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**MAUI PLANNING COMMISSION
PORTION OF REGULAR MINUTES
ITEM B.1
AUGUST 24, 2021**

Ms. McLean: Okay. Chair, the first item is a request for reconsideration of the commission's denial of the request from Ryan Schultz, Vice-President of Development of Versa Real Estate representing Makai V, LLC for a three-year time extension on the SMA Use Permit condition to initiate construction of the Nalu Ola West Subdivision at TMKs: 2-5-004: 055, 068, 069, and 022, and 2 7-004: 007, 048, 049, 052, 053, 054, 055, 056, and 058 in Haiku.

B. UNFINISHED BUSINESS

Pursuant to Chapter 91, Hawaii Revised Statutes, and Maui Planning Commission Rule 12-201-119, no public testimony will be taken.

1. **Request for reconsideration of the denial of the request from MR. RYAN SCHULTZ, VICE-PRESIDENT OF DEVELOPMENT OF VERSA REAL ESTATE representing MAKAI V, LLC, for a three-year time extension on the Special Management Area Use Permit condition to initiate construction of the Nalu Ola West Subdivision at TMK 2-5 -004: 055, 068, 069, and 022, 2 7-004: 007, 048, 049, 052, 053, 054, 055, 056, and 058, Haiku, Island of Maui (SM1 2014/0004) (C. Thackerson) (The Commission denied the request at its June 22, 2021 meeting and may reconsider its decision.)**

Ms. McLean: At your June 22nd meeting, the commission denied the time extension request and this initially came to the commission as a waive review. The commission said it wanted to review, and then you did review it, and denied the request, and the applicant has requested reconsideration. The reasons are detailed in their letter that's in your packet with some relevant attachments.

In a nutshell, I'll just say that the applicant...it seemed that one of the commission's...one of the commission's reason for denial was the lateness of the submittal of the time extension request. And the applicant's reason for that is that they thought they had initiated by installing the silt fence and they didn't think that they would need the time extension. They had started communicating with the Department well before the extension submittal deadline, and so anyway, the applicant can further elaborate on that. The planner is Candace Thackerson. I don't know if she has anything she wants to say first, and then the applicant can give their remarks. Candace was there anything you wanted to bring up?

Ms. Candace Thackerson: I have nothing else to add. I believe you covered it, Michele, and then the applicant can, of course, add any extra information.

Ms. McLean: And if the applicant, Ryan Schultz or a representative of the applicant available? It looks like Steve Robinson is here. Steve, you can unmute your audio and your video.

Mr. Steve Robinson: Hi, good afternoon or good morning.

Mr. Tackett: Good morning.

1 Mr. Robinson: Aloha, thank you for the time today. I appreciate the opportunity to, to
2 rediscuss...our, our request. So, I just want to kinda start with this project was approved in 2016
3 as part of a consolidation and resubdivision, and at the subdivision and plat were recorded at that
4 time, the...just for clarification the request and the work under the SMA is not a condition of that
5 approval as it was done under consolidation and resubdivision.

6
7 We do want to move forward with the work under the SMA. We've been attempting to do that for
8 the last 18 months or so. So, I think the last meeting we had, you know, the question was posed
9 to me why were we late. I think I clearly at that time said that I was unprepared for that answer
10 and I could give you an answer but it might not be as accurate. So, after the meeting we were
11 able to go back and research what had happened. Remember that this is a project that was
12 started by Alexander and Baldwin and which we purchased subsequent to the approvals.

13
14 So, in October of 2019, and I'm not going to review the whole letter, you guys, unless you want
15 me too. In October 2019, we decided we were going to move forward based on market conditions.
16 We had purchased the property from Alexander and Baldwin. The grading plan or the grading
17 permit, it was our understanding, the grading permit was...had been previously issued and was
18 ready to pick up. When we went to go pick it up, they said it's expired, you need to resubmit your
19 grading plans. We went back to the engineer, Stacey Otomo, who had done the original plans to
20 request an update from him. He was busy at the time and couldn't meet the timelines. So, we
21 brought in Dominic to work on those. It wasn't long after that that we came to understand that
22 were some changes in the grading, grading and stormwater rules and that the plans would have
23 to be reconstructed, which we began immediately back in that November of 2019.

24
25 When we discovered that the permit application...that the grading plans were...had to be redone,
26 we decided that in order to create a belt and suspenders for ourselves, that we would request the
27 extension just in case that over...at over the following 90 for 115 days or so, we were unable to
28 break ground, that we would have...we would have an extension in place. As a third step to that,
29 we got a grading permit issued later on for the construction staging area and installed silt fence,
30 sent pictures of the silt fence signs prior to the expiration of the SMA to the county and said, here
31 we started construction. You know, the county, came back and said that that wasn't enough for
32 them, but that was a third attempt for us to make sure that we were covered. So, we were trying
33 to get our grading permit, our full grading permit. We had some submitted for...and the time
34 extension, and we went and got a different grading permit so we could break ground prior to the
35 expiration of our, of our SMA so that we could vest our permit. So, we went to through great
36 lengths, and you can see those, those things during the letter.

37
38 We are, we are very active on this project. This project is not a passive investment for us. We're
39 looking to get going. We think that the best thing for this subdivision, which is, like I said recorded,
40 is to put some of this infrastructure in. And we'd like to get moving on that rather than leave it as,
41 as it sits today and use the existing dirt and gravel roads to service the sites, and as some of
42 these sites have already been sold. I'm welcome to...to respond to any questions you might have,
43 and I again, greatly appreciate the opportunity to represent this request.

44
45 Mr. Tackett: Commissioners, do we have any, any questions for the applicant?
46 Commissioner Freitas.

1
2 Mr. Freitas: Thank you, Chair. Mr. Robinson, besides the deadline date, and because there was
3 opposition by the Kuloloio family regarding the lighthouse and the roads and all of that, despite
4 all of this, have you been in contact with any of them about how you folks will proceed with some
5 of the things that they brought up in the last meeting?
6

7 Mr. Robinson: Yeah, I had, thank you for asking the question. I had a long conversation with
8 Manny after, at the meeting, and subsequent to that. We have offered up a condition, I think, I
9 think the issue that Mr. Hall brought up in his letter was to make sure that we...that that the
10 traditional access route was not blocked, and he referenced a couple existing easements. We've
11 committed in this letter, and if it so pleased the commission to add an additional condition on to
12 the approval, you know, we are committed to preserving the access that's there now through
13 grant, through, through access easements, A5 and A6, the light house property which is that
14 portion of the access which crosses this subdivision, Lot 11. So, we have talked to them. Manny
15 gave me the support, we talked a lot of story with this, about our...my meeting with his father on
16 this similar subject and yes, I believe that...I don't believe they have any further issue. Some of
17 the other property he talked about is not on this property. There's nothing we can...we have, it's
18 A&B.
19

20 Mr. Freitas: Okay. Because it's not a contested case, is Mr. Robinson under oath on what he
21 just said?
22

23 Mr. Tackett: Director? I guess, I guess I can fix that. Mr. Robinson, do you promise that, that
24 what you have represented and what you will be representing is the truth?
25

26 Mr. Robinson: The whole truth, so help me God.
27

28 Mr. Freitas: Okay, the reason I asked is in our other meeting, it was shared that some of the
29 things that you had said prior to Mr. Les Kuloloio, you didn't...you did...you were doing the
30 opposite. And so, I'd like to really start to trust you and want to make sure that your testimony
31 that you just gave us is—
32

33 Mr. Robinson: So, I can...I don't know what, what, what you're referring to is that I was doing the
34 opposite. I think that and if you want it...Okay, so, my, my conversation with Les or Uncle Les
35 was regarding the key to the gate at pine trees. When we put a gate there where there was
36 traditional fishermen access. I had a very similar conversation with the Planning Commission at
37 the time when got the SMA approval that we would allow public access but not vehicular access
38 because there were a lot of issues with vehicular access. So, at the time we had put a gate on
39 the property, which was quite controversial. We put a sign on the gate with our phone number on
40 it for the fishermen to call and get access. That phone was monitored by Alex Boudy, may he
41 rest in peace. And when I had met with Les, the issue was who could hold the key to that gate?
42 And I think there were some issues with Alex as being somewhat of a controversial character, I
43 know Alex may not, not necessarily being a direct Pauwela descendant, as Les is, was, and I
44 believe that was the conversation. I don't know if that's what you're referring to or not, but had a
45 very nice, long conversation about why we were not letting cars back there, and the similar
46 conversation we had with planning commission.

1
2 Mr. Freitas: Thank you, Mr. Robinson, Chair.
3
4 Mr. Tackett: Thank you, Commissioner Freitas. Commissioners, any other discussion?
5
6 Ms. Thayer: I have a question.
7
8 Mr. Tackett: I got a question. So, Mr. Robinson is it, is it your stance that access to the fishing
9 spots and things of that nature will all be by phone call and then, and then, at that point they'll
10 be...the gate will be opened and then people will be allowed access and will that be that process
11 if this goes through?
12
13 Mr. Robinson: So, once the road gets in, there would be no gate. So, at the end of the road, in
14 between lots or by Lot 7, decision was made that the road, the main road through the project,
15 would have public access and that we would create parking spaces. So, right now, the fish, the
16 fishermen access, they come in, they usually come in at pine trees and walk to the back. Once
17 we have the road paved, they will be able to drive to the end of the road, park there, and there is
18 an easement that was created in between Lots 7 and 8 that would allow pedestrian access from
19 the edge of the road out to the conservation area. So, no, the answer I guess is no, 'cause
20 at...when we get this done, it'll be, it'll be open. There won't be any reason for a phone call. You
21 will just be able to drive to the end of the street and much closer than you can drive now. And
22 that's, that, that is how we set it up with the planning commission where we originally did the
23 project.
24
25 Mr. Tackett: Commissioners, any other discussion or any other questions for Mr. Robinson?
26 Okay, hearing none, Director, what would be our next –
27
28 Ms. Thayer: I have a question.
29
30 Mr. Tackett: Oh, sorry, Lindsey, I can't see you. Your video is off.
31
32 Ms. Thayer: This is Commissioner Thayer.
33
34 Mr. Tackett: Oh, sorry, Commissioner Thayer, you're not even on my screen. Go ahead,
35 Commissioner Thayer.
36
37 Ms. Thayer: Sorry, I just want to make sure I heard you correctly. Did you say that when you
38 submitted your photographic evidence to the Planning Department, they said it wasn't enough?
39
40 Mr. Robinson: Yes, that's my understanding, is that the decision was made that the work we had
41 done, we had done prior to the expiration of the SMA was not enough for the Department to
42 determine that construction had started. We were not in agreement, but we accept the, the
43 Department's decision.
44
45 Ms. Thayer: Okay.
46

1 Mr. Tackett: Mr. Robinson, is as I understand it, there's no affordable, there's no affordable
2 component to this project, correct?

3
4 Mr. Robinson: Yes. No, this was a consolidation, resubdivision, so it didn't go that route.

5
6 Mr. Tackett: Got it. Thank you. Director?

7
8 Ms. McLean: Chair, the next step would be for the commission to make a motion. I don't know if
9 Corp. Counsel wants to chime in on the rule for reconsideration first that might be helpful to guide
10 you, and then after that, the commission would make a motion whether to reconsider the
11 commission's action or if there's no motion, then the action would stand.

12
13 Mr. Edlao: I got a question.

14
15 Mr. Tackett: Go ahead, Commissioner Edlao.

16
17 Mr. Edlao: Mr. Robinson, will when you submitted the photograph with the silt fence to the
18 Department, did you have the grading permit in hand as well?

19
20 Mr. Robinson: We had a grading permit for, I believe, the staging area. No, the overall grading
21 permit we still do not have even though we're—

22
23 Mr. Edlao: For that staging area where you put the silt fence, you had the permit to do that, the
24 grading permit?

25
26 Mr. Robinson: Yes. Yes, we did.

27
28 Mr. Edlao: Okay, thank you.

29
30 Ms. McLean: Chair, did you want to hear from Corp. Counsel?

31
32 Mr. Tackett: Yes, please.

33
34 Ms. Desjardins: Okay, thank you, Chair. Your rules, 12-201-84 cover reconsideration of
35 decisions and orders of this commission. At the outset, I want to say that under normal
36 circumstances under your rules, a request for consideration comes after you have initiated and
37 signed and approved a final decision and order in writing, and then that is served on the parties,
38 and they have ten days from receiving that to file a motion or petition for reconsideration. So, my
39 understanding is, is that you have not actually completed your decision and order in this case yet,
40 so the motion for reconsideration is slightly premature, however, I believe that if you wish to
41 proceed today to, to do this, I would suggest that you get from Mr. Robinson a waiver of your
42 normal procedures, and he won't be objecting to any procedural defects or anything based on the
43 fact that the reconsideration is coming before the D&O. So, that would be step number one, and
44 then, once you determine that...I would like to just go over briefly the rest of the rule with you so
45 that you kinda understand what would be your grounds for reconsideration and what you need
46 under your rules on...(inaudible)...part.

1
2 Mr. Tackett: Sure.

3
4 Ms. Desjardins: Thank you.

5
6 Mr. Tackett: So, were you, are you going to go over that now or were you gonna...

7
8 Ms. Desjardins: Up to you, I can go ahead and go into the rule itself if you're going to proceed
9 and to hear this today, then just get your waiver from Mr. Robinson and then in addition to that,
10 what...in order to consider a motion for reconsideration there are certain criteria that need to be
11 met, so a reversal of your prior decision is justified if a couple of things, different choices, one is
12 if there's been an intervening change in the controlling law since you made your decision. Two,
13 there's new evidence available or three, there's some type of a clerical error that needs to be
14 corrected. And if the petitioner is going to be relying on the availability of new evidence since you
15 made your decision, then that new evidence must have been previously undiscovered, even
16 though due diligence was exercised before you had your hearing on this, two, it must be
17 admissible and credible, and three, it must be of such a material and controlling nature as would
18 probably change the outcome, and is it merely cumulative or tending only to impeach or contradict
19 prior evidence? So, new evidence has three requirements. There are three ways that you could
20 reconsider under your rules, and that's your law on this and how you folks are to handle your
21 decision today.

22
23 Mr. Tackett: Okay. Director, what, what is your feeling on this? Would you like to get our final
24 decision and order on this squared away as process should be and then come back to it? Or
25 would you like to or should we follow the, the, the secondary, the secondary path?

26
27 Ms. McLean: To me, this seems to be a bit of a timesaver from having to draft the D&O, have it
28 reviewed and signed off and then formally presented to the commission for the commission to
29 adopt and then for Mr. Robinson to have his time to request reconsideration.

30
31 Mr. Tackett: Okay.

32
33 Ms. McLean: So, if he were to waive the procedural issue as Mimi suggested, I don't think that
34 would...so, let's just play that out. If he, he waives that and the commission does not reconsider
35 today, then a decision and order will come to you at a future meeting, and you would presumably
36 adopt that. He would still have the opportunity at that time to request reconsideration under the
37 rules, I believe. So, I don't know if Mimi agrees with that. We need to make that clear for the
38 applicant.

39
40 Ms. Desjardins: Yeah, I think he either waives it today and you resolve it today, and he then
41 waives his right to reconsideration after your D&O comes out or he waits until after the D&O
42 comes out, he has ten days to file his request for consideration based on the D&O in writing, one
43 or the other, but I think that it's...it is not going to be like two bites of the apple.

44
45 Ms. McLean: Okay.

46

1 Ms. Desjardins: Yeah.

2

3 Ms. McLean: So, then it really comes down to you, Mr. Robinson, if you want the Commission to
4 vote on reconsideration today based on everything that's been discussed or if you want to make
5 the request more formally after the decision and order gets adopted at a future date. So, if you
6 feel like you've...I mean, I'm not your counsel—

7

8 Mr. Robinson: Right.

9

10 Ms. McLean: But if you feel like you've put everything out there, you don't have a written D&O to,
11 to address, so if you would prefer to wait, then, then you wouldn't waive that right and the
12 commission wouldn't take any action today at all.

13

14 Mr. Robinson: I think it would be best for us to waive and move, move this forward today. We're
15 trying to get this project constructed. So, we'd like to get going as soon as that permit's in our
16 hand. So, what I guess, this would, that would be my formal waiver of the procedural issue relative
17 to the timing of the order if that's what you're looking for.

18

19 Ms. McLean: Yeah.

20

21 Mr. Tackett: Thank you, Director. Corp. Counsel, was that clear?

22

23 Ms. Desjardins: I believe it was.

24

25 Mr. Tackett: Outstanding, well thank you everybody for helping me through the process. So, I
26 believe at that point, Director, we have...I can put it out to discussion one last time and then wait
27 for a motion?

28

29 Ms. McLean: That's right, Chair.

30

31 Mr. Tackett: All right, Commissioners, so I believe I'm gonna open the floor, I am gonna open t
32 the floor to discussion one more time if you guys have anything you want to discuss in regards to,
33 to the applicant and then at that point, if there's no...when the, when the discussion is done, we'll
34 open it up to a motion. Commissioner Freitas.

35

36 Mr. Freitas: Thank you, Chair. Message is for the Director or the planner, would the letter
37 received by Mr. Robinson, he has dates on what they did and their timeline, but the question that
38 we have, was that there was a, was it a 90-day that they needed to do something. Can someone
39 walk us through his timeline and what it is that he needed to meet meaning this is the date that
40 he has 90 days to do something and he didn't. Can someone explain part for better clarification?

41

42 Ms. McLean: Candace, can you walk through the timeline?

43

44 Ms. Thackerson: Yeah. So, let me pull up the applicant's...submittal. So, I can't really speak
45 towards their grading permits because that is handled by Public Works, but the applicant did reach
46 out to me prior to the 90 days and had said, you know, hey, we want to file for a time extension

1 request. So, that's what they're mentioning here in these emails. And I had written back and
2 said, you know, filing for an extension is more than just emailing me and telling me you want an
3 extension, you have to do an application and pay a fee, and we mail log it, and that's how we
4 define timely filed, right. So, it's filed with the Department. But that was right...if you look at the
5 dates, so they had reached out November 25th, that it was also Thanksgiving time, I think I was
6 actually out of the office. Ryan reached out again a few days later. I did call him back and let him
7 know that he needed to turn in the application with the filing fee, and then on the 10th, he had
8 written back to me. I'm not sure what the date, I don't have the date of the expiration, but I did tell
9 them prior to the expiration that they needed to turn everything in, with the fee and an application
10 for it to be filed. And it came just a little bit after that on December 19th.

11
12 As far as receiving the grading permit and putting up the silt fence and submitting those photos,
13 that happened the day their permit was due to expire. And that was actually very coincidental
14 and Public Works signed their grading permit the day it was due to expire. However, the condition
15 does read that you need to have the grading permit and initiate grading. They did submit some
16 photos of a silt fence. I do not believe the applicant submitted the photos here that he had given
17 me, but it wasn't one of a very, very large silt fences. It was, it was just kind of more small and
18 just, I'm not sure the linear feet, but the Department at that time did not feel that that had...was
19 initiation of offsite or onsite improvements at the time to put up a small silt fence, so that was the
20 Department's take. And we, also the applicant did have a request in with us at that time, so we
21 thought it was best to just continue to follow through with the application that had been submitted
22 and filed previously. I believe it had already gone to commission in January...this was February
23 when they submitted those photographs. It had gone to the commission in January. You guys
24 had asked for full review. So, we were midway through a time extension process. So, the
25 Department thought it was best to just continue with that since the commission had asked for full
26 review, instead of just saying that, that construction had been initiated and then the commission
27 would no longer see it again. So, that was, that was the Department's take on it and those were
28 the dates.

29
30 I do want to point out the applicant did contact me prior to the 90 days, but again, we didn't
31 consider that filed until there's a fee and an application paid. They did get their grading permit
32 the day it expired. They put up the silt fence. The timing is all just kind of mixed together, but
33 does that...did that you provide you some clarification, Commissioner Freitas?

34
35 Mr. Freitas: That, that helps, thank you, Ms. Thackerson.

36
37 Ms. Thackerson: Yeah, okay, thank you.

38
39 Ms. McLean: Chair, Commissioner Lindsey has her hand up.

40
41 Mr. Tackett: Commissioner Lindsey, go ahead.

42
43 Ms. Lindsey: Thank you. Candace, can you...do you happen to know the exact date that they
44 filed...how late were they? They were 17 days late I believe. I believe the date was
45 December 2nd, but that was my own calculation. Do you know the actual date that it was due after
46 the 90 days? Can't hear you.

1
2 Ms. Thackerson: The one time people can't hear me, huh, with this loud, loud, talkative voice.
3 Okay, I believe the date was in your prior staff report. I don't have it right in front of me, but if you
4 want to give me a minute, I could pull it up. But I believe your calculation was correct. It was just
5 shy of about, like yeah, about two weeks or so with the dates. Do, did you want me to pull the
6 staff report up from the last meeting?

7
8 Ms. Lindsey: I'm just trying to parallel the two so we actually have a date that it was due and then
9 in along the timeline they provided just so that it's set in stone, clear, and it's not my own frame
10 because I reread the staff report and it didn't say the actual date it was due. It said, it was late X
11 amount of days.

12
13 Ms. Thackerson: Oh, X amount of days.

14
15 Ms. Lindsey: Yeah.

16
17 Ms. Thackerson: Okay, I, let me pull that up and then I can get back to you.

18
19 Ms. Thayer: I have the staff report in front of me.

20
21 Ms. Thackerson: Oh, wonderful Kim. Thank you.

22
23 Ms. Thayer: So, this is what the one we got for our last meeting, so it says, the applicant filed for
24 a time extension on December 19 which was 71 days prior to the expiration. It doesn't have a
25 due date, but it says that it was 71 days prior.

26
27 Ms. Thackerson: So, let me pull up the, the deadline for construction to be initiated would be in
28 the original approval letter. Again, which should be in there.

29
30 Ms. Thayer: So, the condition for initiation of construction, I have that in front of me, too.

31
32 Ms. Thackerson: Yeah, do you have the date that it says it needs to be done by?

33
34 Ms. Thayer: So, this is from the Department's letter dated March 14, 2018, and it says, uh, the
35 request is granted subject to the following condition, that to the satisfaction of the department,
36 construction of the proposed project shall be initiated by February 28, 2020. Initiation of
37 construction shall be determined as construction of onsite and/or offsite improvements, issuance
38 of a foundation permit and initiation of construction of the foundation or issuance of a building
39 permit and initiation of building construction whichever occurs first. Evidence of the initiation of
40 construction shall be submitted to the department prior to the date listed immediately above.
41 Failure to comply by that date will automatically terminate this SMA Use Permit unless a time
42 extension is requested no later than 90 days prior to said date. A time extension shall be
43 processed in accordance with the provisions of Section 12-202-17 of the SMA rules for
44 commission.

45

1 Ms. Thackerson: So, it was due to expire on February 28, 2020. That's when they...that's been
2 Public Works signed off on their grading permit that same day, and that was the day that the
3 applicant submitted to me the photos and evidence that they had put up a silt fence 'cause they
4 technically couldn't put it up until they got the grading permit. So, it was due to expire 90 days
5 prior to that date. I could count 90 days backwards on a calendar to figure out which, but yeah,
6 those were the dates.

7
8 Mr. Tackett: Commissioner Lindsey, did that satisfy your, your question?

9
10 Ms. Lindsey: Yeah, kind of. I just, I still didn't get like the date it was due, but I think I did the...I
11 counted 90 days, so I think I'm good. Thank you.

12
13 Mr. Tackett: Commissioners, any other discussion? Who was that?

14
15 Ms. Thayer: Commissioner Thayer.

16
17 Mr. Tackett: Go ahead.

18
19 Ms. Thayer: Real fast, is a foundation permit the same as a grading permit?

20
21 Ms. Thackerson: I believe so, now. I couldn't answer that, those are all issued by Public Works,
22 but Michele, our Director would probably know. It could be an old term that's been carried over.

23
24 Ms. McLean: A foundation permit and a grading permit are different things. A grading is, is
25 clearing and leveling the land, cutting or filling. A foundation permit is for a structure.

26
27 Ms. Thayer: Okay, thank you.

28
29 Ms. Pali: If I can jump in, Chair?

30
31 Mr. Tackett: Please do, Commissioner Pali.

32
33 Ms. Pali: Yeah, and Director, if you can just confirm you can't get a foundation permit until the
34 grading is done. The grading first, then foundation. Can you confirm that?

35
36 Ms. McLean: Not necessarily. Not necessarily. Grading permits are triggered when there's either
37 a certain area that's graded or a certain quantity of material. So, you can clear or grade an area
38 for a foundation that does not meet the threshold of requiring a grading permit. So, you can get
39 a foundation permit without a grading permit.

40
41 Ms. Pali: When one is not required.

42
43 Ms. McLean: When a grading permit is not required, ...(inaudible-audio difficulties)...

44
45 Ms. Pali: But if the grading permit's required, would it then make sense that that needs to go
46 before the foundation?

1
2 Ms. McLean: Well, when we're talking about this project in particular, the SMA covers like a well
3 building, which is small, very small. You wouldn't need a grading permit for the foundation for that
4 well building. So, they could have gotten that foundation permit without grading permit. The
5 grading would be needed for the larger infrastructural improvements, for the excavation, for the
6 utilities.

7
8 Ms. Pali: Okay. Okay, so just to clarify, I did count the days, February has 28, January has 31,
9 December has 31, so actually, it would have expired then midnight of November 30th, and it looks
10 like Candace, you confirmed that after they got all the paperwork in, even though they were
11 corresponding with you as early as November 25th, you probably didn't date and stamp it until
12 December 19th. So, I guess we all can agree that the paperwork portion was 19 days late, I guess
13 if that was what you guys were going for. So, I think we're all on the same page there.

14
15 Yeah, I, I remember this meeting very clear and I remember us being all upside down on the map
16 and super confused on what was what. I also believe and remember that we were all very clear
17 on the lines after the fact when we learned to read the map accurately and we realized a lot of
18 things that were assumed were a lot clearer, at least for me, when that was spelled out. I do like
19 the fact that the applicant started conversation prior to and it sounds like it's been an active project.
20 I get why we might have taken a hard line before, but I definitely appreciate...we've seen
21 applicants that just seem like they don't care or they seem like they were just entitled to just
22 automatically get the extensions and it was okay that they were super late and things. I don't get
23 the sense on this particular one. And I did appreciate knowing that the applicant took time to talk
24 with committing as an additional condition, keeping those...that access for our local families. And
25 so, I feel like I don't want to necessarily, in this particular case, hold people to a really stringent
26 19-day deadline when it was clear that they attempted to start the process prior to the deadline.
27 I feel like if we could give grace, in my opinion, this would be a time for me to do that. So, that's
28 just how I feel about it.

29
30 Mr. Tackett: Thank you. Commissioners, any other discussion?

31
32 Ms. Thayer: Chair?

33
34 Mr. Tackett: Go ahead please.

35
36 Ms. Lindsey: Can't hear you.

37
38 Ms. Thayer: Sorry. Thank you. I have a few concerns with this, some procedural and some to
39 do with the timeline of the project itself. So, I guess first and foremost, I'm wondering how often
40 do we do this entertaining a request for reconsideration in this way? Like, I'm just concerned for
41 setting a precedent that we're doing something out of the ordinary that we don't normally do. And
42 then what happens if we're doing this all the time and the implications of that? I guess that's my
43 first question.

44
45 Ms. McLean: I think it is pretty unusual for a reconsideration request to come for a time extension.
46 It's, it's odd that those are, are not approved. They usually get approved perhaps with additional

1 conditions or they get denied for, for I'll just say, really substantive reasons. And reconsiderations
2 for like a denial of a new permit don't happen all that frequently. And when they do, they come
3 after the just the decision and order has been approved. And they really pick apart a lot of the
4 facts that are established in the D&O. And we've learned from that, which is why Corp. Counsel
5 and I try to be pretty fussy when you make decisions denying that we really lay out the criteria, so
6 that your decision is, is solid and can be upheld. I agree Commissioner Thayer, this is unusual in
7 a number of ways, and we were contacted soon after that last meeting and you know, I agreed
8 with the applicant that, you know, there was more to the story. If you recall, it was the end of the
9 day after a very long agenda, and he was on the East Coast and just wasn't ready to give a fuller
10 explanation. And so, I felt like, yeah, like he should have that opportunity, and that might make
11 you think a little bit differently. So, I agree, this is very unusual.

12
13 Ms. Thayer: Okay, thank you. That's what I thought. Thank you for confirming that. I have
14 another question. So, just on the agenda, the rule that's referenced on the agenda, the rule
15 12-201-119 is different than the one that Corp. Counsel referred to. I think she said 12-201-84?

16
17 Ms. McLean: The rule cited on the agenda relates to taking testimony and to contested cases.
18 The rule that Corp. Counsel cited has to do with reconsideration.

19
20 Ms. Thayer: Okay, yeah 'cause the one on the agenda is under the section on hearing on appeals
21 of notices of violation. I was a little bit confused by that, so I was wondering like is this an appeal
22 but it's not.

23
24 Ms. McLean: I don't have the rule in front of me, so I can't explain why that rule was cited and I
25 didn't check it when the agenda was posted, so I can't, I can't explain that one. I assumed it
26 meant it had to do with just a contested case procedure being a closed procedure after evidence
27 has been taken.

28
29 Ms. Thayer: Okay, thank you. And I do want to make a note that the letter in the agenda item
30 talks about a three year-time extension request and the request that was filed and submitted was
31 for two years. Seems like a bit of an oversight to me.

32
33 Ms. Thackerson: Actually, when the app...this is staff planner, Candace Thackerson, when the
34 applicant had met with the Director and myself they...when they started to piece together their
35 timeline and how long this permit has now been going on with the commission for and because
36 this is here for full review, the Department did say that they could request a three-year. You can,
37 I can...when the application is here for full review before the commission, you guys can add
38 conditions, you can add time, so they just put that out there because they were thinking it's already
39 been taken up almost over a year of time just before the commission.

40
41 Ms. Thayer: Okay, so they don't need to change their application to say three years?

42
43 Ms. Thackerson: No. That would be similar to if you guys put a condition on an application or
44 made a change on the floor, the commissioners can always do that.

45
46 Ms. Thayer: Okay. Okay, thank you.

1
2 Mr. Tackett: Thank you, Commissioner Thayer. Commissioner Freitas, go ahead please.

3
4 Mr. Freitas: I have two questions, and they might be intertwined. I did hear that the photographic
5 evidence that was sent into the Planning Department was...wasn't to the standard of what was
6 required. Did I misunderstand that or is that what someone had said? And if I can could someone
7 explain what, what was done that did not meet the requirement. And also, the next question is
8 that is a silt fence considered construction?

9
10 Ms. McLean: Candace would be better equipped to answer that than I would be, although I could
11 just restate what, what she's told me. So, please go ahead, Candace.

12
13 Ms. Thackerson: That's okay, Michele. Yeah, as I had stated previously, the Department did not
14 feel that the silt fence at the time was enough to initiate construction, as well as the fact that the
15 commissioners had already seen the...in January prior 'cause we got the photographs in
16 February, end of February, this body had already seen the request for the time extension and had
17 asked for full review. So, because it was a mid-process, the Department also felt it was best to
18 finish up the process and take it again to the commission. And the Department did not feel at the
19 time that the installation of the silt fence on the day of the permit was due to expire was enough
20 to be considered initiation of construction.

21
22 Mr. Freitas: Thank you. Thank you, Ms. Thackerson. Thank you, Chair.

23
24 Mr. Tackett: Thank you, Commissioner Freitas. Commissioners, any other discussions or
25 questions for the applicant? I don't believe I can see everybody. I know I can't see Kellie. So, if
26 anybody can see anyone or if anybody has anything to add, please come forward at this time. If
27 there's...if no one comes forward at that point, it would be time to entertain the motion. I believe
28 the Director said if there is a motion and a second, it'll go to a vote. And if the vote is positive,
29 then, then it will, it will be successful. And if the vote is not positive, then it will remain as is.
30 Commissioner Freitas.

31
32 Mr. Freitas: Thank you, Chair. I would like to make a motion denying the reconsideration because
33 there's not enough information or any changes to our original decision to overturn it.

34
35 Mr. Tackett: Okay, and I could be wrong. Kawika, I'm going to go to the Director, but I believe
36 that the way that they explained it to me is that there's only a motion to reconsider. If not, then
37 you guys just leave it as it is and it'll remain as it is. But I could be wrong, Kawika, let me, let me
38 let me ask Director.

39
40 Ms. McLean: Chair, it could go either way. If a motion to—

41
42 Mr. Tackett: Okay, let's...then since I have motion, I'm gonna go with Kawika's motion then.
43 Okay, so we have a motion on the floor to deny, do we have a second?

44
45 Ms. Thayer: Second.

46

1 Mr. Tackett: We have a second. Kawika would you like to speak to your motion?

2
3 Mr. Freitas: You know, although Commissioner Pali gives a good thought on it that we shouldn't
4 punish people because of deadlines when there was intent prior. However, I hate to set a
5 precedent like Commissioner Thayer had said, and I kind of think that what they did do and
6 provide really wasn't even near what the minimum requirement for initiating grade, so I kind of
7 have to stick with our original decision. Thank you.

8
9 Mr. Tackett: Thank you, Commissioner Freitas. Commissioner Thayer, would you like to speak
10 to your second?

11
12 Ms. Thayer: Sure. I guess I concur with everything Commissioner Freitas laid out. I'm also
13 concerned about setting a precedent, the timeliness of what was submitted, the insufficiency of
14 the initiation of construction, like even if they were moving forward, as they say, it seems like there
15 could have been more work done than was done prior to February 28th, and even still, that the
16 evidence was submitted on the day and not prior as the conditions states I think is also against
17 the condition of the approval. So, for all of these reasons above, I'm going to have to move to
18 deny this request.

19
20 Mr. Tackett: Thank you, Commissioner Thayer.

21
22 Ms. Pali: I have a comment, Chair.

23
24 Mr. Tackett: Yeah, go ahead, go ahead, and then after Commissioner Pali, if anyone else would
25 like to speak to the motion. Go ahead, Commissioner Pali.

26
27 Ms. Pali: Yeah, I just want it noted for the record that although I do understand the sentiment with
28 the motion and the second, I disagree. I don't think other cases should influence this particular
29 choice. I think that we have to stand alone in each choice. I think that there's rules and provision
30 that allow this process, which means it's not illegal to consider it. I think that as I'm walking in
31 humility, I think it's healthy that if we made a decision and we didn't have all the evidence that it's
32 okay. There's an avenue to revisit something with new evidence. I disagree that new evidence
33 was not presented. I have a whole list of things I just documented that I had not heard before.
34 So, I would agree that new evidence was permitted. And I would just like to say last year when
35 we were hit with a world crisis in covid, I think if any time we should be giving grace to people, it
36 should have been now and with something that was due last year.

37
38 So, I think although he may not have satisfied construction as to what the conditions said, you
39 have to agree that the condition reads, you know, initiating construction, that's a big area. That's,
40 that's such a huge portal, initiate construction. What does that even mean? Who gets to judge
41 or determine what that looks like? I don't think it was as clear as it could have been. I think that
42 it could have been a lot more clearer. I think that if they...in their mind said, well, grading is
43 construction, a fence is construction, let's just do our best with what we had in the times that we're
44 doing it. I feel like if anybody could attest, I feel like effort, all I'm giving is E for effort. The effort
45 clearly wasn't enough, as the department said, but then you have overlapping. You have
46 November 25th, oh, we just got to get this permit. We're in the clear, well you put in the request

1 just to make sure you meet the timeline for extension request, but then you got this permit. Permit
2 was granted on the day it was expired. But since you got this request, we'll let it go through, oh,
3 but now wait, you need a full review. we can't do this administratively, and you have all these
4 overlapping things that the client or the applicant was just caught in this weird grey area. So, for
5 me, I think we can get lost in those details. But when I step back, we have an active applicant
6 that is, you know, coming through. They've done so much already in the project, and, and we're
7 going to say no this far in the game when to me there was intent, new information and effort. So,
8 although I totally respect my commissioners, I highly disagree, and I just want to get my opinion
9 on record. Thank you.

10
11 Mr. Tackett: Thank you, Commissioner Pali. Commissioner Edlao.

12
13 Mr. Edlao: I appreciate Kellie's comments. It's unfortunate, there's a lot, a lot of things going on,
14 a lot of confusion, a lot of assumptions, a lot of misunderstanding as to what was necessary to be
15 done, but in my mind, the fact is it is it was late, and late is late unfortunately. So, I will support
16 the motion.

17
18 Mr. Tackett: Thank you, Commissioner Edlao. Commissioners, anybody else wish to speak to
19 this motion before it goes to a roll call vote? Hearing none, Director.

20
21 Ms. McLean: Yes, Chair. The motion is to deny the reconsideration. Commissioner Edlao.

22
23 Mr. Edlao: Yes.

24
25 Ms. McLean: Commissioner Freitas.

26
27 Mr. Freitas: Aye.

28
29 Ms. McLean: Commissioner Hipolito.

30
31 Mr. Hipolito: Aye.

32
33 Ms. McLean: Commissioner Lindsey.

34
35 Ms. Lindsey: Aye.

36
37 Ms. McLean: Commissioner Pali.

38
39 Ms. Pali: No.

40
41 Ms. McLean: Commissioner Thayer.

42
43 Ms. Thayer: Aye.

44
45 Ms. McLean: Commissioner Thompson.

1 Mr. Thompson: No.

2

3 Ms. McLean: Chair Tackett.

4

5 Mr. Tackett: Aye.

6

7 Ms. McLean: Chair, the vote was six ayes, two noes, with one excused, Vice-Chair La Costa, the
8 motion to deny the reconsideration passes.

9

10 Mr. Tackett: Thank you, Director

11

12 **It was moved by Mr. Freitas, seconded by Ms. Thayer, then**

13

14 **VOTED: To Deny the Request for Reconsideration of the Denial of a Time**
15 **Extension of the Special Management Area Use Permit Condition to**
16 **Initiate Construction.**

17 **(Assenting – K. Freitas, K. Thayer, J. Edlao, M. Hipolito, A. Lindsey,**
18 **C. Tackett)**

19 **(Dissenting – K. Pali, D. Thompson)**

20 **(Excused – P D. La Costa)**

21

22

23

24

Respectfully Submitted by,

25

26

27

CAROLYN TAKAYAMA-CORDEN
Secretary to Boards and Commissions II

28