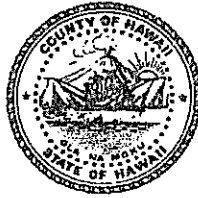


Harry Kim  
Mayor



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

DEC 16 2002

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

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

Dear Mr. Lim:

Special Permit Application (SPP 01-022)

Applicant: Betty Chin

Request: Establishment of a Catering Operation and Multi-Function Workshop  
and Meeting Facility, and Accessory Uses (To Be Known as "Fire Mountain  
Farm and Retreat")

Tax Map Key: 1-9-19:Portion of 27

The Planning Commission at its duly held public hearing on November 15, 2002, voted to approve the above-referenced application and adopted the attached Hearings Officer's Findings of Fact, Conclusions of Law, Decision and Order, as amended.

Special Permit No. 1185 is hereby issued for the establishment of a catering operation and multi-function workshop and meeting facility, and accessory uses (to be known as "Fire Mountain Farm and Retreat") on approximately 2.00 acres of land in the State Land Use Agricultural District. The property is located in Volcano Cymbidium Acres Subdivision approximately 470 feet north of the Laukapu Road-Road E intersection at Volcano, 'Ōla'a, Puna, Hawaii.

Should you have any questions, please contact Alice Kawaha of the Planning Department at 961-8288.

Sincerely,

Geraldine M. Giffin, Chairman  
Planning Commission

LchinfinalPC

cc: Department of Public Works  
Department of Water Supply  
County Real Property Tax Division  
Planning Department - Kona  
State Land Use Commission  
Department of Land and Natural Resources  
Brian Minaai, Director/DOT-Highways, Honolulu  
Steven and Kathleen Geiger (Certified Mail - 7000 0600 0024 2903 7172)  
Patricia K. O'Toole, Esq.  
Jon M. Van Dyke, Esq.  
Steven D. Strauss, Esq.  
Mr. Ronald McIntosh

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DEC 20 2002

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BEFORE THE PLANNING COMMISSION

COUNTY OF HAWAII

In the Matter of the Application of ELIZABETH CHIN for a Special Permit for the establishment of a catering operation and multi-function workshop and meeting facility and accessory uses to be known as "Fire Mountain Farm and Retreat" on State Land Use Agricultural District land situated at Cymbidium Acres at Oloo, Puna, Tax Map Key No. (3) 1-9-9-27

SPP NO. 01-022

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FOR APPROVAL OF SPECIAL PERMIT APPLICATION SPP NO. 01-022

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FOR APPROVAL OF SPECIAL PERMIT APPLICATION SPP NO. 01-022**

Applicant Elizabeth Chin is seeking a Special Permit under Chapter 205 of the Hawai'i Revised Statutes (H.R.S.) and Rule 6 of the Hawai'i County Planning Commission Rules of Practice and Procedure (HCRP) to conduct a catering operation and multi-function workshop and meeting facility and accessory uses (to be known as the "Fire Mountain Farm and Retreat") on two acres of her approximately five-acre parcel located in Volcano Cymbidium Acres Subdivision, Oloo, District of Puna, Hawai'i at TMK:(3) 1-9-19-27, in the State Land Use Agricultural District (hereafter referred to as the Property).

The Planning Commission of the County of Hawai'i, having reviewed the respective pleadings and exhibits submitted in this matter; having considered the June 3, 2002 Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order for Recommending Approval of Special Permit Application SPP No. 01-022 by Jon Van Dyke, to include the Hearing Officer having conducted a site inspection; and having heard and considered the

evidence and arguments of the parties, makes the following Findings of Fact, Conclusions of Law, and Decision and Order:

### INTRODUCTION

1. This Contested Case involves a dispute that has sharply divided the community of Volcano and that of Volcano Cymbidium Acres where the Property is located. It requires the application of the governing law to an unusual and novel factual setting, in a subdivision that is zoned Agricultural, but which contains only a few parcels that are as large as the five-acres owned by Applicant and many more parcels that are only about one acre or a half-acre in size. Because most of the parcels in Cymbidium Acres are much too small for any realistic agricultural operation, many of its residents have come to see this community as residential in nature, and because of the spectacular beauty and tranquility of the area, they want to maintain this character. The other complicating factor is that the roads in this small subdivision are maintained by the residents, and they are substandard in quality. The amount of rainfall in the area takes its toll on these modest roads, and their maintenance is a continual and expensive challenge.

2. Applicant is the owner of one of the five-acre parcels, and appears committed to undertaking a variety of genuinely agriculturally-related activities on her property. She is raising fowl, producing eggs, and growing fruits, vegetables, and herbs. She is processing these items into finished consumer products, is processing products from other farms in Hawai`i as well as those from her farm, and is marketing these processed products. Her marketing strategy includes inviting customers onto the farm to give them a flavor of the agricultural experience, and also includes having functions and events on the Property. These gatherings will bring in additional revenue to Applicant to help defray costs. They can be characterized as "eco-tourism" or

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"ag-tourism," and they are consistent with activities going on throughout Hawai'i, and indeed all over the United States, to provide additional revenues to farmers in order to sustain small- and medium-sized farms. But they will have something of an impact on the neighborhood, leading to the sharply conflicting perspectives on whether these activities should be permitted in this location.

3. The final factor that complicates this dispute is that the Intervenors perceive the Applicant as having misled the community and the County with her previous filings, earlier functions held on her property, and her website, leading to a level of mistrust between the parties. The County has fined Applicant for previous violations of law, and the fine has been paid. County Exhibits E and G. This Contested Case process has forced the Applicant to focus her intentions, and the present Findings of Fact and Conclusions of Law addresses only the specific application filed by Applicant.

4. The paragraphs that follow are designed to identify the significant facts and apply the governing law to them. To the extent that any of the Conclusions of Law constitute Findings of Fact, or the Findings of Fact constitute Conclusions of Law, they should be considered and construed as such.

## **FINDINGS OF FACT**

### **The Application**

1. This Application, filed in its present form on or about September 4, 2001, is for a Special Permit to establish "a catering operation and multi-function workshop and meeting facility and accessory uses to be known as 'Fire Mountain Farm & Retreat'" on two acres of a five-acre parcel located in Volcano Cymbidium Acres, which is described in more detail below (and which will hereinafter be referred to as the Property.)

2. The Proposed Use involves a catering operation whereby foods will be prepared and transferred to off-site destinations, and will also support community-based and private gatherings and functions at the multi-function workshop and meeting facility which has been constructed on the Property. The Proposed Use includes "culinary, cultural, art/music workshops, receptions, meetings, presentations, retreats or community based and private gatherings and/or functions" which would be held on the Property, primarily at the multi-function workshop and meeting facility. Many of these events would be linked to the agricultural activities taking place on the Property, and all would assist in promoting these activities and the products produced on the Property.

3. The Applicant originally agreed to limit these events to four small gatherings each month (each limited to 40 participants), plus an additional ten larger events each year (each limited to 80 participants). Participants at these events would arrive no earlier than 8 a.m. and would leave by 10 p.m., with any acoustic music that may be played ending no later than 9 p.m. Amplified music would not be presented at any of these functions. At the August 15, 2002 and October 18, 2002 Planning Commission meetings, the Applicant agreed to further reduce the scope of activities to address the concerns raised by the community.

4. The Applicant has recognized that her activities may burden the substandard roads in Volcano Cymbidium Acres and has agreed to pay "a pro rata fair share of road maintenance expenses," to obtain written waivers to protect the other residents of Cymbidium Acres from any liability, and to ensure that no participants in its activities park on the roadways in Cymbidium Acres. Applicant has also agreed to accept as a condition for approval of this Application that the Special Permit will not run with the land, but will expire automatically upon

the sale of the Property to a third-party or at such a time as Elizabeth Chin or Les Hershhorn are no longer actively involved in the management of the Fire Mountain Farm & Retreat.

5. This Proposed Use has generated considerable controversy in the Volcano area, as this Contested Case confirms. A community meeting to discuss the proposal was held at the Cooper Center in Volcano on August 23, 2001, after which an informal poll of the 80-plus residents in attendance indicated a two-to-one support for the Proposed Use. Transcript (T)-125-26.<sup>1</sup>

6. The opponents of the Application and Proposed Use tend to be comfortable with the agricultural, processing, and catering activities that have been taking place and will continue on the Property, but have expressed considerable concern about the "open ended" character of the Application. *See, e.g.*, testimony of Virginia Tench at T-152: "I have no objection to the business of selling food at the farmers market, the business of taking Meals on Wheels or catering off the premises, or the -, preparing foods in their kitchen and taking them other places and to small gatherings there....[W]hat concerns me is that in this special permit application...what they say about how they're going to use that, is so broad and so open ended, I think that it would allow virtually any activity, or any kind of event." Similarly, John Moraes, who owns a five-acre parcel next to the Property, testified that the agricultural activities and the "cooking and catering...and taking those foods and those services outside of our community" are appropriate or "pono," "but not to bring the masses in." T-197-98. His wife, Sharon Moraes, gave similar testimony, T-204, as did Intervenor Steven Geiger. T-211.

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<sup>1</sup> The pagination of the transcript changes slightly after it has been transmitted electronically depending on what format one uses. The listed page numbers are those on the transcript used by the Hearing Officer, but they may be one or two pages before or after the location for the quotation on the pages that are found in other versions of the transcript.

## The Parties

7. The Applicant is Elizabeth Chin, who is the fee owner of the Property by Quitclaim Deed recorded in the Bureau of Conveyances of the State of Hawai'i as Document No. 2001-178203. Her position was presented at the Contested Case Hearing and at the Site Visit primarily by her partner Les Hershhorn, who testified in detail. Ms. Chin is represented by Steven S.C. Lim of Carlsmith Ball LLP.

8. The Intervenors are Ronald F. and Barbara McIntosh and Steven M. and Kathleen Geiger, who own parcels in Volcano Cymbidium Acres near the Property. The McIntoshes reside on their parcel at TMK:1-9-19:103. Mr. McIntosh is realtor who has represented clients in Cymbidium Acres. The Geigers own the parcel at TMK:(3) 1-9-19:19, and two adjoining parcels; they currently reside in Terrell, Texas, but plan to build a house on their parcels in Cymbidium Acres and retire to this location. The Planning Commission denied the McIntoshes' application for standing on November 16, 2001, but reconsidered and voted to admit the McIntoshes as a party to the proceeding on December 21, 2001. The Planning Commission voted to admit the Geigers as a party to the proceeding on November 16, 2001. These Intervenors represented themselves *pro se*, with Mr. McIntosh playing the primary role of representing their views.

9. The Intervenors have argued that they will be adversely affected by the Applicant's proposed activities on the subject Property, specifically that increased vehicular traffic and noise caused by Applicant's proposed gatherings will decrease the value of their property and disrupt their enjoyment of their property.

10. The County of Hawai'i Planning Department is a party to this contested case hearing pursuant to Rule 4-7(a) of the Hawai'i County Planning Commission Rules of Practice and Procedure. The County was represented by Deputy Corporation Counsel Lester Ishado.

### The Contested Case Hearing

11. The Contested Case Hearing took place on April 19-20, 2002. It began with a Site Visit to the Property on the morning of April 19. This event was not transcribed, but was designed to give the Hearing Officer a familiarity with the setting. It included a tour of the Property followed by a drive around Volcano Cymbidium Acres. The formal, transcribed part of the hearing began at 1 p.m. on April 19 at the County Building in Hilo, continued to 4:30 that day, and began again at 9 a.m. on the 20<sup>th</sup>, continuing until 7 p.m. that evening, with an hour break for lunch. Jan Kama transcribed the testimony, which is now a part of the record.

12. Numerous members of the community testified at this Contested Case Hearing, with 23 individuals (including Mr. Hershorn) supporting the Application, and ten (including Mr. Geiger and Mr. McIntosh) opposing it. Of particular significance was the testimony of Cynee Wenner, who had coordinated the development of the Volcano Vision 2020 community plan, and Julie Jacobson, a member of the County Council, both of whom supported the Application. T-124-35; T-77-83. *See* Findings of Fact Paragraph 35 and Conclusions of Law Paragraph 4 below. Also of possible importance was the testimony of Xanthe Serafin, who reported that the students at the Volcano Charter School had come to the Property for classes in cooking and home economics. T:3. *See* H.R.S. sec. 205-6(f)(supporting the use of lands in the agricultural district for certain types of "educational ecotourism"). The record also contains numerous letters from members of the community supporting and opposing the Application. Perhaps of particular significance are letters from James F. Martin, Superintendent of the Hawai'i Volcano National Park (dated Oct. 31, 2001), and Randy A. Hart, Director of the Kilauea Military Camp (dated Aug. 9, 2001), both supporting the Application.



13. On June 3, 2002, the Hearing Officer Jon Van Dyke submitted his Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order Recommending Approval of Special Permit Application No. 01-022, With Conditions as Listed.

**Description of the Property**

14. The rectangular-shaped Property of approximately five acres of land is situated at Olaa, District of Puna, and is within the 177-lot Volcano Cymbidium Acres Subdivision. Applicant Exhibit 2. This subdivision contains nine of these five-acre lots, two two-and-a-half-acre lots, 26 lots that are from 1.1 to 1.4 acres in size, and 140 lots of about half an acre in size (21,778 square feet and 24,542 square feet). Applicant Exhibit 8.

15. The Property is located mauka or northeast of the Volcano Village, approximately 1.5 miles off of the Old Volcano Highway/Wright Road (Route 148) junction, with its entrance on Road E. It has five-acre parcels on each side, 1.1-acre parcels across the road (Road E), and the Olaa Forest Reserve behind it (east of it) across from an unbuilt "paper" road.

16. About one-third of the lots in Volcano Cymbidium Acres have been developed residentially, with most of the remaining lots remaining in their natural state as part of the tropical rain forest. Most of those that have been developed give the appearance of typical suburban-style or rural residential units, but one lot is being used for growing orchids and several appear to be provide bed-and-breakfast lodging facilities.

17. Improvements on the Property include a certified kitchen that was constructed in December 1998 under Building Permit No. 980310. The kitchen is certified by the State of Hawai'i Department of Health and is the only federally certified kitchen on the island. The building housing the kitchen is located adjacent to the multi-function facility and is located approximately 386 feet from the Project entrance. This building contains the 700-square-foot kitchen area, a 90-square-foot office, a full bathroom, and a 64-square-foot enclosed utility area.

18. The multi-function facility where the Proposed Use would primarily take place is a 3,348-square-foot building containing a 288-square-foot loft, a 1,280-square-foot reception area, a 96-square-foot and an 80-square-foot storage areas, a full bathroom, a half bathroom, a 430-square-foot library/file room, and a 760-square-foot lanai. It features an open-beam ceiling, crafted woodwork, floors of native red eucalyptus robusta, and double French doors which open unto a lanai and native rainforest landscaping. An ADA accessible ramp is located along the east side of the building. This multi-function facility is situated approximately 337 feet from the entrance to the Property. Applicant Exhibit 2.

19. A production coop, poultry brooder house, breeding pens, and fenced free range yards house a variety of poultry and game birds on the Property (geese, turkey, duck and peacock). Eggs are now being produced for sale, and the fowl will also be offered for sale. See pictures in Applicant Exhibit 3.

20. The Property is located outside of the service limits of the County's water system. The nearest County of Hawai'i water system is located in Glenwood at the Glenwood Transfer Station. Water is contained on the Property in a 10,000-gallon water tank for potable water, supplied periodically by County source, which is located adjacent to and east of the certified kitchen and multi-function facility, a 10,000-gallon water tank which holds rain catchment water for nonpotable use which is located adjacent to and east of the certified kitchen and multi-function facility, and a 13,000-gallon water tank with Fire Department connection which holds rain catchment water for fire protection purposes which is located adjacent to the graveled driveway. The Puna Police and Fire Stations are located in Keaau approximately 20 roadway miles from the Property. Fire extinguishers will be available for fire protection needs. The water tanks are green in color and blend with the native rainforest landscaping. The Planning Director

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has pointed out that the water system has not been evaluated in terms of its suitability to support a meeting facility, because this use was not listed when the building permit was sought.

21. The cesspool to handle wastewater and other wastes is located between the certified kitchen and multi-function facility.

22. Existing overhead electrical and telephone line services are available to the Property.

23. An extensive graveled driveway (12 feet wide and 386 feet in length) leads to a graveled parking lot area located at the rear of the certified kitchen. The parking area is able to accommodate about 40 vehicles, with an additional 20 parking spaces at various pockets on the Property.

24. The remainder of the Property is in open native rain forest, with many citrus and other trees added by Applicant to produce products and provide diversity.

25. The soils in this general area are classified as Keei extremely rocky muck (rKGD), which is characterized by well-drained, strongly acid, thin organic soils overlying pahoehoe lava bed rocks. The Land Study Bureau Overall Master Productivity Rating is "D," or "Poor," in agricultural productivity. The Property is not classified as "Prime", "Unique" or "Other Important Agricultural Lands" by the Agricultural Lands of Importance to the State of Hawai'i (ALISH) map. This soil type is used mostly for pasture.

26. No plant species listed by the U.S. Fish & Wildlife Services or State as threatened or endangered, proposed, or a candidate species or "species of concern" occurs on the Property or immediate vicinity. Known flora consists of ohia and strawberry guava (*Psidium cattleianum*), with an undergrowth of tree fern, uluhe (tanglefoot fern), awa and waiewe.

27. No endangered or otherwise rare bird or mammal species has been observed within the Property, but the Pueo or Hawaiian owl, the Hawaiian bat, and the I'o or Hawaiian hawk have been spotted flying in the vicinity of the Property. The Property is not included within any registered critical habitat for protected species.

28. Known fauna within the Property include lowland urban birds, such as common mynah (*Acridotheres tristis*), house finch (*Carpodacus mexicanus*), northern cardinal (*Cardinalis cardinalis*), and Japanese white-eye (*Zosterops japonica*), as well as upland birds, such as turkey and pheasants. None of these species is rare or endangered.

29. Mammal species that are expected to occur on the Property include mongoose, feral pig, feral cat, mouse and rat. These common species are found throughout the island.

30. The Property has been hand-cleared of alien plants with minimal impact upon the native rainforest environment which has been retained and utilized in the Project's landscaping scheme.

### Land Use Designation

31. The Property is situated in the State Land Use Agricultural District, as are all the other lots in Volcano Cymbidium Acres.

32. The General Plan Land Use Pattern Allocation Guide (LUPAG) Map designates the Property, and the rest of the lots in Volcano Cymbidium Acres, as "Extensive Agriculture." This designation allows for sugar production, orchards, diversified agriculture, and floriculture. The proposed General Plan recommendations pending action with the County Council will retain the Property as "Extensive Agriculture."

33. The County zoning designation for the Property is Agricultural 20-acre (A-20a).

34. The Property is located outside of the County's Special Management Area.

35. Volcano Vision 2020, the community-based strategic planning document facilitated by the Long Range Planning Committee of the Volcano Community Association, was developed for and accepted by the Volcano community in February 1996, and underwent its five-year review in 2001. T-127. Mr. McIntosh referred to this document as "our local community guide." T-10. Relevant language from this community plan says that the community should:

Plan for the development of small-scale enterprises that are consistent with our goal of seeing economic growth while preserving the current rural atmosphere and can be supported by appropriate infrastructure. Well-planned enterprises such as small cottage/home businesses which would have minimum impact upon the appearance of the Volcano area, agricultural operations, bed and breakfast businesses and eco-tourism, should be encouraged.

36. Volcano resident Cynee Wenner, who has been involved in substantially all phases of development and adoption of Volcano Vision 2020, testified that Applicant's Proposed Use is consistent with the goals of the plan. T-124-35. She explained that the Proposed Use should not be considered to be a "commercial enterprise," because it would not be open to the public for set hours like a typical store. T-125. Instead, she characterized it as "a home cottage business" or a "home-based business" compatible with the goals of the Volcano Vision 2020 Plan. T-125, 134.

### Description of the Proposed Use

37. The certified kitchen was completed in 1998 and has been used since 1999 for the agriculturally-related activities of preparing, processing, packaging and selling of agricultural products grown on the Property and at other locations in Hawai'i. Its building permit is number 980310. County Exhibit C.

38. The multi-function structure with its meeting room was completed in 1999 and has been utilized since then to feature and promote the products created at the certified kitchen.

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The Proposed Use requests that it be used as well for a limited number of community gatherings. Some of these gatherings will be related to the presentation and marketing of the products raised and processed at the Property, but others may have a less direct link to agricultural activity. Some such gatherings have already occurred at the Property, leading to the present division within the community and to the citation and fine noted above in Introduction Paragraph 3. During the year 2001, Applicant had a website promoting this facility, suggesting that it would be available for events such as weddings, dinners, and other gatherings unrelated directly to agriculture. County Exhibit F. This website was terminated after the County issued a Notice of Violation on October 2, 2001. *Id.* Because of the concerns raised by neighbors and others in the community, Applicant has scaled back her plans to the more limited request described above in Paragraphs 1-4 of the Findings of Fact.

39. The multi-function facility was constructed pursuant to Building Permit No. 990234, which was issued in December 1998 for the construction of an "agricultural, packing and storage building," with a "workroom, library/file room, w/2 ½ bath, w/lunch room, storage and Lanai, and storage loft." County Exhibit D. This permit was approved by various County departments, but these approvals were for a building with the M-3 designation – which is for a greenhouse – and the requirements for a meeting facility are stricter. Mr. Hershhorn testified that "the intent of this building was a place to package our food products, to store some of our food products, to have an office, and also meet clients and highlight the foods and products that we make, sampling and showing and having meetings with clients for the kind of work we do." T-59.

40. As it was being constructed, this building evolved into a multi-purpose facility with an architecturally-striking meeting room. T-32-36 (testimony of contractor Paul Baillie

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explaining the evolution of the project). The facility evolved into "a beautiful building," Mr. Hershhorn explained, "because we're not selling bags of sugar and we're not selling boxes of papayas, we're selling highly evolved agricultural and culinary products that require a certain degree of presentation, and that is why the building is built the way it is." T-59. The hardwood eucalyptus robusta floor was built using wood from the Big Island, as a way of "promoting Hawai'i agriculture." T-60. According to Mr. Hershhorn's testimony, "It wasn't built as a party facility," but as it neared completion, "people from the community" who saw it asked if they could have functions at the facility. T-59. Applicant is still seeking final approval of the building permit for this modified use.

41. Applicant's catering operation, known as the "Culinary Crusaders-World Cuisine," involves the preparation of finished food products in the certified kitchen and the transfer of these products to off-site destinations, and, if this Special Permit is granted, will also support community based and private gatherings and functions at the multi-function workshop and meeting facility.

42. The food product line uses many of the agricultural products harvested from a variety of fruit trees, vegetables, and herbs grown on the Property (which may include figs, plums, lemons, limes, Surinam cherry, and loquat) and includes jams, jellies, marmalades, curds, chutneys, sauces, nectars, salsas, preserves, juices, and vinegars.

43. Off-site destinations served by the catering operation have included community service organizations, educational institutions, local church groups, and private and non-profit businesses such as Volcano Art Center's Elder Hostel, the Sunday Open Market at the Cooper Center, Senior and Shut In Feeding Programs (Meals on Wheels), the Kilauea Military Camp, Merrill Lynch, the University of Hawai'i at Hilo, the University of Hawai'i at Manoa, the

Smithsonian Institute, the Denver Museum of Natural History, Cal Tech, the Humane Society, and the Hilo Medical Center.

44. The multi-function facility has been utilized to present and market the food products produced in the certified kitchen, and the Proposed Use seeks, in addition, to utilize this facility to host occasional culinary, cultural, art/music workshops, receptions, meetings, presentations, retreats or community-based and private gatherings and/or functions.

45. At the August 15, 2002 and October 18, 2002 Planning Commission hearings, the Applicant has agreed that these community based and private gatherings/functions would be reduced in scope to meet the concerns of the community.

46. Parking can be provided on-site for all functions, regardless of size, as explained above. No vehicles will park outside the Property on either Road E or Laukapu Road.

47. The Applicant does not intend to hire any full-time employees, but may from time to time hire on a contract basis food preparation helpers and food servers.

48. The Applicant has agreed that the number of meeting functions, workshops, and retreats requested in the application would be reduced in scope to meet the concerns of the community. These hours of operation are exclusive of preparation and cooking times of the catering operation for the processing and manufacturing of food products.

49. No amplified music will be allowed at any gatherings, and no amplified music other than acoustic music will be permitted at any function. All music will end by 9:00 p.m.

### The Roads

50. Access to the Property is taken off the Mamalahoa Highway (Highway 11), which connects to Wright Road (Route 148), Laukapu Road, and Road E. Mamalahoa Highway is a



State-owned and maintained roadway. Wright Road is maintained by the County having a 50-foot right-of-way.

51. It is the position of the Hawai'i County Department of Public Works that Laukapu Road is considered a County "paper road." The developer of the Volcano Cymbidium Acres Subdivision – Marine Finance Development, Inc. – was required to build and maintain Laukapu Road as part of its subdivision approvals. But because this road was built to "non-dedicable" standards, the Department of Public Works has not been maintaining this section of Laukapu Avenue. Marine Finance Development, Inc., is now a dissolved corporation. T-140 (Philip Gagorik). The County now considers Laukapu to be a "Road in Limbo," along with more than 600 miles of similar roads in the County. In partnership with the State, the County has a plan, but no funding yet, to bring these roads up to County standards with regular maintenance. Road E is apparently still owned by the now-defunct Marine Finance Development, Inc. and is maintained by the Volcano Cymbidium Acres Road Maintenance Corporation. *See* Intervenor's Exhibit G.

52. The Volcano Cymbidium Acres Road Maintenance Corporation was formed in 1996 to maintain and improve the roads in the subdivision. T-139-50. It is financed by mandatory assessments against the lot owners (except those that front on Wright Road), based on road frontage (75 cents/per foot/per year). T-144. The Corporation takes responsibility to maintain Laukapu Road and Road E, pursuant to an Amendment to Road Maintenance Agreement that was approved as to form and legality by the County of Hawai'i on November 12, 1996. Since then, the two blocks of Laukapu from Wright Road to just beyond Road C have been repaired and paved with a two-inch asphalt cap. Road E was patched and chipsealed in 2000.

53. The proposed use of the multi-purpose meeting facility for gatherings will increase traffic on Laukapu Road and Road E. The current president of the Volcano Cymbidium Acres Road Maintenance Corporation, Mike McKenney, expressed concern about the potential liability of the Corporation. He testified that liability insurance for the Corporation would cost \$4,000/year and individual liability insurance for the Directors would cost an additional \$3,500/year, figures that add up to about two-thirds of the annual assessments received by the Corporation (\$12,000). T-184-88.

54. The Applicant has offered to pay a fair share increase in her road maintenance assessment based on additional wear and tear on the subdivision roadway, and has agreed to include a waiver of liability for all guest functions regarding use of the subdivision roads.

#### CONCLUSIONS OF LAW

1. Many of the activities now taking place at the Property and proposed in the Application are clearly legitimate activities allowed to take place on lands in the Agricultural District under H.R.S. 205-2(d). The raising of fowl; the production of eggs; the growing of fruits, vegetables, herbs, and coffee; the processing of products grown on the Property and in surrounding areas into food products; the display of products; the preparation of foods for catering off-site; the sale of products directly to customers who come onto the Property; and efforts designed to market products are all legitimate agricultural activities.

2. H.R.S. 205-2(d) explicitly allows "processing facilities," and one may arguably interpret that term as encompassing efforts to process ingredients into finished food products suitable for sale. Inevitably, almost any "processing" will require utilizing items acquired from elsewhere as well as those produced on the farm to make the finished product. (Mr. Hershorn testified that then-Planning Director Virginia Goldstein told Applicant that processing was

legitimate on agricultural lands, even if none of the ingredients came from the property itself, so long as the "ingredients and raw products ...were grown in Hawai'i." T-57.)

3. H.R.S. 205-2(d) also permits farmers to sell "products grown on the premises" in "roadside stands." It is logical to give this term a relatively flexible definition, and thus may arguably permit sales and the showcasing of products from a fixed facility on the farm property that is not literally on the "roadside." (Indeed, in the present case, a facility on the Property itself would be much less intrusive to the neighborhood than an old-style "roadside stand," which would require cars to stop on Road E itself and which would probably create more noise.)

4. Events to promote products through sampling of food and the offering of meals to present and potential clients may arguably be legitimate activities on agricultural land. Indeed, on agricultural lands that are not classified as class A and B, H.R.S. Section 205-2(d) permits "open area recreational facilities, including golf courses and golf driving ranges," to be placed on agricultural land, so it is apparent that the drafters of this provision anticipated that some agricultural lands would invite substantial outside traffic to the location. Even in class A and B agricultural lands, H.R.S. Section 205-4.5(a)(6) permits "recreational uses including day camps," a category that is not very far removed from what is envisioned by the Proposed Use that Applicant seeks to engage in on her Property. Councilmember Julie Jacobson testified, for instance, in favor of the Proposed Use, saying that "my sense is that it is a compatible use in ag, and that this is really an evolving thing...[W]e have small farms, and we have an entirely different kind of environment that lends to different uses." T-77. It is thus clear that Applicant can do much of what she wants to do without the need for a Special Permit.

5. This Application for a Special Permit has been submitted because Applicant seeks to have a limited number of gatherings on her Property in addition to the activities listed above.

Some of these gatherings will be related to agriculture, but others may not be, except in the sense that the participants may wish to have a rural farm-like setting for their function. The issuance of a special permit for the uses described herein will alleviate the need for interpreting which uses are, or are not permitted uses in the Agricultural District.

6. Applicant argues that this extension of her agricultural activity to sponsor community gatherings on her farm is consistent with the newly-emerging economic concepts of "ag-tourism," "agri-tourism," or "eco-tourism." It is clear that "ag-tourism" is now a major activity in Hawai'i County and throughout the State of Hawai'i, and, indeed, throughout the United States. Mr. Hershorn testified that he is the vice chair of the Ag Tourism Committee, T-75, and he explained the concept of "ag tourism" in some detail at the Hearing. T-103-04. He explained that the annual meeting of the Bay Clinic in Hilo, which was held at the Property in November 2001 was a "tourism event" because it included serving products grown and produced on the Property to the participants, giving them a tour of the Property, and explaining the goals of using local products and promoting Hawaiian agriculture, and because the participants left with bags of the products from the Property. T-74-75. "The meetings that we propose are designed to help to market our products." T-85.

7. Inviting the public for small gatherings in a rural farm-like setting is a logical use for a farm that may need additional income-generating activities to meet its expenses. Especially in a community focusing on tourism such as Hawai'i, it is logical to encourage farmers to participate in tourism, and both Hawai'i County and the State of Hawai'i are doing just that. Issuance of a special permit for such uses will assist in furtherance of these goals.

8. Mr. Hershorn explained his activities as being consistent with the "chef-farmer relationship," T-87, which is becoming important across the country. In other words, he seeks to

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produce unique ingredients of a quality that will bring special enhancement to the food products he offers through the catering business. This goal is becoming increasingly common among sophisticated members of the food industry.

9. Pursuant to H.R.S. Section 205-6, and Section 15-15-95(b) of the Hawai'i Administrative Rules (HAR), the County of Hawai'i Planning Commission is authorized to permit "certain unusual and reasonable uses within [the State's] agricultural . . . districts other than those for which the district is classified." The specific guidelines listed in HAR sec. 15-15-96(b) authorize the granting of permits for such uses under the following conditions:

- (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, H.R.S. and the rules of the [land use] commission;
- (2) The desired use would not adversely affect surrounding property;
- (3) The use would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, and police and fire protection;
- (4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and
- (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

Rules 6.3(5)(A) - (D) of the Planning Commission Rules of Practice and Procedure reiterate HAR Section 15-15-95(b)(1)-(5) and also require that a petition for a special permit establish that:

- (a) The proposed use will not substantially alter or change the essential character of the land and the present use; and
- (b) The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design Plans.

10. H.R.S. Section 205-6(d) and HAR Section 15-15-95(b) delegate the authority to grant special permits to the County Planning Commission for proposals involving less than 15 acres of land.

11. Pursuant to Section 25-5-72(c)(10) of the Hawai`i County Code (HCC), "meeting facilities" are permitted, provided that a special permit is obtained for such use if the building site is located within the State Land Use Agricultural District. The Planning Director points out that this provision does not apply to the present case because a "meeting facility" is defined in HCC Section 25-1-5 as "a permanent facility for *nonprofit* recreational, social or multi-purpose use" (emphasis added). Ultimately, this issue need not be resolved. Section 25-5-72 authorizes the Planning Commission to issue special permits for activities much more intrusive than the Proposed Use, such as airfields, guest ranches, and public dumps, and it also has a catch-all category allowing special permits to be issued for "[u]ses, other than those specifically listed in this section, which meet the standards for a special permit under chapter 205, Hawaii Revised Statutes." The ultimate question thus remains whether this Application for a Special Permit meets the criteria listed in H.R.S. Section 205. The paragraphs that follow explain that this Application does qualify under these criteria.

**The proposed use is an unusual and reasonable use of the land situated within the State Land Use Agricultural District and would promote the effectiveness and objectives of H.R.S. Section 205, as amended.**

12. The uses proposed by Applicant comply with the special permit guidelines set forth in HCPC Rule 6-3 and H.R.S. § 205-6, and granting this request will promote the effectiveness and objectives of H.R.S. Chapter 205. This Chapter recognizes that certain types of uses might not be strictly agricultural in nature, yet reasonable in such districts, particularly on lands that are not of class A or B quality. To allow for such flexibility, the Legislature has

authorized county planning commissions to issue special permits to allow certain unusual and reasonable uses within the Agricultural District. *See Malama Maha'u lepu v. Land Use Commission*, 71 Hawai'i 332 (1990).

13. Portions of Applicant's Property have been and are actively used for agricultural purposes. On lands classified as class D (poor), Applicant is engaged in innovative agricultural activities, including the growing of fruit trees, coffee trees, vegetables, and poultry for sale, and the production of eggs, but the agricultural resources of the Property are limited and require Applicant to focus on processing, and to utilize creative marketing. Mr. Hershorn explained in his testimony that "Fire Mountain Farm is an effort to perpetuate and sustain agricultural lands in the islands in Hawai'i, specifically in the Volcano community." T-85. The Applicant's Proposed Use is thus linked logically to the existing agricultural activities taking place on the Property, and would utilize the multi-function facility for gatherings of groups that seek a rural farm-type ambience for their event. The Proposed Use will not displace any agricultural activities, but rather will add additional economic value to existing facilities and will enable the Applicant to continue and expand her agricultural efforts in the future. The Proposed Use and its connection to ag-tourism and eco-tourism will complement the natural beauty of the scenic native forest landscape and other natural features thereby promoting the social, cultural, recreational, culinary, artistic, economic, and educational potential of the Volcano community. Although it will have some impact on the surrounding neighborhood, the limitations and conditions accepted by Applicant seem well designed to mitigate this impact and accommodate the concerns of the neighbors.

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**The Proposed Use will not adversely affect surrounding properties  
or substantially alter or change the essential  
character of the land and its present use.**

14. All the parcels around the Property are in the Agricultural District, and hence the agricultural activities on the Property cannot be seen as altering the essential character of the neighborhood. The agricultural character and present use of the Property will not be changed, because the proposed Project will augment the agricultural production and processing that will remain the central use of the Property. Realtor Wade Park testified that disclosures relating to permitted uses in the State Agricultural District were made to the Geigers at the time of their purchase of their property. T-39. Agricultural uses can be noisy and smelly and can disrupt the tranquility of a neighborhood. Farmers are permitted to sell their products from their farm, and roadstand stands are among the permitted activities on agricultural land.

15. Although the development of agricultural activities at the Property and the gatherings proposed to be held at the multi-purpose meeting hall will increase the noise in the neighborhood somewhat, the level of increase is likely to be much less than what would be experienced as a result of a full-scale agricultural operation and will probably be no greater than is experienced in most small communities.

16. The Planning Director has argued that it is improper to consider the potential adverse impacts of agricultural activities on the neighborhood, because this Special Permit Application is to engage in a nonagricultural use, and because Section 15-15-95(b) of the Land Use Commission Rules and H.R.S. Section 205-6 both say that adverse effects on the surrounding property should be avoided. This argument fails to recognize the intertwined relationship between Applicant's Proposed Use and the clearly-legitimate agricultural activities that have been and will continue to take place on the Property. Although it is true that some of



the gatherings that will take place at the multi-function building may not be directly related to agriculture, most groups that seek to hold events on the Property will do so because of a desire to have a farm ambience for their function, and all participants will inevitably be exposed to the products and activities of the Fire Mountain Farm. The multi-function facility will clearly be of use to agricultural activities that take place on the Farm, whether or not this Special Permit is granted, and its additional use for occasional gatherings of nonagricultural groups is a logical and relatively unobtrusive activity that will assist in making Fire Mountain economically self-sustaining.

17. Testimony by some of the neighbors at the Hearing indicated that some of the events that have been held at the Property did create noise that interfered with the tranquility of the community. They indicated that the opening and closing of car doors could be heard in the neighborhood, and the sound of cars coming and going also could be heard. Some testimony indicated that conversations and music could also be heard. Nobody testified about any instances of raucous noise from the events held at Fire Mountain Farm & Retreat.

18. Others who testified noted that some people have as many parties for their family and friends at their homes as the number of gatherings that would take place under the Proposed Use. *See, e.g.*, T-20 (Joaquin Gamiao, testifying that he has six parties a year with 150 persons in attendance); T-28 (Dennis DeRego, referring a neighbor on Maui); T-81 (Julie Jacobson, referring to her Thanksgiving gatherings which have had 75 guests); T-86 (Les Hershorn, referring to baby luaus); T-130 (Cynee Wenner: "I really think that this whole traffic situation has been really blown out of proportion, because it's not going to be that different than what an average person could have that wanted to conduct a fairly social life.").

19. And it is clear that some of the events at the Property that annoyed some of the neighbors were, in fact, private parties like those described above, which could certainly continue whether or not this Special Permit is granted. *See, e.g.*, T-16 (referring to a passover celebration that was held in March 2002); T-80 (referring to a campaign event for Keiko Bonk). The absence of any sharp differences between the activities that are proposed by Applicant and those that could take place without the need for a Special Permit reinforce the logic of granting this Special Permit.

20. The multi-function facility is situated approximately 337 feet from the road, is built with all dual glazed windows and doors, double glass French doors, and is fully insulated.

21. The Property is classified for noise impact purposes in the same category as industrial uses by the Administrative Rules of the Department of Health, Chapter 46 relating to Community Noise Control. The Property is grouped in the Class C district, which includes all areas impacted by noise equivalent to lands zoned agriculture, industrial, country, or similar type. The Category C daytime and nighttime permissible sound levels are 70 dBA, which is equivalent to a subjective evaluation of "Loud", or 10 dBA louder than freeway auto traffic.

22. Volcano Cymbidium Acres Subdivision residents Dennis and Genevieve DeRego who own the residence located closest and directly across from Fire Mountain Farm & Retreat testified that they had not experienced any unusual noise coming from the Project during prior events held at Fire Mountain and that noise in the community was similar to that which one would experience in any small neighborhood. T-25 (Dennis DeRego); T-30 (Genevieve DeRego).

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**The Proposed Use will not unreasonably burden  
public agencies to provide roads and streets, sewers, water, drainage  
and school improvements, and police and fire protection.**

23. The Proposed Use will not unreasonably burden public agencies to provide utilities and police and fire protection. All essential utilities and services, including electricity, water, telephone and wastewater disposal, and school, police and fire services are available and adequate to support and serve the proposed Project requirements. (Potable water is brought in by truck to the Property. T-141.)

24. The roads do present a problem, because the County has not been maintaining those that lead directly into the Property, and they are substandard at present. But the Applicant has expressed a willingness to pay an increase pro rata share to the Volcano Cymbidium Acres Road Maintenance Corporation related to the increased burden imposed on the community, and this willingness appears to be the proper way to address this problem. The Applicant has also agreed to procure and maintain liability insurance covering the Volcano Cymbidium Acres Road Maintenance Corporation and its officers and directors, and to require attendees at any Fire Mountain Farm & Retreat functions to sign liability waivers protecting the Volcano Cymbidium Acres Road Maintenance Corporation and its officers and directors.

**Unusual conditions, trends, and needs have arisen since the  
district boundaries and rules were established.**

25. Unusual conditions, trends, and needs have arisen since the district boundaries and regulations were established, particularly relating to the changes in Hawai'i's economy. As explained above in the Conclusions of Law, eco-tourism and ag-tourism are increasingly becoming a part of a state-wide and worldwide trend toward providing alternative visitor experiences in rural and agricultural areas, and State and County officials have encouraged Hawai'i's farmers to participate in this activity. Ag-tourism, Hawai'i Regional Cuisine

experiences, and the chef-farmer connection are becoming popular for Hawai'i residents and visitors who seek a more localized and authentic way to explore Hawai'i's cultural, natural and agricultural resources. The use of the multi-function facility for occasional gatherings of groups seeking a rural farm-like setting appears to be an appropriate response to these initiatives. Such multiple uses of existing buildings is consistent with the social and physical character of this agriculturally-zoned area and will contribute to the economic development of the County.

**The Proposed Use is consistent with the County General Plan  
and other relevant planning documents.**

26. The Proposed Use would provide a venue that would promote the social, cultural, recreational, culinary, artistic, and educational potential of the Volcano community by integrating area resources in these disciplines and pursuits.

27. The Proposed Use is consistent with the following objectives, goals and standards set forth in the Hawai'i County General Plan:

*Economic:*

Goals:

- Provide residents with opportunities to improve their quality of life.
- Economic development and improvement shall be in balance with the physical and social environments of the island of Hawaii.
- The County shall strive for diversification of its economy by strengthening industries and attracting new endeavors.
- The County shall provide an economic environment with allows new, expanded, or improved economic opportunities that are compatible with the County's natural and social environment.
- The County of Hawaii shall strive for an economic climate which provides its residents an opportunity for choice of occupation.

Policies:

- The County shall strive for an economic climate which provides it residents an opportunity for choice of occupations.
- The County of Hawaii shall encourage the development of a visitor industry which is consistent with the social, physical, and economic goals of the residents of the County.
- The County of Hawaii shall strive for diversification of its economy by strengthening existing industries and attracting new endeavors.

Standard:

- The island of Hawaii should be developed into a unique scientific and cultural model. The island should become a model of living where economic gains are in balance with social and physical amenities. Development should be reviewed on the basis of total impact on the residents of the County, not only in terms of immediate short run economic benefits.

*Land Use - Agriculture*

Goal:

- Identify, protect and maintain important agriculture lands on the island of Hawaii.

*Recreation*

Goals

- Provide a wide variety of recreational opportunities for the residents and visitors of the County.
- Maintain the natural beauty of recreation areas.
- Provide a diversity of environments for active and passive pursuits.

28. The multi-function facility has the potential to enhance community life, generate local economic revenues, and create business partnerships within the community. The architectural design and features of the multi-function facility exist in harmony with and complement the natural rainforest environment of the Volcano community.

29. Approval of the Special Permit would foster the economic goals and policies of the Hawai'i County General Plan by encouraging the expansion of economic opportunities that are compatible with the natural and social environment of the Volcano community in its continuing efforts to attracting new endeavors.

30. Approval of the Special Permit would foster the recreational goals of the Hawai'i County General Plan by providing a gathering center that would promote the social, cultural, recreational, culinary, artistic, and educational potential of the Volcano community by integrating area resources in these active and passive disciplines and pursuits.

31. Approval of the Special Permit is also consistent with the Hawai'i State Plan, which lists as one of its goals the accommodation and promotion of diverse cultural, artistic, and

recreational needs of all diverse and special groups for present and future generations effectively and efficiently. Approval of the Special Permit would foster this socio-cultural objective by providing a venue with the capability of handling special and diverse needs for the integration of area resources and the promotion of social, cultural, recreational, culinary, artistic, and educational disciplines and pursuits.

32. The purpose of the Hawai'i Right to Farm Act in H.R.S. Chapter 165 is to reduce the loss to the State of its agricultural resources by limiting the circumstances under which commercial farming operations may be deemed to be a nuisance. Farming operations involve the pursuit of agricultural activities in areas zoned by the County for agricultural use. The Planning Director argues that the Right to Farm Act does not apply to the present case because it applies only if there has been a "lawful" operation of agricultural activities for one year prior to the complaint, and because the Proposed Use would include nonagricultural gatherings at the Property. It is true that the Right to Farm Act does not literally apply, for the reasons stated by the Planning Director, but the spirit of the Right to Farm Act is nonetheless helpful in resolving the present dispute. Lawful agricultural activities have been taking place on the Property for several years, and no permit is necessary to continue these activities. The Proposed Use would involve additional activities that are less directly agricultural in nature, but which build logically upon the agricultural activities to provide financial resources that will permit and promote an expansion of these agricultural activities. The Proposed Use is consistent with "ag-tourism" and the "chef-farmer relationship," which are central to a twenty-first-century vision of agriculture, and it has been carefully defined and limited to be appropriate for the unique setting of the Property. Approval of the Special Permit will thus serve the same goals as the State Legislature

sought to promote in enacting the Right to Farm Act, and the animating vision of this statute supports approval of this Application.

33. The Proposed Use is consistent with the Volcano Vision 2020 Plan which encourages economic growth such as small cottage/home businesses and eco-tourism activities while preserving the current rural forested atmosphere of the Volcano area with minimum impact. This community-based strategic planning document facilitated by the Long Range Planning Committee of the Volcano Community Association was developed for and accepted by the Volcano community in February 1996. The Proposed Use is consistent with the following objectives, goals and standards set forth in the Plan:

*Economic Interests*

Goal

- Support economic growth which is well planned and which maintains the rural forested atmosphere that currently exists in the Volcano area:
- Plan for the development of small-scale enterprises that are consistent with our goal of seeing economic growth while preserving the current rural atmosphere and can be supported by appropriate infrastructure. Well-planned enterprises such as small cottage/home business which would have minimum impact upon the appearance of the Volcano area, agricultural operations, bed and breakfast businesses and eco-tourism, should be encouraged.

*Design Guidelines:*

Goal 1: Preserve the forested environment by reducing, or mitigating the amount of forest which would have to be removed for any development:

- Encourage the preservation of the native landscape and the replanting of unused or vacant cleared land with native species.

*Recreation:*

Goal 1: Provide for the recreational needs of people of all ages in the Volcano area:

- Enhance recreational activities that integrate the Volcano community

34. The Project conforms to the goals of the Economic Interests, Design Guidelines, and Recreation elements of the Volcano Vision 2020 Plan since the proposed Project as a home-based business, is economically sustainable, will contribute to the region's economic

development, and is consistent with the social and physical character of the rural-agricultural area without negative effects upon the environment.

35. In compliance with the Volcano Community Associations' Long-Range Planning Committee's "Building in the Forest, a guide to building a home in Volcano, Hawai'i" (July, 1991), Intervenor's Exhibit I, the Property incorporates the native rainforest in its landscaping scheme, and provides a venue that will promote the social, cultural, recreational, culinary, artistic and educational potential of the Volcano community by integrating area resources in these pursuits.

#### Other Comparable Special Permits

36. Every application for a Special Permit must be evaluated on its own terms, but some guidance can be gained by examining how comparable applications have been evaluated.

37. An application filed by Gail Duituturaga for an indoor fitness center relatively near the present Property was rejected by the Planning Commission in 1999 as being inappropriate at its location. *See* County Exhibit H.

38. In contrast, an application filed by John and Michele Gamble for an eight-bedroom and eight-bathroom addition to an existing dwelling to transform it into a small inn on their 3.4 acre parcel, with authorization to use the property for weddings, community meetings, and public gatherings, was granted by the Planning Commission on October 6, 2000. *See* Special Permit Application SPP 00-026; Special Management Area Use Permit Application SMA 00-011; Applicant Exhibit 31.

39. In granting the Gamble Special Permit for an inn and a meeting place, the Planning Commission recognized that although their request was not agricultural in nature, it was nevertheless reasonable and was not contrary to the objectives of the State Land Use Law



for the Agricultural District. The Planning Commission explained that the proposal to include weddings and community and public meetings was consistent with the Hawai'i Tourism Authority's June 1999 report entitled "Strategic Directions for Hawaii's Visitor Industry" June 1999, which outlined the Authority's strategy to promote Agri Tourism, which included the: (a) creation of "menus of experiences to make it easier for visitors to purchase agri tourism experiences and products" and (b) the bundling of "agricultural experiences with health, adventure, culture, eco, and edu tourism." Certainly, the present Applicant's Proposed Use would also accomplish both goals in a manner appropriate to the Volcano community.

40. Similarly, on December 19, 1991, the Planning Commission approved a special permit (SP 91-21) for Brian Crawford to operate a bed and breakfast establishment at the corner of Wright and Laukapu Roads in Volcano Cymbidium Acres, which has evolved into the well-respected establishment called Chalet Kilauea. Applicant's Exhibit 12.

41. The present Application is more similar to those of the Gambles and Mr. Crawford than to that of the Duituturagas, because the Proposed Use logically builds on the agricultural activity taking place on the Property, and seeks to participate in ag-tourism and to promote the chef-farmer relationship by inviting some nonagricultural gatherings to take place in an agricultural setting.

### **Conclusion**

42. Applicant has ongoing genuine agricultural activities on her Property that can continue without the need of a Permit. These include the raising of crops and animals, processing of food products, and the display and sale of these products. The Proposed Use would add a limited number of community gatherings to the mix of activities now taking place on the Property, as part of the value-added approach that is inherent in modern concepts of ag-

tourism. These gatherings would take advantage of the agricultural setting and would not change the basic nature of the Property as a working farm. The conditions listed in the Decision and Order below will limit the impact of Applicant's activities on the surrounding community. The impact will certainly be far below than that which would be felt by a golf course or "day camp," which Applicant could operate on her Property without a Special Permit, *see* Conclusions of Law Paragraph 4 above, and many of those living nearby view the Proposed Use as enhancing the life of the community. The granting of this Special Permit is thus consistent with H.R.S. Chapter 205 and governing County law.

43. As explained earlier, this dispute has deeply divided the Volcano Cymbidium Acres and Volcano communities, and any outcome of the dispute will inevitably disappoint one group or the other. It is clear that the opposition of the Intervenors was important in persuading the Applicant to scale down the Proposed Use from the rather open-ended list of activities that had been included in her website to the much more modest number of small- and medium-sized gatherings that will be allowed by this Special Permit. The concerns about noise and the impact on the substandard roads in Cymbidium Acres have also been noted and addressed in the carefully-crafted conditions listed below. During the often-emotional Contested Case Hearing, both sides indicated that they hoped the community would be able to come back together constructively once this dispute is resolved.

### **DECISION AND ORDER**

44. The Petition for Standing in Contested Case Hearing was properly granted by the Planning Commission to Intervenors Ronald F. and Barbara McIntosh at its meeting of December 21, 2001.

45. The Petition for Standing in Contested Case Hearing was properly granted by the Planning Commission to Intervenors Steven M. and Kathleen Geiger at its meeting of November 16, 2001.

46. The Planning Commission has jurisdiction over this request for a special permit pursuant to H.R.S. Section 205-6, because the proposed uses of the Property involve less than 15 acres of land located within the State Land Use Agricultural District.

47. Under HCPC Rules 6-6(a) and (b), and H.R.S. Section 205-6, the Planning Commission may approve a special permit upon a finding that the proposed use is an unusual and reasonable use of land situated within the Agricultural District, and that the proposed use would promote the effectiveness and objectives of H.R.S. Chapter 205, as amended.

48. The uses proposed by Applicant in the application for Special Permit SPP 01-022 are an unusual and reasonable use of the Property that will promote the effectiveness and objectives of H.R.S. Chapter 205, as amended, and these uses meet all the criteria listed under H.R.S. Section 205-6 and in HCPC Rules 6-3(b)(5)(A) through (G) and 6.6.

49. In accordance with the June 3, 2002 Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order Recommending Approval of Special Permit Application SPP No. 01-022, the foregoing Findings of Fact, Conclusions of Law, and based upon the Planning Commission's record and file in SPP No. 01-022,

IT IS HEREBY ORDERED BY THE PLANNING COMMISSION that the application of Elizabeth Chin, SPP 01-022, for a special permit to establish a catering operation and multi-function workshop and meeting facility and accessory uses (to be known as "Fire Mountain Farm and Retreat") on about two acres of land on a portion of the five- acre subject

Property, situated at Oloo, District of Puna, Hawai'i, at TMK:(3) 1-9-19:por. of 27, be approved subject to the following conditions:

(A) The Applicant shall be responsible for complying with all of the stated conditions of approval.

(B) Should any of the following conditions not be met or substantially complied with in a timely fashion, the Planning Director may initiate proceedings to revoke the permit.

(C) Events at the Fire Mountain Farm & Retreat may be conducted Monday through Saturday, and shall be limited to two (2) small events per month with accommodations for a maximum of 40 persons, and ten (10) larger events per year with accommodations for a maximum of 60 persons, provided however, that the total number of events shall not exceed three (3) events per month. Hours of operation for all events held Monday through Thursday shall be limited to the hours between 8:00 a.m. and 8:00 p.m. Hours of operation for all events held Friday and Saturday shall be limited to the hours between 8:00 a.m. and 9:00 p.m. All music shall be limited to the hours of operation, and no amplified live music other than enhanced acoustic music shall be presented at any of these events. All events shall run on a one-day cycle. No overnight events or wedding events are permitted. These hours of operation do not include the time for preparation and cooking of the catering operation, and the processing and manufacturing of food products. To assist in the enforcement and monitoring of this provision, Applicant shall submit an annual report to the Planning Director each January listing the events that took place during the previous year pursuant to this provision, with the dates and times for each event, the organization or organizations involved, the number of participants at each event, and whether any music was played at the event.

(D) In addition to the Applicant's current road maintenance payment for the Property, the Applicant shall pay an appropriate additional *pro rata* fair share of road maintenance expenses for the Fire Mountain Farm & Retreat to the Volcano Cymbidium Acres Road Maintenance Corporation that reflects the increased use of the roads maintained by the Corporation caused by the activities at the Farm. The Applicant shall pay the reasonable attorneys' fees and costs incurred by the Volcano Cymbidium Acres Road Maintenance Corporation in the review and drafting of documents necessary to effectuate the provisions of this paragraph.

(E) Applicant shall not allow any event parking on Road E or any of the roadways within Volcano Cymbidium Acres. Only passenger cars, trucks and vans designated to carry 15 or fewer passengers are permitted on Cymbidium Acres roads to access events at the Fire Mountain Farm & Retreat. Charter and tour busses and vans designated to carry 16 or more passengers are specifically prohibited.

(F) The Applicant shall submit plans and obtain Plan Approval from the Planning Director for the multi-function facility within six (6) months of the effective date of this Special Permit.

(G) As part of its contract with event sponsors, the Applicant shall obtain written waivers from individuals attending events at the Fire Mountain Farm & Retreat, and shall obtain and maintain liability insurance coverage with minimum limits of \$1,000,000.00 per occurrence and \$2,000,000.00 aggregate protecting against any claims against the Volcano Cymbidium Acres Road Maintenance Corporation, the County of Hawaii and/or their employees, officers and directors for any liability that may arise relating to the use of the Volcano Cymbidium Acres Subdivision roadways and Laukapu Road by attendees for events at

the Fire Mountain Farm & Retreat. This provision will no longer be applicable if the County should assume responsibility for the maintenance of Laukapu Road and/or the roads in the Volcano Cymbidium Acres Subdivision, or if Applicant is able to negotiate an effective and legally-binding agreement with the Volcano Cymbidium Acres Road Maintenance Corporation whereby the Applicant would indemnify the Corporation and/or any of its officers and directors for any liability they may incur related to any event that takes place at the Fire Mountain Farm & Retreat.

(H) The Applicant shall comply with all laws, ordinances, rules and regulations relating to obtaining all applicable building permits for the structures on the Property. The Applicant shall not conduct any business activities under this permit until the facilities used for such activities have obtained all permits and certificates of occupancy required for such activities by the County.

(I) The following statement shall be prominently posted at the multi-function facility for all events, and shall be an initialed clause in all event Agreements: "Fire Mountain Farm & Retreat operates by revocable Special Permit in a private, quiet neighborhood and is accessed over private roads. Please kokua and do not exceed the posted speed limit of 15 miles per hour."

(J) A 15-foot wide natural landscaping buffer, with a minimum of 6-foot high densely plantings, shall be maintained along the entire perimeter of the Property, to help mitigate any noise and visual impacts to the adjoining neighbors. As much as possible, the existing forest cover shall be retained. For additional landscaping requirements, native species from the area shall be used when possible.

(K) The Applicant shall limit sales of raw and processed agricultural products on the Property to the days of Wednesday through Saturday, between the hours of 8:00 a.m. to 5:00 p.m. each day.

(L) The Applicant shall not conduct any activities on the Property that require a liquor license.

(M) Upon compliance with all conditions of approval herein, and in conjunction with the application for a certificate of occupancy, the Applicant shall submit a final written status report to the Planning Director.

(N) 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.

(O) An initial extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances:

- a. Non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors, or assigns and that are not the result of their fault or negligence.
- b. Granting of the time extension would not be contrary to the General Plan or Zoning Code.
- c. Granting of the time extension would not be contrary to the original reasons for the granting of the permit.

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- 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).

DEC 16 2002

DATED: Hilo, Hawaii, \_\_\_\_\_.

PLANNING COMMISSION

By

  
GERALDINE M. GIFFIN

Chairperson