

NO. 26215

IN THE SUPREME COURT OF THE STATE OF HAWAII

STEVEN GEIGER and KATHLEEN GEIGER,
Appellants-Appellants

vs.

HAWAII COUNTY PLANNING COMMISSION; CHRISTOPHER J.L. YUEN,
in his official capacity as DIRECTOR, HAWAII COUNTY
PLANNING DEPARTMENT; and ELIZABETH CHIN, Appellees-Appellees

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 03-1-0016)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama,
Acoba, and Duffy, JJ.)

Appellants-Appellants Steven and Kathleen Geiger [collectively, the Geigers] appeal from the October 15, 2003 judgment of the circuit court of the third circuit¹ (the court) affirming a December 20, 2002 decision and order of Appellee-Appellee Hawai'i County Planning Commission (the Planning Commission) granting a Special Permit to Appellee-Appellee Elizabeth Chin (Chin) to conduct certain commercial activities on land zoned for agricultural use. We affirm the judgment.

On appeal, the Geigers argue that the court's judgment, in affirming the Planning Commission's Decision and Order, violated the relevant portions of Hawai'i Revised Statutes (HRS)

¹ The Honorable Greg K. Nakamura presided.

CLERK OF COURT
STATE OF HAWAII

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§ 91-14(g) (1993),² Hawai'i Administrative Rules (HAR) § 15-15-95(b),³ and Rule 6.3 of the Planning Commission Rules of Practice and Procedure (Rule 6.3).⁴

² HRS § 91-14(g) states:

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Emphases added.)

³ HAR § 15-15-95(b) states:

(b) Certain "unusual and reasonable" uses within agricultural and rural districts other than those for which the district is classified may be permitted. The following guidelines are established in determining an "unusual and reasonable use":

- (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission;
- (2) The desired use would not adversely affect surrounding property;
- (3) The use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage, and school improvements, and police and fire protection;
- (4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and
- (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

(Emphasis added.)

⁴ Rule 6.3 of the Planning Commission Rules of Practice and Procedure entitled "Petition and Content," states in relevant part:

A Petition for a Special Permit shall be filed with the Commission's office and shall include the following:

. . . .

The Geigers advance the following nine points of error:

(1) the allowed uses were contrary to the objectives sought by HRS chapter 205 and the Rules of the State Land Use Commission (LUC Rules), (2) the Planning Commission went beyond its statutory authority and jurisdiction, inasmuch as it unlawfully permitted commercial uses within the agricultural district that were not unusual and reasonable and that required a boundary district amendment, (3) the allowed uses substantially and adversely affected surrounding property, including the property of the Geigers, (4) the allowed uses were unreasonably burdensome to public agencies that have a duty to provide roads and streets, (5) unusual conditions, trends, and needs had not arisen since the district boundaries and rules were established, (6) the land upon which the uses were allowed was suitable for the permitted

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- (5) A statement of the reason for the granting of the Special Permit citing how the proposed use would promote the effectiveness and objectives of chapter 205, HRS, and why the proposal is an unusual and reasonable use of the land. 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.

uses within the district and Chin was not deprived of permitted uses in the agricultural district nor was she subject to hardship, (7) the judgment was unenforceable and exceeded the authority and jurisdiction of the Planning Commission by conditioning the Special Permit to require Chin to pay an appropriate pro rata share of road maintenance expenses, (8) the judgment was clearly erroneous because it allowed uses that are inconsistent with the Hawai'i County General Plan (the County Plan), and (9) the judgment was clearly erroneous because it allowed uses that would substantially alter or change the essential character of the land and the present use.

In this secondary appeal, we must decide whether the court's order was right or wrong:

Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which this court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) [] to the agency's decision.

Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai'i 296, 307, 97 P.3d 372, 383 (2004) (quoting Morgan v. Planning Dep't, County of Kauai, 104 Hawai'i 173, 179, 86 P.3d 982, 988 (2004)) (internal quotation marks omitted). HRS § 205-6 (1993) establishes the Planning Commission's authority to issue Special Permits for "certain unusual and reasonable uses within agricultural . . . districts other than those for which the district is classified." HRS § 205-6(a). The Planning Commission may condition Special Permits with "protective restrictions as may be deemed necessary," and Special Permits may be granted "only when the use

would promote the effectiveness and objectives of [HRS chapter 205]." HRS § 205-6(c). Specific guidelines on "unusual and reasonable uses" are found in (1) HAR § 15-15-95(b) and (2) Rule 6.3(5). See supra notes 3 and 4.

As to the Geigers' first point, HRS § 205-4.5(b) (1993),⁵ pursuant to HRS § 205-6, does permit non-agricultural uses within agricultural districts, so long as the use comports with administrative guidelines for unusual and reasonable use. Special Permits are devised precisely to allow some uses in an agricultural district that are not specifically enumerated in HRS chapter 205. The evidence indicates that the instant case does comport with the objectives of HRS chapter 205 and the LUC Rules, and is substantially different from the court's rejection of a Special Permit in Neighborhood Board No. 24 v. State Land Use Commission, 64 Haw. 265, 639 P.2d 1097 (1982).

The Planning Commission reasoned that Chin's proposed use "is . . . a small agricultural-related and culinary facility based upon the quiet agricultural ambiance of the area." Chin's proposal is limited to approximately two acres of her five-acre parcel, is restricted to two forty-person events per month and ten sixty-person events per year, most of the activities are permitted as of right in agricultural districts, and conditions attached by the Planning Commission on Chin's proposed use comply with the Special Permit guidelines.

⁵ HRS § 205-4.5(b) lists the uses permitted as of right in agricultural districts.

As to the Geigers' second point, the Planning Commission concluded that "small gatherings in a rural farm-like setting," like the ones Chin has proposed, "is a logical use for a farm that may need additional income-generating activities to meet its expenses[, e]specially in a community focusing on tourism such as Hawaii." HRS § 205-6 expressly authorizes the Planning Commission to hear and determine applications for Special Permits like Chin's, including non-agricultural, commercial uses for land within state land use agricultural districts.

As to the third and ninth points of error, based on evidence received, the Planning Commission was not wrong in determining that "[t]he absence of any sharp difference" between the number of gatherings under Chin's proposed use and other subdivision residents' activities, "reinforce[s] the logic of granting this Special Permit." Testimony from members of the community in support of the proposed use, the continuance of existing agricultural uses in the property, the design of structural improvements to blend in with the native rainforest landscape, and the minimization of any adverse impact to surrounding property constituted substantial evidence supporting the Planning Commission's determination.

Regarding the fourth point of error, (1) there would be no undue burden on the County of Hawai'i, inasmuch as the burden to maintain roads has been assumed by the Cymbidium Acres Road Maintenance Corporation (RMC), (2) any added burden that the

Special Permit would place upon the RMC is addressed by the condition that Chin pay additional assessment fees to the RMC, (3) the Planning Commission was within its authority, pursuant to HRS § 205-6, to attach necessary conditions to Special Permits, and (4) the steps Chin has taken to protect the RMC officers and directors from liability, through the procurement of insurance and the signed-waiver requirement for guests, further reduces the burden on the RMC.

As to the fifth point of error, as the Planning Commission states, there is no requirement for legislative recognition of a specific change in conditions, trends and needs, for a Special Permit to issue. Instead, HAR § 15-15-95(b)(4) or Rule 6.3(5)(D) empowers the Planning Commission to make that determination. The Planning Commission's conclusions 6⁶ and 25 recognize that the growing acceptance of agricultural-tourism, eco-tourism, and the farmer-chef relationship evinces an emerging trend throughout the State which promotes agricultural products and Hawaiian agriculture in general. Thus, the judgment did not violate HAR § 15-15-95(b)(4) or Rule 6.3(5)(D).

As to the sixth point of error, it does not appear that the Planning Commission issued a conclusion of law specifically addressing guideline 5 of HAR § 15-15-95(b) and criterion E of

⁶ Conclusion 6, reprinted here in part, concludes that trends have emerged to justify the granting of the Special Permit:

It is clear that "ag-tourism" is now a major activity in Hawaii County and throughout the State of Hawaii, and indeed, throughout the United States.

Rule 6.3(5), both of which require that "[t]he land upon which the proposed use is sought is unsuited for the uses permitted within the district." This court has said that guidelines "denote individual factors that are not mandatory in themselves, but instead provide direction or guidance with respect to the ultimate decision[.]" Save Sunset Beach Coalition v. City & County of Honolulu, 102 Hawai'i 465, 479, 78 P.3d 1, 15 (2003). Hence, the Planning Commission's omission of a conclusion directly addressing the suitable-use guideline stated in HAR § 15-15-95(b) (5) and Rule 6.3(5) (E) does not invalidate its ultimate Decision and Order to approve Chin's application for a Special Permit. In this regard, it may be observed that the Planning Commission did conclude in conclusion 13 that the poor soil rating of Chin's property has limited the agricultural uses and resources available to her.

As to the eighth point of error, the Planning Commission gave considerable attention as to how the proposed uses would be consistent with the County Plan. The Planning Commission found that the facility is suitable for community activities, that no plant or animal species will be affected, and in light of the proposed uses the grant of a special permit will be consistent with the County Plan. Conclusion 26 provides that the Property would provide a venue that would promote social, cultural, recreational, culinary, artistic and educational potential of the Volcano Community. Conclusion 27 provides in detail several economic goals, policies, and standards under the

County Plan that would be met, including the land use goal of identifying, protecting and maintaining important agricultural lands, and the recreational goals of providing opportunities for the residents and visitors, maintaining the natural beauty of the recreation areas, and providing a diversity of environments for active and passive pursuits. Conclusion 28 recognizes the potential of the facility to enhance community life, generate revenue, and create business partnerships within the community. Conclusion 29 concludes that approval of the permit would foster economic goals and policies of the County.

The Planning Commission also concluded in conclusion 31 that the Special Permit is consistent with the Hawai'i State Plan's goals of promoting diverse cultural, artistic, and recreational needs. Conclusion 32 further provides that the permit furthers the State Legislature's goals of promoting agriculture. Moreover, in conclusions 33-35, the Planning Commission found that the Special Permit would further the goals of the community, as defined in the neighborhood's Volcano Vision 2020 Plan, a strategic planning document developed for and accepted by the Volcano community in 1996. Hence, the Planning Commission's findings and conclusions that the granting of the Special Permit would be compatible with the County Plan supports the court's affirmance of its decision. Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the

law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's final judgment filed on October 15, 2003, from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, December 19, 2005.

On the briefs:

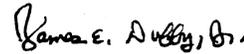
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