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**MAUI PLANNING COMMISSION
PORTION OF REGULAR MINUTES
ITEM D.1
MARCH 10, 2020**

Ms. McLean: Thank you Chair. Next on the agenda is Adoption of a written Decision and Order. These are proposed Findings of Fact, Conclusions of Law, and Decision and Order denying the request for a State Land Use Commission Special Permit by Michael and Mi Ra Finnegan to operate Hale O Ka Pua B&B, a two-bedroom bed and breakfast located in the State Agricultural District at 2350 Aina Mahiai Place at TMK: 4-4-020:036 in Lahaina.

The action on the application was taken by the Commission following a public hearing on November 12, 2019 and then just recently at the February 25, 2020 meeting the matter was deferred. Also on the agenda is the applicant's Statement of Exceptions and Objections to the proposed Findings of Fact, Conclusions of Law, and Decision and Order and as well, distributed today received only by the Department yesterday is the applicant's Motion to Vacate the Hearing.

D. ADOPTION OF WRITTEN DECISION AND ORDER

1. **Proposed Findings of Fact, Conclusions of Law, and Decision and Order denying the request for a State Land Use Commission Special Permit (SUP2) by MICHAEL and MI RA FINNEGAN to operate Hale O Ka Pua B&B, a two-bedroom bed and breakfast located in the State Agricultural District located at 2350 Aina Mahiai Place, TMK: (2) 4-4-020:036, Lahaina, Island of Maui. (SUP2 2019/0008) (J. Burkett) (Action on the application was taken by the Commission following public hearing at the November 12, 2019 meeting.) (Matter was deferred from the February 25, 2020 meeting)**

- a. **MICHAEL C. CARROLL, Attorney of BAYS LUNG ROSE & HOLMA on behalf of MICHAEL and MI RA FINNEGAN submitting Petitioner Michael and Mi Ra Finnegan's Statement of Exceptions and Objections to the Proposed Findings of Fact, Conclusions of Law, and Decision and Order Denying a State Land Use Commission Special Permit for Hale O Ka Pua Bed and Breakfast located in the State Agricultural District located at 2350 Aina Mahiai Place, TMK: (2) 4-4-020:036, Lahaina, Island of Maui. (SUP2 2019/0008)**

The Commission may take action to adopt, adopt with modifications, or take some other action regarding the proposed Findings of Fact, Conclusions of Law, and Decision and Order

Mr. Hopper: Do you want to recognize the counsel and see if he has any comments?

Mr. Carnicelli: Okay Aloha, Mr. Carroll.

Mr. Michael Carroll: Good afternoon Chair.

Mr. Carnicelli: Good afternoon. I will, I guess let you start.

1 Mr. Carroll: Okay, thank you very much.

2
3 Mr. Carnicelli: Not a problem.

4
5 Mr. Carroll: Good afternoon Chair and Members of the Commission. Thank you for giving me
6 the opportunity to speak. I do wish to talk about two issues again similar as I did last week. We
7 also have before the Commission a Motion to Vacate the Hearing today and we're hopeful that
8 the court or excuse me, the Commission will take that under advisement and consider that. What
9 we are asking today is that the Commission not take any action today and there's essentially two
10 reasons, one is a procedural issue and one is a ...(inaudible)...one.

11
12 First, the notice of hearing was not adequate and like the last hearing, the Commission cannot
13 take action on this agenda item without violating its own rules. Second, there was no evidence
14 presented at the hearing to overcome the Planning Department's recommendation to approve
15 this permit just like the permit we just saw there's no reason why this permit was not approved.

16
17 On point one, there's no question that today's hearing today is a hearing, administrative hearing.
18 It falls within the definition of an agency hearing under the Commission's own rules and that's a
19 hearing held immediately prior to judicial review. The Commission is making a final decision on
20 the legal rights and duties of the petitioner. It's deciding to whether to "take action to adopt, modify
21 the Decision and Order or take other action." There is no matter what you choose to call it, this
22 is a hearing and we're entitled to follow the rules...all the parties are obligated to follow the rules.

23
24 Lastly, it fits all the indices of the hearing. The Commission provided notice albeit we're contesting
25 that's sufficient, the Commission is allowing the petitioner to provide arguments to the
26 Commission for consideration, and lastly, the Commission is going to make a decision that affects
27 the Commission...or the petitioner's rights. It clearly falls within the definition of hearing under
28 the Administrative Rules and all the case law that has interpreted it.

29
30 The statute that says what the time period is for notice is clear and unequivocal. This is HRS 91-
31 9.5, and this is what it says, it says, "all parties shall be given written notice of hearing by registered
32 or certified mail with return receipt requested at least 15 days before the hearing." There's no
33 exceptions to that. That is clear and unequivocal language and there's also no question here that
34 the notice provided to the petitioner was not within 15 days or was less than 15 days no question.

35
36 Another issue with respect to the notice, there's another requirement that the proposed Decision
37 and Order is required to be served on the petitioner ten days prior to enable the petitioner to
38 provide exceptions. That's what the rules say. This same rule applies if this was a Land Use
39 Commission proceeding, if it was 15...if it was more than 15 acres. The, the purpose of this rule
40 is very clear. It's to give the parties an opportunity to present their objections. It's also an
41 opportunity for the Commission to consider these objections. We are planning on filing objections
42 and exceptions. We filed initial ones with the limited time we had. We intend to file these
43 exceptions and we intend to do that by the deadline. The deadline is March 11, that's tomorrow.
44 I want to point out that the notice was also dated February 25th, but curiously it was not sent to us
45 until February 26th which I think is also an admission that the notice here was not efficient.

1 Lastly, I just want to comment on the proposed decision. This is not a case where the petitioner
2 has done anything illegal or anything wrong. He's met all the requirements. He's never violated
3 any of the rules. He's never rented it on a short-term basis. He's a resident of the County of
4 Maui. The Planning Commission made expressed findings that the petition meets all the
5 requirements of the special permit. The Planning Department made recommendations or made
6 findings that the bed and breakfast does not conflict with any agricultural uses in the property or
7 surrounding area. The Planning Department made recommendations and findings that it will not
8 impact the farm plan. The Planning Department made recommendations that the applicant meets
9 all the requirements of the Special Use Permit. There was no evidence presented to contradict
10 any of that. There was no evidence or statements of fact in the proposed decision and order that
11 contradict that, and I think on this record, I think it's very clear that the decision and order is
12 inadequate on its face to support a denial, and I don't believe it's proper or prudent for the
13 Commission to take action on this item.

14
15 Lastly, Michael Finnegan is present today. He's available to ask any questions and I think what
16 we're ultimately asking here is the Commission doesn't need to take action today, we're just
17 simply asking that the Commission not take action today. I'm happy to answer any questions, but
18 that's in essence our position in the case. So appreciate to...well, happy to answer any questions.

19
20 Mr. Carnicelli: Thank you Mr. Carroll. Mr. Hopper.

21
22 Mr. Hopper: I just have a few questions also just as an initial matter I do not acknowledge that
23 this is a hearing under HRS, the Hawaii Revised Statutes. I believe it's a commission meeting to
24 decide whether to adopt its staff report. The applicant was given an opportunity to speak but I
25 would not acknowledge that it's a hearing under HRS section referenced.

26
27 So just a few questions. First, if the Commission does not take action today is it your position that
28 it would be beyond the 120-day deadline for decision making such that the permit would be
29 automatically approved?

30
31 Mr. Carroll: Yes, and we would be happy to work with the Department to address any issues or
32 concerns that they have. The Department has already issued recommendations. I've been
33 involved in matters in the past where we have worked with the Department and that's, that's been
34 allowed.

35
36 Mr. Hopper: Okay, so your position...so you're asking for no action but then you would say if the
37 Commission doesn't take action today it could not adopt the Decision and Order denying the
38 permit because after today, the permit would be deemed automatically granted anyway, correct.
39 So asking no action today is not just a deferral to a future meeting date, it's actually to not take
40 any action such that the permit would be automatically approved under the rules, correct?

41
42 Mr. Carroll: That's correct.

43
44 Mr. Hopper: Okay. Another issue, just for my information how was your...a Motion to Vacate
45 Hearing when was it, how was it filed and when was it filed?

46

1 Mr. Carroll: It was mailed yesterday and it was also, an electronic copy was provided to the
2 Department.

3
4 Mr. Hopper: So it was, it was sent, sent in the mail yesterday?

5
6 Mr. Carroll: Yes.

7
8 Mr. Hopper: Okay. And for the record, when did you and...or your client get a record or get a
9 copy of the proposed Findings of Fact and Conclusions of Law? I don't mean have it served by
10 certified mail, I mean become aware of it and its contents?

11
12 Mr. Carroll: I, I believe it was a few days before the last hearing. It's definitely less than ten days.
13 It was, it was maybe a day or so before...I apologize I don't have that date on the top of mind
14 though my recollection was that we found out that it was on the agenda and I looked on the
15 agenda and saw the hyperlink that's how I found out about it.

16
17 Mr. Hopper: And then there was a—

18
19 Mr. Carroll: And we filed the initial brief.

20
21 Mr. Hopper: Yeah, there were objections filed on the 24th of February, correct?

22
23 Mr. Carroll: That's correct. But I do wish to put on the record that it was mailed to the petitioner
24 but it was not received until after the hearing.

25
26 Mr. Hopper: After the 25th.

27
28 Mr. Carroll: Yes.

29
30 Mr. Hopper: But you did have presumably notice of the contents of the...because you filed
31 objections on the 24th so you had it at least by the 24th, correct?

32
33 Mr. Carroll: That's correct.

34
35 Mr. Hopper: So the Commission deferred action on the 25th, and then, from then until now you're
36 saying...okay, I just wanted to get clear on the record that you received the, the notice or the
37 document, the proposed findings on the 24th. I mean again, I, I...we can go over this in executive
38 session but I would disagree with the arguments made with respect to the generally the
39 requirement of ten days or the requirement of 15 days certified mail for this is a contested case
40 hearing under the law, but I wanted to get that clear.

41
42 And then, you had also stated that there in I think both the motion today and the one on the 24th
43 that there were Sunshine Law violations could you please expand on that?

44
45 Mr. Carroll: I'll withdraw that point for purposes of today's hearing. I mainly included that for to
46 preserve our rights. I think the main violation would be the points that I raised today.

1
2 Mr. Hopper: Okay, 'cause I was confused by that. Okay, we can...I don't know if you've got
3 questions. I would, I would maybe advise an executive session on this one to continue what we
4 had discussed at the last meeting as far as action, but you know, I think that at this point this is
5 mainly a review of the proposal from the Commission's staff. This is not a hearing officer proposed
6 findings, conclusions and D&O. It's from your staff to consider whether to adopt the form of the
7 order. So we can continue in executive session or if you've got questions that's up to you, but I'd
8 bring it back to the Chair if there's nothing more from the, from the applicant.
9
10 Mr. Carnicelli: Do you have anything else to add at this point in time Mr. Carroll?
11
12 Mr. Carroll: No I don't. Thank you very much.
13
14 Mr. Carnicelli: Okay, thank you. So if I could get clear why we're here is to either accept or not
15 the Findings of Fact, Conclusions of Law and the D&O?
16
17 Mr. Hopper: Correct. The Commission already voted and they voted to deny. This is to adopt
18 the form of the Decision and Order as prepared by staff not proposed by any party, but prepared
19 staff in order to complete the, the process.
20
21 Mr. Carnicelli: So I guess my question is, is does Commissioners do you have enough information
22 to be able to make a decision on that or do you...would you feel more comfortable going into
23 executive session?
24
25 Ms. La Costa: I would prefer to go in executive session please.
26
27 Mr. Carnicelli: Is that a motion?
28
29 Ms. La Costa: I so move.
30
31 Mr. Carnicelli: We have a motion to go into executive session. Is there a second? Seconded by
32 Commissioner Thompson. Would anybody like to speak to the motion? Okay then...
33
34 Mr. Hopper: Can I—
35
36 Mr. Carnicelli: Yeah, Corporation Counsel.
37
38 Mr. Hopper: Just one clarifying question to the applicant. At the, at the hearing on the...you were
39 present on the...you were both, you and your client present of the hearing on the 25th, correct?
40
41 Mr. Carroll: That's correct.
42
43 Mr. Hopper: And at that time you were made aware that the Commission was deferring action
44 until March 10th, correct?
45
46 Mr. Carroll: That's correct.

1
2 Mr. Hopper: Okay, thank you. Sorry.

3
4 Mr. Carnicelli: That's okay. Okay, clarification.

5
6 Ms. McLean: And Chair may I clarify the motion to go into executive session is to confer with
7 counsel on the Commission's powers, duties, privileges, immunities, and liabilities pursuant to
8 HRS 92-5(a)(4).

9
10 Mr. Carnicelli: Correct. All those in favor of that motion? That is one, two, three, four, five, six.
11 Opposed? One. The motion passes.

12
13 **It was moved by Ms. La Costa, seconded by Mr. Thompson, then**

14
15 **VOTED: To Go into Executive Session.**

16
17 **(Assenting – P. D. La Costa, D. Thompson, K. Freitas, K. Pali,**
18 **C. Tackett, S. Castro)**

19 **(Dissenting – K. Robinson)**

20 **(Excused – T. Gomes)**

21
22 Mr. Carnicelli: So we will put the regular session into recess and then be back after executive
23 session.

24
25 *The regular meeting was then recessed, and the Commission went into executive session at 12:24 p.m. The executive*
26 *session was adjourned at 12:51 p.m., and the regular meeting was then reconvened at 12:54 p.m.*

27
28 Mr. Carnicelli: Good afternoon, the Maui Planning Commission of March 10, 2020 is now back in
29 session. So Commissioners I guess where we are right now on the agenda is the Findings of
30 Facts, Conclusions of Law, and Decision and Order. We can accept that, we can reject it or we
31 can modify it.

32
33 Mr. Hopper: Can I make a comment?

34
35 Mr. Carnicelli: Mr. Hopper.

36
37 Mr. Hopper: If you do end up adopting this, I would recommend one small modification to clarify
38 the effective date of the Decision and Order is today, March 10, 2020 rather than the date of
39 mailing. So the effective date would be today and you could add that at the...on the last sentence
40 of the Decision and Order on Page 7.

41
42 Mr. Carnicelli: Do I have a motion to that effect to change it?

43
44 Ms. La Costa: I so move.

45
46 Mr. Hopper: First you'd have to move to adopt.

1
2 Mr. Carnicelli: Oh, you want me to move to adopt and then we'll amend it after?
3
4 Mr. Hopper: Sorry...
5
6 Mr. Carnicelli: Or if that's what we're gonna do or deny...Mr. Hopper.
7
8 Mr. Hopper: A procedural note, I think the Commission would acknowledge receipt of the motions
9 and at this time will not be taking action on them, so if that's something the Commission would
10 want to do as well they can.
11
12 Ms. McLean: If the Commission chooses to adopt the Findings of Fact, you should say on the
13 record that you have reviewed the applicant's Statement of Exceptions and Objections and that
14 you're choosing not to vote on the Motion to Vacate the Hearing.
15
16 Mr. Carnicelli: Okay.
17
18 Mr. Hopper: This is being...you have read the objections and I think the Commission has had the
19 opportunity to read objections but just to acknowledge that and if you do move to adopt the
20 decision and order you could do that with the modification, without it not adopt it.
21
22 Mr. Carnicelli: Okay. So do I have a motion at this point? I guess somebody want to make a
23 motion?
24
25 Mr. Tackett: I thought we had a motion.
26
27 Ms. La Costa: I move that the Commission having reviewed the Exceptions and Objections that
28 we adopt the D&O with the modification of the date of March 10, 2020.
29
30 Mr. Carnicelli: Moved by Commissioner La Costa. Do I have a second? Seconded by
31 Commissioner Tackett. Speaking to the motion. I would just would add that also taking in the
32 Exceptions and Objections but also that the Motion to Vacate the hearing to also say that that has
33 also been reviewed. Anybody else would like to speak to the motion? Okay, seeing none,
34 Director.
35
36 Ms. McLean: The motion is to adopt the written Decision and Order with one amendment on
37 Page 7, to add the effective date of the D&O being today, March 10, 2020.
38
39 Mr. Carnicelli: All those in favor please raise your hand. That is one, two, three, four, five.
40 Opposed?
41
42 Mr. Robinson: Choose to abstain, Chair.
43
44 Mr. Carnicelli: Commissioner Thompson opposing, and Commissioner Robinson abstaining so
45 that is five one. The motion passes.
46

1 **It was moved by Ms. La Costa, seconded by Mr. Tackett, then**
2

3 **VOTED: That the Commission Having Reviewed the Applicant’s Statement of**
4 **Exceptions and Objections and Motion to Vacate to Adopt the**
5 **Decision and Order with the Amendment on Page 7 to Add the**
6 **Effective Date of March 10, 2020 to the Decision and Order.**
7

8 **(Assenting – P. D. La Costa, C. Tackett, K. Freitas, K. Pali,**
9 **K. Robinson - Abstained, S. Castro)**

10 **(Dissenting – D. Thompson)**

11 **(Excused – T. Gomes)**
12

13
14 **Respectfully Submitted by,**

15
16 **CAROLYN TAKAYAMA-CORDEN**
17 **Secretary to Boards and Commissions II**
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