

MCCORRISTON MIHO MILLER MUKAI

WILLIAM C. MCCORRISTON 995-0
Five Waterfront Plaza, Suite 400
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
Telephone: 529-7300

RECEIVED

AUG 22 10 06 AM '94

SEP 8 PM 3 35

TERRY WILSON

Attorney for Appellants

OT
COUNSEL
OF HAWAII

ROUTING	
CC _____	ACC _____
O'T _____	HSG _____
(TAK) _____	DAB _____
CHU _____	KAM _____
GIA _____	LEE _____
SHI _____	KEN _____

IN THE CIRCUIT COURT OF THIRD CIRCUIT
STATE OF HAWAII

DAVID SOUZA and BIG ISLAND
TOPSOIL,

Appellants,

vs.

PLANNING COMMISSION OF HAWAII
COUNTY,

Appellee.

CIVIL NO. 92-191K

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER; EXHIBIT "A"

Date : June 27, 1994

Time : 1:00 p.m.

Judge: Ronald Ibarra

I hereby certify that this is a full, true and
correct copy of the original on file in this
office.

S. Muli Chen

Clerk, Third Circuit Court, State of Hawaii

009

FINDINGS OF FACT

1. Appellants David Souza and Big Island Topsoil (hereinafter "Appellants") applied for a special permit pursuant to § 205-6, Hawaii Revised Statutes ("HRS") to conduct soil mining operations on a ten-acre parcel located on the Ponoholo Ranch in North Kohala.

2. Because soil mining in a quarry operation would not be permitted in an agricultural district pursuant to § 205-4.5 HRS, an application had to be made for a special permit to the Hawaii County Planning Commission (Appellee"). On December 30, 1991, the Hawaii County Planning Director, then Norman Hayashi, wrote to Appellants acknowledging receipt of their permit

15306

application and informing Appellants of the permit approval process and other requirement that Appellants send notice of the permit application to the owners of the properties within 300 feet of the subject property. On the same, date, Mr. Hayashi sent a memorandum to various state and county agencies, community groups, and a utility company soliciting their written comments to Appellants' permit application.

3. The Hawaii County Planning Director received responses to his memorandum from the State Department of Transportation, the County Department of Water Supply, the Hawaii Electric Light Company, the State Historic Preservation Division of the State Department of Land and Natural Resources, the State Department of Health, the Chairman of the Kohala Community Association, and the Hawaii County Police Department. While some of these responses voiced operational concerns about the permit application, none of the respondents opposed the permit application.

4. On February 20, 1992 by letter to Mr. Hayashi, the Appellants answered the operational concerns contained in the responses by incorporating into their permit application certain remedial measures.

5. Appellee also received letters expressing "concerns" over the application, but only one such letter (Jeanne O'Brien) expressed an opposition to the application.

6. On March 18, 1992, the Planning Department issued a recommendation that Appellee approve Appellants' permit

application subject to 16 conditions, all of which were acceptable to Appellants. See Exhibit "A" hereto which is incorporated herein by reference. In its recommendation for approval, Appellee concluded, in pertinent part, that:

The granting of this request will not be contrary to the objectives of Chapter 205, Hawaii Revised Statutes, as amended. The State Land Use Law and Regulations are intended to preserve, protect, and encourage the development of lands in the State for those uses to which they are best suited[.] In the case of the Agricultural District, the intent is to preserve or keep lands of high agricultural potential in agricultural use. . . . Aside from the pasture use of the project site, no other agricultural resources will be affected. . . . With these mitigative measures [as proposed by the Planning Department] in place, it can be determined that the proposed activity will not be detrimental to the agricultural resources of the County or State.

. . . .

The desired use will not adversely affect the surrounding properties. . . . Kohala Ranch Estates, the nearest residential community, is located approximately 3,500 feet makai of the project site. The applicant will utilize only two trucks for the transport of extracted material from the site with a maximum of 8 trips per day. . . . Given the limited nature of the proposed use, the limited trips generated along the Kohala Mountain Road, and the preparation of an Erosion Control and Site Reclamation plan, it is not anticipated that this request will result in a significant increase in noise, traffic and visual impacts to the surrounding properties. Any potential impacts can be mitigated by conditions of this approval.

The proposed use is not anticipated to unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, police and fire protection. The nature of the proposed

activity would not require the need for most of these services or utilities.

. . .

Based on the foregoing, it is determined that the proposed soil mining activity is an unusual and reasonable use of the land within the state Land Use Agricultural District and that approval of the subject request would promote the effectiveness and objectives of Chapter 205, HRS, as amended.

7. At a public hearing held on March 24, 1992 to consider the application of Appellants, Daryn Arai, Staff Planner for the Planning Department, outlined the permit application and the Department's recommendation for approval. He also explained certain of the conditions, acceptable to Appellants, which addressed the concerns raised in response to Mr. Hayashi's letters including, but not limited to, requirements that:

(1) applicant prepare an erosion control and site restoration plan for the review and approval of the Planning Director;

(2) the applicant prepare and submit an archaeological inventory survey and mediation plan for the project site;

(3) plans for access onto the Kohala mountain road for the project site meet with the approval of the State Department of Transportation - Highway Division;

(4) mining activities be limited between 7:00 a.m. and 3:30 p.m. Mondays through Saturdays;

(5) the applicant be limited to the use of two (2) trucks for the purposes of transporting the material extracted from the project site;

(6) the applicant use its best efforts to stop soil mining operations when winds exceeded 15 miles per hour; and

(7) the applicant wash down all vehicles leaving the project site so as to prevent mud and dirt being tracked on to the roadway.

Mr. Souza at said hearing affirmed under oath his agreement to the Planning Department's recommendation of conditions as outlined hereinabove.

8. In response to a concern raised by a Commissioner, Mr. Souza testified at the hearing that he would have no objection to amending a condition so as to prohibit the hauling of material from the project site onto the Kohala Mountain Road before 8:00 a.m. so as to avoid any potential use of the road by his trucks when a school bus would operate on the road. Mr. Souza further testified that his excavation would be limited to taking cinder soil at the bottom of the cinder cones on the project site so as to have no visual effect on the shape of the cones. In response to a question from another Commissioner, Mr. Souza verified that the mining operation would take place on the makai side of the cinder cones which would be out of view of motorists from the Kohala Mountain Road.

9. Mr. Pono Von Holt testified that the use of the land was for ranching operations and that the soil excavation

project would have no effect on his ranching operations or otherwise decrease any agricultural production on the land. He further testified that the school bus passed the site before 7:00 a.m.

10. At the March 24, 1992 hearing, no member of the public testified against the project. Only one member of the public testified to express a concern that all Appellants' representations as to their activities would be incorporated into the permit conditions.

11. Appellee voted at the close of the March hearing 3-2 for approval; however since a count of 5 affirmative votes was required for approval, the matter was deferred until the next meeting.

12. On May 6, 1992 the Planning Department issued a revised recommendation again urging Appellee to approve the permit application. The revised application incorporated new conditions limiting the hauling of material by applicant to eight (8) roundtrips a day, prohibiting applicant from putting its trucks onto the Kohala Mountain Road before 8:00 a.m., and prohibiting soil mining activities on the geographical features known as Pu'u Aiea, Pu'u Lepo and Pu'u O' Lani, which Appellants agreed to.

13. A further public hearing on the permit application was held on May 7, 1992. No new evidence or public testimony was taken at this hearing. The motion to approve Appellants' permit application was defeated by a vote of 4-3.

After the vote, Commissioner Manalili moved to have the Planning Department, which had previously recommended approval of the permit, draft findings of fact and reasons for a denial recommendation. That motion carried by a vote of 6-1.

14. On June 5, 1992 Planning Director Hayashi issued a memo to Appellee containing "findings of a denial recommendation" but indicated in the first paragraph of that memo that the Department's recommendation for approval "has not changed." The proposed findings for a denial recommendation provided, in pertinent part:

The granting of this request will unreasonably burden public agencies to provide roadway improvements. The only access available to the subject property is via the Kohala Mountain Road, which is a winding roadway having a pavement width of 18 feet with a 50-foot right-of-way. This roadway provides one of only two primary accesses between the districts of North and South Kohala. The applicant's proposal includes the transport of extracted material from the site utilizing two trucks have [sic] capacities of 5 and 15 cubic yards. The applicant anticipates that 4 to 8 trips per day will be required for the transport of material along the Kohala Mountain Road. The types of trucks to be utilized and the number of trips anticipated would adversely impact traffic along the Kohala Mountain Road, which narrow pavement width and numerous horizontal and vertical curves within the roadway makes passing a limited and potentially hazardous option. In addition, approval of this request would encourage similar types of requests along the Kohala Mountain Road, thereby further deteriorating an already regressive situation.

The proposed activity would be located in an area makai of the Kohala Mountain Road where geographical features such as Pu'u Aiea, Pu'u Lepo and Pu'u O Iani have been formed. While the proposed soil mining activity will not occur on the pu'us, it will be conducted within the

vicinity and may affect the overall character and the immediate surrounding area.

15. On June 18, 1992 a third public hearing on Appellants' permit application was held. No new evidence or public testimony was received during the hearing. On motion by Commissioner Fiesta to deny the permit application "on the findings and reasons provided by the staff on the safety aspect of the North Kohala Road" Appellee voted on the motion to deny which carried by a vote of 5-2. During the hearing and prior to the vote, Mr. Daryn Arai, representing the Planning Department, reminded Appellee again that the proposed findings for denial of the application did not represent the Planning Department's recommendation which continued to be that the project be approved.

16. The clear weight of reliable, probative, and substantial evidence adduced at Appellee's proceedings was that Appellants' mining operation, as circumscribed by the conditions which would apply to the permit, would not create a safety problem on the North Kohala Road.

17. While not made part of Commissioner Fiesta's motion to deny the application, the clear weight of the reliable, probative, and substantial evidence was that Appellants' mining operation, as circumscribed by the conditions which would apply to the permit, would not affect whatsoever the geographical features of Pu'u O' Lani, Pu'u Aiea, and/or Pu'u Lepo or their immediate surrounding area.

18. While not made part of Commissioner Fiesta's motion to deny the application, there was no evidence adduced in Appellee's proceedings to show that the approval of Appellants' application would encourage similar types of requests along the Kohala Mountain Road.

19. Appellants properly noticed their appeal from the Planning Commission's denial of their application on June 28, 1992.

20. Appellants' Statement of the Case was duly filed on August 12, 1992.

21. Index to Record on Appeal and Record on Appeal was duly filed in this Court on August 26, 1992.

22. Appellee's Answer to Appellants' Statement of the Case was duly filed on October 5, 1992.

23. Appellants' Pretrial Statement was duly filed on July 26, 1993.

24. Appellee's Responsive Pretrial Statement was duly filed on September 27, 1993.

25. Appellants' Opening Brief was duly filed on May 31, 1994.

26. Appellee's Answering Brief was duly filed on June 15, 1994.

27. Oral argument was held before this Court on June 27, 1994. William C. McCorriston, Esq. appeared on behalf of Appellants, and Gerald A. Takase, Esq. appeared on behalf of Appellee.

CONCLUSIONS OF LAW

28. This Court has jurisdiction over the subject matter of the appeal and has jurisdiction to order the relief herein rendered based upon Hawaii Revised Statutes § 205-6 (1985), Haw. R. Civ. P. 72(a), and the stipulations entered into by Appellants and their counsel.

29. While decisions of an agency are to be given deference by this Court, agencies' findings of fact are reviewable for a clear error and reversible when the findings are against the clear weight of the evidence or clearly erroneous in view of the reliable, probative and substantial evidence of the whole record.


30. Appellee's findings in support of its denial of Appellants' permit application were contrary to the clear weight of reliable, probative and credible evidence adduced in Appellee's proceedings and are clearly erroneous in view of the reliable, probative and substantial evidence of the whole record.

31. Appellants' application for a special use permit, by the evidence adduced at the hearing, met the criteria set forth in Hawaii Revised Statutes § 205-6 (1985) as implemented by Section 15-15-95 of the Hawaii Administrative Rules.

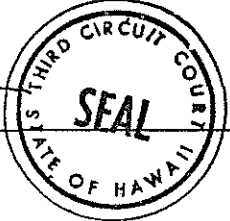
ORDER

WHEREFORE, for all reasons stated above, this Court grants the appeal of Appellants and hereby orders that Appellee Hawaii County Planning Commission's denial of Appellants' application is reversed and Appellee is instructed to issue the permit subject to the conditions agreed to by Appellants during the proceedings below.

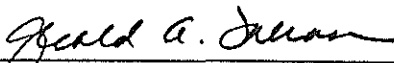
DATED: Kealahou, Hawaii, 22 Aug 94.



JUDGE RONALD IBARRA



APPROVED AS TO FORM:



GERALD A. TAKASE
Attorney for Appellee
PLANNING COMMISSION
OF HAWAII COUNTY

SOUZA, ET AL. VS. PLANNING COMMISSION OF HAWAII COUNTY, Civil No. 92-191K; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

COUNTY OF HAWAII PLANNING DEPARTMENT
RECOMMENDATION

DAVID SOUZA dba BIG ISLAND TOPSOIL
SPECIAL USE PERMIT APPLICATION 91-29

~~Upon careful review of the request against the guidelines for~~
granting a Special Permit, the Planning Director is recommending
that it be approved. This recommendation does not, however,
sanction the specific plans submitted with the application as they
may be subject to change given specific code and regulatory
requirements of the affected agencies. Since this recommendation is
made without the benefit of public testimony, the Director reserves
the right to modify and/or alter his position based upon additional
information presented at the public hearing. The favorable
recommendation is based on the following:

The granting of this request will not be contrary to the
objectives of Chapter 205, Hawaii Revised Statutes, as amended.
The State Land Use Law and Regulations are intended to preserve,
protect, and encourage the development of lands in the State for
those uses to which they are best suited in the interest of the
public health and welfare of the people of the State of Hawaii.
In the case of the Agricultural District, the intent is to
preserve or keep lands of high agricultural potential in
agricultural use. The project site is situated within the
County's Agricultural-20 acres (A-20a) zoned district and State
Land Use Agricultural District. Soils within the project site
are classified as "C" or "Fair" for agricultural productivity by
the Land Study Bureau's Overall Productivity rating system. The
site is classified as "Prime" agricultural land by the State's
Agricultural Lands of Importance to the State of Hawaii (ALISH)
map. Aside from the pasture use of the project site, no other
agricultural resources will be affected. It is recommended that
the applicant implement the recommendations of the Mauna Kea
Soil and Water Conservation District for erosion control and
reclamation of the project site. This will be accomplished
~~through a condition of approval requiring the applicant to~~

EXHIBIT A

~~prepare an Erosion Control and Site Restoration plan meeting~~
with the approval of the Planning Department, in consultation
with the Mauna Kea Soil and Water Conservation District, the
Department of Agriculture and the Department of Public Works:
With these mitigative measures in place, it can be determined
that the proposed activity will not be detrimental to the
agricultural resources of the County or State.

The subject request would support the following goal and
policy in the Natural Resources Element of the General Plan
which "Ensure that alterations to existing land forms and
vegetation, except crops, and construction of structures cause
minimum adverse effect to water resources, and scenic and
recreational amenities and minimum danger of floods, landslides,
erosion, siltation, or failure in the event of earthquake" and
that "The County of Hawaii should require users of natural
resources to conduct their activities in a manner that avoids or
minimizes adverse effects on the environment." The proposed
soil mining activity is temporary in nature for a period not to
exceed three years. The applicant will be required to secure a
grading permit and comply with the requirements of Chapter 10,
Erosion and Sedimentation Control (Grading Ordinance) as a
condition of approval. Restoration, as previously discussed,
will be accomplished to the satisfaction of the Planning
Director.

The desired use will not adversely affect the surrounding
properties. The proposed activity will be limited to the use of
two trucks for hauling of the extracted material. Two workers
will be present during the operating hours of 7:00 a.m. to
3:30 p.m., Monday through Saturday for a period of 3 years. The
life of this permit and the hours of operation will be included
as conditions of approval. Surrounding properties are presently
in agricultural use. Kohala Ranch Estates, the nearest
residential community, is located approximately 3,500 feet makai
of the project site. The applicant will utilize only two trucks
~~for the transport of extracted material from the site with a~~

~~maximum of 8 trips per day. As these trucks enter the Kohala Mountain Road, it is recommended that the applicant wash down these trucks to avoid tracking mud and dirt onto the road. The location of the proposed activity between Pu'u Aiea, Pu'u Lepo and Pu'u O Lani would mitigate any adverse visual impact from the Kohala Mountain Road. While the soil mining activity may be seen from portions of Kohala Mountain Road and the Kohala Ranch Estates subdivision, the temporary nature of the activity and the implementation of an approved Site Reclamation Plan would mitigate any prolonged adverse visual impacts. Given the limited nature of the proposed use, the limited trips generated along the Kohala Mountain Road, and the preparation of an Erosion Control and Site Reclamation plan, it is not anticipated that this request will result in a significant increase in noise, traffic and visual impacts to the surrounding properties. Any potential impacts can be mitigated by conditions of this approval.~~

The proposed use is not anticipated to unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, police and fire protection. The nature of the proposed activity would not require the need for most of these services or utilities. A water tank will be provided on site for dust control measures. The applicant will utilize an existing ranch access road to provide access to the Kohala Mountain Road. The applicant will be required to provide an access connection to the Kohala Mountain Road with adequate site distance in a manner meeting with the approval of the Department of Transportation. No other utilities or services will be required for the proposed activity.

The proposed use will not substantially alter or change the essential agricultural character of the land and the present use. As previously mentioned, the applicant will be required to implement an approved Erosion Control and Site Reclamation Plan. The plan shall be approved by the Planning Director in ~~consultation with the Departments of Agriculture and Public~~

~~Works and the Mauna Kea Soil and Water Conservation District.~~
The implementation of this approved plan would ensure that the integrity of the land for potential agricultural use is maintained.

Prior to any land alteration activities, the applicant will be required to conduct an archaeological inventory survey of the project site and prepare an archaeological inventory survey report and mitigation plan for the review and approval by the Planning Department in consultation with the Department of Land and Natural Resources.

Based on the foregoing, it is determined that the proposed soil mining activity is an unusual and reasonable use of the land within the State Land Use Agricultural District and that approval of the subject request would promote the effectiveness and objectives of Chapter 205, HRS, as amended.

It is further recommended that the request be approved subject ~~to the following conditions:~~

1. The applicant, its successors, or assigns shall be responsible for complying with all stated conditions of approval.
2. A metes and bounds description of the project site in map and written form shall be submitted to the Planning Department prior to or in conjunction with an application for a grading permit. The entire 10-acre project site shall be staked out prior to commencing any soil mining activities.
3. A grading permit for the project site shall be secured from the Department of Public Works within one year from the date of approval of this permit.
4. The applicant shall submit an Erosion Control and Site Restoration Plan for the review and approval by the Planning Director, in consultation with the Department of Public Works, the Department of Agriculture and the Mauna Kea Soil and Water Conservation District, prior to the issuance of a grading permit.

8. As represented by the applicant, the proposed soil mining operation shall be limited to the use of 2 trucks for the purpose of transporting the material extracted from the project site

5. The applicant shall prepare and submit an archaeological inventory survey and mitigation plan for the project site for the review and approval by the Planning Department, in consultation with the Department of Land and Natural Resources - Historic Preservation Division, prior to the issuance of a grading permit.
6. Access onto the Kohala Mountain Road from the project site, including the provision of adequate site distance, shall meet with the approval of the State Department of Transportation-Highways Division prior to the issuance of a grading permit.
7. The soil mining activity shall be limited to the hours of 7:00 a.m. and 3:30 p.m., Mondays through Saturdays.
9. 8. Best effort measures shall be taken by the applicant to stop soil mining activities when wind speeds in the general area exceed 15 miles per hour.
10. 9. The applicant shall wash down all vehicles leaving the project site before gaining entry onto the Kohala Mountain Road for the purpose of preventing dirt and mud from being tracked onto the Kohala Mountain Road.
11. 10. Should any unidentified sites or remains, such as artifacts, shell, bone or charcoal deposits, human burials, rock or coral alignments, paving or walls be encountered, work in the area shall cease and the Planning Department notified. Subsequent work within the area shall proceed upon an archaeological clearance from the Planning Department when it finds that sufficient mitigating measures have been taken.
12. 11. Upon termination of the operations or abandonment of any portion of the affected site, the land shall be graded to blend with the surrounding area and rehabilitated as approved in the Erosion Control and Site Restoration Plan. The affected site shall be left in a non-hazardous condition. Appropriate documentation which demonstrates

Amended on floor by ASA at 3/24/92 AC. mg.

56

compliance with this condition shall be submitted to the Planning Department and the Department of Public Works for review and approval within ninety (90) days from the date of termination or abandonment.

13. ~~12.~~ The life of this permit shall be for a period not to extend beyond three (3) years from the date of approval of this permit or the date of completion of the proposed soil mining activity or its abandonment, whichever comes first.
14. ~~13.~~ Comply with all other applicable laws, rules, regulations and requirements, including those of the Departments of Health, Public Works, Transportation and Land and Natural Resources.
15. ~~14.~~ An annual progress report shall be submitted to the Planning Director prior to the anniversary date of the approval of the permit. The report shall include, but not be limited to, the status of the development and to what extent the conditions of approval are being complied with. This condition shall remain in effect until all of the conditions of approval have been complied and the Planning Director acknowledges that further reports are not required.
16. ~~15.~~ An extension of time for the performance of conditions within the permit, with the exception of Condition No. 12, may be granted by the Planning Director upon the following circumstances: a) the non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence; b) granting of the time extension would not be contrary to the General Plan or Zoning Code; c) granting of the time extension would not be contrary to the original reasons for the granting of the permit; and d) the time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year). Further, should any of the

conditions not be met or substantially complied with in a timely fashion, the Director shall initiate procedures to revoke the permit.