

PLANNING COMMISSION
COUNTY OF HAWAI'I

HEARING TRANSCRIPT
JULY 1, 2009

A regularly advertised hearing on the application of **HAWAII JOHNS, INC. (SPP 09-82)** was called to order at 9:54 a.m. in the Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawai'i with Chairman Rell Woodward presiding.

PRESENT: Rell Woodward
Takashi Domingo
Wallace Ishibashi
Zendo Kern
Shelly Ogata

Brandon Gonzalez, Deputy Corporation Counsel
Norman Hayashi, Planning Program Manager
Phyllis Fujimoto, Staff Planner
Jeff Darrow, Staff Planner
Maija Cottle, Staff Planner

And approximately 13 people from the public in attendance

ABSENT & EXCUSED: Andrew Iwashita

APPLICANT: HAWAII JOHNS, INC. (SPP 09-82)

Special Permit to allow the storage of portable toilets, parking for employee and business vehicles, and office on 1.65 acres of land situated within the State Land Use Agricultural District. The property is located at the southwest corner of Highway 19 and Kalopa Lower Road intersection, Kalopa Homesteads, Hamakua, Hawaii, TMK: 4-4-3:portion of 50.

WOODWARD: Agenda Item No. 4, applicant Hawaii Johns, Inc. requesting a Special Permit to allow the storage of portable toilets, parking for employee and business vehicles, and office on 1.65 acres of land within the State Land Use Agricultural District, located at the southwest corner of Highway 19 and Kalopa Lower Road intersection, Hamakua. Jeff.

DARROW: Thank you, Mr. Chairman. If I can direct your attention to the presentation map on the wall. Our next applicant, Hawaii Johns, Inc., is requesting a Special Permit to allow the storage of portable toilets, parking for employee and business vehicles, and an office on 1.65 acres of land. The location of this application is along, within the Hamakua district. More specifically we're looking at, in between the Honokaa area and the Paauilo area, which are identified on both the left and right sides of the map. The actual application area, the subject property is identified with a black outline. This brings a little closer view of the property. This is on the corner of the intersection of Mamalahoa Highway or Hawaii Belt Road,

as well as Kalopa Lower Road. Some people in this area refer to it as Gravity Road. And, again, the zoning in the area identifies this particular property as Agricultural 5 acres. The blue zoning represents Agricultural 40 acres. So in this particular area we're looking at all Agricultural zoning. This is an overview of the property. Again, we have the highway running on the upper portion of the maps through the middle. We've got scattered residences around, across the highway, as well as next to the applicant's residence. The particular area that we're looking at for the permit area is identified in this particular area. We have the storage of portable toilets as well as the parking for business employees; and there is an existing dwelling that a portion of it will be used for an office.

The applicant is requesting a special permit to allow the following uses on a 1.65 acre portion of their 4.033 acre property. They're requesting a storage of approximately 200 to 300 portable toilets, parking for employee and business vehicles which includes approximately 9 employee vehicles, 7 pump and flatbed trucks, 3 trailers, and several flat racks and, lastly, an administrative office in a room located within the existing residence. This is a site plan that, again, shows the highway on the lower portion of the map. We have here the area that will be used for the parking and the storage of the portable toilets, and the existing residence where the administrative office will be located. The remainder of the property is identified for agricultural or pasture type uses. This is a site photo that was taken on March 18, 2009. This was taken on their access from Kalopa Lower Road or Gravity Road; and it shows, you know, some of the items that were being stored. According to the application, the applicant has been in operation or this has been in operation for approximately 17 years. More recently, there was a complaint filed. Our Department followed up; and then the applicant is coming in for a special permit to legitimize the operation. Again, this is another photo from that site visit.

The Planning Director's recommendation is that the application should be denied or the request should be denied. The recommendation goes into detail regarding the reasons for denial; and I can entertain any questions if there are any questions.

WOODWARD: Questions for staff? I guess not at this point. So if we could have the applicant and/or representatives come up and give your testimony. All right, Mr. Melrose, welcome. Okay, if you could raise your right hand. Do you swear or affirm to tell the truth today before the Windward Planning Commission?

MELROSE: I do.

CUMMINGS: I do.

WOODWARD: Very good. Were you going to start, Mr. Melrose, or -?

MELROSE: You know, I'll start and just break ice a little bit. I'd just like to let Mr. Cummings introduce himself and, but I know that he's nervous so I don't know that he has a lot to say, he wants to say. So let me just let John introduce himself and give a quick introduction, and then I'll pick up for the rest of it.

WOODWARD: Okay. Mr. Cummings.

CUMMINGS: You've got to forgive me. I'm very nervous. My name is John Cummings. I live at 44-2307 Mamalahoa Highway. I take medication for my kidney transplant so it makes me very emotional, the medication. So I'm sorry. But I run a small family business. I rent portable toilets, me, my wife, my sons, and I have seven employees. We've been doing this for about 17 years now. And I try to be an honest businessman. I do a lot of charity things and most of, about 100 of my toilets is for agricultural use. I rent to people who grow plants and stuff like that. But, you know, I try to help people who call and ask for our help cause, you know, cause of the work I do. Sorry. But before I give this over to Jeff I'd like to say that I'm amazed on what you guys do. You guys don't get paid but you guys come here and listen to people like me and try to help us. So I'll give it over to Jeff. Thank you.

WOODWARD: All right, thank you. Any questions for Mr. Cummings? All right, Jeff.

MELROSE: Yeah, thank you. Thank you, John, I know that's not easy. You know, I recognize the, and read through the -.

WOODWARD: If you could give us your name and address.

MELROSE: Oh, I'm sorry, Jeff Melrose, 1405 Waianuenue Avenue, Hilo 96720. We've read the Planning Department's background report and recommendation and understand the rationale they presented for a denial of this application. I think our task here today is to kind of, is to take a couple of those specifics and talk about some of the specifics of the recommendation, put a little bit of a personal face on the business, because this isn't just a simple application of State Land Use law. It is an existing business that supports multiple families in a rural community. So this issue was not really provoked by neighbor complaints. In fact, I think -. Did you guys just get the letters -? I think there are three letters from immediate neighbors, and I believe there's actually a neighbor here who's willing to, who drove down for the purpose of testifying in favor. Mr. Cummings is a, you know, has built his business one small piece at a time, one step, backyard, slow, from the bottom up. He's a good competitor. He reaches out to the community, and I think helps in a lot of different ways. But I think it's partly, it was a competitive issue that drove the complaint that brought us here today. And I think Mr. Cummings knew couple years ago that this was something that he needed to get. He's not making any excuses for not getting it. He made a couple of efforts to try and do so. But he had the citation, so here we are; and we're here just 90 days after the time the citation was here. So that's thanks to the Planning Department's quick movement, but I think it shows you his intent.

Generally speaking the State Land Use law is a pretty blunt instrument for managing land use issues in rural communities, as different as they are state-wide. It's a fairly clear statement about the importance of one element or quality of land for which we have about 2,000,000 acres of. So, and it can also be a very sharp instrument, and it can have the impact of impacting a small business like this in a very harsh way. So I think what I want to do today is kind of blur that line and talk with you folks a little bit about what are the issues that are really associated with this

business and how it applies in this case.

And the first issue I think is that, we understand the land is ranked B, it's Important Ag Land and it's prime. Those are three different separate agronomic distinctions about the value of agricultural land. There are not a lot of B lands on the Big Island but there are some on the Hamakua coast. Those land use classifications or those soil classifications are not necessarily the best way to predict the best use of agriculture or to show where agriculture is going to happen. Agriculture happens on all kinds of lands in many places for a variety of reasons. So I wanted to spell right off the notion that Hawaii Johns is any kind of threat to regional agriculture. It's a one-acre really, aside from his house site, a one-acre area of land that he's using for this business. But what the, if you look at what's going on around the outside of this property in the Kalopa area and really on the Hamakua coast in general, the predominant agricultural use of agricultural land is either pasture or forestry. And this one-acre lot is probably not a likely forestry place, commercial forestry operation. So if you use the cattle as a reasonable opportunity, as a reasonable measure, what's an acceptable ag use on these properties, it's certainly what most of the neighbors do. The land in question is worth about half a cow over 18 months. There's, you could produce about a half a cow if you fed it and sold it. That's the kind of agricultural production that's at risk in this kind of a conversation. So I just want to put that half a cow up against the kind of businesses that his neighbors have not complained about and for which he hires 10 people total. So I think that from an agricultural perspective, this is really not a threat to the bigger issue about ag sustainability.

There's some statement in the recommendations that talk about this as being an island-wide business therefore should be, could be located anywhere. First off, Hawaii Johns really serves the Puna to North Kona service area, and has been doing that for a decade or so; and they're about in the middle of that. That's, it's in their backyard. It allows them to keep and maintain a close eye on their equipment, and that they are, so I don't know that there's anywhere on the island they could go. They have been looking for some time. And this has been an on-going conversation about finding locations for industrial use. The location of existing zoned industrial property available today on the MLS today, if you go and look at it, is predominantly in the Hilo area. There's some up in Kaumana, there's some lease land out here in the industrial area. But it's a long distance from where they currently run their business. The available industrial land on the Hamakua coast is essentially in the places where the mills used to operate – Haina, Paauilo, actually not in Paauilo, Hakalau, Ookala. So, and in our looking at each one of those circumstances, there really is not available land. Right now, when we got the citation, Mr. Cummings had been servicing the Hamakua Energy, still is, Hamakua Energy Partners. So they actually took some of the toilets that are now coming back. Understand that this is a low time in the economy so a lot of the construction material is coming back, the things that have been out on construction jobs. So he has now got a surplus of these things that have really been out for the most part; and he put them in, in Haina. That's an okay short-term place. It has got no fencing, it got no observation, and no clarity about the future of the land. It's actually in

foreclosure. This is on the sawmill property. So in a lot of ways the options that he has outside of the place that he has been in all this time are very limited.

And I just want to suggest to the Commission, because you're going to see this issue come up in the Kau Community Development Plan and in the Hamakua Development Plan, that a lot of what drives the economy in rural Hawaii are small people doing small things in their own backyard in a way that doesn't affect their neighbors. And if there's a strict application of the State Land Use Law we're going to pull those feathers off of that wing of rural economy. So I think what the Hamakua Community Development Plan needs to look at is how do you actually enable and cushion agricultural or non-agricultural uses that actually do a sustained effort to fund the economies of rural Hawaii. So I just want to put it in that broader context for a minute because I think it is an issue that's going to come to you folks; and it isn't just a matter of applying simple hard black and white rules on land. So finding alternative locations is hard in this place; and we know that that has got to change, the community has actually got to revisit that issue a little bit.

The application refers to this as a permanent use of agricultural land. This is not a quarry. This is not a job that's going to dig up soil and take it away. They're not going to pave it over and put rebar in it. At any point if this business is stopped, within a year it will be a pasture again. It will be fully grassed and you could have your half a cow. But that's what the issue is in terms of use. So we never perceived this to be a permanent entitlement. We perceived it to be a period of years. And anything over a period of 5 years, say you let the community development plan process work, you kind of look at what, how this region wants to look at these kinds of decentralized economic uses. If we could get a use for a period of years, that will be acceptable. The recommendation calls it an irreversible use of ag land; and we just don't think that's what we expect to be doing here, and we don't think that that's what it really is.

The recommendation talks a little bit about visual impact; and I'm sure if you guys have driven along this coast you've probably seen these units. We're fortunate to have a good barrier on the makai side. But I'll tell you right after this thing came one of the first things John did is get another 70, 75 trees planted all around the outside, fast growing podocarpus trees, so that visual impacts can be mitigated; and they are being mitigated. They will be out of sight in a short period, that visual impact certainly as it relates to the neighbors. If that was the driving feature, that's where the complaint would have come from, but it did not. And all of the neighbors have been supportive; and we've got written testimony to that effect.

So I think that's, you know, what we're asking the Commission to do is to look at this as a, one, a right for a period of years, two, for a reasonable use of a small amount of land that produces a significant amount of economy with a very little cost, and to allow Mr. Cummings and his family to continue to do and to try and mitigate any visual impacts or any kind of neighbor's thing. He's very willing to try and address those issues. But we clearly ask that this Commission consider this not to be a kind of an end to the business that he has built.

The last thing I want to add is that from an agricultural perspective, from a point of view of using this business's role in agriculture, today probably more than a hundred of his units are on farms,

at farmers' markets, in nurseries, on taro patches, inside macadamia nut farms when pickers are there. It services the charter schools and the park at Waipio, you know, the beach at Waipio, with four-wheel drive that he adapted just to be able to make that service. He's probably the largest County provider at the beach parks around the County of toilet operations. So from an agricultural perspective he is a partner in agricultural businesses and does that on an on-going basis. So I just want to build that bridge to the agricultural industry which he indeed is and has been for the whole time of his business. So I'll leave it at that; and I look forward to your questions.

WOODWARD: Thank you. Any questions for the applicant or Mr. Melrose?
Commissioner Domingo.

DOMINGO: Thank you, Mr. Chairman. Thank you, Mr. Melrose. With regards to the support and/or negative reactions from the community, I see that there are three letters submitted this morning by people who live or are adjacent to the property or abutting the property, and that from the every day perspective as they look and drive by they see the so-call operation every day -- and they have, in that way and with that ability to see the operation they've even submitted letters of support for him, for the applicant. And I saw across the street also to which Mr. Tim Mann is present, and I think he would be also presenting verbal support for this issue. And another item that I thought I'd just bring up with you is the fact that in their letter of denial, you know, "The approval to allow a portable toilets storage baseyard on this property would result in the conversion of land identified as Prime Agricultural Land to an irreversible non-agricultural use, which would be against the State Land Use Law and Regulations, which are intended to preserve...." Now as you made it clear this is perhaps short term or just a place for storage, and nothing is to be built or put there that would render this property in a different designation as prime agricultural land. It's just something that they put there, and tomorrow or next week they can take it away, and it will still be prime agricultural land for that particular use. So it doesn't take anything away from this designation. Am I correct?

MELROSE: Yes.

DOMINGO: Okay, thank you. Because I see that even some, in some other applications with regards to cellular towers that, you know, they're established on prime agricultural land with Soil Category C rating, of course this is B. But when you consider the entire Hamakua and the availability of agricultural lands for that purpose, you know, there's so much land; and this is only 1., 1.5, 1.6 acres.

WOODWARD: All right. Commissioner Ogata.

OGATA: I just have a question on the time period. So I know you mentioned that this is, or that you're thinking that this is going to be a temporary storage facility until, I guess, or baseyard facility until the Hamakua Plan CDP comes out and you can figure out if there might be other more well suited industrial zoned areas, I guess, that -. Is that the intent then to -?

MELROSE: Well, let me just state that a little more clearly. I think what we're saying

is that it's, we're not saying that this is not a good place for the business. We think it actually is. I mean it has operated that way for a long period of time. But as far as the permit is concerned we never perceived this to be, you know, there you have it, go forever. A lot of your permits have timeframes on them, and that times change and things change. And if there is, you know, alternatives created, then that makes sense to come back. So I wouldn't say that this is a temporary solution because this actually has been in place for quite some time. What I'd say is that the term for this permit is something that I think is very reasonable to set a term. And to do so, you know, we're suggesting 5 or more years, but I think the, partly because I know those are terms you use in other permits. And I think from our perspective the CDP would have been done and maybe that conversation would get more clarified. And so that's the way I would say, that's not so much as a temporary use -.

OGATA: Okay, okay. I understand. Thank you.

WOODWARD: Commissioner Ishibashi.

ISHIBASHI: Thank you, Mr. Chair. Mr. Cummings, thank you. You do a great service to the community and it's a necessary business you run for our community. Yeah, and you do a good job, too. My question I had was, you know, the pumping of these portable toilets, how often is that done and how often, how many loads or whatever you do for -?

CUMMINGS: Some of the toilets is like twice a week, some three times. But we're dumping, there's a dump site in Hilo and there's a dump site in Kona, nothing comes back to the yard, nothing at all. And then when we pick up the toilets, the toilets are cleaned out on the site, loaded on the truck and then brought in. Yes, we bring home no waste. Maybe sometimes get like three or four toilets in the truck, but that's it.

ISHIBASHI: So when you wash your portables it's at the dump site?

CUMMINGS: At the job site. Like the truck loads, the truck is equipped with clean water and, you know, half/half, clean and, well, waste water. So as they deliver they clean them down right there and then they move on. So once in a while we wash them down in the yard, that's rarely. But most time it's clean on the site.

ISHIBASHI: So the greater service to the community is the jobs that you provide to the community. The residual effects of their jobs are greater than half a cow so I appreciate the business. And I understand the problem that the County is facing with your business, but I commend you for a job well done.

CUMMINGS: Thank you. You guys gotta forgive for the beginning part, you know. I can walk in a construction trailer with eight construction guys inside that, walk right up to them and talk the shit, excuse me, just talk crazy to them. But when I'm in this kind of situation, I cannot handle. So I apologize for that.

WOODWARD: No apologies necessary. Thank you. Any further questions? All right,

we do have -. Thank you, gentlemen, if you would be seated. We do have one person signed up to testify from the public, Tim Mann. Good morning, Mr. Mann. If you'll raise your right hand. Do you swear or affirm to tell the truth today before the Windward Planning Commission?

MANN: I do.

WOODWARD: Very good. If you'll give us your name and address, and then you may proceed.

MANN: Aloha, Members of the Committee. My name is Tim Mann. My home is at 44-2321 Middle Road, Honokaa, Hawaii 96727. I'm a farmer and a small business owner for the last 33 years in Hawaii. My two businesses were tied to the construction industry and crashed; and the farm saved our butts. The farm is currently employing 5 people right now. I have a farm right across the highway from Hawaii Johns. I've known John for almost 25 years. I've been a neighbor across the street from him for 5 years. I know all the neighbors in the area fairly intimately, and I have never heard a negative comment about him personally or about his business operation. And we've never smelled anything, that's the most important thing. His operation is quiet, clean, it provides a necessary service to the community at a reasonable cost. I personally feel it's in keeping with the agricultural zoning of the area.

One of the things Mr. Cummings' representative noted is that there's little or no selection of available commercial property in the area. I've also looked for commercial sites for a business venture of mine and I found nothing closer than Kawaihae or Hilo. This unreasonably burdens the possibility of business operations in this area.

My personal feeling is that this is a business that benefit the residents, benefits the community, is an asset to the community, and it is something that's, it deserves to continue.

On the other side of that, within three quarters of a mile of this area I know of two small sawmills, two furniture manufacturing businesses, a motorcycle shop, an auto paint shop, a machine shop, several contractors who store their equipment, two small trucking companies. These are all located on ag zoned properties; and none of them to the best of my knowledge has a special use permit. However, all these businesses in the aggregate probably employ somewhere between 30 to 45 people, full-time and part-time. Now I don't know how it is in Hilo but we've been hit really hard in Hamakua. And anything we can do to conserve jobs, to help keep our community intact, keep the families together is, I mean, you've seen me, you know -. I'm employing people partially to give them work, not because we have the money to do so; and we're right on the edge ourselves. So thank you for your consideration of John's permit.

WOODWARD: Thank you, Mr. Mann. Any questions or comments for Mr. Mann? All right, seeing none, you may be seated, sir. Is there any further discussion? Commissioner Kern.

KERN: Yes, comment. I've been a customer of Hawaii Johns, my construction company, for about 5 years. I want to state that for the record. We never even met, but I do business with them. I have no interest in their business whatsoever. They run a good business,

dealt with them, they really do. It's clean, it's tidy, it's professional, it's not a fly-by-night. They've always been respectful of us; and it is tough times right now. Running a business is challenging; and everyone is on the brink of falling off. And I think we need a little stimulus for small businesses. So I'm getting emotional now, too.

I think it would partially be detrimental to pull the rug out underneath the bottom of this business at that location in this economy right now. I would support an approval of it with some sort of time limit on it or when the CDP is brought into place which will identify more potentially industrial light, light industrial land that could be used in that area.

So I just wanted to say that I support it, and they're good people, and they need help. Thank you.

GONZALEZ: Mr. -?

WOODWARD: Yes, sir. Yes, go ahead, Mr. Gonzalez.

GONZALEZ: Thank you, Mr. Chair. I would like to point out for the Commission, thanks to the brains of the Department, that if the Commission is planning to not follow the recommendation of the Department that this request should be denied and instead wants to contemplate approving it, that the Commission does not have the final authority to approve this permit in this case. Pursuant to Hawaii Revised Statutes Section 205-6, subsection (d), this is a special permit for lands, the area of which is greater than 15 acres or -. This is what's applicable, lands designated as Important Agricultural Lands shall be subject to approval by the Land Use Commission. Therefore, I would like to advise the Commissioners that, if you're contemplating going against the Director's recommendation, any motion that you make should state that this motion, is that the Planning Commission send a favorable recommendation to the Land Use Commission for the request for a special permit based upon the public support, the public benefit, and the testimony presented at the hearing today. Thank you, Mr. Chair.

WOODWARD: Thank you, counsel, very valuable information. I would just like to kind of echo what Commissioner Kern said. It seems to me that, and I believe Mr. Melrose made a good point, this is not irreversible use of agricultural land, and they're not asking to be able to have this in place forever. I think a reasonable approach would be to suggest a 5-year, well, in this case the Land Use Commission would have to issue that, but we suggest that the Land Use Commission give them a 5-year permit with a potential 5-year extension. I do agree that you want to protect prime agricultural land, but this is a special circumstance. And I would suggest that if we're going to recommend that to the Land Use Commission there'd be certain conditions. One would be that there be no permanent structures created, that there be a limit of 5 years on this with at most one extension, with the idea being that we do want to get this back into agricultural use at some point without unduly burdening the business that is currently there. That should give them plenty of time to find an alternative site. So that would kind of be where I'm coming from; and I do appreciate our counsel's, Mr. Gonzalez's, input. It kind of gives us an idea of where we might want to go. And that being said, anybody else have any comments or would we, is there a motion that somebody would like to entertain?

DOMINGO: I'd just like, Mr. Chairman, I'd just like to confirm what the counsel stated in regards to the need to go to the State Land Use Commission. I understand because it is within the State Land Use Agricultural District and that it's a prime agricultural parcel -.

GONZALEZ: Yeah, I believe that it has been designated Important Agricultural Land as well as classified as -. Yes, the simple answer is yes, Mr. Domingo.

DOMINGO: And it's only because we're contemplating action with regards to going against the recommendation of the Planning Director that that triggers it?

GONZALEZ: No, I wanted -. Yes, I want it to be clear that you folks and the applicant was aware that by, this body doesn't have the final say in approving the requested use, that because of the State law there's another body of the government that has to give you final approval.

DOMINGO: What's with regards to cellular towers in State Land Use Agricultural Districts?

HAYASHI: Perhaps I can respond to that. This particular provision of the Statute applies to any property that is designated as Important Ag Land. Currently as far as we're concerned we don't know what the definition of Important Ag Land means in the Statute. This is why we need to check with the State Land Use Commission as to what is the definition. If there is no current definition for Important Ag Land then perhaps the action of the Planning Commission, if they were to approve the application, would be final. However, if they determine that Important Ag Land is determined as lands classified as soil, Class Soil B by the Land Study Bureau or on the County's General Plan as Important Ag land, then that would have to have the State Land Use Commission's approval. So it doesn't necessarily mean that just because you're overturning our recommendation that it will go to the State Land Use Commission. Any time that the property is situated within an area designated as Important Ag land or if it's more than 15 acres, it would be going to the Land Use Commission for ratification.

DOMINGO: Thank you. Of course this not being more than 15 acres or even near that size, I'm just wondering -. As long as I've been here on the Commission we've entertained a number of special permits. And has it at any time necessitated that measures taken action on those applications have been forwarded to the State Land Use Commission for their input or for a final decision?

HAYASHI: Well, this provision of the Statute was just recently brought to our attention; and this would be the first time that such a decision would be made to send it to the State Land Use Commission. But then again, as I indicated earlier, we may have to check with the State Land Use Commission as to what is defined as Important Ag Land.

DOMINGO: So if this is the first item or issue that we're going to, we would do and

refer it to the State Land Use Commission, then other items on the agenda which would require a similar action by the Planning Commission would then also be referred to the State Land Use Commission for some interpretation or their opinion?

HAYASHI: No. I think what we need to do is, first of all, check with the State Land Use Commission as to what the actual definition of Important Ag Land is. Once the determination has been made, then we can say that, okay, whenever an application comes in and it fits within this category of being Important Ag Land, then any approval by this Planning Commission would be forwarded to the State Land Use Commission for their approval; and it's only for approval recommendations. If the Planning Commission at this level denies this particular petition or any other petition under similar situation, it would be a denial.

DOMINGO: So if this Commission recommends approval of this petition and the Commission would make a decision as to no effect, then it will come back to the Planning Department or the Commission for further consideration?

GONZALEZ: If I may -. Okay, so if I may step in at this point. So, Commissioner Domingo, is your question basically if this section is triggered we cannot outright approve, we conversely cannot outright deny? Is that what you're trying to say?

DOMINGO: Well, that's my interpretation right now. That's how I look at it.

GONZALEZ: Okay, I can, well, if we can take a recess, I'll go look it up, because I think that's a valid question. I kind of have an idea of what is applicable here but I just want to make sure. So -.

WOODWARD: Break time, ten minutes.

RECESSED The Chair called a recess at 10:31 a.m.

RECONVENED The meeting reconvened at 10:41 a.m.

WOODWARD: All right, will the Planning Commission please come back to order. Mr. Gonzalez, I believe you have, got some research for us.

GONZALEZ: I believe the Department has clarified for us that the Planning Commission has the final authority to deny special permits. Only in cases where it involves this section of the Statute, if they decide to approve such action, they do not have final authority to approve. It has to be forwarded. So they can deny outright. But if they approve, they don't have final authority to approve, they have to get it ratified by the Land Use Commission.

WOODWARD: All right. Discussion? Commissioner Ogata.

OGATA: I'm ready to make a motion.

WOODWARD: Go for it.

OGATA: Okay. I move that the Planning Commission send a favorable recommendation to the Land Use Commission for the request for a special permit, SPP 09-82, based upon public support, public benefit, and the testimony provided today. And if the LUC determines it does not have to ratify the actions of the Planning Commission, then SPP 09-82 will be deemed approved with conditions by the Planning Commission. And is it, do you have some conditions?

HAYASHI: If you'd like, Mr. Chairman, I can provide you with the conditions that - .

WOODWARD: Yes, I would like to get -. Yes, please; and then I think we ought to ask the applicant if they're comfortable with it.

HAYASHI: Okay, first, I don't have the exact wording. Basically this is what it is - .

WOODWARD: Give us your best shot.

HAYASHI: Condition 1 would be the applicants, successors or assigns shall be responsible for complying with all applicable conditions of the permit. Condition No. 2 would be the permit shall be effective for 5 years from the date of approval. And we would have the standard plan approval condition, including landscaping. Condition No. 4 would be that there shall be no on-site disposal of waste or washdown of equipment on the property. Condition 5, comply with all applicable federal, state and county laws, rules and regulations. And, finally, the standard extension condition. Actually that will be all of the conditions.

WOODWARD: Well, I would suggest one other, and we mentioned this, that there be no permanent structures constructed in regards to this business - .

HAYASHI: Okay.

WOODWARD: On the site for this business. Are those conditions acceptable to the applicant and Mr. Melrose?

MELROSE: May I ask a question?

WOODWARD: Yes. Okay, you've been sworn in so - .

MELROSE: I want to make sure, if those are just the conditions that I've heard that that's all associated with the application, I would ask that you include your standard extension provision so that there is -.

WOODWARD: He did.

MELROSE: But I, no, he didn't.

WOODWARD: Didn't you?

HAYASHI: We would have a, we can include the standard extension condition; however, it's questionable whether we can grant an administrative time extension because the Land Use Commission would be the body to, if the Land Use Commission were to be the body to approve this application, then they would have to, unless they delegate that to the Planning Department.

WOODWARD: Okay, how about if we said something to the effect that our standard condition we have will be decided by the Land Use, the extension will be decided by the Land Use Commission or the Planning Commission, depending on who has the jurisdiction in this matter? Can we do that or something close to that?

HAYASHI: Okay. Yes, we can use our normal administrative time extension condition, and any future time extension would have to be ratified by the, either the Planning Commission or the State Land Use Commission.

WOODWARD: Is that acceptable?

MELROSE: That's acceptable. Let me go back and understand, cause I'm not sure that, I think I was out of the room when you started your motion. What I understood the issue to be is that there was a, somehow a change in the law that brought up a new wrinkle in the approval as it relates to Important Ag Lands, that specific word, Important Ag Lands.

HAYASHI: Right.

MELROSE: My understanding is that the State has identified a methodology for identifying Important Ag Lands and formally has adopted two changes for ag lands, one on the County of Maui, A and B both, and one on Kauai. So they've actually adopted this as part of the voluntary step of determining agricultural, Important Ag Lands. But the nonvoluntary process of determining at the State level the Important Ag Lands that is in conformance with US, the Hawaii Constitutional requirement has not proceeded. So that terminology, Important Ag Lands, as it relates to the State law is still in flux and moving; and these lands are not so designated. When the County redid their General Plan the Director changed the definition of what used to be important and/or intensive and extensive ag lands and created a new County-based, but not well bedded, designation at the GP for Important Ag Lands. That is not the State law. That is not what the State, it's not the same designation as the State. And I think that's what you're asking,

is to have the State opine as to whether or not those two things are somehow connected?

HAYASHI: That is correct.

MELROSE: Okay.

HAYASHI: Exactly.

MELROSE: Okay. So if that's the case, I don't have a problem cause I don't think they're connected. In fact, I know they're not connected, cause the law doesn't say that as far as the State law. And this says, it's really, I understand the use of the words -. And it's one of the areas where we're going to come up with this kind of cross-over using the same words for two different things. Naming your twins the same thing isn't a good thing sometimes, right? But I think if that's the case, I'm not concerned too much about this issue. Well, I appreciate your raising it but I'm not really, I don't think it's, I think the answer is going to come up pretty clear. So that being the case, the conditions that he spoke to and the addition of that additional extension is acceptable to us.

WOODWARD: Very good. Okay, do we have a second?

ISHIBASHI: Second.

WOODWARD: All right. Any further discussion? Maybe we ought to just have the motion read again, just so everybody is clear.

OGATA: Okay. Let's try this again. The motion is that the Planning Commission will send a favorable recommendation to the Land Use Commission for the request for a special permit, SPP 09-82, based upon public support, public benefit, and testimony provided today. And if the Land Use Commission determines it does not have to ratify the actions of the Planning Commission then SPP 09-82 will be deemed approved with the conditions stated by the Department. And that's it, period.

WOODWARD: All right, great. Mr. Melrose.

MELROSE: I didn't get the first portion of that when it was first read.

WOODWARD: Okay.

MELROSE: Can I have it read back for a moment?

WOODWARD: Okay. That's why I wanted everybody to be clear -.

MELROSE: Yes, thank you. Thanks for rereading that.

WOODWARD: About what the situation is.

MELROSE: I think I'd just like to, I mean like this is an approval. You're now, you have the authority to approve this. You've had the authority to approve special permits in County law for many years. So to in this case you're only sending a positive recommendation subject to LUC because staff has a question about what IL is seems a little odd. It seems to me the staff ought to find this definition about what IL is and the Commission needs to make its decision based on the laws that it was granted.

HAYASHI: Mr. Chair, because there is this concern as to what the definition of Important Ag Land is and whether this property has been identified as or not identified as Important Ag Land by the State Land Use Commission, staff would suggest that the Commission continue this hearing and give the staff the opportunity -.

WOODWARD: Would do what?

HAYASHI: Continue this hearing and give the staff the opportunity to contact the State Land Use Commission and bring this matter back to the Planning Commission.

GONZALEZ: Okay, well, I'd like to address the -.

WOODWARD: Mr. Gonzalez.

GONZALEZ: The only reason why the Commission, a motion language was drafted was to expeditiously handle this matter. Because the motion as drafted allows the staff to verify with the Land Use Commission whether it's applicable. And if it's not, you don't have to come back again for another hearing, and we take more public testimony, and then there's another vote on whether to approve. So, I mean, if you think about it that way, -.

MELROSE: Okay, I got it, I got it.

WOODWARD: All right.

MELROSE: It's subject to a communication not having to show back up in this process; and we don't necessarily have to go to the Land Use Commission to have this discussion with them.

GONZALEZ: If they say they don't have to ratify the action then it's an approval from the Commission. That's why it's drafted that way.

MELROSE: Okay. Thank you.

WOODWARD: Great. Are you good with that?

MELROSE: That's good. Thanks.

WOODWARD: Okay, let's take a vote.

DARROW: Thank you, Mr. Chairman. I'm not going to reiterate the motion, but I'll go ahead and take the roll call. I did not get the second. I'm sorry. Who seconded?

WOODWARD: It was Commissioner Kern or Ishibashi.

KERN: Ishibashi.

WOODWARD: Ishibashi.

DARROW: With that I'll take the roll. Commissioner Ogata?

OGATA: Aye.

DARROW: Commissioner Ishibashi?

ISHIBASHI: Aye.

DARROW: Commissioner Domingo?

DOMINGO: Aye.

DARROW: Commissioner Kern?

KERN: Aye.

DARROW: And Mr. Chairman?

WOODWARD: Aye.

DARROW: The motion passes 5 to 0.

WOODWARD: All right. Once we figure out what's going on you'll be notified in writing.

At 10:45 a.m., the Commission took up Items 5 and 6 on its agenda.

At 11:18 a.m. the Commission again brought this matter up.

HAYASHI: Mr. Chairman, before you go into the next item of business, I just wanted to let the Commissioners know that after the Hawaii Johns's application, I did contact the State Land Use Commission's Executive Officer and he indicated to me that none of the lands on Hawaii County are designated Important Ag Lands. The procedure is that how the, this is the procedure. If you as the landowner wanted to identify the property as Important Ag Land you will petition the Land Use Commission to have that done. So it will go through the hearing process; and the Land Use Commission would issue a declaratory ruling indicating, yes, we agree that the land should be placed into the Important Ag Land category. So that's how the Important Ag lands are designated. There is a situation in Honolulu, Oahu, where the State Land Use Commission recently approve a petition for a declaratory ruling to have one of the large landowners designate that land as Important Ag Land. So basically that is the process.

So for the Hawaii Johns's application, your action is final.

WOODWARD: So we did it, it's done.

HAYASHI: Yes.

WOODWARD: Got it done, good. Okay, thank you, Mr. Hayashi.

The discussion ended at 11:20 p.m.

Respectfully submitted,

Sharon M. Nomura, Secretary
Windward Planning Commission