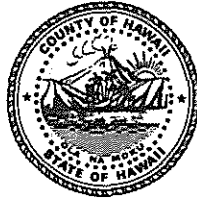


Stephen K. Yamashiro  
Mayor



## County of Hawaii

### PLANNING COMMISSION

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Z 179 517 332

NOV 24 1997

Michael J. Matsukawa, Esq.  
75-167E Hualalai Road, Suite 2  
Kailua-Kona, HI 96740

Dear Mr. Matsukawa:

Special Permit Application (SPP 97-12)

Applicant: Teruo Matsumoto

Request: Establishment of the Existing Contracting Baseyard and Related Uses

Tax Map Key: 7-5-3:Portion of 10

The Planning Commission at its duly held public hearing on October 24, 1997, voted to approve the above-referenced application and adopt the Hearing Officer's proposed Findings of Fact, Conclusions of Law and Decision and Order. Special Permit No. 989 is hereby issued to allow the establishment of the existing contracting baseyard and related uses on approximately 2 acres of land within the State Land Use Agricultural District. The property is located off of Henry Street adjacent (east) to the Cross Roads Development at Lanihau, North Kona, Hawaii.

Approval of this request is based on the following:

I. Findings of Fact

A. Procedural Background

1. Teruo Matsumoto, Inc. (the Applicant) applied for a Special Permit under Section 205-6, HRS, and Rule 6 of the Planning Commission to maintain and operate a baseyard and related uses on a portion of TMK (3) 7-5-03:10 at Lanihau, North Kona, County of Hawaii.
2. TMK (3) 7-5-03:10 is a larger parcel of land on which the proposed activity will occur.
3. The Applicant's use is confined to an area of about two acres (called the Project Site) within TMK (3) 7-5-03:10 (called the Larger Parcel).
4. The Applicant filed the subject application on April 16, 1997.

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5. The Applicant delivered notices of the filing of the subject application, public hearing and right to petition for a contested case to adjoining landowners within three hundred feet of the Larger Parcel, as evidenced by the proof of mailing/delivery filed on May 2, 1997, July 1, 1997 and July 15, 1997.

6. Notice of the public hearing on the subject application was published in newspapers having a general circulation in the County of Hawaii and was posted and filed in the manner and in the time required by applicable law.

7. The Planning Commission held a public hearing on the subject application on August 7, 1997, at the Kamehameha Ballroom, Kona Surf Resort, Keauhou, North Kona, County of Hawaii.

8. At the public hearing, the Planning Commission reviewed the petitions of Intervenor E. H. Patterson and Maryl Group, Inc. to intervene as parties and to request a contested case hearing under Rule 4 of the Planning Commission.

9. After considering the Intervenor's respective petitions and the supporting testimony therefor, the Planning Commission voted to admit the Intervenor as parties to the proceeding and to conduct the proceeding on the subject application in the manner provided by Chapter 91, HRS, and Rule 4 of the Planning Commission (contested hearing).

10. The parties, by their respective counsel, submitted a stipulation to the Planning Commission at the public hearing governing the manner in which the contested hearing would be administered.

11. After reviewing the stipulation, the Planning Commission voted to approve the stipulation and appointed Kevin Balog, Chairman of the Planning Commission, to serve as Hearing Officer.

12. The stipulated procedure for the contested hearing is part of the record and is further summarized by the Planning Department's letter dated August 20, 1997.

13. Intervenor filed their position statements on August 22, 1997.

14. The Applicant, noting that he had not received copies of the Intervenor's position statements until August 29, 1997, submitted its response on September 2, 1997 instead of August 29, 1997 (without objection). Intervenor filed rebuttal position statements on or about September 5, 1997.

15. The County of Hawaii Planning Department did not file any position statement or comments.

B. Decision Criteria

16. Section 205-6, HRS, and Rules 6-3 and 6-6 of the Planning Commission establish the decision criteria for the subject application.

C. The Proposed Use

17. The Applicant has a use agreement for the Project Site with the owners of the Larger Parcel, TMK 7-5-3:10.

18. The owners of the Larger Parcel signed the Application and signified their consent to the Application and the Applicant's proposed use.

19. The lay-out of the Project Site is depicted on the site plan submitted as part of the Application and reflects the distance which the Project Site is setback from the boundaries of the Larger Parcel.

20. The Applicant previously used a portion of the Larger Parcel's owner's land for a baseyard, which was then located makai or westerly of Intervenor E. H. Patterson's property (TMK 7-5-03:19) and over which a portion of Henry Street is now built.

21. The Applicant, as part of an agreement with Intervenor E. H. Patterson's predecessor, Donrey, Inc., relocated its operations to the Project Site in about 1984-1985 and has maintained its operations at the Project Site to date.

22. When the Applicant relocated its operations to the Project Site in about 1984-1985, the owner of the Larger Parcel, subdivided and created a 13-acre parcel (TMK 7-5-03:27) out of the Larger Parcel.

23. The owner of the Larger Parcel then leased the 13-acre parcel (TMK 7-5-03:27) to Donrey, Inc.

24. The purpose for subdividing and creating the 13-acre parcel was to create a buffer between Donrey, Inc.'s property (now owned by Intervenor E. H. Patterson), TMK 7-5-03:19, and the Applicant's Project Site and operations thereon. The 13-acre parcel is still used for such a buffer at this time.

25. The property owned or controlled by Intervenor Maryl Group, Inc. lies westerly or makai of the Kuakini Wall which runs along or near the common boundaries of the Larger Parcel, TMK 7-5-03:10, and the property owned or controlled by Intervenor Maryl Group, Inc.

26. Intervenor Maryl Group, Inc. obtained rezoning approvals and related development permits to construct and to maintain commercial uses on its property (commonly referred to as the Crossroads project).

27. Amongst the various government approvals which Maryl Group, Inc., or related entities/developers, obtained for the Crossroads project was Ordinance 93-124, County of Hawaii, which rezoned the Intervenor Maryl Group, Inc.'s property from Agricultural A-1a to General Commercial CG-20.

28. A copy of the zone map prepared by the County Council, County of Hawaii, reflecting the change of zone is attached hereto. A copy of the Applicant's site plan is also attached hereto.

29. As a condition of rezoning, the County Council required Intervenor Maryl Group, Inc. to prepare and execute a detailed archaeological mitigation plan to be reviewed by the State Department of Land and Natural Resources, Historic Preservation Division and, further, to incorporate recommended mitigation measures into any final plan approval or subdivision approval.

30. The State Department of Land and Natural Resources, Historic Preservation Division, by letter dated January 13, 1994, discussed the significance of the Kuakini Wall and recommended mitigation measures, including a buffer zone, during-construction protective fencing and a long-range preservation plan.

31. The Larger Parcel and the Project Site, as well as Intervenor E. H. Patterson's property, all lie mauka or easterly of the Intervenor Maryl Group, Inc.'s property and Crossroads project.

32. The Larger Parcel and the Project Site and Intervenor E. H. Patterson's property lie in the State Land Use AGRICULTURAL District (as opposed to the Intervenor Maryl Group, Inc.'s property which lies in the URBAN District) and are zoned by the County of Hawaii as an AGRICULTURE zoning district (as opposed to the Intervenor Maryl Group, Inc.'s property which is now zoned General Commercial).

33. However, the County of Hawaii General Plan designates the Larger Parcel and Project Site and Intervenor E. H. Patterson's property as an Urban Expansion area.

34. Various property owners in the vicinity filed joint petitions to reclassify lands in the immediate vicinity of Intervenor Maryl Group, Inc.'s property and the Larger Parcel from the State Land Use AGRICULTURAL District to the URBAN District in Land Use Commission Docket A94-705, as amended.

35. As noted in paragraphs 21 and 22, above, the Applicant has maintained its operations on the Project Site for at least twelve years prior to the filing of the Application.

36. Based upon the Applicant's submittal, the Project Site has access to Henry Street through a private right-of-way that has a variable width of 50 feet with 14 feet of pavement and runs approximately parallel to the common boundary between the Larger Parcel and Intervenor Maryl Group, Inc.'s property and to the Kuakini Wall.

37. County water service is available to the Larger Parcel and Project Site.

38. There is no municipal sewer line leading to or serving the Larger Parcel and Project Site.

39. Telephone and electric service are available to the Project Site.

40. The Applicant uses solar energy processes for its electric energy consumption.

41. The Kailua-Kona fire station is located about 0.4 mile away from the Project Site.
42. The Kealakehe Police Station is located about 2.1 miles away from the Project Site.
43. The hours of Applicant's traffic uses on a typical work day are as follows:
  - 6:30 a.m. - 7:00 a.m.
  - 7:00 a.m. - 8:00 a.m.
  - 9:00 a.m. - 1:00 p.m.
  - 4:00 p.m. - 5:30 p.m.
44. The Land Study Bureau designates the soil at the Project Site as Class E soil.
45. The Department of Agriculture does not classify the soil or land at the Project Site as being important to the State for agriculture uses.
46. The Project Site has been previously cleared and graded and there is no evidence of native vegetation present.
47. According to the Flood Insurance Rate Map (FIRM) prepared by the U.S. Department of Army, the Larger Parcel and Project Site lie in FIRM Zone X (a 500-year flood plain).
48. The Applicant states that all run-off associated with the proposed use, if any, will be disposed of on-site and will not be directed toward adjoining properties.
49. There is no known history of flooding on the Larger Parcel and Project Site.
50. The Applicant's statement regarding native Hawaiian gathering rights and other culturally related impacts of the proposed use indicate that the Applicant's use will not interfere with or harm any existing native Hawaiian gathering rights or items of significant cultural or historical importance.
51. In light of the County Council, County of Hawaii, and Department of Land and Natural Resources, Historic Preservation Division recognition of the cultural and historic significance of the Kuakini Wall, appropriate measures should be undertaken to preserve and to protect the Kuakini Wall since a portion of the Larger Parcel leading to the Project Site is located near the Kuakini Wall on the westerly or makai side of the Larger Parcel.

52. Intervenor E. H. Patterson expresses concerns over the noise/dust impacts of the proposed use on his property and also questions the reasonableness of such a use in the AGRICULTURAL District.

53. Intervenor Maryl Group, Inc. expresses concerns over potential impacts of hazardous waste (specifically diesel fuel oil or petroleum products) from past, present or future operations on the Project Site to Intervenor Maryl Group, Inc.'s property.

54. In 1997, the Planning Commission issued a Special Permit to the County of Hawaii, Department of Public Works to construct and to maintain a baseyard on land owned by or under the control of the County of Hawaii in Keauhou, North Kona, makai of the Kuakini Highway and south of Higashihara Park.

## II. Conclusions of Law

1. The Special Permit program established by the State legislature under Section 205-6, HRS, is a conditional use system which, like the Special Management Area program under Chapter 205A, HRS, and County use permit program under Chapter 25, Hawaii County Code, authorizes the Planning Commission (where the affected area is less than 15 acres in area) to issue a Special Permit for the maintenance of certain uses in the State Land Use AGRICULTURAL District.

2. Under Section 205-6, HRS, the Planning Commission may issue a Special Permit for a use that the Planning Commission finds is unusual and reasonable.

3. By its own Rule 6, the Planning Commission established decision criteria for determining whether a proposed use meets the unusual and reasonable standard of Section 205-6, HRS.

4. The proposed use is consistent with the decision criteria of Rule 6-3(b)(5)(A) to (G):

a. The proposed use is consistent with the County of Hawaii General Plan. The General Plan designates the Larger Parcel and Project Site as an Urban Expansion area. Further, the General Plan, Pages 14-17, 80, provides for floating zones for industrial uses. The floating zone gives land use officials flexibility and takes advantage of new concepts and trends, economic influences, unique resources and other situations which may occur in a community or region. Further, the General Plan, Page 16-17, outlines policies and standards governing industrial uses, including the use of appropriate buffer zones. Buffer zones and setbacks already exist between the Project Site and Intervenor E. H. Patterson's property and Intervenor Maryl Group, Inc.'s property.

b. The proposed use will not substantially alter or change the essential character of the land and the present use. The Larger Parcel and the Project Site have been used for agriculture and the existing baseyard uses for several years. There will be no alteration of such existing uses as a result.

c. The land upon which the proposed use is sought is unsuited for the uses permitted within the district. The Larger Parcel and Project Site are zoned for agriculture uses but lie within the General Plan Urban Expansion area. The soil on the Project Area is not of importance to the State for agriculture purposes. While the Project Site can be used for pasturage, warehousing or processing within the range of permissible agricultural uses under State and County regulations, such uses may be more intensive and may bear greater impacts than the proposed use on the Project Site.

d. Unusual conditions, trends and needs have arisen since the State Land Use AGRICULTURAL district boundaries were established for the Larger Parcel and Project Site. As indicated in the County of Hawaii General Plan, recent land use petitions to the Land Use Commission and County Council Rezoning Ordinance 93-124, the area around the Larger Parcel and Project Site is undergoing urbanization. Further, agencies of the County of Hawaii use portions of the Project Site for parking and storage of mass transit vehicles and fire safety vehicles and equipment in order to meet public needs in the area.

e. The proposed use will not unreasonably burden public agencies. The proposed use will not require public agencies to provide additional improvements or services such as roads and streets, water, sewers, drainage, school improvements, and police and fire protection. The proposed use already uses existing roads and utilities and will not demand additional services from public agencies.

f. The proposed use, with appropriate mitigation measures, will not adversely affect surrounding properties. The existing 13-acre parcel, TMK 7-5-03:27, acts as a buffer between the Project Site and Intervenor E. H. Patterson's property. The potential of any migration of hazardous waste from current operations on the Project Site to Intervenor Maryl Group Inc.'s property is presently undetermined; however, the Applicant's compliance with existing Federal and State laws governing the use of hazardous materials, particularly petroleum products, will provide adequate assurances that the Applicant will not use the Project Site or any part of the Larger Parcel in a manner which causes or which may cause adverse impacts from hazardous waste on Intervenor Maryl Group, Inc.'s property. Intervenor Maryl Group, Inc.'s concern over any pre-existing hazardous waste impacts from past or current uses can be determined through an appropriate site investigation and appropriate mitigation measures to address any sources of potential adverse impacts.

The protection and preservation of the Kuakini Wall can be maintained through an appropriate mitigation plan. Finally, the shielding of the Project Site from visual impacts can be maintained through an appropriate mitigation plan.

g. The proposed use will not be contrary to the objectives sought to be accomplished by the State Land Use law, Chapter 205, HRS, and Rule 6 of the Planning Commission and will promote the effectiveness and objectives of Chapter 205, HRS. In Waianae Neighborhood Board No. 24 v. Land Use Commission, 64 Haw. 265 (1982), the Hawaii Supreme Court described the

objectives of Chapter 205, HRS, as being the allocation of land for development in an orderly manner, the resolution of inadequate land use controls, the avoidance of scattered urban development and the accommodation of urban growth in existing urban areas.

Although the owners of the Larger Parcel could join the efforts of other owners in the area to reclassify the Larger Parcel to the URBAN district, the owners have not done so. However, the urban character of the immediate land area is obvious.

Further, under the State Plan, Chapter 226, HRS, the legislature described certain objectives and policies to improve the planning process, setting forth specific priorities in Section 226-104(b), HRS, to encourage growth primarily in urban areas and to make marginal and nonessential agricultural lands available for appropriate urban uses. The State Plan, Chapter 226, HRS, read in context with Chapter 205, HRS, authorizes the Planning Commission to weigh competing uses, demands, interests and priorities and to render a rational determination on an application for a Special Permit.

There is a rational basis upon which to conclude that the proposed use, as situated and proposed to be implemented and maintained, will promote the effectiveness of Chapter 205, HRS, and the objectives of Chapter 205, HRS.

5. Appropriate conditions should be attached to any Special Permit that is issued for the proposed use to ensure that appropriate mitigation measures will minimize adverse impacts of operations on the Project Site on adjoining property owners, Intervenor E. H. Patterson and Maryl Group, Inc. and the general public.

6. The recommended conditions affixed hereto are reasonable and appropriate.

7. The proposed use, as conditioned, is an unusual and reasonable use in the State AGRICULTURAL district.

### III. Decision and Order

Based on the foregoing findings of fact and conclusions of law, the application of Teruo Matsumoto, Inc. for a Special Permit to allow the Applicant to use the Project Site for the uses described in the subject application is hereby granted, provided, however, that the Applicant shall be responsible to observe and to comply with the conditions of approval affixed hereto and which, by this reference, are incorporated herein and are made a part of the Special Permit granted to the Applicant.

Approval of this request is subject to the following conditions:

#### Responsible Party

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



### Compliance with All Laws

2. The Applicant shall conduct and maintain its operations on the Project Site and on the Larger Parcel in accordance with all governing laws and applicable regulations of the federal, state and county governments, including without limitation, the County of Hawaii Building Code, federal and state statutes and regulations governing the use, storage and disposal of hazardous waste materials, noise and air pollution regulations.

### Historic Preservation -- Kuakini Wall

3. Within 90 days of the issuance of the Special Permit, the Applicant shall prepare and submit to the State Department of Land and Natural Resources, Historic Preservation Division a mitigation plan for the protection and preservation of the Kuakini Wall.

4. The Applicant shall submit to the Planning Commission a signed copy of the mitigation plan recommended and approved by the State Department of Land and Natural Resources, Historic Preservation Division for the protection and preservation of the Kuakini Wall.

5. The Applicant shall comply with the mitigative measures and shall cause such mitigative measures to occur and to be maintained in the manner set forth in the mitigation plan for the protection and preservation of the Kuakini Wall.

### Visual Impact Mitigation

6. Within 90 days of the issuance of the Special Permit, the Applicant shall prepare and submit to the Planning Director for approval a mitigation plan for the protection of view planes and the mitigation of adverse visual impacts of the Project Site from adjoining properties, particularly the properties owned or controlled by Intervenor E.H. Patterson and Maryl Group, Inc. The mitigation plan may include measures such as a planting screen and appropriate plantings.

7. The Applicant shall comply with the mitigative measures and shall cause such mitigative measures to occur and to be maintained in the manner set forth in the mitigation plan for the protection against adverse visual impacts of the operations and/or Project Site.

### Hazardous Waste Impact

8. Prior to the effective date of the Special Permit, the Applicant shall retain the services of a licensed engineer having experience with construction sites, baseyards and equipment maintenance workshops and garages and the use of petroleum products and hazardous materials to conduct an examination of the Project Site and the portion of the Larger Parcel near the Project Site to determine whether there is any evidence of soil contamination from the storage, use or spillage of petroleum products or other hazardous materials on the Project Site or the Larger Parcel. The examination shall be conducted in the manner deemed most appropriate by the engineer to determine whether any soil

contamination has occurred on the Project Site to include, if deemed necessary by the engineer, the digging of test pits on the Project Site and/or the Larger Parcel and the off-site laboratory testing of samples from the Project Site and/or the Larger Parcel.

9. The inspection may be conducted at such time and date determined by the Applicant but with not less than ten days written notice to Intervenor Maryl Group, Inc., or its counsel, and to the Planning Director and Chief Engineer of the County of Hawaii.

10. In the event the engineer determines that there is no evidence of soil contamination from storage, use or spillage of petroleum products on the Project Site and Larger Parcel, the engineer shall submit such a report and finding to the Planning Director, Chief Engineer and Intervenor Maryl Group, Inc., or its counsel, and the Applicant shall have no further obligations to report to the Planning Commission under this Special Permit in relation to hazardous waste material impacts.

11. In the event the engineer determines that there is evidence of contamination from storage, use or spillage of petroleum products, the engineer shall submit a report and finding to the Planning Director, Chief Engineer and Intervenor Maryl Group, Inc., or its counsel, together with the engineer's recommendations for mitigative measures, if any should be appropriate, to address the potential impacts which may arise out of such storage, use or spillage of petroleum products.

12. The Applicant shall comply with the recommendations of the engineer and cause such recommendations to occur and to be maintained and shall file a report thereon with the Planning Director, Chief Engineer and Intervenor Maryl Group, Inc., or its counsel.

#### Current Use

13. Since the Applicant is currently using the Project Site for the uses described in the application, the Applicant shall be entitled to continue maintenance of such uses upon the issuance of the Special Permit; provided, however, that the Applicant shall have satisfied the provisions of Conditions 3 to 12, inclusive, by causing any recommended or approved mitigation measures to occur within one year after the issuance of the Special Permit.

#### Extensions of Time for Condition Compliance

14. The Applicant may obtain an initial extension of time for the performance or satisfaction of the foregoing conditions from the Planning Director upon the following grounds:


- a. The non-performance or non-satisfaction is the result of conditions that could not have been foreseen or are beyond the control of the Applicant, its successors or assigns, and that are not the result of the Applicant, its successors or assigns negligence or fault;
- b. Granting the Applicant's request for a time extension would not be contrary to the General Plan or the State Land Use Law, Chapter 205, HRS; and
- c. Granting the Applicant's request for a time extension would not be contrary to the original reasons for the issuance of the Special Permit;

PROVIDED, that the time for compliance or satisfaction of conditions shall not exceed a period of one year.

This approval does not, however, sanction the specific plans submitted with the application as they may be subject to change given specific code and regulatory requirements of the affected agencies.

Should you have any questions, please feel free to contact Alice Kawaha or Susan Gagorik of the Planning Department at 961-8288.

Sincerely,

  
Kevin M. Balog, Chairman  
Planning Commission

LMatsu02.PC  
cc: Department of Public Works  
Department of Water Supply  
County Real Property Tax Division  
West Hawaii Office  
State Land Use Commission  
Department of Land & Natural Resources  
Kazu Hayashida, Director/DOT-Highways, Honolulu  
Teruo Matsumoto, Inc.  
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