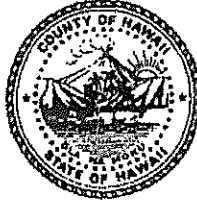


Stephen K. Yamashiro  
Mayor



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## County of Hawaii

### OFFICE OF THE CORPORATION COUNSEL

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January 26, 1999

1999 JAN 27 PM 4 00  
COUNTY OF HAWAII

TO: Virginia Goldstein, Director  
Planning Department

FROM: Frederick Giannini, Deputy Corporation Counsel

RE: Status of Special Management Area Use Permit No. 153 (SMA 153)

This is in response to your January 20, 1999 referral to this office of questions involving the above-noted SMA permit. The Planning Commission granted the permit on February 26, 1981 to allow the construction of a 78-unit condominium project and related improvements on the mauka side of Alii Drive in the vicinity of Holualoa Bay, between the Royal Kahili and Coconut Palm Condominium complexes. That permit contained condition no. 4, which required that the permittee begin construction of the project within one year of obtaining plan approval. At its November 7, 1989 meeting, the Planning Commission denied the permittee's request to amend condition no. 3 to extend the time limitation for plan approval. In its letter of November 17, 1989 to the permittee, the Planning Commission noted that since February 26, 1981, the permittee had revised the original development plans twice and had been granted five time extensions. The letter stated that Final Plan Approval for the original development was granted on September 9, 1982, but that the deadline date in that approval of September 9, 1984 had passed without the permittee beginning construction, the Final Plan Approval was voided. The November 17, 1989 letter stated that the Planning Director would be initiating steps to revoke the SMA permit; however this was never done. **There has been no action in which the Director has placed a revocation action before the Commission, and the Commission has never voted to revoke the SMA permit.**

Time Share  
15 Mh allowed  
on the property  
GPRM - 8/26/99

000727

You have asked the following questions:

1. What is the status of the permit? Answer: There is no valid permit. It has been rendered void because it contains a condition which is impossible to meet.

2. Can the Planning Director re-activate the permit or must it be revoked? The Planning Director cannot re-activate the permit. Only the Commission may re-issue it.

3. If the permit is revoked, what is the liability of the County for the continued water commitment payments? The County of Hawaii would not have any liability for the return of the money paid by the permittee for the purpose of water commitments.

**Status of the Permit.** As noted above, in 1989, the Planning Commission voted to deny an extension in the amount of time the permittee would have to meet a condition. A board or agency which is empowered to issue permits has the power to attach conditions to insure that the objectives of the permit are accomplished. *Bernstein v. Board of Appeals, Village of Matinecock*, 60 Misc. 2d 470, 302 NYS 2d 141 (1969); 3 Anderson, *American Law of Zoning* 3d, §21.30. In the case of Special Management Area use permits, the conditions are meant to insure that the standards embodied in HRS §§205A-2 and 205A-26 are carried out. When a validly imposed condition cannot be performed, it is impossible to meet the standards of the permit. Therefore the permit is void, regardless of whether or not the Commission has voted to revoke it. Although the letter to the permittee stated that the Planning Director would initiate action to have the Commission revoke the permit, the Director never took such action. Nevertheless, the Commission did vote to deny a time extension on a condition, taking an action that it knew to be the equivalent of rendering the permit void.

**Re-activation of the Permit.** The statute gives the Planning Commission the authority to issue a Special Management Area use permit. HRS §205A-21, *et. seq.* The Planning Commission is thus the only body which may amend the permit. Even assuming the permit were not void and were in some way "in limbo", the Planning Director could not "revive" it administratively because the "revival" would be in the nature of an amendment, which would require Commission action.

**Liability for Water Commitment Payments.** The question has also arisen about the possibility that the County of Hawaii may be liable to the permittee for the money paid to

Memorandum to Virginia Goldstein

January 26, 1999

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the County department of Water Supply for water commitment payments made over the years since the decision was sent out. The file in the Planning Department shows that payments for a water commitment were paid up to and including August of 1993, more than four years after the Commission voted against extending the permit. It is our opinion that the County would not be liable for the repayment of any water commitments made by the permittee. The permittee made those payments voluntarily even after having been informed that the time extension on the permit was denied and after the permittee had been informed of the time in which an appeal could be filed. The permittee continued to make payments with full knowledge of the risks. Furthermore, by continuing to pay for the water commitment, the permittee was in fact continuing to receive a benefit, in that the permittee would still be able to transfer the property with the water commitment included. Thus the land maintained its value or increased in value.

Please contact this office if there are any questions.

FG:ch

comm2:a/Holualoabaysma153.ltr

PLANNING COMMISSION

Planning Department  
County of Hawaii  
Hilo, Hawaii

APPLICATION FOR	)	
SPECIAL MANAGEMENT AREA	)	
USE PERMIT	)	SMA USE PERMIT
by	)	NO. 153
HOLUALOA BAY PARTNERS	)	
for	)	
78-UNIT CONDOMINIUM PROJECT AND	)	
AND RELATED IMPROVEMENTS	)	
in	)	
HOLUALOA, NORTH KONA, HAWAII	)	
	)	

SPECIAL MANAGEMENT AREA USE PERMIT

The County Planning Commission at its duly held public hearing on January 8, 1981 and February 11, 1981, and at its meeting of February 26, 1981, considered the application of HOLUALOA BAY PARTNERS for a Special Management Area Use Permit in accordance with Rule No. 9 of the Planning Commission, Rules and Regulations Relating to Environmental Shoreline Protection to allow the development of a 78-unit condominium project and related improvements at Holualoa, North Kona, Hawaii, Tax Map Key 7-6-14:2 & 3 and 7-7-04:22, 23, 27 & 47.

The Commission has found the following:

That the proposed development is not anticipated to have any substantial adverse environmental or ecological effects. The purpose of the request is to allow the development of a seventy-eight (78) unit condominium project within three (3) 3-story buildings at heights of about 40+. The proposed development also includes recreational facilities, landscaping, parking and other related improvements.

The property is not known to contain any unique ecological systems, nor provide habitats for any endangered plant or animal species. Further, while certain archaeological features and artifacts were found on the property, certain mitigating conditions of approval will be imposed for their protection, preservation, etc.

Since the property is located mauka of Alii Drive, the proposed development is not expected to have any significant adverse effects on coastal resources, detract from lines of sight toward the ocean from Alii Drive, nor adversely affect any existing or proposed accesses to the shoreline.

Further, any potential adverse effects on the off-shore water quality will be mitigated through compliance with existing regulations. Such is the case in which the petitioner intends to construct a private underground sewage treatment plant. The

construction of this system and the manner in which the sewage is to be disposed of will have to meet with the approval of the State Department of Health and any other approving agency(ies). Based on the above, it is determined that the impacts on coastal ecological systems will be negligible and are not anticipated to be significantly adverse.

Based on the above, it is determined that the approval of the proposed project will not result in the loss of valuable natural, cultural, or recreational resources of this shoreline and coastal area.

No adverse impacts on air and water quality are expected to be generated by the proposed development. The nature of the proposed development is such that no unusual air emissions are likely to be produced from it. Air emissions generated during the construction phase can be mitigated by existing regulations. Any potential runoff or discharge which could reach ocean waters can be handled by on-site improvements. Further, negative impacts on the local water quality resulting from soil erosion and runoff during site preparation and construction phases are unlikely, but should they occur they can be adequately mitigated through compliance with existing ordinances and regulations. In regards to the hazards posed by potential tsunami inundation, these can be mitigated through the requirements of the Building Code and Plan Approval process.

All other essential utilities and services, including water, are or will be made available to the subject property. In this regard, the proposed development will complement the Multiple Residential element of the General Plan which encourages the development of multiple residential units in areas serviced by existing infrastructures.

Based on the above, it is determined that the proposed development will not have any substantial adverse impacts on the surrounding area nor will its approval be contrary to the objectives and policies of Chapter 205-A or with the intent of Rule 9.

Therefore, the Commission hereby grants to the petitioner a Special Management Area Use Permit to allow the development of a 78-unit condominium project and related improvements at Holualoa, North Kona, Hawaii, Tax Map Key 7-6-14:2 & 3 and 7-7-04:22, 23, 27 & 47, pursuant to the authority vested in it by Rule No. 9 of the Planning Commission.

Approval of the Special Management Area Use Permit is subject to the following conditions:

1. That the petitioner, Holualoa Bay Partners, shall be responsible for complying with all of the stated conditions of approval.
2. That final approval for the consolidation/resubdivision of the affected parcels shall be secured within six (6) months from the effective date of the Special Management Area (SMA) Use Permit.
3. That plans shall be submitted and Final Plan Approval secured from the Planning Department within one (1) year

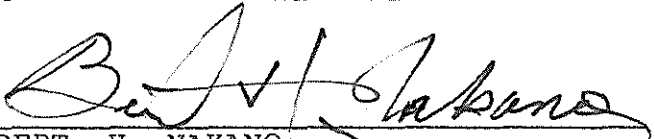
from the date of approval of the consolidation/  
resubdivision plan.

4. That construction commence within one (1) year from the date of receipt of Final Plan Approval and be completed within two (2) years thereafter.
5. That the buildings shall be designed to have an exterior appearance of three (3) stories.
6. That no Final Plan Approval shall be issued by the Planning Director until an intensive archaeological survey has been completed, submitted and accepted by the Planning Department.
7. That should any unanticipated archaeological features be found during grading or construction, work shall immediately cease and the Planning Director shall be immediately notified. Work shall not resume until approval is received from the Planning Director.
8. That the potential inundation elevations shall be noted on the construction plans submitted for Building Permit and that said plans shall conform to applicable requirements.
9. That the method of sewage disposal shall comply with the requirements of the appropriate State and County agencies.
10. That, if a future ruling in a pending action (Civil No. 3234) in Third Circuit Court places title to any of the subject properties in issue or otherwise limits the applicant's ability to proceed with development of such properties, this permit shall be immediately suspended by the Planning Director pending Commission review and possible further action.
11. That accesses to the property shall meet with the approval of the Department of Public Works.
12. That all other applicable rules, regulations, and requirements including those of the Departments of Fire, Public Works, and Water Supply be complied with.

Should the foregoing conditions not be met, the Special Management Area Use Permit may be deemed null and void by the Planning Commission.

The effective date of this Permit shall be February 26, 1981.

Dated at Hilo, Hawaii, this 8th day of April, 1981.

  
BERT. H. NAKANO  
Chairman, Planning Commission

APPROVED AS TO FORM AND LEGALITY:

  
DEPUTY CORPORATION COUNSEL  
Date: 27 Mar 81