

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, Hawaii 96813

October 8, 2004

Chairperson and Members
Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Land Board Members:

SUBJECT: Default of Timber Land License No. H-101 held by
Tradewinds Forest Products, LLC.

Background: At its June 8, 2001 meeting the Board of Land and Natural Resources approved the Division's request to issue a Timber Land License (TLL) to Tradewinds Forest products, LLC (TFP) for timber resources in the Waiakea Timber Management Area (WTMA). The June 8, 2001 Board submittal is summarized as follows:

- The WTMA is comprised of over 11,700 acres of non-native timber plantations that were established primarily between 1959 and 1968 for the purposes of providing sustainable wood resources for Hawaii's forest products industry.
- The Division prepared a forest management plan for non-native timber resources in the WTMA (approved at the September 11, 1998 Board meeting), and a Final Environmental Assessment completed on September 28, 1999, relating to proposed commercial harvesting and replanting operations.
- A request for proposals was released in December 1998, with the intention of encouraging private sector investment in value-added processing opportunities for Hawaii-grown woods, creating local jobs, ensuring that smaller wood workers would have access to public timber, stimulating the forest product economy of Hawaii, and through replanting of suitable species, improving the future productivity of the WTMA. The proposal submitted by TFP was selected by the Department.
- In a letter dated February 6, 2001, TFP notified the Department, that it had entered into a 15-year timber supply agreement with a third-party timber owner, which manages extensive eucalyptus plantations on the Big Island - a pre-condition of the Department for awarding a TLL. At that time the third-party timber plantations were immature, and timber in the WTMA was seen as a crucial source of timber to support TFP in it's first few years of operating its proposed facility with an annual capacity of 200,000 cubic meters of logs.

- Terms guiding rights to terminate the License were established to read “The Licensor reserves the right to terminate this License if the facility is not substantially completed by May 31, 2004. The Licensor agrees to not unreasonably terminate this License if the Licensee is making good faith efforts to complete the facility, obvious progress has been made, and the completion date is expected by May 31, 2005.”
- The remainder of the submittal discussed other general terms and conditions of the proposed TLL.

On August 29, 2001, TLL No. H-101 was signed by representatives of the State and TFP. In this TLL document, the terms guiding rights to terminate the License appear to accidentally differ from those established by Board action. In section 3.1 of the TLL, pertinent language included “The Licensee will begin construction of the facility between the year 2001 and 2003... The Licensor reserves the right to terminate this License if the facility is not substantially completed by January 1, 2004. The Licensor agrees to not unreasonably terminate this License if the Licensee is making good faith efforts to complete the facility, obvious progress has been made, and the completion date is expected in the 2005 calendar year.”

Section 10.7 of the TLL stipulates that the Licensee will designate a community liaison within 90 days of license signing, and create a community advisory board to advise the Licensee on community-related issues. It is also notable that in section 11.8 of the TLL, the term *Facility* is defined as “Sawmill and/or veneer and plywood plant capable of processing at least 200,000 cubic meters of logs annually.”

The Department has periodically received correspondence from TFP, detailing their research and planning efforts surrounding construction and operation of their proposed mill facility:

- In a February 6, 2001 letter, TFP announced that it was proceeding with mill site selection, permitting, and engineering, and expected a fully operational mill in 2004.
- In a December 19, 2003 letter TFP reported that they had located three prospective investors, identified a prospective fourth, and had entered into discussions with an investment banking house in New York.
- In a May 11, 2004 letter, TFP reported that they had located two prospective investors, one of which was prepared to initiate testing of timber resources from Hawaii.
- In an August 8, 2004 conversation with Staff, TFP indicated that the latter two prospective investors were indeed conducting tests that revealed some favorable initial results, some unexpected delays and problems with conducting the physical tests, and plans for continued testing relating to their decisions to invest. Staff was also lead to believe that TFP had not initiated pursuit of permitting requirements for its facility.

- In correspondence dated September 22, 2004, TFP indicated that these tests were continuing, revealed that their agreement with the third-party timber owner had been reduced in scope, such that TFP's access to those resources had been significantly reduced, and as a result, the design and scale of their facility would have to be reduced.

Analysis: The Division believes that TFP is in default of the terms of TLL No. H-101, according to Section 9.2 of the TLL titled "Breach". While deadlines stipulated in the Board action of June 8, 2001 and the TLL dated August 29, 2001 differ, it is fact that TFP did not initiate facility construction before the end of 2003, and has not substantially completed a facility by January 31, 2004 or May 31, 2004. In fact, no facility construction of any sort has been initiated in Hawaii thus far. It does not seem probable that TFP will be able to complete permitting requirements, locate a facility site, initiate and finish construction of any facility before either May 31, 2005, or December 31, 2005. The Division is not aware of the appointment of a community liaison or community advisory board by TFP.

The Division therefore feels that it is in the best interest of the State to terminate this TLL, and seek new proposals for active management of timber resources in the WTMA. Because TFP indicated that it must reduce the scale of its proposed facility below the mandated capacity of 200,000 cubic meters of logs annually, the Department should once again entertain a variety of concepts and proposals. Such action would not preclude TFP from submitting a new bid that more accurately reflects a reduced scope in their facility concept. Before the TLL can be terminated, TFP must be formally notified that they are in default under their TLL, and afforded the designated opportunity to cure or remedy this default.

RECOMMENDATIONS

That the Board of Land and Natural Resources:

1. Finds that TFP is in default under their TLL No. H-101, and authorizes the Division to provide TFP with written notice of default, as guided by Section 9.2 of the TLL.
2. Instruct the Division to stipulate in this letter that the following conditions for cure or remedy of default must be met within thirty (30) days after delivery by the Licensor of written notice of default:
 - a. TFP must substantially complete construction of a mill with a minimum capacity of 200,000 cubic meters of logs annually.

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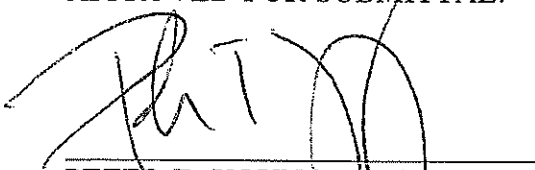
- b. TFP must designate a community liaison and a community advisory board, as stipulated by TLL Section 10.7, and notify the Department accordingly.

Respectfully submitted,



for PAUL J. CONRY
Administrator

APPROVED FOR SUBMITTAL:



PETER T. YOUNG, Chairperson
Department of Land and Natural Resources

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES**

DATE: FRIDAY, OCTOBER 8, 2004
TIME: 9:00 A.M.
PLACE: OHANA KEAUKOU BEACH RESORT
BALLROOM 2
45-6740 ALII DRIVE
KAILUA-KONA, HAWAII 96740

Chairperson Peter Young called the meeting of the Board of Land and Natural Resources to order at 9:22 a.m. The following were in attendance:

MEMBERS

Mr. Peter Young
Ms. Kathryn Inouye
Mr. Gerald DeMello
Mr. Ron Agor

Mr. Timothy Johns
Mr. Ted Yamamura
Mr. Toby Martyn

STAFF

Ms. Dede Mamiya, Land
Mr. Mike Constantinides, DOFAW
Mr. Sam Lemmo, OCCL
Mr. Gavin Chun, Land

Mr. Paul Conry, DOFAW
Mr. Eric Hirano, Engineering
Mr. Keith Chun, Land

OTHERS

Mr. Calvin Choy, D-4
Mr. Dave Gedeon, D-6
Mr. George Robertson, K-2
Mr. Peter Simmons, K-1, C-1
Mr. Roy Vitousek III, K-5
Mr. Alan Murakami, D-18
Mr. Skip Cowell, D-12
Mr. Frank Brandt, D-12

Mr. Terry Causey, D-14
Mr. Richard Spiegel, K-2
Ms. Mary Ellen Wong, K-1
Mr. Steven Lim, K-3
Mr. Don Bryant, C-1
Mr. David Marquez, D-12
Mr. Chad Martin, D-12
Mr. Chris Armstrong, D-12

{Note: language for deletion is [bracketed], new/added is underlined}

Item A-1: Minutes of September 24, 2004

Member Martyn recused himself.

The Board made the following changes

Page 8, Staff's recommendations 2)

"2. That the Board [authorize] deny the appointment of a Hearing Officer for CC HA-05-01 [and let the Hearing Officer conduct all the hearings relevant to the subject petition for a Contested Case Hearing, and]."

Page 9, Item D-4, third sentence

"Ms. Mamiya also pointed out under "allied uses" it states that the kayaks used by the lessee are not considered "allied uses" [were] where as traditional outrigger Hawaiian canoes . . ."

Approved as amended by the remaining Board members (Johns/Inouye).

Item D-4: Grant of Perpetual, Non-Exclusive Easement to Verizon Hawaii Inc. (Verizon) for Telecommunication Purposes, Nuuanu, Honolulu, Oahu, TMK: 2-2-54:01 por.

Dede Mamiya, Administrator of the Land Division noted that Verizon Hawaii Inc is requesting an easement, which consists of an underground concrete encased conduit connecting two of their facilities. Staff contacted the Office of Conservation and Coastal Lands Division and it was determined this project falls under their existing CDUP OA-2809. Ms. Mamiya recommended the Board authorize the issuance of a perpetual non-exclusive easement to Verizon Hawaii, Inc. covering the subject area for utility purposes.

Unanimously approved as submitted (Inouye/Johns).

Item D-14: Grant of Perpetual, Non-Exclusive Easement to Honomalino -Okoe Community Association, for Access and Utility Purposes, Honomalino & Okoe, South Kona, Hawaii, TMK: (3) 8-9-03:por. 01 & 83.

Ms. Mamiya made it known the Honomalino-Okoe Community Association have been using an existing gravel road owned by the State to gain access to their landlocked parcel but have not obtained the necessary paperwork. It was also revealed that the subject lands are encumbered by the Kona Wilderness Area pursuant to Act 59. Ms. Mamiya recommended the Board authorize the issuance of a perpetual, non-exclusive easement to the Honomalino-Okoe Community Association covering the subject area for access and utility purposes.

Peter Miranda, Planner with the National Resources Conservation Services informed the Board he was the planner that worked on the conservation plan. He let it be known the plan submitted by the applicant was approved by the Soil and Water Conservation District. He communicated the Himalayan raspberry are not the only noxious weed in the area and that there are others already growing in that area. Mr. Miranda noted this is a worthwhile project and asked the Board for their support.

Peter Simmons, representing Kamehameha School testified in support of the applicant's request. He spoke of the favorable work done and dedication provided by the Wong's.

Approved as submitted by the remaining Board members (DeMello/Yamamura).

Item K-3: Conservation District Violation HA-03-49 Regarding Unauthorized Construction of a Bed and Breakfast Facility, Lanai Addition and Other Improvements at Honomu, Hawaii, TMK: (3) 2-8-13:38, by J. and M. Gamble.

Mr. Lemmo reminded the Board this item was deferred from the September 10, 2004 meeting. This submittal involves the unauthorized construction of a bed and breakfast, lanai, wall extension and pipe, landscaping, tree cutting, and orchard. He recommended the Board find the Gambles in violation of HRS, Chapter 183C and HAR Chapter 13-5 and subject to the eight conditions in staff's submittal.

Steven Lim attorney representing the landowner informed the Board they have been working with the State Land Use Commission and he is confident they will find in favor of his clients belief as to the location of a 1990 boundary interpretation. Mr. Lim confirmed if they are not successful with the Land Use Commission he is ready to file the necessary paperwork to request a contested case hearing. Mr. Lim requested that the Board defer a decision today and provided him with additional time in order to receive a boundary interpretation from the Land Use Commission.

Chairperson Young informed Mr. Lim he will have ten days from today to fill out the necessary paperwork to request a Contested Case Hearing.

No Action.

Item K-5: Reconsideration of Petitioner's Request for a Contested Case Hearing (HA-05-01), Appointment and Selection of Hearing Officer to Conduct all Hearings for a Contested Case Hearing, in a Matter Regarding Alleged Unauthorized Land Uses at Aleamai and Kaloloa, South Hilo, Hawaii, TMK: (3) 2-7-8:63, by G. Kamai.

Mr. Lemmo reminded the Board on September 24, 2004 the Board rejected staff's recommendation to waive the petitioner's lack of an oral or written request for a contested case prior to the close of the Board meeting at which the matter was scheduled for disposition and the lack of a timely written request for a contested case subsequent to

the meeting. He indicated that staff believes the petitioner was not apprised of his right to request a contested case before or during the meeting at which the petitioner was assessed a fine and costs in this matter. For this reason, Mr. Lemmo is recommending the Board reconsider its September 24, 2004 decision and waive the petitioners' failure to make an oral or written request for a contested case prior to the close of the August 13, 2004 meeting and the lack of a timely written request for a contested case hearing and authorize the appointment of a Hearing Officer.

Roy Vitousek III, attorney for the applicant communicated that Mr. Kamai would like the opportunity to be able to tend to farming the land while this case is in a contested case mode.

Unanimously approved as submitted (DeMello/Johns).

Item K-4: Conservation District Use Application Request (HA-3030) for an Extension of Time to Complete Project Construction for Organic Farming, Construction of a Workshed, Shadehouse and Water Catchment System, Improvements and Extensions to Existing Jeep Roads, at North Hilo, Hawaii, TMK: (3) 3-2-4:43 & 44, by G. B. Hagim.

Mr. Lemmo conveyed that the permittee is requesting an eighteen-month time extension to complete the subject project. He noted that due to a construction boom on the Big Island the permittee is encountering difficulties in hiring a contractor. Mr. Lemmo recommended the Board approve an extension of eighteen months to complete the associated improvements for organic agricultural use.

Unanimously approved as submitted (DeMello/Johns).

Item C-1: Default of Timber Land License No. H-101 held by Tradewinds Forest Products, LLC.

Paul Conry, Administrator for the Division of Forestry and Wildlife and Michael Constantinides, Program Manager appeared to present the subject submittal. Mr. Conry pointed out the Waiakea Timber Management Area (WTMA) is comprised of approximately 12,000 acres of non-native timber plantations that were established for the purposes of providing sustainable wood resources for Hawaii's forest products industry. The department began accepting proposals with the intention of encouraging private sector investment in value-added process opportunities for Hawaii-grown woods, creating local jobs, ensuring that smaller wood workers would have access to public timber, stimulating the forest product economy of Hawaii and improving the future productivity of the WTMA. In February 2001, the Department entered into a 15-year timber supply agreement as a pre-condition of the Department for awarding a Timber Land License. Mr. Conry went on to state in August 29, 2001 a Timber Land License was signed. One of the terms of the license stated "The Licensee will begin construction of the facility between the year 2001 and 2003 . . . The Licensor reserves the right to terminate this

License if the facility is not substantially completed by January 1, 2004. The Licensor agrees to not unreasonably terminate this License if the Licensee is making good faith efforts to complete the facility, obvious progress has been made, and the completion date is expected in the 2005 calendar year." Mr. Conry also went over the details of some of the correspondence sent in by Tradewinds Forest Products, LLC (Tradewinds) detailing why they did not comply with the terms of their lease and why their efforts were running three years behind. Lastly, it was revealed that Tradewinds was undergoing physical testing of their timber and if the results were favorable it could lead to investment of capital into the company. Mr. Conry recommended the Board find that Tradewinds Forest Products is in default under their Timber Land License No. H-101, and authorize the Division to provide Tradewinds Forest Products, LLC with a written notice of default and instruct the Division to stipulate in this letter that the two conditions listed in staff's submittal for cure or remedy of default must be met within thirty (30) days after delivery by the Licensor the written notice of default.

Mr. Constantinides informed the Board all the division is asking for is that the Board find Tradewinds Forest Products, LLC in default of their land license and authorizes the division to notify Tradewinds of this fact.

Peter Simmons, representing Kamehameha Schools and board member of the Hawaii Forest Industry Association and Chairman of the Society of American Foresters in Hawaii spoke of the spirit involved in creating these forest products. He also spoke of the faith by other large landowners who believed the forest industries would be a viable industry. Mr. Simmons believes what the department is doing will well intentioned but misguided. Mr. Simmons spoke of the cost associated with the manufacturing of the wood from the forest and placing it into the hands of the consumer. He let it be known because they believe in Tradewinds his company has scrutinized Tradewinds business plan and economic model and they have come to the realization that Tradewinds has a viable business. Mr. Simmons asked the Board to defer action on this matter and allow Tradewinds the opportunity to succeed.

Don Bryant of Tradewinds Forest Products, LLC. communicated how his company has gone through a two year depression in the forest industry. On a positive note he believes his company can survive because the prices of wood panels in 2004 have been increasing as well as the fact that his company has made some positive changes with regards to the structure of Tradewinds. He went on to discuss the process his company has gone through from removal of the tree from the forest up to the point of testing the strength of the wood. Mr. Bryant indicated the results from the strength test should be available at the end of next week. With regards to funding, Mr. Bryant has taken the lead in this area. As far as capital, they have the necessary start up capital to pay for the engineering and permit phases. Also to save money, they have secured a mill construction team that will cut their cost in half. Mr. Bryant also indicated if the strength test on the wood is positive they have secured a verbal commitment from an unidentified source. In closing, Mr. Bryant asked the Board not to declare his company in default of their land license but instead provide them with additional time, til the end of the year in order for his company to complete the testing on the wood as well as secure the necessary funding. Mr. Bryant

confirmed if his company should fail the strength test they will immediately notify staff of this fact.

The Board asked staff to bring this item back to the Board for the first meeting in January and at that time to indicate the status report of the test results as well as start up capital for Tradewinds Forest Product, LLC. and include a detailed project schedule which will include the permitting process. Should Tradewinds Forest Products, LLC. fail the strength test they will immediately notify staff of this fact.

Motion to deny staff's recommendation

Unanimously approved to Deny staff's recommendation (Inouye/DeMello).

- Item L-1: Correction to the List of Low Bidders for ADA Projects Under \$100,000.00 Submitted on August 27, 2004.**
- Item L-2: Approval for Award of Construction Contract – Job No. B75DO71A, Waianae Boat Harbor Pier Repair and Improvements, Oahu, Hawaii**
- Item L-3: Appointment of West Maui Soil and Water Conservation District Director.**
- Item L-4: Approval for Cancellation of Award – Job No. J00CB45A Maalaea Small Boat Harbor, ADA Barrier Removal Project Maui, Hawaii.**
- Item L-5: Approval for Award of Construction Contract – Job No. J00CF46B, Kokee State Park, ADA Barrier Removal Waimea, Kauai, Hawaii.**

Unanimously approved as submitted (Johns/Yamamura).

- Item D-18: Resolution of Certain Improvements Constructed on State Land at the Hilton Waikoloa Village, Anaehoomalu, South Kohala, Hawaii, TMK: (3) 6-9-07:14.**

Chairperson Young recused himself.

Ms. Mamiya reminded the Board in August 1997, Judge Ezra determined the subject lands were ceded lands owned by the State of Hawaii and therefore subject to the public lands trust. As part of his order Judge Ezra directed the State to take all appropriate actions to immediately seek compensation from the effective date of his order from the occupiers of the submerged lands. Ms. Mamiya pointed out in 2002, the Board approved a conceptual resolution which consisted of a land exchange for the filled State lands, a perpetual non-exclusive easement to Lanpar for the submerged lands and payment of back rent by Lanpar for the time period of January 1, 1986 to the date the land exchange is consummated and interest. Since that time staff has moved away from a land exchange