



## County of Hawai'i

### PLANNING COMMISSION

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720  
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FEB 23 2010

Thomas L. H. Yeh, Esq.  
85 W. Lanikaula Street  
Hilo, HI 96720

Dear Mr. Yeh:

Special Permit Application (SPP 09-000094)

Applicant: Timothy and Patsy Withers

Request: To Allow Existing "What's Shakin" Fruit/Smoothie/Snack Stand

And Include the Sale of Products Not Grown on the Property

Tax Map Key: 2-7-11:6

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The Windward Planning Commission at its duly held public hearing on February 5, 2010, voted to approve the above-referenced application to allow the establishment of a visitor stand for the sale of novelty gift items, fruits, smoothies, and snacks on 0.66 acre of land within the State Land Use Agricultural District. The area involved is located at 27-999 Old Māmalahoa Highway, Pepe'ekeo, South Hilo, Hawaii.

Approval of this request is based on the following:

The applicants, Timothy and Patsy Withers, are requesting a Special Permit to allow the continued operation of a fruit/smoothie/snack stand called "What's Shakin" for visitors who travel along the Onomea 4-mile Scenic Drive (Old Māmalahoa Highway) to view the coastline and/or to visit the Hawai'i Tropical Botanical Garden. It is located on a 0.66-acre portion of an approximate 20-acre property. The operation will include the following:

- Fruit/smoothie/snack stand with certified kitchen in a 784-square foot building, which consists of 252 square feet for the kitchen/preparation area and 532 square feet for the deck, restroom and storage area.
- The sale of smoothies, sandwiches, wraps, and drinks, such as tea and coffee. The applicants will mainly utilize items grown on the property for the operation, but will also use some items not grown on the property as well, such as the sale of island-style gift and novelty items.

- A 500-square foot covered concrete pad with picnic tables for dining.
- Parking area.

The applicants received Final Plan Approval in 1994 to operate a fruit stand and provide visitors an opportunity to sample, purchase and to drink the exotic fruits of Hawai'i grown on the Wither's 20-acre farm and sell island made health snacks.

The applicants were issued a warning letter from the Planning Department on July 30, 2009, for selling products that are not allowed to be sold at the permitted fruit stand. These were identified as products that are not grown on the applicant's property or items not described in their previous request in 1994 to operate the fruit stand. In response to the warning letter, the applicants have submitted this Special Permit to include the sale of products that were not originally permitted for the fruit stand.

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.

The project site is a 0.66-acre portion of a 20-acre parcel. There is an existing dwelling in which the applicants reside and a fruit stand developed on the property. The applicants utilize the majority of the 20-acre parcel for agricultural purposes, including the growing of tropical fruits such as bananas, guavas, various citrus, rambutan, mangoes, lychee, lilikoi, pineapples, and avocados. The fruit grown on the property is used mainly for products sold at the fruit stand, including smoothies and juices. The applicants would like to continue to sell food items not grown on the property including sandwiches and wraps, as well island-style gift and novelty items. Based on the above information, the subject request is considered an unusual and reasonable use of agricultural land.

**The granting of this request would promote the effectiveness and objectives of Chapter 205, 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.

The property is situated on soil characterized as Hilo silty clay loam, 0 to 10 percent slopes. Soils on the property are classified as "C" or "Fair" and "E" or "Very Poor" by the Land Study Bureau's Overall Master Productivity Rating and is classified as "Prime Agricultural Land" by the Department of Agriculture's ALISH Map. The fruit stand is an accessory use to the principal use of the property, which is the growing of tropical fruits. The proposed use will not displace any existing agricultural activity or diminish the agricultural potential of the land, as the fruit stand will utilize only a small portion of the 20-acre parcel. 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) The granting of this request would promote the effectiveness and objectives of Chapter 205, Hawai'i Revised Statutes, as amended.** The subject 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.

**(B) The desired use would not adversely affect surrounding properties.** The property, which is approximately 20 acres in size, is located on Old Māmalahoa Highway along the Onomea Scenic Drive. Currently, there is a single-family dwelling on the upper portion of the property and a fruit stand and the lower portion of the property near the highway. Surrounding properties are similarly zoned A-20a and consist of agricultural uses, scattered dwellings and vacant land. The nearest dwellings are located to the north over 200 feet from the fruit stand.

The Hawai'i Tropical Botanical Garden is located approximately one mile to the south on Old Māmalahoa Highway. Visitors travel along Old Māmalahoa Highway for the coastal views and to visit the botanical garden. Visitors will stop at the fruit stand to have a smoothie and/or a sandwich or wrap. The hours of operation are from 10:00 a.m. to 5:00 p.m. It is not anticipated that the requested use will have an adverse affect on the 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.** The requested use will not burden public agencies to provide additional services. Access to the project site is from Old Māmalahoa Highway, which is a County owned and maintained road with an approximate 18-foot pavement within a 50-foot right-of-way. The roadway is in relatively poor condition. The property currently has a gravel driveway and parking area fronting the fruit stand. Access from the highway to the fruit stand is via the existing nonconforming gravel driveway. A condition of approval will be added requiring the applicants to construct an asphalt or concrete driveway conforming to Chapter 22, County Streets, of the Hawai'i County Code.

Electricity and telephone services are available to the property. The fruit stand is currently hooked up to the County water system. The applicants have recently installed a 1,000-gallon septic system for wastewater. The property is situated within an area designated as Flood Zone X, an area determined to be outside the 500-year flood plain. A condition of approval will be included to require the applicants to meet all applicable County, State and Federal laws, rules, regulations and requirements.

**(D) Unusual conditions, trends, and needs have arisen since district boundaries and regulations were established.** In the 1960's and 1970's, the State's agricultural district boundaries and regulations were established and subsequently amended pursuant to HRS Chapter 205. The State Land Use Commission was created in 1961, and interim regulations and temporary district boundaries became effective in 1962. Subsequently, the regulations and Land Use District Boundaries became effective in August of 1964. The property and surrounding areas are designated for agricultural uses by both State and County land use laws. Through the issuance of a Special Permit, various "non-agricultural" services may be allowed.

**(E) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.** The land upon which the proposed use is sought is suited for agricultural uses and the property is being used for these purposes. The property is situated on soil characterized as Hilo silty clay loam, 0 to 10 percent slopes. Soils on the property are classified as "C" or "Fair" and "E" or "Very Poor" by the Land Study Bureau's Overall Master Productivity Rating and is classified as "Prime Agricultural Land" by the Department of Agriculture's ALISH Map. The majority of the property is used for agricultural purposes and only a small portion of the property will be used for the fruit stand, which has been in operation since 1995. The fruit stand, which is utilized mainly to sell items grown on the property, is an accessory use to the principal use of the property for agriculture.

**(F) The use will not substantially alter or change the essential character of the land and the present use.** The fruit stand has been in operation since 1995. The

continued use of the fruit stand, including the request to sell items not grown on the property, will not substantially alter or change the essential character of the land or its present use.

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

Land Use-Agriculture Element

- Encourage, where appropriate, the establishment of visitor-related uses and facilities that directly promote the agriculture industry.

Land Use Element

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

Economic Element

- Provide residents with opportunities to improve their quality of life through economic development that enhances the County's natural and social environments.
- Economic development and improvements shall be in balance with the physical, social and cultural environments of the island of Hawai'i.
- Provide an economic environment that allows new, expanded, or improved economic opportunities that are compatible with the County's cultural, natural and social environment.

- Strive for an economic climate which provides its residents an opportunity for choice of occupation.
- Encourage the development of a visitor industry that is consistent with the social, physical and economic goals of the residents of the County.

The proposed request will allow the applicants an opportunity to improve their quality of life, provide an economic environment that allows this new, economic opportunity and will increase the development of the visitor industry for Hawai'i, which directly promotes agriculture.

**The proposed use is not contrary to the objectives sought to be accomplished by Chapter 205A, Hawai'i Revised Statutes, relating to coastal zone management program.** Given the fact that the property is being utilized for agricultural purposes and has been developed with a dwelling and a fruit stand, it is unlikely that any archaeological features and threatened species of plant or animal are present on the property. There is no designated public access to the mountain areas over the property. It is adjacent to existing residences and vacant lands. The property is not located within the Special Management Area. Therefore, the proposed use will not adversely impact any recreational resources, including access to and along the shoreline, scenic and open space nor visual resources, coastal ecosystems, and marine and coastal resources. Further, the property will not be affected by any coastal hazards or beach erosion.

**The proposed request will not have a significant adverse impact to traditional and customary Hawaiian Rights.** In view of the Hawai'i State Supreme Court's "PASH" and "*Ka Pa'akai O Ka'Aina*" decisions, the issue relative to native Hawaiian gathering and fishing rights must be addressed in terms of the cultural, historical, and natural resources and the associated traditional and customary practices of the site:

Investigation of valued resources: No 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 has been utilized mainly for agricultural purposes, 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 October 26, 2009 stating that DLNR-SHPD has determined 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 applicants to notify the DLNR-SHPD should any unidentified sites or remains be encountered, and proceed only upon an archaeological clearance from the DLNR-SHPD.

Based on the above considerations, the fruit stand operation is an unusual and reasonable use of land, which would not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations. Approval of this request is subject to the following conditions:

1. The applicants, successor or assigns shall be responsible for complying with all stated conditions of approval.
2. The fruit stand operation shall be conducted in a manner that is substantially representative of the details contained within the Special Permit application. Any increase of the facility or expansion of operations will require an amendment to the Special Permit.
3. If an issue arises as to whether the applicant's use exceeds the .66-acre permit area, the applicants shall submit metes and bounds of the 0.66-acre project area by a registered surveyor prior to the receipt of Final Plan Approval. Activities will be limited to this permitted area.
4. The covered area used for sales shall be limited to 784 square feet in size.
5. The hours of operation shall be limited to 8:00 a.m. to 6:00 p.m. daily.
6. All development-generated runoff shall be disposed of on-site and not directed toward any adjacent properties.
7. The applicants shall construct an asphalt or concrete driveway conforming to Chapter 22, County Streets, of the Hawai'i County Code meeting with the approval of the Department of Public Works within 3 years from the effective date of this permit.

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 Department of Land and Natural Resources-Historic Preservation Division (DLNR-HPD) shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the DLNR-SHPD when it finds that sufficient mitigative measures have been taken.
9. The applicants shall comply with all applicable County, State and Federal laws, rules, regulations and requirements.
10. An initial extension of time for the performance of conditions may be granted by the Planning Director upon the following circumstances:
  - A. Non-performance is the result of conditions that could not have been foreseen or are beyond the control of the 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 the granting of the permit.
  - D. The time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year).
11. Should any of these conditions not be met or substantially complied with in a timely fashion, the Director may initiate procedures to revoke this Special 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.



Thomas L. H. Yeh, Esq.  
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Should you have any questions, please contact the Planning Department at 961-8288.

Sincerely,

A handwritten signature in black ink that reads "Rell Woodward". The signature is written in a cursive style with a large, sweeping "R" and "W".

Rell Woodward, Chairman  
Windward Planning Commission

Lwitherspp09-00009401PC

cc: Timothy and Patsy Withers  
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  
Zoning Inspector-Hilo