

PLANNING COMMISSION
COUNTY OF HAWAII

HEARING TRANSCRIPT
AUGUST 31, 2007

A regularly advertised hearing on the application of **ALII GARDENS MARKETPLACE (SMA 358/USE 142)** was called to order at 4:35 p.m. at the King Kamehameha's Kona Beach Hotel, 75-5660 Palani Road, Kailua-Kona, Hawaii, with Chairman William Graham presiding.

PRESENT: C. Kimo Alameda
William Graham
Alvin Rho
Rodney Watanabe
Rell Woodward

ABSENT & EXCUSED: Takashi Domingo
Andrew Iwashita
Shelly Ogata
Rene' Siracusa

Ivan Torigoe, Deputy Corporation Counsel
Christopher Yuen, Planning Director
Norman Hayashi, Planning Program Manager
Phyllis Fujimoto, Staff Planner
Jeff Darrow, Staff Planner

And no one from the public in attendance.

APPLICANT: ALII GARDENS MARKETPLACE (SMA 358/USE 142)

Amendment to Condition No. 5 (time to complete construction) of Special Management Area Use Permit No. 358 and Condition No. 5 (time to complete construction) of Use Permit No 142 which allowed the establishment of an open-air marketplace, parking area, and related improvements. The property is located across from the entrance to the Alii Point Subdivision and bordered by Alii Drive and the proposed Keauhou Parkway right-of-way, approximately 120 feet northwest of Kahakai Elementary School, Puapuaa 2nd, North Kona, Hawaii, TMK: 7-5-20:70.

GRAHAM: The applicant is Alii Gardens Marketplace. The application refers to SMA Permit 358 and Use Permit 142, and both cases the applications asked for an amendment to essentially allow more time. We have an amendment to Condition 5 of SMA Permit 358 and Condition 5 of Use Permit No. 142 which allowed the establishment of an open-air marketplace, parking area, and related improvements. This property is located across from the entrance to the Alii Point Subdivision and is bordered by Alii Drive on the makai side and the proposed Keauhou Parkway right-of-way, approximately 120 feet northwest of Kahakai Elementary School, in Ahupuaa of Puapuaa 2nd, North Kona, Hawaii. Jeff?

DARROW: Thank you, Mr. Chairman. Last application of the day. If I could direct your attention to the location map, the area of this application is North Kona. More specifically, we are looking at Alii Drive running along the bottom of the map in a north-south direction. Through the middle of the map, we have Queen Kaahumanu Highway. And you'll notice a red line moving in between the two, Alii Drive and Queen Kaahumanu Highway, that represents the Special Management Area. The area of this application is on the mauka side of

Alii Drive within the Special Management Area. The zoning for the property is identified as Agricultural 5-Acre. State Land Use is Urban designation. This is very near to our application earlier, the Association of Apartment of Owners for Hale Kai O'Kona. Just mauka of this development is the Kahakai Estates, and to the north we have the recent SunStone development located in this particular area.

The applicant before us is Alii Gardens Marketplace, and they are requesting a time extension to Condition 5 of both the Use Permit 142 and the Special Management Area Use Permit 358. Both of these Permits were originally approved on December 14, 1995 to allow the development of an open-air marketplace, parking area, and related improvements. The applicant has submitted to the Planning Department a kind of a sketch of what's on the ground, and this was submitted on March 13, 2004. So this is pretty close to what's on the ground now; there may be some minor changes. We have Alii Drive running on the lower portion of the map. Identified on the map we have approximately 40 kiosks, and these are permanent structures in which the open-air marketplace is occurring. Additionally, we have the parking area identified in this area. And this area here is mainly the area for Phase I. Phase II is identified in the upper portion of the map, which hasn't been constructed; and that's the reason before us today the applicant is requesting a 5-year time extension to complete construction of Phase II and Phase III, which hasn't been completed at this date.

This situation is unique. In reviewing this request from the applicant, it has been determined that the original request to allow the open-air marketplace within the State Land Use Urban District, as well as within the Agricultural 5-Acres, is not allowed through the Use Permit process. In the Zoning Code, an open-air marketplace is not listed as a use that can be permitted through a Use Permit. The Planning Department did advise the applicant to proceed for applying for a Use Permit to allow this to become a permitted use, and the applicant proceeded with the information given to him from the Planning Department, and the two Permits were approved. And since then, since 1995, there's been numerous actions that have occurred between the applicant and the Planning Department, including three Plan Approvals, an amendment to the Permit for Condition 12, additionally a 5-year administrative time extension. In review the Planning Director came to the conclusion that based on this information – the fact that there are no options as far as permitting this through the Use Permit option – he is stating that he is advising the Planning Commission that the time extension cannot be legally granted and that the Planning Commission, therefore, should deny the request. If I could also just read a portion of the Recommendation; it says, “The question before the Planning Commission is how to proceed with the knowledge that the use was permitted through a mistaken reading of the Zoning Code. There appears to be no options to grant the time extension requested for Phases II and III legally without continuing the mistaken reading of the Zoning Code to accommodate the desired result. The Planning Department would allow the operation of Alii Gardens Marketplace first phase as approved and as it has been established up to this date without the temporary structures which are no longer allowed, but we cannot support the proposed time extension request for Phases II and III.”

Additionally, since the Planning Department sent the Background and Recommendation to the Planning Commission, we have received comment letters from the Department of Health and the Department of Public Works. And additionally, we have received a letter dated August 27 from the applicant's representative detailing their objections to the recommendation. Are there any questions?

GRAHAM: Thank you, Jeff. Commissioner Watanabe?

WATANABE: I have a question; this probably is more for the Director, though. Let's assume the interpretation now is correct that there is no legal means, and so you're going to, like we are playing damage control. Is there any other options such as -, they would have to go for rezoning then or something to that effect in order to meet that legal use of the property?

YUEN: Yes, there are legislative means that would go to the County Council, like a rezoning, like an amendment to the Zoning Code to expand the list of things that can be done with a Use Permit in the zone that they are in. I do not see administrative means.

GRAHAM: Commissioner Alameda?

ALAMEDA: This is to Mr. Director. I guess the applicant's claim is that the Department didn't spot this Permit 142 as inadequate 10 years ago or a little over 10 years ago. Does the Department fail to spot other -? Is this common or uncommon or -?

YUEN: I'd say this type of mistake is quite uncommon; I can't think of something parallel to it where a Use Permit was granted for something that could not be Use Permit. There are other kinds of mistakes that happen certainly, but not this type certainly.

ALAMEDA: Okay, thank you.

GRAHAM: Other questions from Commissioners?

WOODWARD: Mr. Chairman?

GRAHAM: Commissioner Woodward?

WOODWARD: Well, it's not really a question, just a comment. I feel bad about this, I really do. I mean this was a mistake that has been overlooked for 10 years. And now the person is going to suffer damages, not us. You know, I think we ought to come up with some remedy whereby we can live by the original agreement, whether that be rezoning, whether that be a variance. You know, we are taking it out on this poor guy for a mistake we made 10 years ago and didn't recognize until now. That's not right, that's just not right.

GRAHAM: Further comments from the Commissioners? I might say in my own sense and from the kind of fairness point of view, I have some of the same feelings that Commissioner Woodward says. If we were asked for some new part of the permitting that had been done, then I could certainly see that would be inappropriate. But we don't have public here saying that this is a problem. I don't know of any conditions that have changed since the original Permit went out that would make us want to act differently based on just the substance of what's there. So, and our applicant has obviously invested money and has an operation, and planned this whole operation with expectations these thing would come about in the future. So even though he didn't meet the time frame within which he planned to do that, he certainly was using that in his planning. So my fairness sense kind of leads me to think that we should try to accommodate him. Mr. Torigoe, have you looked at this closely also?

TORIGOE: I've looked at it somewhat.

GRAHAM: I don't want to -, wait, maybe we should go into an executive session shortly, but -. Is the reason that we are asked not to support the time extension primarily based on the fact that it was an illegal permit in the past, or is it primarily based on the fact that it is an illegal permit now, or both of those kind of consequential?

TORIGOE: I think it's both of those in some sense. It gets a little bit abstract and complicated when you start really talking about these doctrines that of estoppel and invested rights. And if you like, we can discuss that in an executive session probably. I see Mr. Lim has come to the table.

WATANABE: Chair?

GRAHAM: Okay. Commissioner Watanabe?

WATANABE: Yeah, I have a question. Currently, the County zoning for this is Agriculture, yeah? Am I right?

YUEN: Right.

WATANABE: So typically in Agriculture that's the only place where we can use a Special Use Permit. And that was the assumption, but now technically we are saying that it's not a legal use because the permitted use is not specifically stated within the statute as one that you could allow with a Special Use Permit.

YUEN: Right. You couldn't use a Special Permit for the property because although it's a County Agricultural zone, it's a State Land Use Urban district. And actually when the Permit was originally done, it was what was called Unplanned zone or a U, or Unplanned zone. In December 1996 the Zoning Code was amended, and all the Unplanned areas were sort of fiat-rezoned to A-5a. So that's why that's an Ag zone. But the Special Permit – of course the Commission has seen dozens of Special Permits, which can be virtually for any kind of use – are only available in the Agricultural District. In the Urban District there is a similar mechanism called a Use Permit; it is limited to certain types of things.

WATANABE: And an open-air market is not included in that, yeah?

YUEN: That's the gist of our reasons for it.

WATANABE: Okay. On the other hand, I think we are in agreement that the current County zoning is kind of a default zoning, and so maybe we should look towards the County's revised General Plan, and I believe that's probably Urban in the revised General Plan for that area. I don't think it's even Rural. Isn't that Urban there? Or Residential or something?

ALAMEDA: The applicant might know.

YUEN: It's either Low-Density Urban or Medium-Density Urban.

GRAHAM: It says Urban Expansion Area on our Background Report.

YUEN: Okay.

LIM: It's Medium-Density Urban on the current General Plan.

DARROW: Medium-Density Urban. It was originally Urban Expansion.

WATANABE: I didn't look this up in our Rules. But in the proposed General Plan, what are the allowed uses there in Medium-Density Urban, let's say?

YUEN: The General Plan wouldn't change the uses that are allowed by the zoning; the General Plan would hold open the possibility of rezoning the property -.

WATANABE: Exactly, exactly.

YUEN: To Commercial, for example. Because of being Medium-Density Urban, that would be a possible rezoning. But it doesn't -.

WATANABE: And in that regard -, but I guess what I'm getting at -, I didn't imply that we should use the General Plan to trump everything else. I wasn't implying that. What I was trying to drive at is if within the General Plan, the revised General Plan, this would be something that we would allow, then maybe we can conditionally approve this with the understanding that they would proceed for a change of zone -.

LIM: Excuse me, Mr. Chairman.

WATANABE: That may open up a whole other can of worms, I'm not sure, you know. 'Cause if they fail, then what happens, right?

GRAHAM: Let's take a time out, and let Mr. Lim make a comment at this time. Would that be all right?

ALAMEDA: Right. I just wanted to just turn it over to the applicant 'cause they didn't have a chance yet to -.

LIM: Yeah, I -.

GRAHAM: Right.

ALAMEDA: To share their presentation.

GRAHAM: But we generally begin with our questioning of Jeff after his presentation -.

ALAMEDA: Yeah, but we are making statements more than questions, so we should turn it over to the applicant.

GRAHAM: Okay.

LIM: Thank you very much, Mr. Chairman. I was getting a little bit frustrated there. Seating next to me is Mr. Eric von Platen Luder whom most of you know. He is one of the principals in Alii Gardens Marketplace. He has been involved in the marketplace from its inception, and is actively involved in managing and operating it today.

I understand and I appreciate your feelings of why this seems to be unfair. The Planning Commission and the Planning Department have ever since the initial approval of these Permits way back in 1995, taken at least four other formal actions. In April of 2002, the Planning Commission amended Condition 12E; and in acting on the Special Management Area Permit and the Use Permit in 2002, we believe that they ratified those SMA and Use Permits. May 2002, the Planning Director approved a 5-year time extension to complete the development of Phases II and III. In August of 2003, Final Plan Approval was granted for one of the additional kiosks at the property. And finally on March 7th of 2005, Final Plan Approval was granted for Phase III. All through this process the Planning Department and the Planning Commission have treated the Use Permit as being a valid Permit.

And because we were involved in the inception of how this came down, I'll give you the history on how it came to be a Use Permit. The Director is correct in stating that this -, if this was in the State Land Use Agricultural District, we would ordinarily be applying for what you usually see as a Special Permit under HRS 205-6. Because it was in the Urban District, that avenue was not open to it, although it was zoned Unplanned or Agricultural A-5a as it is today. So what happened was we didn't make up the Use Permit procedure ourselves; we basically went down to the Planning Director, met with them at that time to determine what permit process we should follow to implement this open-air market use. It seems kind of just a short time ago, but in the mid-90's there really weren't any open-air markets, or at least not too many of them were around. And in fact, I don't think that there was even a permitted use called an open-air market at that time. That's why we went to the County Planning Director to determine what the procedures were, and the result was we were directed to apply for the Use Permit and the Special Management Area Permit. We did obtain those things.

At the initial hearings in 1995 we had objections from the neighboring property owners; there were maybe about 15 of them who participated in the contested case. Eric and his partner, Keith Unger, worked on the concerns by the residents, and we settled that matter with them. And many of the conditions that they demanded with respect to traffic impacts and buffering are all contained in the Use Permit and Special Permit that you see today.

We don't think that the Planning Director's interpretation that the Use Permit is no good is correct. Essentially we have the existing Zoning Code provision, 25-2-61, which deals with Use Permits, and under Section 61 (b) it states the following – and I'll paraphrase the portion that's irrelevant to us: Any use which received prior approval through the use permit process is considered a legal use of the affected parcel and may be expanded or enlarged without obtaining another use permit, provided that such expansion, enlargement or addition is in full compliance with this chapter and the applicable district regulations. We believe that this Section gives the current Use Permit No. 142 validity as a pre-existing and non-conforming Use Permit. Now whether it was correct to do it in the first place or not is up to argument; that's the issue today.

We believe that the Use Permit was properly granted, and that the fact that it was granted prior makes the uses on the property the permitted uses on the property. The section of the Zoning Code prior to that at the time of the application was Section 25-28, Subsection (b), and stated that any use which received prior approval through the use permit process is considered a legal use of the affected parcel, and may be expended or enlarged, etc. So both the prior Zoning Code and the present Zoning Code recognized that once you obtain a Use Permit, it is considered the legal use of the affected property. Part of what the Planning Director essentially is doing, we feel, is he is trying to essentially appeal the granting of the Use Permit that was acted upon in 1995 and in last in 2002. As you have heard many times before, there is a 30-day period within which to appeal any granting of a permit, and if you fail to appeal, then you are forever barred from attacking it. That's essentially what we are dealing with now is a post hoc attack on the Permit, and we believe that it does not comply with the statute limitations.

Furthermore, under the Planning Commission's own Rule 7 on Use Permits, effectively what the Planning Director is recommending is that you revoke the Use Permit. Rule 7-10 on Revocation of Use Permits says that you can revoke a Use Permit only under two specific circumstances: One is the request of the applicant or with the property owner's consent, which you obviously don't have at this point, and the other one is at a request of the Director. And there are three circumstances at a request of the Director: One is that there are continual violations of the Use Permit; I don't believe you have that in this particular case. The second is that the use creates a threat to public health and safety; again we don't believe that has been shown. And the third is that the use authorized under the Use Permit has been abandoned for a continuous period of two years. So we don't believe that any of the tests for the Planning Commission's revocation of this Use Permit can be met.

In fact, as you see, there are no public opposition, and the Alii Gardens Marketplace has been operating for 10 years now, over 10 years now. I think we have received maybe some comments on noise; we've addressed those. We've complied with whatever regulations the Planning Department has put on the project. And we feel it's a good project that should be allowed to proceed. We think that there are legal basis for you to give the Alii Gardens Marketplace its time extension, and that there are significant other vested rights, equitable estoppel, all the other legal terms that you always hear us talk about here. The reasons why you should give the time extension for the SMA Permit and the Use Permit is because essentially I can see that you understand it's a fairness issue. You are all appointed appointments of Mayor Kim and this is something that I've shown the Commission a long time ago – it's kind of fun – it was February 1, 2002, and it says, "Mayor Kim Still Stressing Fairness." This is something that I think all of you are feeling in your guts that this is not fair. I urge you to find a way to make this happen for Eric and Keith Unger. They've got a good project, and we'd like to proceed. Thank you.

GRAHAM: Eric, could I swear you in, if you are going to testify?

VON PLATEN LUDER: Oh, yes.

GRAHAM: Do you swear or affirm to tell the truth on this matter before the Planning Commission today?

VON PLATEN LUDER: I do.

GRAHAM: Thanks. And could you give your name and address, please?

VON PLATEN LUDER: Eric von Platen Luder, 75-632 Makalauna Place, Kailua-Kona, Hawaii 96740.

GRAHAM: Okay, carry on.

VON PLATEN LUDER: I don't really have too much to add to Steve's synopsis of what's happen; I think you are all very clear on how this happened, and where we are now. Just to let you know, it's quite, it's kind of above my head, and I thank you all very much for looking so carefully at it. But we did go into this with really asking all the right questions, we thought, from the Planning Department at that time as to how to achieve this. It happened very shortly after the Kona Gardens Open Market which everybody in town really loved was closed down, and vendors all over town were looking for a place to vend. And we came up with this idea, and went to the Planning Department to ask them how we could achieve this. And this is the path that we took based on what they told us, and you know the history since that happened, and here we are today. Due to circumstances we have not been able to complete the project, and we really, really do need and really humbly request the extension that's before you today. Thank you.

GRAHAM: Thank you. Commissioner Watanabe?

WATANABE: I have a question. How soon do you expect – I understand that some of the other Phases II and III, I guess, the plans were approved, etc. – how soon do you expect to start building that out?

VON PLATEN LUDER: Due to the recent downturn of the economy and also the construction of the Kona International Marketplace, we felt prudent to not jump on the bandwagon into the similar kind of -, since our concepts were fairly similar, at the same time. But we do clearly expect to finish this before the 5-year extension and hopefully within the next two to three years.

WATANABE: Okay. The reason I ask is because I offered earlier if you would seek legislative, meaning a change of zone, and maybe Mr. Lim could comment on that. I -.

VON PLATEN LUDER: Would you advise us to do that?

LIM: No, not really. What would also happen is that we would be barred for at least a little while from pursuing a change of zone because they have the County Council's moratorium, essentially the resolutions they adopted saying they aren't going to process any change of zones pending the adoption of the Community Development Plans for North and South Kona. We feel that this is a project that has complied substantially with the requirements of its permit. We have the legal basis that we feel you can stand on to give us the time extension. There are all the negative consequences; we reserve all of our rights under equitable estoppel and vested rights. Obviously, there is also a potential negligence claim against the County. Those are things that we raise for the record, but I'm not going to bore you with those right now. If we have to litigate those and raise those at any appeal of this matter,

then we'll do that at the Circuit Court level, but I'm raising that for the record now. We don't think that we have to get that; we think the Commission has the ability to find a way to reaffirm the Use Permit and the SMA Permit. We believe that at the very least when you acted on the time extension in 2002, that ratified whatever had happened before, and that that's a sufficient basis to continue to act on the time extension. Thank you.

GRAHAM: Mr. Lim, could I ask you one question based on what you just said a few minutes ago? When you first began your presentation, you were expressing your view that the original permit was a legal permit. From the standpoint of the Planning Commissioners, if we were to believe or even find out from the court that the original permit was not a legal permit, then would our only proper course of action be to deny this? Would you agree with that, or -?

LIM: I don't understand your question. You are thinking about doing a declaratory ruling?

GRAHAM: No. I'm saying your basic contention that I heard from you when you began your testimony was that the original permit was in fact a valid permit. And what I'm saying now is if by a court ruling or whatever, it is clear to us that the original permit is not a valid permit, or we believe it's not a valid permit, then would you agree that it's not proper for us to give a time extension at this time? In other words, is the time extension contingent upon it being a valid permit, as you are alleging?

LIM: Yes, it is a valid permit, and therefore you can give a time extension. I think one way to address it also as a practical matter is if you feel like you want to recognize that the permit should go forward, the only person that would appeal a granting of the time extension would be the Planning Director.

ALAMEDA: Chair?

GRAHAM: Yes, Commissioner Alameda?

ALAMEDA: I just want to ask the applicant. So in my mind as I envision the project, so there are three phases basically; the first phase 24 vendors, the second phase 14 and the third phase 42 vendors, coming to a total of 80 vendors and that includes also 200 parking spaces. You know, sometimes when we get a request to extend, it gives us the chance to step back and revisit the whole application and see if there are any impacts to the community and traffic, for example. Would you say that the 200 parking spaces and the increase in vendors, wouldn't impact that area adversely?

VON PLATEN LUDER: Well, for Plan Approval -.

GRAHAM: Mr. von Platen Luder, go ahead.

VON PLATEN LUDER: To get the Plan Approval for our second phase – and I think it might or might not be important to point out that the original permit wasn't granted in any kind of a phased development; phasing of it is our internal time building out of the project. They were just granted as one project all at one time. But in planning what we are calling our Phase III, which is the finishing of the project, we did do all of the traffic studies and did all of our due

diligence that was required in there. The impacts were thought to be not impacting or, you know, the infrastructure we were putting in and the additional parking spaces, it was all adequate for the impacts of the traffic according to the studies that we submitted to the Planning Department.

ALAMEDA: Thank you.

LIM: Part of the conditions -.

GRAHAM: Mr. Lim?

LIM: For approval for the Use Permit and the SMA Permit include conditions that they would provide adequate parking, have a designated manager on property, they would work with the -, on an-ongoing basis, monitor traffic flow on Alii Drive, and assess any impacts. Thus far – and these mitigation measures could include such things as hiring off-duty police officers and security guards to direct traffic, and those types of things – thus far, I'm not sure if you ever had to do that.

VON PLATEN LUDER: No, we've never had to do that. And even for the 40 kiosks that we have now, which is about a half, we have a little over 50 stalls which is more than adequate for what we have now.

ALAMEDA: Thank you.

GRAHAM: Thank you.

WATANABE: Question.

GRAHAM: Commissioner Watanabe?

WATANABE: I have a question. What types of items are sold, and what's your general clientele that comes to this open-air market?

VON PLATEN LUDER: The clientele varies from time of the year. During the off-seasons a majority of it is local people; when there're a lot of visitors in town, then I would say that a majority of the people are visitors. But in general the items for sale are crafts, hand-made and home-made things. A lot of them are imported, but a lot of them are also made by people who are here on the islands and actually who vend their own things at the site. So it's a mixture of imported trinkets and handy crafts, and also things made by the actual vendors who are sitting there in their booths. We do also have one kiosk that serves food for people who visit the marketplace. We have two kiosks that do flowers and vegetables, although that's not a big part of our market right now. And this last phase is to play, is the part which we will be accommodating, and the major part of that is a farmers' market to address the farmers' market for actual produce and fruits and things.

WATANABE: Oh, okay, produce. That's -. Okay, let me share with you what I'm thinking because we always talk about smart development and people not having to travel as far, and I'm wondering if you are serving some of the local needs, then maybe there is a better

argument for a, well, there is a need for this use. But if you are attracting mainly tourists to the site, then I can't say that it's supportive so much of smart development because, you know, you are generating traffic, yeah? But all that's said, I've got to tell you this, Mr. Lim, I really don't take overturning the Director's recommendations lightly because, as you've seen, say, like with Ibbetson earlier today, it didn't work out quite the way that we instinctively thought. So I'm really looking for some type of middle ground where at some later date, if not right at this point in time, this can be made to go away, and there is no contesting of any of this. I hope you understand what I'm driving at.

LIM: I understand. And I was going to ask the Director what his position would be on the -, there is another Section relating, because this has an SMA Permit also. And I think Mr. Yuen knows the Section is 25-4-5, and it basically says that all land uses allowed in SMA permits issued pursuant to Chapter 205A shall be deemed to be permitted uses on the property. That might be another way to essentially get out of the Use Permit box, and just say that because we've got an SMA Permit, that we are a permitted use pursuant to 25-4-5.

GRAHAM: Mr. Yuen, would you like to respond?

YUEN: Well, I have to say I'm afraid not, because the SMA Permit itself, you have to conform to the Zoning Code to properly obtain an SMA Permit.

LIM: So your position is that the SMA Permit is invalid also?

YUEN: The SMA Permit should not have been granted in 1995 for the open-air market, yes. As I stated before, we are not seeking revocation of the Use Permit; we are recommending that, and it is our position that the time extension cannot legally be granted for the Use Permit.

LIM: Perhaps, what I could suggest is then there are various alternatives, as Commissioner Watanabe has noted, that we might be able to discuss with the Director with respect to limiting the size of the next phase or somehow recasting the Permit to come back to you with something that might be acceptable. I'll see what we can work out, if we could get a -, I guess if we could continue this matter to have a discussion with the Director, I think that might help.

WATANABE: I'm thinking, because we want to protect both sides, right? And I'm thinking if we can find some middle ground, then maybe we can all shake hands and agree. Obviously, it wasn't an intentional error.

GRAHAM: Mr. Lim, would you be suggesting that we continue this matter then?

LIM: I would ask that the Commission suggest that they continue the matter, so we don't have to notice everybody all over again.

WATANABE: I -.

GRAHAM: Commissioner Watanabe?

WATANABE: I'll see if it flies; we've only got five Commissioners here, but -. I move to continue this matter until – shall we say – the next Kona meeting?

GRAHAM: Okay.

WOODWARD: If I might -.

GRAHAM: Do we have a second first, or -?

WOODWARD: Second.

GRAHAM: Seconded by Commissioner Woodward.

WOODWARD: If I might add that we request that, rather than continue it necessarily to the next meeting that puts a time limit on it, that we ask that the Director work closely with Mr. Lim to try and work this out, since it was not a fault of the applicant that this whole thing got screwed up. And there ought to be – we are talking legal questions now – there ought to be a legal way to figure it out. And I think if we can get Mr. Lim to work with Mr. Yuen till they've come to a reasonable agreement, and then bring it back to us, that would be my suggestion.

WATANABE: I'm not -.

GRAHAM: So we don't need the time limit? Is that all right with you, Commissioner Watanabe, to take that out of the motion?

WATANABE: Okay, I'll tell you what. I'm willing to take out the time limit; let's say, until it's ready for review by the Commission.

WOODWARD: Okay. Second.

GRAHAM: Okay. Any discussion by the Commissioners? Mr. Yuen, do you have anything further you'd like to say?

YUEN: Just this: The Commission doesn't need to urge me to try to find a way to read this legally. I did try to do that, you know, to find a legal means without coming to a contorted interpretation of the law that would make this problem go away.

WATANABE: Yeah, that's why I didn't -, even as a discussion matter, that's why I didn't really want to leave that in. However, I had suggested that maybe we could provide the extension providing they sought a change of zone or whatever other administrative means it might take – not administrative, but legislative means it might take. And that might include just adding open-air markets through the regulation; maybe that's a simpler way to go. And then it's all legal. I'm hoping that somehow we can work this out.

GRAHAM: Okay. I'd like to move forward, if we can, since we've had such a long day here today. We do have a motion for continuance. Jeff, would you take a roll call vote?

DARROW: Sure. It's okay with you, if I could – we have two permits before us: SMA 358 and Use Permit 142 – it's okay if I take the roll for both permits for the continuance?

GRAHAM: I believe so.

DARROW: Thank you. The motion before us is to continue this matter until it is ready to be reviewed by the Planning Commission. With that, I'll take the roll. Commissioner Watanabe?

WATANABE: Aye.

DARROW: Commissioner Woodward?

WOODWARD: Aye.

DARROW: Commissioner Alameda?

ALAMEDA: Aye.

DARROW: Commissioner Rho?

RHO: Aye.

DARROW: And Mr. Chairman?

GRAHAM: Aye.

DARROW: The motion passes, five to zero.

GRAHAM: All right. Thank you, Mr. Lim.

LIM: Thank you very much.

VON PLATEN LUDER: Thank you

The discussion ended at 5:17 p.m.

Respectfully submitted,

Noriko Sauer
West Hawaii Secretary