

County of Hawai'i

WINDWARD PLANNING COMMISSION

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

OCT 14 2014

Mark G. Jernigan
P.O. Box 4801
Kailua-Kona, HI 96745

Dear Mr. Jernigan:

Special Permit No. 09-000081

Applicant: Mark G. Jernigan

Request: Time Extension to Condition No. 2 (Life of Permit)

Tax Map Key: 9-2-145:059

The Windward Planning Commission, at its duly held public hearing on October 2, 2014, voted to approve the above-referenced request to amend Condition No. 2 (life of permit) of Special Permit No. 09-000081. The property is located along the south side of Mahimahi Drive, approximately 356 feet east of the Mahimahi Drive-Lurline Lane intersection, Hawaiian Ocean View Estates Subdivision, Kahuku, Ka'u, Hawai'i.

Approval of this amendment, which the Commission revised to a 3 year time extension from your original request for 5 years, is subject to the following conditions (new material is underscored and material to be deleted is struck through and bracketed):

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 [~~five (5) years~~] three (3) years from the effective date of the [~~permit~~] amendment, or its completion or abandonment, whichever occurs first.
3. The applicant shall comply substantially with the representations made within the application, identified as Petitioner's Exhibit A, B & C, for slope and finish elevations of the property once the cinder is removed.

OCT 15 2014

4. 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 Hawaii Revised Statutes to the Planning Department. If required, the applicant shall secure any permits required by the DLNR-Land Division.
5. The removal of cinder shall be limited to the hours of 7:00 a.m. and 5:00 p.m., Monday through Saturday.
6. 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.
7. 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.
8. 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.
9. Upon termination of the cinder removal or abandonment of any portion of the affected site, 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.
10. 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).
11. The applicant shall leave a 12-foot undisturbed setback that matches the same elevation with the adjoining property to the east.

Mark G. Jernigan
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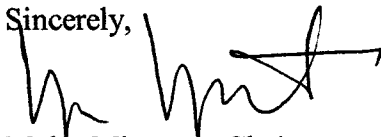
12. Should any of the conditions not be met or substantially complied with in a timely fashion, the Director shall initiate procedures to revoke the permit.

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.

Approval of this amendment is based on the reasons given in the attached Findings Report.

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

Sincerely,



Myles Miyasato, Chairman
Windward Planning Commission

LMJerniganspp09-081wpc

cc: Department of Public Works
Department of Water Supply
County Real Property Tax Division -Kona
Planning Department - Kona
State Land Use Commission
State DLNR- HPD
State Department of Transportation
Mr. Gilbert Bailado

**COUNTY OF HAWAI‘I
PLANNING COMMISSION FINDINGS**

**MARK JERNIGAN
AMENDMENT TO SPECIAL PERMIT NO. 09-000081**

The applicant is requesting a 5-year time extension for Condition No. 2 of Special Permit No. 09-000081, which was approved by the Planning Commission on July 1, 2009 to allow the removal of cinder on 43,608 square feet of land. The property is located along the south side of Mahimahi Drive, approximately 356 feet east of the Mahimahi Drive – Lurline Lane intersection, Hawaiian Ocean View Estates Subdivision, Kahuku, Ka‘u, Hawai‘i, TMK: 9-2-145:59.

There are two (2) employees and hours of operation are from 7:00 a.m. to 5:00 p.m., Monday through Saturday. The number of trucks accessing the property on a daily basis does not exceed twenty-five (25) per day.

Condition No. 2 states “This Special Permit shall be valid for a period of five (5) years from the effective date of the permit, or its completion or abandonment, whichever occurs first.”

The reasons for the original request was that the property had become unsafe because the adjacent landowners on three sides had removed cinder creating vertical faces on the east, west and south boundaries of the property.

The applicant originally proposed to remove the cinder material to bring the property to a safe and usable condition by reducing the height of the vertical faces on three (3) sides of the property to match existing grades on the adjacent properties. The cinder would be removed over the entire surface area of the subject property to an elevation that will eliminate or reduce the vertical faces to the east, west and south. The north boundary will remain at the same elevation to connect the property with Mahimahi Drive.

Since 2009, the applicant has been actively removing cinder on the property. Unfortunately, the new owner of the adjacent property to the south and west (Arrow of Oregon/Hawai‘i, LLC) has also been actively removing cinder, which has now created an even greater vertical face on the south and west boundaries. The adjacent landowner has recently been issued a violation notice and has been instructed to cease all operations on the adjacent property. The applicant is very close to matching the existing grade of the adjoining property to the east, which is owned by the HOVE Road Maintenance Corporation. Concerns have been submitted by the HOVE Road Maintenance Corporation asking that a 12-foot undisturbed setback be established between the applicant’s property and the HOVE Road Maintenance Corporation’s property on the eastern boundary.

Continued approval of this request without a Master Plan would create major safety conditions and concerns for the operators and the residents of HOVE.

In 2009, the Planning Commission approved this Special Permit with a 5-year life to allow the applicant to come back to the Planning Commission and report on the status of the operation and allow the Planning Commission an opportunity to review the cinder removal operation, as well as confirm compliance with the conditions.

The Planning Department has increased safety concerns regarding the continued quarrying of cinder in this area of HOVE, including the subject property, without a more comprehensive plan involving all the surrounding property owners in this area.

As a result of several violation notices being issued to several operators recently and a site inspection conducted by staff, it is clear that a more comprehensive approach to the quarry operations in this area has to be developed and implemented for these activities to continue in a safe manner.

There is currently no comprehensive oversight for the activities occurring in this area of HOVE. Quarry operators have created very unsafe conditions by cutting vertical faces, some of which exceed one hundred feet in areas. There is tension and disputes between property owners regarding property boundaries and ownership of cinder. This has resulted in the creation of vertical faces rather than working together to bring the properties to a safe condition.

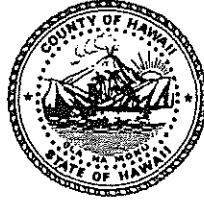
In the past, there has been a death reported in this area as a result of a vertical cinder wall collapsing on a heavy equipment operator. As a result of this incident, the United States Department of Labor's Mine Safety and Health Administration (MSHA) and Occupational Safety and Health Administration (OSHA) has been more actively involved with the operations in the area, but only from an occupational safety standpoint, not a land use approach.

In the Special Permit (SPP 09-000076) issued to Arrow of Oregon/Hawai'i, LLC, a condition of approval was added that required a geotechnical report be prepared and that there would be oversight by a soils engineer to make sure that there were buffers, benching and adequate sloping for the quarry operation, and oversight to insure that the applicant complies with the recommendations of the report.

The Planning Department is recommending that the Planning Commission allow the applicant to continue operations for a period of three (3) years. Within this time period, the applicant is encouraged to work with all quarry operators in the immediate area and with the HOVE Road Maintenance Corporation to develop a master plan that will bring all the affected properties into a safe condition. The master plan shall incorporate a similar condition that was added to SPP 09-000076, where a geotechnical report be prepared for the entire area, which it includes safety measures such as buffers, benching and adequate sloping, and that there is oversight by a soils engineer to confirm compliance that the overall master plan is being complied with.

After three (3) years or sooner, if a master plan is developed and there is an agreement in place between all operators and the HOVE Maintenance Road Corporation to bring this area into a safer condition, this will help to guide the discussions of the Planning Commission for any new or extension to existing quarries within this section of HOVE.

Based on the above, the Planning Commission approved a three (3)-year time extension for the continued removal of cinder on 43,608 square feet of land.



County of Hawai'i

PLANNING COMMISSION

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Phone (808) 961-8288 • Fax (808) 961-8742

July 20, 2009

Mr. Mark G. Jernigan
P.O. Box 4801
Kailua-Kona, HI 96745

Dear Mr. Jernigan:

Special Permit Application (SPP 09-000081)

Applicant: Mark G. Jernigan

Request: To Allow the Removal of Cinder on 43,608 Square Feet of Land

Tax Map Key: 9-2-145:59

The Windward Planning Commission at its duly held public hearing on July 1, 2009, voted to approve the above-referenced Special Permit application to allow the removal of cinder on 43,608 square feet of land situated within the State Land Use Agricultural District. The property is located along the south side of Mahimahi Drive, approximately 356 feet east of the Mahimahi Drive-Lurline Lane intersection, 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 removal of cinder to bring the property into a safe condition on 43,608 square feet of land by reducing the steep vertical walls on three (3) sides of the property. The property is located on Mahimahi Drive between Lurline Lane and Liliana Lane near the top northeastern portion of the Hawaiian Ocean View Estates Subdivision.

The reasons for the request is that the property has become unsafe because adjacent landowners on three sides have removed cinder creating vertical faces on the east, west and south boundaries of the property.

The applicant will remove the cinder material to bring the property to a safe and usable condition by reducing the height of the vertical faces on three (3) sides of the

property to match existing grades on the adjacent properties. The cinder will be removed over the entire surface area of the subject property to an elevation that will eliminate or reduce the vertical faces to the east, west and south. The north boundary will remain at the same elevation to connect the property with Mahimahi Drive.

There will be two (2) employees for the proposed use. Hours of operation are proposed to be from 7:00 a.m. to 5:00 p.m., Monday through Saturday. The number of trucks accessing the property on a daily basis will not exceed twenty-five (25) per day.

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 request to remove cinder 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 surrounding 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 5-year life rather than allowing it to continue without placing a time condition on the use. The 5-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 removal 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 property will be from Mahimahi Drive, which is a two-lane, private subdivision road comprised of crushed cinder approximately 18 to 20 feet in width within a 40-foot right-of-way. Mahimahi Drive is currently closed between Lurline Lane and Liliana Lane because of unsafe conditions but can be accessed by lot owners in this 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 removed. The applicant has submitted plans showing the slope elevations and the finish elevations once the cinder is removed. A condition of approval will be added requiring the applicant to comply with the representations made within the application for the slope elevations and the finish elevations of the property after removal of the cinder. The applicant will also be required to comply with the laws, rules, regulations and requirements of the United States Department of Labor's Mine Safety and Health Administration (MSHA) and

Occupational Safety and Health Administration (OSHA) to maintain safe operations when removing the cinder from the vertical faces.

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.

(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 present character of the area is vacant, barren lava with several cinder quarry operations present in the immediate area. The applicant is proposing to remove cinder material from approximately one acre of land to bring it to a safe and usable condition. The requested use will change the essential character of the land, which is presently vacant of structures and uses, but the change will bring the property more into conformance with the surrounding properties and create a safer condition. 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 removal 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.

The project site contains raw materials that can be used for construction type projects, such as fill material, landscaping and road cover. The applicant is proposing to remove the cinder to an industrial site in Kona and process the cinder material to use for his landscaping business.

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 and April 30, 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 five (5) years from the effective date of the permit, or its completion or abandonment, whichever occurs first.
3. The applicant shall comply substantially with the representations made within the application, identified as Petitioner's Exhibit A, B & C, for slope and finish elevations of the property once the cinder is removed.
4. 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 to the Planning Department. If required, the applicant shall secure any permits required by the DLNR-Land Division.


5. The removal of cinder shall be limited to the hours of 7:00 a.m. and 5:00 p.m., Monday through Saturday.
6. 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.
7. 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.
8. 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.
9. Upon termination of the cinder removal or abandonment of any portion of the affected site, 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.
10. 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).
11. 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. Mark G. Jernigan
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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".

Rell Woodward, Chairman
Windward Planning Commission

Ljerniganspp09-000081PC

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