

BEFORE THE COUNTY OF HAWAI'I

PLANNING COMMISSION

In the matter of the Contested Case
Hearing of

DANIEL IBBETSON

Request: Allow a 2-unit bed and breakfast establishment on 0.722 acre of land situated within the State Land Use Agricultural District situated at Kaohe 5th, South Kona, Hawai'i, Tax Map Key: (3) 8-7-009:014.

SPP No. 05-000015

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

BACKGROUND

DANIEL IBBETSON (hereinafter referred to as "Applicant") submitted an application for a Special Permit on July 15, 2005, to allow a 2-unit bed and breakfast establishment within an existing 3-bedroom single family dwelling on 0.722 acre of land situated within the State Land use Agricultural District. The Property is owned by the Applicant and is situated along the west (makai) side of Māmalahoa Highway (Highway 11), approximately 120 feet south of the Ka'ohē Road-Māmalahoa Highway intersection, Ka'ohē 5th, South Kona, Hawai'i, Tax Map Key: 8-7-009:014.

The Applicant provided statutory notice to the surrounding property owners of the September 30, 2005 Planning Commission (referred to as "Commission") hearing. Mr. Dean Kaiawe, represented by Michael J. Matsukawa, submitted a Petition for Standing in Contested Case Hearing September 22, 2005. At its September 30, 2005 meeting, the Commission granted Dean Kaiawe (hereinafter "Intervenor") standing to intervene in a contested case hearing regarding the Project.

The Commission as a whole conducted the contested case hearing on the Special Permit application with C. Kimo Alameda as the Presiding Officer.

The Commission reviewed evidence and heard testimony at the contested case hearing held on November 18, 2005 and January 20, 2006 at the King Kamehameha's Kona Beach Hotel, 75-5660 Palani Road in Kailua-Kona, Hawai'i and at the Outrigger Keauhou Beach Resort, 78-6740 Ali'i Drive in Keauhou, Hawai'i, respectively. Dennis A Krueger appeared for the Applicant: Deputies Corporation Counsel Bobby Jean Leithead-Todd and Amy Self appeared for the Hawai'i County Planning Department (referred to as "Department"); and Michael J. Matsukawa appeared for the Intervenor. Applicant and Intervenor attended and testified throughout the hearings.

At the November 18, 2005 hearing, the parties agreed that Commissioners not in attendance for the entire hearing may review transcripts and exhibits and make a decision based on the record.

By Findings of Fact, Conclusions of Law, Decision and Order dated February 21, 2006, ("Decision and Order"), the Commission denied Applicant's Application SPP NO. 05-000015 for a Special Permit to operate a 2-unit bed and breakfast establishment.

On March 22, 2006, Applicant filed his Notice of Appeal to the Circuit Court of the February 21, 2006 Decision and Order rendered by the Commission, in the case entitled Daniel Ibbetson vs. Planning Commission of the County of Hawai'i, et al., identified as Civil No. 06-01-037K, in the Kona Division of the Circuit Court of the Third Circuit ("Court").

Oral arguments were heard by the Court on July 17, 2006. On December 22, 2006, the Court granted Daniel Ibbetson's appeal of the Commission's Decision and Order, by reversing the Decision and Order of the Planning Commission and remanding the case to the Commission for further consideration consistent with the Court's Order Reversing Decision of the Planning

Commission and Remanding Case to Agency for Further Proceedings, filed on December 22, 2006 (“Third Circuit Court Order”).

The Commission, having considered the entire record, including the Third Circuit Court Order, and having heard and considered the arguments on remand, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Property is located along the west (makai) side of Māmalahoa Highway (Highway 11), approximately 120 feet south of the Ka‘ohe Road-Māmalahoa Highway intersection, at 87-3173 Māmalahoa Highway, Ka‘ohe 5th, South Kona, Hawai‘i, Tax Map Key: 8-7-009:014.
2. The Property is rectangular in shape and is 0.722 acre in size.
3. The Property is conveyed by Mikala Kaiawe to the Hawaiian Evangelical Association by deed dated February 2, 1915.
4. Mikala Kaiawe is the great-grandmother of the Intervenor.
5. The landowner of the Property is the Applicant.
6. The Applicant purchased the Property from the Hawai‘i Conference Foundation, successor in interest to the Hawaiian Evangelical Association, on March 17, 2003, by way of a limited warranty deed. The Property is encumbered with a perpetual non-exclusive easement for the visitation, maintenance and care of existing grave sites, and for ingress and egress to Grave Site A from Māmalahoa Highway and a limited right of entry for the purpose of the visiting “presently unidentified grave sites” (Grave Site B). The deed states that the easement and right of entry shall run with the land for the benefit of the relatives of the persons buried in the graves located within Grave Site A and Grave Site B, with certain terms and conditions identified within the limited warranty deed.

7. Prior to the Applicant's purchase of the Property, and on or about the first part of March 2003, the Applicant contacted Kai Markell, the History and Culture Branch Chief of the Department of Land and Natural Resources, State Historic Preservation Division, to discuss the existence of the graves on the Property and his obligations with respect thereto after he purchased the Property.

8. As a result of the Appellant's telephone call to Kai Markell, Keola Lindsey and MaryAnne B. Maigret of the Department of Land and Natural Resources, State Historic Preservation Division, met with the Applicant at the Property on March 11, 2003, to discuss the existing graves and the potential impact of the construction of a home on the Property.

9. Mr. Lindsey described to the Applicant how impacts to the identified grave sites should be avoided during construction and that there should be as little disturbance as possible. Other than that, Mr. Lindsey simply told the Applicant that they wanted to stay in touch with him during the construction.

10. Based upon the foregoing discussions, the Applicant purchased the Property.

11. Mr. Lindsey testified that the Applicant met all requirements of Mr. Lindsey and the State Historic Preservation Division with regard to the protection of the grave sites and the Applicant's construction on the Property. Mr. Lindsey testified that the granting of the special permit would not have an adverse impact upon the existing grave sites.

12. As a condition of the sale of the Property to the Applicant and as a condition of the proposed special permit, the Applicant was required to allow the heirs of the decedents buried at the site to have ingress and egress to the identified graves sites for visitation and maintenance of the graves.

13. The Applicant agreed to this condition in the deed and agreed to the condition as a part of the approval of the special permit.

00934

14. There was no evidence that the Applicant ever denied any request for visitation or access to the grave sites.

15. The Applicant obtained a building permit (Building Permit No. 030859) from the County of Hawai'i Department of Public Works- Building Division on April 23, 2003 to construct a 3-bedroom/3-bath single family dwelling.

16. The Applicant obtained a building permit (Building Permit No. 031117) from the County of Hawai'i Department of Public Works-Building Division on May 29, 2003, to construct an in-ground swimming pool.

17. On July 15, 2005, the Applicant submitted an application for a Special Permit to the County of Hawai'i Planning Department, to allow a 2-unit bed and breakfast establishment within a existing 3-bedroom single family dwelling on 0.722 acre of land situated within the State Land Use Agricultural District.

18. The Applicant received final inspection for the dwelling and the concrete pool on the Property on April 27, 2005.

19. On April 28, 2005, the Department of Land and Natural Resources-State Historic Preservation Division issued a "no-effect" letter regarding the proposed bed and breakfast, stating that they believe that there were no historic properties present because the bed and breakfast operation in the existing structure was less than 5 years old, and no new construction would be required. Thus, DLNR-SHPD believed that "no historic properties will be affected" by this undertaking.

20. The Property is situated within the State Land Use Agricultural district and the County's Agricultural 5-acre (A-5a) zoned district.

21. The surrounding properties are similarly zoned situated within the State Land Use Agricultural district and the County's Agricultural 5-acres (A-5a) zoned district.

00935

22. Surrounding property owners were notified of the proposed use and there were no objections raised by any of the surrounding property owners.

23. The surrounding area is characterized by a mix of single-family dwellings within the Kona Paradise Subdivision to the north and northwest, agricultural uses and farm dwellings within the Ka'ohē Ranch Estates Subdivision to the east and northeast, and larger agricultural properties to the South.

24. There is presently an existing 3-bedroom, single-family dwelling and concrete pool located on the Property.

25. The General Plan Land Use Pattern Allocation Guide (LUPAG) map designation for the Property is Extensive Agriculture.

26. The U.S.D.A. Soil Type at the Property is Kaimū extremely stoney peat, 6 to 20 percent slopes (rKED), in which permeability is rapid, runoff is slow, and the erosion hazard is slight. This soil is not suitable for cultivation.

27. The Property is classified as "Other Important Agricultural Land" by the ALISH Map.

28. The Land Study Bureau's Detailed Land Classification system designates the soil type a "D" or "Poor."

29. The Property is in an area designated as Zone X-an area determined by the Federal Emergency Management Agency (FEMA) to be outside the 500-year flood plain on the Flood Insurance Rate Map (FIRM).

30. There is no known public access through the Property to mountains or shorelines.

31. The Property is located approximately one mile from the nearest coastline and will not be impacted by coastal hazard or beach erosion.

32. The Property is not located within the Special Management Area (SMA).

33. The Property is not subject to any county community plan or design plan.

34. No formal floral or fauna study was conducted on the Property. The Property has been landscaped with Prichardia Pacifica, Gokso Minor, Syngonium, Rashis Palms, Dwarf Ofheopogon, Musa Williamsii, Musa Chinensis, Zamia Furfarcea and Cycas Revoluta Baburantha Cegantea. There are also existing mango and guava trees. Fauna resources consist of introduced bird species and some mongoose and feral cats.

35. There is no evidence of traditional and customary Native Hawaiian Rights being exercised on the Property, other than those covered by easements in the Applicants 2003 deed, which expressly allows rights of entry for the visitation, maintenance and care of existing grave sites, for the benefit of the relatives of the persons buried in the graves located within Grave Site A and Grave Site B from Māmalahoa Highway to and from the grave sites.

36. The Property is not listed as a historic site under the South Kona section of the Historic Sites Element in the General Plan.

37. Access to the Property and the bed and breakfast use is proposed from Māmalahoa Highway which is a State-owned highway. There is a 10-foot roadway easement that runs from the highway through Tax Map Key: (3) 8-7-9:002 to the Property. The Applicant will need to submit an application to the State Department of Transportation (SDOT) for a permit to construct a driveway from the Property onto the State Highway. The driveway connection to Mamalahoa Highway (Highway 11) shall be approved and conform to the requirements of the SDOT prior to the establishment of the bed and breakfast operation. Until such time the driveway is constructed, the Applicant does not have a permitted access.

38. The Property is not connected to County water. There is an existing water catchment system located on the Property.

39. Electricity and telephone services are available to the Property.

40. There were no major objections or concerns expressed by the Department of Public Works, the Department of Water Supply, the Police Department, the Fire Department, the

Real Property Tax Office, the Department of Land and Natural Resources-Land Division, and the Department of Health which reviewed the Applicant's permit application.

41. The County Planning Department and the Planning Director support the Application and recommended approval.

42. The house on the 0.722 acre Property has three bedrooms and three baths. Two bedrooms would be used for guest lodging, and breakfast would be served.

43. The house to be used for the bed and breakfast includes approximately 20 X 50 foot concrete deck behind the house, connecting the house to an 18 X 60 foot lap pool. The house has multiple large doors opening onto the deck, which has an expansive ocean view.

44. To the extent that any of these Findings of Fact constitute conclusions of law, they shall be so considered and construed.

45. The Planning Commission has considered all proposed Findings of Fact offered by each party. The intent of all proposed findings consistent with the findings of fact herein are incorporated herein, with the specific language herein to govern. All proposed findings inconsistent with or contrary to the findings herein are rejected.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission makes the following Conclusions of Law:

1. In Neighborhood Board v. State Land Use Commission, 64 Haw. 265, 639 P.2d 1097 (1982), the Hawai'i Supreme Court stated that:

Hawai'i Revised Statutes ("HRS") 205-6 allows the County Planning Commission and the Land Use Commission to issue special permits for "certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified", "but only when the use would promote the effectiveness and objectiveness of HRS Chapter 205." Whether a particular use is "unusual and reasonable" is determined by applying the five (5) guideline set forth in the Land Use District Regulation & 5-2 to the proposed project. Section 5-2 requires the following:

- 1) Such use shall not be contrary to the objectives sought to be accomplished by the Land use Law and Regulations.
- 2) That the desired use would not adversely affect surrounding properties.
- 3) Such use would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvement, and police and fire protection.
- 4) Unusual conditions, trends and needs have arisen since the district boundaries and regulations were established.
- 5) That the land upon which the proposed use is sought is unsuited for the used permitted within the District.

2. Similar guidelines to those set forth in the Neighborhood Board, supra, can be found in Rule 6-3 of the Rules of Practice and Procedure for the Planning Commission of the County of Hawai'i.

3. As explained in Neighborhood Board, supra, at Page 271, the essential purpose of a special use permit, "...is to provide landowners relief in exceptional situations where the use desired would not change the essential character of the district, nor be inconsistent with it."

4. The requested special permit for a bed and breakfast use on the Property complies with the requirements of Chapter 205 and Rule 6-3 of the Rules and Practice and Procedure for the Planning Commission of the County of Hawai'i, and would not change the essential character of the Property being used as a single family residence.

5. The Commission has jurisdiction over this Special Permit application to Hawai'i Revised Statutes Section 205-6.

6. In accordance with Section 25-5-52 of the Hawai'i County Code relating to zoning, permitted and allowable uses for this Property, without the issuance of a special permit, include, but are not limited to, a single family dwelling, adult day care homes, family child care homes, group living facilities, kennels, commercials or boarding stables, animal hospitals and veterinary establishments, tennis courts and swimming pools.

7. The proposed bed and breakfast permit is subject to specific standards found in Section 25-4-7 of the Hawai'i County code, which the Applicant has agreed to comply with as a condition of any approval.

8. Section 25-1-5 sets forth the definitions of terms used in the Hawai'i County Code. It identifies the following terms:

- a. Single Family Dwelling: "means a building containing only one dwelling unit."
- b. Dwelling Unit: "means one or more rooms designed for or containing or used as the complete facilities for the cooking, sleeping and living area of a single-family only and occupied by no more than one family and containing a single kitchen."
- c. Family: "means an individual or two or more persons related by blood, state-sanctioned adoption, foster parentage, guardianship or marriage, or a group of not more than five unrelated persons (excluding servants) occupying a dwelling unit. The term includes individuals in larger group living situations described as group living facilities and family child care homes."

Based on the foregoing definitions and the permitted uses within the Ag-5a zone, the Applicant is presently entitled to have up to five unrelated persons living in his home without a special permit. In addition thereto, the Applicant is presently entitled to sell his home to a family comprised of an unlimited number of members related by blood. He is also entitled to operate his home as a group living facility which includes a facility licensed by the state as an adult residential care home or an intermediate care facility/mental retardation community for persons including mentally ill, who are not related to the home operator or facility staff.

With the exception of the group living facility (which would require State approval), all of these things can be done immediately, without County or Court supervision, notwithstanding the fact that Applicant's home is located in an area that was once used as a cemetery and contains graves. Any of these occupants are free to roam and play on the Property and to loudly use the swimming pool on the Property, notwithstanding its relative location to surrounding

grave sites. The number of cars coming and going from the Property, and driving near grave site “A” on the access road would also be unlimited.

9. Granting the requested special permit will allow the County to condition the use of the Property and to have greater control over the activities that are conducted on the Property.

10. Based on the foregoing findings and conclusions, the proposed use is an unusual and reasonable use under HRS Section 205-6.

11. To the extent that any of these Conclusions of Law constitute findings of fact, they shall be so considered and construed.

DECISION AND ORDER

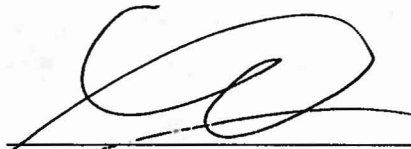
Based on the foregoing Findings of Fact and Conclusions of Law, Application SPP No. 05-000015 for a Special Permit to operate a 2-unit bed and breakfast establishment is hereby GRANTED, subject to the following conditions:

- (1) The Applicant and his successors and assigns shall be responsible for complying with all stated conditions of approval.
- (2) The Applicant shall comply with all applicable requirements of Section 25-4-7 of the Zoning Code, relating to bed and breakfast establishments.
- (3) The bed and breakfast operation shall be limited to the use of two (2) bedrooms and shall be limited to six (6) guests at any given time.
- (4) The Applicant shall provide bottled water for all guests of the bed and breakfast operation.
- (5) The driveway connection to Māmalahoa Highway (Highway 11) shall be approved and conform to the requirements of the Department of Transportation prior to the establishment of the bed and breakfast operation.
- (6) The Applicant shall maintain the perpetual non-exclusive easement and right of entry over and for the visitation, maintenance and care of the existing graves located within Grave Site “A” and Grave Site “B” identified as Easement “1” within the Applicant’s deed to the Property.
- (7) The Applicant shall preserve the cemeteries located on the subject property. There shall be no development within the Grave Site “A” and Grave Site “B” identified within the Applicant’s deed to the Property.

941

- (8) The Applicant shall provide, on its website and other promotional materials, notice of the presence of native Hawaiian graves and the need to be respectful of them and of those who visit them.
- (9) The Applicant shall provide a concrete curb or other physical protective barriers to demarcate and protect the native Hawaiian graves adjacent to any driveway used by guests, subject to reasonable approval by the Planning Director.
- (10) The Applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements.
- (11) Should any of these conditions not be met or substantially complied with in a timely fashion, the Planning Director may initiate procedures to revoke this Special Permit.

Dated: Hilo, Hawai'i, DEC 27 2007.

By 
WILLIAM R. GRAHAM, Chair
Planning Commission
County of Hawai'i