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County of Hawai'i

LEEWARD PLANNING COMMISSION

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APR 27 2021

CERTIFIED MAIL
7018 0360 0000 8778 8157

Mr. John Pipan
Land Planning Hawai'i, LLC
194 Wiwoole Street
Hilo, HI 96720

Dear Mr. Pipan:

SUBJECT: Special Permit Application (SPP 21-000222)
Applicant: Douglas Leider Hickey and Kathryn Hickey
Request: To Legitimize the Establishment of a Venue for Weddings and Similar Gatherings
Tax Map Key: 7-6-002:028: Portion of 0001

The Leeward Planning Commission, at its duly held public hearing on April 15, 2021, reviewed and acted on the above-referenced request to legitimize the establishment of a venue for weddings and similar gatherings. The project site is situated at 76-1297 Waiono Ranch Road, about 1.5 miles east and mauka of the Māmalahoa Highway – Waiono Ranch Road intersection, Waiono Meadows, Hōlualoa, North Kona, Hawai'i.

After review of the entire record and in concurrence with the recommendation made by the Deputy Planning Director, the Commission voted to deny the request.

Pursuant to Rule 6-10 of the Planning Commission's Rules of Practice and Procedure, this decision is appealable to the Third Circuit Court within thirty (30) days after the date of the Commission's written decision.

Denial of this permit is based on the reasons given in the attached Findings Report.

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Mr. John Pipan
Land Planning Hawai'i, LLC
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Should you have any questions, please contact Christian Kay of the Planning Department at 961-8136.

Sincerely,

Michael Vitousek

Michael Vitousek (Apr 27, 2021 12:53 HST)

Michael Vitousek, Chairman
Leeward Planning Commission

LHickeySPP21-222deniallpc

Enclosure: PC Findings Report

cc: Douglas and Kathryn Hickey
J Yoshimoto, Esq., (Counsel for the Leeward Planning Commission)
Jean Campbell, Esq., (Counsel for the Planning Director)
GIS Section (via email)

COUNTY OF HAWAII
PLANNING COMMISSION FINDINGS

DOUGLAS AND KATHRYN HICKEY

SPECIAL PERMIT APPLICATION NO. 21-000222 (SPP 21-000222)

Based on the following findings, the requested Special Permit to legitimize the establishment of a venue for weddings and similar gatherings on an approximately 2-acre portion of a 20-acre condominium property regime unit of an 80-acre property situated in the State Land Use Agricultural District is hereby denied by the Leeward Planning Commission.

The applicants have applied for a Special Permit to construct and operate a venue for weddings and similar gatherings with associated improvements on a 2.0-acre portion of 20-acre CPR Unit 1 within an 80-acre property consisting of the following components:

- The applicants propose to construct a new, 3,000 square foot event venue structure situated south of the existing farm dwelling. The structure will consist of approximately 1,300 square feet of enclosed space, including a 211 square foot “dance hall” space, four bathrooms, a catering preparation and service area, two (2) wedding party dressing rooms and two utility/linen storage rooms. The remaining 1,700 square feet of space will consist of a covered lanai. The applicants propose to complete construction within one (1) year of receiving all the necessary planning and building permits. The estimated cost of the proposed venue and related improvements is \$300,000.
- The applicants propose to hold no more than 75 events per year or an average of fewer than two (2) events per week with a maximum of four (4) events per week. According to the applicants, fifty (50) of the proposed annual events will have fifty (50) or fewer guests, twenty (20) of the proposed annual events will have eighty (80) or fewer guests and five (5) of the proposed annual events will have up to one hundred (100) guests.
- No food preparation will be allowed for events on the CPR unit, instead food will be brought by the guests or provided by caterers or food trucks. Alcohol will be permitted at events but not provided by the applicants.
- No amplified music will be allowed outdoors. Music and dancing will occur within the enclosed, 211 square foot “dance hall” portion of the proposed venue. A Public Address system may be used in ceremonies so that attendees may hear the officiant and other speakers. Such a system would have established volume limits monitored by decibel meters that will be installed on property boundaries and will provide alerts to the applicants and be logged to ensure compliance with acceptable residential noise levels. Furthermore, the applicants propose planting screening vegetation that will further reduce noise and light impacts to surrounding properties.
- The applicants propose to limit traffic to 20 vehicles per event inclusive of vendors and shuttle vans or minibuses for guest transportation.
- The applicants request to continue to use the grounds of the permit area (but not the applicant’s home) with temporary event tents and port-a-potties, to accommodate 20 rescheduled events and already reserved events, until construction of the wedding venue structure is completed.
- The applicants will continue to live on site in the existing farm dwelling.
- The applicants expect to have three to five full-time employees for the events venue.
- Events will be held daily between 11:00 a.m. and 10:00 p.m. by reservation. No overnight accommodations are proposed.

- Events will be limited to weddings, vow renewals, community, and charity events. Examples of community events include Donkey Mill Art Center fundraisers, luncheon for the Kona Coffee Pageant, Hope Services Hawai'i dinner, and school field trips to learn about farming. Approximately 5% of events annually are planned to be community and charitable events.
- According to the application, the applicants have been operating an event venue out of their home on CPR Unit 1 for about three (3) years without a Special Permit, and without complaints from the neighbors. Upon learning of permitting requirements for the operation of the event venue the applicants stopped taking reservations while pursuing a Special Permit. Additionally, all previously scheduled events have been postponed indefinitely due to the COVID-19 pandemic.

The grounds for approving a Special Permit are based on Rule 6-7 in the Planning Commission Rules. It states that the Planning Commission shall not approve a Special Permit unless it is found that the proposed use (a) is an unusual and reasonable use of land situated within the Agricultural or Rural District, whichever the case may be; and (b) the proposed use would promote the effectiveness and objectives of Chapter 205, Hawai'i Revised Statutes, as amended.

The proposed use is not an unusual and reasonable use of land situated within the State Land Use Agricultural District and would not promote the effectiveness and objectives of the State Land Use Law and Regulations and Chapter 205, HRS, as amended. 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. While the proposed wedding venue use is unusual in that that it is not strictly agricultural in nature, the Deputy Director does not consider it reasonable for the reasons related to the criteria below.

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 Deputy Director recommends the following:

(A) The granting of this request would not promote the effectiveness and objectives of Chapter 205, Hawai'i Revised Statutes, as amended. The intent of the State land use laws is to preserve, protect, and encourage the development of lands in the State for those uses to which they are best suited in the interest of the public health and welfare of the people in Hawai'i. The proposed use is located in an area designated Agricultural by the State Land Use Commission. According to Hawai'i Revised Statutes (HRS) §205-2 relating to districting and classification of lands, subsection (3) indicates that, "*In the establishment of the boundaries of agricultural districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation;*"

While the applicants are actively farming eight (8) acres of land for commercial coffee production, they have stated that farm-related income is not enough to earn a living and that the proposed wedding venue is needed to supplement their farm related income. In the September 2020 Leeward Planning Commission (LPC) hearing for the initial Special Permit, the applicants indicated that their 2019 farm related income was approximately \$30,000 and their wedding venue income in the same timeframe was approximately \$80,000.

In response to the needs of small farmers to diversify their income streams to supplement farming operations, HRS §205-4.5 allows agricultural tourism and agricultural-based commercial operations as permitted uses in the State Land Use Agricultural District. The intent of those added income producing activities is that they will be secondary and accessory to a working farm use. Having the proposed event venue be the primary income-generating use of the CPR Unit is not consistent with the intent of the State land use laws for lands in the Agricultural District.

(B) The desired use would adversely affect surrounding properties.

Neighbors have provided written public testimony raising concerns about traffic safety, liability issues and flooding of the private access roadway, Waiono Ranch Road. The Deputy Director agrees with these concerns as there will be a substantial increase in traffic on this roadway if the proposed use is established. This is further addressed in the next criterion.

Daytime visual impacts to surrounding properties should be minimal since there are existing natural vegetation buffers between the Permit Area and surrounding CPR units and properties. The applicants are proposing to provide additional landscaping as needed to maintain the visual buffer. Although the Permit Area is about 500 feet from the nearest residences to the west, there is still a possibility that increased noise and nighttime light pollution will adversely affect surrounding properties. Particularly, the nighttime hours of operation up to 10:00 p.m. daily can be disruptive to neighboring properties.

Noise impacts to surrounding properties related to the proposed use are a concern with weekly events consisting of 50-100 guests per event. To mitigate possible noise impacts, the applicants are proposing to restrict amplified music and dancing within the proposed 211 square foot "dance hall" space, which is located in the enclosed portion of the proposed wedding venue structure. However, the majority of the proposed event venue structure (1,700 of 3,000 square feet) will be outdoors on a covered lanai so related celebratory crowd noise is likely to be an issue especially later at night.

According to the applicants, if a public address system is used in outdoor ceremonies so that attendees may hear the officiant and other speakers, such a system would have established volume limits monitored by decibel meters that will be installed on property boundaries that provide alerts to the applicants and logged to ensure compliance with acceptable residential noise levels (55 decibels). Unfortunately, the Planning Department has no way to monitor or enforce this volume limitation.

The applicants are requesting to continue to use the grounds of the permit area (but not the applicant's home) with temporary event tents and port-a-potties, to accommodate twenty (20) rescheduled and already reserved events, until construction of the wedding venue structure is completed (anticipated to be one (1) year+). The applicant has not provided information on how they would mitigate amplified music/noise impacts prior to completion of the proposed event venue structure.

Based on the preceding, the Deputy Planning Director believes a substantial increase in noise will occur, with or without mitigation, due to the largely open design of the venue and size and nature of the events that will be held in the permit area.

Lastly, any time a non-agricultural use is established in an area actively being farmed or ranched, it can create conflicts between the two land uses. There is a concern that the guests of the proposed event venue may complain about farm and ranch-related nuisances such as noise or odors from 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 Planning Department has public safety concerns over the potential traffic hazards of increasing traffic on the private access road, Waiono Ranch Road, which was built to accommodate a low volume of traffic associated with the farming community rather than the proposed commercial/visitor-oriented use.

The existing agricultural road is narrow, with a pavement width of approximately twelve (12) feet, and has grass shoulders, an intermittent stream crosses over the roadway surface at the 0.7-mile marker which has an abrupt grade change, causing vehicles to slowly maneuver the crossing, and there are several locations on the roadway with limited sight distance due to blind curves and hilly terrain along the roadway. Furthermore, according to the Department of Public Works, the intersection of Waiono Ranch Road and Māmalahoa Highway requires widening and sight distance improvements and Waiono Ranch Road does not meet Fire Code requirements due to grade (15%+) and width (12 feet of pavement width instead of the minimum 20 feet required by the fire code).

Additionally, significant public testimony has been submitted by neighbors citing concerns about traffic safety due to inadequate sight distance and the substandard condition of the roadway, liability issues if there is an accident on the private access roadway, and flooding of the roadway. Unless the road is widened to accommodate two-way traffic there will be a potential for increased traffic accidents due to the hills and turns that limit the ability for drivers traveling in opposite directions to see each other in advance.

The applicants propose to limit traffic to 20 vehicles per event, inclusive of vendors and shuttle vans or minibuses for guest transportation. In addition, to better understand and address the roadway safety concerns, the applicants conducted a Traffic and Road Assessment Report prepared in October 2020 by Island Engineering LLC, reporting existing traffic volume, and projecting increased traffic volume related to wedding events, detailing existing roadway and traffic safety conditions, and recommending mitigation efforts to reduce impacts to the road and maintaining roadway safety. The report recommended the following mitigation measures in order to increase safety and road integrity:

- Speed limit signs of 15 mph should be installed.
- Warning signs pertaining to steep grade, narrow road, and blind corners should be installed.
- Regrading of the road or installing a culvert at the stream crossing to allow smoother maneuverability.
- Installing paved pullouts along the roadway to allow for increased traffic safety. It is recommended to consult with an engineer to determine locations and design criteria.
- Informing residents that an event is taking place via notifications or by installing a temporary sign at the beginning of the road.
- All wedding traffic should be limited to light duty (two-axle) passenger vehicles.

The applicants have committed to implement these recommendations and intersection improvements as recommended by DPW within 2 years of the effective date of an approved permit.

Despite the proposed mitigation measures and improvement commitments, the Deputy Director still has the following concerns related to roadway safety:

- There is a pending question about the legal ability of the applicant to unilaterally implement the proposed roadway safety improvements without the approval of the roadway owner (Golden Bay International, Co. Ltd.) or the other easement holders along the roadway.

During the September 2020 LPC hearing for the first Special Permit submittal, the applicants, their representative, and attorney all indicated on the record that they may not have the legal right to make roadway improvements unilaterally (without permission from the landowner or outside of a formalized roadway improvement association). When the applicants re-submitted the application with proposed safety improvements, the Department inquired about their legal ability to unilaterally make roadway improvements. The applicant's representative replied that they found more recent roadway ownership records and would make every effort to secure permissions. Furthermore, they indicated that based on research: "... *the easement holder has the duty and right to maintain the easement for access purposes, even without approval of the landowner.*" (See No. 5 in the applicant's January 7, 2021 supplemental information included in PD Exhibit 4). Staff later requested that the applicants supply the Planning Department with the referenced ownership records and from whom they would need to secure permissions. Additionally, staff asked the applicants to provide the Department with evidence substantiating the applicant's legal ability to unilaterally make roadway improvements.

By letter dated April 7, 2021, the applicant's attorney provided a legal memorandum arguing general principals of law to suggest that the applicants may improve the road without the consent of the fee owner or any other easement holders. The Deputy Director remains concerned that these general principals do not address the specific source of the applicant's authority to maintain or improve the roadway as requested.

Based on a review of the 1997 Limited Warranty Deed by which the applicants took title to the property, the applicants (as part of Hawaii Greener Pastures Partnership) were conveyed the fee simple interest to their lot as well as a nonexclusive perpetual easement interest in the roadway. Regarding the applicant's ability and obligation to maintain the road, the 1997 Limited Warranty Deed provides: "*Grantee hereby agrees that Grantee shall be responsible for one-tenth (1/10th) of the liability and maintenance, repair, and other obligations relating to the aforementioned Lot 11 (and any substitute easement or road parcel agreed upon in accordance with the terms of that certain Deed, dated March 18, 1980, recorded in the Bureau of Conveyances of the State of Hawaii in Liber 14588, at Page 768) for which the owners of the lots in said "Waiono Meadows" subdivision are responsible, as a group, under the terms of said Deed"* [emphasis added](See Page 3 of the 1997 Limited Warranty Deed). Thus, the applicant's authority to improve the road appears to spring only from this language "as a group" together with the 9 other lot owners.

Furthermore, according to Condition (c) of the 1980 deed there is one exception to the "as a group" rule, which allows : "*Grantor or Grantee, either one acting alone, may in its discretion from time to time, improve the substitute easement¹ or a portion thereof so that such portion is acceptable as a public road.*"(See Page 4 of the 1980 deed). At this time, the applicant is not proposing to improve the roadway to County dedicable standards, so the responsibility to maintain and repair Road Lot 11 articulated in the applicant's deed similarly appears to spring only from this language "as a group" together with the 9 other lot owners.

¹ Please Note: The substitute easement required to be created under Condition (a) in the 1980 deed was later formalized as Road Lot 11 by Subdivision No. 5528 in 1987.

Based on the preceding, the question of whether the applicants have the right to unilaterally install safety improvements to the roadway has not been resolved, therefore the Deputy Director is concerned that any approval recommendation based on these representations could not be implementable.

- Extensive public testimony was submitted by neighbors with concerns about the safety of the road and their liability exposure due to increased traffic on the substandard, agricultural roadway, should there be an accident related to the proposed wedding venue on the private access roadway.

In his April 7, 2021 letter, the applicant's attorney argues that: "...liability for one who is not an owner of land is based on the extent to which they can legally control its maintenance..." Furthermore, the letter references a Hawai'i Supreme Court "control" test that indicates: "...it is the control and not the ownership that determines liability." (See Page 5 of the April 7, 2021 letter) The applicant's deed and the deeds to the other 9 lots within the Waiono Meadows subdivision bestow that maintenance control to the respective lot owners indicating that they "...shall be responsible for 1/10th of all liability and maintenance, repair and other obligations..." relating to the roadway lot (Lot 11) "as a group." (See Page 3 of the 1997 Limited Warranty Deed)

Furthermore, Condition (e) of the 1980 deed includes explicit liability language related to the roadway, stating: "Until a portion of the substitute easement is dedicated as a public road, the parties shall enjoy the use of and bear the burden of the private road easement then existing in an equitable manner, including: (i) liability for injury, damage, or death from condition of premises, (ii) obligations of repair, and (iii) interruption for repairs or improvements." (See Page 4 of the 1980 Deed).

Based on the preceding, the Deputy Director is concerned about recommending approval of a use that would increase surrounding landowner's liability exposure based on increased traffic related to the proposed use.

- Despite the proposed reduction in the number of events and limitations on allowed number of vehicles, the proposed use will still bring in passenger vans, minibuses, water-hauling trucks, food trucks, and up to a maximum of 80 passenger vehicles per week, which will increase traffic beyond present levels and exacerbate potentially unsafe road conditions. Additionally, the proposed mitigation actions have not altered the surrounding property owner's opposition to the proposed project.
- To ensure public health and safety, any required roadway safety improvements would need to be implemented prior to resumption of the proposed use on the subject property, not 2 years after the approval of a permit, as represented by the applicants.
- Since the applicants are not proposing to widen the private access roadway to meet Fire Code requirements, it is likely they will need to provide automatic fire sprinklers in the proposed event venue building, which may be infeasible or too costly for the applicants to provide since the property is not on a municipal water system.

Based on the preceding, the Deputy Director cannot support a Special Permit for the proposed use if safe access for that use cannot be ensured.

(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. Because so much of Hawai'i island's land is classified as agricultural, there is increasing pressure to use these lands for urban uses, particularly economically lucrative visitor-oriented uses that are more appropriate to locate in areas zoned for resort and visitor-oriented uses.

(E) The land upon which the proposed use is sought is not unsuited for the uses permitted within the district. The property is situated in the Kona Coffee Belt, an area known to be ideal for coffee production. Moreover, the applicants are actively farming coffee on an 8-acre portion of the CPR Unit. Although soils on the property are classified as "Poor" by the Land Study Bureau classification system, the Permit Area is classified by the ALISH system as "Other" important agricultural land, which are lands of statewide or local importance for the production of food, feed, fiber, and forage crops. These lands can be farmed satisfactorily by applying greater inputs of fertilizer and other soil amendments, drainage improvements, erosion control practices, flood protection and produce fair to good crop yields when managed properly. Based on the preceding, the land upon which the proposed use is sought has a high agricultural potential and should be preserved for agricultural uses permitted within the agricultural district.

(F) The use will substantially alter or change the essential character of the land and the present use. The essential character of the land is currently agricultural in that it is situated in the Kona Coffee Belt and there is an active coffee farm on about 8 acres of the CPR Unit. Additional agricultural infrastructure consisting of an existing farm dwelling and agricultural storage building with an attached coffee drying and processing area are present on the CPR Unit. Surrounding properties are similarly zoned Agricultural with a 20-acre minimum lot size (A-20a) and consist of forest, pastureland, coffee farms, farm dwellings and substandard, agricultural roadway infrastructure. Construction and operation of the proposed 3,000 square foot event venue and related improvements and the introduction of a maximum of 200-400 visitors per week to the property would substantially change its agricultural character.

(G) The request will be contrary to the General Plan and Kona Community Development Plan and other documents such as Design Plans. The Deputy Director recognizes there is a potential economic benefit related to the establishment of the proposed event venue, which is evidenced by the economic analysis related to wedding spending submitted by the applicants and public testimony in support of the proposed use from several local businesses such as caterers, florists, musicians, photographers, and tourism experts submitted with the application. However, through the Special Permit process, the Deputy Director must balance economic benefit to the applicant and ancillary service providers with other criteria such as impacts to the surrounding community, infrastructure availability and retention of the area's character. According to General Plan, the County should, "*Promote and develop the island of Hawai'i into a unique scientific and cultural model, where economic gains are in balance with social and physical amenities. Development should be reviewed on the basis of total impact on the residents of the County, not only in terms of immediate short run economic benefits.*" (GP Economic Goal 2.2 (h))

The County of Hawai'i's General Plan is the policy document for the long-range comprehensive development of the island of Hawai'i. One of the purposes of the General Plan is to guide the pattern of future development in this County based on long-term goals. The General Plan Land Use Pattern Allocation Guide (LUPAG) Map designates the subject property classified as Important Agricultural Land, which is the highest classification of agricultural land in the County because these lands have a better potential for sustained high agricultural yields because

of soil type, climate, topography, and other factors. It is likely that this area was designated Important Agricultural Lands due to its location in the Kona Coffee Belt (designated as being located between the 500- and 3,200-foot elevation). LUPAG designations that are not capable of producing sustained, high agricultural yields are classified as Extensive Agriculture and are typically used for grazing and pasture.

Establishment of the proposed use would be contrary to the following goals, policies and courses of action articulated in the General Plan:

Land Use - Agricultural

- *Protect and encourage the intensive and extensive utilization of the County's important agricultural lands.*
- *Preserve the agricultural character of the island.*
- *Designate, protect, and maintain important agricultural lands from urban encroachment.*
- *Ensure that development of important agricultural land be primarily for agricultural use.*
- *Investigate possibilities to prevent non-agricultural uses that could interfere with potential or existing agricultural activities on important agricultural lands.*
- *Protect important agricultural lands within the Kona Coffee Belt from urban encroachment through the use of zoning and other mechanisms.*

The Kona Community Development Plan (KCDP) established the preferred land use pattern for North and South Kona, including the siting of future urban uses within the Kona Urban Area to protect encroachment onto important agricultural lands. A primary strategy for enhancement of the Kona agricultural industry is to protect agriculturally zoned lands outside of the Kona Urban Area for agricultural uses.

In the lone mention of the word "Special Permit" in the KCDP, policy ENV-1.6, states that only on lands designated as Extensive Agriculture on the LUPAG Map, "... a special permit for an eco-tourism related or other non-agricultural related use may be considered provided the proposed project is consistent with the Kona Mauka Watershed Management Program..." The purpose of the watershed management program is to create an action plan for preserving the ecosystem value of the watershed above the 1,500-foot elevation, however, to date this plan has not been created. In this case, the subject property and proposed permit area are situated on lands designated as Important Agricultural Lands and are located at about the 2,400-foot elevation, thus the proposed use is inconsistent with the KCDP's criteria for considering a Special Permit in the area.

As previously stated, the proposed use would not preserve and protect important agricultural lands, is not compatible with the surrounding agricultural land uses, would substantially change the agricultural character of the property and would introduce an inappropriate visitor-oriented urban land use into the existing farming community. Based on the preceding, the proposed use is inconsistent with the General Plan LUPAG Map, General Plan policies, and Kona CDP strategies.

Based on the foregoing, the Deputy Director finds that the proposed use is not unusual and reasonable and does not promote the objectives of Chapter 205, HRS.