

COUNCIL OF THE COUNTY OF MAUI
LAND USE COMMITTEE

July 22, 2005

Committee
Report No.

_____ 05-93

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 29, 2005, makes reference to the following:

1. Bill No. 55 (2005), entitled "A BILL FOR AN ORDINANCE TO AMEND THE WAILUKU-KAHULUI COMMUNITY PLAN AND LAND USE MAP FROM SINGLE-FAMILY TO OPEN SPACE, OPEN SPACE TO RURAL, AND OPEN SPACE TO PUBLIC/QUASI-PUBLIC FOR PROPERTY (E PAEPAE KA PUKO`A RURAL SUBDIVISION) SITUATED AT SPRECKELSVILLE, MAUI, HAWAII".

The purpose of Bill No. 55 (2005) is to amend the Wailuku-Kahului Community Plan and Land Use Map for approximately 14.859 acres from Open Space to Rural; for approximately 3.000 acres from Single-Family to Open Space; and for approximately 1.163 acres from Open Space to Public/Quasi-Public, to facilitate a request from Henry Spencer, on behalf of Old Stable LLC, to develop a 16-unit "E Paepae Ka Puko`a" rural subdivision project, an open space conservation easement, and a County/State donation project on Spreckelsville Beach Road, also known as Stable Road, Spreckelsville, Maui (TMK: (2) 3-8-01:003 (por.), (2) 3-8-02:009, and (2) 3-8-02:010) (the Project).

2. Bill No. 56 (2005), entitled "A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM R-3 RESIDENTIAL DISTRICT TO OS-2 OPEN SPACE DISTRICT, FROM R-3 RESIDENTIAL DISTRICT TO RU-0.5 RURAL DISTRICT, AND FROM R-3 RESIDENTIAL DISTRICT TO P-1 PUBLIC/QUASI-PUBLIC DISTRICT (CONDITIONAL ZONING) FOR PROPERTY (E PAEPAE KA PUKO`A RURAL SUBDIVISION) SITUATED AT SPRECKELSVILLE, MAUI, HAWAII".

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The purpose of Bill No. 56 (2005) is to conditionally change the zoning for approximately 14.859 acres from R-3 Residential District to RU-0.5 Rural District; for approximately 24.501 acres from R-3 Residential District to OS-2 Open Space District; and for approximately 1.163 acres from R-3 Residential District to P-1 Public/Quasi-Public District to facilitate the proposed development.

Your Committee notes that it previously reported on the matter through Committee Report No. 05-70, which recommended that the proposed bills be passed on first reading and ordered to print. At its meeting of June 3, 2005, the Council approved the proposed bills on first reading, directed the County Clerk to record the "Unilateral Agreement and Declaration for Conditional Zoning", and filed County Communication No. 05-110. At its meeting of June 17, 2005, the Council recommitted Bill No. 55 (2005) and Bill No. 56 (2005) to your Committee.

Your Committee further notes that the recommitment of the bills to your Committee was prompted by issues relating to public access to the shoreline raised at the June 17, 2005 Council meeting.

By correspondence dated June 20, 2005, the Chair of your Committee transmitted correspondence dated June 17, 2005, from Councilmember Michelle Anderson to the Council Chair and Members of the Council, relating to a proposed floor amendment to amend the second condition in Bill No. 56 (2005), in order "to ensure that public access to the shoreline is provided in the form of an easement to the County". Attached to Councilmember Anderson's correspondence is a copy of a "Unilateral Agreement for Public Access" dated September 16, 1999, and recorded with the Bureau of Conveyances, State of Hawaii, as Document No. 99-154366 on September 24, 1999.

Your Committee notes that the "Unilateral Agreement for Public Access" was executed by A&B-Hawaii, Inc. and involves property identified for real property tax purposes as TMK: (2) 3-8-01:003, which is also one of the parcels affected by the Project. Your Committee further notes that this agreement makes reference to the granting of a "perpetual easement to the County for public ingress and egress to the shoreline over the Property" in a described location over the parcel, along with a right to relocate the easement in the future. Your Committee also notes that the agreement provides that it "shall become fully effective on the effective date final approval is given by the County of the Maui [*sic*] to the Subdivision Application" submitted by the applicant, A&B-Hawaii, Inc.

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By correspondence dated June 20, 2005, Henry Spencer, Old Stable LLC, transmitted a copy of correspondence dated June 17, 2005, from the Director of Public Works and Environmental Management to Hideo Kawahara, A & B Properties, Inc., confirming that a request to withdraw TMK: (2) 3-8-01:003 from the "Ulmer Subdivision" application (LUCA File No. 3.1751) was received on that same day. The Director noted that the Ulmer Subdivision application was thereby deemed withdrawn in its entirety.

By correspondence dated June 21, 2005, the Chair of your Committee requested that the Planning Director review Councilmember Anderson's June 17, 2005 correspondence and provide written comments responding to the wording of the proposed amendment to Condition No. 2 of Bill No. 56 (2005).

By correspondence dated June 21, 2005, the Chair of your Committee requested that the Department of the Corporation Counsel review Councilmember Anderson's June 17, 2005 correspondence, as well as correspondence dated June 20, 2005 from Henry Spencer. The Chair of your Committee requested a response to the following: (1) whether withdrawal of the subdivision application resolved outstanding issues relating to the "Unilateral Agreement for Public Access" and any requirement that an easement for public ingress and egress be conveyed; (2) whether the Department would approve as to form and legality the language proposed by Councilmember Anderson; and (3) whether an amendment such as the one proposed by Councilmember Anderson would require the Council to again consider Bill No. 56 (2005) on first reading. The Chair of your Committee also requested that the bill be revised to incorporate language appropriate to address the requested amendment.

By correspondence dated June 22, 2005, the Chair of your Committee transmitted a draft document from Henry Spencer, Old Stable LLC, entitled "DEED OF CONSERVATION EASEMENT INCLUDING DEVELOPMENT RIGHTS" in favor of the Maui Coastal Land Trust (Conservation Easement Deed). The purpose of the Deed is to convey to the Maui Coastal Land Trust a conservation easement in perpetuity over the protected property located along the Spreckelsville Beach coastline.

By correspondence dated June 22, 2005, Councilmember Anderson transmitted a copy of her correspondence dated June 17, 2005 to the Planning Director, requesting that he inform her of the Department of Planning's efforts to ensure that all of its associated

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boards and agencies will be fully cognizant of the importance of protecting public access to the shoreline.

By correspondence dated June 23, 2005, the County Clerk transmitted a copy of Old Stable LLC's "Unilateral Agreement and Declaration for Conditional Zoning", dated June 3, 2005, and recorded with the Bureau of Conveyances as Document No. 2005-117066 on June 14, 2005.

By correspondence dated June 24, 2005, the Planning Director responded to the June 21, 2005 request from the Chair of your Committee, noting that it is not advisable to reference the "Unilateral Agreement for Public Access" in the conditions of zoning, because the agreement is not in effect. He opined that the proposed revision to the condition may limit access through the open space conservation easement and expose the County to potential liability. He suggested language to clarify the intent of the proposed public access.

By correspondence dated June 28, 2005, the Department of the Corporation Counsel responded to the June 21, 2005 request from the Chair of your Committee, noting that your Committee should consider the following: obtaining clarification from the declarant (A&B-Hawaii, Inc.) concerning its intentions for the "Unilateral Agreement for Public Access"; verifying whether the proposed public access easement location is identical to the one described in the conservation easement; and determining the appropriate mechanism, in light of other alternatives, for imposing the easement for public shoreline access. The Department also deferred the question of whether first reading would again be required until changes to the bills had been specified.

By correspondence dated June 29, 2005, Councilmember Anderson transmitted a draft (unsigned) "Unilateral Agreement and Declaration for Conditional Zoning (Amended and Restated)" from Henry Spencer, incorporating the language of her proposed amendment to Condition No. 2.

By correspondence dated June 29, 2005, Councilmember Anderson provided a response to the points raised in the Planning Director's correspondence dated June 24, 2005. She noted that the "Unilateral Agreement for Public Access" is simply a handy reference point; that ensuring public access to the shoreline is a core function of County government; and that the language proposed by the Department of Planning omits County ownership, which is "the most critical element" of her proposed amendment.

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By correspondence dated June 29, 2005, the Chair of your Committee transmitted the following: (1) a copy of correspondence dated February 25, 2005, from the Director of Public Works and Environmental Management to Henry Spencer, granting preliminary subdivision approval for the E Paepae Ka Puko`a Subdivision; and (2) a copy of Section 18.16.210 of the Maui County Code (MCC). Your Committee notes that, according to the correspondence, the applicant must “[c]omply with or show compliance with Section 18.16.210 (Shoreline and other access rights-of-way) MCC” as a condition of final subdivision approval.

At its meeting, your Committee met with the Planning Director; a Planner, Department of Planning; the Deputy Director of Public Works and Environmental Management; a Civil Engineer, Development Services Administration, Department of Public Works and Environmental Management; two Deputy Corporation Counsel; Henry Spencer, Old Stable LLC, the applicant; Gwen Hiraga, Munekiyo & Hiraga, Inc., the applicant’s consultant; Thomas D. Welch, Jr., Esq., Mancini, Welch & Geiger LLP, the applicant’s attorney; and Mercer “Chubby” Vicens, on behalf of A & B Properties, Inc.

Your Committee received a copy of the following legal authorities from Councilmember Anderson: (1) Section 18.16.210, MCC (Shoreline and other access rights-of-way); (2) Hawaii Revised Statutes (HRS) Section 46-6.5 (Public access); and HRS Chapter 520 (Landowners’ Liability). Councilmember Anderson also transmitted to your Committee various documents relating to public access to the beach via Stable Road and the dedication of access easements on unrelated property, and a copy of the draft Conservation Easement Deed.

The Planner noted that the Department had responded by correspondence dated June 24, 2005, suggesting changes to clarify the public access issue.

Your Committee received public testimony from three individuals. Two individuals testified in support of ensuring public access to the shoreline, one specifying support for Councilmember Anderson’s proposed amendment and the other referring to the requirements of HRS Section 46-6.5. The third testifier was the applicant, Henry Spencer, who confirmed that he had no objection to incorporating a condition for public beach access to the County, citing his correspondence dated June 20, 2005. He further confirmed that he would be satisfied with either Councilmember Anderson’s proposal or the wording proposed by the Department of Planning.

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Mr. Spencer informed your Committee that the Conservation Easement Deed with the Maui Coastal Land Trust has been executed.

Your Committee questioned Mr. Spencer on the intent and implementation of the provision set forth on Page 12, Paragraph No. 9 of the Conservation Easement Deed, which provides for "access by public". Mr. Spencer advised that he has no intention of incorporating a permit process, but would allow free access to the shoreline. He informed your Committee that he intends to ensure that sensitive lands mauka of the road, including dunes and wetlands, are protected. He further assured your Committee that he intends to allow people to travel down the existing road, use the existing parking area, and freely access the shoreline.

The Planner explained the concerns expressed in the Department's June 24, 2005 response. She advised that the Department suggests language to clarify that the public would be permitted access through the roadway (which may shift due to movement of the dunes), to a parking area, and to shoreline property. She noted that the reason portions of the property are being designated as Open Space is because they contain environmentally sensitive areas that the owner wants to preserve. In order to restore such areas, the public would ordinarily be excluded, and wetland enhancement efforts would include fencing off the area. The proposed conditions attempt to accommodate these concerns.

Councilmember Anderson informed your Committee that on June 17, 2005, Mr. Spencer provided her with a draft unilateral agreement incorporating the language of her proposed amendment, stating he had no objections to the amendment.

Your Committee discussed the legal status of shoreline access through Laulea Place, a private roadway. The Planner informed your Committee that when the beach access inventory study was done, the study identified Laulea Place as an access point, but it was never formalized in any document as a public access to the beach. The Department of Planning recommended that a 10-foot wide pedestrian accessway in favor of the County be provided through Laulea Place and that Lot 20 be used to ensure continued access to the shoreline from the residential areas of Spreckelsville. However, the Maui Planning Commission recommended that the proposed condition be deleted because the public was being permitted access to the shoreline from Stable Road, Laulea Place is a private roadway, property owners in the area opposed the use of Laulea Place as a public access, and additional shoreline accesses are available in Spreckelsville.

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Your Committee briefly discussed Native Hawaiian rights for traditional and customary access.

The Deputy Director informed your Committee that there is an existing pump station accessed by Laulea Place and that a utility easement exists through the subject property.

Councilmember Anderson noted that her proposed amendment would provide that public access to the shoreline will allow for a full range of traditional, customary, and recreational uses and ensure that the grant of easement occurs prior to issuance of any building permit. The amendment would further require that signage be erected on Stable Road and Hana Highway indicating the presence of the shoreline access. The amendment would also require that the easement be maintained by Old Stable LLC or the nonprofit organization holding the open space conservation easement.

Your Committee encouraged the Department of Public Works and Environmental Management to install appropriate signage in a timely manner.

Your Committee recommended three corrections to Councilmember Anderson's proposed amendment: (1) to correct "Old Stable Road" to "Stable Road"; (2) to correct the date of recordation of the "Unilateral Agreement for Public Access" to September 24, 1999; and (3) to correct the name of the declarant to A&B-Hawaii, Inc. Your Committee otherwise recommended that her proposed amendment be incorporated in its entirety into Bill No. 56 (2005). No further amendments to Bill No. 56 (2005) were incorporated.

Your Committee notes that any resolution accepting the dedication of the perpetual easement to the County for the public shoreline access should include a reference to possible shifting of the easement due to the movement of the dunes.

When asked by your Committee, the Deputy Corporation Counsel advised that the amendments to which your Committee had agreed warranted a return to first reading for Bill No. 56 (2005). She noted that the major change to the bill is the dedication of the easement to the County instead of to the Maui Coastal Land Trust. She advised that the applicable standard is whether or not the amendment changes the bill to such a degree that it is in essence a new bill.

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Your Committee clarified that the conservation easement would still be granted to the Maui Coastal Land Trust, and that only the shoreline access easement across that parcel would be granted to the County.

Your Committee voted to recommend that Bill No. 55 (2005) and Bill No. 56 (2005), Draft 1, be passed on second and final reading.

Your Committee is in receipt of Bill No. 56 (2005), Draft 1, approved as to form and legality by the Department of the Corporation Counsel, which incorporates the amendments to which your Committee agreed. Your Committee is also in receipt of an amended unilateral agreement, executed by the applicant and recorded with the Bureau of Conveyances, which contains the conditions recommended by your Committee.

Your Land Use Committee RECOMMENDS the following:

1. That Bill No. 55 (2005), attached hereto, entitled "A BILL FOR AN ORDINANCE TO AMEND THE WAILUKU-KAHULUI COMMUNITY PLAN AND LAND USE MAP FROM SINGLE-FAMILY TO OPEN SPACE, OPEN SPACE TO RURAL, AND OPEN SPACE TO PUBLIC/QUASI-PUBLIC FOR PROPERTY (E PAEPAE KA PUKO`A RURAL SUBDIVISION) SITUATED AT SPRECKELSVILLE, MAUI, HAWAII", be PASSED ON SECOND AND FINAL READING; and
2. That Bill No. 56 (2005), Draft 1, attached hereto, entitled "A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM R-3 RESIDENTIAL DISTRICT TO OS-2 OPEN SPACE DISTRICT, FROM R-3 RESIDENTIAL DISTRICT TO RU-0.5 RURAL DISTRICT, AND FROM R-3 RESIDENTIAL DISTRICT TO P-1 PUBLIC/QUASI-PUBLIC DISTRICT (CONDITIONAL ZONING) FOR PROPERTY (E PAEPAE KA PUKO`A RURAL SUBDIVISION) SITUATED AT SPRECKELSVILLE, MAUI, HAWAII", be PASSED ON SECOND AND FINAL READING.

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**