Committee's requested revisions, and filing of the communication.

Your Committee is in receipt of a revised proposed bill incorporating your Committee's requested revisions.

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

1. That Bill No. _____ (2008), as revised herein and attached hereto, entitled "A BILL FOR AN ORDINANCE TO AMEND THE KIHEI-MAKENA COMMUNITY PLAN AND LAND USE MAP FROM PARK TO CONSERVATION FOR PROPERTY SITUATED AT KIHEI, MAUI, HAWAII", be **PASSED ON FIRST READING** and be **ORDERED TO PRINT**; and
2. That County Communication No. 04-233 be **FILED**.

Adoption of this report is respectfully requested.

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MICHAEL J. MOLINA Chair

JO ANNE JOHNSON Member

JOSEPH PONTANILLA Vice-Chair

DANNY A. MATEO Member

MICHELLE ANDERSON Member

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