



County of Hawai'i

PLANNING COMMISSION

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720
Phone (808) 961-8288 • Fax (808) 961-8742

June 10, 2008

Mr. Gregory R. Mooers
P.O. Box 1101
Kamuela, HI 96743

Dear Mr. Mooers:

Special Permit Application (SPP 08-000052)
Applicant: Reuben Lelah
Request: Psychological Counseling Clinic
Tax Map Key: 7-3-48:por 4

The Planning Commission at its duly held public hearing on May 22, 2008, voted to approve the above-referenced application to allow the establishment of a psychological counseling clinic and related improvements on approximately 2 acres of land situated within the State Land Use Agricultural District. The property is located along the west side of Huehue Street, approximately 1,600 feet north of the Kaloko Drive-Huehue Street intersection, Kaloko Mauka Subdivision, Kaloko, North Kona, Hawaii.

Approval of this request is based on the following:

The applicant is requesting a Special Permit to allow the establishment of a psychological counseling clinic and related improvements on approximately 2 acres of land, which includes an office building, a proposed music therapy room and surrounding gardens. The office building and surrounding gardens will be used for treatment and therapy with families. The applicant is also proposing to construct a music therapy room that will be used periodically for treatment. Related uses for the project include an open deck, the concrete driveway from Huehue Street and parking.

Reuben Lelah, Psy.D. is the founder of the Loving Service Foundation, which was established as a 501c3 Public Charitable Trust in 2005. The Foundation's mission is to fund children's clinical and collateral non-clinical programs to initiate the same on Hawaii Island according to available funding and other resources. The Foundation also

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has plans to do music and sound therapy work with youth and has a mission of having children be involved in greenhouse agriculture on the property. Dr. Lelah has been practicing in Hawaii since 1995 and has been operating on the subject property since February of 2003, with the understanding that a home occupation was a permitted use under the County's Zoning Code.

The grounds for approving a Special Permit are based on Rule 6-6 in the Planning Commission Rules. It states that the Planning Commission shall not approve a Special Permit unless it is found that the proposed use (a) is an unusual and reasonable use of land situated within the Agricultural or Rural District, whichever the case may be; and (b) the proposed use would promote the effectiveness and objectives of Chapter 205, Hawaii Revised Statutes, as amended

The proposed use is an unusual and reasonable use of land situated within the Agricultural District. In recognizing that lands within agricultural districts might not be best suited for agricultural activities and yet classified as such, and in recognition that certain types of uses might not be strictly agricultural in nature, yet reasonable in such districts, the legislature has provided for the Special Permit process to allow certain unusual and reasonable uses within the Agricultural district. The project site is an approximate 2-acre portion of a 22.347-acre parcel. The majority of the property is heavily forested with native trees and shrubs such as ohia, tree fern, and other native trees and shrubs, and non-native vegetation. Additionally, the subject property is proposed to have 80% remain in native forest to help with the essential habitat for the Alala, which is an endangered bird whose population has reached an extremely critical state. Lastly, the applicant is actively involved in raising roses and other flowering plants, including various varieties of protea and fruit trees. Based on the minimal use of land for the proposed request, the minimal impacts to existing or potential agricultural activities and the majority of the property to be preserved for habitat for the Alala, the subject request is considered an unusual and reasonable use of agricultural land.

The granting of this request would promote the effectiveness and 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 for those uses to which they are best suited in the interest of the public 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 subject property is unclassified under the ALISH designation, and soils are classified as "E" or Very Poor. No active agricultural activities will be diminished, as only a small portion of the 22.347-acre parcel property will be used for the clinic and related uses, with the majority of the remaining area continuing in agricultural uses. Therefore, the proposed use would not remove significant lands from agricultural use and would not be contrary to the objectives of the State Land Use Law for the Agricultural District.

In addition to the above listed criteria, the Planning Commission shall also consider the criteria listed under Section 6-3(b)(5) (A) through (G). In considering the criteria, the Planning Director recommends the following:

(A) Such use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations. This criterion has been met based on the previous discussion listed above, mainly because the subject request is considered an unusual and reasonable use of the agricultural land and the proposed use will not adversely affect the preservation and agricultural use of the County's prime agricultural lands that is not contrary to the objectives sought to be accomplished by the State Land Use Law and Regulations.

(B) The desired use would not adversely affect surrounding properties. Surrounding properties to the north, east and west are zoned A-20a and the property to the south is zoned A-10a. The properties in the area are mainly 20+ acres in size. Uses in the area consist mainly of rural residential uses, agricultural uses, forest and vacant land. According to the applicant, the existing office is not visible from any of the adjoining properties and the proposed music therapy structure will be landscaped to mitigate any visual impacts to neighboring properties. To help mitigate potential adverse impacts to the surrounding properties, landscaping will be required as part of the Plan Approval process. In addition, hours of operation will be limited to 10 a.m. to 9 p.m., daily. These additional requirements should further minimize the possibility of adverse impacts to the surrounding area. Based on the above information, the applicant has met this criterion.

(C) Such use shall not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection. The access to the property is from Huehue Street, which is a private road that has a 22-foot wide paved roadway with 8-foot grass shoulders within an 80-foot right-of-way. Kaloko Drive, which is County owned and maintained, intersects with the Mamalahoa Highway approximately five miles below the property. Water is available to the property from a 4-inch waterline in Huehue Street fronting the property. Wastewater will be disposed of by an existing cesspool. Telephone and electrical services are available to the property. Police and fire services are available in Kailua-Kona. Based on the above, the requested use will not burden public agencies to provide additional services and the applicant has met this criterion.

(D) Unusual conditions, trends, and needs have arisen since district boundaries and regulations were established. In the 1960's and 1970's, the State's agricultural district boundaries and regulations were established and subsequently amended pursuant to HRS Chapter 205. The State Land Use Commission was created in 1961, and interim regulations and temporary district boundaries became effective in 1962. Subsequently, the regulations and Land Use District Boundaries became effective in August of 1964.

The property and surrounding areas are designated for agricultural uses by both State and County land use laws. Through the issuance of a Special Permit, various “non-agricultural” services may be allowed.

(E) The land upon which the proposed use is sought is unsuited for the uses permitted within the district. The project site is classified as “E” or “Very Poor” by the Land Study Bureau’s Overall Master Productivity Rating and is unclassified by the Department of Agriculture’s ALISH Map. Based on the poor soil classification for the property and the small area relative to the size of the property being utilized for this request, the applicant has met this criterion.

(F) The use will not substantially alter or change the essential character of the land and the present use. The use of the clinic and related uses will utilize approximately a 2-acre portion of a 22.347-acre property. The clinic will be located within a structure that was permitted as an additional farm dwelling. A condition of approval will require the applicant to withdraw the additional farm dwelling agreement and to submit a building permit to change the use of the structure from a dwelling to an office. The remaining area of the property will be used for agricultural purposes and forest. Therefore, based on the small area of the project site compared to the size of the property, the proposed use will not substantially alter or change the essential character of the land and its present use.

(G) The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design Plans. The Land Use Pattern Allocation Guide (LUPAG) Map component of the General Plan is a representation of the document's goals and policies to guide the coordinated growth and development of the County. It reflects a graphic depiction of the physical relationship among the various land uses. The LUPAG Map establishes the basic urban and non-urban form for areas within the County. The project site is located in area identified as Extensive Agriculture in the General Plan. The request will not be contrary to the Land Use Pattern Allocation Guide (LUPAG) Map designation for this area. Additionally, the approval of the subject request would support the goals and policies of the Land Use and Economic elements of General Plan.

Land Use Element

- Designate and allocate land areas in appropriate proportions and mix and in keeping with the social, cultural, and physical environments of the County.
- Encourage the development and maintenance of communities meeting the needs of its residents in balance with the physical and social environment.

Economic Element

- Provide residents with opportunities to improve their quality of life through economic development that enhances the County's natural and social environments.
- Economic development and improvements shall be in balance with the physical, social and cultural environments of the island of Hawaii.
- Provide an economic environment that allows new, expanded, or improved economic opportunities that are compatible with the County's cultural, natural and social environment.
- Strive for an economic climate which provides its residents an opportunity for choice of occupation.

The proposed request will allow the applicant an opportunity to improve their quality of life and to provide an economic environment that allows this new, economic opportunity.

The request is consistent with the objectives and policies as provided by Chapter 205A, HRS, and Special Management Area guidelines contained in Rule No. 9 of the Planning Commission Rules of Practice and Procedure. The project site is not proximate to the shoreline and will not be impacted by coastal hazard and beach erosion. There are no identified recreational resources, historic resources, public access to the shoreline or mountain areas, scenic and open space preserves, coastal ecosystems, marine resources or other natural and environmental resources in the area.

In view of the recent Hawaii State Supreme Court's "PASH" and "*Ka Pa'akai O Ka'Aina*" decisions, the issue relative to native Hawaiian gathering and fishing rights must be addressed in terms of the cultural, historical, and natural resources and the associated traditional and customary practices of the site:

Investigation of valued resources: No formal archaeological reconnaissance survey, oral history of kamaaina accounts of the area, historical survey of documentary records, or botanical study was included in the application. However, there are existing archaeological studies of the immediate area.

The valuable cultural, historical, and natural resources found in the permit area: According to the applicant, the parcel is located at the 5,000-foot elevation and was the subject of a reconnaissance survey in 1970 and 1971 as well as a 1991 National Park

Service study of the area. This study identified remains of an agricultural field system up to the 3,500-foot elevation. The Department of Land and Natural Resources-State Historic Preservation Division has issued a "no-effect" letter dated April 1, 2008, stating that DLNR-SHPD believes that no historic properties will be affected by this proposed activity because new construction or land alteration will occur in connection with this permit and residential development/urbanization has altered the land.

The Alala Recovery Plan dated October 28, 1982, prepared and approved by the U.S. Fish and Wildlife Service in cooperation with the Alala Recovery Team, recommends that certain selected essential habitats be preserved and properly managed to provide for the continued existence and growth of the population of the Alala, an endangered bird whose population has reached an extremely critical state. The Central Kona area along the north and west slopes of Hualalai is considered to be the center of concentration for breeding Alala. The Plan recommends that portion of the lands of Kaloko above approximately the 3,200 to 3,400-foot elevation, including all parcels in Blocks 8 through 13 of Kaloko Mauka Subdivision, be designated as an essential habitat for the Alala. The subject property is located within Block 12, at approximately the 5,000-foot elevation. According to the applicant, the property is proposed to have 80% remain in native forest to be preserved for habitat for the Alala.

Possible adverse effect or impairment of valued resources: The property does not abut the shoreline, therefore Hawaiian gathering and fishing rights is not an issue. Additionally, the property is being utilized for agricultural purposes and has been developed several structures. Presently, there is no evidence of any traditional and customary Native Hawaiian rights being practiced on the site, nor existence of known valued cultural, historical or native resources in the area. Thus, it is not anticipated that the proposed request will have any adverse impact on cultural or historical resources in the area.

Feasible actions to protect native Hawaiian rights. To the extent to which traditional and customary native Hawaiian rights are exercised, the proposed action will not affect traditional Hawaiian rights and no action is necessary to protect these rights. A condition of approval will be included to require the applicant to notify the DLNR-SHPD should any unidentified sites or remains be encountered, and proceed only upon an archaeological clearance form the DLNR-SHPD.

Based on the above, the request to allow a psychological counseling clinic and related improvements on approximately 2 acres of land would be an unusual and reasonable use of land within the State Land Use Agricultural District, and would not be contrary to the objectives sought to be accomplished by the State Land Use Law Rules and Regulations.

Approval of this request is subject to the following conditions:

1. The applicant, successors or assigns shall comply with all of the stated conditions of approval.
2. The applicant shall submit a metes and bounds description in map and written form of the approximate 2-acre project area by a registered surveyor prior to the receipt of Final Plan Approval.
3. Construction of the psychological counseling clinic and related improvements shall be completed within five (5) years from the effective date of this permit. Prior to the commencement of construction, Final Plan Approval shall be secured from the Planning Director in accordance with the Zoning Code Section 25-2-70, Chapter 25 (Zoning Code), Hawaii County Code, within one (1) year from the effective date of this permit. Plans shall identify all existing and/or proposed structures, paved driveway access and paved parking stalls associated with the proposed development. Landscaping shall also be indicated on the plans for the purpose of mitigating any adverse noise or visual impacts to adjacent properties in accordance with the requirements of Planning Department's Rule No. 17 (Landscaping Requirements).
4. The applicant shall secure and finalize all building permits for all existing structures from the Building Division-Department of Public Works within three (3) months from the effective date of this permit. If any structures are located within the setback area, the applicant shall obtain a variance within three (3) months of the effective date of this permit.
5. The applicant shall withdraw the additional farm dwelling agreement for the additional farm dwelling and change the use of the building permit from a farm dwelling to an office under Building Permit No. 026083 within one hundred and eighty days of the effective date of this permit.
6. The deck shall be reduced in size to 80 feet by 25 feet and shall include hand or guardrails along the perimeter of the deck. The deck shall be used for quiet individual or small group activities and the music therapy shall be conducted only in the enclosed building with individual or small groups.
7. Hours of operation shall be limited to 10:a.m. to 9:00 p.m., daily.
8. A Solid Waste Management Plan shall be submitted to the Department of Environmental Management for review and approval prior to the issuance of a Certificate of Occupancy.

9. Should any remains of historic sites, such as rock walls, terraces, platforms, marine shell concentrations or human burials be encountered, work in the immediate area shall cease and the Department of Land and Natural Resources-Historic Preservation Division (DLNR-HPD) shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the DLNR-HPD when it finds that sufficient mitigative measures have been taken.
10. The applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements.
11. Upon compliance with applicable conditions of approval, the applicant shall submit a final status report, in writing, to the Planning Director.
12. An extension of time for the performance of conditions of the permit may be granted by the Planning Director upon the following circumstances:
 - A. 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 the Zoning Code.
 - C. Granting of the extension would not be contrary to the original reasons for the granting of the permit.
 - 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).
 - E. If the applicant should require an additional extension of time, the Planning Department shall submit the applicant's request to the Planning Commission for appropriate action.

Should any of the conditions not be met or substantially complied with in a timely manner, the Planning Director may initiate the revocation of the permit.

This approval 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.

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Should you have any questions, please contact Norman Hayashi of the Planning Department at 961-8288, x205.

Sincerely,



Rodney Watanabe, Chairman
Planning Commission

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cc: Dr. Reuben Lelah
Department of Public Works
Department of Water Supply
County Real Property Tax Division-Kona
Planning Department - Kona
State Land Use Commission
Department of Land & Natural Resources-HPD
DOT-Highways, Honolulu