

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

April 4, 2008

**Committee
Report No.**

_____ 08-51

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

Chair and Members:

Your Land Use Committee, having met on February 6, 2008 and March 12, 2008, makes reference to County Communication No. 07-114, from the Planning Director, transmitting the Board of Variances and Appeals' approval of a request from the Department of Public Works and Environmental Management for a use variance to allow Pacific Biodiesel, Inc. to process waste cooking oil into biodiesel within the Interim District at the Central Maui Landfill, Phase III, located off of Pulehu Road, Kahului, Maui (TMK: (2) 3-8-03:019, comprised of approximately 59.686 acres).

Your Committee notes that the Board of Variances and Appeals (BVA) held a public hearing on the request for a use variance on September 28, 2006.

Your Committee further notes that the BVA, after reviewing the document entitled "DEPARTMENT OF PLANNING'S STAFF; *[sic]* RECOMMENDATION REPORTS TO THE BOARD OF VARIANCES AND APPEALS" in Docket No. BVAV 20060002 (Department's Report), voted to recommend approval of the request on September 28, 2006. The BVA issued its Findings of Fact, Conclusions of Law, Decision and Order on December 1, 2006 (BVA's 2006 Decision and Order).

Your Committee notes that the BVA's 2006 Decision and Order contains detailed Findings of Fact (FOF), including the following description of the operation, found at FOF No. 11(a):

Pacific Biodiesel operates a recycling operation which processes used cooking oils into biodiesel, a renewable energy. The facility removes waste vegetable oil from the waste stream and creates a final product that can displace petroleum fuel with a locally produced product. Approximately 200,000 gallons of biodiesel are produced annually at the site. Use of the final product instead of petroleum fuel results in decreased exhaust emissions for the engine using it, decreased greenhouse gas releases, and decreased environmental hazards in the production, storage, and distribution systems.

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By correspondence dated April 13, 2007, the Chair of your Committee noted that no proposed legislation had been included in the County Communication, and requested that the Department of the Corporation Counsel transmit proposed legislation that would permit the Council to take such action as it deems appropriate. He noted that Subsection 19.02.050(D), Maui County Code (MCC), provides as follows: "Any action of the board, whether granting or denying the relief applied for, shall be referred to the council for its approval. The council may override any action of the board and either grant or deny relief, as the case may be, by an affirmative vote of at least five of its members."

By correspondence dated May 18, 2007, the Department of the Corporation Counsel transmitted a proposed resolution entitled "APPROVING THE ACTION OF THE BOARD OF VARIANCES AND APPEALS GRANTING A VARIANCE TO ALLOW PACIFIC BIODIESEL, INC. TO PROCESS WASTE COOKING OIL INTO BIODIESEL ON PROPERTY ZONED INTERIM AT KAHULUI, MAUI, HAWAII". The purpose of the proposed resolution is to approve the BVA's grant of the requested use variance.

Your Committee notes that, effective July 1, 2007, the Department of Public Works and Environmental Management was split into two separate departments. From that point forward, the Department of Environmental Management assumed responsibility for this request.

By correspondence dated September 27, 2007, the Chair of your Committee requested that the Planning Director clarify the duration of the use variance granted by the BVA. He noted that Subsection 19.02.050(B), MCC, provides, in pertinent part, as follows: "Upon finding by the board of adjustment and appeals at the completion of the hearing that the application presents a situation wherein strict enforcement of any provision of this article would involve practical difficulty or unnecessary hardship, and further, that desirable relief may be granted without being detrimental to the public interest, convenience and welfare, a variance permit may be issued to such applicant on such terms and conditions and for such period of time as the facts may warrant." He further requested that the Planning Director inform your Committee of the duration of the State Special Use Permit, as amended in 2006.

By correspondence dated September 27, 2007, the Chair of your Committee acknowledged receipt of a proposed resolution approving the BVA's action, and

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requested that the Department of the Corporation Counsel advise whether a proposed resolution disapproving the BVA's action would be required in order to permit the Council to deny the variance, if it so desired. In addition, the Chair requested that the Department of the Corporation Counsel opine whether the BVA was required to fix a period of time for the variance, based on the BVA's review of the facts, and to also advise your Committee of its options in this regard.

Your Committee notes that the BVA held another meeting on the use variance request on November 29, 2007, to consider the questions posed by correspondence dated September 27, 2007, from the Chair of your Committee.

By correspondence dated December 13, 2007, the Department of the Corporation Counsel transmitted a proposed resolution entitled "DISAPPROVING THE ACTION OF THE BOARD OF VARIANCES AND APPEALS GRANTING A VARIANCE TO ALLOW PACIFIC BIODIESEL, INC. TO PROCESS WASTE COOKING OIL INTO BIODIESEL ON PROPERTY ZONED INTERIM AT KAHULUI, MAUI, HAWAII". The purpose of the proposed resolution is to disapprove the BVA's grant of the requested use variance.

By correspondence dated December 14, 2007, the Council Chair transmitted correspondence dated December 10, 2007, from the Planning Director, transmitting a copy of the following documents: (1) the BVA's 2006 Decision and Order; (2) the Department's Report; (3) the State Land Use Commission's Decision and Order Approving an Amendment to a Special Use Permit, adopted on January 9, 2006; and (4) an excerpt of the draft minutes of the BVA's November 29, 2007 meeting. Your Committee notes that, according to the draft minutes, the BVA determined that "the time duration for this variance is supposed to be in perpetuity, unless a condition is violated or some other thing happens".

By correspondence dated January 29, 2008, the Director of Environmental Management requested expedited scheduling of the matter. In support of her request, she transmitted a copy of correspondence dated January 11, 2008, from Thomas Arizumi, Chief, Environmental Management Division, State Department of Health (DOH). Mr. Arizumi noted that "the operation of the biodiesel facility without land use approval and a solid waste permit has occurred for over four years", and stated the Department's intent to begin formal enforcement action.

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By correspondence dated February 4, 2008 and February 5, 2008, three individuals submitted written testimony in support of the request. The testifiers noted that Pacific Biodiesel, Inc.'s operation enhances the landfill operations; that it focuses on reuse and recycling of waste cooking oil, allowing Maui to become more autonomous; and that its location at the Central Maui Landfill is vital to the operation.

At its meeting of February 6, 2008, your Committee met with the Deputy Planning Director; a Planner, Department of Planning; the Director of Environmental Management; and Larry Zolezzi, Operations Manager, Pacific Biodiesel, Inc.

Your Committee received a copy of correspondence dated January 31, 2008, from the Director of Environmental Management to Thomas Arizumi, Chief, Environmental Management Division, State DOH, advising the Department that your Committee would be considering this matter at its meeting of February 6, 2008.

Your Committee received oral testimony from one individual in support of the request, who stated that she uses biodiesel for her vehicle and voiced concerns regarding the County's prospects for disposing of waste cooking oil if the request was not approved.

The Director of Environmental Management provided a brief description of the request, noting that Pacific Biodiesel, Inc. operates under a subcontract with EKO Systems, Inc. d.b.a. Maui EKO Systems (Maui EKO), a composting company under contract with the County. She noted the importance of the use variance in order to complete the solid waste permit application pending before the State DOH.

Your Committee questioned whether there is a license or lease agreement with Pacific Biodiesel, Inc., and whether any lease or rental fees are assessed. The Director advised that the County is not in a direct contractual relationship with Pacific Biodiesel, Inc., but does pay Maui EKO for its services. Your Committee requested a copy of any license or lease agreement Pacific Biodiesel, Inc. might have entered into for the use of the property.

Due to conflicting information received at its meeting, your Committee asked the Director to confirm whether the County owns the property. Your Committee discussed Pacific Biodiesel, Inc.'s authorization to operate on the property, and the appropriateness of granting a use variance "in perpetuity" under the circumstances. Your Committee also

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questioned the rationale for the Department's decision to seek a use variance rather than a change in zoning.

Your Committee noted that the system currently in place for processing the County's fats, oil, and grease (FOG) into renewable fuel is working.

Your Committee deferred consideration of the matter pending further discussion.

By correspondence dated February 25, 2008, the Chair of your Committee requested that the Director of Environmental Management confirm the identity of the owner of the property that would be subject to the use variance, and provide documentation confirming such ownership; indicate by what authorization Pacific Biodiesel, Inc. operates on the subject property, including an explanation of the duration for which Pacific Biodiesel, Inc. is authorized to operate there; and advise whether the Department supports the BVA's conclusion that the use variance should be approved "in perpetuity".

By correspondence dated March 7, 2008 through March 11, 2008, 13 individuals submitted testimony in support of the request. The testifiers noted the benefits of the recycling operation, stating that biodiesel is the best use for FOG and a cleaner-burning fuel for the community.

By correspondence dated March 10, 2008, the Director of Environmental Management confirmed that the County owns the property known as the Central Maui Landfill (Landfill), identified as TMK: (2) 3-8-03:019, which includes the closed Phases I and II of the Landfill and the composting and biodiesel area located on Phase III. The Director provided a copy of a Warranty Deed dated March 12, 1987, conveying certain property, including the subject parcel, from Alexander & Baldwin, Inc. to the County. The Director explained that Pacific Biodiesel, Inc. is authorized to operate on the subject property as a subcontractor to the County's biosolids and green waste contractor, Maui EKO, and that Maui EKO has no license or lease agreement with the County for the property. She advised that the use of the property by Maui EKO and Pacific Biodiesel, Inc. is allowed under the County's contract with Maui EKO. The Director further advised that the Department supports the proposed "in perpetuity" language because other controls are in place to restrict the duration of use by the contractor or subcontractor, such as the term of the contract and the term of the operating permit.

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At its meeting of March 12, 2008, your Committee met with the Planning Director; a Planner, Department of Planning; the Director of Environmental Management; the Solid Waste Division Chief, Department of Environmental Management; a Deputy Corporation Counsel; Kelly King, Vice President, Pacific Biodiesel, Inc.; Thomas Pawlish, Vice President, Pacific Biodiesel, Inc., and President, EKO Systems, Inc. d.b.a. Maui EKO Systems; Larry Zolezzi, Operations Manager, Pacific Biodiesel, Inc.; and Rubens Fonseca, Plant Manager, EKO Systems, Inc. d.b.a. Maui EKO Systems.

Your Committee received oral testimony from eight individuals in support of the use variance request. A testifier noted that Pacific Biodiesel, Inc.'s operation is well respected in the industry and provides the only legal option for disposal of FOG in the County. Testifiers noted that biodiesel produces lower emissions and better fuel economy, and represents a part of the future of Maui's energy independence.

During her testimony, Ms. King explained that if the use variance was not approved, Pacific Biodiesel, Inc. would be in danger of receiving a cease and desist order from the State DOH. She advised that Pacific Biodiesel, Inc. had been operating for about 12 years, and it was not until 2 or 3 years ago that the County discovered that the property is zoned Interim District, and not Agricultural District. She provided information concerning the operation, and clarified that Pacific Biodiesel, Inc. does not dispense biodiesel from the subject property.

During his testimony, Mr. Pawlish explained that Maui EKO has a contract with the County to dispose of FOG. He advised that he did not know what Maui EKO would do with the FOG if Pacific Biodiesel, Inc. could no longer operate. He also noted that Maui EKO's contract with the County would expire in July 2008, but that the County has a five-year option to extend the contract.

Your Committee received written testimony from Alexander de Roode, Executive Director, Sustainable Living Institute of Maui, dated March 12, 2008, in support of the request.

The Director of Environmental Management summarized her March 10, 2008 response. She also advised that the Department has had discussions with the Department of Planning, and is amenable to doing what is necessary to ensure that the property's zoning is ultimately in conformance with its use.

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The Director further explained the existing recycling operations on Phase III of the Landfill and the synergistic relationship between Maui EKO and Pacific Biodiesel, Inc. She noted that the State DOH permit under which they had been operating expired about one month prior to your Committee's meeting.

The Planning Director explained that Pacific Biodiesel, Inc.'s biodiesel facility is not permitted in the Interim District, but that Maui EKO's operation does not require a use variance because it constitutes an agricultural use. The Planner advised that the appropriate zoning for Pacific Biodiesel, Inc.'s operation would be M-2 Heavy Industrial.

Your Committee discussed the BVA's November 29, 2007 determination that the use variance should be approved "in perpetuity". The Deputy Corporation Counsel summarized the proceedings before the BVA as they related to the issue of duration of the use variance. He advised that the Council could evaluate the facts and decide whether a time period is warranted, or, if it chose to adopt the findings of the BVA, it could simply add a recital clarifying the time frame.

Your Committee recommended that the proposed resolution approving the action of the BVA be revised to incorporate a new WHEREAS clause, immediately preceding the last WHEREAS clause, which states: "WHEREAS, the BVA held a further meeting on the subject variance application on November 29, 2007, and found that the use variance should be granted in perpetuity; and".

Your Committee discussed whether the use variance should apply to the whole parcel, or just the 13-acre portion upon which Pacific Biodiesel, Inc. operates. Your Committee noted that the application is for a use variance for the whole parcel.

Your Committee voted to recommend adoption of the revised proposed resolution approving the action of the BVA and filing of the communication.

Your Committee is in receipt of a revised proposed resolution approving the action of the BVA, approved as to form and legality by the Department of the Corporation Counsel, incorporating your Committee's requested revisions and nonsubstantive revisions.

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Your Land Use Committee RECOMMENDS the following:

1. That Resolution No. _____, as revised herein and attached hereto, entitled "APPROVING THE ACTION OF THE BOARD OF VARIANCES AND APPEALS GRANTING A VARIANCE TO ALLOW PACIFIC BIODIESEL, INC. TO PROCESS WASTE COOKING OIL INTO BIODIESEL ON PROPERTY ZONED INTERIM AT KAHULUI, MAUI, HAWAII", be ADOPTED; and

2. That County Communication No. 07-114 be FILED.

Adoption of this report is respectfully requested.

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