

**County of Hawaii**  
**PLANNING COMMISSION**

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-3043  
(808) 961-8288 • Fax (808) 961-8742

October 15, 2004

Steven S. C. Lim, Esq.  
Carlsmith Ball LLP  
121 Waianuenue Avenue  
Hilo, HI 96720

Dear Mr. Lim:

Special Management Area Use Permit Application (SMA 03-016)  
Applicant: 11-Lot Agricultural Subdivision and Related Improvements  
Request: Continental Pacific, LLC  
Tax Map Key: 2-8-7:Portion of 1

The Planning Commission at its duly held public hearing on September 16, 2004, voted to approve the above-referenced application. Special Management Area (SMA) Use Permit No. 449 is hereby issued to allow the development of an 11-lot subdivision, ranging in sizes from 2.0 acres to 5.6 acres, and related improvements. The area involved is located approximately 1,900 feet south of the Hilo Coast Processing Co.'s Power Plant and about 150 feet east (mauka) of the shoreline, Pepekeo, South Hilo, Hawaii.

Approval of this request is based on the following:

The purpose of Chapter 205A, Hawaii Revised Statutes (HRS), and Special Management Area Rules and Regulations of the County of Hawaii, is to preserve, protect, and where possible, to restore the natural resources of the coastal zone areas. Therefore, special controls on development within an area along the shoreline are necessary to avoid permanent loss of valuable resources and the foreclosure of management options.

The applicant proposes to develop an 11-lot subdivision of "Bulk Lot 88" to create 11 agricultural lots ranging in size from 2.0 acres to 5.6 acres, and related improvements. Bulk Lot 88 consists of approximately 68.16 acres and is part of the Pepekeo Point Subdivision (Subdivision No. 7644) which was granted Final Subdivision Approval on January 27, 2003. The subdivision consists of 92 pre-existing lots of record. The application is being submitted pursuant to the terms and conditions under an April 12,

OCT 15 2004

2002 Settlement Agreement for Board of Appeals and Subdivision of Continental Pacific, LLC Lands, entered into by and between the applicant and the County of Hawaii Planning Department.

The Settlement Agreement resolved a disagreement in 2001 between the Planning Director and Continental Pacific, LLC over the number of "pre-existing lots" on the property. The Planning Department historically has recognized that lots created before the first County Subdivision Code have a valid existence, even if they were combined into one tax map key for property tax purposes. So, for example, old grants from the Hawaiian Kingdom are considered "pre-existing lots."

The significance of "pre-existing lots" is that they can be sold as separate parcels, even if they are smaller than the size allowed by the current zoning, and even if they lack water or the quality of road access that would be required by the current Subdivision Code. Also, they can be used in a consolidation/resubdivision action to create a new subdivision with different lot boundaries, as long as the number of lots does not increase, without following the normal infrastructure requirements of the current Subdivision Code. Some regulations do apply, but not the full requirements.

On the property makai of the Mamalahoa Highway in Pepekeo owned by Continental Pacific, LLC, the Planning Director had recognized 53 pre-existing lots, based mostly on old grants. The landowner claimed that there were an additional 153, based on the number of homes in the old Pepekeo Mill Camp, which had been demolished in the late 1970's, and also claimed that 14 very small lots that had been created as roadway lots, anchor lots for bridge supports, etc., should also be counted.

After the Planning Director denied that the demolished plantation camp could be used as "pre-existing lots", Continental Pacific, LLC took the dispute to the Board of Appeals. (All final decisions of the Planning Director can be appealed to the Board of Appeals) The Board of Appeals sided with the landowner that the 153 "plantation camp" lots should be considered as "pre-existing". After this decision, and while the appeal of the 14 other lots was pending, Continental Pacific, LLC and the Planning Director compromised the dispute by agreeing that the County would recognize 92 pre-existing lots, including the 53 that were agreed upon by both sides, and Continental Pacific, LLC would give up its claims to more pre-existing lots, including another demolished camp in the makai Pepekeo area. The parties also compromised a similar issue on the mauka side of the highway. After the compromise, the Planning Department prepared an amendment to the Subdivision Code that made it clear that demolished plantation camps and various non-buildable lots such as roadway lots could not be considered as "pre-existing lots." This passed the Council in late 2002.

The Settlement Agreement also committed the Planning Director to support a plan for the consolidation/resubdivision of the agreed-upon 92 lots. Most of those lots have already been subdivided. The plan included an 11-lot subdivision in the general area of this SMA permit application, but the settlement did not commit the Planning Director to support moving the boundaries of the lots into the SMA. It did allow the owner to submit a SMA application for that purpose, which is the present application

The proposed request 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 elimination of planning options. The applicant is requesting the SMA Use Permit to allow the development of 11 agricultural lots and related improvements.

The proposed project will not create significant adverse impacts upon immediately adjacent properties, as surrounding properties are vacant, used for limited grazing, or in industrial uses. Lands to the north of the project area are zoned MG-5a, and consists of the former Pepeekeo Sugar Mill and unimproved abandoned sugarcane lands and cane haul roadways. Kulaimano Homesteads is located to the south and zoned A-5a, and there are properties zoned RS-10 to the west of the subject area. The proposed project will not substantially affect scenic vistas or viewplanes of nearby residents nor have an adverse impact on coastal recreational or visual resources to the shoreline and coastal ecosystems. The property is located makai of the Hawaii Belt Road in Pepeekeo. As a result of the related Settlement Agreement, there will be mauka-makai public access to the shoreline (two pedestrian public accesses and parking easements for this area) along with lateral coastal public access. Therefore the project will not restrict access to coastal recreational resources along the shoreline. The project site is not visible from the nearest public highway and will not block views from the highway to the sea. The viewplane from the shoreline towards the property will not be impacted as surrounding properties are vacant, used for limited grazing, or in industrial uses.

The proposed project is consistent with the objectives and policies as provided by Chapter 205A, HRS, and Special Management Area guidelines contained in Rule No. 9 of the Planning Commission Rules of Practice and Procedure. Water is available to the site from a private water system. Any potential runoff or discharge that could reach ocean waters can be handled by on-site improvements consistent with the requirements of the Department of Public Works. Any impacts from soil erosion and runoff during site preparation and construction phases can be adequately mitigated through compliance with existing regulations and proper construction practices. Air quality in the area of the subject property is mostly affected by emissions from natural and vehicular sources. The

principal source of both short-term air and noise impacts associated with the construction of the proposed improvements is expected during construction, especially during grubbing and grading activities. These impacts can be mitigated through the utilization of best management practices and existing construction regulations. Given the limited nature of the improvements, no significant long-term air and noise impacts are anticipated. With these precautionary measures in place, the proposed development is not anticipated to have any substantial adverse effects upon nearby coastal resources or the surrounding environment. Conditions of approval will be included relating to wastewater, solid waste and public safety to ensure that impacts on coastal resources are minimized.

Public recreational resources - primarily access to and along the shoreline - are protected by permit conditions. The project site is not directly tied with the recreational resources of the coastal areas, and will not reduce the size of the coastline or other areas used for public recreational uses. The property is not among those listed as historic properties in the Hawaii State Register of Historic Places, has not been determined to be eligible for inclusion in the National Register of Historic Places, and is not profiled as a significant cultural and/or historic site in the General Plan. An archaeological field inspection was conducted by PHRI on October 6, 2000, and no archaeological evidence of any kind was identified. By memos dated September 9, 2003 and December 15, 2003, the State Department of Land and Natural Resources Historic Preservation Division indicated that they believe "there are no historic properties present because intensive cultivation has altered the land, and an acceptable archaeological assessment or inventory survey found no historic properties. Thus, no historic properties will be affected by this undertaking." The project area's existing terrain is marked by a dense overgrowth of ground cover, guava, kukui nut trees and abandoned sugarcane. The project area is absent of any active agricultural activity. According to the applicant, there are no rare, threatened or endangered species in the immediate area. The overall impact on the existing flora is expected to be negligible since the plants are alien and introduced species. The applicant has also stated that there are no rare or endangered species of fauna present in the area, as the property is not within the critical habitat for protected species.

There is no evidence of any traditional and customary Native Hawaiian rights being practiced on the site, other than fishing and gathering along the shoreline, nor existence of any known valued cultural, historical or native resources in the area. Public access to the shoreline will be protected by proposed conditions. Mauka-makai public shoreline access and lateral public access along the oceanfront of the project area will be available.

The proposed development is consistent with the County General Plan and Zoning Code. The General Plan Land Use Pattern Allocation Guide (LUPAG) Map designation for this area is Intensive Agricultural. The proposed project will complement the goals, policies and standards of the Economic and Land Use Elements of the General Plan.

While the proposed project will not have a direct impact upon coastal recreational resources, review of developments within the Special Management Area must also consider the cumulative impacts of such developments upon these resources. Access to the site is from Hawaii Belt Road, a state-owned two-lane paved roadway within a 100-foot right-of-way. The primary subdivision roadway will be the Pepeekeo Mill Road, an existing 20 to 30-foot wide asphalt-concrete paved roadway. The secondary subdivision roadway will consist of an 8 or 16-foot wide asphalt-concrete paved or gravel roadway to be held in private ownership and maintained by lot owners in the subdivision.

The Pepeekeo Community Association and the applicant made an agreement that the applicant would contribute funds for recreational facilities at Kulaimano Park (Kulaimano Community Center) and grade the site. Specifically, the applicant agreed to contribute \$15,000 from the sale of each of the 11 lots that are expected to be created by this SMA permit.

Both the applicant and the Community Association wanted the funds to be donated to the county and spent by the county for the desired improvements. The Community Center is a county facility. The Community Association is not incorporated and does not have the ability to manage large funds or supervise a construction contract. The county administration is willing to manage the funds and to arrange for the construction contract when sufficient funds have accumulated. The County Council has a role in that by Charter, the Council has to formally accept any donations to the County. The county can accept donations that are earmarked for a specific purpose, and it is obligated to use the funds for those purposes after it has accepted them. Of course, it has to be for a purpose consistent with the functions of the county, but these facilities would clearly fit within those functions.

The applicant and the Community Association also requested that the agreement to make these donations be made a condition of the SMA permit. The Community Association is concerned about its ability to enforce the agreement if it is not a condition of the permits. Ordinarily, the Planning Director's recommended conditions of approval for a SMA permit are tied to the direct impacts of the project on the resources that are protected by the SMA law. To give some examples, because coastal development may affect public access, conditions may be included that require public access, or public beach facilities in the SMA (to accommodate increased public use), or to mitigate visual impacts, there may be conditions that the project be reduced in size or moved back from

the shoreline. The donation, while certainly beneficial to the community and a very positive move by the applicant, does not directly mitigate impacts of this SMA permit. In a broad sense, it provides facilities that can be used by the future lot owners as well as the general public, and accommodates recreational demand that may be generated by all of the applicant's various subdivisions in the area. To accommodate the wishes of the parties, the Planning Director recommends that the following condition be added as Condition No. 9:

"9. As agreed to by the applicant, the applicant shall donate \$15,000 upon the sale of each lot (up to a maximum of 11 lots) created by this permit (SMA 03-016) to the County of Hawaii, to be used only for recreational improvements at Kulaimano Park (Kulaimano Community Center), as specified by the Pepeekeo Community Association, and grade a two-acre area of Phase 2 of the Kulaimano Master Plan. This condition is subject to County Council acceptance of the donation."

While the proposed development will not have a direct impact upon coastal recreational resources, review of developments within the Special Management Area must also consider the cumulative impacts of such developments upon these resources. In view of the recent Hawaii State Supreme Court's "PASH" and "*Ka Pa'akai O Ka'Aina*" decisions, the issue relative to native Hawaiian gathering and fishing rights must be addressed. These rights must be addressed in terms of the cultural, historical, and natural resources and the associated traditional and customary practices of the site.

Investigation of valued resources: The applicant presented the following information from which the Planning Commission can determine the valued cultural, historical, and natural resources within the area sought for Special Management Area Use Permit: Memo dated September 9, 2003 from the Department of Land and Natural Resources State Historic Preservation Division (SHPD).

The valuable cultural, historical, and natural resources found in the Special Management Area Use permit area: There are no sites identified for preservation by SHPD for this property. There may be historic sites that are undiscovered such as rock walls, terraces, platforms, marine shell concentrations or human burials. However, the discovery of unanticipated historic sites is unlikely as the project area is the site of the former Hilo Coast Processing Company's sugar cane lands. According to the SHPD, "there are no historic properties present because intensive cultivation has altered the land, and an acceptable archaeological assessment or inventory survey found no historic properties. Thus, no historic properties will be affected by this undertaking." Thus, with the SHPD's review, the possibility of discovery of any valued resources is unlikely. According to the applicant, no known federally listed threatened or endangered floral or faunal species are found on the site. In addition, the location of the project site in close

proximity to an urban area would preclude its habitation by rare or endangered species of animals. The shoreline may be used for fishing, and 'opihi picking. It is possible to get to the shoreline at two or three places down the sea cliff.

Possible adverse effect of impairment of valued resources: The proposed project will alter the land and may cause changes to the types of vegetation, if any, on the site. However, as the SHPD has stated, intensive cultivation has altered the land, and no adverse effect or impairment of any valued resources is anticipated.

Feasible actions to protect native Hawaiian rights: According to the applicant, no valued cultural resources were identified for this site. However, the shoreline itself is used for fishing and 'opihi picking. Thus, to the extent to which traditional and customary native Hawaiian rights area exercised, the proposed action will not affect traditional Hawaiian rights. For this area, two pedestrian public accesses and parking will be provided as stipulated under the Settlement Agreement. Conditions of approval will protect any unidentified cultural, historical, and natural resource in the event any are encountered during construction. The requirement of septic waste disposal systems will mitigate potential problems from human waste disposal.

Based on the above findings, it is determined that the proposed development and related improvements will not have any substantial adverse impacts on the surrounding area, nor will its approval be contrary to the objectives and policies of Chapter 205A, HRS, relating to Coastal Zone Management and Rule No. 9 of the Planning Commission relating to the Special Management Area.

Approval of this request is subject to the following conditions. Should any of the foregoing conditions not be met or substantially complied with in a timely fashion, the Planning Director shall initiate procedures to revoke the permit.

1. The applicant, its successor or assigns shall be responsible for complying with all stated conditions of approval.
2. Final Subdivision Approval of the proposed subdivision shall be secured from the Planning Director within three (3) years from the effective date of this permit.
3. The project, including the provision of public accesses to and along the shoreline and the limitation of number of dwellings to one per lot shall be completed in substantial compliance with the Settlement Agreement dated April 12, 2002. The public lateral shoreline access shall include the existing field road running close to the top of the sea cliff. All lots shall have a septic tank system with leach field, rather than cesspools.

4. No fence, wall, structure, or landscaping shall be installed that impedes usage of the public access easement.
5. Applicant, and any private lot owners, shall obtain a NPDES permit for any land disturbance of more than one acre.
6. Trees along the top of the sea cliff within the 40-foot shoreline setback area shall not be removed without further Conservation District and SMA approvals.
7. The makai boundary of the lots shall conform to the Conservation District boundary as established in Subdivision No. 7644, Revision 2, and shall not be closer to the top of the sea cliff than represented in Subdivision No. 7644, Revision 2. That map shows the closest approach of the Conservation District line to the top of the pali as 125 feet in two locations. The surveyor shall field-verify that the final lot lines do not come closer to the top of the sea cliff than shown on that map.
8. The Police and Fire Departments and Civil Defense Agency shall be given the access codes to any gates.
9. As agreed to by the applicant, the applicant shall donate \$15,000 upon the sale of each lot (up to a maximum of 11 lots) created by this permit (SMA 03-016) to the County of Hawaii, to be used only for recreational improvements at Kulaimano Park (Kulaimano Community Center), as specified by the Pepeekeo Community Association, and grade a two-acre area of Phase 2 of the Kulaimano Master Plan. This condition is subject to County Council acceptance of the donation.
10. All lot purchasers shall be informed that a coal-burning power plant is operated on nearby property and that they may expect noise and smoke from its operation. This condition may be removed if operation of the power plant ceases and the existing SMA permit for the power plant expires or is revoked.
11. All development generated runoff shall be disposed of on-site and not be directed toward any adjacent properties. A drainage study of the property shall be prepared and submitted to the Department of Public Works prior to submittal of plans for Final Subdivision Approval.



12. During construction, measures shall be taken to minimize the potential of both fugitive dust and runoff sedimentation. Such measures shall be in compliance with construction industry standards and practices utilized during construction projects in the State of Hawaii.
13. Should any remains of historic sites, such as 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 State Historic Preservation Division (DLNR-SHPD) shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the DLNR-SHPD when it finds that sufficient mitigation measures have been taken.
14. Comply with all applicable laws, rules, regulations and requirements of other affected agencies, including the Department of Public Works and Department of Health.
15. The area makai of the Conservation District line shall be used only for agriculture and open space, to the extent permitted by Conservation District rules, and shall not be developed with homes or other substantial structures.
16. The applicant and successors, including future lot owners' community association, shall maintain pedestrian public access easements in walkable condition (for example, by periodic mowings) and the parking easements so that vehicles can park.
17. To facilitate use of the public accesses and to provide safe ingress and egress to lot owners, the applicant shall pave the private road accessing the lots to a minimum width of 10 feet.
18. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of the approval of the permit. The report shall include, but not be limited to, the status of the development and compliance with the conditions of approval. This condition shall remain in effect until all of the conditions of approval have been satisfied and the Planning Director acknowledges that further reports are not required.
19. An initial extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances:

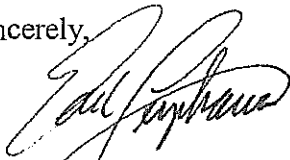
Steven S. C. Lim, Esq.  
Page 10

- 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 original reasons for the granting of the permit.
- C. 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 one year may be extended for 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 Norman Hayashi of the Planning Department at 961-8288.

Sincerely,



Fred Galdones, Chairman  
Planning Commission

Lcontinentalsma01PC

cc: Department of Public Works  
Department of Water Supply  
County Real Property Tax Division  
Department of Land and Natural Resources/HPD-Kona  
Rodney Haraga, Director/DOT-Highways, Honolulu  
Ms. Alice Kawaha  
Mr. Robert Usagawa  
Subdivision Section  
Mr. Jeremiah Henderson, III