

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

November 16, 2007

Committee
Report No.

07-131

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

Chair and Members:

Your Land Use Committee, having met on October 31, 2007, makes reference to County Communication No. 02-199, from the Planning Director, transmitting a proposed bill entitled "A BILL FOR AN ORDINANCE GRANTING DAVID DANTES AND BEVERLY LIVINGSTON, DBA MAUI TRADEWINDS, A CONDITIONAL PERMIT TO USE ONE BEDROOM ON THE FIRST LEVEL OF A TWO-STORY MAIN FARM DWELLING (DWELLING A), AND TWO BEDROOMS OF A SECOND FARM DWELLING (DWELLING B), FOR TRANSIENT VACATION RENTALS WITHIN THE COUNTY AGRICULTURAL DISTRICT, FOR PROPERTY SITUATED AT 4320 UNE PLACE, HAIKU, MAUI, HAWAII". The purpose of the proposed bill is to grant a request from David Dantes and Beverly Livingston, dba Maui Tradewinds (the applicants), for a one-year Conditional Permit for the operation of transient vacation rentals on approximately two acres at 4320 Une Place, Haiku, Maui (TMK: (2) 2-8-02:158).

Your Committee notes that the Maui Planning Commission held a public hearing on the application on August 27, 2002.

Your Committee further notes that the Maui Planning Commission, after reviewing the findings presented in the document entitled "MAUI PLANNING DEPARTMENT'S RECOMMENDATION *[sic]* REPORT TO THE MAUI PLANNING COMMISSION August 27, 2002 Meeting" (Department's Report), and the conclusions and recommendations presented in the document entitled "MAUI PLANNING DEPARTMENT'S RECOMMENDATION REPORT TO THE MAUI PLANNING COMMISSION August 27, 2002 Meeting", voted to recommend approval of the Conditional Permit application, with 13 conditions, on August 27, 2002.

Your Committee further notes that the Council (2001-2003 Council term) referred County Communication No. 02-199 to its Land Use Committee at the Council meeting of October 4, 2002.

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

November 16, 2007
Page 2

Committee
Report No. 07-131

At its meeting of January 10, 2003, the Council (2003-2005 Council term) referred County Communication No. 02-199 to its Planning and Land Use Committee (County Communication No. 03-10).

By correspondence dated January 28, 2003, the Chair of the Committee requested that the Planning Director transmit a copy of the relevant excerpt of the minutes of the Maui Planning Commission's August 27, 2002 meeting.

By correspondence dated February 12, 2003, the Planning Director transmitted a copy of the excerpted minutes of the Maui Planning Commission's August 27, 2002 meeting.

At its meeting of January 21, 2005, the Council (2005-2007 Council term) referred County Communication No. 02-199 to its Land Use Committee (County Communication No. 05-13).

By correspondence dated August 25, 2006, the Chair of the Committee requested that the Department of the Corporation Counsel incorporate nonsubstantive and technical revisions into the proposed bill. The Chair also noted a discrepancy between the owners identified in the application dated January 1, 2002, and the owners as set forth in Condition Nos. 10 and 12 of the proposed bill, and questioned whether the bill should be revised to correct the discrepancy.

By correspondence dated August 25, 2006, David Dantes transmitted copies of the following documents: (1) correspondence dated July 19, 2005, from Kenneth Yamamura, Agriculture Specialist, Office of Economic Development, regarding his survey of the property; (2) correspondence dated June 4, 2002, from Linda Taylor, Linda Taylor Engineering, Inc., to the Director of Water Supply, relating to fire flow protection; (3) correspondence dated August 23, 2002, from David Dantes to a Captain, Department of Fire and Public Safety, relating to fire flow requirements; (4) correspondence dated March 27, 2003, from Brian Munier, North Shore Fire Protection, to David Dantes, confirming the installation of fire sprinklers at the subject property; (5) correspondence dated May 2, 2003, from a Captain, Department of Fire and Public Safety, to a Planner, Department of Planning, confirming that departmental conditions have been met; and eight pieces of written testimony in support of the application.

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

November 16, 2007
Page 3

Committee
Report No. 07-131

At its meeting of August 30, 2006, the Committee met with the Planning Director; the Planning Program Administrator, Current Planning Division, Department of Planning; the Deputy Director of Public Works and Environmental Management; the Planning Program Manager, Water Resources and Planning Division, Department of Water Supply; a Lieutenant, Fire Prevention Bureau, Department of Fire and Public Safety; a Deputy Corporation Counsel; and David Dantes and Beverly Livingston, the applicants.

The Committee received public testimony from eight individuals, seven of whom are neighbors residing on Une Place and all of whom support the application. The testifiers noted that the transient vacation rentals have not had any negative impact on the neighborhood; that no noise, traffic, or parking problems have been experienced; and that the applicants provide a good experience for visitors and residents alike.

Dr. Dantes and Ms. Livingston provided brief background information concerning their application, noting that their transient vacation rentals have been in operation for approximately eight years.

The Planning Program Administrator distributed photographs of the dwellings on the subject property, and gave an overview of the application.

The Deputy Corporation Counsel advised that the Department is in the process of updating the proposed bill to correct the discrepancy in the description of the legal owners of the property.

The Committee discussed fire flow requirements for the operation. Dr. Dantes summarized the history and status of discussions with the Department of Water Supply concerning the limitations of existing infrastructure, and whether the fire sprinklers the applicants had installed would impact fire flow calculations. He further noted that the Board of Water Supply's recommendation was that the adequacy of fire flow for the operation be left to the Department of Fire and Public Safety.

The Lieutenant informed the Committee that the Fire Code allows for a reduction of fire flow requirements when a fire sprinkler system is installed, and that, from the Department of Fire and Public Safety's perspective, the applicants are, therefore, providing the fire safety necessary for both of their dwellings. He noted that the

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

November 16, 2007
Page 4

Committee
Report No. 07-131

Department of Water Supply does not have a mechanism for considering the installation of fire sprinklers in its fire flow calculation.

The Planning Program Manager, Water Resources and Planning Division, Department of Water Supply, advised that fire protection is still inadequate by the Department's standards for commercial property, due partly to a bottleneck on Ulumalu Road and partly to the lack of a fire hydrant. She explained that the Department has responsibility for determining that a system can deliver the necessary flows.

The Committee questioned whether it would be unlawful to grant a Conditional Permit for a use other than those that are permitted or special uses under Chapter 205, Hawaii Revised Statutes (HRS). The Committee noted correspondence dated February 22, 2002, from the State Department of Business, Economic Development & Tourism (DBEDT), setting forth the guidelines for unusual and reasonable uses within the State Agricultural District, and questioning whether the applicants' proposed use can meet those guidelines. The Committee also noted correspondence dated February 6, 2002, from the Director of Housing and Human Concerns, commenting that the Department has no objection to the proposed use of Dwelling A, but that the proposed transient vacation rental use in Dwelling B is not consistent with the intended use of second dwellings on Agricultural lands. The Director suggested that the second dwelling be used for long-term rental purposes.

The Deputy Corporation Counsel noted that the Maui Planning Commission had granted a State Special Use Permit for the operation, and that the Conditional Permit was, therefore, properly before the Council for a determination as to whether the transient vacation rentals are a reasonable use of the Agricultural lands. The Planning Program Administrator confirmed the procedures provided under Section 205-6, HRS, and noted that the criteria for an unusual and reasonable use under the Hawaii Administrative Rules had been evaluated.

The Committee discussed the agricultural activity conducted on the property. Dr. Dantes noted that his understanding is that 51 percent of the property must be in agricultural production if a water discount or an agricultural tax rate is claimed, and that the applicants claim neither. He advised that the potential for agricultural development on the property is limited by topographical considerations and the nature of the soil, and referred the Committee to the agricultural survey conducted by the Office of Economic Development. He further noted that the amount of agricultural production on his property is far less than 51 percent.

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

November 16, 2007
Page 5

Committee
Report No. 07-131

The Committee expressed concerns over the request for the transient vacation rentals in Dwelling B.

The Committee deferred consideration of the matter pending further discussion.

By correspondence dated November 14, 2006, David Dantes and Beverly Livingston advised the Committee of progress they had made in addressing the Committee's concerns, and requested that their application be referred to the Council for the ensuing term.

By correspondence dated November 27, 2006, the Chair of the Committee advised the applicants that their application would be automatically referred to the Council Chair for the term beginning January 2, 2007.

At its meeting of January 5, 2007, the Council referred County Communication No. 02-199 to your Land Use Committee (County Communication No. 07-5).

By correspondence dated April 3, 2007, the Department of the Corporation Counsel transmitted a revised proposed bill entitled "A BILL FOR AN ORDINANCE GRANTING DAVID DANTES AND BEVERLY LIVINGSTON, DBA MAUI TRADEWINDS, A CONDITIONAL PERMIT TO USE ONE BEDROOM ON THE FIRST LEVEL OF A TWO-STORY MAIN FARM DWELLING (DWELLING A), AND TWO BEDROOMS OF A SECOND FARM DWELLING (DWELLING B), FOR TRANSIENT VACATION RENTALS WITHIN THE COUNTY AGRICULTURAL DISTRICT, FOR PROPERTY SITUATED AT 4320 UNE PLACE, HAIKU, MAUI, HAWAII", incorporating the revisions requested by correspondence dated August 25, 2006.

By correspondence dated September 5, 2007, David Dantes summarized the history of his application.

By correspondence dated October 4, 2007, David Dantes provided additional information concerning his application.

By correspondence dated October 7, 2007, David Dantes advised your Committee of his position on the issue of whether the Maui Planning Commission had acted within the scope of its authority in granting a State Special Use Permit.

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

November 16, 2007
Page 6

Committee
Report No. 07-131

By correspondence dated October 11, 2007, David Dantes transmitted additional information concerning fire flow requirements for his application.

By correspondence dated October 24, 2007, the Chair of your Committee transmitted a copy of his correspondence dated October 1, 2007, to Anthony Ching, Executive Officer, State Land Use Commission (LUC), in relation to another pending transient vacation rental application, requesting a response as to whether a transient vacation rental in the State Agricultural District, including but not limited to a bed and breakfast, is permissible under Chapter 205, HRS, with a State Special Use Permit. The Chair referenced correspondence dated September 5, 2007, from Mary Lou Kobayashi, Planning Program Administrator, Office of Planning, DBEDT, to the Planning Director, in which she stated, in part, that: “. . . Section 205-5, HRS, as amended, prohibits overnight accommodations related to agricultural tourism in the State Agricultural District. Thus a B&B would not be permissible even with a State special use permit”.

By correspondence dated October 26, 2007, the Chair of your Committee transmitted a copy of correspondence dated October 23, 2007, from Mary Lou Kobayashi, Planning Program Administrator, DBEDT, to David Dantes, clarifying DBEDT’s position concerning the permissibility of a bed and breakfast operation on lots with an Agricultural or Rural classification with a State Special Use Permit.

By correspondence dated October 31, 2007, the Chair of your Committee transmitted a copy of correspondence dated October 30, 2007, from Anthony Ching, Executive Officer, State LUC, in which he clarified his position as non-voting staff to the State LUC, noting that none of his statements should be construed to reflect the position of the State LUC. He further responded that he had no comments on the matter.

At its meeting of October 31, 2007, your Committee met with the Planning Director; a Planner, Department of Planning; a Captain, Fire Prevention Bureau, Department of Fire and Public Safety; two Deputy Corporation Counsel; and David Dantes and Beverly Livingston.

Your Committee received oral testimony from 16 individuals. Fifteen individuals testified in support of the application. Two of those testifiers were the applicants, David Dantes and Beverly Livingston. Dr. Dantes testified concerning the Committee’s deferral of their application last year due to questions over the permissibility of a transient vacation rental operation in the State Agricultural District. He stated that he and

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

November 16, 2007
Page 7

Committee
Report No. 07-131

Ms. Livingston are not promoting a State agricultural tourism activity, nor have they applied for agricultural tax rates because they are not capable of cultivating over 50 percent of their property. He also submitted a document which he described as an excerpt of a report from a Planner, Department of Planning, purporting to memorialize a telephone call between a staff person, Department of Planning, and the Executive Officer, State LUC, on October 1, 2007, relating to an interpretation that Act 250 does not prohibit overnight accommodations from being established via the State Special Use Permit process under Section 205-6, HRS.

Several of the individuals supporting the application are neighbors of Dr. Dantes and Ms. Livingston. They stated that guests of the transient vacation rentals are not intrusive; that the operators are concerned about their community, their neighbors, and Hawaiian culture; that the transient vacation rentals will allow Dr. Dantes and Ms. Livingston a means of financial support; that the operation is appropriate to their neighborhood; and that it is not cost effective to raise produce on the property.

One individual questioned whether consideration of the application should await resolution of the pending lawsuit by Maui Vacation Rental Association, Inc., relating to the enforcement of laws governing transient vacation rentals.

The Planner provided an overview of the application and its procedural history.

Councilmember Michelle Anderson submitted a copy of Chapter 19.40, Maui County Code, relating to Conditional Permits.

Your Committee questioned whether the Department of Planning had been able to verify compliance by Dr. Dantes and Ms. Livingston with the conditions imposed by the Maui Planning Commission in connection with the State Special Use Permit and/or those recommended by the Maui Planning Commission in connection with the County Conditional Permit. The Planner advised that the applicants still were having difficulties meeting the fire flow requirement. The Planning Director stated that generally once a permit is issued with conditions of approval, the applicants must then comply with those conditions. He noted that both the State Special Use Permit and the County Conditional Permit have standards that need to be met, and that the expectation is not that applicants comply with conditions prior to issuance of a permit.

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

November 16, 2007
Page 8

Committee
Report No. 07-131

The Captain noted that, in this case, the fire flow requirements are dictated by the Department of Water Supply. He also responded to other questions pertaining to fire-related requirements for the application and response time to the property.

The Planning Director advised that the Conditional Permit, if granted, would expire after one year, requiring the applicants to seek a renewal. He advised that past practice has been for the renewal request to go before the planning commission then to the Council for approval. He further advised that, in his view, the Council would have the ability to dictate a different renewal process, including one that is strictly administrative or is relegated to the planning commission.

Your Committee discussed the justification for determining that the application had met the “unusual and reasonable” definition for uses within the State Agricultural District. The Planner summarized for your Committee the Department’s Report, at pages 15 through 18, where the five guidelines for making such a determination had been applied, and where four of the five guidelines were deemed to have been met. He noted that the oral testimony at the meeting supported the guideline that the proposed use would not adversely affect surrounding property. The Planning Director noted that the Department does not necessarily agree with the report that had previously been prepared, but would cite to the record before your Committee.

Your Committee noted the lack of opposition to the application from the community; documentation received from the State regarding the permissibility of a transient vacation rental under Chapter 205, HRS; and the applicants’ diligence in seeking to comply with applicable requirements. Your Committee also noted that the Conditional Permit would only be granted for one year, after which time the applicants’ ability to comply with the requirements of the permit could be further evaluated.

A Committee member noted his view that Chapter 205, HRS, is clear in its policy statement that overnight accommodations are not allowed in the State Agricultural District, noting the impact such use would have on the valuation of parcels.

Your Committee voted to recommend passage of the revised proposed bill and filing of the communication.

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

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

November 16, 2007
Page 9

Committee
Report No. 07-131

1. That Bill No. _____ (2007), as revised herein and attached hereto, entitled "A BILL FOR AN ORDINANCE GRANTING DAVID DANTES AND BEVERLY LIVINGSTON, DBA MAUI TRADEWINDS, A CONDITIONAL PERMIT TO USE ONE BEDROOM ON THE FIRST LEVEL OF A TWO-STORY MAIN FARM DWELLING (DWELLING A), AND TWO BEDROOMS OF A SECOND FARM DWELLING (DWELLING B), FOR TRANSIENT VACATION RENTALS WITHIN THE COUNTY AGRICULTURAL DISTRICT, FOR PROPERTY SITUATED AT 4320 UNE PLACE, HAIKU, MAUI, HAWAII", be PASSED ON FIRST READING and be ORDERED TO PRINT; and

2. That County Communication No. 02-199 be FILED.

Adoption of this report is respectfully requested.

