

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

April 7, 2006

Committee
Report No.

_____06-53_____

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

Chair and Members:

Your Land Use Committee, having met on June 1, 2005, July 7, 2005, and February 15, 2006, makes reference to County Communication No. 02-55, from the former Planning Director, transmitting the following:

1. A proposed bill entitled "A BILL FOR AN ORDINANCE TO AMEND THE STATE LAND USE DISTRICT CLASSIFICATION FROM AGRICULTURAL TO RURAL FOR PROPERTY SITUATED AT HAMAKUAPOKO - MAKAWAO, MAUI, HAWAII" (District Boundary Amendment bill).

The purpose of the proposed bill is to grant a District Boundary Amendment for the operation of the Banyan Tree "bed and breakfast" (Banyan Tree), a transient vacation rental, on approximately 2.102 acres situated at Baldwin Avenue, Hamakuapoko-Makawao, Maui, Hawaii (TMK: (2) 2-4-02:002) (the subject property).

2. A proposed bill entitled "A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM INTERIM DISTRICT TO RU-1 RURAL DISTRICT (CONDITIONAL ZONING) FOR PROPERTY SITUATED AT HAMAKUAPOKO - MAKAWAO, MAUI, HAWAII" (Change in Zoning bill).

The purpose of the proposed bill is to conditionally change the zoning for the subject property for the operation of the Banyan Tree.

3. A proposed bill entitled "A BILL FOR AN ORDINANCE GRANTING A CONDITIONAL PERMIT TO MARTY HERLING FOR A SHORT-TERM VACATION RENTAL WITHIN THE RU-1 RURAL ZONING DISTRICT FOR PROPERTY SITUATED AT 3256 BALDWIN AVENUE, HAMAKUAPOKO - MAKAWAO, MAUI, HAWAII" (Conditional Permit bill).

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The purpose of the proposed bill is to grant a one-year Conditional Permit to Marty Herling for the operation of the Banyan Tree on the subject property.

Your Committee notes that the Maui Planning Commission held a public hearing on the application by Marty Herling (applicant) for a District Boundary Amendment, Change in Zoning, and Conditional Permit on July 24, 2001.

Your Committee further notes that the Maui Planning Commission, after reviewing the findings presented in the document entitled "MAUI PLANNING DEPARTMENT'S REPORT TO THE MAUI PLANNING COMMISSION JULY 24, 2001 MEETING", voted to recommend approval of the proposed District Boundary Amendment, Change in Zoning, and Conditional Permit. Your Committee further notes that the Department of Planning did not prepare a report of recommendations to the Maui Planning Commission due to the pending Petition to Intervene filed by Richard and Lynn Rasmussen (the Rasmussens), whose property shares a common boundary with the subject property.

Your Committee further notes that the Rasmussens entered into a settlement agreement with the applicant dated July 23, 2001 (Settlement Agreement). The Settlement Agreement provides, among other things, that the property shall not be used as a venue for special events, the operation will be consistent with the character of the existing neighborhood, no exterior live amplified sound will be permitted, guests will be required to limit the number of off-site visitors to the property, the number of guest rooms shall be restricted to seven, the zoning requested through the Change in Zoning shall be RU-1 Rural District, and a condition of zoning would prohibit further subdivision of the property and/or the creation of a horizontal property regime.

Your Committee further notes that the Council referred County Communication No. 02-55 to the Land Use Committee (2001-2003 Council term) on March 1, 2002.

At its meeting of January 10, 2003, the Council referred County Communication No. 02-55 to the prior Council's Planning and Land Use Committee (County Communication No. 03-10).

By correspondence dated September 4, 2003, the Chair of the Committee requested that the Planning Director provide the following: (1) a copy of the Settlement

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Agreement relating to the application; (2) comments concerning the State Office of Planning's opinion that the proposed District Boundary Amendment would constitute "spot zoning"; (3) the Department's recommendation regarding infrastructural improvements recommended in a traffic assessment report; (4) the status of concerns relating to compliance with the Americans with Disabilities Act (ADA); and (5) any pertinent changes in circumstances relating to the application.

By correspondence dated October 13, 2003, the Planning Director responded as follows: (1) by providing a copy of the Settlement Agreement; (2) by concurring with the State Office of Planning's assessment as it relates only to the State Land Use District, while noting that the District Boundary Amendment is being processed concurrently with the proposed Change in Zoning, implementing the Makawao-Pukalani-Kula Community Plan Land Use Map; (3) by recommending that the infrastructural improvements be made a part of the Conditional Permit; (4) by indicating that the applicant will continue to work with the Maui County Commission on Persons with Disabilities to pursue ADA compliance of the operation; and (5) by stating that there have been no pertinent changes in the circumstances relating to the operation.

By correspondence dated November 10, 2004, the Chair of the Committee transmitted correspondence dated October 21, 2004, from Christopher Hart, President, Chris Hart & Partners, Inc., to staff of the Committee, requesting confirmation of a meeting date for consideration of the application.

By correspondence dated December 14, 2004, the Chair of the Committee notified Christopher Hart, Chris Hart & Partners, Inc., that the matter would be referred to the Council Chair for the 2005-2007 Council term for appropriate disposition.

At its meeting of January 21, 2005, the Council referred County Communication No. 02-55 to your Land Use Committee (County Communication No. 05-13).

By correspondence dated May 5, 2005, the Chair of your Committee requested that the Department of the Corporation Counsel revise the proposed Conditional Permit bill to correct the street address. The Chair also questioned the use of the term "short-term vacation rental", which is not defined in the Maui County Code (MCC), and requested nonsubstantive and technical revisions to the proposed bills.

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By correspondence dated May 10, 2005, the Department of the Corporation Counsel transmitted the following revised proposed bills, which incorporate your Committee's requested revisions:

1. "A BILL FOR AN ORDINANCE TO AMEND THE STATE LAND USE DISTRICT CLASSIFICATION FROM AGRICULTURAL TO RURAL FOR PROPERTY SITUATED AT HAMAKUAPOKO - MAKAWAO, MAUI, HAWAII";
2. "A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM INTERIM DISTRICT TO RU-1 RURAL DISTRICT (CONDITIONAL ZONING) FOR PROPERTY SITUATED AT HAMAKUAPOKO - MAKAWAO, MAUI, HAWAII"; and
3. "A BILL FOR AN ORDINANCE GRANTING A CONDITIONAL PERMIT TO MARTY HERLING FOR A TRANSIENT VACATION RENTAL WITHIN THE RU-1 RURAL ZONING DISTRICT FOR PROPERTY SITUATED AT 3265 BALDWIN AVENUE, HAMAKUAPOKO - MAKAWAO, MAUI, HAWAII".

At its meeting of June 1, 2005, your Committee met with the Planning Director; a Planner, Department of Planning; the Deputy Director of Public Works and Environmental Management; a Deputy Corporation Counsel; Marty Herling, the applicant; and Christopher Hart and Michael Summers, Chris Hart & Partners, Inc., the applicant's land use consultants.

Your Committee received public testimony from Charlotte Smith, a member of the Maui County Commission on Persons with Disabilities. Ms. Smith stated she believed that, under the ADA, a transient vacation rental with five or more units is required to have at least one of those units accessible to persons with disabilities.

Mr. Hart provided a computer-generated presentation with background information on the property, along with a printout of the presentation. He described the history of the structures on the property, noting that the primary residence had been constructed in 1926 and the servants' quarters had been constructed in 1938. Mr. Hart described the applicable land use classifications, and informed your Committee that when the applicant acquired the property in 1998, it was already being operated as a transient

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vacation rental. He noted that the bed and breakfast ordinance only applies in the Urban District.

Mr. Hart described the approvals being requested in order for the applicant to operate a seven-room transient vacation rental. He noted that the primary residence contains three guest bedrooms and baths, and that there are four bedrooms and baths in the servants' quarters. The applicant currently lives in the primary residence. Mr. Hart informed your Committee that no special events would be conducted on the property. The applicant plans to construct an accessory dwelling for his own use not to exceed 1,000 square feet in living area or a height of 20 feet. Your Committee viewed photos of the property.

The Planner summarized the application and the terms of the Settlement Agreement, and noted that Change in Zoning conditions had been proposed to prohibit future subdivision of the property or the creation of a horizontal property regime, and to restrict the use and size of the future accessory dwelling. She informed your Committee that the remaining terms of the Settlement Agreement would be imposed as conditions of the State Land Use Commission's Special Use Permit (SUP).

The Deputy Corporation Counsel advised your Committee that proposed Condition No. 5 of the Conditional Permit bill, which requires full compliance with all applicable governmental requirements, would address the ADA concerns noted by the member of the Maui County Commission on Persons with Disabilities.

The Planner informed your Committee that the applicant had not been residing on the property on a full-time basis at the time the application was submitted. She clarified that the application is not for a bed and breakfast operation, but for a transient vacation rental, and that, therefore, the applicant is not required to live in the structure.

Your Committee questioned whether the Department of Planning had considered asking the applicant to have the zoning for his property changed to Hotel. The Planner advised that the Department would not want to set a precedent for Hotel zoning in the area. The Planner also advised that the Rasmussens had not withdrawn their petition pending the outcome of the Council's action on the application.

Your Committee questioned whether the proposed operation is appropriate for its location, noting in particular the curved roadway, driveway grading issues, and the historic nature of the area.

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Mr. Herling advised that he hires others to clean the rooms and do the gardening on his property, and that, until he moved to Maui, he had a property manager who still resides on the property. He also confirmed that he does not currently serve food on the property, but that if he does in the future, it would be limited to prepared foods. Mr. Herling noted that many of his neighbors, including the Rasmussens, have recommended that guests stay at the Banyan Tree. He stated that an engineering report was done to address sight distance issues and that he has complied with the report.

Your Committee questioned whether the infrastructure improvements recommended in the traffic impact assessment report should be incorporated as conditions in the Conditional Permit bill, as recommended by the Planning Director in his correspondence dated October 13, 2003. The Planner responded that the Department continues to recommend that those improvements be incorporated. The improvements would address sight distance issues and the installation of advisory speed signs for makai-bound traffic along Baldwin Avenue.

The Planner clarified that the Land Zoning Map is incorrect and that the current zoning is Interim, not Agricultural, and that the map will need to be corrected.

Your Committee noted that changing the State Land Use District classification from Agricultural to Rural would be consistent with the rural use of the area dating back to the 1920s and with the Makawao-Pukalani-Kula Community Plan. Your Committee further noted that the proposed Change in Zoning from Interim District to RU-1 Rural District would also be consistent with such use.

Your Committee questioned whether the State Legislature had enacted legislation during the past session that would eliminate the counties' authority to reclassify agricultural lands. The Planning Director indicated that the bill being referenced is House Bill No. 1640, and that his understanding is that the bill had not been signed by the Governor. He also described the bill, and stated he did not believe it would have any impact on the application.

Your Committee voted to recommend passage of the revised proposed District Boundary Amendment bill and the revised proposed Change in Zoning bill, and recordation of a unilateral agreement reflecting the applicable zoning conditions.

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Your Committee requested that the Department of the Corporation Counsel transmit a revised proposed Conditional Permit bill incorporating the missing conditions that had been recommended by the Department of Planning, including a condition that would require compliance with the conditions of the SUP.

By correspondence dated June 6, 2005, the Chair of your Committee requested that the Planning Director: (1) supplement correspondence dated February 13, 2002, listing the conditions the Department would recommend to the Maui Planning Commission for inclusion in the SUP; (2) provide confirmation of the additional conditions the Department would advise be incorporated into the proposed Conditional Permit bill, including infrastructure improvements referenced in correspondence dated October 13, 2003, as well as compliance with the terms of the SUP; and (3) provide a revised Land Zoning Map No. L-1066.

By correspondence dated June 22, 2005, the Planning Director provided a revised Land Zoning Map along with the requested information, noting 7 standard conditions and 11 project specific conditions that would be recommended for the SUP, and recommending that the following 6 conditions be incorporated into the proposed Conditional Permit bill:

- “1. That full compliance with the conditions of the Land Use Commission Special Use Permit (SUP2 2000/0007) shall be rendered.
2. That the applicant shall grade the banks on each side of the driveway to improve site *[sic]* distance.
3. That the applicant shall repave the driveway upon completion of the grading of the banks.
4. That the applicant shall execute a Hold Harmless Agreement indemnifying the County should final sight distance after grading of the banks not be adequate to meet County Standards.
5. That the Applicant shall install warning signage for vehicles traveling in an east and westbound direction along Baldwin Avenue.
6. That the applicant shall continue to meet the requirements for individual wastewater treatment systems of the State Department of Health.”

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By correspondence dated June 24, 2005, the Chair of your Committee requested that the Department of the Corporation Counsel revise the proposed Conditional Permit bill to incorporate the six additional conditions recommended by the Department of Planning.

By correspondence dated June 29, 2005, the Department of the Corporation Counsel transmitted a revised proposed bill entitled "A BILL FOR AN ORDINANCE GRANTING A CONDITIONAL PERMIT TO MARTY HERLING FOR A TRANSIENT VACATION RENTAL WITHIN THE RU-1 RURAL ZONING DISTRICT FOR PROPERTY SITUATED AT 3265 BALDWIN AVENUE, HAMAKUAPOKO - MAKAWAO, MAUI, HAWAII", incorporating your Committee's requested revisions.

At its meeting of July 7, 2005, your Committee met with the Planning Program Administrator, Current Planning Division, Department of Planning; a Planner, Department of Planning; the Deputy Director of Public Works and Environmental Management; a Deputy Corporation Counsel; Marty Herling, the applicant; and Christopher Hart, Chris Hart & Partners, Inc., the applicant's land use consultant.

There was no public testimony.

The Planner summarized the six additional conditions that had been incorporated into the revised proposed Conditional Permit bill. The Planner also reiterated that the reduction in the proposed number of rooms from eight to seven was a result of the Settlement Agreement.

The Deputy Director informed your Committee that the Department's traffic engineer had conducted a field inspection of the property and that some effort had been made to grade the bank to improve sight distance. He advised that, in the engineer's opinion, more grading and a slight modification to the parabolic mirror could be done to make conditions safe. He advised that the Department would be discussing these modifications with the applicant.

Your Committee questioned why the former Director of Public Works and Environmental Management had commented on ADA compliance issues with respect to this application, but similar concerns had not been addressed with other applications. Your Committee requested that compliance with ADA requirements, which would be

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enforceable through the standard condition that applicants comply with all applicable governmental requirements, receive more attention from the Department of Planning and the Department of Public Works and Environmental Management.

Your Committee discussed the possibility of incorporating a condition in the Conditional Permit bill that would limit the number of rooms to four, and require the applicant to live on the property. Your Committee also voiced concerns over transient vacation rental units that bore a resemblance to hotel or motel units, and whether an affordable housing requirement should apply. Your Committee further questioned whether issues over consistency might arise with respect to prior transient vacation rental operations with several rooms that had been granted a Conditional Permit without the imposition of an affordable housing requirement.

The Planning Program Administrator advised that the Department interprets Chapter 2.94, MCC, to require a minimum of 20 rooms in order for the affordable housing requirement to apply.

Your Committee noted that broad policy issues relating to transient vacation rentals are separately being considered. Your Committee further noted that the proposed Conditional Permit would, upon expiration, be subject to scrutiny under any transient vacation rental legislation then in effect, absent a provision in such legislation that grandfathered in existing uses or a Council-approved extension of the Conditional Permit.

Your Committee considered amending the Conditional Permit bill to incorporate a new Condition No. 12 that would limit the number of rooms available for rent to four, and require the owner to live on the property. Your Committee was unable to reach agreement on such a condition.

Your Committee deferred consideration of the matter pending further discussion.

By correspondence dated August 22, 2005, the Chair of your Committee transmitted correspondence dated July 18, 2005, from John Lofgren, Executive Director, Hui No`eau Visual Arts Center, to Marty Herling, expressing support for the Banyan Tree.

By correspondence dated September 14, 2005, the Vice-Chair of your Committee requested that the Department of the Corporation Counsel opine on the applicability of

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the affordable housing requirements set forth in Chapter 2.94, MCC, to transient vacation rentals.

By correspondence dated November 4, 2005, the Chair of your Committee requested that the Department of the Corporation Counsel respond to your Committee's inquiry dated September 14, 2005.

By correspondence dated December 15, 2005, Marty Herling transmitted correspondence dated December 14, 2005, from Stacey Eaton, Campus Receptionist, Kamehameha Schools Maui, Office of the Headmaster, expressing support for the Banyan Tree.

By correspondence dated February 6, 2006, the Department of the Corporation Counsel opined that the Banyan Tree is not subject to the affordable housing requirements of Chapter 2.94, MCC.

By correspondence dated February 10, 2006, the Chair of your Committee transmitted to the applicant a copy of the opinion dated February 6, 2006 from the Department of the Corporation Counsel.

At its meeting of February 15, 2006, your Committee met with the Planning Director; a Planner, Department of Planning; the Director of Finance; the Administrator, Real Property Tax Division, Department of Finance; the Deputy Director of Public Works and Environmental Management; a Deputy Corporation Counsel; Marty Herling, the applicant; and Christopher Hart and Michael Summers, Chris Hart & Partners, Inc., the applicant's land use consultants.

There was no public testimony.

Mr. Summers provided your Committee with a description of the historic Sunnyside area, the project site, the prior use of the property, and the use being requested. He displayed poster boards containing photographs of the site and site plans.

The Planner summarized the application.

The Deputy Corporation Counsel summarized the Department's opinion, which concluded that the affordable housing requirement under Chapter 2.94, MCC, is inapplicable in this context.

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Your Committee discussed sight distance issues. The Deputy Director noted that an engineer with the Department had visited the site in July 2005. He noted that the parabolic mirror that had been installed has improved the sight distance to some degree, and that some grading had also been completed.

Your Committee questioned whether the grading that had been done on the driveway banks brought the sight distance within County standards. Your Committee requested that it be updated on the status of sight distance issues, and that the applicant continue to monitor such issues.

Your Committee also questioned whether any further grading of the banks to increase sight distance would threaten the monkeypod trees along Baldwin Avenue. The Deputy Director agreed to investigate the situation and respond to your Committee.

Your Committee noted that the proposed transient vacation rental appears to be an appropriate use of the historic residence. Your Committee also found noteworthy the applicant's willingness to scale back his operation and reach an agreement with his neighbors as to its scope.

Your Committee recommended that the revised proposed Conditional Permit bill be further revised to change the duration of the Conditional Permit from one year to five years. Your Committee also recommended that the year of the bill be changed from "(2005)" to "(2006)", and that the word "site" in Condition No. 7 be corrected to "sight".

Your Committee recommended that the revised proposed Conditional Permit bill be further revised to incorporate these changes.

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

Your Committee is in receipt of the further revised proposed Conditional Permit bill, approved as to form and legality by the Department of the Corporation Counsel, incorporating your Committee's requested revisions. Your Committee is also in receipt of a revised proposed District Boundary Amendment bill and a revised proposed Change in Zoning bill, noting the change in year and a nonsubstantive correction to the Tax Map Key reference for consistency.

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Your Committee is also in receipt of an agreement entitled "Unilateral Agreement and Declaration for Conditional Zoning" executed by the applicant.

Following your Committee's meeting, your Committee received correspondence dated February 27, 2006, from the Director of Public Works and Environmental Management, advising your Committee of a subsequent site visit to the subject property where it was determined that available sight distance from the driveway to the property satisfies minimum criteria; and that further grading of the slope to the right of the driveway as one exits is recommended and would improve sight distance. He noted, however, that effects to the monkeypod trees are not known, and suggested an arborist be contacted to address the concern.

By correspondence dated March 22, 2006, the Director of Parks and Recreation transmitted a copy of correspondence dated March 22, 2006, from the Parks Arboriculturist to the Director of Parks and Recreation. In that correspondence, the Parks Arboriculturist stated that he had conducted a site visit to the subject property, and noted that the monkeypod tree is located 21 feet from the edge of Baldwin Avenue and well within the private lot.

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

1. That Bill No. _____ (2006), as revised herein and attached hereto, entitled "A BILL FOR AN ORDINANCE TO AMEND THE STATE LAND USE DISTRICT CLASSIFICATION FROM AGRICULTURAL TO RURAL FOR PROPERTY SITUATED AT HAMAKUAPOKO - MAKAWAO, MAUI, HAWAII", be PASSED ON FIRST READING and be ORDERED TO PRINT;
2. That Bill No. _____ (2006), as revised herein and attached hereto, entitled "A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM INTERIM DISTRICT TO RU-1 RURAL DISTRICT (CONDITIONAL ZONING) FOR PROPERTY SITUATED AT HAMAKUAPOKO - MAKAWAO, MAUI, HAWAII", be PASSED ON FIRST READING and be ORDERED TO PRINT;
3. That Bill No. _____ (2006), as revised herein and attached hereto, entitled "A BILL FOR AN ORDINANCE GRANTING A CONDITIONAL PERMIT TO MARTY HERLING FOR A TRANSIENT

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VACATION RENTAL WITHIN THE RU-1 RURAL ZONING DISTRICT FOR PROPERTY SITUATED AT 3265 BALDWIN AVENUE, HAMAKUAPOKO - MAKAWAO, MAUI, HAWAII”, be PASSED ON FIRST READING and be ORDERED TO PRINT;

4. That the County Clerk RECORD the “Unilateral Agreement and Declaration for Conditional Zoning”; and
5. That County Communication No. 02-55 be FILED.

Adoption of this report is respectfully requested.

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ROBERT CARROLL **Chair**

DAIN P. KANE **Member**

JOSEPH PONTANILLA **Vice-Chair**

DANNY A. MATEO **Member**

MICHELLE ANDERSON **Member**

MICHAEL J. MOLINA **Member**

G. RIKI HOKAMA **Member**

CHARMAINE TAVARES **Member**

JO ANNE JOHNSON **Member**