



## County of Hawai'i

### PLANNING COMMISSION

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720  
Phone (808) 961-8288 • Fax (808) 961-8742

October 30, 2006

Mr. Klaus Conventz dba  
Baumeister Consulting  
P.O. Box 2308  
Kailua-Kona, HI 96745-2308

Dear Mr. Conventz:

Special Management Area Use Permit Application (SMA 05-000006)  
Request: Additional Single Family Dwelling With Related Improvements,  
Including Upgrade of Existing Structures  
Applicant: Catherine V. Giacometti Evans Family Trust  
Tax Map Key: 7-8-12:1 and 57

Enclosed is the Planning Commission's Findings of Fact, Conclusions of Law and Decision and Order regarding the above-referenced application which was approved by the Commission on September 22, 2006.

Sincerely,

C. Kimo Alameda, Chairman  
Planning Commission

Lgiacometti01pc  
Enclosure

cc/enc: Ms. Catherine Evans  
Department of Public Works  
Department of Water Supply  
Ivan Torigoe, Esq.  
Planning Department-Kona  
Ms. Alice Kawaha

OCT 30 2006

PLANNING COMMISSION OF THE COUNTY OF HAWAI'I

STATE OF HAWAI'I

In the Matter of the Application of ) SMA 05-006  
)  
CATHERINE GIACOMETTI EVANS ) FINDINGS OF FACT, CONCLUSIONS  
FAMILY TRUST ) OF LAW AND DECISION AND ORDER  
)  
For a Special Management Area Use Permit to )  
Allow The Construction of an additional single )  
family dwelling with related improvements, )  
including upgrading of existing structures, )  
involving properties located along the north )  
side of Ehukai Street, adjacent to the Sheraton )  
Keauhou Bay Resort and Spa complex, )  
Keauhou 2<sup>nd</sup>, North Kona, Hawai'i, Tax Map )  
Key 7-8-12:1 and 57. )  
\_\_\_\_\_ )

The Planning Commission has considered all proposed Findings of Fact and Conclusions of Law, and to the extent that the proposed findings or conclusions are inconsistent with this decision, they are rejected, and to the extent that the proposed findings or conclusions are consistent with this decision, their intent is captured herein, with the specific language of this Findings of Fact, Conclusions of Law and Decision to govern.

I. **FINDINGS OF FACT**

A. **BACKGROUND**

1. The Catherine Giacometti Evans Family Trust (Applicant) submitted an application for Special Management Area (SMA) Use Permit (No. 05-006) dated November 9, 2005. The application was to permit the construction of an additional single-family dwelling with related improvements, including upgrading of existing structures. The application was filed by Klaus D. Conventz, dba Baumeister Consulting, representative for the owner. (Applicant's Exhibit No. 4)

2. The subject properties are located along the north side of 'Ehukai Street, at

78-131 and 78-131A 'Ehukai Street. They are adjacent to the Sheraton Keauhou Bay Resort and Spa complex, Keauhou 2<sup>nd</sup>, North Kona, Hawaii, TMK 7-8-12:1 and 57. The property has been owned by the Evans family since the 1940's and has always served as a family residence.

(Director's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 1; Applicant's Exhibit No. 4, Page 14)

3. The permit request on TMK: 7-8-12:1 provides for construction of a new 2,800-square-foot, 1-story, 4-bedroom/3-bath, single-family dwelling; a 1,232-square foot, 1-story workshop/garage with utility room and storage room; and upgrading two (2) existing structures including adding a bedroom to the existing dwelling, adding a 200-square foot lanai to the existing guest house and legitimizing an existing 6' to 8'2" unpermitted rock wall that runs along 'Ehukai Street. (Director's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 1)

4. The permit request for TMK: 7-8-12:57 would legitimize an existing 6' to 8'2" unpermitted rock wall that runs along 'Ehukai Street and replacement of a crumbling dry-stack wall along the western boundary. (Director's Exhibit PD-A, Applicant's Exhibit No. 3; County of Hawaii Planning Department Background Report, Page 1).

5. The Planning Department received a Petition for Standing in a Contested Case Hearing from Margaret Ann Lueck-Joye, the owner of an adjoining property, TMK: 7-8-12:2. The petition was submitted by the law Office of Alan H. Tuhy on January 6, 2006. (Director's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 5).

6. A Petition for Standing filed by Koa Hotels, LLC was also granted by the Commission on January 20, 2006, but it withdrew from active participation in this proceeding by

written notice to the Hearing Officer dated July 1, 2006.

7. Michael W. Gibson was appointed the Hearing Officer for this contested case hearing.

8. Pursuant to Minute Order No. 1, dated April 5, 2006, exhibits and witness lists were duly submitted by the parties, and the contested case hearing was conducted at the King Kamehameha Hotel in Kailua-Kona, Hawaii on July 11, 2006 and concluded that day.

9. On July 11, 2006, a contested case hearing was held, wherein Alan Tuhy, Esq. appeared as counsel on behalf of Petitioner, the Margaret Ann Lueck Joye Revocable Trust; Bobby Jean Leithead-Todd, Esq. appeared as corporation counsel on behalf of the County of Hawaii; Francis L. Jung, Esq. and Carol M. Jung, Esq. appeared as counsel on behalf of the Applicant; also present was Jeffrey Darrow from the Planning Department, County of Hawaii.

10. Pursuant to Minute Order No. 2, Ian Joye and Margaret Ann Lueck-Joye were allowed to testify telephonically at the contested case hearing.

11. Also appearing as witnesses at the contested case hearing were Bruce Witcher, Patrick Cunningham, Peter Evans, Klaus Conventz, and Jeffrey Darrow.

**B. PARTIES**

12. The Applicant is the fee simple owner of two adjoining parcels of land situated along the Keahou Bay. The first is identified as TMK (3)7-8-12:57, consisting of approximately 10,000 square feet ("Lot 1"), along a portion of which the Rock Wall was constructed. The second is TMK (3)7-8-12:1 ("Lot 2"), which is approximately 31,873 square feet in area. The Applicant appeared by and through Peter Evans.

13. Petitioner is not a person descended from native Hawaiians who inhabited the Hawaiian Islands prior to 1778 and who practiced rights which were customarily and traditionally exercised for subsistence, cultural, or religious purposes. (Petition for Standing in a Contested Case Hearing, Page 2)

14. The Petitioner owns the parcel of land adjacent and immediately east of the Applicant's property, identified as TMK (3) 7-8-12-002. The Petitioner, by its trustee Margaret Ann Lueck-Joye, has constructed a residence on the this property used exclusively for residential purposes, and has resided there with her husband, Ian Joye for approximately 8 years.

15. Peter J. Evans is the son of Catherine Giacometti Evans. He lives on and takes care of the property. He is familiar with the subject application. (Transcript Vol. 1, Pages 67-71). As manager of the subject property he retained Klaus Conventz as a land use consultant for the subject application and Bruce Witcher as the civil engineer. (Transcript Vol. 1, Pages 73-75). Mr. Evans lives in a residence on one of the lots. His mother lives in the residence on the other lot. (Transcript Vol. 1, Page 75).

16. The Planning Director of the County of Hawaii appeared through Jeffrey Darrow of the planning staff.

17. Mr. Darrow has been with the Planning Department for over seven (7) years. His duties include reviewing applications for the Planning Commission and preparing recommendations and background reports for the Planning Director. After receiving the application, Mr. Darrow sent a copy of the application to different government agencies for their review and comments so they could be incorporated into the permit conditions. (Testimony of Jeff Darrow, Transcript Vol. 1, Pages 9-10)

C. PROCEDURAL MATTERS

18. The subject application was reviewed by Jeff Darrow, Planning Officer. (Testimony of Jeff Darrow, Transcript Vol. 1, Page 10)

19. The Planning Director recommended that the subject application for the additional dwelling and related improvements, including the rock walls be approved by the Planning Commission. (Testimony of Jeff Darrow, Transcript Vol. 1, Page 11)

20. Mr. Darrow and the Planning Director use the guidelines suggested in the County Rules and SMA regulations and follow the Hawaii Revised Statutes in putting together the County recommendations. (Testimony of Jeff Darrow, Transcript Vol. 1, Page 11)

21. The Planning Director concluded that the proposed development would not have any significant environmental or ecological impact. (Testimony of Jeff Darrow, Transcript Vol. 1, Page 11)

22. The estimated cost of the improvements is \$700,000. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 1)

23. Zoning and SMA Notice of Violations were issued to the Applicant for violations that occurred on each of the two (2) properties. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 2)

24. The Planning Department determined that a SMA Use Permit is required for the proposed additional single-family dwelling, detached garage/storage accessory building and related improvements, the proposed and existing rock walls in excess of six (6) feet, and the proposed 200-square-foot lanai addition to the guest cottage. (Director 's Exhibit PD-A, County

of Hawaii Planning Department Background Report, Page 2)

25. The certified shoreline submitted with the application was approved by the Chairman of the Board of Land and Natural Resources on April 26, 2004. The survey shows that the shoreline follows along the upper reaches of the wash of the waves as evidenced by the debris or vegetation line. The survey was certified on August 25, 2000 and re-certified on October 8, 2003. (Director 's Exhibit PD-A, County of Hawaii 'i Planning Department Background Report, Page 2)

26. The State Land Use classification of the project site is Urban. (Director's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 2)

27. The County General Plan LUPAG Map for the project site is Open. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 2)

28. The Kona Regional Plan, adopted by the Planning Commission in April 1984, designates the project site as Open. (Director 's Exhibit PD-A, County of Hawaii Planning Department)

29. The county zoning for the subject property is Single-Family Residential, 10,000 square feet (RS- 10). (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 3)

30. The United States Department of Agriculture (USDA) soil type for the subject property is lava flows, specifically Pahoe-hoe. Pahoe-hoe has a billowy, glassy surface that is relatively smooth and is typically bare of vegetation except for mosses and lichens. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 3)

31. The Land Study Bureau's productivity rating for the project site is Urban Development. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 3)

32. The ALISH classification for the project site is Existing Urban Development. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 3)

33. The Department of Land and Natural Resources-State Historic Preservation Division (DLNR-SHPD) has issued a "no-effect" letter dated June 7, 2004, stating that they believe there are no historic properties present on the project site because residential development/urbanization has altered the land. Thus DLNR-SHPD believes that "no historic properties will be affected" by this undertaking. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 4)

34. TMK: 7-8-12:1 is located with Flood Zones VE, AE and X. TMK: 7-8-12:57 is located within Flood Zones AE and X. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 4)

35. Surrounding properties to the east and south of the project site are zoned Resort-Hotel (V-.75 and V-1.75). The property bordering to the west is zoned Single-Family Residential (RS-10). Further east are properties zoned Resort-Hotel (V-1.75). To the north is Keauhou Bay. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 4)

36. There is no public access to the seashore that traverses the subject



properties. There is public access to the shoreline just west of the subject property. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 4)

37. County water service is available from an existing waterline on 'Ehukai Street. (Director 's Exhibit PD-A, County of Hawaii Planning Department Background Report)

38. Electrical and telephone service are available to the subject properties. (Director's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 4)

39. Police protection is provided by the Kealakehe and Captain Cook police stations. Fire protection is provided by the Kailua-Kona, Kealakehe, and Keauhou fire stations. Emergency medical and paramedical services are also provided by the Hawaii County Fire Department. Kona Hospital at Kealakehe is located approximately six (6) miles away. (Director's Exhibit PD-A, County of Hawaii Planning Department Background Report, Page 4-5)

D. ISSUES RAISED BY PETITIONERS

40. Petitioner alleged that the proposed development would restrict access to publicly owned and used beach areas, and restrict native fishing rights historically exercised in Keauhou Bay. (Petitioner 's Statement of Issues, Page 2)

41. Petitioner alleged that solid waste and liquid waste is not presently authorized through Keauhou Community Services, Inc. for the expanded use envisioned in the application. (Petitioner 's Statement of Issues, Page 2)

42. Petitioner alleged that the proposed development would have substantial adverse environmental and ecological effect that has not been minimized in the application.

Alleged impacts included sewage which has or would continue to seep into Keauhou Bay from the property and noise and traffic in the vicinity of an area of historical significance and which acts as an estuary for akule and other native species. (Petition For Standing In A Contested Case Hearing Page 2)

43. Petitioner alleged that construction would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast. (Petition For Standing In A Contested Case Hearing, Page 3)

44. Petitioner alleged that a pile of approximately 300-400 cubic yards of loam was located near the seawall and had been imported without a permit, was in violation of applicable county rules on fill in a flood zone area, and that the proposed construction would significantly increase the danger of floods, storm surge, erosion, and siltation. (Petition For Standing In A Contested Case Hearing, Page 3)

45. Petitioner alleged that the proposed structure would allow artificial light from floodlights, uplights, or spotlights used for decorative or aesthetic purposes that either directly or indirectly illuminate the shoreline and ocean waters or would be directed to travel across property boundaries toward the shoreline and ocean waters. (Petition For Standing In A Contested Case Hearing, Page 3)

46. Petitioner alleged that water quality and the existing fisheries in the estuary would be adversely affected by added sewage run off and importation of fill material in a flood plain area. (Petition For Standing In A Contested Case Hearing, Page 3)

47. Petitioner alleged that the Applicant has a history of violation of county

building ordinances, including the importation of fill without a permit, construction of improvements in existing structures (approximately two years ago) without an SMA or building permit, and construction/extension of a rock wall in excess of six (6) feet in height without proper county approvals from the engineering and building sections of the Department of Public Works. (Petition For Standing In A Contested Case Hearing Page 4)

48. Petitioner alleged that Applicant should be required to obtain an Environmental Impact Statement prior to any construction because of the alleged threat to environmental resources. (Petition For Standing In A Contested Case Hearing Page 4)

49. Petitioner alleged that the shoreline certification was invalid and that a new survey was required. (Petition For Standing In A Contested Case Hearing Page 4)

E. CONSISTENCY WITH OBJECTIVES, POLICIES, AND GUIDELINES OF THE SPECIAL MANAGEMENT AREA

50. Bruce Edward Wicher was qualified as an expert in Civil Engineering. Transcript Vol. I, Page 34.

51. Mr. Witcher provided a grading plan and sewer design plan to serve the entire property and total build-out. Transcript Vol. I, Page 35.

52. The structures and renovations will meet the County Engineering Divisions flood erosion and sedimentation erosion requirements. Transcript Vol. I, Page 35.

53. The development, as planned, will comply with shoreline setback requirements. Transcript Vol. I, Page 35.

54. The development, as planned, will hook up to the private sewer system. Transcript Vol. I, Page 36.

55. The development's grading plan would have no impact on the neighbor's property and that the impact upon the subject property is within the parameters set forth by FEMA. Transcript Vol. I, Page 37.

56. The dirt or gravel that has been deposited on the property is not in the flood plain. Transcript Vol. I, Page 37.

57. The pile of dirt/loam is to be used as fill and for grading the property so that the majority of the property will slope towards the street rather than the ocean. Transcript Vol. I, Page 38.

58. Sloping the property toward the street reduces any flow of water to the ocean. Transcript Vol. I, Page 38.

59. The shoreline is lava rock. Transcript Vol. I, Page 39.

60. The plan calls for excavation of the crawl space under the proposed residence, with a finished floor 17.5 feet above sea level, or 3.5 feet above base flood elevation. Transcript Vol. I, Page 45-47.

61. Excavation will generally reduce the impact of storm surge. Transcript Vol. I, Page 53, 59.

62. Peter J. Evans is the son of Catherine Giacometti Evans. He lives on and takes care of the property. He is familiar with the subject application. Transcript Vol. I, Pages 67-71. As manager of the subject property he retained Klaus Conventz as a land use consultant for the subject application and Bruce Witcher as the civil engineer. Transcript Vol. I, Pages 73-75. Mr. Evans lives in the residence on lot E-1-A. His mother lives in the residence on lot E-2A. Transcript Vol. I, Page 75.

63. The existing main house and guest house were lifted approximately 3-4 feet to allow them to be hooked up to the sewer system so cesspools could be abandoned. Transcript Vol. I, Pages 84-86. They are currently hooked up to cesspools. Transcript Vol. II, Pages 19-20.

64. There is no record of any building permits in connection with this work. Transcript Vol. I, Pages 84-92.

65. Mr. Klaus Conventz was qualified as an expert in the limited area of civil engineering and structural compliance as it relates to the building code and other county ordinances. Transcript Vol. I, Page 111.

66. The applicant represented that all conditions requested by the County will be complied with if the permit is granted. Testimony of Klaus Conventz, Transcript Vol. I, Page 116.

67. If the SMA application is approved, the applicant will apply for building permits for the fence walls and for the work previously done on the existing structures. Testimony of Klaus Conventz, Transcript Vol. I, Pages 123-124, Testimony of Klaus Conventz, Transcript Vol. II, Pages 10-11.

68. The certified shoreline did not change between 2002 and April 2004. Testimony of Klaus Conventz, Transcript Vol. II, Page 23.

69. Mr. Joye has observed swimming, snorkeling and kayaking in Keauhou Bay. Testimony of Ian Joye, Transcript Vol. II, Page 40. He has also seen pleasure craft and tourist boats in the bay on a regular basis. Additionally, there are tourist businesses operating out of the bay. Testimony of Ian Joye, Transcript Vol. II, Page 53.

70. Mr. Joye has observed runoff into the bay which leaves a brown stain. Testimony of Ian Joye, Transcript Vol. II, Page 41.

71. Ehukai Street services the Evans property, the Joye residence and the Sheraton Hotel. There is a volume of commercial traffic throughout the day. Testimony of Ian Joye, Transcript Vol. II, Page 44.

72. Mr. Joye testified that they have done extensive planting on their property so that their structure is not visible. Testimony of Ian Joye, Transcript Vol. II, Page 45.

73. Mr. Joye is concerned that plantings in the Evans property will block some of their view. They are also concerned about an existing kiawe tree that blocks their view of the sunset. Testimony of Ian Joye, Transcript Vol. II, Page 50.

74. Mr. Joye believes that no planting is allowed in setback areas. Testimony of Ian Joye, Transcript Vol. II, Page 52.

75. The Joyes do not have a view plane easement over the Giacometti Evans property in their favor. Testimony of Ian Joye, Transcript Vol. II, Page 52.

76. Neither Mr. Joye, his wife or their children are of Native Hawaiian descent. Testimony of Ian Joye, Transcript Vol. II, Page 54.

77. The single-family residence on the Joye property is a plantation style home with six bedrooms and is 10,000 square feet in size. It also has a swimming pool, an open-air gymnasium and a glass sauna. Testimony of Ian Joye, Transcript Vol. II, Page 61. It is a two-story structure. Testimony of Margaret Joye, Transcript Vol. II, Page 73.

78. Mrs. Joye testified that she has seen "local families" in front of the Evans property swimming and fishing. Testimony of Margaret Joye, Transcript Vol. II, Page 64-65.

79. Mrs., Joye has also seen kayaking and swimming. Testimony of Margaret Joye, Transcript Vol. II, Page 64-65.

80. Mrs. Joye has observed siltation in the Bay after heavy rains and has smelled “effluent” coming from the direction of the Evans property. Testimony of Margaret Joye, Transcript Vol. II, Page 67-68.

81. Mr. Patrick Cunningham is a licensed contractor and licensed commercial fisherman. He owns a small boat rental and charter business in Keauhou Bay. He has operated a boat rental business in Keauhou Bay since 1987. Testimony of Patrick Cunningham, Transcript Vol. II, Page 80-81, 84.

82. There is no permit for the importation of the pile of soil/loam material on the subject property. Testimony of Patrick Cunningham, Transcript Vol. II, Page 104-105.

83. The fish boundaries have been moved from inside the bay between the Evans and Joye property out to the mouth of Keauhou Bay. Testimony of Patrick Cunningham, Transcript Vol. II, Page 109.

## II. CONCLUSIONS OF LAW

### A. CONSISTENCY WITH OBJECTIVES POLICIES, AND GUIDELINES OF SPECIAL MANAGEMENT AREA

84. The proposed development is consistent with the County General Plan and Zoning Code. (Testimony of Jeff Darrow, Transcript Vol. 1, Page 12-13)

85. There will be insignificant impacts on traffic and parking in the area. (Testimony of Klaus Conventz, Transcript Vol. II, Pages 14-19)

86. The certified shoreline did not change between 2002 and April 2004. (Testimony of Klaus Conventz, Transcript Vol. II, Page 23)

87. Variances Permit 04-095 for TMK: 7-8-12:1, Lot E-2-A (large lot on the

shoreline), and Permit 04-098 for TMK: 7-8-12:57, Lot E-1-A, have been granted. The variances allow the Applicant to build or to have the existing walls in place as long as it is subject to the SMA conditions and the subsequent building permit. (Testimony of Klaus Conventz, Transcript Vol. II, Pages 29-32)

88. State law was recently amended to prohibit artificial light from flood lights, up lights, or spotlights. (Hawaii Revised Statutes, Section 205A-30.5)

89. The Hawaii Planning Commission may not issue an SMA use permit unless there is a finding that the proposed project will not have any significant adverse effects. (Public Access Shoreline Hawaii v. Hawaii Planning Commission, et al., 79 Haw. 425, 426 (Haw. 1995).

90. The proposed development will not result in a loss or destruction of any natural or cultural resource, including but not limited to historic sites and view planes.

91. The proposed development will not have any adverse effect upon the economic or social welfare and activities of the community, county or state.

92. Since the proposed buildings are going to be tied to the KCSI sewer system, the proposed development will not have a substantial adverse effect on the coastal environment and ecosystem.

93. Petitioners conclude that sewage is seeping into Keauhou Bay from the Applicant's Properties, and, as a result thereof, noxious odors are generated. There is no probative evidence or legal basis to support the allegation that sewage is seeping into Keauhou Bay from Applicant's property.



94. The proposed development will not substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast.

95. The proposed 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.

96. The proposed development will not increase the allowable amount of structures that are currently permitted.

97. The value of the proposed development exceeds \$125,000.

98. The development as proposed does not involve an irrevocable loss or destruction of any natural or cultural resource, including but not limited to historic sites and view planes outlined in the General Plan or other adopted plans.

99. The proposed development does not curtail the range of beneficial use of the environment.

100. The proposed development does not conflict with the long-term environmental policies or goals of the General Plan or the State Plan.

101. The proposed development does not substantially affect the economic or social welfare and activities of the community, county, or state.

102. The proposed development does not involve substantial secondary impacts such as population changes and effects on public facilities.

103. The proposed development does not involve a commitment for larger

actions.

104. The proposed development does not affect any rare, threatened, or endangered species of an animal or plant or its habitat.

105. The proposed development does not detrimentally affect air or water quality or ambient noise levels.

106. The proposed development does not have a substantial detrimental effect on an environmentally sensitive area

107. The proposed development is not contrary to the objectives and policies of Hawai'i Revised Statutes, Section 205A, and the SMA Guidelines.

108. The proposed development does not adversely impact any Native Hawaiian customary and traditional rights.

## B. CONDITIONS

109. The Planning Commission finds and concludes that the subject SMA Use Permit Application should be approved, subject to the following conditions:

(1) The applicant, its successors or assigns, shall be responsible for complying with all stated conditions of approval;

(2) Any new construction or substantial improvements in the flood zones will be subject to the requirements of Chapter 27 - Flood Control, of the Hawai'i County Code. No work shall be done in the flood zones without consulting with the Department of Public Works regarding Chapter 27 compliance;

(3) The use and treatment of the stockpiled material shall be done in compliance with Chapter 10, Erosion and Sediment Control, and Chapter 27, Flood Control, of the Hawai'i County Code as may be applicable, and that any fill not so used shall be removed from the property.

(4) All development-generated runoff shall be disposed of on site and shall not be directed toward any adjacent properties;

(5) The applicant shall submit an updated grading plan to the Planning Department to supersede any previous grading plan. All earthwork and grading shall conform to Chapter 10, Erosion and Sediment Control, of the Hawai'i County Code;

(6) 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 of the State of Hawai'i;

(7) The Applicant shall be required to hook up the existing and new structures to the existing private sewer system on Ehukai Street and close cesspool connections prior to final inspection and in conformance with the Department of Health regulations;

(8) An Emergency Response Plan shall be submitted to the Hawai'i County Civil Defense Agency for review and approval prior to the issuance of a Certificate of Occupancy of the new dwelling;

(9) For purposes of this Special Management Area Use Permit, the shoreline setback shall be 45 feet, instead of 40 feet, and shall be delineated on building plans. This would be five feet further inland from where the shoreline was last certified.

(10) Should any unidentified sites or remains such as artifacts, shell, bone, or charcoal deposits, human burials, rock or coral alignments, pavings or walks 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-SHPD when it finds that sufficient mitigative measures have been taken;

(11) The Applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements. This SMA Use Permit approval shall not be construed as a validation or sanctioning of any prior violations of applicable law regarding the subject property or improvements thereon;

(12) An annual progress report shall be submitted to the Planning Director detailing compliance with all conditions of approval;

(13) An initial extension time for performance of conditions within the permit may be granted by the Planning Director upon certain conditions. 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 or Zoning Code. C. Granting of the time extension would not be contrary to the

original reasons for 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 one year may be extended for up to one additional year).

110. A condition of a county building permit would require a 45-foot shoreline setback along the certified shoreline. The current proposal has the structures a minimum of 60 feet or more from the certified shoreline. Pursuant to Planning Commission Rule 9-11(A)(1)(g), under these facts, in accepting and processing the subject application, the Planning Director has waived the submission of a currently certified shoreline survey, and also so stated and made such waiver on the record at the last hearing on the matter. (Testimony of Klaus Conventz, Transcript Vol. I, Pages 119-120)

111. If the SMA application is approved, the applicant will apply for building permits for the fence walls and for the work previously done on the existing structures. (Testimony of Klaus Conventz, Transcript Vol. I, Pages 123-124, Testimony of Klaus Conventz, Transcript Vol. II, Pages 10-11)

### III. DECISION AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Planning Commission hereby approves the subject SMA Use Permit Application (SMA 05-000006), subject to the above-referenced conditions.

DATED: Hilo, Hawai'i, October 27, 2006.

By \_\_\_\_\_

  
C. Kimo Alameda, Chairman  
Planning Commission