

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
TOYAMA GARDENS HAWAII, INC. dba)
NANI MAU GARDENS, INC.)
)
For a Sixth Amendment to the)
Special Permit which establishes)
a commercial arboretum for public)
tours and the sale of agricultural)
products on approximately 58.786)
acres of land situated within the)
State Land Use Agricultural)
District at Waiakea, South Hilo,)
Hawaii, Tax Map Key No.: 2-2-48:)
por. 11 and 13)

DOCKET NO. SP73-159
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER
AMENDING CONDITIONS OF
THE DECISION AND ORDERS
DATED JULY 24, 1991 AND
JUNE 17, 1993

This is to certify that this is a true and correct
copy of the Decision and Order on file in the office
of the State Land Use Commission, Honolulu Hawaii.

OCT 24 1994

Date

by

Robert Lee
Executive Officer

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
AMENDING CONDITIONS OF THE DECISION AND ORDERS
DATED JULY 24, 1991 AND JUNE 17, 1993

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LAND USE COMMISSION
STATE OF HAWAII

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BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)	DOCKET NO. SP73-159
TOYAMA GARDENS HAWAII, INC. dba)	FINDINGS OF FACT,
NANI MAU GARDENS, INC.)	CONCLUSIONS OF LAW, AND
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
AMENDING CONDITIONS OF THE DECISION AND ORDERS
DATED JULY 24, 1991 AND JUNE 17, 1993

Toyama Gardens Hawaii, Inc. dba Nani Mau Gardens, Inc. ("Petitioner" or "Applicant") initiated this proceeding pursuant to section 205-6, Hawaii Revised Statutes ("HRS"), and sections 15-15-95 and 15-15-96, Hawaii Administrative Rules ("HAR"). The Land Use Commission ("Commission"), having considered the entire record on this matter, hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

PROCEDURAL MATTERS

1. On April 6, 1994, the Applicant submitted to the County of Hawaii Planning Department ("Planning Department") a

request for a Sixth Amendment to the Special Permit that was originally approved by the Commission on October 17, 1973 under Docket No. SP73-159 ("Permit"), and amended by Decision and Orders dated September 5, 1984; February 18, 1988; October 31, 1989; July 24, 1991; and June 17, 1993. The Sixth Amendment to the Permit requested an amendment to Condition No. 8 of the Commission's Decision and Order dated June 17, 1993 relating to improvements to the Hawaii Belt Highway and the deletion of an approximately five-acre garden expansion area identified as TMK No.: 2-2-48: por. 11.

2. On July 28, 1994, a public hearing on the Sixth Amendment to the Permit was conducted by the County of Hawaii Planning Commission ("Planning Commission") pursuant to a public notice published in the Hawaii Tribune-Herald and West Hawaii Today on July 18, 1994. The Planning Commission did not receive any public testimony on the Sixth Amendment to the Permit.

3. On July 28, 1994, the Planning Commission recommended approval of the Sixth Amendment to the Permit to the Commission.

4. On August 8, 1994, a portion of the complete record of the Planning Commission's proceedings was received and accepted for consideration by the Commission. On September 2, 1994, the remaining portion of the record of the Planning Commission's proceedings was received and accepted for consideration by the Commission.

DESCRIPTION OF THE PROPERTY AND SURROUNDING AREAS

5. The approximately 58.786-acre Special Permit area¹ has been improved as a botanical garden with related improvements, and is known as Nani Mau Gardens. Nani Mau Gardens is situated at the corner of Makalika Street and Awa Street, Panaewa Farm Lots, Waiakea, South Hilo, Hawaii, and is identified as TMK No.: 2-2-48: por. 11 and 13 ("Property"). The existing structures and uses of the garden include greenhouses and garden pavilions, restaurant, snack shop, gift shop, fruit and vegetable stand, stables and equestrian trails, office, maintenance building, tram station and garage, and a single-family dwelling.

6. The Property is relatively level with slopes of 0 to 5%. Average annual rainfall is approximately 140 inches.

7. The Property has been previously cleared, making it unlikely that there are historic sites on the Property.

8. The Property does not appear to have any endangered flora or fauna.

9. Primary access to the Property from the Hawaii Belt Road is provided by Makalika Street, a County-maintained roadway having a pavement width of 18 feet within a 50-foot wide right-of-way. Awa Street, which would provide secondary access, also has a pavement width of 18 feet within a 50-foot wide right-of-way.

¹According to the Petitioner, an updated survey of TMK No.: 2-2-48: 13 indicated that the parcel is 53.793 acres, and not 53.786 acres as represented in previous amendments. Therefore, the current total acreage of the Special Permit area, including TMK No.: 2-2-48: por. 11, is approximately 58.793 acres.

10. County water is available to the Property via a 12-inch line. Water for irrigation purposes is available from a private well located within the Property.

11. Wastewater generated within the Property is disposed of within cesspools. All other essential utilities and services are available to the Property.

12. The Soil Conservation Service Soil Survey Report identifies the soils on the Property as the Papai series (rPAE), which consist of well-drained, thin, extremely stony organic soils over fragmental A'a lava. Permeability is rapid, runoff is slow, and the erosion hazard is slight. These soils are primarily in woodland. Small areas are used for pastures, orchards, and truck crops.

13. The Land Study Bureau ("LSB") Overall Master Productivity Rating system classifies soils within the Property as "E" or very poor for agricultural productivity.

14. The State Department of Agriculture's Agricultural Lands of Importance to the State of Hawaii map identifies soils within the Property as "Other Important Agricultural Lands."

15. According to the Flood Insurance Rate Maps prepared by the Federal Emergency Management Agency, the Property is located outside of the 500-year floodplain (Zone X).

16. Adjacent lands to the north, west, and east across Railroad Avenue are zoned A-10a by the Planning Department. Lands across Makalika Street to the south and immediately adjacent to the east are zoned A-3a. Mixed residential and agricultural uses surround the Property.

DESCRIPTION OF THE PROPOSED SIXTH AMENDMENT

17. The Applicant is requesting to delete the five-acre expansion area (TMK No.: 2-2-48: por. 11) that was approved by Decision and Order dated July 24, 1991. The Applicant had proposed the five-acre expansion area for a forested walking trail and a material and equipment stockpile area. The Applicant has since determined that a smaller and more compact area would accomplish the same objectives and functions of the original arboretum concept with lower development and maintenance costs. The Applicant had a lease to this five-acre area until the year 2000. The Applicant has since relinquished this lease and the five-acre area has been sold to another party. The Applicant has no further interest in these five acres.

The applicable conditions which would be affected by the Applicant's request to delete the five-acre area from the Property include the following Condition Numbers 2 and 3 of the Permit:

2. Petitioner shall provide a metes and bounds and map description of the 5-acre addition to the Special Permit area within one year from the effective date of this amendment.
3. Final Plan Approval for the expanded development, as approved under the fourth amendment by the State Land Use Commission - Decision and Order effective July 24, 1991, shall be secured by Petitioner from the Planning Department within one year from the date of consolidation approval. To assure adequate time for plan approval review and in accordance with Chapter 25-244 (Zoning Code), plans shall be submitted a minimum of forty-five days prior to the date by which plan approval must be secured. Plans shall include a landscaping buffer along the property lines adjacent to Parcels 12, 14, 91, 92, 97 and portion of 11. Parking shall comply with the requirements of

Chapter 25, Zoning Code and no parking variance from the Code shall be applied for. Additional parking for buses, vans and cars may be imposed at the time of plan approval. Parking for all functions shall be maintained on the subject properties.

18. The Applicant is also requesting an amendment to Condition Number 8 to allow an extension of time of five years in which to construct improvements to the Hawaii Belt Highway or sooner if vehicular traffic to the Nani Mau Gardens development reaches 3,500 vehicles per month (about 116 vehicles per day). Condition Number 8 currently states:

8. The Hawaii Belt Highway (Highway 11) shall be improved with a) a right-turn deceleration lane from the Hawaii Belt Highway onto Makalika Street; b) an acceleration lane for traffic entering the Hawaii Belt Highway from Makalika Street; c) additional street lighting in the vicinity of the Hawaii Belt Highway-Makalika Street intersection. The foregoing improvements shall meet the requirements and approval of the Department of Transportation-Highways Division. Highway improvements shall be constructed prior to the approval of an occupancy permit by the Planning Director for any portion of the expanded development approved under the fourth amendment by the State Land Use Commission - Decision and Order effective July 24, 1991, or within one year from the date of this amendment, whichever occurs first.

The Applicant has provided the following reasons for the time extension request:

- 1) Additional time necessary to prepare, approve, and construct intersection improvements;
- 2) Sluggish economic conditions have made the expansion of the garden facilities and the construction of off-site improvements financially imprudent; and,
- 3) Declining visitor counts have suspended the expansion of the garden facilities as envisioned by the Applicant in the fourth amendment to the Permit approved by the Commission in July 1991. Traffic levels have, therefore, been below levels

which would necessitate the required intersection improvements for the expanded facilities and functions.

19. On July 28, 1994, the Planning Commission approved the Applicant's Use Permit application to establish a nine-hole pitch and putt golf course on 12 to 15 acres of land located within the Property. The Applicant has represented that the proposed pitch and putt golf course would diversify the park and open space activities of the facility and help to attract a more diversified group of people to the area.

20. The Applicant has also represented that it intends to develop 18 to 20 1-acre lots around and within the Property to help underwrite some of the required off-site improvement costs, particularly the channelized intersection, and to generate funds to complete improvements within the balance of the arboretum area. The Applicant has submitted a rezoning application for these proposed lots to the Planning Department. The Applicant has represented that should the rezoning application be approved, it may be necessary to amend the Permit by deleting that portion of the Property (20 to 25 acres) from the Permit area.

21. The Applicant has represented that should the rezoning application be denied, the Applicant would like to retain the option of continuing and expanding its arboretum into this 20 to 25-acre area.

STATE AND COUNTY PLANS AND PROGRAMS

22. The Property is located within the State Land Use Agricultural District as reflected on the Commission's official map, H-66 (Hilo).

23. The Property is designated for Low Density Urban by the General Plan Land Use Pattern Allocation Guide Map.

24. The Property is zoned Agricultural-10 acres (A-10a).

25. The Property's current A-10a designation is recommended to be retained by the Hilo Community Development Plan Zone Guide Map.

26. The Property is not located within the Special Management Area of the County of Hawaii.

SUMMARY OF STATE AND COUNTY AGENCY COMMENTS

27. The County of Hawaii Department of Parks and Recreation, the County of Hawaii Department of Water Supply, the County of Hawaii Police and Fire Departments, the County of Hawaii Real Property Tax Office, the Waiakea Soil and Water Conservation District, the State Departments of Agriculture and Health, the Soil Conservation Service, and the Hawaiian Electric Light Company had no objections or comments on the Sixth Amendment to the Permit.

28. The Historic Preservation Division of the State Department of Land and Natural Resources noted that the Property has been cleared some time in the past and, therefore, it is unlikely that there are historic sites on the Property, so the proposed action should have "no effect" on historic sites.

29. The State Department of Transportation, Highways Division ("DOT"), recommended that the provision of street lighting at the Volcano Road/Makalika Street intersection be a condition of approval. DOT also recommended that highway

improvements required from this application be provided at no cost to the State and shall conform to the Hawaii Statewide Uniform Design Manual for Streets and Highways and the Specifications for Installation of Miscellaneous Improvements within State Highways. DOT further recommended that the Applicant provide traffic count data for the Volcano Road/Makalika Street intersection to DOT, and that the Applicant construct roadway improvements listed in letter HWY-H-91-2.0449 by July 1999, or sooner, should they be required for the traffic volumes at the intersection (to be determined by DOT).

30. The County of Hawaii Department of Public Works had the following comments:

Where will access to the pitch and putt golf course be located? What is the anticipated daily attendance for the golf course? The increase in traffic may warrant improvements to the existing County roads.

CONFORMANCE WITH THE SPECIAL USE PERMIT CRITERIA

31. In support of the Sixth Amendment to the Permit, the Planning Department provided the following comments related to the Sixth Amendment's conformance with the guidelines for "unusual and reasonable" use authorized by a Special Use Permit under section 15-15-95(b), HAR:

The granting of this request would continue to promote the effectiveness and objectives of Chapter 205, Hawaii Revised Statutes, as amended. In its approval of the 5-area garden expansion area in 1991, the State Land Use Commission found that the garden expansion "constitutes an 'unusual and reasonable' use as defined in Chapter 205-6, Hawaii Revised Statutes and the amendments are not contrary to the objectives sought to be accomplished by the State Land Use Law to preserve, protect and encourage development of lands in the State for those uses to which they are best suited in the interest of the public health and welfare." A favorable recommendation of the petitioner's request to delete the

5-acre garden expansion area subject to uses previously approved under Special Permit No. 247 would not compromise the integrity of the existing Nani Mau Gardens complex or the substance of the State Land Use Commission's initial approval of Special Permit No. 247 and amendments thereto. The petitioner cites no real property controlling interest in the 5-acre site since the lease to the area had been cancelled and the land subsequently sold to another party.

An amendment to Condition No. 8 to allow for the deferral of construction of improvements to the Hawaii Belt Highway-Makalika Street intersection is correlated to the postponement of plans for the expansion of the Nani Mau Gardens complex due to current economic conditions. Furthermore, the petitioner cites the additional time necessary to have the construction plans prepared and approved and the highway improvements constructed. According to the petition, "... the estimated cost of these improvements is pegged at \$455,000. While the applicant is prepared to make these improvements that would benefit the community at large, it can be realistically done only when financial conditions warrant the expansion of its project and in turn the off-site road improvements." The petitioner is requesting that Condition No. 8 be amended to allow an extension of time of 5 years in which to construct improvements to the Hawaii Belt Highway or sooner if vehicular traffic to the Nani Mau Gardens development reaches 3,500 vehicles per month (approximately 116 vehicles per day).

The Director is agreeable to the 5-year extension, but feels that a traffic volume of 3,500 vehicles per month to the gardens complex as a trigger for intersection improvements is not a true measure of impacts which may be generated at the Hawaii Belt Highway-Makalika Street intersection. The State Land Use Commission required these intersection improvements based on traffic generated by the gardens complex and its impacts at the affected intersection. It is recommended that these intersection improvements be provided at a time determined by the Department of Transportation or within 5 years from the date of this amendment, whichever occurs first. This will allow the Department of Transportation to utilize vehicle counts to the gardens complex and traffic volumes along the Hawaii Belt Highway in its determination of when intersection improvements are necessary.

A favorable recommendation of the amendment to Condition No. 8, as recommended, would allow the petitioner additional time to prepare and secure approval of the necessary construction drawings as well as to explore alternatives which would support the expansion of the gardens complex as approved under Special Permit No. 247 and the ability to

financially accommodate the attendant highway intersection improvements. Given the numerous components of the expanded development, it is difficult to determine which specific use would generate traffic which would warrant traffic improvements. A portion of the expanded development included the provision of coin-operated dispensing machines. Should the petitioner wish to proceed with only this portion of the expanded development, it would be difficult to structure a condition which would not trigger intersection improvements for such uses which would not adversely impact traffic volumes. With the many components of the expanded development, it is reasonable to structure an intersection-improvement condition around traffic volumes at the affected intersection. The burden of monitoring traffic conditions will be placed on the petitioner as part of this favorable recommendation. Therefore, a favorable recommendation of the requested amendments, as recommended, would not be contrary to the objectives of the State Land Use Law for the Agricultural district.

The desired use will not adversely affect the surrounding properties. The Nani Mau Gardens development was approved by the State Land Use Commission through the issuance of Special Permit No. 247 and amendments thereto upon findings that the development would not have an adverse impact to surrounding properties. A favorable recommendation of the requested amendments would not affect the general scope of the development as an arboretum. The deletion of the 5-acre expansion area will reduce the acreage of the overall development, but not its concept as a botanical garden. A deferral of intersection improvements is correlated to the deferral of the expansion of the gardens facilities. Therefore, the original findings of no adverse impact to surrounding properties are still applicable. Should the accompanying Use Permit be approved to allow the establishment of a pitch and putt golf course, then appropriate conditions relative to mitigating adverse impacts to surrounding properties will be provided for within the conditions of approval of the Use Permit.

The desired use will not unreasonably burden public agencies to provide roads and streets, sewers, water drainage, police and fire protection. As previously mentioned, the overall concept of the Nani Mau Gardens complex has not changed. Existing utilities and facilities are or will be made available to accommodate the existing development and its future expansion as approved under Special Permit No. 247. As previously discussed, the request, as recommended, is reasonable since it ties intersection improvements with traffic volumes. However, there is a concern regarding the provision of street lighting at the Hawaii Belt Highway-Makalika Street intersection as required by Condition No. 8. Unlike the deceleration/acceleration lanes required as part

of the future expansion of the complex, street lighting is not necessarily related to the traffic volume. As part of the State Land Use Commission's approval of the Fourth Amendment to Special Permit No. 247, the hours of operation of the restaurant and commercial uses was (sic) extended from a 7:00 p.m. closing time to 11:00 p.m. While the petitioner is requesting a reduction in the total acreage of the project site, the expansion of retail activities and hours of operation within the remaining project area will still be permitted as approved under the State Land Use Commission's third and fourth amendments to the subject permit. Therefore, expanded operational activities during evening hours would generate commercial traffic through the Hawaii Belt Highway-Makalika Street intersection at night. The provision of street lighting at this intersection is purely a safety measure and should be provided irregardless of the amount of traffic generated by the gardens complex. It is recommended that Condition No. 8 be amended to require the installation of street lighting at the affected intersection within six (6) months from the effective date of the amended Special Permit, should it be approved by the State Land Use Commission.

A favorable recommendation of the requested amendments, as revised, would not be contrary to the original reasons for granting of the Special Permit by the State Land Use Commission by Decision and Order dated October 17, 1973, and its subsequent amendments. Therefore, a favorable recommendation would still be consistent with the following remaining standards for approval of a Special Permit or its amendment:

- Unusual conditions, trends and needs have arisen since the district boundaries and regulations were established.
- The use will not substantially alter or change the essential character of the land and the present use.
- The land upon which the proposed use is (sought is) marginally suitable for the uses permitted within the district.
- The proposed use is consistent with the goals, policies and standards of the General Plan.

Based on the above considerations, an amendment to Condition No. 8 (improvements to Hawaii Belt Highway) and the deletion of the 5½ acre garden expansion area as approved under Special Permit 247, would not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations.

PLANNING COMMISSION RECOMMENDATION

32. On July 28, 1994, the Planning Commission voted to recommend approval of the Sixth Amendment to the Permit to the Commission subject to the following amended conditions of the Commission's July 24, 1991 and June 17, 1993 Decision and Orders:

1. Petitioner, successors or assigns shall be responsible for complying with all conditions of approval.
2. Final Plan Approval for the expanded development, as approved under the fourth amendment by the State Land Use Commission - Decision and Order effective July 24, 1991, and exclusive of the 5-acre addition to the Special Permit area (portion of Parcel 11), shall be secured by the Petitioner from the Planning Department within one year from the date of this amendment. To assure adequate time for plan approval review and in accordance with Chapter 25-244 (Zoning Code), plans shall be submitted a minimum of forty-five days prior to the date by which plan approval must be secured. Plans shall include a landscaping buffer along the property lines adjacent to parcels 12, 14, 91, 92, and 97. Parking shall comply with requirements of Chapter 25, Zoning Code and no parking variance from the Code shall be applied for. Additional parking for buses, vans and cars may be imposed at the time of plan approval. Parking for all functions shall be maintained on the subject properties.
3. Construction of the various improvements shall commence within one year from the date of receipt of Final Plan Approval and shall be completed within two years thereafter.
4. The regular hours of operation for the arboretum shall be limited between 8 a.m. and 11 p.m., provided, however, that the arboretum may remain open until 11 p.m. for special events. The secondary uses (i.e., restaurant, retail gift shop, equestrian trails, agricultural museum, exhibits) shall operate only during arboretum hours.
5. Retail commercial activities shall be confined to: a) a 25,000-square foot area, including the existing main structure, outdoor dining area, and two proposed snack shops; b) the proposed fruit/vegetable stand and the agricultural museum; and c) coin-operated dispensing machines and mobile vendors. For the purposes of this conditions, retail commercial activities do not include

the aviary/animal exhibits and equestrian stables and trails.

6. Main access to the development from Makalika Street shall be restricted to three entrance/exit driveways as approved by the Department of Public Works. Additional accesses from Awa and Makalika Streets may be permitted as service driveways which shall meet with the requirements of the Department of Public Works. No access shall be allowed from Railroad Avenue unless and until it has been improved to County dedicable standards.
7. The Hawaii Belt Highway (Highway 11) shall be improved with a) a right-turn deceleration lane from the Hawaii Belt Highway onto Makalika Street; b) an acceleration lane for traffic entering the Hawaii Belt Highway from Makalika Street; and c) additional street lighting in the vicinity of the Hawaii Belt Highway-Makalika Street intersection. The foregoing improvements shall meet with the requirements and approval of the Department of Transportation-Highways Division. Highway improvements, with the exception of additional street lighting, shall be constructed within five (5) years from the date of this amendment or when traffic volumes at the Hawaii Belt Highway-Makalika Street intersection reach levels warranting such improvements as determined by the State Department of Transportation or Department of Public Works, whichever occurs first and by whichever agency is applicable. The petitioner shall submit annual traffic volume counts to the State Department of Transportation for traffic turning onto Makalika from the Hawaii Belt Highway and from Makalika Street onto the Hawaii Belt Highway. The initial report shall be submitted within 6 months from the effective date of this amendment and annually thereafter. Additional street lighting in the vicinity of the Hawaii Belt Highway-Makalika Street intersection shall be provided within one (1) year from the effective date of this amendment.
8. A drainage system in accordance with the requirements of the County Department of Public Works shall be installed.
9. All other applicable laws, rules, regulations, and requirements, including those of the State Department of Health, shall be complied with.
10. An annual progress report shall be submitted to the State Land Use Commission, County Planning Commission, and County Planning Director prior to the anniversary date of the approval of this amendment. The report

shall address the status of the development and the compliance with the conditions of approval. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.

11. An extension of time for the performance of conditions within 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 or zoning code; c) granting of the time extension would not be contrary to the original reasons for the granting of the permit; and 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). Further should any of the conditions not be met or substantially complied with in a timely fashion, the Director may initiate procedures to nullify the permit.

LAND USE COMMISSION DETERMINATION

33. On September 22, 1994, at the Commission's meeting on this matter in Kailua-Kona, Hawaii, the Commission noted that there appeared to be typographical errors in the representation of certain conditions imposed by the Planning Commission in its recommendation. The Commission clarified that its consideration of the proposed Sixth Amendment to the Permit is based on the conditions imposed by the Commission and as represented in its Decision and Orders dated July 24, 1991 and June 17, 1993.

34. The Commission adopts the County Planning Department and Planning Commission's findings of "unusual and reasonable" use and the conditions provided by the Sixth

Amendment; provided, that the Commission amends said conditions in the manner provided herein.

35. Any findings of fact that may be a conclusion of law shall be deemed a conclusion of law.

CONCLUSIONS OF LAW

The Applicant's request for a Sixth Amendment to the Permit to amend Condition Number 8 of the Decision and Order dated June 17, 1993 relating to improvements to the Hawaii Belt Highway and to delete a five-acre garden expansion area, identified as TMK No.: 2-2-48: por. 11, is not contrary to the objectives ought to be accomplished by the State Land Use Law under chapter 205, HRS, to preserve, protect, and encourage development of lands in the State for those uses to which they are best suited in the interest of the public health and welfare.

ORDER

IT IS HEREBY ORDERED that the Applicant's request for the Sixth Amendment to the Permit to amend Condition Number 8 of the Decision and Order dated June 17, 1993 relating to improvements to the Hawaii Belt Highway and to delete a five-acre garden expansion area, identified as TMK No.: 2-2-48: por. 11, and approximately shown on Exhibit "A" attached hereto and incorporated by reference herein, is hereby approved subject to the following conditions to replace all previous conditions imposed on the Permit:

1. Petitioner, successors or assigns shall be responsible for complying with all conditions of approval.

2. Final Plan Approval for the expanded development, as approved under the fourth amendment by the State Land Use Commission - Decision and Order effective July 24, 1991, and exclusive of the 5-acre addition to the Special Permit area (portion of Parcel 11), shall be secured by Petitioner from the Planning Department within one year from the date of this amendment. To assure adequate time for plan approval review and in accordance with Chapter 25-244 (Zoning Code), plans shall be submitted a minimum of forty-five days prior to the date by which plan approval must be secured. Plans shall include a landscaping buffer along the property lines adjacent to parcels 12, 14, 91, 92, and 97. Parking shall comply with requirements of Chapter 25, Zoning Code and no parking variance from the Code shall be applied for. Additional parking for buses, vans and cars may be imposed at the time of plan approval. Parking for all functions shall be maintained on the subject properties.

3. Construction of the various improvements shall commence within one year from the date of receipt of Final Plan Approval and shall be completed within two years thereafter.

4. The regular hours of operation for the arboretum shall be limited between 8 a.m. and 7 p.m., provided, however, that the arboretum may remain open until 11 p.m. for special events. The secondary uses (i.e., restaurant, retail gift shop, equestrian trails, agricultural museum, exhibits) shall operate only during arboretum hours.

5. Retail commercial activities shall be confined to:
a) a 25,000-square foot area, including the existing main

structure, outdoor dining area, and two proposed snack shops; b) the proposed fruit/vegetable stand and the agricultural museum; and c) coin-operated dispensing machines and mobile vendors. For the purposes of this condition, retail commercial activities do not include the aviary/animal exhibits and equestrian stables and trails.

6. Main access to the development from Makalika Street shall be restricted to three entrance/exit driveways as approved by the Department of Public Works. Additional accesses from Awa and Makalika Streets may be permitted as service driveways which shall meet with the requirements of the Department of Public Works. No access shall be allowed from Railroad Avenue unless and until it has been improved to County dedicable standards.

7. The Hawaii Belt Highway (Highway 11) shall be improved with a) a right-turn deceleration lane from the Hawaii Belt Highway onto Makalika Street; b) an acceleration lane for traffic entering the Hawaii Belt Highway from Makalika Street; c) additional street lighting in the vicinity of the Hawaii Belt Highway-Makalika Street intersection. The foregoing improvements shall meet the requirements and approval of the Department of Transportation-Highways Division. Highway improvements, with the exception of additional street lighting, shall be constructed within five (5) years from the date of this amendment or when traffic volumes at the Hawaii Belt Highway-Makalika Street intersection reach levels warranting such improvements as determined by the State Department of Transportation or

Department of Public Works, whichever occurs first and by whichever agency is applicable. The Petitioner shall submit annual traffic volume counts to the State Department of Transportation for traffic turning onto Makalika from the Hawaii Belt Highway and from Makalika Street onto the Hawaii Belt Highway. The initial report shall be submitted within 6 months from the effective date of this amendment and annually thereafter. Additional street lighting in the vicinity of the Hawaii Belt Highway-Makalika Street intersection shall be provided within one (1) year from the effective date of this amendment.

8. A drainage system in accordance with the requirements of the County Department of Public Works shall be installed.

9. All other applicable laws, rules, regulations, and requirements, including those of the State Department of Health, shall be complied with.

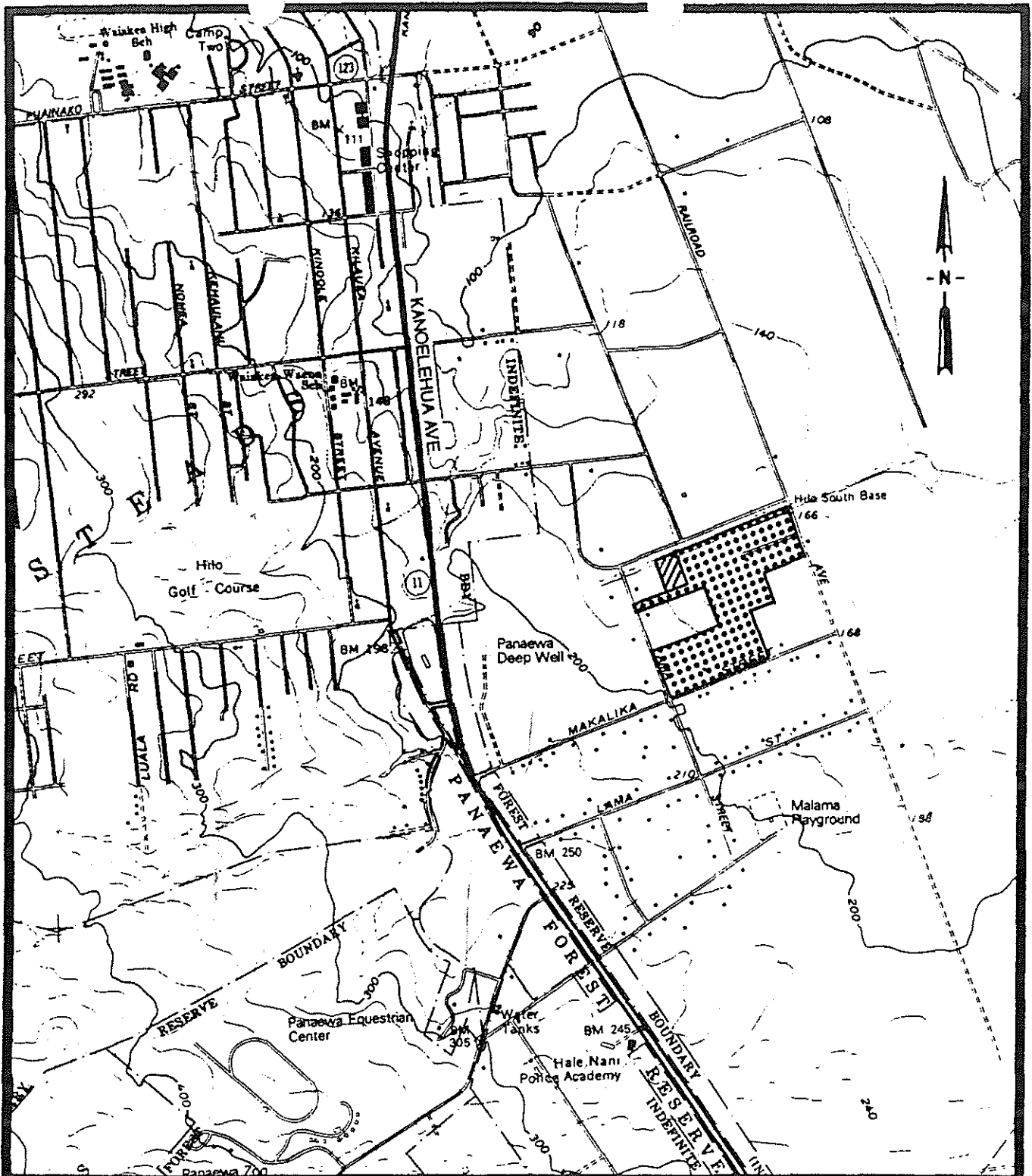
10. An annual progress report shall be submitted to the State Land Use Commission, County Planning Commission, and County Planning Director prior to the anniversary date of the approval of this amendment. The report shall address the status of the development and the compliance with conditions of approval. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.

11. Should any of the conditions not be met or substantially complied within a timely fashion, the Planning

Director of the County of Hawaii may initiate procedures to nullify the Permit.

12. The Petitioner shall file an amendment to the Special Permit to the Hawaii County Planning Commission to delete the acreage comprising the 9-hole pitch and putt golf course from the Special Permit area.

13. The Petitioner shall file an amendment to the Special Permit to the Hawaii County Planning Commission upon receiving approval of its rezoning application from the County to delete the acreage comprising the proposed 18-20 one-acre lots from the Special Permit area.



LOCATION MAP

DOCKET NO. SP73-159 / TOYAMA GARDENS HAWAII, Inc.
dba NANI MAU GARDENS, Inc. (6th Amendment)
TAX MAP KEY NO.: 2-2-48: por. 11 and 13
WAIAKEA, SOUTH HILO, HAWAII

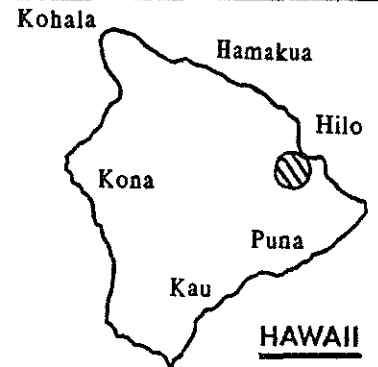
SCALE: 1" = 2,000 ft.±



SPECIAL PERMIT AREA



DELETED AREA



BEFORE THE LAND USE COMMISSION
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State Land Use Agricultural)	
District at Waiakea, South Hilo,)	
Hawaii, Tax Map Key No.: 2-2-48:)	
por. 11 and 13)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Findings of Fact, Conclusions of Law, and Decision and Order Amending Conditions of the Decision and Orders Dated July 24, 1991 and June 17, 1993 was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

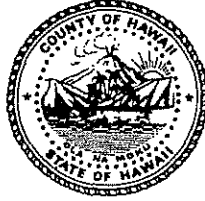
CERT. VIRGINIA GOLDSTEIN, Planning Director
Planning Department, County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720

CERT. SIDNEY FUKU, Petitioner
Sidney Fuku and Associates
100 Pauahi Street, Suite 212
Hilo, Hawaii 96720

DATED: Honolulu, Hawaii, this 24th day of October 1994.



ESTHER UEDA
Executive Officer



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

August 31, 2009

Mr. Ken Fujiyama
Nani Mau, Inc.
421 Makalika Street
Hilo, HI 96720

Dear Mr. Fujiyama:

Amendment to Special Permit 73-159 (PD File No. 247)

Applicant: Nani Mau, Inc.

Request: Amend SP 73-159 to Allow the Conversion of the Existing
Maintenance Building to a Charter School

Tax Map Key: 2-2-48:13

The Windward Planning Commission at its duly held public hearing on August 7, 2009, voted to forward a favorable recommendation to the State Land Use Commission for an amendment to Special Permit No. 73-159 to allow the conversion of a maintenance building and former salon into a charter school facility on a 23-acre area within the State Land Use Agricultural District. The property is part of the Nani Mau Gardens complex located along the north side of Makalika Street, Pana'ewa Farm Lots Subdivision, Wai'ākea, South Hilo, Hawai'i.

The favorable recommendation for this request is based on the following:

The granting of this request would promote the effectiveness and objectives of Chapter 205, Hawai'i Revised Statutes, as amended. The State Land Use Law Rules and Regulations are intended to preserve, protect and encourage the development of lands for those uses to which they are best suited in the interest of the public welfare of the people of the State of Hawaii. Docket No. SP73-159 was approved by the State Land Use Commission on October 17, 1973, to allow the establishment of a commercial arboretum (Nani Mau Gardens) for public tours and the sale of agricultural products on the property. Since the approval of Docket No. SP73-159, the State Land Use Commission approved nine amendments to the permit.

The applicant requests an amendment to LUC Docket No. SP 73-159 to allow the conversion of a maintenance building and former salon to a charter school facility within the Nani Mau complex. The maintenance building and salon are located next to the main parking area; the maintenance building was previously used as office space and a maintenance shop. According to the applicant, "Connections Public Charter School reports that there are 105 students enrolled with 7 staff members at the school with approximately 70-75 students bused in daily. This corresponds to an expected increase in car trips by approximately 75 per day or 1,332 car trips per month."

The request was originally received by the Planning Department on January 20, 2006. (By letter dated June 18, 2009, the applicant amended the request to include the salon as well as the maintenance building for the conversion to a charter school after a site inspection confirmed that the salon was being used for the school). It was subsequently discovered that the *Decision and Order Approving a Ninth Amendment to a Special Use Permit* dated May 24, 2005 issued by the State Land Use Commission (LUC) included a new condition that required the submittal of a Traffic Impact Analysis Report (TIAR) in the event of a future amendment request that "involves either additional uses beyond those which are currently allowed or the expansion of the retail commercial area beyond 25,000 square feet..." The condition further stated that the TIAR "is subject to the review and approval of the State Department of Transportation and the County of Hawai'i." Based on the condition imposed by the LUC, by letter dated March 7, 2006, the Planning Department notified the applicant that the request will be held in abeyance until such time that a TIAR was approved by the DOT and the County.

On August 1, 2006, the applicant submitted a TIAR (dated July 28, 2006) conducted by M&E Pacific, Inc. to the DOT, LUC and Planning Department. The applicant requested the DOT provide the results of the review to the LUC and the Planning Department. On May 11, 2009, the Department of Transportation approved the TIAR.

The request to convert a maintenance building and salon to a charter school would not be contrary to Chapter 205, Hawai'i Revised Statutes. A favorable recommendation of the request would not compromise the integrity of the existing Nani Mau Gardens complex or the substance of the State Land Use Commission's initial approval of Docket No. SP73-159 and amendments thereto.

The desired use will not adversely affect surrounding properties. The Nani Mau Gardens development was approved by the State Land Use Commission through the issuance of Docket No. SP73-159 and amendments thereto upon findings that the development would not have an adverse impact to surrounding properties. A favorable recommendation of the request would not affect the general scope of the development as an arboretum.

The applicant states that traffic generated by the project relative to the overall ambient level is minimal. The applicant projects an increase in car trips by approximately 75 per day or 1,332 car trips per month. Further, the daily visitor count has dropped since 2004. The applicants states "the existing heavy usage of Highway 11 should encourage parents to access Makalika Street through the Railroad Avenue intersection."

The desired use will also not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, police and fire protection. Utilities and facilities are available to accommodate the proposed use. Agencies reviewing the request had no major objections to the request. The DOT has approved the TIAR dated July 28, 2006, and stated that "should the charter school operations be significantly greater than as characterized, follow-up traffic analyses and measures to mitigate any project generated traffic impacts may be required." The applicant's June 2, 2009 letter containing the revised traffic count has been forwarded to the Department of Transportation and Department of Public Works for their review. As of this writing, no comments were received from either agency.

Based on the above, the request to convert a maintenance building and a former salon to a charter school facility would not be contrary to the objectives sought to be accomplished by the State Land Use Law Rules and Regulations and the original reasons for approval of Docket No. SP73-159 by the State Land Use Commission by Decision and Order dated October 17, 1973 and subsequent amendments (material to be deleted is bracketed and struck-through; material to be added is underscored):

1. Petitioner, successors or assigns shall be responsible for complying with all of the conditions of approval.
2. Final Plan Approval for the expanded development, as approved under the fourth amendment by the State Land Use Commission - Decision and Order effective July 24, 1991, and exclusive of the 5-acre addition to the Special Permit area (portion of Parcel 11), shall be secured by petitioner from the Planning Department within one year from the date of this amendment. To assure adequate time for plan approval review and in accordance with Chapter 25-244 (Zoning Code), plans shall be submitted a minimum of forty-five days prior to the date by which plan approval must be secured. Plans shall include a landscaping buffer along the property lines adjacent to Parcels 12, 14, 91, 92, and 97. Parking shall comply with the requirements of Chapter 25, Zoning Code and no parking variance from the Code shall be applied for. Additional parking for buses, vans and cars may be imposed at the time of plan approval. Parking for all functions shall be maintained on the subject properties.

- ~~[3. Construction of the various improvements shall commence within one year from the date of receipt of Final Plan Approval and shall be completed within two years thereafter.]~~
- [4.] 3. The regular hours of operation for the arboretum shall be limited between 8 a.m. and 7 p.m., provided, however, that the arboretum may remain open until 11 p.m. for special events. The secondary uses (i.e., restaurant, retail gift shop, exhibits) shall operate only during arboretum hours.
- [5.] 4. Retail commercial activities shall be confined to: a) a 25,000-square foot area, including the existing main structure and outdoor dining area; and b) coin-operated dispensing machines and mobile vendors. For the purposes of this condition, retail commercial activities do not include the aviary/animal exhibits.
5. The regular hours of operation for the charter school shall be limited to 7:00 a.m. to 6:00 p.m. Mondays through Fridays provided that the school may remain open until 10:00 p.m. and on weekends for special events such as parent teacher conferences, PTA meetings, and other meetings and events for student activities.
6. Main access to the development from Makalika Street shall be restricted to three entrance/exit driveways as approved by the Department of Public Works. Additional accesses from Awa and Makalika Streets may be permitted as service driveways which shall meet with the requirements of the Department of Public Works. No access shall be allowed from Railroad Avenue unless and until it has been improved to County dedicable standards.
7. A drainage system in accordance with the requirements of the County Department of Public Works shall be installed.
8. All other applicable laws, rules, regulations, and requirements, including those of the State Department of Health, shall be complied with.
9. An annual progress report shall be submitted to the State Land Use Commission, County Planning Commission, and County Planning Director prior to the anniversary date of the approval of this amendment. The report shall address the status of the development and the compliance with conditions of approval. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.

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10. Should any of the conditions not be met or substantially complied within a timely fashion, the Planning Director of the County of Hawaii may initiate procedures to nullify the Permit.

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,



Rell Woodward, Chairman
Windward Planning Commission

Lnanimauspp247(73-159)PC

cc: Department of Public Works
Department of Water Supply
County Real Property Tax Division
State Land Use Commission
Department of Land & Natural Resources-HPD
DOT-Highways, Honolulu
Mr. Gilbert Bailado /