

## 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

February 2, 2009

Mr. Michael Miyahira  
Hawaiian Rainbows Business Development, LLC  
P.O. Box 391  
Pepe'ekeo, HI 96783

Dear Mr. Miyahira:

#### **Special Permit Application (SPP 08-000071)**

Request: To Allow Removal and Sale of Stockpiled Topsoil

**Revocation of SPP No. 1188** (*Docket Ref. No. 02-000036*)

**Applicant: Hawaiian Rainbows Business Development, LLC**

**Tax Map Key: 2-8-8:portion 144**

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The Planning Commission at its duly held public hearing on January 15, 2009, voted to revoke Special Permit No. 1188, which allowed the removal and sale of stockpiled topsoil on approximately 3.76 acres situated within the State Land Use Agricultural District. The property is located southwest of the former Pepe'ekeo Power Plant, approximately  $\frac{3}{4}$  mile east (makai) of State Highway 19, Makahanaloa, South Hilo, Hawai'i.

The Commission then approved Special Permit No. 08-000071 to allow the removal and sale of stockpiled topsoil for a 4.07-acre area situated within the State Land Use Agricultural District located along the east (makai) side of the Old Railroad Way and Southwest of the former Pepe'ekeo Power Plant, makai of State Highway 19, Makahanaloa, South Hilo, Hawai'i.

Approval of Special Permit No. 08-000071 is based on the following:

The applicant is requesting a Special Permit to allow the removal and sale of stockpiled topsoil for a 4.07-acre area of a 23.603-acre parcel.

The topsoil was stockpiled there to comply with the environmental regulations for sugar cane companies and the discharge of soil from their washing of the sugar cane. There are many large mounds of topsoil in the area that were created when C. Brewer

pumped the residual soil from the sugar cane that was harvested and processed. The processing of stockpiling began in the 1970's and continued until C. Brewer's sugar cane operations ceased. Heavy equipment to be operated on the project site will consist of an excavator and a D-6 bulldozer. The objective of the proposed use includes providing valuable soil to residents of East Hawai'i for landscaping, vegetative cover and fill material.

The proposed use is not contrary to the objectives sought to be accomplished by the land use law and regulations. The granting of this request would promote the effectiveness and objectives of Chapter 205, Hawai'i 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 Hawai'i. In the case of the Agricultural District, the intent is to preserve or keep lands of high agricultural potential in agricultural use. The stockpiled topsoil is located on an area whose soils are classified as "C" or "Fair" by the Land Study Bureau's Overall Master Productivity Rating and "Prime Agricultural Land" by the Department of Agriculture's Agricultural Lands of Importance to the State of Hawai'i (ALISH) Map. The applicant proposes to sell topsoil situated upon a 4.07-acre portion of the subject property. The parcel is 23.603 acres in size, and the removal of the stockpiled topsoil would allow for future agricultural use of the project site.

Lands within agricultural districts might not always be best suited for agricultural activities and yet classified as such. Also, there are certain types of uses which may not be agricultural in nature, yet reasonable in such districts. As such, the legislature has provided for the Special Permit process to allow for certain unusual and reasonable uses within the Agricultural district. The subject parcel is designated Agricultural by the State Land Use Commission and zoned Agricultural (A-20a) by the County. The topsoil operation is situated on a smaller portion of a larger approximate 23-acre parcel and would not significantly affect the agricultural resources or potential of the area nor significantly displace any active agricultural activity. After the topsoil is removed, the land will be brought back into agricultural uses, such as row cropping or pasture. Therefore, based on the above circumstances, approval of the request would not be contrary to the objectives of the State Land Use Law Rules and Regulations given the subject conditions.

The request is not contrary to the General Plan. The subject request is not contrary to the General Plan Land Use Pattern Allocation Guide (LUPAG) Map, which designates the project site as Important Agricultural Land. The project would complement the Land Use, Economic and Natural Resources goals and policies of the General Plan.

The desired use will not adversely affect the surrounding properties. There will be minimal impact of the operation to residents in the area. The project site consists of 4.07 acres. Operations will occur on Wednesdays and Saturdays, from 7:00 a.m. to 3:30 p.m. The applicant anticipates an average of 10–15 truckloads of topsoil will be transported out via the private road per day. Dust can be mitigated by water available to the site. Noise will be minimized by installing standard mufflers on the equipment. Lands surrounding the project site are used for pasture, farming and scattered residential dwellings. Although the nearest dwelling is located across Old Railroad Way fronting the subject property, the use will be operated only on two days a week and the applicant will mitigate noise and dust impacts that may be generated by the use.

The land upon which the proposed use is sought is suited for the uses permitted within the district; however, this use will not interfere with existing uses. The land on which the topsoil is located is rated "C" or "Fair" and "Prime Agricultural Land" by the ALISH Map. After the stockpiled topsoil is removed and the original elevation attained, the ground will be restored to its natural state by grubbing the area and contouring to a non-hazardous condition to provide for future agricultural uses.

The use will not substantially alter or change the essential character of the land and the present use. This operation will occur on a small portion of the subject property. The project site has not been productive and has been vacant of activity since C. Brewer began this stockpiling in the 1970's. Therefore, it is not anticipated that the use will not substantially alter or change the essential character of the land.

Unusual conditions, trends and needs have arisen since the 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.

The desired use will not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, and police and fire protection. Access to the project site is from Old Railroad Way, which is a 16-foot wide gravel private road. County water is available at the site to provide for dust control. All other essential utilities and services are available to the property.

The proposed request will not have a significant adverse impact to traditional and customary Hawaiian Rights. In view of the Hawai'i 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 archaeological assessment /inventory survey or flora/fauna study was conducted for the property.

The valuable cultural, historical, and natural resources found in the project area: The likelihood of any rare or endangered species, habitat of flora or fauna or any archaeological features is remote on the property because the project site and surrounding properties were used for the stockpiling of topsoil from the washing of sugar cane for many years.

The Department of Land and Natural Resources-State Historic Preservation Division has issued a “no-effect” letter stating that no historic properties will be affected by this project because intensive cultivation has altered the land.

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.

Possible adverse effect or impairment of valued resources: As the proposed request will involve minimal ground alteration activities in a grassy area, Hawaiian gathering and fishing rights are not an issue.

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.

Based on the above considerations, the request to allow the removal and sale of stockpiled topsoil is an unusual and reasonable use of land, which would not be contrary to the objectives sought to be accomplished by the Land Use Law 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 hours of operation shall be limited from 7:00 a.m. to 3:30 p.m. on Wednesdays and Saturdays.

3. The operation shall not obstruct public access to and along the shoreline.
4. Adequate dust control mitigation measures shall be implemented for the duration of the operation in accordance with Department of Health requirements.
5. The applicant shall provide erosion and sedimentation control, and mitigate all development-generated runoff.
6. A drainage study shall be prepared by a licensed civil engineer and submitted to the Department of Public Works prior to the commencement of operations. Any recommended drainage improvements shall be constructed meeting with the approval of the Department of Public Works prior to the commencement of operations.
7. The applicant shall obtain an NPDES (National Pollutant Discharge Elimination System) Permit, if required, from the State Department of Health prior to the commencement of operations.
8. The applicant shall contact the Department of Health-Clean Air Branch and receive a clearance regarding elevated soil arsenic levels prior to the commencement of operations.
9. The applicant shall submit a compliance report regarding conditions of approval required prior to the commencement of operations (Conditions Nos. 6, 7, & 8) in writing to the Planning Director.
10. Upon termination of the operation, the land shall be graded and agricultural use or vegetation to blend with the surrounding areas shall be established. Appropriate documentation which demonstrates compliance with this condition shall be submitted to the Planning Director for review and approval within ninety (90) days from the termination date.
11. 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.
12. The applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements.

Mr. Michael Miyahira

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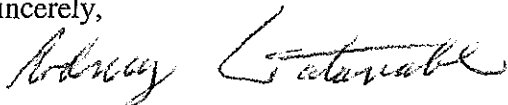
13. An extension of time for the performance of conditions within the permit, may be granted by the Planning Director upon the following circumstances:
- A) Non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns 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 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).

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.

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

Sincerely,



Rodney Watanabe, Chairman  
Planning Commission

Lhawaiianrainbows01PC

cc: Department of Public Works  
Department of Water Supply  
County Real Property Tax Division  
State Land Use Commission  
Department of Land & Natural Resources-HPD  
DOT-Highways, Honolulu  
Mr. Gilbert Bailado ✓