

## 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

July 20, 2009

Mr. Joseph Chamberlain  
Arrow of Oregon/Hawai'i, LLC  
15666 NE Eilers Road  
Aurora, OR 97002

Dear Mr. Chamberlain:

Special Permit Application (SPP 09-000076)

Applicant: Arrow of Oregon/Hawai'i, LLC

Request: Establish a Cinder Quarry Operation on Approximately  
Five Acres

Tax Map Key: 9-2-148:1-5

---

The Windward Planning Commission at its duly held public hearing on July 1, 2009, voted to approve the above-referenced application to allow a cinder and rock quarry operation on 5.003 acres of land situated within the State Land Use Agricultural District. The properties are located at the corner of Mahimahi Drive and Liliana Lane, Hawaiian Ocean View Estates Subdivision, Kahuku, Ka'u, Hawai'i.

Approval of this request is based on the following:

The applicant is requesting a Special Permit to allow the establishment of a cinder and rock quarry operation on approximately 5 acres of land. The applicant proposes to remove approximately 700,000 to 750,000 cubic yards of cinder from the project site in an approximate 15-year period. The quarry operation will consist of a 1,920-square foot steel building to be used as a shop and for storage of equipment and tools. The building will be enclosed with a security fence. Equipment for the quarry operation will consist of two CAT D8 bulldozers, one CAT D6 bulldozer, two loaders, two 6-yard dump trucks and an excavator. A 10' by 4' rock and cinder berm has been placed around the five acres for safety.

The criteria for approving a Special Permit are based on Rule 6-6 in the Planning Commission Rules. Rule 6-6 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, Hawai'i 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. Based on the poor soil conditions of the project site for agricultural activities, the proposed quarry operation is considered an unusual and reasonable use of agricultural land in this location within the State Land Use Agricultural District.

**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 for those uses to which they are best suited in the interest of the public 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. Soils on the project site are identified as Cinder Land (rCL) and Lava Flows, Aa (rLV). Soils are classified as "E" or "Very Poor" soil by the Land Study Bureau's Overall Master Productivity Rating and classified as existing urban development by the Department of Agriculture's ALISH Map. As the property is currently vacant and is not in active agricultural use, the use will not displace any existing agricultural activity or diminish the agricultural potential of the subject property. Therefore, the proposed use will not adversely affect the preservation and agricultural use of the County's prime agricultural lands, and is not contrary to the objectives sought to be accomplished by the State Land Use Law and Regulations.

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.** The request is considered an unusual and reasonable use of agricultural land and the proposed use will not adversely affect the preservation and agricultural use of the County's prime agricultural lands, which 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 are zoned Agricultural (A-1a) and are located near the northeastern (top) portion of the Hawaiian Ocean View Estates Subdivision. The immediate area surrounding the project site is made up of vacant, barren, lava fields with quarrying activity occurring on lots to the south and west of the project site. The nearest dwelling is located over 1,000 feet from the project site.

The Planning Director is recommending that the Planning Commission approve the permit with a 10-year life rather than allowing it to continue without placing a time condition on the quarry operation. The 10-year time condition would allow the applicant(s) to come back to the Planning Commission and report on the status of the operation. It allows the Planning Commission an opportunity to review the operation, as well as confirm compliance with the conditions.

**(C) Such use shall not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection.** Access to the project site will be from Liliana Lane, which is a two-lane, private subdivision road comprised of chipseal and oil within a 40-foot right-of-way. Mahimahi Drive has been closed between Lurline Lane and Liliana Lane for safety reasons caused by an existing mining operation and will not be used for access. The quarry will be used to provide cinder material for the residents of Hawaiian Ocean View Subdivision and the residents of the County of Hawai'i. The quarry operation will help reduce the necessity for trucks to haul material over long distances on County roads to provide cinder to the area.

A major safety concern of the quarry operation is the stability of the slopes near roadways and adjacent properties as the cinder is being mined. The Department of Public Works recommended that the applicant have the quarry site evaluated by and to follow the recommendations of an engineer, qualified in the field of soil mechanics, for minimum setbacks from the subdivision road and adjacent properties and to establish and maintain safe operational and resultant stability of the entire quarry site.

The applicant hired Construction Engineering Labs (CEL) to evaluate the proposed 5-acre quarry site to establish minimum setbacks and the make recommendations on slope cuts and fills along the side walls of the proposed quarry. CEL personnel conducted a series of site visits and collected samples from sidewalls of existing excavations and from an excavated test pit. CEL developed geotechnical recommendations for grading of the quarry site, including setbacks and side-wall slope construction, which was compiled in a geotechnical investigation report and submitted to the Planning Department.

The geotechnical investigation report recommended that the top of all slopes should be a minimum of 15 feet offset (setback) from the nearest property line. Additionally, the report recommended that permanent cut slopes should be constructed at an inclination of no greater than 1H:1V (one foot in the horizontal direction for each foot in the vertical direction) to a maximum height of 20 feet. Cut slopes exceeding 20 feet in height should have an 8-foot wide bench installed at mid-height of the slope. Slopes of up to 100 feet are anticipated for this project. As such, these cut slopes should have an 8-foot wide bench installed at each 20-foot interval (vertical). Surface water should be directed away from the cut slope by means of an appropriate system constructed at the top of the slope. Benches used for access drives of excavation and hauling equipment should be at least 15 feet wide. Lastly, the report concludes that it is necessary that construction monitoring be a part of the contract to ensure that the recommendations as included in the report are followed. The construction monitoring should be under the supervision of CEL's personnel and licensed engineer. All cut, fill, and backfill operations should be monitored under the supervision of CEL personnel with periodic tests and observations of fills to determine the degree of compaction and moisture content obtained by the contractor. In addition, monitoring is necessary to identify any unsuitable soils or deleterious material that may have to be removed. Based on the information and recommendations provided within the report, conditions of approval will be added to requiring the applicant to comply with these recommendations.

Additionally, all mineral and metallic mines are reserved in favor of the State of Hawai'i. The applicant must comply with Sections 181 and 182 of the Hawai'i Revised Statutes and should consult with the DLNR-Land Division prior to the commencement of operations. A condition of approval will be added requiring the applicant to comply with this request.

Lastly, a condition of approval also will be added requiring the applicant to provide an on-site water storage tank for dust mitigation. All other services are available to the project site. There is currently no electrical or telephone services to the project site. The applicant will be utilizing a generator to operate power tools.

**(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 properties and surrounding areas are designated for agricultural uses by both State and County land use laws. Through the issuance of a Special Permit, a community may establish various "non-agricultural" services that may not be available or allowed by zoning for its residents.

**(E) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.** Soils for the project site are classified as "E" or "Very Poor" by the Land Study Bureau's Overall Master Productivity Rating and classified as existing urban development by the Department of Agriculture's ALISH Map. Additionally, the U.S. Soil Survey identifies the soil type for the project as Cinder Land (rCL) and Lava Flows, Aa (rLV). Based on the above information, it has been determined that the land upon which the proposed use is sought is unsuited for the uses permitted within the district.

**(F) The use will not substantially alter or change the essential character of the land and the present use.** The proposed quarry operation will utilize approximately five (5) acres of land to remove approximately 700,000 to 750,000 cubic yards of cinder. The present character of the area is vacant, barren lava with several cinder quarry operations present in the immediate area. The requested use will change the essential character of the land, which is presently vacant of structures and uses, to operate a cinder and rock quarry. Therefore, based on the above the discussion, the proposed use will alter or change the essential character of the land and its present use, but the change will not be substantial as cinder mining has been occurring in this area since the 1960's.

**(G) The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design Plans. The request will conform to, among others, the Land Use and Economic elements of the General Plan.** 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 General Plan LUPAG Map designation for the project site is Rural, which includes existing subdivisions in the State Land Use Agricultural and Rural districts that have a significant residential component. Typical lot sizes vary from 9,000-square feet to two acres. These subdivisions may contain small farms, wooded areas, and open fields as well as residences. Allowable uses within these areas, with appropriate zoning, may include commercial facilities that serve the residential and agricultural uses in the area, and community and public facilities. While quarrying activities are not defined as a use that is compatible with the Rural designation, the proposed use is consistent with the Land Use and Economic elements of the General Plan.

Quarries must be located in locations where there is an abundance of raw materials. For this reason, while industrial in character, quarries cannot be confined to Industrial-designated areas, as evidenced by the granting of Special Permits for quarries islandwide. The project site contains raw materials essential for construction projects in

the Oceanview area. The project would also complement the following goals and policies of the Land Use and Economic elements of the General Plan:

**Land Use - Industrial Element:**

- Industrial activities may be located close to raw material or key resources. The ability of the subject property to provide the needed raw material vital to the construction industry while able to absorb the noxious nature of quarries speaks to the appropriateness of the area for such uses.

**Economic:**

- The County shall strive for diversification of its economy by strengthening industries and attracting new endeavors.

**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. Although there were no professional surveys conducted of the site, it is not anticipated that endangered or threatened candidate species of flora or fauna are located within the property. The area has not been identified as a significant botanical or biological habitat. 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.

**The 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 formal archaeological reconnaissance survey, oral history of kamaaina accounts of the area, historical survey of documentary records, botanical and/or fauna study was submitted.

The valuable cultural, historical, and natural resources found in the permit area: As the property is a vacant, barren lava field with scattered ohia trees, an archaeological

inventory survey of the site was not conducted. The Department of Land and Natural Resources-State Historic Preservation Division has issued a "no-effect" letter dated January 6, 2009, stating that DLNR-SHPD determines that no historic properties will be affected by this project.

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.

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 considerations, the approval of the request would support 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, its successor or assigns shall be responsible for complying with all stated conditions of approval.
2. This Special Permit shall be valid for a period of ten (10) years from the effective date of the permit, or its completion or abandonment, whichever occurs first.
3. The applicant shall follow all of the soil engineer's recommendations as stated within the Geotechnical Investigation Report dated May 22, 2009. This includes, but is not limited to, 1) at least 15-foot setbacks from all property lines to the top of slopes, 2) side-wall cut slopes should have an 8-foot wide bench installed at each 20-foot interval (vertical) and benches used for access drives of excavation and hauling equipment should be at least 15 feet wide, and 3) construction monitoring shall be under the supervision of CEL's personnel and licensed engineer to oversee the quarrying operations and verify compliance with the established safety operation procedures and to oversee the resultant stability of the entire quarry site as long as the quarry site is in operation. All cut, fill, and backfill operations shall be monitored under the supervision of CEL personnel with periodic tests and observations of fills to determine the degree of compaction and moisture content obtained by the contractor.
4. Prior to commencement of operations, the applicant shall submit an Erosion Control and Site Restoration Plan that assures the site will be left in a

nonhazardous condition. The Plan shall include photographs of the area and a topography map of the project site and its related surroundings areas. This Plan shall be reviewed by the Department of Public Works and their comments submitted to the Planning Director for review and approval

5. Prior to commencement of operations, the applicant shall consult with the Department of Land and Natural Resources-Land Division and submit verification of compliance with Sections 181 and 182 of the Hawai'i Revised Statutes. If required, the applicant shall secure any permits required by DLNR-Land Division.
6. Prior to commencing construction of the warehouse, Final Plan Approval shall be secured from the Planning Department in accordance with Chapter 25-2-70 (Zoning Code). Plans shall identify any proposed structures and parking associated with the proposed quarry operation.
7. Quarrying activities shall be limited to the hours of 7:00 a.m. and 5:00 p.m., Monday through Friday.
8. A Solid Waste Management Plan shall be submitted to the Department of Environmental Management for review and approval prior to the issuance of Final Plan Approval.
9. Adequate dust control mitigation measures shall be implemented for the duration of the operation in accordance with Department of Health requirements. The applicant shall provide an on-site water storage tank to be used for dust control.
10. 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 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.
11. Upon termination of the quarry operations or abandonment of any portion of the affected site, the land shall be graded to blend in with the surrounding area and rehabilitated as approved in the approved Erosion Control and Site Restoration Plan. The affected site shall be left in a non-hazardous condition. Appropriate documentation which demonstrates compliance with this condition shall be submitted to the Planning Department and the Department of Public Works for review and approval within 90 days from the date of termination and/or abandonment.



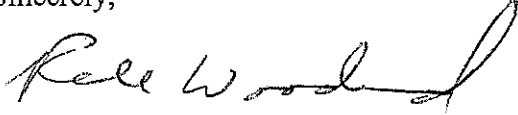
12. The applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements, including the United States Department of Labor's Mine Safety and Health Administration (MSHA) and Occupational Safety and Health Administration (OSHA).
13. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of this permit. The report shall include, but not be limited to, the status of quarrying activities and to what extent the conditions of approval are being complied with. The report shall also include information regarding compliance with the monitoring program, the established safety operation procedures and the resultant stability of the entire quarry site, including side-wall slope construction. This condition shall remain in effect as long as the quarry is in operation.
14. An initial extension of time for the performance of conditions within the permit, with the exception of Condition No. 2, 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 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.
15. 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.

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.

Mr. Joseph Chamberlain  
Page 10

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

Sincerely,

A handwritten signature in cursive script that reads "Rell Woodward". The signature is written in black ink and is positioned above the typed name.

Rell Woodward, Chairman  
Windward Planning Commission

Larrowoforegonspp09-000076

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  
Mr. Randy Lovato

BEFORE THE WINDWARD PLANNING COMMISSION  
OF THE  
COUNTY OF HAWAI'I

In the Matter of Special Permit  
Applications:

Applicant ARROW OF  
OREGON/HAWAI'I LLC's Application  
to Amend Special Permit No. 09-000076,  
for Expansion of Quarry Operations  
(TMK Nos.: (3) 9-2-148: 005 (existing  
SPP Area) and (3) 9-2-148:6-10, 15-16,  
and 36),

and

DAVID J. and LAURA A. RODRIGUES'  
Special Permit Application, SPP No. 15-  
000178, to Allow a Cinder and Rock  
Quarry Operation on 5.003 Acres of Land  
(TMK Nos.: 9-2-142: 020, 021, 022 and  
9-2-145: 047, 048).

SPP No. 09-000076  
SPP No. 15-000178  
(Consolidated)

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND DECISION AND  
ORDER OF THE COUNTY OF  
HAWAI'I, WINDWARD PLANNING  
COMMISSION; EXHIBITS "1" AND  
"2"; CERTIFICATE OF SERVICE

Oral Argument & Decision:

Date: February 4, 2016

Time: 10:00 a.m.

Place: Aupuni Center Conference Room  
101 Pauahi Street, Hilo, HI 96720

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND  
ORDER OF THE COUNTY OF HAWAI'I, WINDWARD PLANNING COMMISSION

This matter comes before the Windward Planning Commission of the County of Hawai'i ("Commission") pursuant to Hawai'i Revised Statutes ("HRS") § 205-6 and Rule 6 of the County of Hawai'i Planning Commission Rules of Practice and Procedure ("PC Rules"), upon the applications of Arrow of Oregon/Hawai'i LLC ("Arrow") to amend its existing Special Permit No. 09-000076, and of David J. and Laura A. Rodrigues ("Rodrigueses") for Special Permit No. 15-000178 (collectively, "Applications").

On September 30 and October 1, 2015, the Applications came on for consolidated contested case hearing before the Hearings Officers as appointed pursuant to Rule 4 of the PC Rules. At the close of the evidentiary portion of the hearing on October 1, 2015, the parties were asked to submit proposed findings of fact and conclusions of law, together with proposed permit conditions. Upon due consideration of the parties' submissions, the evidence presented at the hearing, and the record and files therein, the Hearings Officers filed and submitted the Hearings Officers' Report and Recommendation ("Recommendation") to the Commission and the parties on November 30, 2015.

This matter came on for hearing before the Commission on January 7, 2016, wherein the Commission voted to reopen the evidentiary portion of the proceedings for the purpose of conducting a site inspection on January 15, 2016. The site inspection was later continued to January 29, 2016.

This matter subsequently came on for hearing on February 4, 2016. Appearing on behalf of Arrow was Roy A. Vitousek III, Esq. The Rodrigueses appeared, *pro se*. Appearing on behalf of Intervenor Hawaiian Ocean View Estates Road Maintenance Corporation ("HOVE RMC") was Thomas L. Yeh, Esq. and Laura Foster. Appearing on behalf of the Department of Planning, County of Hawai'i, was Planning Director Duane Kanuha ("Director") and Deputy Corporation Counsel Amy G. Self, Esq.

Having considered the complete record in this matter, the Commission hereby finds, concludes, and determines as follows:

## **FINDINGS OF FACT**

### **I. The Parties**

#### **A. Arrow**

1. Arrow is requesting an amendment to Special Permit No. 09-000076, which was approved in 2009 to allow a cinder and rock quarry operation on 5.003 acres of land situated within the State Land Use Agricultural District.

2. Such amendment would add 8.009 acres, for a total of 13.012 acres of land, to its current cinder and rock quarry operation for the parcels identified as TMK Nos. (3) 9-2-148:005, 006-010, 015, 016 and 036. Arrow proposes to remove approximately 700,000 to 750,000 cubic yards of cinder from the project site over the course of approximately 15 years. The quarry operation includes an office building, water catchment tank, and a 1 kW wind generator, a weigh scale and equipment storage area, which is enclosed with a security fence. Equipment for the quarry operation will consist of two CAT D8 bulldozers, one CAT D6 bulldozer, two front end loaders, two 6-yard dump trucks, a large excavator, and a rock crusher.

#### **B. Rodrigueses**

3. The Rodrigueses are requesting a Special Permit to legitimize a cinder and rock quarry operation on 5.003 acres of land identified as TMK Nos. (3) 9-2-142:020, 021, 022 and 9-2-145: 047 and 048, situated within the State Land Use Agricultural District. The Rodrigueses propose to remove approximately one-to-two truckloads of cinder from the project site on a daily basis.

4. The quarry operation will consist of a storage area of equipment, which is an area to park dump trucks, trailers and heavy equipment (2 loaders, 2 dump trucks, 1 Case dozer, backhoe, excavator, 2 trailers, a utility trailer and spare parts). This is referenced as

“junkyard” in the application, which is the term defined for an area of storing equipment in the Zoning Code. The Rodrigueses and family will be the only employees for the quarry operation as this is a family owned and operated business.

5. The Rodrigueses have historically operated a cinder quarry on their proposed sites without a Special Permit.

**C. HOVE RMC**

6. On May 28, 2015, HOVE RMC filed a Petition For Standing In A Contested Case Hearing (“Petition”) in the proceedings pertaining to Arrow’s application to amend SPP No. 09-000076 and the Rodrigueses’ application for a Special Permit, SPP 15-000178. The Commission granted HOVE RMC’s Petitions on June 4, 2015.

7. HOVE RMC is a non-profit organization whose purpose is to rebuild and maintain the roads within the Hawaiian Ocean View Estates Subdivision (“HOVE”) as a privately maintained road system.

8. The scope of HOVE RMC’s obligation to maintain and repair the roadways in HOVE and its right to collect assessments to effect these repairs are set out in HOVE RMC’s Amended and Restated Articles of Incorporation and Bylaws.

9. HOVE RMC intervened in these proceedings to advocate conditions on any permit or amended permit approval in order to mitigate adverse impacts to HOVE RMC’s roads and property.

**D. Director**

10. Pursuant to Rule 4-6(a) of the PC Rules, the Director is a party to these consolidated proceedings. The Planning Department, through its Director, currently Duane

Kanuha, is tasked with receiving, processing and providing recommendations to the Commission on Special Permit applications.

## **II. The Special Permit Applications**

### **A. Arrow's Application for Amendment of SPP 09-000076**

11. The project site is County zoned Agricultural (A-1a), situated within the State Land Use Agricultural District. The General Plan Land Use Pattern Allocation Guide Map designates the project site "Rural."

12. The properties surrounding the project site are similarly zoned A-1a and consist mainly of vacant lots or lots that have been used for cinder quarry operations, primarily across the project site along Mahimahi Drive and the nearest dwelling is over 1,000 feet from the project site.

13. The Commission has issued two Special Permits for cinder and rock quarries in the area thus far, including SPP 09-000076 issued to Arrow.

14. The U.S.D.A. Soil Type for the project site is Cinder Land (rCL) and Lava Flows, A'a (rLV); the Land Study Bureau Soil Rating is "E" or "Very Poor."

15. The Department of Land and Natural Resources-State Historic Preservation Division ("SHPD") issued a determination letter on May 6, 2015 that "no historic properties will be affected" by the proposed amendment.

16. There is no evidence of traditional and customary Native Hawaiian rights being practiced on the project site.

17. There is no known public access to the mountains or the shoreline that runs through the project site.

18. Access to the project site will be from Liliانا Lane, which is a two-lane, private subdivision road comprised of chipseal and oil within a 40-foot right-of-way.

19. Water will be made available to the project site from a private water catchment system.

20. Arrow will be required to comply with the rules and regulations of the Department of Health regarding wastewater.

21. The project site currently has no electrical or telephone services, but will be utilizing a generator to operate power tools.

22. Arrow's quarry operations are licensed and monitored by the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA"). Arrow's MSHA license number is Mine ID 51-00302. Arrow has indicated that its quarry operations will follow all Occupational Safety and Health Administration's ("OSHA") and MSHA rules and regulations.

23. Although Arrow has attended OSHA training and requested an on-site consultation, OSHA has never conducted a site inspection of Arrow's operation.

24. Arrow indicated that MSHA inspections are conducted twice per year and the last MSHA inspection of Arrow's operation was on January 26, 2015.

25. Arrow currently has two employees (truck driver and office clerk), but could have as many as four employees.

26. The Department of Public Works ("DPW") recommended that Arrow be required to have the project site evaluated by and follow the recommendations of an engineer qualified in the field of soil mechanics for minimum setbacks from the subdivision road and



adjacent properties and to establish and maintain safe operational and resultant stability of the entire quarry site.

27. Although several violation notices have been issued for properties included in Arrow's amendment application, parcels 006, 007 and 008 were not owned by Arrow at the time the notices were issued and did not involve Arrow.

28. Arrow was issued a violation notice for activity that occurred on parcel 036 in 2014, but the violation has since been resolved.

**B. The Rodrigueses' Application**

29. The Rodrigueses' application for a Special Permit, if approved, will allow a cinder and rock quarry already in operation to continue operating on 5.003 acres of land within the State Land Use Agricultural District and County Zoning Agricultural (A-1a).

30. The Rodrigueses propose to remove approximately one-to-two truckloads of cinder from the project site on a daily basis.

31. The operation will consist of a storage area of equipment, which is an area to park dump trucks, trailers and heavy equipment (2 loaders, 2 dump trucks, 1 Case Dozer, backhoe, excavator, 2 trailers, a utility trailer and spare parts).

32. The Rodrigueses' operation has been inspected by MSHA at which time they were informed that if the operation does not possess a powered screen or crusher, they would be exempt from MSHA permit requirements or oversight of activity; the Rodrigueses' representative made a request on behalf of the Rodrigueses to OSHA for an on-site consultation.

33. The Rodrigueses submitted grading permits with their Special Permit application which were issued to allow the excavation of material from three (3) of the five (5) properties covered by the application (i.e., TMK Nos. (3) 9-2-142:020, 021 and 022).

34. Peter J. K. Dahlberg (“Dahlberg”) of Aina Engineers Inc. submitted a Geotechnical Report with recommendations, dated March 3, 2015, on behalf of the Rodrigueses. Dahlberg is also the engineer of record for Arrow.

35. The Planning Department has issued violation notices to the Rodrigueses for unpermitted excavation and a junkyard on the Rodrigueses’ property included in the Special Permit application; the Rodrigueses submitted the Special Permit application to resolve such violations.

36. The Rodrigueses’ property has been used for quarrying activities for several decades.

37. The properties surrounding the Rodrigueses’ property are similarly zoned A-1a and consist mainly of vacant lots or lots that have been used for cinder quarry operations, primarily above Kailua Boulevard; the nearest dwelling is located on the northwest corner of Kailua Boulevard and Lurline Lane directly across from Rodrigueses’ property.

38. The U.S.D.A. Soil Type for the Rodrigues property is Cinder Land (rCL) and Lava Flows, A`a (rLV); the Land Study Bureau Soil Rating is “E” or “Very Poor.”

39. SHPD issued two “no-effect” letters dated December 17, 2014 stating that SHPD determined that no historic properties will be affected by the proposed activities.

40. There is no evidence of traditional and customary Native Hawaiian rights being practiced on the Rodrigueses’ property.

41. There is no known public access to the mountains or the shoreline that runs through the Rodrigueses’ property.

42. Access to the project will be from Lurline Lane, which is a two-lane, private subdivision road comprised of chipseal and oil approximately 18 feet in width within a 40-foot right-of-way.

43. Water is not available in the area for the proposed use.

44. If needed, Rodrigues will provide portable sanitation facilities.

45. Currently, there is no electrical or telephone services to the Rodrigueses' property; if needed, the Rodrigueses will utilize a generator for electricity.

**C. Director's Recommendation**

46. After reviewing both Arrow's and the Rodrigueses' applications against the grounds for Special Permits set forth in PC Rule 6-7, the Director recommended that the Commission approve each of the applications with specific conditions.

47. In recommending approval, the Director determined that the quarry operations proposed in both applications are considered an unusual and reasonable use of agricultural land in the location within the State Land Use Agricultural District, based on the poor soil conditions of the properties for agricultural activities and the existence of other similar quarries in the immediate area.

48. The Director determined that the proposed quarry operations in both applications would promote the effectiveness and objectives of Chapter 205, HRS, because they would not displace any existing agricultural activity or diminish the agricultural potential of the subject properties due to the poor soil classification.

49. The Director also found the applications met the criteria found in PC Rules 6-3(b)(5)(A) – (G).

50. As part of his recommendations for the Arrow and Rodrigues' applications, the Director reserved his right to modify and/or alter his position based upon additional information presented at the public hearing.

### **III. The Consolidated Contested Case Hearing**

51. The Arrow (SPP 09-000076) and Rodrigues (15-000178) applications were consolidated for contested case hearing; the hearing was held on September 30 and October 1, 2015.

52. The focus of the parties during the contested case hearing centered on proposed conditions of approval for both the Arrow and Rodrigues applications. No party directly disputed the Special Permit criteria for both applications were met, as the Director's recommendations for approval of both applications had opined.

53. Robert J. Thomas Jr. ("Thomas"), P.E., prepared the Geotechnical Investigation Report by Construction Engineering Labs ("CEL") dated May 21, 2009 ("2009 Geotechnical Report"), as Arrow's engineer of record at the time of its 2009 application for the existing Special Permit. At the contested case hearing in this matter, Thomas was qualified as an expert in the field of geotechnical engineering and soil mechanics.

54. Thomas prepared a Geotechnical Report, dated, May 26, 2015 ("Thomas 2015 Geotechnical Report") for HOVE RMC as a result of an April 27, 2015 site visit, as well as his review of relevant documents from the record herein, including the 2009 Geotechnical Report for Arrow.

55. The Thomas 2015 Geotechnical Report makes similar recommendations as in the 2009 Geotechnical Report.

56. HOVE RMC suggested a condition that would require Arrow and the Rodrigueses to “pay an increased road maintenance (special assessments) fee, which will be determined and issued by the HOVE RMC.”

57. Laura Foster (“Foster”) is the Chief Operating Officer for HOVE RMC. During the hearing, Foster testified on behalf of HOVE RMC that they’re asking the Commission “to help us enforce what’s right for our road system” in the way of conditions.

58. On September 4, 2015, HOVE RMC, citing its Articles of Incorporation and Bylaws, levied a “special assessment” against Arrow in the amount of \$258,263.00 to “re - pair Lurline” and “rebuild Liliana.” HOVE RMC has not levied a similar “special assessment” against any of the other quarry operators in HOVE who use the roadways in the quarry area; nor has such an assessment been made against any other property owner in HOVE, generally.

59. Article VII B. of Intervenor’s Amended and Restated Articles of Incorporation (hereinafter “Articles”) provides HOVE RMC the power to implement and enforce assessments, as provided in the Amended Bylaws and a court order, related to the use, operation, safety, upkeep, maintenance, repair and improvement of the HOVE road system, etc., which includes the power to levy fines and other sanctions against those who abuse and damage the road system.

60. In addition, Article VII C. of the Articles requires the HOVE RMC to utilize the road assessments to repave, repair, maintain, upkeep and improve the HOVE road system, to levy fines or other sanctions against those who abuse and damage the road system, etc.

61. Article V., sections 5.8 and 5.10 of HOVE RMC's Bylaws provides HOVE RMC with the authority to place a lien on a property for unpaid road assessments and to foreclose on the property after proper notice to the property owner.

62. Foster testified that she understood that HOVE RMC has the power to place liens on properties for failure to pay their assessments and the power to foreclose on the properties but that they are "not into just foreclosing on people's property."

63. Foster also testified that she was not aware of any language in the HOVE RMC Articles that allows HOVE RMC to delegate its responsibilities to the Planning Department or the Commission.

64. After hearing the testimony, the Director testified that he would recommend deleting Condition 8 of his previously made recommendations relating to increased road maintenance fees to be paid by Arrow and the Rodrigueses, because the County does not have any role in enforcing private covenants, restrictions, articles, or bylaws.

65. Speaking to whether Saturday operations should be allowed under the Special Permit, David Rodrigues testified that a lot of customers of the quarry operations live outside of Ocean View and by the time people get home, they cannot get material for their yards. It is helpful to customers if the quarries are allowed to operate on Saturdays.

66. Subsequent to the issuance of the Recommendation, the Commission received public testimony objecting to the Applications; the Commission also received public testimony supporting the Applications.

**IV. Special Permit Criteria**

67. A Special Permit may be granted if the criteria required under HRS § 205-6 and Rule 6 of the PC Rules are met. Pursuant to Rule 6-7 of the PC Rules, the 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) Would promote the effectiveness and objectives of Chapter 205, Hawai'i Revised Statutes, as amended.

The Commission shall also consider the criteria listed under Section 6-3(b)(5)(A) through (G).

68. Under Rule 6-3(b)(5) of the PC Rules, "the following criteria shall also be addressed:"

- (A) Such use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations;
- (B) The desired use shall not adversely affect surrounding properties;
- (C) Such use shall not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection;
- (D) Unusual conditions, trends, and needs have arisen since the district boundaries and regulations were established;
- (E) The land upon which the proposed use is sought is unsuited for the uses permitted within the district;
- (F) The proposed use will not substantially alter or change the essential character of the land and the present use; and
- (G) The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design Plans.

**A. Arrow's Application**

69. Arrow's proposed use is an unusual and reasonable use of land situated within the Agricultural District.

70. 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. Based on the poor soil conditions of the project site for agricultural activities and the existence of other similar quarries in the immediate area, the proposed expanded quarry operation is considered an unusual and reasonable use of agricultural land in this location within the State Land Use Agricultural District.

71. The granting of Arrow's request would promote the effectiveness and objectives of Chapter 205, HRS, as amended.

72. 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. Soils on the project site are identified as Cinder Land (rCL) and Lava Flows, Aa (rLV). Soils are classified as "E" or "Very Poor" soil by the Land Study Bureau's Overall Master Productivity Rating and classified as existing urban development by the Department of Agriculture's ALISH Map. As the properties are currently vacant of dwellings and are not in active agricultural use, the expanded quarry use will not displace any existing agricultural activity or diminish the agricultural potential of the subject properties. Therefore, the proposed use will not adversely affect the preservation and agricultural use of the County's prime agricultural lands, and is not



contrary to the objectives sought to be accomplished by the State Land Use Law and Regulations.

73. Arrow's proposed use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations.

74. Arrow's request is considered an unusual and reasonable use of agricultural land and the proposed use will not adversely affect the preservation and agricultural use of the County's prime agricultural lands, which is not contrary to the objectives sought to be accomplished by the State Land Use Law and Regulations.

75. Any potential adverse effects to surrounding properties will be mitigated with appropriate Special Permit conditions imposed.

76. Surrounding properties are zoned Agricultural (A-1a) and are located near the northeastern (top) portion of HOVE. The immediate area surrounding the project site is made up of vacant, barren, lava fields with quarrying activity occurring on lots to the south and west of the project site. The nearest dwelling is located over 1,000 feet from the project site.

77. The proposed quarry is situated within an area that has been quarried for over 50 years. Therefore, this approval recommendation builds upon the general understanding that once quarries are established, there is typically no going back to restore the area to its former state of configuration or use. There are adjoining and nearby, privately-owned parcels within HOVE that could accommodate potential agricultural uses and associated homesites, although that has yet to occur. These parcels are and will be adversely impacted by the quarrying activities. The area affected by the requested quarry and other existing quarries in the immediate vicinity have already been significantly compromised and severely impacts adjoining and nearby vacant parcels. The goal is to manage these quarries through the Special Permit process with

appropriate mitigation conditions rather than to ignore the obvious that this particular area of HOVE will never be restored to its former state as a typical agricultural subdivision.

78. A 10-year permit rather than the requested 15 years would allow the Commission to monitor the progress of quarrying activity and compliance with conditions of approval of this amended permit.

79. Arrow's proposed use shall not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection.

80. Access to the project site will be from Liliana Lane, which is a two-lane, private subdivision road comprised of chipseal and oil within a 40-foot right-of-way. Mahimahi Drive has been closed between Lurline Lane and Liliana Lane for safety reasons caused by an unpermitted mining operation and will not be used for general access. The expanded quarry operation will provide a local source of this material for uses within the region.

81. HOVE RMC has submitted several proposed conditions of approval that they would like the applicant to comply with as part of the approval of Arrow's amendment request. A major safety concern associated with these quarry operations is maintaining stability of the cut slopes near roadways and adjacent properties as cinder is being mined. The Department of Public Works ("DPW") commented that it has been its practice to recommend that the applicant have quarry sites evaluated by and to follow the recommendations of an engineer, qualified in the field of soil mechanics, for minimum setbacks from the subdivision road and adjacent properties, and to establish and maintain safe operational and resultant stability of the entire quarry site.

82. In 2009, Arrow hired CEL to evaluate the original 5-acre quarry site to establish minimum setbacks and the make recommendations on slope cuts and fills along the side walls of the proposed quarry. CEL personnel conducted a series of site visits and collected samples from sidewalls of existing excavations and from an excavated test pit. CEL developed geotechnical recommendations for grading of the quarry site, including setbacks and side-wall slope construction, which was compiled in the 2009 Geotechnical Report and submitted to the Planning Department. Additionally, in 2015, Arrow replaced CEL and hired Dahlberg to submit a geotechnical report with recommendations for the amended Special Permit application.

83. The 2009 Geotechnical Report recommended that the top of all cut slopes should be a minimum of 15 feet offset (setback) from the nearest property line. Additionally, the report recommended that permanent cut slopes should be constructed at an inclination of no greater than 1H:1V (one foot in the horizontal direction for each foot in the vertical direction) to a maximum height of 20 feet. Cut slopes exceeding 20 feet in height should have an 8-foot wide bench installed at mid-height of the slope. Slopes of up to 100 feet in depth are anticipated for this project. As such, these cut slopes should have an 8-foot wide bench installed at each 20-foot interval (vertical). Surface water should be directed away from the cut slope by means of an appropriate system constructed at the top of the slope. Benches used for access drives of excavation and hauling equipment should be at least 15 feet wide. Lastly, the 2009 Geotechnical Report concludes that monitoring is necessary to ensure that the recommendations as included in the report are followed.

84. More recently, Arrow hired Dahlberg to prepare and submit a geotechnical report with recommendations as part of this amendment request. The report recommended that the top of all slopes should be a minimum of 8 feet offset (setback) from the property lines.

Additionally, the report recommended that permanent cut slopes should be constructed at 1/2H:1V (1/2 -foot in the horizontal direction for each foot in the vertical direction), and 8-foot wide benches at 15-foot vertical intervals. Arrow proposes that Aina Engineers Inc. will be retained by Arrow to monitor the behavior of the above recommendations and institute a program insuring compliance or necessary modifications to the recommendations with regards to safety of Arrow's operations, impacts to surrounding properties and access roads.

85. In 2014, Arrow requested to change the engineer of record from Thomas of CEL (Oahu) to Dahlberg of Aina Engineers Inc. (Kailua-Kona). The reason for the request was the difficulty and cost of having to rely on an engineer based on Oahu. The Planning Department approved the change with the requirement that the new engineer comply with the new Condition No. 4, including complying strictly with the recommendations within the 2009 Geotechnical Report and with the requirement that all cut, fill, and backfill operations be monitored under the supervision of the new engineer with periodic tests and observations of fills to determine the degree of compaction and moisture content obtained by the contractor.

86. The original conditions of the Special Permit did not contain provisions for safety or repair to the unsafe setback areas from the roadways along Mahimahi Drive and Liliana Lane. Currently, Mahimahi Drive is closed to through traffic because of these unsafe conditions. The original 2009 Geotechnical Report recommended the excavation of the roadway and shoulder areas down to the lowest adjacent grade and that clinker material generated from this excavation be used to repair the area including the filling of potholes created by prior quarry operations and fill for constructed slopes on either side of the lowered roadway. HOVE RMC does not want the roadways excavated and other measures will need to be done to bring these roadways into a safe condition.

87. Additionally, all mineral and metallic mines are reserved in favor of the State of Hawai‘i. The applicant must comply with Sections 181 and 182 of the HRS and should consult with the DLNR-Land Division prior to the commencement of Operations.

88. Unusual conditions, trends, and needs have arisen since district boundaries and regulations were established.

89. 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 properties and surrounding areas are designated for agricultural uses by both State and County land use laws. Through the issuance of a Special Permit, a community may establish various “non-agricultural” services that may not be available or allowed by zoning for its residents.

90. The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

91. Soils for the project site are classified as “E” or “Very Poor” by the Land Study Bureau’s Overall Master Productivity Rating and classified as existing urban development by the Department of Agriculture’s ALISH Map. Additionally, the U.S. Soil Survey identifies the soil type for the project as Cinder Land (rCL) and Lava Flows, Aa (rLV). Based on the above information, it has been determined that the land upon which the proposed use is sought is unsuited for the uses permitted within the district.

92. The use will not substantially alter or change the essential character of the land and the present use.

93. The proposed quarry operation will utilize approximately thirteen (13) acres of land to remove approximately 700,000 to 750,000 cubic yards of cinder. The present character of the area is vacant, barren lava with several cinder quarry operations present in the immediate area. The requested use will change the essential character of the land, which is presently vacant of structures and uses, to operate a cinder and rock quarry. Therefore, based on the above the discussion, the proposed use will alter or change the essential character of the land and its present use, but the change will not be substantial as cinder mining has been occurring in this area since the 1960's.

94. The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design Plans. The request will conform to, among others, the Land Use and Economic elements of the General Plan.

95. 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 General Plan LUPAG Map designation for the project site is Rural, which includes existing subdivisions in the State Land Use Agricultural and Rural districts that have a significant residential component. While quarrying activities are not defined as a use that is compatible with the Rural designation, the proposed use is consistent with the Land Use and Economic elements of the General Plan.

96. Quarries must be located in locations where there is an abundance of raw materials. For this reason, while industrial in character, quarries cannot be confined to Industrial-designated areas, as evidenced by the granting of Special Permits for quarries

island-wide. The project site contains raw materials essential for construction projects in the Oceanview area. The project would also complement the following goals and policies of the Land Use and Economic elements of the General Plan:

Land Use - Industrial Element

Industrial activities may be located close to raw material or key resources. The ability of the subject property to provide the needed raw material vital to the construction industry while able to absorb the noxious nature of quarries speaks to the appropriateness of the area for such uses.

Economic

The County shall strive for diversification of its economy by strengthening industries and attracting new endeavors.

**B. Rodrigueses' Application**

97. The Rodrigueses' proposed use is an unusual and reasonable use of land situated within the Agricultural District.

98. 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. Based on the poor soil conditions of the project site for agricultural activities and the existence of other similar quarries in the immediate area, the proposed expanded quarry operation is considered an unusual and reasonable use of agricultural land in this location within the State Land Use Agricultural District.

99. The granting of the Rodrigueses' request would promote the effectiveness and objectives of Chapter 205, HRS, as amended.

100. 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. Soils on the project site are identified as Cinder Land (rCL) and Lava Flows, Aa (rLV). Soils are classified as “E” or “Very Poor” soil by the Land Study Bureau’s Overall Master Productivity Rating and classified as existing urban development by the Department of Agriculture’s ALISH Map. As the properties are currently vacant of dwellings and are not in active agricultural use, the expanded quarry use will not displace any existing agricultural activity or diminish the agricultural potential of the subject properties. Therefore, the proposed use will not adversely affect the preservation and agricultural use of the County’s prime agricultural lands, and is not contrary to the objectives sought to be accomplished by the State Land Use Law and Regulations.

101. Such use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations.

102. The request is considered an unusual and reasonable use of agricultural land and the proposed use will not adversely affect the preservation and agricultural use of the County’s prime agricultural lands, which is not contrary to the objectives sought to be accomplished by the State Land Use Law and Regulations.

103. Any potential adverse effects to surrounding properties will be mitigated with appropriate Special Permit conditions imposed.

104. Surrounding properties are zoned Agricultural (A-1a) and are located near the northeastern (top) portion of HOVE. The immediate area surrounding the project site is



made up of vacant, barren, lava fields with quarrying activity occurring on lots to the north, south and east of the project site. The nearest dwelling is located on the northwest corner of Kailua Boulevard and Lurline Lane directly across from the Rodrigueses' project site.

105. The proposed quarry is situated within an area that has been quarried for over 50 years. Therefore, this approval recommendation builds upon the general understanding that once quarries are established, there is typically no going back to restore the area to its former state of configuration or use. There are adjoining and nearby, privately-owned parcels within HOVE that could accommodate potential agricultural uses and associated homesites, although that has yet to occur. These parcels are and will be adversely impacted by the quarrying activities. The area affected by the requested quarry and other existing quarries in the immediate vicinity have already been significantly compromised and severely impacts adjoining and nearby vacant parcels. The goal is to manage these quarries through the Special Permit process with appropriate mitigation conditions rather than to ignore the obvious that this particular area of HOVE will never be restored to its former state as a typical agricultural subdivision.

106. A 10-year permit would allow the Planning Commission to monitor the progress of quarrying activity and compliance with conditions of approval of the Rodrigueses' Special Permit.

107. The Rodrigueses' proposed use shall not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection.

108. Access to the project site will be from Lurline Lane, which is a two-lane,

private subdivision road comprised of chipseal and oil approximately 18 feet in width within a 40-foot right-of-way. The quarry operation will provide a local source of this material for uses within the region.

109. HOVE RMC has submitted several proposed conditions of approval that they would like the Rodrigueses to comply with as part of the approval of the Rodrigueses' Special Permit request. A major safety concern associated with these quarry operations is maintaining stability of the cut slopes near roadways and adjacent properties as cinder is being mined. DPW commented that it has been its practice to recommend that the applicant have quarry sites evaluated by and to follow the recommendations of an engineer, qualified in the field of soil mechanics, for minimum setbacks from the subdivision road and adjacent properties, and to establish and maintain safe operational and resultant stability of the entire quarry site.

110. In 1992, the Rodrigueses' father (James Rodrigues) hired Richard Fewell of Fewell Geotechnical Engineering, LTD. to conduct a Geologic Reconnaissance Report for grading permits that were submitted to DPW to allow for excavation of the lots. A total of three (3) grading permits were issued to cover from April of 1992 to February of 1995. In 2015, the applicants hired Dahlberg of Aina Engineers Inc. to submit a geotechnical report with recommendations for this Special Permit application.

111. The Geotechnical Report submitted by Dahlberg is very similar to the Geologic Reconnaissance Report conducted in 1992 by Richard Fewell of Fewell Geotechnical Engineering. Both reports recommended that the top of all slopes should be a minimum of 8 feet offset (setback) from the property lines. Additionally, the reports recommend that permanent cut slopes should be constructed at 1/2H:1V (1/2-foot in the horizontal direction for each foot in the vertical direction), and 8-foot wide benches at 15-foot vertical intervals. The Rodrigueses

propose Aina Engineers Inc. will be retained by the Rodrigueses to monitor the behavior of the above recommendations and institute a program insuring compliance or necessary modifications to the recommendations with regards to safety of the Rodrigueses' operations, impacts to surrounding properties and access roads.

112. As noted above, in 2009, Arrow submitted a similar Special Permit request in this general location to establish a cinder and rock quarry operation on approximately 5 acres of land. CEL personnel conducted a series of site visits and collected samples from sidewalls of existing excavations and from an excavated test pit. CEL developed geotechnical recommendations for grading of the quarry site, including setbacks and side-wall slope construction, which was compiled in the 2009 Geotechnical Report and submitted to the Planning Department.

113. Also as noted above, the 2009 Geotechnical Report recommended that the top of all cut slopes should be a minimum of 15 feet offset (setback) from the nearest property line. Additionally, the report recommended that permanent cut slopes should be constructed at an inclination of no greater than 1H:1V (one foot in the horizontal direction for each foot in the vertical direction) to a maximum height of 20 feet. Cut slopes exceeding 20 feet in height should have an 8-foot wide bench installed at mid-height of the slope. Slopes of up to 100 feet in depth are anticipated for this project. As such, these cut slopes should have an 8-foot wide bench installed at each 20-foot interval (vertical). Surface water should be directed away from the cut slope by means of an appropriate system constructed at the top of the slope. Benches used for access drives of excavation and hauling equipment should be at least 15 feet wide. Lastly, the 2009 Geotechnical Report concludes that monitoring is necessary to ensure that the recommendations as included in the report are followed.

114. In reviewing the recommendations of both the Fewell Geotechnical Engineering and Aina Engineering reports, as well as the recommendations of the 2009 Geotechnical Report, the Planning Director recommended utilizing the recommendations made for the original Arrow of Oregon/Hawai'i LLC Special Permit application in the 2009 Geotechnical Report for the Rodrigueses' requested quarry site. Upon the Director's recommendation, the Rodrigueses will be allowed to excavate/grade two properties (TMKs: 9-2-145:047 & 048) to match the existing grade of the two properties to the south and east (TMKs: 9-2-145:046 & 049), which have been actively quarried for decades. This exemption still requires that the applicants meet the minimum setbacks along Kailua Boulevard and Lurline Lane.

115. Additionally, all mineral and metallic mines are reserved in favor of the State of Hawaii. The applicant must comply with Sections 181 and 182 of the Hawaii Revised Statutes and should consult with the DLNR-Land Division prior to the commencement of Operations.

116. Unusual conditions, trends, and needs have arisen since district boundaries and regulations were established.

117. 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 properties and surrounding areas are designated for agricultural uses by both State and County land use laws. Through the issuance of a Special Permit, a community may establish various "non-agricultural" services that may not be available or allowed by zoning for its residents.

118. The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

119. Soils for the project site are classified as “E” or “Very Poor” by the Land Study Bureau’s Overall Master Productivity Rating and classified as existing urban development by the Department of Agriculture’s ALISH Map. Additionally, the U.S. Soil Survey identifies the soil type for the project as Cinder Land (rCL) and Lava Flows, Aa (rLV). Based on the above information, it has been determined that the land upon which the proposed use is sought is unsuited for the uses permitted within the district.

120. The Rodrigueses’ proposed use will not substantially alter or change the essential character of the land and the present use.

121. The proposed quarry operation will utilize approximately five (5) acres of land as a source of cinder. The present character of the area is vacant, barren lava with several cinder quarry operations present in the immediate area. The requested use will change the essential character of the land, which is presently vacant of structures and uses, to operate a cinder and rock quarry. Therefore, based on the above discussion, the proposed use will alter or change the essential character of the land and its present use, but the change will not be substantial as cinder mining has been occurring in this area since the 1960’s.

122. The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design Plans. The request will conform to, among others, the Land Use and Economic elements of the General Plan.

123. 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 General Plan LUPAG Map designation for the project site is Rural, which includes existing subdivisions in the State Land Use Agricultural and Rural districts that have a significant residential component. While quarrying activities are not defined as a use that is compatible with the Rural designation, the proposed use is consistent with the Land Use and Economic elements of the General Plan.

124. Quarries must be located in locations where there is an abundance of raw materials. For this reason, while industrial in character, quarries cannot be confined to Industrial-designated areas, as evidenced by the granting of Special Permits for quarries island-wide. The project site contains raw materials essential for construction projects in the Oceanview area. The project would also complement the following goals and policies of the Land Use and Economic elements of the General Plan:

Land Use - Industrial Element

Industrial activities may be located close to raw material or key resources. The ability of the subject property to provide the needed raw material vital to the construction industry while able to absorb the noxious nature of quarries speaks to the appropriateness of the area for such uses.

Economic

The County shall strive for diversification of its economy by strengthening industries and attracting new endeavors.

**CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over Arrow's application for amendment to SPP 09-000076 and the Rodrigueses' application for Special Permit, SPP 15-000178, pursuant to Chapter 205, HRS, and Rule 6 of the PC Rules.

2. Arrow and the Rodrigueses have the burden of proof regarding their respective applications, including the burden of producing evidence as well as the burden of persuasion, by a preponderance of the evidence. Arrow and the Rodrigueses have met their respective burdens.

3. The Commission may amend a Special Permit pursuant to Rule 6-9 of the PC Rules.

4. Both the Arrow and the Rodrigueses' applications were complete, in accordance with Rule 6-4 of the PC Rules.

5. The Commission may impose protective conditions as it deems necessary in the issuance of a Special Permit.

6. The quarry operations proposed in both Arrow and the Rodrigueses' applications are unusual and reasonable uses of the applicants' respective properties, and will promote the effectiveness and objectives of Chapter 205, HRS.

7. The quarry operations proposed in both Arrow and the Rodrigueses' applications are uses that meet the criteria for issuing a Special Permit, and amendment thereto, under Rules 6-7 and 6-3(b)(5)(A) through (G) of the PC Rules.

8. Pursuant to section 205-6, HRS, and Rule 6-8 of the PC Rules, the Commission is authorized to grant Arrow's application for amendment to SPP 09-000076 and the Rodrigueses' application for Special Permit, SPP 15-000178, subject to the respective conditions attached hereto and incorporated herein as Exhibits "1" and "2".

9. To the extent any of the Findings of Fact constitute Conclusions of Law, or Conclusions of Law constitute Findings of Fact, they shall be considered and construed as such.

**DECISION AND ORDER**

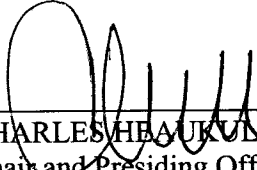
Based upon the foregoing Findings of Fact and Conclusions of Law, and pursuant to Rules 4 (Contested Case Procedure) and 6 (Special Permits) of the PC Rules,

IT IS HEREBY DECIDED AND ORDERED:

A. The parties' proposed findings not adopted are DENIED, as they are, in whole or in part, immaterial, unsupported, or otherwise inconsistent with the findings of fact and conclusions of law set forth herein; and

B. Arrow's application to amend SPP 09-000076 and the Rodrigueses' application for a Special Permit, SPP 15-000178, are approved subject to the respective conditions attached hereto and incorporated herein as Exhibits "1" and "2".

DATED: Hilo, Hawai'i, FEB 23 2016.

  
\_\_\_\_\_  
CHARLES HEA UKULANI,  
Chair and Presiding Officer,  
Windward Planning Commission



**ARROW OF OREGON/HAWAI'I, LLC**  
**AMENDMENT TO SPECIAL PERMIT NO. 09-000076 (SPP 09-76)**

Approval of this request is subject to the following amended conditions.

1. The applicant, its successor or assigns shall be responsible for complying with all stated conditions of approval.
2. This Special Permit shall be valid for a period of ten (10) years from the effective date of the amended permit, or its completion or abandonment, whichever occurs first.
3. The applicant shall consolidate TMKs: 9-2-148:005, 006-010, 015, 016 & 036 into one parcel within one year from the effective date of this amended permit.
4. The applicant shall follow all of the soil engineer's recommendations as stated within the Geotechnical Investigation Report by CEL dated May 21, 2009. This includes, but is not limited to, 1) at least 15-foot setbacks from all property lines to the top of slopes, 2) side-wall cut slopes should have an 8-foot wide bench installed at each 20-foot interval (vertical) and benches used for access drives of excavation and hauling equipment should be at least 15 feet wide, and 3) construction monitoring shall be under the supervision of a qualified licensed engineer to oversee the quarrying operations and verify compliance with the established safety operation procedures and to oversee the resultant stability of the entire quarry site as long as the quarry site is in operation. All cut, fill, and backfill operations shall be monitored under the supervision of a qualified licensed engineer with periodic tests and observations of fills to determine the degree of compaction and moisture content obtained by the contractor.
5. Within one year from the effective date of this amended permit, the applicant shall submit a revised Erosion Control and Site Restoration Plan that assures the site will be left in a nonhazardous condition. The Plan shall include photographs of the area and a topography map of the project site and its related surroundings areas. This Plan shall be reviewed by the Department of Public Works and their comments submitted to the Planning Director for review and approval.
6. Within one year from the effective date of this amended permit, the applicant shall consult with the Department of Land and Natural Resources-Land Division and submit verification of compliance with Sections 181 and 182 of the Hawai'i Revised Statutes. If required, the applicant shall secure any permits required by DLNR-Land Division.

7. Within 6 months from the effective date of this amended permit, the applicant shall install guardrails or appropriate safety barriers, and appropriate safety signage thereon, at locations where the cuts or embankments are located within the minimum quarry setback width of 15 feet from Mahimahi Drive and Liliana Lane. Within one year from the effective date of this amended permit, the applicant shall submit a remediation plan for restoring the appropriate setback width buffers where the cuts have occurred within the minimum quarry setback width of 15 feet, which shall be completed within four (4) years from submittal of the remediation plan. As recommended within the original Geotechnical Investigation Report, these fill slopes should consist of the material recommended within the report and that fill slopes using the on-site clinker material should be no steeper than 2H:1V.
8. Quarrying activities shall be limited to the hours of 7:00 a.m. and 5:00 p.m., Monday through Saturday.
9. Adequate dust control mitigation measures shall be implemented for the duration of the operation in accordance with Department of Health requirements. The applicant shall provide an on-site water storage tank to be used for dust control.
10. 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 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.
11. Upon termination of the quarry operations or abandonment of any portion of the affected site, the land shall be graded to blend in with the surrounding area and rehabilitated as approved in the approved Erosion Control and Site Restoration Plan. The affected site shall be left in a non-hazardous condition. Appropriate documentation which demonstrates compliance with this condition shall be submitted to the Planning Department and the Department of Public Works for review and approval within 90 days from the date of termination and/or abandonment.

12. The applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements, including the United States Department of Labor's Mine Safety and Health Administration (MSHA) and Occupational Safety and Health Administration (OSHA).
13. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of this permit. The report shall include, but not be limited to, the status of quarrying activities and to what extent the conditions of approval are being complied with. The report shall also include information regarding compliance with the monitoring program, the established safety operation procedures and the resultant stability of the entire quarry site, including side-wall slope construction, and provide the amount of material that has been excavated from the site during the previous year. This condition shall remain in effect as long as the quarry is in operation.
14. An initial extension of time for the performance of conditions within the permit, with the exception of Condition No. 2, 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 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.

15. 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.

**DAVID AND LAURA RODRIGUES**  
**SPECIAL PERMIT NO. 15-000178 (SPP 15-000178)**

Approval of this request is subject to the following conditions:

1. The applicants, its successor or assigns shall be responsible for complying with all stated conditions of approval.
2. This Special Permit shall be valid for a period of ten (10) years from the effective date of the permit, or its completion or abandonment, whichever occurs first.
3. The applicants shall consolidate TMKs: 9-2-142:020, 021, 022 into one parcel and TMKs: 9-145:047 & 048 into one parcel within one year from the effective date of this permit.
4. The applicants shall follow all of the soil engineer's recommendations as stated within the Geotechnical Investigation Report by CEL dated May 21, 2009. This includes, but is not limited to, 1) at least 15-foot setbacks from all property lines to the top of slopes, 2) side-wall cut slopes should have an 8-foot wide bench installed at each 20-foot interval (vertical) and benches used for access drives of excavation and hauling equipment should be at least 15 feet wide, and 3) construction monitoring shall be under the supervision of a qualified licensed engineer to oversee the quarrying operations and verify compliance with the established safety operation procedures and to oversee the resultant stability of the entire quarry site as long as the quarry site is in operation. All cut, fill, and backfill operations shall be monitored under the supervision of a qualified licensed engineer with periodic tests and observations of fills to determine the degree of compaction and moisture content obtained by the contractor. An exception to this condition is that the applicants can bring the grade down to the same grade as the adjoining properties on TMKs: 9-2-145:046 & 049 except for the roadway setbacks.
5. Within one year from the effective date of this permit, the applicants shall submit an Erosion Control and Site Restoration Plan that assures the site will be left in a nonhazardous condition. The Plan shall include photographs of the area and a topography map of the project site and its related surroundings areas. This Plan shall be reviewed by the Department of Public Works and their comments submitted to the Planning Director for review and approval.

6. Within 6 months from the effective date of this permit, the applicants shall install guardrails or appropriate safety barriers, and appropriate safety signage thereon, at locations where the cuts or embankments are located within the minimum quarry setback width of 15 feet from Kailua Boulevard and Lurline Lane. Within one year from the effective date of this permit, the applicants shall submit a remediation plan for restoring the appropriate setback width buffers where the cuts have occurred within the minimum quarry setback width of 15 feet, which shall be completed within four (4) years from submittal of the remediation plan. As recommended within the original Geotechnical Investigation Report, these fill slopes should consist of the material recommended within the report and that fill slopes using the on-site clinker material should be no steeper than 2H:1V.
7. The driveway entrance to the parcel (TMKs: 9-2-142:020, 021, 022) which is south of Kailua Boulevard, shall be relocated to a reasonable distance along Lurline Lane, north of its current location, as approved by the Director.
8. Within one year from the effective date of this permit, the applicants shall consult with the Department of Land and Natural Resources-Land Division and submit verification of compliance with Sections 181 and 182 of the Hawai'i Revised Statutes. If required, the applicants shall secure any permits required by DLNR-Land Division.
9. Quarrying activities shall be limited to the hours of 7:00 a.m. and 5:00 p.m., Monday through Saturday.
10. Adequate dust control mitigation measures shall be implemented for the duration of the operation in accordance with Department of Health requirements. The applicants shall provide an on-site water storage tank to be used for dust control.
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 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. Upon termination of the quarry operations or abandonment of any portion of the affected site, the land shall be graded to blend in with the surrounding area and rehabilitated as approved in the approved Erosion Control and Site Restoration Plan. The affected site shall be left in a non-hazardous condition. Appropriate documentation which demonstrates compliance with this condition shall be submitted to the Planning Department and the Department of Public Works for review and approval within 90 days from the date of termination and/or abandonment.
13. The applicants shall comply with all applicable County, State and Federal laws, rules, regulations and requirements, including the United States Department of Labor's Mine Safety and Health Administration (MSHA) and Occupational Safety and Health Administration (OSHA).
14. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of this permit. The report shall include, but not be limited to, the status of quarrying activities and to what extent the conditions of approval are being complied with. The report shall also include information regarding compliance with the monitoring program, the established safety operation procedures and the resultant stability of the entire quarry site, including side-wall slope construction, and provide the amount of material that has been excavated from the site during the previous year. This condition shall remain in effect as long as the quarry is in operation.
15. An initial extension of time for the performance of conditions within the permit, with the exception of Condition No. 2, 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 applicants, 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 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 applicants should require an additional extension of time, the Planning Department shall submit the applicants' request to the Planning Commission for appropriate action.
16. 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.



BEFORE THE WINDWARD PLANNING COMMISSION  
OF THE  
COUNTY OF HAWAI'I

In the Matter of Special Permit Applications:

Applicant ARROW OF OREGON/HAWAI'I LLC's Application to Amend Special Permit No. 09-000076, for Expansion of Quarry Operations (TMK Nos.: (3) 9-2-148: 005 (existing SPP Area) and (3) 9-2-148:6-10, 15-16, and 36),

and

DAVID J. and LAURA A. RODRIGUES' Special Permit Application, SPP No. 15-000178, to Allow a Cinder and Rock Quarry Operation on 5.003 Acres of Land (TMK Nos.: 9-2-142: 020, 021, 022 and 9-2-145: 047, 048).

SPP No. 09-000076  
SPP No. 15-000178  
(Consolidated)

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was served upon the following electronically via Email, and by U.S. Mail, postage prepaid on FEB 23 2016:

Roy A. Vitousek, III, Esq. (*rvitousek@cades.com*)  
75-170 Hualālai Road, Suite B-303  
Kailua-Kona, Hawai'i 96740-1737  
Attorney for Applicant  
Arrow of Oregon/Hawai'i LLC

DAVID and LAURA RODRIGUES (*po.cho67@live.com*)  
P.O. Box 689  
Volcano, Hawai'i 96785  
Applicants

Thomas L.H. Yeh, Esq. (*tly@yehandmoore.com*)  
Jill D. Raznov, Esq. (*jdraznov@gmail.com*)  
85 W. Lanikāula Street  
Hilo, Hawai'i 96720  
Attorneys for Intervenor/Petitioner  
Hawaiian Ocean View Estates Road Maintenance Corporation

Amy G. Self, Esq. (*Amy.Self@hawaiicounty.gov*)  
Deputy Corporation Counsel  
County of Hawai'i  
101 Aupuni Street, Unit 325  
Hilo, Hawai'i 96720  
Attorney for Planning Director,  
County of Hawai'i

**FEB 23 2016**

Dated: Hilo, Hawai'i, \_\_\_\_\_.



---

CHARLES HEAUKULANI,  
Chair and Presiding Officer,  
Windward Planning Commission