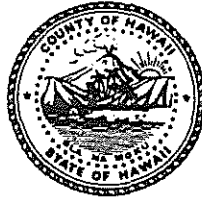


Stephen K. Yamashiro
Mayor



County of Hawaii

PLANNING COMMISSION

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CERTIFIED MAIL
Z 095 324 400

DEC 11 1998

Kazuichiro Furusawa, President
Sobay Hawaii, Inc.
c/o Mr. Yukio Takeya
Ala Kai Realty
688 Kionoole Street, Suite 102
Hilo, HI 96720

Dear Mr. Furusawa:

Special Management Area Use Permit Application (SMA 97-6)
Request: Construct a 21-Unit, 4-Story Residential Condominium
and Related Improvements
Applicant: Sobay Hawaii, Inc.
Tax Map Key: 7-5-18:20

The Planning Commission at its duly held public hearing on November 20, 1998, voted to approve the above-referenced application per the Findings of Fact, Conclusions of Law, and Decision and Order, as amended. Special Management Area (SMA) Use Permit No. 387 is hereby issued to allow the construction of a 21-unit, 4-story residential condominium and related improvements. The property is located on the makai side of Ali'i Drive adjacent (south) to the Kona Reef Condominium complex, Waiaha 1st, North Kona, Hawaii.

Approval of this request is based on the following:

I. FINDINGS OF FACT

The Parties

Petitioner SoBay Hawaii, Inc.

1. Petitioner SoBay Hawaii, Inc. ("SoBay") is a Hawaii corporation. The shareholders of SoBay are Dr. Kazuichiro Furusawa and his mother Kaneko Furusawa. Dr. Furusawa is a practicing orthodontist in Japan. Dr. Furusawa resides in Funabashi-City, Chiba Prefecture, Japan.

EXHIBIT A

2. SoBay Hawaii owns the Property in fee simple. This is the only real property owned by SoBay.

3. Dr. Furusawa and his mother purchased this property in 1990. He was introduced to the property by a Hawaii estate agent who presented Dr. Furusawa with a design and business plan for development of a condominium. The agent assured Dr. Furusawa that the Property was zoned for resort development and that he would be able to develop a condominium on the Property. The agent assured Dr. Furusawa that if he bought the property, cleaned it up, and developed a condominium that the local people would be very happy and grateful.

4. Dr. Furusawa and his mother transferred the property to SoBay in 1991 and in 1992 SoBay applied for an SMA use permit and Shoreline Setback Variance (SSV). SoBay's planning consultant at the time guaranteed Dr. Furusawa that the SMA use permit would be granted by the Planning Commission. The Project was submitted to and approved by the Kailua Village Design Commission. The consultant later advised Dr. Furusawa to withdraw the application for SMA use permit and SSV because of a downturn in the real estate market. Dr. Furusawa withdrew the applications and waited for the real estate market to improve.

5. In 1997 it was Dr. Furusawa's impression that the market was improving and he reinitiated the process of the SMA use permit application.

6. Between 1990 and the present Dr. Furusawa (through SoBay) paid real property taxes to the County based on the property being zoned for Resort-Hotel use.

7. Dr. Furusawa and his mother have developed two condominium projects on his mother's property in Chiba Prefecture, Japan. Dr. Furusawa is now aware that the laws and rules in Hawaii with respect to developing property, and especially shoreline property, are different from Japan. Dr. Furusawa is aware that the beach and ocean and the recreational and cultural activities associated with the beach and ocean are very important to the people of Hawaii. Dr. Furusawa understands and agrees with the need to protect coastal resources such as beaches, surfing areas, and fishing areas. He has designed his Project to minimize negative impacts on coastal resources, is aware of and will comply with setback requirements and he will agree with reasonable conditions designed to protect the coastal zone.

8. Dr. Furusawa would eventually like to retire and live in Kona.

9. Dr. Furusawa has accepted the recommendations of his planning consultant, Roy Takemoto, to dedicate or set aside the southern portion of the Property for public use. Dr. Furusawa is willing to dedicate the southern portion of the Property as a condition to approval of the SMA use permit because he is convinced that preserving this portion of the Property for its scenic, recreational, open space, and cultural value is consistent with the Objectives, Policies, and Guidelines of the SMA.

10. Dr. Furusawa will commence construction as soon as all necessary permits have been obtained.

11. SoBay is represented by Roy A. Vitousek III of Cades Schutte Fleming & Wright.

Kona Reef Association of Apartment Owners
and Timothy D. Fitzpatrick

12. Intervenors Kona Reef Association of Apartment Owners ("Kona Reef") filed a petition for standing in the contested case hearing on the SMA use permit application on or about August 8, 1997. The Commission considered the Kona Reef's petition in a hearing held on February 20, 1998, and voted to admit Kona Reef as a party to the proceeding.

13. Kona Reef is the association of owners of the Kona Reef Condominium. In its petition, Kona Reef alleges that it will be adversely affected by vandalism and traffic, that it is concerned about the beach, and that the Project is too crowded for the small parcel.

14. The Kona Reef is a 130-unit resort condominium project located on a 3.082 acre lot located immediately north of the Property. Portions of the Kona Reef which abut the Property consist of four stories of resort condominium units which are operated by Castle Resorts and Hotels as a condominium resort. Of the 130 units of the Kona Reef, only two are occupied by full-time residents. Additionally, the Kona Reef's manager, Roy Thompson, occupies a manager's unit but is not a condominium owner. There are several owners at the Kona Reef who spend up to six months per year in their units however neither the two permanent residents nor any of the long-term residents reside in the units which are adjacent to the Property.

15. Existing County zoning for the Kona Reef is Resort-Hotel (V-.75). The Kona Reef has been zoned Resort-Hotel since the adoption of the North Kona zone map (Ordinance No. 74, County of Hawaii, adopted May 24, 1967).

16. Kona Reef is represented by its General Manager, Roy Thompson and by its attorney, Michael J. Matsukawa.

17. Kona Reef, through its counsel, has raised several issues with respect to the shoreline boundary of the Property, the status of a wall on the Property, the location of the shoreline, and the County's rules with respect to SMA objectives. The issues raised by Mr. Thompson were:

- A. that the Project was too dense;
- B. that the Project would interfere with views from the Kona Reef; and
- C. that Kona Reef owners and guests walk on the Waiaha beach.

18. Intervenor Timothy Fitzpatrick is apparently condominium owner in the Kona Reef. Mr. Fitzpatrick filed a Petition for Standing in Contested Case Hearing on June 30, 1997. It appears from his Petition for Standing that Mr. Fitzpatrick is a resident of Healdsburg, California. His Petition for Standing alleges that he owns a condominium unit in the Kona Reef and that his view and the value of his property would be adversely affected by the SoBay Project. This Petition for Standing was considered by the Commission in its meeting on February 20, 1998 and the Commission voted to admit Mr. Fitzgerald as a party to this proceeding.

19. Intervenor Fitzpatrick did not appear or offer testimony at the contested case hearing. He is represented by attorney Michael J. Matsukawa.

Walter Aniban, Sr. and
West Hawaii Surfing Association

20. Intervenor Walter Aniban, Sr. filed a Petition for Standing in Contested Case Hearing on February 11, 1998. His Petition for Standing was considered by the Planning Commission at its hearing on February 20, 1998. The Planning Commission granted Mr. Aniban's Petition for Standing.

21. Mr. Aniban is a surfer who is of Hawaiian ancestry. He is a resident of Kona, Hawaii, having moved to Kona from Honolulu 33 years ago. He does not claim to have any ancestors who have resided in the ahupua`a of Waiaha.

22. Mr. Aniban's Petition for Standing asserts that:

- A. he is descended from a native Hawaiian, that his mother is a Kanahele from Oahu;
- B. that he is a surfer who has made surfing a cultural and spiritual part of his life; and
- C. that he uses the sacred, cultural spot slated for development.

23. Mr. Aniban testified that he has been surfing at Waiaha for more than 30 years, that surfing is a recreational, cultural, spiritual and healing activity for him. Mr. Aniban also swims and uses the beach at Waiaha. Mr. Aniban expressed concerns about beach access, protection of the beach, visual concerns and public safety issues.

24. Mr. Aniban is represented by attorney Kevin R. Seiter.

25. Intervenor West Hawaii Surfing Association ("WHSA") filed a Petition for Standing in Contested Case Hearing on February 11, 1998. The WHSA Petition for Standing was considered by the Planning Commission in its February 20, 1998 meeting. The Planning Commission granted the WHSA Petition for Standing.

26. WHSA is a Hawaii nonprofit corporation. The officers of WHSA are Michael McMichael and Kevin Seiter. No officer or director of WHSA testified at the contested case hearing. Michael Varney, Chairman of Honi's Beach Association, testified on behalf of WHSA having been asked to testify by WHSA officer and attorney Kevin Seiter.

27. WHSA purports to represent the interests of surfers in West Hawaii. WHSA opposed the issuance of an SMA use permit on several grounds including:

- A. the allegations that the SMA use permit could not be issued because the shoreline certification expired;

B. that the wall along the makai portion of the Property was adversely impacting beach processes;

C. that surfing is a recreational and native Hawaiian cultural activity that may be adversely impacted by the proposed development;

D. that the Waiaha property may have historical significance because purported artifacts were allegedly recently found on the Property; and

E. because the area where the development is planned may be subject to water run-up during high surf, in storm surf or tsunami conditions.

28. WHSA is represented by attorney Kevin R. Seiter.

County Planning Department

29. The County Planning Department ("Planning Department") is a department of the County of Hawaii government and is a party to this contested case hearing pursuant to Plan. Comm. Rules, Rule 4-7(a).

30. The Planning Department is represented by the Planning Director, Virginia Goldstein, and by Deputy Corporation Counsel Patricia K. O'Toole.

Description of the Property and Surrounding Area

31. The Property is located within the County's SMA. The Property is a single lot of approximately 0.68 acres which was consolidated from two parcels (former Lot 7 to the north and former Lot 11 to the south) in 1980 (Subdivision Consolidation No. 422, approved December 10, 1980) (See also Ex. 7B). The Property is located on Alii Drive between Kailua and Keauhou, North Kona, Hawaii, approximately one-half mile south of the Royal Kona Resort (the former Kona Hilton).

32. The Property is roughly triangular. The Alii Drive frontage of the Property is 375.72 feet in length, the northern mauka/makai boundary is 250.56 feet in length (measured from the mauka north corner at Alii Drive to the 1997 certified shoreline) and the south mauka/makai boundary is 73.00 feet (again measured to the 1997 Certified shoreline--see Ex. 7B).

33. The Property can be divided into three separate sections or portions to facilitate analysis of the issues:

A. The "northern portion" of the Property is the former Lot 7 which abuts the Kona Reef. There is no wall on the makai area of the northern portion of the Property.

B. The "middle portion" of the property is the area between the boundary between the former Lot 7 and former Lot 11, and the existing driveway. The wall in the makai area of the middle portion is essentially intact and undamaged.

C. The "southern portion" of the Property runs from the existing driveway to the southern boundary of the Property. The wall in the makai area of the southern portion has been substantially damaged.

34. There are presently two single-story structures which occupy the northern and middle portions of the Property. The Kona Rub-a-Dub message therapy business is a tenant in one of the structures and the other structure is vacant. The southern portion of the Property is vacant.

Land Use Designations

35. The Property is in the State land use "Urban" district.

36. The General Plan Land Use Pattern Allocation Guide (LUPAG) Map designates the Property as "Resort." The Resort designation is intended for "uses such as hotels, condominium-hotels (condominiums developed and/or operated as hotels) and support services." The Project will not require General Plan amendment. A thorough analysis of the General Plan consistency is set out in the Final EA (Ex. 3, pp. 30-34). The Hearing Officers adopt and incorporate this analysis.

37. The current County zoning designation for the Property is Resort-Hotel (V-.75). The Property has been zoned Resort since 1967 with the adoption of the North Kona Zone Map. The maximum permissible density is 750 sq. ft. of land for each unit which results in a calculated density for the Property of 39 units. The 21 units proposed for the Project are significantly less than the maximum calculated density. The 21 units on .68 acres results in a proposed density of 30 units per acre.

38. There is a 20'-wide shoreline setback area along the makai portion of the Property. Pursuant to the shoreline setback rules (Plan. Comm. Rules, Rule 11-5(b)(1)), the County granted an exception to the 40' setback because the buildable area of the Property would be reduced by more than 50% if the 40' setback was used. (See Ex. 3, p. 38, Letter of November 1, 1980.)

39. To the north of the Property is the Kona Reef condominium, a 130-unit condominium project located on 3.082 acres. The Kona Reef is zoned V-.75 and was included in the Resort zone at the same time and under the same ordinance as the Property. The density at Kona Reef is 42 units per acre or 12 units per acre more than the proposed density on the Property.

40. To the south of the Property is a single family home. The property south of the Property is zoned RS-10 and is in residential use.

41. To the east of the Property is Alii Drive, vacant lands zoned RS-10, and the County's Waiaha Pump Station.

42. To the west of the Property is the shoreline.

The Certified Shoreline

43. The shoreline on the makai side of the Property has been located and certified by the Department of Land and Natural Resources (DLNR) on at least five occasions:

A. There is a reference to a July 3, 1979 shoreline certification with respect to Parcel Second in Exhibit "A" to the June 18, 1991 Warranty Deed recorded on August 9, 1991 as Regular System document No. 107929 (Ex. 12).

B. There was an October 23, 1980 Shoreline Certification Map signed by S. Ono, Chairman of the Board of Land and Natural Resources (BLNR) (Ex. S2).

C. There was a January 7, 1982 Shoreline Certification Map signed by S. Ono, Chairman, BLNR. (Ex. S3.)

D. There was a March 8, 1991 Shoreline Certification Map signed by William Paty, Chairman, BLNR (Ex. 14).

E. There is a May 14, 1997 Shoreline Certification Map signed by Gilbert Coloma-Agoran for the Chairman, BLNR (Ex. 7B).

44. With respect to the certified shoreline in the middle and southern portions of the Property (the former Lot 11) the shoreline was, in each certification by the DLNR, certified to follow along the seaward or makai face of the wall.

45. The location of the certified shoreline with respect to the middle and southern sections of the Property is exactly the same in 1980, 1982, 1991 and 1997 shoreline certification.

46. The location of the certified shoreline in the northern portion of the Property (the former Lot 7, and where there is no wall) changed somewhat between 1982 and 1991. The shoreline in this area follows along the upper reaches of the wash of the waves as evidenced by the debris or vegetation lines. (See Ex. 7B.) The certified shoreline in the northern portion did not change between 1991 and 1997 (cf Ex. 7B and 14).

47. The certified shoreline in 1991 and 1997 is slightly further mauka in the northern section of the Property than was the certified shoreline in 1980 and 1982. (cf Ex. 7B & 14 with Ex. 52 & 53.)

48. The 1980, 1982, 1991, and 1997 Shoreline Certification Maps are each stamped by a licensed surveyor and each locates the interface between the wall and the shoreline. The 1980 and 1982 Shoreline Certification Maps are stamped by John Cline Mann and the 1991 and 1997 Shoreline Certification Maps are stamped by Chrystal Thomas Yamasaki.

The Makai Boundary

49. Intervenors have raised an issue with respect to the location of the seaward or makai boundary of the Property. Intervenors argue that the Property boundary is mauka of the certified shoreline and that the proposed Project may not be on SoBay's property.

50. The makai boundary of the Property is described in Land Commission Award 387 (Ex. 11) as "Commencing at Rock marked X at high water mark makai W. corner of this land 31 ch. 20 ft. in a direct line from Makai S corner of Hianaloli (at Thurstons) towards Kau and running along Sea 20 ch. 59½ ft. in a direct line to another Rock marked X at makai S. corner of this land."

51. In the 1991 Warranty Deed by which SoBay took title to the Property, the makai boundary is described as "Thence along the seashore at highwater mark and the direct azimuth and distance being" (Ex. 12.)

52. The 1997 Shoreline Certification Map locates the high water mark along the makai boundary of the Property and locates the original description of the mauka/makai boundaries on the north and south sides of the Property. The 1997 Shoreline Certification map also contains a calculation of the area between the high water mark and the 1997 certified shoreline along the makai portions of the Property. (Ex. 7B.)

53. At the southern boundary of the Property the certified shoreline is 31 feet mauka of the highwater mark. At the boundary of former Lots 7 and 11, the certified shoreline is 42.47 feet mauka of the highwater mark. At the northern boundary of the Property the certified shoreline is located 33.76 feet mauka of the highwater mark (Ex. 7B).

54. The use of the certified shoreline to delineate the makai boundary of the Property as opposed to the highwater mark results in the "loss" of 12,542 sq. ft. of the Property (Ex. 7B).

55. The 1997 certified shoreline was used to determine the location of the 20' shoreline setback line. All development proposed on the Property is located mauka of the shoreline setback line which is located 20 feet mauka from the certified shoreline.

56. Intervenors argue that the shoreline boundary of the Property is located mauka of the 1997 certified shoreline. Intervenors base this argument on the contentions that:

A. the wall on the makai portion of the property has been damaged and that the upper reach of the wash of the waves extends beyond the wall in the damaged areas in the southern portion; and

B. the wash of the waves would extend beyond the present location of the intact portion of the wall (the middle portion) if the wall was removed.

The Makai Rock Wall

57. There is a rock wall which runs along the makai area of the middle and southern portion of the Property (formerly Lot 11). There was testimony which indicates that the wall was built in the mid-1950s. John Kailiwai testified that he recalls seeing the wall being built when he passed through the area on the school bus in the mid-1950s. There was also evidence that the dates 1960 and 1962 were written on the wall. The wall is clearly visible in an aerial photograph taken on August 21, 1969 by RM Towill Corp., Photo No. 5011-3 (Ex. 3, p.5).

58. At the southern end of the rock wall there is a rock swimming pool. This pool is also visible in the August 21, 1969 photograph referred to above. The rock swimming pool is not in use.

59. The wall in the middle portion of the property is intact and essentially undamaged.

60. At the time of the 1991 shoreline certification the shoreline map (Ex. 14) does not depict or describe damage to the wall in the southern portion of the Property.

61. The 1997 shoreline map depicts and describes sections of the wall in the southern portion of the Property as follows: "upper portion of wall destroyed" and "upper portion of wall destroyed, lower portion may be buried by sand" (Ex. 7B). Despite this damage the shoreline was located and certified by the Chairman of the BLNR along the makai face of the wall.

62. During the year between May 1997 and May 1998 the damage to the wall in the southern portion of the property increased substantially.

63. Concerned about the pace and extent of damage, SoBay applied to the Planning Department for a determination of whether the wall could be repaired.

64. The Planning Director has determined that the wall qualifies as a structure permitted within the shoreline setback area in accordance with the Plan. Comm. Rules, Rule 11-7 (Ex. S8).

65. The Planning Director determined that the wall may be repaired in conformance with plans to be approved by the Planning Department, but may not be enlarged without an SSV. Further, the wall may be routinely maintained. (Ex. S8.)

66. SoBay submitted repair plans to the Planning Department and the repair plans were approved by the Planning Director on May 12, 1998. (Ex. S-9A). The Planning Director's approval was conditioned on the applicant complying with Hawaii County Code ("HCC") Chapter 27, relating to flood control. The Planning Director also required that the repair work be completed within two years of the date of her letter (May 12, 1998).

67. By letter dated May 14, 1998, the Department of Public Works concluded that the wall repair work will not be in violation of HCC Chapter 27, Flood Control, because the wall was not a structure as defined in Chapter 27 and because the wall predated the Federal Emergency Management Act's ("FEMA") original mapping of the area and it is reasonable to conclude that FEMA has already analyzed and included any impacts caused by the wall into their existing FIRM (Flood Insurance Rate Maps) for the area. (Ex. S10C).

68. SoBay obtained all necessary government approvals to repair the wall on or before May 14, 1998.

69. On or about February 4, 1998, intervenors Aniban and WHSA filed suit in the Circuit Court of the Third Circuit and requested, among other things, an injunction preventing SoBay from repairing the wall.

70. The Third Circuit Court entered an order with the effective date of May 14, 1998 staying the court proceedings and referring the issues to mediation. Under the terms of the order, SoBay is not to repair the wall during the stay/mediation period.

71. Intervenors contend that the damage to the wall was caused by waves and that this proves that the upper reach of the wash of the waves (and therefore the Property's makai boundary) is located mauka of the 1997 certified shoreline.

72. SoBay's position is that:

A. damage to the wall was caused at least in part by intentional acts;

B. that the wall is legal and may be repaired; and

C. even if the wall is not repaired and the certified shoreline moves mauka on the southern portion of the property this would not impact the development or alter the assessment of the petition with respect to the SMA criteria.

73. There was direct evidence that portions of the wall were being intentionally damaged or destroyed. Charles Cartwright, a licensed contractor and building inspector, testified that he inspected the damage to the wall in March, 1998 and observed what he concluded were marks made by metal tools. He identified what, in his opinion, were pick marks in several rocks in the wall or laying in the sand near the wall. He concluded that the wall had been intentionally damaged.

74. Michael Varney, chairman of Honi's Beach Association, testified on behalf of West Hawaii Surfing Association. Mr. Varney first testified that he observed what he believed was intentional damage to the wall on May, 1998 and called counsel for SoBay because he was angry about the damage and because he didn't want the Honi's Beach Association to be blamed for it.

75. Tom Pack of the Engineering Division, County Public Works Department, testified that when he was on the Property taking photographs of the wall he was approached by surfers who first described the proposed development to him then stated that they were systematically dismantling the wall.

76. The evidence on the record at the contested case hearing establishes that people opposed to the SoBay development were intentionally damaging the wall in the southern portion of the Property in March and May, 1998.

77. Further, most of the damage to the wall occurred from the top of the wall down. There are no areas where the wall was visibly undermined by waves or where the wall collapsed in a seaward direction. There is some undermining of the makai face of the rock swimming pool.

78. Robert Mullane, a coastal geologist called as a witness for Intervenors, testified that under normal circumstances, seawalls collapse because sand erodes away from the makai portion of the wall, the wall becomes undermined, and collapses in a seaward direction.

79. There was no evidence on the Property that sand was eroding away from the makai portion of the wall and that the ocean was undermining the wall.

80. Instead, the evidence shows that in the southern portion of the Property the upper portions of the wall were being damaged and that in many locations the lower portion of the wall was either visible in the sand or covered by sand.

81. Chrystal Thomas Yamasaki, the surveyor who prepared the 1991 and 1997 shoreline maps, inspected the property on September 17, 1998 to evaluate the present location of the shoreline in light of the damage to the wall which occurred after the 1997 certification.

82. In this inspection, Ms. Yamasaki determined that the southern portion of the wall sustained substantial additional damage between March 1997 and September 1998 and that the middle portion remained essentially undamaged. Ms. Yamasaki testified that:

A. the northern portion of the Property, where there is no wall, remained unchanged since March 1997; and

B. the wall in the middle section of the property remained essentially undamaged;

83. Ms. Yamasaki testified that with respect to the northern portion of the Property the shoreline on September 16, 1998 was in the same location, along the same line, as the May 14, 1997 certified shoreline.

84. Ms. Yamasaki testified that with respect to the middle section of the property where the wall remains intact, the shoreline on September 16, 1998 is in the same location, along the same line as the May 14, 1997 certified shoreline.

85. Ms. Yamasaki testified that with respect to the southern portion of the Property, based on conditions as they existed on September 16, 1998 and based on the assumption that the shoreline in the southern section is not fixed by an artificial structure, the shoreline in the southern portion of the Property would be as located on the May 14, 1997 shoreline certification map to the southern end of the wall remnant located near the coconut tree identified as "12,40,25" and then along a course running as shown on Exhibit 2 to the Written Testimony of Chrystal Thomas Yamasaki.

86. If the shoreline changed in the southern portion of the Property any change would be 40-60 feet from any portion of the proposed development.

87. Even if there is a change in the shoreline as a result of damage to the wall, the proposed development is clearly and unmistakably located at a considerable distance laterally from any area where the shoreline may have changed.

88. Any change in the shoreline with respect to the southern portion of the Property will not impact the proposed development of the middle and northern sections of the Property.

89. The southern section of the Property, where the wall has been damaged, will be dedicated or set aside by SoBay for public use and recreation. Any change in the shoreline in

the southern portion of the Property will impact the public recreational area and not development of the middle and northern portions of the Property.

90. The Planning Director testified that in her opinion it was appropriate for the Planning Commission to proceed with consideration of the SMA use permit application even though the 1997 shoreline certification was approved more than one year before the date of the contested case hearing.

91. The evidence on the record establishes that the shoreline in the northern and middle portions of the Property (the portions where the proposed development will be located) has not changed since the 1997 shoreline certification.

The Wall and Beach Processes

92. Intervenors assert that the wall in the makai area of the Property adversely impacts the beach at Waiaha.

93. SoBay's position is that any impacts the wall may have are not relevant to the SMA assessment because the wall is an existing condition and not part of the proposed development. Further, SoBay asserts that the wall does not have any substantial adverse impact on the beach.

94. There was conflicting testimony with respect to whether, and if so, how the wall was impacting beach processes.

95. Intervenors' witness Robert Mullane, a coastal geologist, testified that in his opinion the wall caused beach erosion or beach loss. He based his opinion on his experience in other areas and his visual observation of the beach. He said that in the areas where the wall was damaged the beach was "broader."

96. Mr. Mullane did not take any measurements of the beach and did not perform any studies or calculations.

97. Mr. Mullane did not testify as to any adverse impact the proposed Project itself, as opposed to the existing wall, may have on the beach.

98. Mr. Mullane could not explain why, if the wall caused beach loss, there was still a beach makai of the wall after the wall had been there for approximately 40 years.

99. Mr. Mullane could not explain why, if the waves topped the wall in the middle section of the property, there was no evidence of wave wash in the leaf litter, vegetation, or on the structures mauka of the existing wall. Mullane testified that there was evidence of wave wash mauka of the damaged wall, but that he didn't see such evidence mauka of the undamaged wall.

100. Mr. Mullane could not explain why there were portions of the wall where the level of the ground mauka of the wall was lower than the level of sand makai of the wall. He said sand may be building up against the wall, which is not consistent with erosion.

101. Mr. Mullane had not examined the nearshore waters or the ocean bottom offshore at Waiaha.

102. Dr. Warren Bucher, a coastal engineer, testified on behalf of SoBay. Dr. Bucher had performed field work at Waiaha including diving in the nearshore water to examine bottom conditions, taking measurements to evaluate beach profiles, and observing Property conditions.

103. Dr. Bucher testified that the beach profiles or beach slopes at Waiaha were very similar in all sections of the beach including the northern section where there is no wall, the middle section where the wall is intact and undamaged, and the southern portion where the wall has been damaged. The beach slopes measured at Waiaha were also consistent with the typical slopes for beaches of this type in Hawaii.

104. Because the measured beach slopes are consistent with each other and with typical beach slopes which would be expected in areas where there are no walls or artificial shoreline structures, Dr. Bucher concluded that the existing wall does not have a substantial adverse impact on the beach.

105. Dr. Bucher testified that based on the measured beach slopes it appeared that the wall was built on a natural break on the slope of the beach which break was consistent even in areas where there was no wall (the southern portion of the Property).

106. It was Dr. Bucher's opinion, based on his measurements and observations and his review of aerial photographs that the wall and the beach makai of the wall has and will continue to coexist with the wall. The fact that the beach has existed for 40 years after the wall was built demonstrates that the wall itself is not necessarily detrimental to the beach.

107. Dr. Bucher did not see physical evidence on the Property which suggested that there was beach loss due to erosion. Instead he observed what appeared to be accretion at one point along the existing wall.

108. Dr. Bucher did not see any evidence that waves were washing over the existing wall. The existing structures and vegetation on the middle and northern sections mauka of the wall did not show damage from high waves or storm surge. There are two drain holes in the existing wall. One was clear and the other had vegetation in it. There was no channel or other evidence of erosion in the vicinity of these drains as would be expected if waves washed over the wall.

109. Wave action mauka of the existing wall and mauka of the certified shoreline does not appear to be a regular occurrence and has not caused much, if any, damage over the past 40 years.

Public Access to Waiaha Bay

110. At the present time the only dedicated public access to the shoreline is located north of the Kona Reef. There is a permitted mauka-makai access across a small portion of the Kona Reef property from a public road to the beach. There was a condition requiring

public access in an SMA Use Permit and/or SSV granted to the Kona Reef but that condition was released at the request of the Kona Reef.

111. Lateral shoreline access across the Kona Reef property is apparently permitted on the grassy area within the shoreline setback.

112. The public presently gains access to Waiaha beach either by using the mauka-makai access north of the Kona Reef then walking more than 100 yards along the grassy area in front of the Kona Reef, or by walking across the Property in the area of the existing driveway on the southern portion of the Property.

113. Intervenor Walter Aniban, Sr. testified that he has been gaining access to the beach and surf at Waiaha by crossing the Property in the area of the existing driveway from Alii Drive to the beach.

114. Mr. Aniban testified that he has been gaining access to the beach in this manner for more than 30 years and he has never been told he was trespassing or that he was not permitted to use the Property for access to the areas he uses for recreational, subsistence, and cultural purposes.

115. Mr. Aniban testified that approximately five years ago a chain was placed across the existing driveway. He said the chain gate was designed so there was a gap between the post holding the chain and the stone wall along Alii Drive which was wide enough for pedestrians to walk through to get access to the beach. He said the gap indicated that people were permitted to walk to the beach but the chain was there to keep vehicles out.

116. Dr. Furusawa testified that SoBay has permitted the public to gain access to the beach and ocean for recreational purposes across the southern portion of the Property near the existing driveway.

117. Mr. Aniban testified that he has been able to enjoy access to the beach over the southern portion of the Property and enjoy the recreational, subsistence and cultural uses of Waiaha Bay and the nearshore for more than 30 years.

118. Mr. Aniban acknowledged that the wall in the southern portion of the Property had been present and undamaged during the more than 30 years and had not interfered with his ability to gain access to the beach and ocean.

119. Mr. Aniban also acknowledged that if the southern portion of the Property was dedicated to public use he would continue to be able to gain access to the beach and ocean and would be able to continue to enjoy the same activities and uses he had enjoyed for the last 30 years.

Description of the Proposed Project

120. On or about June 6, 1997, SoBay submitted an application for an SMA use permit to develop a 21-unit, four-story resort condominium (the "Project") on SoBay's property located at Waiaha 1st, North Kona, Island, County and State of Hawaii, Tax Map Key (3) 7-5-18:20.

121. The Project is intended by SoBay to be a smaller, more intimate resort condominium project that is located fronting a sandy beach but located closely to the amenities of Kailua-Kona. SoBay hopes that the Project will be attractive to people around the world who, like Dr. Furusawa, are interested in investing in Hawaii oceanfront property and perhaps eventually living in Kona.

122. The design of the Project calls for a basement parking level below four living floors with five units on each floor. There may also be an additional unit on one floor.

123. The basement parking level would be at or near existing grade with the Alii Drive frontage and portions of the north and south boundaries backfilled to meet County requirements for basement parking.

124. The makai or seaward frontage of the basement parking area would be left open.

125. There would be one ingress/egress driveway from the basement parking area to Alii Drive.

126. The structure will probably be constructed of concrete and the design will involve undulations in the face of the building, including lanais, balconies, and railings to break up the apparent mass.

127. The building itself comes to a "point" on the south side of the Property where the public access/public use area will be located. This will further reduce the apparent mass of the building when viewed from the public beach as the building tapers from north to south. The wider, northern portion of the building will be located adjacent to the Kona Reef, a condominium structure of similar size.

128. The tapered design of the building affects a transition between the Resort uses to the north and the residential uses to the south of the Property.

129. The selections of colors will be geared to minimize the apparent mass of the building by using color changes on different portions of the building structure. The intent of the design is to be as aesthetically pleasing as possible and designed in a way to break up the apparent mass of the building.

130. There will also be substantial landscaping around the building including existing and new native and exotic vegetation consistent with the existing landscaping at the Property. Landscaping of the makai portion of the Property will be with coconut trees, naupaka, pohue, and other typical beach strand vegetation which can be started and maintained in the area makai of the proposed structure without importation of topsoil.

131. Mark Richards, President of the Maryl Group, a Kona-based development and construction firm testified that Maryl had, at SoBay's request, developed estimates of construction and development costs, average unit sales prices, construction jobs, payroll, and return on SoBay's investment.

132. Maryl estimated construction cost for the building at approximately \$5,500,000.00. Other development and marketing costs were approximately \$2,300,000.00 for total construction and development costs of \$7,800,000.00.

133. The estimated average sales price per unit was \$500,000.00 for 20 units or \$10,000,000.00. This resulted in a return on investment of \$2.2 million. This return would enable SoBay to recover its investment on the property. Mr. Richards was of the opinion that the Project was economically feasible.

134. The Project would put more than \$7,000,000.00 into the local economy.

135. Mr. Richards estimated that construction of the Project would generate approximately 100 jobs over a one-year period and would require a total payroll to construction workers of approximately \$3,000,000.00.

136. The proposed Project is a coastal dependent development because the Project depends on its oceanfront location for its economic success. If the Project was located off the ocean, the units would sell for one-half of oceanfront prices.

137. New resort development in Hawaii is to some extent necessarily coastal dependent. Hawaii's coastal areas have substantial economic value as well as recreational and resource value.

138. New coastal resort developments such as the proposed Project are important to Hawaii's economy. Hawaii's economy depends on tourism. Without new investment in resort development, Hawaii could stagnate as a tourist destination and our state could lose tourists to other destinations.

139. Small investors like SoBay create diversity, new ideas and innovative projects in Hawaii's investment market. Smaller investors may be willing to take risks which larger, more conservative investors would not.

140. The development environment in Hawaii is carefully watched by other investors and financial institutions. If reasonable, investment-backed expectations are successful this encourages other investors.

141. The Property has already been designated and zoned for Resort use and the adjoining property, the Kona Reef, is already in Resort use. The SoBay property is a suitable location for the proposed Project. Allowing the proposed Project on the Property would concentrate coastal dependent development in an area already designated and used for Resort uses.

The Application Process

142. In early 1997 SoBay decided that the real estate market in West Hawaii had improved to the point where it would be economically feasible to proceed with development of the Project.

143. SoBay decided to resubmit applications for an SMA use permit and SSV to permit development of the Project.

144. A shoreline survey was required with respect to both the SMA use permit and SSV applications. Plan. Comm. Rules, Rules 9-11(A)(1)(h) and 8-8(a)(2)(E)(iii).

145. SoBay hired Wes Thomas Associates to apply to the DLNR for shoreline certification. The Chairman of the BLNR approved the Shoreline Certification Map on May 14, 1997.

146. On June 6, 1997 the present SMA use permit application and SSV application were submitted.

147. The SSV application triggered an environmental assessment ("EA") requirement under Hawaii Revised Statutes ("HRS") § 343-5(A)(3).

148. On June 12, 1997 the surrounding property owners were notified of the pending application. The notice was mailed in accordance with SMA rules.

149. On July 8, 1997 the Office of Environmental Quality Control ("OEQC") published the Draft EA and the 30-day public comment period ended August 7, 1997.

150. On November 10, 1997, SoBay amended the SSV application based on comments received in the Draft EA. All structural intrusions into the shoreline setback were deleted. The only remaining actions were placement of sand berms, a pathway, and filling the man-made pool.

151. On or about December 22, 1997, the Planning Director made a Finding of No Significant Impact ("FONSI") (Ex. 4). This finding was forwarded to OEQC with the Final EA for publication in the January 8 1998 Environmental Notice (Ex. G).

152. On January 8, 1998, the Final EA was published and included SoBay's commitment to dedicate or set aside the southern portion of the Property for perpetual public use and enjoyment. This easement or set aside would be in place of a previously proposed 10'-wide right of way originally proposed in the initial application Draft EA.

153. On January 27 and February 17, 1998 the Kailua Village Design Commission (KVDC), or members thereof, took testimony then issued a recommendation against the Project. The KVDC had previously approved essentially the same Project in 1992.

154. On February 4, 1998 intervenors/plaintiffs Walter Aniban, Sr. and WHSA, represented by Kevin Seiter, filed suit in the Circuit Court of the Third Circuit in Kona challenging the FONSI and EA and seeking injunction against repairing the wall.

155. The first hearing before the Planning Commission with respect to the SMA and SSV applications was held on February 20, 1998. In this hearing the Planning Commission granted Intervenor's requests for standing, and appointed a hearing panel consisting of Chairman Balog, as presiding officer, and Commissioners Mary Katayama and Millie Mosher. The Planning Commission had set the contested case hearing for April 4, 1998. A prehearing conference was set for March 26, 1998.

156. On March 18, 1998, SoBay withdrew its application for SSV due to opposition from intervenors and because the SSV was not necessary to development of the Project.

157. On March 26, 1998, Intervenors Aniban and WHSA filed a Motion for Recusal of Kevin Balog as Contested Case Hearing Officer.

158. On March 30, 1998, the contested case hearing was continued until a later date to allow consideration by the Planning Commission of Intervenors Aniban and WHSA's Motion for Recusal of Kevin Balog. The matters of scheduling and the discussion of procedures relating to hearings officers were set for hearing before the Planning Commission on April 17, 1998. Further, the matter of SoBay's request to withdraw the SSV application required official action by the Commission.

159. On April 15, 1998, SoBay's request to repair the wall was approved by the Planning Director subject to approval of repair plans. Repair plans were submitted on April 23, 1998.

160. In the hearing on April 17, 1998, Intervenors opposed SoBay's request to withdraw the SSV application. At this hearing it was decided that the members of the Planning Commission would hear the contested case hearing and a prehearing conference was set for May 15, 1998. Counsel for WHSA and Aniban argued in favor of this procedure.

161. In the hearing on April 17, 1998, Intervenors Aniban and WHSA withdrew the Motion for Recusal of Chairman Kevin Balog.

162. On May 12, 1998 the Planning Director approved the repair plans for the wall based on the separate SMA assessment submitted on May 7, 1998. The Director determined that repair of the wall was not a development under SMA rules. The Director determined that the wall was built before June 22, 1970 and was legal structure within the shoreline setback and could be repaired subject to compliance with HCC Chapter 27 relating to flood control. On May 14, 1998, the Department of Public Works determined that the proposed repair was exempt from Chapter 27.

163. In the meeting held on May 15, 1998 the contested case hearing was set for June 26 and 27, 1998, to be heard by the entire Planning Commission.

164. On June 19, 1998 the contested case hearing was continued until August 28 and 29, 1998 to allow the parties to participate in ongoing mediation.

165. On August 26, 1998, the contested case was again continued, this time as a final continuance, until September 19, 1998, again to allow the parties to participate in mediation.

166. Despite good faith efforts by all parties to mediate the issues, no resolution was reached and the contested case hearing proceeded, as scheduled, on September 19, 1998.

167. At the September 19, 1998 hearing it was stipulated by all parties that all written testimony, all exhibits attached to or included with the written testimony, and all exhibits previously offered by the parties would be accepted into evidence. Based on this

stipulation, the Hearing Officers accepted all written testimony, all exhibits attached thereto, and all previously offered exhibits of all parties into the record of the contested case hearing.

168. When it became apparent during the course of the contested case hearing that several hours would be required to receive all testimony the presiding officer, Chairman Balog, offered the parties the opportunity to decide how to proceed. Among the alternatives offered by the presiding officer were:

- A. continuing the hearing to the following day, or
- B. proceeding with the hearing until completion.

The parties agreed on the record to proceed with the hearing until completion and not to continue the hearing to the following day.

169. The Planning Department advised the Hearing Officers that the Planning Director would not be available the following day. Counsel for Intervenors WHSA and Aniban said he intended to call Planning Director Virginia Goldstein as a witness.

170. Planning Director did provide testimony on behalf of the Planning Department, and counsel for Intervenors declined to call her as a witness for Intervenors.

171. The Hearing Officers allowed Intervenors to call Mr. Robert Mullane out of order and during SoBay's presentation of its case based on Intervenors' representation that Mr. Mullane had to catch a flight back to Maui.

172. No party objected to the hearing procedure, the length of hearing, or raised any objection based on the availability of witnesses.

173. The Hearing Officers allowed complete examination and cross-examination of witnesses.

174. SoBay diligently pursued the SMA application. The hearing with respect to the SMA use permit application was initially set for February 20, 1998. The hearing was continued because of Intervenors' request for a contested case hearing until April 4, 1998. The April 4, 1998 contested case hearing was continued because Intervenors Aniban and WHSA filed a Motion to Recuse the presiding hearing officer. This Motion to Recuse was withdrawn and the contested case hearing was continued to June 26 and 27, 1998. After May 14, 1998, Intervenors began to argue that SMA use permit application should be denied because the shoreline certification "expired" and because the shoreline changed due to damage to the wall. The evidence also shows that there was intentional damage to the wall in March and May, 1998. It would be essentially unfair and inappropriate to dismiss SoBay's SMA use permit application under these circumstances.

SMA Decision Criteria

Environmental Impacts

175. Because SoBay initially applied for both an SMA use permit and SSV, the SSV application triggered HRS Ch. 343. SoBay was required to participate in the more thorough,

structured assessment of potential adverse environmental impacts required by HRS Ch. 343 and related regulations. This included publication of the Draft EA, responding to agency and public comments, and preparing and publishing the Final EA.

176. The Planning Director, as the duly authorized delegate of this Commission (Plan. Comm. Rules, Rule 8-10) applied the specific criteria set out in the rules pertaining to environmental impact statements ("EIS") (Hawaii Administrative Rules, Chapter 200 of Title 11) and made a FONSI determination.

177. Neither HRS Ch. 343 nor Plan. Comm. Rules, Rule 9, require an EA or EIS for an SMA use permit. Nonetheless, the Draft EA and Final EA were structured to consider, did consider, and did solicit agency and public comment on the aspects of the proposed Project which were covered by the SMA use permit application but not by the SSV application.

178. The SMA use permit application was the subject of more thorough structured public review of possible adverse environmental effects than is required by statute or rule.

179. As a result of the EA process, several possible mitigating measures were identified through agency and public input and many mitigating measures were incorporated in the Final EA, the SMA use permit and the design of the Project.

180. Mitigating measures identified in the EA process have been or may be incorporated in the Project and included as conditions to the SMA use permit (see section III below) are as follows.

A. Prepare the necessary documentation and dedicate the southern portion of the Property for public recreational use.

B. Provide a handicap ramp to the southern portion, if required by the accepting entity.

C. Prepare a landscaping plan for approval by the Planning Department that includes the following:

1) Uses native species as much as possible along the shoreline to enhance the coastal strand ecosystem and screen the building from the beach users;

2) Screens the building along the Alii Drive frontage;

3) Retains the existing banyan and monkeypod trees to the extent possible;

4) Screens the southern building facade from the public users of the southern portion of the Property;

5) Screens the Kona Reef units along the northern boundary.

D. Provide an off-site water connection for fire flow.

- E. Comply with HCC Chapter 27 for construction within special flood hazard areas.
- F. Comply with design review requirements of the Kailua Village Design Commission.
- G. Comply with the Fair Housing Act Amendments design guidelines, as applicable.
- H. Clear the Alii Drive shoulder of fallen debris from the trees on the Property and trim the trees to the satisfaction of the Department of Public Works.
- I. Comply with Grading Permit requirements to prevent sedimentation of the coastal waters during construction.
- J. Comply with noise regulations during construction.

Coastal Resources

The Beach at Waiaha

181. There is a small white sand beach at Waiaha Bay. The beach area includes a rocky outcropping on the north and south portions of the beach area and a rocky outcropping in the middle of the bay. The beach is located immediately makai of the Property.

182. The beach at Waiaha is a pocket beach. The sand is contained at the site of the beach by natural rocky structures extending into the water on either side of the beach.

183. Dr. Bucher testified that pocket beaches in West Hawaii tend to be seasonal with short period storm waves moving sand offshore and longer period ocean swells moving sand back onshore. Sand movement in a pocket beach is generally offshore-onshore pattern and not along the shore as on larger beach expanses.

184. There is recreational use of the beach and nearshore waters at Waiaha. The beach is used by swimmers, sunbathers, walkers, fishermen, limu pickers, surfers and others. The nearshore waters are also used by swimmers, divers, fishermen, limu pickers and surfers.

185. There are two surf breaks near Waiaha Bay. One is a right point break, the other a left break off the same point. The left break is located in the nearshore waters makai of the Kona Reef.

186. Surfers gain access to these breaks either from Waiaha Bay or from the shoreline fronting the Kona Reef.

187. The proposed dedication or set-aside of the southern portion of the Property will enhance and preserve public access to and use of the beach at Waiaha.

188. The surf breaks at Waiaha were described by Mr. Aniban as reef point breaks.

189. The surf breaks at Waiaha break on a rock and coral bottom. They do not break on a sand bottom or sand bar.

190. The surf breaks at Waiaha are totally independent from and unrelated to beach process at the beach at Waiaha.

191. The proposed development will have no adverse physical impact on the surf at Waiaha. The surf will break in the same places and in the same way regardless of what is built on the Property.

192. The left point break is located closer to the Kona Reef than to the proposed development. The Kona Reef is a much larger, more extensive development than SoBay's proposed Project. If the Kona Reef did not adversely impact the surf site, neither would the smaller, less proximate SoBay development.

193. Dr. Bucher testified that the conditions of the beach and nearshore environment would not change significantly if the proposed development were built. The beach makai of the wall will not change because of what is built 20 feet mauka of the wall. The beach makai of the certified shoreline will not change because of development more than 20 feet mauka of the shoreline.

194. Dr. Bucher testified that because the wall and development have minimal, if any, impact on the beach and because the waves at Waiaha break offshore on a hard rock and coral bottom, the proposed development would have no adverse physical impact on the surf breaks at Waiaha.

195. Dr. Bucher testified that the proposed development does not involve filling, dredging, or altering any bay, estuary, marsh or lagoon.

196. Dr. Bucher testified that the proposed development would not reduce the size of any beach or other area usable for public recreation. In fact, Dr. Bucher stated that in his experience with coastal development permitting he had never seen an owner offer to dedicate or set aside so large a portion of its property for public recreational use.

197. There has been no credible evidence presented at the contested case hearing which demonstrates that the proposed development will in any way adversely impact surfing resources in the waters makai of Waiaha.

198. The only surfing-related use of the Property itself, access to the beach, will be enhanced rather than adversely impacted by the proposed development.

Coastal and Nearshore Ecosystems

199. Dr. Bucher testified that the proposed development would not adversely affect nearshore water quality or other coastal ecosystems.

200. Dr. Bucher recommended that:

A. no soil or topsoil be imported into the shoreline setback area; all landscaping makai of the shoreline setback should involve native beach strand plant species which can grow in sand;

B. the wall in the southern portion of the property not be immediately repaired and that beach processes in the area be monitored to evaluate whether erosion, accretion or other changes occur;

C. Trial consideration be given to placement of sand berms on the property for beach nourishment.

201. The Project has been designed in a manner to control drainage and avoid increased runoff from the property into the ocean or onto surrounding properties. Drainage from the roof and parking areas will be collected in a sump, probably in the parking area, and will be pumped to a dry well or drainage field on the mauka portion of the property. Rainwater from the roof will be collected and piped to the drywell/seepage field.

202. The proposed drainage system will reduce the risk of runoff into the ocean and will reduce the risk of siltation.

203. There will be substantial landscaping surrounding the Property including existing and new natural beach strand vegetation and exotic vegetation consistent with existing landscaping on the Property. Landscaping on the makai portion of the Property will consist of coconut trees, naupaka, pohue and other typical coastal strand vegetation which can be started and maintained in the area makai of the proposed condominium without importation of topsoil.

204. Landscaping the Property with native beach strand vegetation will control runoff and erosion. The root systems of natural beach strand species are generally adapted to allow the plant to survive in sand and when exposed to coastal hazards. The use of sand instead of topsoil in the makai areas reduces the risk of siltation.

Cultural Resources and Traditional Practices/Historical Sites

Historic Sites

205. The State of Hawaii, Historic Preservation Division, has made the express determination that the subject property has been thoroughly disturbed by the construction of the existing buildings and the "Old Kailua-Keauhou Beach Road"¹ and that any significant historic sites in the parcel are likely to have been destroyed. Hence the application will have "no effect" on historic sites. Letter of August 5, 1992 from Don Hibbard to Norman Hayashi, Exhibit 3, Appendix A). The alignment of the "Old Kailua-Keauhou road was visible on Exhibit 7B.

¹ The location of the "Old Kailua-Keauhou Beach Road" is shown on Exhibit 7B and is within 30 feet of the certified shoreline at the boundary line between former Lots 7 and 11.

206. Mary "Mele" Kunewa, a woman who is familiar with this area testified that she recalls seeing this Property when she was in school and that the property was only sand and trees at that time. Mrs. Kunewa testified that she did not recall seeing any walls or rock platforms. She testified she was not aware of any heiau or burial sites on or near the Property.

207. There was evidence offered in the Written Testimony of Curtis Tyler and oral testimony from Michael Varney that according to F. G. Stokes, an archaeologist from the Bishop Museum who visited sites around the Big Island in 1906 and 1907, there may have been a heiau called Nalupo`o or Ma`o at Waiaha. This was heiau associated with rain making and may have been built by Kiwalao, a son of Kalaniopu`u in about 1750.

208. Stokes states in 1906 that a portion of the northern side of the heiau has been removed for the government road. Mr. Varney also testified that while he is not familiar with the later studies by J. Reinecke and T. Kelsey and H. Kekahuna, he was aware of their observation that the large stones of the heiau were removed to build the American Factors store foundation.

209. While the exact location of the former heiau is unknown, Mr. Varney opined that the heiau was located on the sand beach at Waiaha and that there was what he called a "seawall" on the makai side of the structure which was, in his opinion, 40 feet from the ocean.

210. Mr. Varney could not explain why the heiau would be built in an area he claimed was subject to regular wave wash or how the heiau could have survived at this location from 1750 until when it was dismantled in the early 1900s if the area was exposed to regular high wave wash as he had earlier testified.

211. There is no evidence of any historic or prehistoric structures or archaeological features on the Property.

212. Mr. Varney claimed to have found artifacts at the Property. He presented one purported artifact at the contested case hearing. He said it was a fishing sinker. He said he dug it up on the Property mauka of the certified shoreline. He admitted that he did not have permission to search for or remove artifacts and that he had not told any government authority or the landowner about this purported artifact until the contested case hearing.

213. The presence of an artifact on the property, even if properly authenticated, does not in and of itself make the property significant to Hawaiian culture and history. Nonetheless an appropriate plan should be developed to ensure appropriate treatment of any artifacts or archeological resources should they be encountered during construction and development.

Cultural Uses

214. Mr. Aniban is of Hawaiian and Filipino ancestry. His mother's side of the family is Hawaiian and are from Honolulu. Mr. Aniban moved to Kona from Honolulu 33 years ago, does not reside in Waiaha I, and was not aware of whether any of his ancestors had ever resided in the ahupua`a of Waiaha.

215. Mr. Aniban did not claim any traditional or customary rights, interests or uses with respect to the Property. He testified that he used the property for access to the beach and

nearshore waters where he claimed to participate in cultural activities such as surfing and swimming. He acknowledged that his access across the property to gain access to the beach and ocean would not be adversely impacted by the proposed development, especially if the southern portion of the Property were dedicated or set aside for public access and use.

216. The beach and nearshore waters were and are no doubt used by native Hawaiians and others for fishing, surfing, swimming, picking limu, and other subsistence and recreational purposes. There was no evidence that the Project would impair or interfere with these activities and uses. Mr. Aniban testified that surfing was a spiritual activity for him but there was no other evidence or information about ongoing exercise of religious practices at Waiaha I or the Property.

217. The Property has been developed with two single family homes and/or commercial use. The homes have been on the site since the 1950s.

218. There is no evidence that the Property is subject to any rights which are customarily or traditionally exercised for religious or cultural practices and possessed by ahupua`a tenants who are descendants of native Hawaiians.

Visual Impacts

219. The Property is currently developed with two structures and native and exotic landscaping. The view from Alii Drive to the ocean is blocked by the structures and the trees from the northern boundary of the Property to the existing driveway.

220. The views from the beach in the mauka direction are also blocked by the existing structures and the trees except for the southern portion of the Property.

221. The view from the nearest State highway, Kuakini Highway, is blocked by intervening development and vegetation.

222. The dedication of the southern portion of the Property to public use will preserve existing view corridors.

223. The Property has not been identified as a valued scenic resource by the County General Plan.

224. The visual impact of the Project will be that one will see a condominium building where before one saw dilapidated structures and large exotic trees. Some people prefer to view the older, lower rise structures; other people may prefer to view a newer more architecturally interesting structure. It is a matter of taste and personal preference.

225. Mr. Aniban also testified as to what he believed were adverse visual impacts of the proposed development. He said he would prefer to see the existing houses and trees when he looked in from the surf sites. At the same time he said the Kona Reef was built after he started surfing at Waiaha and after a while he didn't really notice it. He also said he used the rocky point and the date palm trees as his lineup. These landmarks would not be affected by the proposed development.

226. Roy Thompson of Kona Reef said he and the Kona Reef owners are concerned about their views and that the proposed Project is too dense.

227. Mr. Thompson acknowledged that the two properties were zoned Resort at the same time and that Kona Reef purchasers could have investigated the adjoining property and learned that a project like the one they were buying into could be built next door.

228. Mr. Thompson also acknowledged that the density of the Kona Reef may be greater than the density of the proposed SoBay Project.

229. Mr. Thompson testified that SoBay should not be allowed to do exactly what Kona Reef had done.

230. There are specific mitigating measures which could be required as conditions and which could reduce any adverse visual impacts from the Project. These include the dedication of the southern portion where there is an existing view, landscaping, building design, lighting, building colors and the like.

Coastal Hazards and Public Safety

231. The Property is exposed to coastal hazards such as high surf, storm surf and tsunami. This is also the case with respect to most oceanfront properties on the Island of Hawaii. The proposed condominium has been designed and will be constructed in a manner to minimize the adverse impacts of coastal hazards such as flooding, wind damage, tsunami, earthquake, lava flow inundation, and other natural hazards.

232. The relevant FIRM map designates portions of the Property in Zones VE and AE. The VE zone, defined as the coastal high hazard zone, extends inland approximately 40 feet from the shoreline at the northern boundary of the Property, narrowing to 20 feet at the boundary between former Lots 7 and Lot 11, and then to 0 feet at the southern corner of the proposed building. The AE zone which is the area of potential inundation by a 100 year rainfall extends roughly 20 feet further inland parallel to the VE zone. The Property is within the Civil Defense Tsunami Evacuation Zone.

233. Construction is permitted in the VE and AE zones subject to compliance with the requirements of HCC Chapter 27 relating to flood control. The County Department of Public Works, Engineering Division will review all requests for plan approval and/or building permits for developments within the VE and AE zones for compliance with Chapter 27. If the proposed development does not comply with the requirements of Chapter 27, no building permit will be approved.

234. The relevant Federal Emergency Management Act (FEMA) maps require a base elevation of 10 feet in the makai portion of the Property.

235. The design of the proposed condominium is intended to minimize the risk of hazards to life and property from high surf and tsunami. All living floors would be located above the base flood elevation.

236. The design of the proposed condominium has been modified in response to recommendations from the Project architect and coastal engineers. The present plan calls for the makai portion of the parking area to be at or near existing grade and will not be enclosed. This will allow any run-up from high surf in tsunami to run into, then freely drain out of the proposed parking area to reduce the risk of structural damage to the condominium and/or interference with beach processes.

237. The current proposed design of the parking level of the Project condominium is different from and supersedes the design depicted on the scale model prepared by Dr. Furusawa and submitted by SoBay pursuant to Plan. Comm. Rules, Rules 9-11(A)(4).

238. The Property is located in an area of risk for lava flow hazard and earthquake hazard. Proposed construction methods and standards for the proposed condominium will comply with the County Building Code requirements of seismic zone 3 or 4.

239. Mr. Aniban testified he was concerned about public safety. He testified that if the development was built Hawaiian kids may not walk to the northern side of Waiaha beach because they may be "shame" to walk by the proposed development. He said they may enter the water where Mr. Aniban does, on the southern portion of the property.

240. It appears from the record that surfers presently walk along the area makai of the Kona Reef condo to get access to the surf sites. It also appears that surfers walk along the beach makai of the wall in front of the existing houses on the Property to get access to the surfing areas. It does not appear that the ere presence of the proposed SoBay development would deter surfers from getting access to the surf breaks. As Mr. Aniban testified, if there is surf, surfers will get access to it.

241. The public safety concerns expressed by the West Hawaii Surfing Association and Mr. Aniban relate primarily to risks caused by high waves. This concern is difficult to evaluate because surfers are generally attracted to high waves and seek to place themselves in proximity to high waves and thus voluntarily expose themselves to any dangers resulting from high waves.

HRS Chapter 205A and Planning Commission
Rule 9-6 A and B, OBJECTIVES AND POLICIES

242. The Project complies with the objectives and policies of the Coastal Zone Management Act set forth in HRS §205A-2. The following findings of fact compare the evidence on the record in the contested case hearing to the specific Objectives and Policies of the SMA. Therefore the findings in this section may repeat and apply findings in the previous sections.

HRS § 205A-2(b) OBJECTIVES

- (1) Recreational resources;
 - (A) Provide coastal recreational opportunities accessible to the public.

243. Where other shoreline developments have been required to provide just a pedestrian pathway easement or provided no public access (e.g., Kona Reef), SoBay has agreed to dedicate the southern portion of the Property for public recreation. This dedicated area would facilitate public access to the beach and increase the area available for public recreation and use. (See § III, ¶ 8.) Existing beach uses and access to the surf sites would not be affected by the Project, and in fact would be enhanced with the dedicated area.

(2) Historic resources;

- (A) Protect, preserve, and where desirable, restore those natural and man-made historic and pre-historic resources in the coastal zone management area that are significant in Hawaiian and American history and culture.

244. The State Historic Preservation Division, in a letter dated August 5, 1992 from Don Hibbard, Administrator, to Norman Hayashi, Planning Director, determined that there are no significant historic features on the Property (see Appendix A of the Final EA (Ex. 3)). To protect unknown subsurface features, a reasonable condition would be to require monitoring of construction site work activities by an archaeologist, that work stop immediately in the affected area if archaeological features are uncovered, and that the State Historic Preservation Division and the Planning Department are notified to determine the proper disposition of the uncovered features. (See § III, ¶ 6.)

(3) Scenic and open space resources;

- (A) Protect, preserve, and where desirable, restore or improve the quality of coastal scenic and open space resources.

245. With the dedication of the southern portion of the Property, the existing line of sight from Alii Drive to the ocean would be preserved as open space in perpetuity. The Project would not affect existing lateral views along the beach. The existing structures and landscaping on the northern portion of the Property presently block any makai views from the highway and mauka views from the beach. Since the proposed building would be in the same general location as the existing structures, the proposed building will not detract from existing views. Reasonable mitigation measures include landscaping and architectural design features intended to break up the apparent mass of the structure. (See § III, ¶ 9.)

(4) Coastal ecosystems;

- (A) Protect valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems.

246. Proposed landscaping in the shoreline setback area, especially with native species, would enhance the coastal strand vegetation. Since there are no activities proposed makai of the shoreline setback line, the Project will not affect the littoral cell processes. Compliance with the Grading Permit requirements would prevent sedimentation of the coastal waters during construction. (See § III, ¶ 15.) On-site drainage facilities would ensure that the proposed development does not increase drainage to the coastal waters over predevelopment

conditions. (See § III, ¶ 3.) Landscaping with sand and not using topsoil in the shoreline setback area would prevent siltation should extremely high waves top the wall. (See § III, ¶ 9.) The studies by Dr. Bucher of Oceanit Coastal Corporation document the minimal adverse effect on the coastal ecosystems.

(5) Economic uses;

- (A) Provide public or private facilities and improvements important to the State's economy in suitable locations

247. The State and County, through their land use designations, have determined that the Property is a suitable location for an urban-type Resort use. The State Land Use designation is Urban, the County General Plan designation is Resort, and the County zoning is Resort-Hotel. The adjacent property, the Kona Reef, is currently in Resort use. The proposed use is related to tourism, which presently is the most important sector in Hawaii's economy. The testimony of Mark Richards establishes the economic importance of the proposed Project and the economic benefits to the community.

(6) Coastal hazards;

- (A) Reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, subsidence, and pollution.

248. The only area where there is any possible change in the shoreline, change which could only occur if the wall was not repaired, is the area where the wall is damaged on the southern portion of the Property. There is no development proposed for the southern portion of the Property. The proposed development is clearly located at a considerable distance from any area where there may arguably be a change in the shoreline.

249. Because it does not appear that the existing wall affects the beach processes or that waves wash over the wall, and because the proposed Project will be located at least 20 feet mauka of the wall and/or the certified shoreline, the Project will have only minimal, if any, impact on the shoreline, the beach, and the nearshore areas makai of the wall.

250. The proposed structure is sited nearly entirely out of the special flood hazard zone. A minor portion of the building may extend into the AE or VE zone, of which the design and construction of this portion will comply with requirements of the County's Flood Control Code (HCC Chapter 27). Compliance with the Flood Control Code should provide reasonable assurance that hazards to life and property due to tsunami, storm waves, and stream (or rainfall) flooding from development of the Property has been reduced to acceptable standards comparable to other development in coastal areas. (See § III, ¶ 4.) The Property's exposure to potential erosion, subsidence, and pollution are comparable to the developed properties in the vicinity.

251. The proposed design with the parking level near the existing grade (approximately 10' elevation) allows extremely high waves to wash in and out, and raises the first occupied level to approximately 20'. This is higher than the base flood elevation of 10' set forth in the Flood Insurance Rate Maps, and higher than the occupied levels of the existing structures on the Property.

(7) Managing development;

- (A) Improve the development review process, communication, and public participation in the management of coastal resources and hazards.

252. SoBay has participated in several processes and forums to provide opportunities for public input including the HRS Chapter 343 environmental review, KVDC public hearings, notices sent to surrounding owners within 300' of the pending application and scheduled Planning Commission public hearing, Planning Commission public hearings, presentation requested by the Kona Reef, the participation in formal mediation, and presently this contested case proceeding.

(8) Public participation;

- (A) Stimulate public awareness, education, and participation in coastal management.

253. The Planning Commission notice requirements and the procedures which encourage public testimony at all hearings together with the news media have definitely stimulated public awareness of this Project. The Hearing Officers encouraged participation in alternative dispute resolution by twice continuing the scheduled contested case hearing to allow mediation to take place.

(9) Beach protection;

- (A) Protect beaches for public use and recreation.

254. Public use of the sandy beach fronting the Property would be enhanced with the dedication of the southern portion of the Property for public recreation.

255. There has been a thorough analysis of beach protection issues as they relate not only to the proposed Project but to the existing wall. The Hearing Officers heard and considered the testimony of a coastal geologist and a coastal engineer with respect to beach protection as well as several lay witnesses. The Hearing Officers considered the evidence and considered the SMA use permit application with respect to this objective. The Hearing Officers find that the proposed Project will not reduce the size of any beach and will instead increase the area of coastline dedicated to public use.

(10) Marine resources;

- (A) Implement the State's ocean resources management plan.

256. Not applicable to this application.

HRS § 205A-2(c) POLICIES.

(1) Recreational resources;

- (A) Improve coordination and funding of coastal recreation planning and management; and

257. The Project presents an opportunity to provide a coastal recreational resource at minimal cost to the public. To capitalize on this opportunity, coordination would be required between State and County agencies and or responsible entity to determine ownership and maintenance responsibilities, and provision of public parking facilities. SoBay would provide the land at no cost.

- (B) Provide adequate, accessible, and diverse recreational opportunities in the coastal management area by:

- (i) Protecting coastal resources uniquely suited for recreation activities that cannot be provided in other areas;

258. Dedication of the southern portion of the Property would increase access and add a shady area to the sandy beach fronting the Property. (See § III, ¶ 8.)

259. The proposed Project would have no adverse impact on the coastal recreational activities which the public currently enjoys at Waiaha.

- (ii) Requiring replacement of coastal resources having significant recreation value, including but not limited to surfing sites and sandy beaches, when such resources will be unavoidably damaged by development; or requiring reasonable monetary compensation to the State for recreation when replacement is not feasible or desirable;

260. Not applicable--replacement of coastal resources is not necessary since no beach, surf site, or other recreational resource will be damaged by the proposed Project.

- (iii) Providing and managing adequate public access, consistent with conservation of natural resources, to and along the shorelines with recreational value;

261. SoBay will not merely provide a 10' wide public access, but would dedicate the southern portion of the Property for public recreational use. This dedicated area will improve access to the beach and surf sites. The Project will not affect lateral access along the beach makai of the shoreline. Providing lateral shoreline access within the shoreline setback area shall be a condition of approval. (See § III, ¶ 10.)

- (iv) Providing an adequate supply of shoreline parks and other recreational facilities suitable for public recreation;

262. The dedicated southern portion of the Property would increase the supply of shoreline parks.

- (v) Ensuring public recreational use of County, State, and Federally owned or controlled shoreline lands and waters having recreational value consistent with public safety standards and conservation of natural resources;

263. Dedication of the southern portion of the Property would ensure public recreational use of the shoreline areas makai of the certified shoreline.

- (vi) Adopting water quality standards and regulating point and non-point sources of pollution to protect, and where feasible, restore the recreational value of coastal waters;

264. The proposed Project would not cause any point or non-point source pollution, and would not therefore violate the prevailing coastal water quality standards.

- (vii) Developing new shoreline recreational opportunities, where appropriate, such as artificial lagoons, artificial beaches, and artificial reefs for surfing and fishing; and

265. Not applicable--the Project does not propose any artificial lagoons, artificial beaches, or artificial reefs. The dedication of the southern portion of the Property would create a new public shoreline recreational opportunity.

- (viii) Encouraging reasonable dedication of shoreline areas with recreational value for public use as part of discretionary approvals or permits by the land use commission, board of land and natural resources, county planning commissions; and crediting such dedication against the requirements of section 46-6.

266. Through the testimony of Dr. Furusawa, SoBay has agreed that the dedication of the southern portion of the Property is a reasonable condition. The dedication can be in the form of a conservation easement, subdivided lot, or other means mutually acceptable. (See § III, ¶ 8.)

(2) Historic Resources;

- (A) Identify and analyze significant archaeological resources;

267. There are no significant archaeological resources on the Property as determined by the State Historic Preservation Division. This as confirmed by long-term residents of the area. Historical records suggest that there may have been an heiau on or near the Property, but that the heiau was destroyed more than 50 years ago.

- (B) Maximize information retention through preservation of remains and artifacts or salvage operations; and

268. Monitoring of construction site work activities by an archaeologist would ensure information retention of any uncovered subsurface remains. (See § III, ¶ 6.)

- (C) Support State goals for protection, restoration, interpretation and display of historic resources.

269. Not applicable--there are no known historic resources on the Property.

- (3) Scenic and Open Space Resources;

- (A) Identify valued scenic resources in the coastal zone management area;

270. The County General Plan has identified valued scenic resources, none of which are in the vicinity of the Property (see General Plan Supporting Document, November 1989, p.36).

- (B) Ensure that new developments are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and existing public views to and along the shoreline;

271. There is an existing view of the ocean from Alii Drive over the southern portion of the Property; this view will be preserved upon dedication of this southern portion. Since the proposed building would be sited entirely mauka of the shoreline setback line, the proposed building would not block existing public views along the shoreline. The proposed building may interfere with existing private views from certain units of the neighboring Kona Reef. These units are not occupied by full-time owners or owners or owners who reside in their units for up to six (6) months (Testimony of Roy Thompson, resident manager of Kona Reef). Further, the affected units do not have a negative easement over the Property entitling them to the preservation of these views. Moreover, the Property had been zoned Resort at the time the Kona Reef was constructed and the affected unit owners knew or could and should have known that a development comparable to the Kona Reef could be developed on the Property (Testimony of Roy Thompson).

272. The proposed design of the building, which would be subject to review by the KVDC, incorporates several features to blend the structure into its visual environment setting:

- A. undulations in the face of the building will break up the apparent mass of the structure;
 - B. neutral colors and non-reflective glass will not draw attention to the building;
 - C. the building form tapers toward the south to reduce the apparent mass when viewing the building from the south; and
 - D. planters, trellises, and landscaping will soften and buffer the building from Alii Drive and the beach. (See § III, ¶ 17.)
- (C) Preserve, maintain, and, where desirable, improve and restore shoreline open space and scenic resources; and

273. Dedication of the southern portion of the Property would preserve, maintain, and improve this existing shoreline open space.

- (D) Encourage those developments which are not coastal dependent to locate in inland areas.

274. The proposed use is resort-related and therefore coastal dependent. The proposed use is a permitted use under State and County zoning laws. SoBay does not own any other land that would provide an option to locate elsewhere. The proposed building would be built on the combined footprint of the existing buildings, and would not therefore substantially increase lot coverage.

- (4) Coastal Ecosystems;

- (A) Improve the technical basis for natural resource management;

275. SoBay has provided a study by an ocean engineer to improve the technical basis for decision making.

- (B) Preserve valuable coastal ecosystems, including reefs, of significant biological or economic importance;

276. The ocean engineer, Dr. Warren Bucher, has provided findings and recommendations to protect the coral reef ecosystem and littoral cell processes in the nearshore area fronting the Property. (See § III, ¶ 9.)

- (C) Minimize disruption or degradation of coastal water ecosystems by effective regulation of stream diversions, channelization, and similar land and water uses, recognizing competing water needs; and

277. Not applicable--the Project does not disrupt any stream flows.

- (D) Promote water quantity and quality planning and management practices which reflect the tolerance of fresh water and marine ecosystems and prohibit land and water uses which violate State water quality standards.

278. The Project does not affect State water quality standards for coastal waters or safe drinking water.

- (5) Economic Uses;

- (A) Concentrate coastal dependent development in appropriate areas;

279. The Property is part of the Resort-zoned area designated by the County to concentrate such developments. The Project is coastal-dependent.

- (B) Ensure that coastal dependent development such as harbors and ports, and coastal related development such as visitor industry facilities and energy generating facilities, are located, designed, and constructed to minimize adverse social, visual, and environmental impacts in the coastal zone management area; and

280. The Property is within the Resort-zoned area as determined by the County. As a permitted use within this zone, the County has determined such use to be suitable and appropriate in this location. The proposed landscaping and structure has been designed to minimize visual impacts, the amended design and proposed dedication of the southern portion of the Property has been an attempt by SoBay to resolve social issues, and compliance with the HRS Chapter 343 process has ensured that environmental impacts have been evaluated and reviewed.

- (C) Direct the location and expansion of coastal dependent developments to areas presently designated and used for such developments and permit reasonable long-term growth at such areas, and permit coastal dependent development outside of presently designated areas when:
 - (i) Utilization of presently designated locations is not feasible;
 - (ii) Adverse environmental effects are minimized; and
 - (iii) The development is important to the State's economy.

281. The Property is designated for Resort use by the County General Plan and zoning. This zone is actually used for such resort uses, with the neighboring Kona Reef as an immediate example. The Property is part of the reasonable long-term growth of this Resort zone planned by the County at the time of the initial adoption of the North Kona zoning map in 1967. The Project would occur inside of this presently designated Resort area.

(6) Coastal Hazards;

- (A) Develop and communicate adequate information on storm wave, tsunami, flood, erosion, subsidence, and point and nonpoint source pollution hazards;

282. Not applicable--this policy is a directive to applicable government agencies with jurisdiction over such coastal hazards to develop and disseminate such information related to coastal hazards.

- (B) Control development in areas subject to storm wave, tsunami, flood, erosion, hurricane, wind, subsidence, and point and nonpoint source pollution hazards;

283. The Project would comply with the County's Flood Control Code (HCC Chapter 27), which controls development in areas subject to storm wave, tsunami, and floods. The Building Code (HCC Chapter 5) controls development in areas subject to hurricane and wind hazards, which in essence is island-wide. The need for site-specific controls with reference to erosion, subsidence, and point or nonpoint source pollution is questionable since the Property is exposed to the same extent of erosion, subsidence, and point or nonpoint source pollution as the surrounding developed properties.

- (C) Ensure that developments comply with requirements of the Federal Flood Insurance Program;

284. Compliance with the Federal Flood Insurance Program through the County's Flood Control Code would be a reasonable condition of SMA approval. (See § III, ¶ 4.)

- (D) Prevent coastal flooding from inland projects; and

285. Not applicable--the Project is not an inland project.

- (E) Develop a coastal point and nonpoint source pollution control program.

286. Not applicable--this policy is a directive to the applicable government agencies.

- (7) Managing Development;

- (A) Use, implement, and enforce existing law effectively to the maximum extent possible in managing present and future coastal zone development;

287. The use of the SSV law has convinced SoBay to avoid any development in the shoreline setback area. The SMA law can be used effectively to increase public recreation opportunities by requiring the dedication of the southern portion of the Property and to specify landscaping to buffer the building.

- (B) Facilitate timely processing of applications for development permits and resolve overlapping or conflicting permit requirements; and

288. The Property is already zoned Resort. The only discretionary permit is the SMA. Focusing on the specific objectives and policies pertinent to the SMA, recognizing that the Property has already been designated for the proposed use under the zoning code, would facilitate the timely processing of this application.

- (C) Communicate the potential short and long-term impacts of proposed significant coastal developments early in their life-cycle and in terms understandable to the public to facilitate public participation in the planning and review process.

289. The potential short and long-term impacts of the Project were communicated in the early conceptual planning stage of the Project through the HRS Chapter 343 environmental review process to facilitate public participation. Because the Project is in its early stages, conditions can be attached to the SMA approval to modify or control the design and construction of the Project without unreasonably burdening the applicant.
(See § III)

(8) Public participation;

- (A) Maintain a public advisory body to identify coastal management problems and to provide policy advice and assistance to the coastal zone management program;

290. Not applicable--this policy is a directive to the applicable government agencies to maintain a public advisory body.

- (B) Disseminate information on coastal management issues by means of educational materials, published reports, staff contact, and public workshops for persons and organizations concerned with coastal-related issues, developments, and government activities; and

291. Not applicable--this policy is a directive to the applicable government agencies to disseminate appropriate information on coastal management issues.

- (C) Organize workshops, policy dialogues, and site-specific mediations to respond to coastal issues and conflicts.

292. SoBay participated in mediation in a good faith attempt to explore acceptable alternatives to the proposed Project.

(9) Beach protection;

- (A) Locate new structures inland from the shoreline setback to conserve open space and to minimize loss of improvements due to erosion;

293. All new structures on the Property would be located inland of the shoreline setback line.

- (B) Prohibit construction of private erosion-protection structures seaward of the shoreline, except when they result in improved aesthetic and engineering solutions to erosion at the sites and do not interfere with existing recreational and waterline activities; and

294. The existing seawall is located mauka of the certified shoreline. This seawall is a legal structure that can be repaired with approval by the Planning Director as provided in the Planning Department's SSV Rules, which approval has been issued. The seawall has existed

for 30 to 40 years without interfering with public recreational uses. The wall is an existing condition on the Property. SoBay is not asking the Planning Commission for permission to construct any erosion protection structures. There has been considerable expert and lay testimony about beach protection and neither the existing wall nor the proposed Project would interfere with existing recreational and waterline uses.

- (C) Minimize the construction of public erosion-protection structures seaward of the shoreline.

295. Not applicable--there are no public erosion-protection structures proposed.

- (10) Marine resources;

- (A) Exercise an overall conservation ethic, and practice stewardship in the protection, use, and development of marine and coastal resources;

296. SoBay is attracted to the Property because of the sandy beach, clear waters, and marine resources. It is in SoBay's best interest to do its part in the stewardship of these resources. If necessary, SoBay is willing to create and support a nonprofit entity to hold and manage the public use easement over the southern portion of the Property. (See § III, ¶ 8(B),(D).)

- (B) Assure that the use and development of marine and coastal resources are ecologically and environmentally sound and economically beneficial;

297. The economic benefits of the Project cannot be over emphasized--the augmented property tax revenues, the multiplier effects during and after construction, and the perception that Hawaii's environmental laws reasonably balance public and private rights. The ocean engineer's study provides additional assurances that marine and coastal resources would not be impacted.

- (C) Coordinate the management of marine and coastal resources and activities management to improve effectiveness and efficiency;

298. Not applicable--this is a policy to affected government agencies to coordinate their management activities as related to coastal and marine resources.

- (D) Assert and articulate the interests of the State as a partner with federal agencies in the sound management of ocean resources within the United States exclusive economic zone;

299. Not applicable--the Project does not use any ocean resources within the exclusive economic zone.

- (E) Promote research, study, and understanding of ocean processes, marine life, and other ocean resources in order to acquire and inventory information necessary to understand how ocean

development activities relate to and impact upon ocean and coastal resources; and

300. The ocean engineer's study contributes to the information baseline to monitor the proposed development and evaluate future activities proposed in the vicinity.

- (F) Encourage research and development of new, innovative technologies for exploring, using, or protecting marine and coastal resources.

301. Not applicable--this policy applies to the encouragement of technological projects.

Planning Commission Rules, § 9-7--SMA GUIDELINES

302. The Project complies with the SMA Guidelines set forth in SMA Rules §9-7, as amended by HRS §205A-26. The following Findings of Fact compare the evidence on the record in the contested case hearing to the specific guidelines of the SMA. Therefore the findings in this section may repeat and apply the findings in the previous sections.

- A. The Authority and/or the Director, in reviewing any proposed development, shall seek to minimize where reasonable:

- 1. Dredging, filling or otherwise altering any bay, estuary, salt marsh, river mouth, slough, or lagoon.

303. The proposed development does not involve any dredging or filling of any water body.

- 2. Any development which would reduce the size of any beach or other area usable for public recreation.

304. The proposed development would not reduce the size of the beach fronting the Property; in fact, the proposed dedication of the southern portion of the Property would expand the area usable for public recreation.

- 3. Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and streams within the Special Management Area and the mean high tide line where there is no beach.

305. The proposed dedication of the southern portion of the Property would expand rather than reduce public access to the beach and submerged lands fronting the Property.

- 4. Any development which would substantially interfere with or detract from the line of sight toward the sea from the State highway nearest the coast or from other scenic areas identified in the General Plan.

306. The State highway nearest to the Property is Kuakini Highway (Highway 11), located approximately 1000' inland from the Property at an elevation of approximately 100' (USGS Kailua quad map). Any ocean views from the highway at that elevation looks over the 45'-high Kona Reef, which is the same height as the proposed structure. With the dedication of the southern portion of the Property as open space, the existing views of the ocean from Alii Drive (a County highway) would be preserved. The General Plan does not identify any scenic areas within the same tax plat as the Property. The nearest identified scenic areas are the Kailua Bay area (7-5-05:23, 24, 32) and White Sand Beach (7-5-05:7); the Property is not visible from either scenic area.

5. Any development which would adversely affect water quality, existing areas of open water free of visible structures, existing and potential fisheries and fishing grounds, wildlife habitats, estuarine sanctuaries, potential or existing agricultural uses of land.

307. The Project would not cause any point or nonpoint source pollution, and therefore not affect coastal water quality. No structures are proposed on any existing open waters. The nearshore fishing grounds will not be adversely impacted nor will any wildlife habitats. There are no estuarine sanctuaries or agricultural lands on or in the immediate vicinity of the Property.

- B. No development shall be approved by the Authority or the Director unless it is first found that:

1. The development will not have any significant adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interest. Such adverse effect shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect, and the elimination of planning options;

308. The environmental impacts of the proposed Project have been evaluated in accordance with the requirements of HRS Chapter 343 and proposed mitigation measures may be included as conditions to the SMA approval as deemed appropriate. Based on the findings, comments, and responses in the Final EA, the Planning Department issued a FONSI. The Project is the last parcel in the Resort zone established in this area by the initial North Kona zone map. The development of this parcel would implement and culminate the intended planning options and cumulative impacts envisioned by this zoning plan. The lateral tapering of the Resort use culminating in an open space provides a well-planned transition to the adjoining residential zoning district.

2. The development is consistent with the objectives and policies as provided by Chapter 205A, HRS, and the Special Management Area guidelines as contained herein; and

309. Refer to prior discussions herein.

3. The development is consistent with the County General Plan and zoning. Such a finding of consistency does not preclude concurrent processing when a general plan or zoning amendment may also be required.

310. The Property is zoned Resort-Hotel (V-0.75), which is consistent with the General Plan's Resort designation. The proposed condominium use is a permitted use under the zoning code and General Plan.

- C. All development permitted in the Special Management Area shall be subject to reasonable terms and conditions as necessary in order to ensure that:

1. Adequate access, by dedication or other means, to publicly owned or used beaches, recreation areas, and natural reserves is provided to the extent consistent with sound conservation principles;

311. Dedication of the southern portion of the Property would provide adequate access to the public beach fronting the Property. (See § III, ¶ 8.)

2. Adequate and properly located public recreation areas and wildlife preserves are reserved;

312. Dedication of the southern portion of the Property would provide a public recreation area presently recognized by the public as a desirable shady area along a beach. (See § III, ¶ 8.)

3. Provisions are made for solid and liquid waste treatment, disposition, and management which will minimize adverse effects upon Special Management Area resources;

313. Mandatory connection to the recently constructed sewer main along Alii Drive would minimize adverse effects caused by existing cesspools. (See § III, ¶ 7.)

4. Alterations to existing land forms and vegetation, except crops, and construction of structures shall cause minimum adverse effect to water resources and scenic and recreational amenities and minimum danger of floods, wind damage, storm surge, landslides, erosion, siltation, or failure in the event of earthquake;

314. Compliance with the Flood Control Code (HCC Chapter 27) and Building Code (HCC Chapter 5) would minimize risks from floods, wind damage, storm surge, and earthquake. Compliance with the Grading and Sedimentation Control Code (HCC Chapter 10) would prevent siltation during construction. (See § III, ¶ 4, 15.) Compliance with the Department of Public Works requirements for drainage and prohibition of importing topsoil within the shoreline setback area would prevent siltation during the post-construction phase of the Project. The Property is not subject to landslides.

5. Adverse environmental or ecological impacts are minimized to the extent practicable; and

315. Compliance with permit conditions for landscaping and KVDC recommendations for building aesthetics would minimize visual impacts and can be enforced at Plan Approval.
(See § III, ¶ 9.)

6. The proposed development is consistent with the goals, policies, and standards of the General Plan.

316. The environmental assessment identified and discussed relevant goals, policies, and standards of the General Plan. None of the comments received during the public review period of the Draft Environmental Assessment addressed or criticized the discussion. The Final EA (Ex. 3) includes the discussion which has been incorporated herein.

II. CONCLUSIONS OF LAW

Procedural Rulings

1. Petitions for Standing in Contested Case Hearing were granted by the Planning Commission in its meeting of February 20, 1998 to the following parties:

- a. Timothy Fitzpatrick;
- b. Kona Reef Association of Apartment Owners;
- c. Walter Aniban, Sr.; and
- d. West Hawaii Surfing Association.

2. Petitions for Standing in Contested Case Hearing were denied by the Planning Commission in its meeting on February 20, 1998 as follows:

- a. Peter Vann--no fees, standing denied; and
- b. Michael Matsukawa--untimely petition, standing denied.

SMA Use Permit Criteria

3. An SMA use permit is required for the development of the Project.

4. The Planning Commission may approve an SMA use permit for the development of the Project upon making the findings required under Rule 9-11(C)(1)-(3), Plan. Comm. Rules and HRS § 205A-26(2).

5. Under Rule 9-11(C)(1), Plan. Comm. Rules and HRS § 205A-26(2)(A), the Planning Commission must find that the Project will not have any significant adverse environmental or ecological effect except as such adverse effect is minimized to the extent

practicable and is clearly outweighed by public health, safety, or compelling public interest.

6. Under Rule 9-11(C)(2), Plan. Comm. Rules and HRS § 205A-26(2)(B), the Planning Commission must find that the Project is consistent with the objectives, policies, and guidelines as provided in Chapter 205A, HRS, and Rule 9-7, Plan. Comm. Rules.

7. Under Rule 9-11(C)(3), Plan. Comm. Rules and HRS § 205A-26(2)(C), the Planning Commission must find that the Project is consistent with the General Plan, Zoning Code, and other applicable ordinances.

8. The Hearing Officers conclude that the Project will not have a significant adverse environmental or ecological effect. Further, any adverse environmental or ecological effect of the Project will be minimized to the extent practical and is clearly outweighed by public health, safety, or compelling public interests.

9. The Hearing Officers conclude that the Project is consistent with the objectives, policies and SMA guidelines of Chapter 205A, HRS, and Rule 9, Plan. Comm. Rules.

10. The Hearing Officers conclude that the Project is consistent with the General Plan, the Zoning Code, and the zoning ordinances specifically applicable to the Property.

11. SoBay's application complies with the requirements of the Plan. Comm. Rules, Rule 9-11 with respect to the contents of the SMA use permit application. SoBay submitted a shoreline survey with the Director as required by Plan. Comm. Rule 9-11(A)(1)(h).

12. The Hearing Officers conclude that neither SoBay nor the Planning Commission are required to recertify the shoreline before proceeding with the consideration of and/or granting SoBay's SMA use permit application where credible evidence on the record establishes that there has been no change in the location of the shoreline in any area relevant to the proposed development or the assessment of the proposed development relative to the policies, objectives and guidelines of the SMA use permit.

III. DECISION AND ORDER

Upon review of the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED by the Planning Commission that the application of SoBay Hawaii, Inc. for an SMA use permit to allow construction of the proposed Project, not to exceed 21 units, on approximately .68 acres of land identified as Tax Map Key (3) 7-5-18:20 situated in the makai portion of the Waiaha I ahupua`a situated at 75-5894 Alii Drive, North Kona, Island, County and State of Hawaii, is approved subject to the following conditions:

1. SoBay, its successor and assigns, shall be responsible for complying with all stated conditions of approval.
2. Construction of the proposed condominium development shall be completed within five (5) years from the effective date of the Special Management Area Use Permit. Prior to the start of construction, the applicant shall secure Final

Plan Approval, in accordance with Chapter 25-2-70 (Zoning Code), from the Planning Department. Plans shall identify structures, landscaping, fire protection measures and parking stalls in accordance with Chapter 25 (Zoning Code). In addition, 5 off-street parking stalls shall be provided for public use. These 5 parking stalls shall be set aside for public use only and shall be marked and signage provided to indicate its location.

3. Drainage improvements shall be constructed in a manner meeting with the requirements of Chapters 10 and 27, HCC.
4. All Federal, State and County regulations and programs regarding drainage, including the Federal Flood Insurance Program, shall be complied with during Project development.
5. During construction, mitigative measures shall be taken to minimize the potential of fugitive dust and runoff sedimentation. Such measures shall be in compliance with construction industry standards and practices and in accordance with Department of Health requirements.
6. Should any remains of historic and cultural sites (such as rock walls, terraces, platforms, midden or human burials) not previously identified be encountered, work in the immediate area shall cease and SoBay shall contact the Historic Sites Preservation Division of DLNR and the Planning Department.
7. Comply with all other laws, rules, regulations and requirements of the affected agencies for the proposed development.
8. SoBay shall dedicate, set aside, or grant a public use and/or conservation easement over the southern portion of TMK (3) 7-5-18:20 beginning approximately at the existing driveway and extending to the southern boundary of the Property. The dedication of this portion of the Property to public use may be accomplished in one of the following ways or in another way approved by the Planning Director:
 - A. A dedication of the fee interest of the Property to the County or State of Hawaii.
 - B. Granting and recording a conservation easement pursuant to Chapter 198, HRS, to a public body or to a qualified organization approved by the Planning Director.
 - C. Granting and recording an easement for public use and enjoyment which may not qualify as a conservation easement under HRS Chapter 198 but which is approved by the Planning Director.
 - D. Entering and recording a Declaration of Covenants setting aside the southern portion of the Property for public use and enjoyment. This document would also set out SoBay's undertaking with respect to maintenance of the area.

9. SoBay will prepare and submit to the Planning Department for approval by the Planning Director a landscape plan which includes the following:
 - A. using native beach strand species along the shoreline and in the shoreline setback area to enhance the coastal strand ecosystem and screen the building from beach users;
 - B. using landscaping to screen the building along the Alii Drive frontage;
 - C. retaining existing trees to the extent feasible;
 - D. screening the southern portion of the building from public beach users and the northern portion of the building from the Kona Reef;
 - E. no importation or use of topsoil in the shoreline setback area and that plant species used to landscape the shoreline setback area will be beach strand plant species which can grow in sand.
10. SoBay will provide reasonable lateral public shoreline access within the shoreline setback area in a manner to be approved by the Planning Director.
11. SoBay will provide an off-site water connection for fire flow.
12. The applicant shall, as part of the Plan Approval procedure, submit the landscaping plan and preliminary building and site plans for review by the Kailua Village Design Commission prior to granting of Final Plan Approval.
13. SoBay will comply with the Fair Housing Act Amendments Design Guidelines, if applicable.
14. SoBay will keep Alii Drive shoulders free of fallen debris from trees on Property and will trim trees as approved by the Department of Public Works.
15. SoBay will comply with grading permit requirements to prevent siltation of coastal waters during construction.
16. SoBay will comply with noise regulations during constructions.
17. SoBay will attempt to design the proposed structure in a manner which uses design elements such as undulations on the building's surface, railings, lanais, color selections and the like to reduce the apparent mass of the structure.
18. SoBay will agree to defer repair of the wall on the southern portion of the property for a period of one year to allow an evaluation of the impacts, if any, on the beach in the southern portion of the Property. Nothing in this condition will prevent SoBay from repairing or maintaining the existing wall in the middle section of the Property. Further, this condition may be released by the Planning Director if it appears that repairing the wall would benefit the public interest. Nothing will prevent SoBay from initiating and developing a beach nourishment

program on the Property including within the shoreline setback subject to approval by the Director or the Planning Commission as appropriate under HRS § 205A and/or Plan. Comm. Rules.

19. Access to the subject property and any improvements shall be constructed in a manner meeting with the requirements and approval of the Department of Public Works.
20. The applicant would take necessary legal steps to remove or fill the existing saltwater swimming pool at the southern boundary of the property.
21. The applicant consider using the name Waiaha and to incorporate it into its project's name.
22. Prior to Final Plan Approval, the developer will use all good faith efforts to move the building 10 feet mauka, away from the shoreline, including the submittal of an application to the Planning Director for a front yard setback variance.
23. All construction activities, including grading, landscaping and building construction within the subject property must comply with Chapters 10 and 27, of the Hawaii County Code. All plans must delineate the limits of the tsunami inundation zones.
24. If drywells are included in the subject development, Chapter 23, Underground Injection Control (UIC), Administrative Rule, Department of Health, prohibit any person from operating, constructing, or modifying an injection well (drywell) unless authorized by a permit issued by the Director of Health, State of Hawaii.
25. There shall be no construction activities allowed within the Shoreline Setback Area during the construction of the proposed development. Before construction or any land alteration activities occur within the subject property, the 20-foot shoreline setback shall be measured, staked with bright colored plastic construction fencing by a registered surveyor. The Planning Department shall be notified and a site inspection of the subject property shall be made to verify the location of the staking and fencing prior to commencing any construction or land alteration activities and subsequently, after completion of the proposed development. The staking and fencing shall be left in place for the duration of construction activities within the subject property.
26. The applicant shall comply with all applicable setbacks and building height requirements of the Resort zoned district.
27. Should any remains of historic sites, such as artifacts, 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

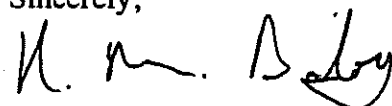
the DLNR-HPD when it finds that sufficient mitigative measures have been taken.

28. An initial extension of time for the performance of the permit may be granted by the Planning Director upon the following circumstances:
- A. The non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, 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, Zoning Code or SMA Guidelines.
 - 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 the one year may be extended or up to one additional year.)

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.

Should you have any questions, please contact Alice Kawaha of the Planning Department at 961-8288 or Royden Yamasato of the Planning Department West Hawaii Office at 327-3510.

Sincerely,



Kevin M. Balog, Chairman
Planning Commission

LSobay03.PC

cc: Department of Public Works
Department of Water Supply
County Real Property Tax Division
West Hawaii Office
Office of Planning, CZM Program (w/Background)
Department of Land and Natural Resources
Kazu Hayashida, Director/DOT-Highways, Honolulu
Roy Takemoto, Esq.
Virginia Goldstein, Planning Director
Mr. Norman Hayashi
Patricia O'Toole, Esq.
Fred Giannini, Esq.
Roy A. Vitousek, III, Esq. ✓
Kevin R. Seiter, Esq.
Michael Matsukawa, Esq.
The Honorable J. Curtis Tyler, III, County Council