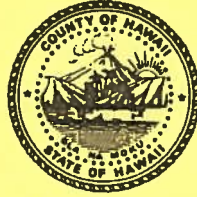


Harry Kim  
Mayor



Christopher J. Yuen  
Director  
Brad Kurokawa, ASLA  
LEED® AP  
Deputy Director

County of Hawaii  
PLANNING DEPARTMENT

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

August 28, 2006

R. Ben Tsukazaki, Esq.  
Tsukazaki, Yeh & Moore  
85 W. Lanikaula Street  
Hilo, HI 96720-4199

Dear Mr. Tsukazaki:

Special Permit No. 944  
Applicant: Big Island County Club & Estates  
Request: Time Extension to Condition No. 7 (Construction)  
Subject: Acknowledge Receipt of Withdraw Letter Dated August 17, 2006  
TMK: 7-1-5: Portion of 41

This is to acknowledge receipt of your letter dated August 17, 2006 requesting to withdraw the above referenced amendment request. Based on your request, we will withdraw your Special Permit Amendment application.

If you have any questions, please feel free to contact Jeff Darrow at 961-8288, ext 259.

Sincerely,

CHRISTOPHER J. YUEN  
Planning Director

JWD:smn

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AUG 29 2006

COLIN L. LOVE, #1795  
Post Office Box 2072  
Kailua-Kona, Hawaii 96745  
Telephone No.: 329-2460

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PLANNING DEPT.  
COUNTY OF HAWAII

Contested Case Hearing Officer

BEFORE THE PLANNING COMMISSION  
COUNTY OF HAWAII

In the Matter of the Application ) SPP 95-24  
 )  
of ) REPORT OF HEARING OFFICER  
 )  
BIG ISLAND COUNTRY CLUB & )  
ESTATES )  
for a Special Permit for lands situated )  
at Puuanahulu, North Kona, Hawaii, )  
Tax Map Key No. (3<sup>rd</sup>) 7-1-5:Por. 31, 34 )  
and 39 )  
\_\_\_\_\_ )

**REPORT OF HEARING OFFICER**

The undersigned hearing officer conducted an evidentiary hearing on June 3 - 4, 1996, pursuant to the rules of the County of Hawaii Planning Commission. Present at the contested case hearing were Sandra Pechter Schutte, Esq., representing Big Island Country Club & Estates, (BICC); Michael J. Matsukawa, Esq., representing Sally Rice ("Rice") and Debralee Kailiwai-Ray ("Ray"); Rodney Inaba ("Inaba") represented himself; and Richard Wurdeman, Esq., representing the Hawaii County Planning Department.

**FINDINGS OF FACT**

After having heard all of the testimony, read the transcript of the Contested Case Hearing, and reviewed all of the documentary exhibits<sup>1</sup>, including the entire Official Record File of

<sup>1</sup> Rice's and Ray's (collectively called "Intervenors") Exhibits A, B, C, D, and N were received into Evidence. Intervenors' exhibits E, F, G, H, I, J, K, L, M, P, and Q were withdrawn by Intervenors. Intervenors' Exhibit O was not admitted, but Intervenors were allowed to refer to and read portions of Exhibit O and R through OO during the examination and cross-examination of witnesses. Intervenors' Exhibits PP through III were withdrawn. The exhibits provided to the Hearing Officer by the deposition reporter included Intervenors' Exhibits R through OO, but they were not read by the Hearing Officer because they had not been received into evidence.,

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the Special Use Permit No. 95-24, and being fully apprised of all of the facts and circumstances of the matter as presented, the Hearing Officer now makes the following Findings of Fact:<sup>2</sup>

1. On December 18, 1995, Big Island Country Club and Estates (BICC) submitted an amendment to its special permit application to the Hawaii County Planning Commission (HCPC), under which the lodge was relocated to a ten-acre site within BICC's property on a portion of TMK No. 7-1-05:41.

2. Public hearings were held by the HCPC on the special permit application on December 13, 1995, February 1, 1996 and March 14, 1996.

3. At the December 13, 1995 hearing, requests were submitted by Rice and Ray (collectively called "Intervenors") for a contested case hearing on the application.

4. On February 1, 1996, the HCPC voted to hold a contested case hearing on BICC's special permit application.

5. The HCPC also granted Rice and Ray standing as parties to the proceeding.

6. On February 6, 1996, Inaba submitted a request to the HCPC to be admitted as a party to the contested case proceeding, and on March 14, 1996, the HCPC granted Inaba's request, admitting Inaba as a party.

7. On March 14, 1996, the HCPC appointed Colin L. Love as the hearing officer to preside over the contested case proceeding.

8. The contested case hearing on the special permit application was held on June 1 and 2, 1996 at the Kona Surf Hotel in Kailua-Kona, Hawaii.

9. At the contested case hearing, the hearing officer heard arguments on Rice and Ray's Motion to Dismiss Application for Lack of Jurisdiction or in the Alternative Motion for Stay of Proceedings to Determine Jurisdiction dated May 18, 1996, and after hearing arguments on the motion, found that the HCPC had jurisdiction over BICC's application.

10. As of the date of the contested case hearing, BICC had submitted a complete application for determination by the HCPC. In addition, the Planning Director, who is the technical advisor to the HCPC, found the application to be complete.

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<sup>2</sup> To the extent the findings herein also constitute conclusions of law or are mixed findings of fact and conclusions of law, they shall be treated accordingly. Similarly, to the extent that the conclusions herein constitute findings of fact, they shall be treated accordingly.

11. The special permit sought by BICC is part of a golf course project which is under construction by BICC on its 425-acre parcel of land ("BICC's land").

12. The entire parcel is situated within the State Land Use Agricultural District.

13. The plan for BICC's land includes the development of a 27-hole golf course a golf clubhouse complex with dining facilities, golf pro shop, golf cart storage area, meeting facilities, exercise room, locker and restrooms, tennis courts and swimming pool; and 106 one-acre agricultural/residential lots surrounding the golf course.

14. BICC's plan also includes the development of a community park and volunteer fire station on BICC's land.

15. The golf course with related improvements (clubhouse with dining facilities, pro shop and golf cart storage area), and one-acre lots are permitted uses within the State Land Use Agricultural District, pursuant to the State Land Use law, Chapter 205, HRS.

16. The County of Hawaii requires the issuance of a use permit from the HCPC, pursuant to Section 25-28 of the Hawaii County Code ("HCC"), for any golf course. Such a permit was issued by the HCPC for the BICC golf course and its clubhouse on March 13, 1990, as Use Permit No 74.

17. The one-acre lots, which are part of BICC's development plan, required the rezoning of BICC's land from Unplanned (U) to Agricultural with a minimum lot size of one acre (A-1a), and the County rezoned the property to this zoning designation under Ordinance No. 94-78, in 1994.

18. The expanded use of the clubhouse complex, adding meeting facilities, exercise room, locker and restrooms, tennis courts and swimming pool, the community park and the volunteer fire station, are not permitted uses within the State Land Use Agricultural District and required a special permit from the HCPC. Such a special permit was issued by the HCPC on March 1, 1994 as Special Permit No. 93-24.

19. No evidence was presented to show that the Applicant developed the concept of a "private, member's only" lodge earlier than 1995.

20. No evidence was presented to show that a private member's only lodge was intended for the project at the time the Special Use Permit Application that resulted in SP 93-24 was submitted.

21. No evidence was presented to show that submitting the Special Use Permit Application for the lodge separate from the prior Special Use Permit Application was part of a scheme or device to avoid the requirements of HRS Chapter 205 or Rule 6 of the Planning Commission Rules of Practice and Procedure.

22. No evidence was presented to show that the inclusion of a private member's only lodge in the project was the result of anything other than changes in the economic climate and a need on the part of the Applicant to make the project more competitive in the market.

23. The lodge was intended by BICC to provide an amenity to attract membership in its golf course.

24. The ten-acre site on which the lodge is proposed to be located (the "Lodge Site") is situated on the makai side of the Mamalahoa Highway at Puuanahulu, North Kona, Hawaii.

25. Although BICC's application, as originally submitted, showed the lodge to be situated near the clubhouse, within portions of three separate tax map parcels, TMK Nos.: 7-1-5:31, 34 and 39, it was subsequently amended, because of public comments regarding visual impacts of the lodge, to relocate the building approximately 100 yards away from the clubhouse at its present location on TMK No.: 7-1-5:41.

26. The Lodge Site is designated Agriculture under the State Land Use system. The Land Use Pattern Allocation Guide (LUPAG) Map of the County General Plan designates the Lodge Site for Intensive and Extensive Agricultural uses.

27. The Lodge Site is entirely surrounded by BICC's land.

28. A significant portion of the surrounding BICC land area has been developed into the first 18 holes of its golf course, and the building permit for the golf clubhouse has been issued. The Lodge Site and the remainder of BICC's land is not being used at the present time.

29. Physical access to BICC's land is by means of the Mamalahoa Highway, a State owned road.

30. The Lodge Site and the surrounding BICC land were used in the past for cattle grazing. Also, corn was raised on a portion of BICC's land.

31. The Land Study Bureau's detailed land classification system, which rates land within the State from Class A (highest rating) down to Class E (poorest rating) designates the overall (master) productivity rating of the Lodge Site as "D" poor and "E" very poor.

32. Although there are identified archaeological sites on BICC's land, there are no such sites where the lodge is proposed.

33. There are no known endangered or threatened plant species on the Lodge Site.

34. There is some usage of BICC's land by the threatened Nene or Hawaiian goose, and to a limited degree by the Hawaii hoary bat. The area is not a known habitat for any other endangered animal species.

35. Without the benefit of extensive irrigation, the land at the site of the proposed lodge is not economically suited for agriculture.

36. Standing on its own, a 10-acre parcel of land on the Subject Property, without the benefit of water supplied as part of the development, is not suited for the uses permitted in a State Land Use Agricultural district.

37. BICC's land is designated on the US Army Corps of Engineers' Federal Insurance Rate Maps as being within Zone "X" or an area that is outside of the 500-year floodplain.

38. There are no known drainage problems either on the Lodge Site or on BICC's land.

39. Homestead and rural-residential lots are located adjacent to and to the mauka side of BICC's land.

40. Puu Lani Ranch Subdivision, an upscale agricultural-residential subdivision with one-acre lots, is situated on the mauka side of the Mamalahoa Highway.

41. There are approximately 850 to 900 acres of privately owned land, including BICC's land, within the Puuanahulu area. This 850 to 900 acres, which is all classified as State Land Use Agricultural land, is an island of private lands, completely surrounded by State owned land.

42. Rice resides near BICC's land, on leased land situated on the mauka side of the Mamalahoa Highway.

43. Ray lives near BICC's land on family owned land situated on the mauka site of the Mamalahoa Highway.

44. Inaba owns an undivided interest in a portion of BICC's land, designated by TMK Nos.: 7-1-05:29 and 30, which is approximately 300 to 400 years away from the Lodge Site. Inaba owns no interest in the Lodge Site.

45. The lodge, proposed by BICC, is intended to be used by golf course members to provide them with the convenience of overnight accommodations.

46. Only sleeping accommodations are proposed for the lodge.

47. No restaurant, bar, retail outlets or other amenities usually found in a resort type hotel are proposed to be in or a part of the lodge.

48. The lodge is proposed to contain 50 rooms or units, having an estimated capacity of 100 persons, and a separate lobby and registration area are also proposed.

49. The present plans for the building propose a two-story structure with the maximum height not exceeding 35 feet.

50. The building area is proposed to be somewhere between 40,000 to 50,000 square feet.

51. The addition of the lodge to the project will enhance the golf course, and it will make membership in the private organization more attractive.

52. BICC proposes to construct and maintain, in private ownership, the road leading to the Lodge Site.

53. Neither the State nor the County will be required to construct or maintain the roads leading to the Lodge Site.

54. BICC also proposes to construct a left turn lane and acceleration and deceleration lanes along the Mamalahoa Highway providing access into BICC's land in order to mitigate the traffic impacts of BICC's entire project on the public highway.

55. The lodge will not produce a noticeable difference in off-site traffic.

56. The wastewater disposal system for the project, the subdivision lots, the clubhouse and the lodge are under the jurisdiction of the State of Hawaii Department of Health

57. BICC has developed two wells as the water source to provide potable and irrigation water from a private groundwater system for all of its lands, including the Lodge Site.

58. The County of Hawaii Department of Water Supply has not made a recent, independent evaluation of the water available to the project.

59. BICC has installed an electrical substation for the Puuanahulu area in conjunction with its entire project.

60. BICC has yet to design and construct a drainage system to dispose of surface water on its property. These facilities will be addressed later in the project.

61. Solid waste generated by the lodge can be disposed of at the County landfill at Punanahulu. There is sufficient capacity at this County facility to handle the solid waste from the lodge.

62. There have been numerous complaints made by local residents about excessive dust from the project

63. The Applicant, or its predecessor-in-interest, started construction on the project without having a mitigation plan approved by the US Fish and Wildlife Service and the State Department of Land and Natural Resources.

64. The Applicant does not have a mitigation plan approved by the US Fish and Wildlife Service and the State Department of Land and Natural Resources.

65. BICC does not have an ownership interest or a right to represent Inaba or his co-owners.

66. BICC filed an application for consolidation and re-subdivision of properties that include the property owned by Inaba and his co-owners without their authority.

67. BICC's proposed lodge should not unreasonably burden public agencies to provides roads and streets, sewers, water, drainage, school improvements and police and fire protection.

68. Since the district boundaries and regulations were first established in the 1960s there has been a trend which has converted the Puuanahulu area from a cattle grazing area to a golf course and small agricultural-residential lot area.

69. The proposed lodge will not substantially alter or change the essential character of the land and its present use because the Punanahulu area has already changed from a traditional agricultural area to a suburban area with the establishment of upscale one-acre agricultural and residential lots.



70. The Planning Director, whose responsibility includes making recommendations to the HCPC regarding permits to be issued by the HCPC, compared the application with the standards for approval of special permits under the Commission Rules, and has recommended that a special permit be issued to BICC for its proposed lodge, subject to certain performance conditions.

71. The proposed lodge will not adversely affect surrounding properties.

### CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the following Conclusions of Law are made:

1. The Commission has jurisdiction over the subject matter of this special permit application as well as the parties involved herein.

2. A complete special permit application was submitted to the HCPC by BICC.

3. The use of 10-acres for a 50 unit private lodge is not contrary to the objectives sought to be accomplished by Land Use Law and Regulations.

4. The use of 10-acres at the location on the Subject Property indicated for the 50-unit private lodge will not adversely affect surrounding properties.

5. The use of 10-acres for a private, 50-unit lodge will not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection.

6. Unusual conditions, trends, and needs have arisen since the district boundaries and regulations were established.

7. The land upon which the proposed use sought is unsuited for the uses permitted within the district.

8. The proposed use will not substantially alter or change the essential character of the land and the present use.

9. The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design Plans.

10. No further review of BICC's special permit application for its lodge by the State Land Use Commission is required.

11. A special permit for the lodge proposed by BICC may be issued under Section 205-6, HRS and Rule 6 of the Commission Rules, subject to appropriate performance conditions,

**REASONS FOR FINDINGS OF FACTS AND CONCLUSION OF LAW**

This contested case arose out of a Special Permit Request filed by BICC for the construction of a 50-room private lodge on 10-acres out of approximately 425-acres of land in Puuanahulu, North Kona, Hawaii (the "Subject Property"). The Subject Property lies within the state agriculture land use district. The Subject Property consists of several contiguous homestead grants on the westerly, or makai, side of Mamalahoa Highway and is bordered by vacant state lands and a few privately owned parcels. The property was a cattle ranch for many years. Sometime before the Special Permit Request was filed, a portion of the ranch above the highway was subdivided into 1-acre lots. In 1992, subdivision approval was granted for a 70 unit PUD at Puu Lani Ranch Subdivision. The Subject Property is located several miles away from the established urban communities and resort communities of West Hawaii.

There is a mixture of population and attitudes living around the Subject Property. Many of the residents see the development as a chance for employment close to home. The testimony from the public was mostly favorable, and mostly from local families who do now or have in the past lived on or around the Subject Property. Some of them are former ranch hands. Another portion of the population is against the improvements. They have comfortable lives and want to continue to live them in a rural environment. Over the time that the project has been underway, they say that their homes have been inundated by dust, and they are not confident that the developer will comply with the conditions that are attached to any permit. Some of the people appear to believe that the developer has used the Special Use Permit procedure to avoid placing the entire project before the Planning Commission all at one time.

Probably the most difficult thing for many people to understand is how what was once the Puuwaawaa Ranch can change into an upscale country club on a par with some of the large country clubs on Oahu, and 106 residential/agricultural lots, and still be zoned for agriculture. To understand how the change has come about, and why some people are upset, a brief discussion of the history of the project is helpful.

**Background, Use Permit No. 74**

During the year 1990, Royal Vista Estates and Country Club filed a Use Permit Application seeking a Use Permit to construct a golf academy and a 27-hole, private golf course, along with 40 +/- five-acre lots on the Subject Property. At the proposed golf academy golf professionals would provide both classroom and field classes. The proposed clubhouse was to be 18,000 to 20,000 square feet, and it would include dining facilities, a pro shop, the teaching classrooms, and a golf cart storage area.

The issue of water for the project was addressed with a water delivery agreement with Puuwaawaa Water Works, Inc. The water company had two wells with a then present combined capacity of 100,000 gallons per day (gpd) and a potential combined capacity of 432,000 gpd. The Applicant assured the County and local residents that if the water resource diminished, the Applicant would be responsible for rectifying the situation. The Applicant also agreed that in the event of a diminished water supply it would provide a maximum of \$10,000 per year for a 10-year period for existing water users as a subsidy for the existing water users.

By letter dated March 13, 1990, Use Permit 74 was approved to allow the establishment of a 27-hole golf course and related improvements on the Subject Property, which was within the County's Unplanned (U) zoned district. A number of conditions were attached to Use Permit 27 including:

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3. Construction of the golf course and related improvements shall commence within one year from the date of receipt of Final Plan Approval and be completed within three years thereafter.

\*\*\*\*

10. A complete biological survey shall be conducted and a recommended mitigation plan, if necessary, shall be submitted for review and approval by the US Fish and Wildlife Service and the State Department of Land and Natural Resources prior to issuance of any land development permit for the property.

\*\*\*\*

12. During construction, best effort measures shall be taken to minimize the potential of both fugitive dust and runoff sedimentation. Such best effort measures shall be in compliance with construction industry standards and practices utilized during construction of projects in the State of Hawaii.

\*\*\*\*

18. ... Further, should any of the conditions not be met or substantially complied with in a timely fashion, the Director may initiate procedures to revoke the permit.”

**First Special Use Permit Request for Changes in the Project; SP 93-24**

In December of 1993 Spear Development Corporation, the successor to Royal Vista Estates and Country Club, filed a Special Use Permit Request for (a) an expanded use of the golf clubhouse and the construction of additional recreational facilities on 8+/- acres of land, and (b) a community park and volunteer fire station facility on 4.4+/- acres of land. The application indicated that the clubhouse would have conventional amenities already permitted under the existing Use Permit, including:

- a. lobby/reception area;
- b. a pro shop;
- c. offices for the golf course operations;
- d. shower/locker room facilities;
- e. restrooms and lounges;
- f. restaurants and/or eating areas and their respective beverage areas;
- g. parking; and
- h. other structures and/or activities like cart storage and other storage areas, maintenance building, housekeeping, employee and golfers rest areas, etc.

The Applicant sought permission to have the following included within the golf clubhouse complex:

Recreation Center consisting of:

- a. 3,000+/- square foot building for lockers, meeting rooms, restrooms, game room, etc.;
- b. 4 lighted tennis courts; and
- c. a 25 meter swimming pool.

The developer offered that the center would be available to members and their guests and, on some structured basis, to residents of the Puuanahulu community. The expanded use of the golf clubhouse and recreation facility was to have it function more like a "country club". They planned to make restaurant facilities available to members and their guests at times not strictly tied to the hours of the golf course operation. The stated intent was to allow for evening dinners and receptions. The developer also said that it planned on having in-house or on-call physical therapists, exercise room and the like for members and their guests. The intent of the developer was to make the clubhouse equivalent to other golf country clubs in Honolulu, such as the Honolulu International Country Club, Oahu Country Club, or the Waiialae Country Club. The Special Permit Application was approved in March of 1994 as SP-93-24.

As part of the changes in the project made during 1993-94, BICC purchased some remnants of land within the Pu'u Anahulu Homesteads for consolidation with their abutting fee properties. They also obtained Ordinance No. 94-78 which amended the Hawaii Zoning Code to change the district classification of the Subject Property from Unplanned (U), to Agricultural (A-1a). A number of conditions were attached to the ordinance, including a limitation on the proposed residential-agricultural subdivision to a maximum of 106 one to five-acre sized lots. Prior to issuance of Final Subdivision approval on any portion of the Subject Property, except for consolidation and resubdivision of existing parcels, the developer was to submit to the Planning director all information necessary to initiate a change of zone application to reclassify all lands comprising the 27-hole golf course, the community park, the clubhouse and related recreational facilities into an Open-zoned District classification.

Ordinance No. 94-78 provides that the developer must demonstrate to the satisfaction of the Planning Director that agricultural activities are being conducted on the subdivision lots within three years after Final Subdivision Approval. "Agriculture" is defined as the cultivation of crops, including but not limited to flowers, vegetables, foliage, and fruits that are propagated for economic or personal use. Agricultural activity will be deemed satisfactory if, among other alternatives, it provides a source of income to the person who resides on the property.

BICC contends that the 1993-94 changes in the project were forced by changes in economic realities. The initial financial projections of the project were apparently based upon a Japanese and world economy of the late 1980's.

**Special Use Permit Request for a 50-Unit Private Lodge; SP 95-24**

The Special Use Permit Application, which is the subject matter of this Contested Case, was filed on October 18, 1995. It seeks consent to construct a 50-room private lodge on approximately 10-acres of land. The proposed location of the lodge was changed from adjacent to the clubhouse to approximately 100 yards from the clubhouse as the result of public input. The stated reasons for the request include the developer's need to make the project more competitive, and the difficulty in selling memberships in a country club that does not have all of the amenities completed.

**Objections Raised by Intervenors', Inaba and Members of the Public**

Based on the pre-hearing submittals and the testimony, evidence and argument presented during the Contested Case Hearing, it is the Hearing Officer's understanding that the objections raised by the Intervenors, Inaba and by members of the public may properly be summarized as follows:

1. A lodge is an urban use and it cannot be put into an agricultural zoned area by means of a special permit;
2. The lodge is an urban activity which requires the Applicant to reclassify the land from state agricultural land use district to the state urban land use district;
3. The Applicant should have submitted its request as an amendment to the existing special permit (93-24);
4. The Applicant should have submitted the entire project at one time so that the planners could look at the broad implications of the project with all of its components
5. The area affected is greater than 15 acres;
6. The lodge is part of a bigger project and it should get the proper zoning;
7. There is an inadequate supply of water available to service the project as proposed;
8. A lodge is not "unusual" and "reasonable".

9. The Applicant has violated or failed to fulfill various conditions of Use Permit 74;

10. The Applicant is seeking to consolidate and re-subdivide portions of the Subject Property, but it does not have the consent of some of the co-owners of the land to take such action;

11. The location of the 27-hole golf course, the community park and related recreational facilities must be placed into an Open-zoned district classification. This means that the lodge will have to be placed in an Open zoned district, or it will be left in the Agricultural (Ag. 1a) district. A lodge is not permitted in an Open zoned district, and if it remains in the Ag-1a district, it will have the same agricultural requirements as the house lots;

12. The wastewater treatment facility proposed by the Applicant is inadequate;

13. The planning system and its laws are not designed to make adjustments in allocation of entrepreneurial risk;

14. No corporate officer appeared at the hearing, despite having been subpoenaed, and therefore there is no evidence on when the Applicant first conceived the plan to add a 50-unit private lodge to the project; and

15. The application is incomplete as to form and content, and should not be processed or passed.

Many of the contentions of the Intervenors, Inaba and the public have merit. The perception that many have is that the Applicant has taken advantage of "loop-holes" in the planning and permitting process. It seems to many that by making piecemeal changes the Applicant and its predecessor have selected the course of least resistance in moving its project from a relatively benign, 27-hole golf course with 40 agricultural lots to a full scale country club with 106 residential/agricultural lots. Whether the course followed by the Applicant and its predecessor was a matter of choice or circumstance we do not know. The witnesses were all asked if they had any evidence of a plan on the part of the Applicant to avoid the orderly planning process, and they all responded in the negative. Whatever the case may be, the realities are that there is no choice but to recommend approval of the Special Use Permit. Technically, the Applicant has followed the rules as they are written, and it should not be punished for doing so. It is not appropriate to change our interpretation of the rules just because some are not satisfied with

the result. However, some conditions other than those normally attached to a Special Use Permit are warranted to try and limit problems in the future. When, or if, the problems arise, the Applicant may not be available to address them. For example, there are older subdivisions in North Kona that were built with private water systems. Years later it became apparent that the water systems were inadequate, and the problem had to be solved by the residents of the subdivisions and the County of Hawaii.

Some of the potential problems that were raised during the contested case hearing are as follows:

1. The relatively low impact of the project on the surrounding area is the result of the golf course, clubhouse and lodge being a private, members only facility. The developer originally planned on selling memberships for \$50,000 to \$80,000 each. If the developer is unable to sell memberships for the price contemplated, it may well decide to sell short term memberships in the private club. This devise is used in other states to make the benefits of membership in a private club available to the general public.

2. Once a 50-unit lodge is approved and constructed, it will be a simple matter to submit it to a Declaration of Condominium Property Regime. The developer would then be in a position to sell 50 condominium apartments.

3. The local residents have complained repeatedly about excessive dust created on the project. They do not appear to be getting the attention to the matter that they are looking for.

4. Construction on the project began without the developer first having a management plan approved by the US Fish and Wildlife Service and the State Board of Land and Natural Resources. Apparently the plan has yet to be approved.

5. The County of Hawaii Water Supply Department appears to have relied on reports from the Applicant as to available water. The record is not clear on whether the County has made an independent assessment of the available data.

6. The Applicant has applied for consolidation and re-subdivision of all of the Subject Property without having a written agreement with owners of some of the land involved.

7. Ordinance No. 94-78 requires that the land occupied by the golf course, community park, clubhouse, and related facilities be reclassified into an Open-zoned District



classification. A lodge is not a permitted use in an Open-zoned District. If the lodge remains in the Agriculture-zoned District, it is subject to the agricultural development requirements.

### **RECOMMENDED ORDER**

On the basis of the foregoing Findings of Fact and Conclusions of Law following recommendations is made to the County of Hawaii Planning Commission

1. The Applicant, its successors or assigns, shall be responsible for complying with all stated conditions of approval.

2. The Applicant shall submit restrictive covenants to the County of Hawaii Planning Department and the Corporation Counsel

a) that will insure that in the long term the amenities of the project will be available only to legitimate club members and to a limited, but defined degree, to members of the residents of the Puuanahulu community, and

b) that prevents Farm Dwellings and that prevents any portion of the Subject Property from being submitted to a Declaration of Condominium Property Regime.

Approval of the restrictive covenants shall be a condition precedent to the approval of the Special Use Permit. A copy of the approved covenants shall be recited in an instrument executed by the Applicant and the County prior to final plan approval for the lodge. The Planning Director shall promptly deliver such document to the Bureau of Conveyances for recordation. A copy of the recorded document shall be filed with the Planning upon its receipt from the Bureau of Conveyances.

3. The appropriate County agency monitor the project to insure that best effort measures are taken by the Applicant to minimize the potential of both fugitive dust and runoff sedimentation. Such best effort measures shall be in compliance with construction industry standards and practices utilized during construction of projects in the State of Hawaii.

4. The Applicant shall have an endangered vertebrate species management plan approved by the US Fish and Wildlife Service and the State Board of Land and Natural Resources. To the extent reasonably possible the plan shall be implemented before final plan approval for the lodge.

5. The Applicant shall provide the County of Hawaii Water Supply Department with such data as that agency needs to determine that sufficient water will be available for all of the project's projected future needs. A finding by the County of Hawaii Water Supply Department that there will be sufficient water available for all of the project's future needs shall be a condition precedent to approval of the Special Use Permit.

6. The Applicant shall complete the pending consolidation and re-subdivision process with the participation of all property owners. Completion of the consolidation and re-subdivision shall be a condition precedent to the approval of the Special Use Permit.

7. The Applicant shall present the County of Hawaii Planning Department and the Corporation Counsel with a proposal acceptable to them as to how the proposed lodge will comply with applicable zoning requirements once the golf course, community park, clubhouse and related facilities are reclassified into an Open-zoned District. Approval of the Applicant's proposal shall be a condition precedent to the approval of the Special Use Permit.

8. Construction of the lodge shall be completed within five (5) years from the effective date of the special permit. Prior to the start of any construction, final plan approval for the proposed improvements shall be secured from the Planning Director in accordance with Section 25-243 of the Hawaii County Code. Plans shall identify the proposed structures, vehicular traffic, paved driveway access and parking stalls associated with the proposed use.

9. A metes and bounds description in written and map form of the lodge site shall be prepared by a certified surveyor or engineer in the State of Hawaii and submitted simultaneously with plans for plan approval review.

10. During construction, should any unidentified archaeological or historical sites or remains such as artifacts, shell, bone, or charcoal deposits, human burials, rock or coral alignments, pavings or walls be encountered, work in the immediate area shall cease and the Planning Director shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the Planning Director when the Director finds that sufficient mitigative measures have been taken.

11. A wastewater disposal system shall be constructed for the lodge in a manner meeting with the approval of the State Department of Health.

12. Access to the lodge shall be constructed in a manner meeting with the approval of the Department of Public Works, and shall be completed prior to the issuance of the certificate of occupancy for the lodge.

13. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of the permit. The report shall include the status of the lodge development, the compliance with the conditions of approval, and a detailed listing of public complaints or problems and their disposition.

14. If the Applicant fails to comply with the conditions of approval or is unable to resolve any public complaint(s), the Planning Director shall investigate and, if necessary, enforce the appropriate conditions. The Planning Director may, as part of any enforcement action, refer the matter to the Planning Commission for review. Upon appropriate findings by the Planning Commission, that the Applicant has failed to comply with the conditions of approval or has caused an unreasonable adverse impact on surrounding properties, the permit may be suspended or revoked.

15. An initial extension of time for the performance of conditions within the special 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 the State Land Use law;

c) Granting of the time extension would not be contrary to the original reasons for the granting of the special 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).

Dated at Kailua-Kona, Hawaii, July 24, 1996.

  
\_\_\_\_\_  
COLIN L. LOVE, Contested Case Hearing Officer

File

SANDRA PECHTER SCHUTTE 1552  
101 Aupuni Street, Suite 1014A  
Hilo, Hawaii 96720  
Telephone No.: (808) 969-7331

Attorney for Applicant  
Big Island Country Club & Estates

BEFORE THE PLANNING COMMISSION

COUNTY OF HAWAII

|                                            |   |                                |
|--------------------------------------------|---|--------------------------------|
| In the matter of the application           | ) | SPP 95-24                      |
|                                            | ) |                                |
| of                                         | ) | BIG ISLAND COUNTRY CLUB &      |
|                                            | ) | ESTATES' PROPOSED FINDINGS     |
| BIG ISLAND COUNTRY CLUB &                  | ) | OF FACT, CONCLUSIONS OF LAW,   |
| ESTATES                                    | ) | AND DECISION AND ORDER;        |
|                                            | ) | CERTIFICATE OF SERVICE         |
| for a Special Permit for lands situated at | ) |                                |
| Puuanahulu, North Kona, Hawaii, Tax        | ) | Hearing Officer: Colin L. Love |
| Map Key No. (3) 7-1-5:por. 31, 34, 39,     | ) |                                |
| and 41                                     | ) |                                |
| _____                                      | ) |                                |

**BIG ISLAND COUNTRY CLUB & ESTATES'  
PROPOSED FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND DECISION AND ORDER**

BIG ISLAND COUNTRY CLUB & ESTATES (hereinafter "BICC"), the Applicant herein, hereby submits its proposed Findings of Fact, Conclusions of Law, and Decision and Order in the above-entitled action:

FINDINGS OF FACT

Procedural Matters

1. On October 18, 1995, BICC submitted an application to the Hawaii County Planning Commission ("HCPC") for a special permit, pursuant to Section 205-6, Hawaii Revised Statutes ("HRS") and Rule 6 of the Planning Commission Rules of Practice and

Procedure ("Commission Rules"), to allow the establishment of a 50-unit private members lodge on a ten-acre site within its property situated within the State Land Use Agricultural District, as part of a larger project proposed for BICC's property. The application designated that the lodge was to be located within portions of Tax Map Key ("TMK") Nos: 7-1-05:31, 34 and 39. (Planning Commission Official Record or "R", pp. 2-47.)

2. On December 18, 1995, BICC submitted an amendment to its special permit application to the HCPC, under which the lodge was relocated to a ten-acre site within BICC's property on a portion of TMK No. 7-1-05:41. (R. pp.172-174.)

3. Public hearings were held by the HCPC on the special permit application on December 13, 1995, February 1, 1996 and March 14, 1996. At the December 13, 1995 hearing, requests were submitted by Sally Rice ("Rice") and Debralee Kailiwai-Ray ("Ray") for a contested case hearing on the application. (R. pp. 136, 138, 153-155.)

4. On February 1, 1996, the HCPC voted to hold a contested case hearing on BICC's special permit application. The HCPC also granted Rice and Ray standing as parties to the proceeding. (R. pp. 201-202, 212-214.)

5. On February 6, 1996, Rodney Inaba ("Inaba") submitted a request to the HCPC to be admitted as a party to the contested case proceeding, and on March 14, 1996, the HCPC granted Inaba's request, admitting Inaba as a party. (R. pp. 217-230, 252, 256.)

6. On March 14, 1996, the HCPC appointed Colin L. Love as the hearing officer to preside over the contested case proceeding. (R. pp. 252, 259.)

7. The contested case hearing on the special permit application was held on June 1 and 2, 1996 at the Kona Surf Hotel.

8. Present at the contested case hearing were Sandra Pechter Schutte, Esq., representing BICC; Michael J. Matsukawa, Esq., representing Rice and Ray; Inaba, representing himself; and Richard Wurdeman, Esq., representing the Hawaii County Planning Department.

9. At the contested case hearing, the hearing officer heard arguments on Rice and Ray's Motion to Dismiss Application for Lack of Jurisdiction or in the Alternative Motion for Stay of Proceedings to Determine Jurisdiction, dated May 18, 1996, and after hearing arguments on the motion, found that the HCPC had jurisdiction over BICC's application. (Transcript ("TR") v. I, p. 18, l. 11-15, v. II, p. 345 l. 17-15, p. 346, l. 1-2.)

10. As of the date of the contested case hearing, BICC had submitted a complete application for determination by the HCPC. In addition, the Planning Director, who is the technical advisor to the HCPC, found the application to be complete. (Tr. v. I, p 32, l. 14-16, p. 54, l. 16-25.)

Golf Course/Agricultural Lot Project Proposed by BICC

11. The special permit sought by BICC is part of a golf course project which is under construction by BICC on its 425-acre parcel of land ("BICC's land"). (R. p. 8.) The entire parcel is situated within the State Land Use Agricultural District. (Id.)

12. The plan for BICC's land includes the development of a 27-hole golf course; a golf clubhouse complex, with dining facilities, golf pro shop, golf cart storage area, meeting facilities, exercise room, locker and restrooms, tennis courts and swimming pool; and 106 one-acre agricultural/residential lots surrounding the golf course. (R. p. 8; Rice & Ray's Exhibit N.)

13. BICC's plan also includes the development of a community park and volunteer fire station on BICC's land. (R. p. 12.)

14. The golf course with related improvements (clubhouse with dining facilities, pro shop and golf cart storage area), and one-acre lots are permitted uses within the State Land Use Agricultural District, pursuant to the State Land Use law, Chapter 205, HRS.

15. Notwithstanding the fact that a golf course is a permitted use in the State Land Use Agricultural District, the County of Hawaii requires the issuance of a use permit from the HCPC, pursuant to Section 25-28 of the Hawaii County Code ("HCC"), for any golf course. Such a permit was issued by the HCPC for the BICC golf course and its clubhouse on March 13, 1990, as Use Permit No 74. (Rice & Ray's Exhibit D.)

16. The one-acre lots, which are part of BICC's development plan, required the rezoning of BICC's land from Unplanned (U) to Agricultural with a minimum lot size of one acre (A-1a), and the County rezoned the property to this zoning designation under Ordinance No. 94-78, in 1994. (Rice & Ray's Exhibit O.)

17. The expanded use of the clubhouse complex, adding meeting facilities, exercise room, locker and restrooms, tennis courts and swimming pool, the community park and the volunteer fire station, are not permitted uses within the State Land Use Agricultural District and required a special permit from the HCPC. Such a special permit was issued by the HCPC on March 1, 1994 as Special Permit No.863. (Rice & Ray's Exhibit N.)

18. The concept of a private member's lodge as part of the BICC's golf course project was not developed until after construction of the golf course had commenced and after Special

Permit No. 863 had been issued. (Tr. v. I, p.140, ln. 23-25, p. 141, ln. 16-25, p.142, ln. 1-15.)

19. The lodge was intended by BICC to provide an amenity to attract membership in its golf course. (Tr. v. I, p. 141, ln. 1-2.)

20. Since a lodge is not a permitted use in the State Land Use Agricultural District, this use can only be established if a special permit is issued by the HCPC in accordance with Section 205-6, HRS and Rule 6 of the Commission Rules. (R. p. 115.)

#### Description of the Property

21. The ten-acre site on which the lodge is proposed to be located (the "Lodge Site") is situated on the makai side of the Mamalahoa Highway at Puuanahulu, North Kona, Hawaii. (R. at 85.)

22. Although BICC's application, as originally submitted, showed the lodge to be situated near the clubhouse, within portions of three separate tax map parcels, TMK Nos.: 7-1-05:31, 34 and 39, it was subsequently amended, because of public comments regarding visual impacts of the lodge, to relocate the building approximately 100 yards away from the clubhouse at its present location on TMK No.: 7-1-5:41. (Tr. v. I, p. 131, l. 11-25, p. 132, l. 1-7, p. 195, l. 11-12.)

23. The Lodge Site is designated Agriculture under the State Land Use system. The Land Use Pattern Allocation Guide (LUPAG) Map of the County General Plan designates the Lodge Site for Intensive and Extensive Agricultural uses. (R. at 86.)

24. The Lodge Site is entirely surrounded by BICC's land. (BICC's Exhibit 1-A.)



25. The Lodge Site and the surrounding BICC land were used in the past for cattle grazing. Also, corn was raised on a portion of BICC's land. A significant portion of the surrounding BICC land area has been developed into the first 18 holes of its golf course, and the building permit for the golf clubhouse has been issued. The Lodge Site and the remainder of BICC's land is not being used at the present time. (Tr. v. I, , p. 179, l. 7-9, p. 197, l. 6-14, 22-25, p. 198, l. 1, p. 201, l. 20-25.)

26. Physical access to BICC's land is by means of the Mamalahoa Highway, a State owned road. (R. p. 95.)

27. The Land Study Bureau's detailed land classification system, which rates land within the State from Class A (highest rating) down to class E (poorest rating) designates the overall (master) productivity rating of the Lodge Site as "D" poor and "E" very poor. (R. p. 87.)

28. Although there are identified archaeological sites on BICC's land, there are no such sites where the lodge is proposed. (Tr. v. I, p. 135, l. 3-25, p. 136, l. 1-13.)

29. There are no known endangered or threatened plant species on the Lodge Site. (Tr. v. I, p. 137, l. 13-25, p. 138, l. 1-4.)

30. There is some usage of BICC's land by the threatened Nene or Hawaiian goose, and to a limited degree by the Hawaii hoary bat. The area is not a habitat for any other endangered animal species. (Tr. v. I, p. 120, l. 15-21.)

31. BICC's land is designated on the U.S. Army Corps of Engineers' Federal Insurance Rate Maps as being within Zone "X" or an area that is outside of the 500-year flood

plain. (R. pp. 87, 98.) There are no known drainage problems either on the Lodge Site or on BICC's land. Id.

32. Homestead and rural-residential lots are located adjacent to and to the mauka side of BICC's land. Puu Lani Ranch Subdivision, an upscale agricultural-residential subdivision with one-acre lots, is situated on the mauka side of the Mamalahoa Highway. (R. p. 88.)

33. There are approximately 850 to 900 acres of privately owned land, including BICC's land, within the Puuanahulu area. This 850 to 900 acres, which is all classified as State Land Use Agricultural land, is an island of private lands, completely surrounded by State owned land. (Tr. v. I, p. 144, l. 9-25, p. 145, l. 1-12.)

34. Rice resides near BICC's land, on leased land situated on the mauka side of the Mamalahoa Highway. (BICC's Exhibit 21; Tr. v. II, p. 249, l. 25, p. 250, l. 1-13.) Ray lives near BICC's land on family owned land situated on the mauka site of the Mamalahoa Highway. (BICC's Exhibit 21; Tr. v. II, p. 301, l. 10-19.)

35. Inaba owns an undivided interest in a portion of BICC's land, designated by TMK Nos.: 7-1-05:29 and 30, which is approximately 300 to 400 years away from the Lodge Site. Inaba owns no interest in the Lodge Site. (Tr. v. II, p. 227, l. 1-4, p. 236, l. 13-20.)

#### Description of Lodge

36. The lodge, proposed by BICC, is intended to be used by golf course members to provide them with the convenience of overnight accommodations. (Tr. v. I, p. 132, l. 9-24.)

37. Only sleeping accommodations are proposed for the lodge. (Tr. v. I, p. 132, l. 9-24, p. 195, l. 15-16.)

38. No restaurant, bar, retail outlets or other amenities usually found in a resort type hotel are proposed for the lodge. (Tr. v. I, p. 132, l. 12-16, p. 195, l. 17-18, 25, p.196, l. 1.)

39. The lodge is proposed to contain 50 rooms or units, having an estimated capacity of 100 persons. (Tr. v. I, p. 132, l. 25, p. 133, l. 1-4.) A separate lobby and registration area are also proposed. (R. p. 14). The present plans for the building propose a two-story structure with the maximum height not exceeding 35 feet. The building area is proposed to be somewhere between 40,000 to 50,000 square feet. (Tr. v. I, p. 133, l. 5-12.) The plans for the facility show a vehicular parking area, with 51 stalls adjacent the lodge. (BICC's Exhibit 1.)

40. BICC proposes to construct and maintain, in private ownership, the road leading to the Lodge Site. Neither the State nor the County will be required to construct or maintain the roads leading to the Lodge Site. (Tr. v. I, p. 157, l. 14-16, p. 158, l. 2-3.)

41. BICC also proposes to construct a left turn lane and acceleration and deceleration lanes along the Mamalahoa Highway providing access into BICC's land in order to mitigate the traffic impacts of BICC's entire project on the public highway. (Tr. v. I, p. 108, l. 9-15, p. 157 l. 15-21.) It is anticipated that the lodge will not produce a noticeable difference in off-site traffic, because the lodge is intended to be used by BICC's golf course members. (Tr. v. I, p. 105, l. 16-25, p. 106, l. 1-4.)

42. BICC proposes to develop an on-site private wastewater disposal system, known as the Hitachi wastewater treatment unit, to handle the wastewater disposal for the lodge. (Tr. v. I, p. 89, l. 16-18). The effluent produced from this system is expected to meet the State Department of Health ("DOH") requirements for a secondary unit. Sludge from this system

may only have to be removed once each year. (Tr. v. I, p. 92, l. 5-23.) There is neither odor nor noise anticipated from this system. (Tr. v. I, p. 93, l. 1-14.) The system will meet all of the DOH standards for private wastewater treatment systems. Further, the DOH will have to approve this system. (Tr. v. I, p. 94-, l. 24-25, p. 95, l. 1-6.)

43. BICC has developed two wells as the water source to provide potable and irrigation water from a private groundwater system for all of its lands, including the Lodge Site. Thus, water from the present County water system will not be required for the lodge. (Tr. v. I, p. 200, l. 23-25, p. 201, l. 1-5; R. P. 96.)

44. BICC has installed an electrical substation for the Puuanahulu area in conjunction with its entire project. Thus, electricity is available to service the Lodge Site as well as the entire Puuanahulu area. (Tr. v. I, p. 138, l. 12-22.)

45. BICC proposes to design and construct a drainage system to dispose of surface water on its property. (Tr. v. I, p. 114, l. 19-25, p. 115, l. 1-11.)

46. Solid waste generated by the lodge can be disposed of at the County landfill at Puuanahulu. There is sufficient capacity at this County facility to handle the solid waste from the lodge. (Tr. v. I, p. 117, l. 6-15.)

#### Consistency of Project with Special Permit Standards

47. A special permit may be issued by the HCPC, with appropriate performance conditions, pursuant to Rule 6-7 of the Commission Rules, if the standards under Rule 6-6 of the Commission Rules are met. These standards require that the use:

- (a) Is an unusual and reasonable use of land situated within the Agricultural or Rural District, whichever the case may be; and

- (b) Would promote the effectiveness and objectives of Chapter 205, Hawaii Revised Statutes, as amended.

48. Rule 6-6 of the Commission Rules also requires the HCPC to consider, but not necessarily to require compliance with, all of the criteria under Rule 6-3(b)(5). These criteria provide that:

- (a) Such use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations;
- (b) The desired use shall not adversely affect surrounding properties;
- (c) Such use shall not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection;
- (d) Unusual conditions, trends, and needs have arisen since the district boundaries and regulations were established;
- (e) The land upon which the proposed use is sought is unsuited for the uses permitted within the district;
- (f) The proposed use will not substantially alter or change the essential character of the land and the present use; and
- (g) The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design Plans.

49. The lodge proposed by BICC is an unusual use of the land since the facility will be used in conjunction with a permitted use in the Agricultural district, namely a golf course. It will also be a reasonable use of the land within the district since the soil capabilities of the land are poor to very poor.

50. BICC's use of ten acres of its property for a lodge will not be contrary to the objectives sought to be accomplished by the State land use law because the objectives of the land use law are to protect agricultural lands and to minimize scattered urban development.

Since the entire 850 to 900 acres of private land within Puuanahulu is either subdivided into residential-agricultural lots or planned as a golf course, the potential for further urban development is remote. Further, the restriction on the type of development with a special permit would limit urban use. In addition, the 425 acres of BICC's land, except for the actual acreage used for the lodge, will remain in permitted agricultural uses. The use proposed is in furtherance of a golf course which is a permitted agricultural use. Thus, the actual loss of agricultural land would not be significant, and the benefit to agricultural use substantial. (Tr. v. I, p. 154, l. 21-25, p. 155, l. 1-25, p. 156, l. 1-10, p. 206, l. 5-14.)

51. BICC's proposed lodge will not adversely affect surrounding properties. The lodge is in the middle of BICC's 425-acre parcel, removed from neighboring landowners. Wastewater treatment would be internalized on BICC's land. In addition, there would be no traffic impacts as a result of the lodge. (Tr. v. I, p. 156, l. 11-25, p. 157, l. 1-9.)

52. BICC's proposed lodge, at its relocated site, is sufficiently removed from surrounding properties so that it should not have any adverse visual impact upon the surrounding properties. (Tr. v. I, p. 156, l. 18-22.)

53. Although Rice has raised fears over potential danger to the Nene, Rice has not presented any evidence that establishes that the lodge will increase the danger to the Nene. (Tr. v. II, p. 262, l. 13-25, p. 263, l. 1-6, p. 283, l. 10-20, p. 284, l. 1-16.) Moreover, BICC has proposed to implement a mitigation plan for the protection of the Nene. (Tr. v. I, p. 137, l. 7-12.) Likewise, Rice has raised fears over the odor from BICC's sewage treatment plant; however, Rice has not presented any evidence that establishes that the sewage treatment plant

proposed by BICC will result in any odor affecting the surrounding properties. (Tr. v. II, p. 266, l. 17-25, p. 267, l. 1-2, p. 275, l. 17-25, p. 276, l. 1-25, p. 277, l. 1-8.)

54. Although Rice and Ray have raised fears about the impact of dust on surrounding properties because of the dust created with the development of BICC's golf course, the land area involved in the lodge is substantially less than the golf course and BICC is committed to mitigate the impact of dust from the lodge development. (R. pp. 131, 163, Tr. v. II, p. 262, l. 1-12.) Likewise, the fears expressed by Rice and Ray regarding the impact of the lodge on the water resources of surrounding properties is not supported by any evidence on their part. (R. p. 131; Tr. v. II, p. 264, l. 8-9, p. 303, l. 21-25, p. 304, l. 1-4, p. 271, l. 12-25, p. 272, l. 1-10.)

55. Although Ray has raised fears about increases in property taxes, Ray has not presented any evidence that establishes that the surrounding agricultural properties will be adversely impacted by reason of the lodge. (R. p. 131; Tr. v. II, p. 303, l. 17-19.) Likewise, Ray has raised fears about the protection of archaeological resources (Tr. v. II, p. 304, l. 9-25, p. 305, l. 1-10, p. 306, l. 7-25), but the evidence establishes that there are no archaeological resources on the Lodge Site. (T. v. 1, p. 136, l. 1-13.)

56. Although Inaba has raised concerns about the partition of his undivided interest out of the property owned by BICC (Tr. v. II, p. 227, l. 1-21, p. 231, l. 10-14), Inaba admits that his undivided interest to be partitioned is approximately 300 to 400 yards away from the Lodge Site. (Tr. v. II, p. 236, l. 13-20.)

57. BICC's proposed lodge should not unreasonably burden public agencies to provides roads and streets, sewers, water, drainage, school improvements and police and fire

protection because all of the roads and streets, wastewater facilities, water and drainage improvements are being developed privately by BICC. (Tr. v. I, p. 157, l. 10-25, p. 158, l. 1-3.) School facilities will not be needed for the lodge and the impact upon police would be negligible given the nature of the private facility. BICC is proposing to construct a volunteer fire station on BICC's land for the Puuanahulu community, which will assist the County in providing fire protection for this area. (Tr. v. I, p. 159, l. 2-24.)

58. Unusual conditions, trends and needs have arisen since the district boundaries and regulations were first established in the 1960s which would justify the approval of a lodge by means of a special permit. There has been an unusual trend which has converted the Puuanahulu area from a cattle grazing area when the district was first established to a golf course and small agricultural-residential lot area. Also, there has been a migration of residents out of the area because of the lack of employment, and BICC's golf course project, with the proposed lodge, has brought back many of the former residents to the area. (Tr. v. I, p. 159, l. 25, p. 160, l. 1-18, p. 206, l. 17-25, p. 207, l. 1-17.)

59. The land on which the lodge is being proposed is marginal agricultural land, from a technical standpoint, under the Land Study Bureau's classification of the land as class D and E. Thus, it is unsuited for many types of agricultural activities. (Tr. v. I, p. 160, l. 19-25, p. 161, l. 1-5.)

60. The proposed lodge will not substantially alter or change the essential character of the land and its present use because the Puuanahulu area has already changed from a traditional agricultural area to a suburban area with the establishment of upscale one-acre agricultural and residential lots. Further, only a very small area out of BICC's 425 acres



would be used for this facility. Thus, there will not be a significant change from a visual standpoint. (Tr. v. I, p. 161, l. 21-25, p. 162, l. 1-7.)

61. The proposed lodge will not be contrary to the County General Plan. The LUPAG Map, which designates the area for Intensive and Extensive Agricultural use does not disallow the requested use; nor is any amendment of the LUPAG map designation required for any special permit. (R. p. 117; Tr. v. I., p. 83, l. 12-25, p. 84, l. 1-2, 16-17.) Also, the use is consistent with the Land Use element of the General Plan which is to “designate and allocate lands in appropriate proportions and mix and in keeping with the social, cultural, and physical environments of the County” and to “encourage the development and maintenance of the communities meeting the needs of its residents in balance with the physical and social environment.” The lodge will complement the permitted golf course by adding an increased level of services and enjoyment for members of this facility. (R. pp. 117-118.)

62. The HCPC and the State Land Use Commission (“SLUC”) have issued special permits in the past for overnight transient accommodations, including permits for hotels, inns and bed and breakfast establishments. (Tr. v. I, p. 42, l. 21-25, p. 43, l. 1-11, p. 148, l. 14-25, p. 149, l. 1-13.)

63. The Planning Director, whose responsibility includes making recommendations to the HCPC regarding permits to be issued by the HCPC, compared the application with the standards for approval of special permits under the Commission Rules, and has recommended that a special permit be issued to BICC for its proposed lodge, subject to certain performance conditions. (R. pp. 115-120; Tr. v. I, p. 37, l. 14-16.)

### HCPC's Authority to Issue the Special Permit

64. Pursuant to Section 205-6, Hawaii Revised Statutes, any special permit for land the area of which is fifteen acres or less may be issued by the HCPC without further review of the permit by the SLUC. The SLUC is only permitted to review HCPC decisions on special permits for land the area of which is greater than fifteen acres.

65. There is no standard under Section 205-6, HRS, the SLUC Rules or Rule 6 of the Commission Rules which provides for SLUC review of any HCPC decision in a special permit application involving land areas of fifteen acres or less, when the use requested by the special permit is within the fifteen acre limit but affects an area outside of a fifteen acre radius.

66. The lodge is only proposed on ten acres of BICC's land. It is not a use on an area greater than fifteen acres, requiring additional review of the HCPC's decision by the SLUC.

67. There is also no requirement under Section 205-6, HRS or the Commission Rules, which would prohibit BICC from filing a special permit application for a lodge, when it had previously obtained a special permit for expanded uses of its clubhouse, a community park and a volunteer fire station.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this special permit application as well as the parties involved herein.

2. A complete special permit application was submitted to the HCPC by BICC.

3. The lodge proposed by BICC is an unusual and reasonable use within the agricultural district which may be permitted under Section 205-6, HRS and Rule 6 of the Commission Rules.

4. A special permit for the lodge proposed by BICC may be issued, subject to appropriate performance conditions, under Section 205-6, HRS and Rule 6 of the Commission Rules.

5. No further review of BICC's special permit application for its lodge by the SLUC is required.

6. If any finding of fact herein is found, upon review, to be a conclusion of law, then that finding shall be considered a conclusion of law notwithstanding its placement in these findings, and if any conclusion of law is found, upon review to be a finding of fact, then that conclusion shall be considered a finding of fact notwithstanding its placement in these findings.

#### DECISION AND ORDER

Based on the foregoing Findings of Fact and Conclusion of Law, a special permit for a lodge on ten acres of land situated within TMK No.: 7-1-05:41 is hereby issued, subject to the following conditions:

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

2. Construction of the lodge shall be completed within five (5) years from the effective date of the special permit. Prior to the start of any construction, final plan approval for the proposed improvements shall be secured from the Planning Director in accordance with Section 25-243, HCC. Plans shall identify the proposed structures, vehicular traffic, paved driveway access and parking stalls associated with the proposed use.

3. A metes and bounds description in written and map form of the lodge site shall be prepared by a certified surveyor or engineer in the State of Hawaii and submitted simultaneously with plans for plan approval review.

4. A restrictive covenant shall be recorded against BICC's property which shall restrict the use of the lodge from use by the general public and shall limit the use of the lodge to golf course members. A copy of the covenant with this requirement shall be submitted to the Planning Director for review and approval and a copy of the approved covenant shall be recited in an instrument executed by the applicant and the County prior to final plan approval for the lodge. The Planning Director shall promptly deliver such document to the Bureau of Conveyances for recordation. A copy of the recorded document shall be filed with the Planning Director upon its receipt from the Bureau of Conveyances.

5. During construction, should any unidentified archaeological or historical sites or remains such as artifacts, shell, bone, or charcoal deposits, human burials, rock or coral alignments, pavings or walls be encountered, work in the immediate area shall cease and the Planning Director shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the Planning Director when the Director finds that sufficient mitigative measures have been taken.

6. A wastewater disposal system shall be constructed for the lodge in a manner meeting with the approval of the State Department of Health.

7. Access to the lodge shall be constructed in a manner meeting with the approval of the Department of Public Works, and shall be completed prior to the issuance of the certificate of occupancy for the lodge.

8. An endangered vertebrate species management plan for BICC's property, approved by the United States Fish and Wildlife Services and the State Department of Land and Natural Resources, shall be implemented to the extent practicable prior to the issuance of the certificate of occupancy for the lodge.

9. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of the permit. The report shall include the status of the lodge development, the compliance with the conditions of approval, and a detailed listing of public complaints or problems and their disposition. If the applicant fails to comply with the conditions of approval or is unable to resolve any public complaint(s), the Planning Director shall investigate and, if necessary, enforce the appropriate conditions. The Planning Director may, as part of any enforcement action, refer the matter to the Planning Commission for review. Upon appropriate findings by the Planning Commission, that the applicant has failed to comply with the conditions of approval or has caused an unreasonable adverse impact on surrounding properties, the permit may be suspended or revoked.

10. An initial extension of time for the performance of conditions within the special 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 the State Land Use law;

(c) Granting of the time extension would not be contrary to the original reasons for the granting of the special 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).

DATED: Hilo, Hawaii, July 8, 1996.



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SANDRA PECHTER SCHUTTE  
Attorney for Applicant  
Big Island Country Club & Estates

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Big Island Country Club & Estates' Proposed Findings of Fact, Conclusions of Law, and Decision and Order was served by facsimile transmission, and/or by hand delivering, and/or by U.S. Post Office, postage prepaid, on July 8, 1996, to:


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