

County of Hawai'i

PLANNING COMMISSION

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

September 21, 2007

Alii Gardens
c/o Steven S. C. Lim, Esq.
121 Waianuenu Avenue
Hilo, HI 96720

Dear Mr. Lim:

Special Management Area Use Permit No. 358

Use Permit No. 142

Request: Time Extension to Condition 5 (Construction of Open Air Market)

Applicant: Alii Gardens

Tax Map Key: 7-5-20:70

The Planning Commission at its duly held public hearing on August 31, 2007, voted to continue the hearing for the above-referenced matter until it is ready for review by the Planning Commission. This continuance will also allow the Planning Director and the applicant additional time to resolve issues relative to the request.

Should you have questions regarding the above, please contact Norman Hayashi of the Planning Department at 961-8288, x205.

Sincerely,

William Graham, Chairman
Planning Commission

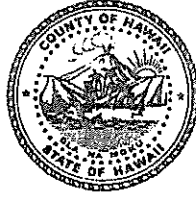
Laliigardens01pc

cc: Planning Department-Kona

SEP 21 2007

USE 142

Harry Kim
Mayor



Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT

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

May 1, 2007

Steven S.C. Lim, Esq.
CARLSMITH BALL LLP
121 Waiianuenue Avenue
Hilo, HI 96720

Dear Mr. Lim:

SUBJECT: ALII GARDENS MARKETPLACE, USE PERMIT NO. 142

We have reviewed your April 11, 2007 letter concerning the time extension for Alii Gardens Phases II and III and must respectfully disagree. Under the provisions of the Zoning Code in existence at the time of the issuance of Use Permit No. 142, and under the current zoning code, a use permit could only be issued for certain listed uses. An "open air market" is not one of those uses, and was not one of those uses under the pre-1996 Code, nor can we fairly characterize Alii Gardens as one of the listed uses which can be done with a use permit.

The applicable regulations were not materially different in January 1996 when the Alii Gardens use permit was issued. At that time, sec. 25-45 provided that "any use not listed among the permitted uses in a district shall be deemed to be a prohibited use within that district, except as otherwise provided for." The current equivalent section is sec. 25-4-4. Sec. 25-6 provided that "all departments, officials, and public employees authorized to issue permits or licenses shall conform to the provisions of this chapter and shall issue no permits for uses, buildings, or other purposes where it would be in conflict with the purposes of this chapter. The corresponding section currently is sec. 25-2-2. The code at the time then had a section, 25-28, which provided that "a use permit shall be obtained from the planning commission for the following uses within designated County-zoned districts unless specifically permitted in a zoned district." The corresponding section is sec. 25-2-61. The code then listed certain uses which could be allowed with a use permit, in the various districts.

Our interpretation, under the current and former zoning codes, is that the power of the Planning Commission to issue use permits is limited to those listed uses which can be allowed with a use permit. Your interpretation, under the former code, would be that the Planning Commission could also issue use permits for any other use, provided that it was not specifically listed as a permitted use in any zoning district. (The current code, but not

Steven S.C. Lim, Esq.
CARLSMITH BALL LLP
Page 2
May 1, 2007

the former code has a provision allowing the council to authorize, by resolution, a use not allowed in any zoning district.)

The primary difficulty with accepting your argument is that the Zoning Code simply didn't say that "uses not listed as permitted in any zoning district may be also allowed by use permit". It has a list of uses that can be allowed in a district as permitted uses, and others that can be allowed with a use permit. It makes no sense to list specific uses that can be allowed with a use permit if potentially almost anything can be allowed under a use permit. Under normal principles of statutory construction, "expressio unis est exclusio alterius", the fact that certain uses are listed as allowed with a use permit would mean that uses other than those listed would not be allowed. The pre-1996 Zoning Code, by stating in sec. 25-45 that uses not listed were prohibited, "except as otherwise provided for" meant the other uses as specifically provided for in the use permit section. Also, the Zoning Code clearly contained a judgment that certain uses which might be allowed by use permit in some zoning districts are inappropriate in others, such as commercial excavation in RS and other zones. It would not be consistent with this to potentially allow almost anything in any zoning district by use permit.

I have spoken with past and present staff and deputy corporation counsels about the Alii Gardens situation. All agree that a use permit should only be issued for uses specified in the use permit section of the zoning code, under the pre-1996 code, and no one has been able to explain how the open-air market at Alii Gardens qualified for a use permit. It is true that the Planning Department processed an amendment to the permit in 2002 that was granted by the Planning Commission. We simply did not spot the issue with respect to the use at that time.

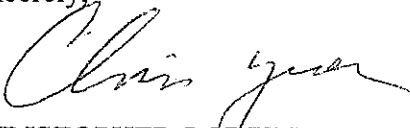
I am very sorry that this problem has come up and that the Planning Department initially advised your client in 1995 that a use permit could be granted for this use. I would have liked to have found a way to agree that the time extension requested for Phases II and III could legally be granted but we cannot adopt a mistaken reading of the Zoning Code to accommodate the desired result. As we stated in our February 19, 2007 email, we will continue to allow the operation of Alii Gardens first phase as approved and as it has been established, but we cannot support the proposed time extension for Phases II and III. Because this is not in dispute between your client and the Planning Department I will not explain the reasons further, except to re-confirm our willingness to provide further written assurance on this point.

Although your April 11, 2007 letter says that it is a request to continue the processing of the time extension request, if you do wish to continue, I request that you send a short

Steven S.C. Lim, Esq.
CARLSMITH BALL LLP
Page 3
May 1, 2007

letter to that effect if you do want us to take this time extension to the Planning Commission. We will, however, unfortunately have to advise the Planning Commission that the time extension cannot legally be granted.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

CJY:pak
Wpwin60/Chris 07 - Lim - Alii Gardens Use Permit

cc: USE 142

USE 142

2007 APR 17

CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP

121 WAIANUENUE AVENUE
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HILO, HAWAII 96721-0686
TELEPHONE 808.935.6644 FAX 808.935.7975
WWW.CARLSMITH.COM

JZELKO@CARLSMITH.COM

April 11, 2007

Christopher Yuen
Planning Director
Hawaii County
Planning Department
Aupuni Center
101 Pauahi Street, Suite. 3
Hilo, Hawaii 96720

Re: Use Permit No.142
Ali'i Gardens Marketplace
Establishment of an Open-Air Market and Related Improvements
Request for 5-Year Time Extension for Phase II & Phase III
Tax Map Key: (3) 7-5-020:070

Dear Mr. Yuen:

As you are aware, we represent Ali'i Gardens Marketplace ("Ali'i Gardens") as it pertains to their Open Air Market in Kailua-Kona, Hawaii. Use Permit No. 142 ("Use Permit") for the Open Air Market was issued on January 4, 1996 (attached hereto as Exhibit A) for the above referenced property ("Subject Property").

It is our understanding that the Use Permit was originally applied for and granted because in the 1995 version of the Hawaii County Zoning Code ("Zoning Code")¹, "Open Air Markets" and "Farmers Markets"² were not listed as a permitted use in any zoning district, and neither term was defined within the Zoning Code. This was due to the fact that at that time, Farmers Markets were not as popular a use as they are today. It was in May 1996, that Ordinance No. 96-59 amended Chapter 25 of the Zoning Code to allow Farmers Markets in the Downtown Hilo Commercial District ("CDH"), General Commercial ("CG"), and Village Commercial ("CV") Districts³.

The Applicant consulted with the Hawaii County Planning Department ("Planning Department") to determine what type of action would be appropriate for the establishment of an

¹ Hawaii County Zoning Code, Chapter 25, (effective in 1995) attached as Exhibit B.
² Farmers Markets are defined under the Hawaii County Zoning Code ("Zoning Code") as Open Air Markets.
³ Ordinance No. 96-59 attached as Exhibit C.

Open Air Market in a then Unplanned zoning district. The Planning Department determined that a Use Permit would be the most appropriate entitlement application to implement for Ali'i Gardens. As a result, Ali'i Gardens applied for and was granted the Use Permit by the Hawaii County Planning Commission ("Planning Commission") on December 14, 1995, which allowed for the establishment of an Open Air Marketplace on the Subject Property.

We understand pursuant to your recent email dated February 19, 2007, that you agreed the Planning Department would allow the continuation of the existing Open Air Market under "principles of estoppel and basic fairness," however you stated that the Planning Department will not give a favorable recommendation for a proposed time extension for Phase II and III if Ali'i Gardens should go before the Planning Commission for the same. We respectfully disagree.

In the current Zoning Code, a Farmers Market is a permitted use in several of the zoning districts including, Neighborhood Commercial ("CN"), CG, CV, and Industrial-Commercial Mixed Use (MCX) Districts. In the current Zoning Code, use permits also have an "other" provision in place which allows persons to apply for a use permit if the use that is proposed is not a permitted use in any other zoning district⁴. However, in 1995, Farmers Markets were not listed as a permitted use in any zoning classification, and although it was not listed as one of the uses that "a use permit shall be obtained...for"⁵, there was nothing in the 1995 version of the Zoning Code which excluded a use not specifically listed within the use permit section. It simply provided for uses that a use permit SHALL be obtained for.

It is apparent that the use permit process has been placed in the Zoning Code to allow for uses which are not permitted in any other zoning district. In 1995 that was the case for Farmers Markets. This sentiment was echoed in a letter dated January 4, 1996 from the Planning Commission to Ali'i Gardens which stated:

"The establishment of an open-air marketplace on a parcel located within the State Land Use Urban District and the County's Unplanned zoned district may be permitted through the Use Permit review process. The Use Permit process provides an avenue to review and analyze a proposed project on a case-by-case basis relative to infrastructure and impacts on surrounding properties and existing uses as well as the General Plan goals and policies."

Until the recent communication from the Planning Department regarding this matter, there has never been any discussion regarding an issue with the legality of the Use Permit, and

⁴ Zoning Code (2007 version) Section 25-2-61(a)(12): "The following uses shall be permitted within designated County zoning districts only if a use permit is obtained for the use from the commission... Other unusual and reasonable uses which are not specifically permitted in any zoning district with the approval of the director and the concurrence of the council by resolution."

⁵ Zoning Code Section (1995 version) 25-28(a): "A use permit shall be obtained from the planning commission for the following uses within the designated County-zoned districts unless specifically permitted in a zoned district".

this is after applying for and being granted an amendment in 2002 to the Use Permit⁶, and filing annual progress reports to the Planning Department pertaining to the Use Permit. In fact, in a letter dated June 8, 2004 the Planning Department acknowledged that Ali'i Gardens had represented to the Planning Commission that the project would be developed in three phases⁷. At that time and at no time prior, did the Planning Department ever state there was an issue with the Use Permit.

Use Permit No. 142 was issued and granted to Ali'i Gardens for the project which includes all phases of development necessary to complete the same. The fact that the current Zoning Code now only allows for Farmers Markets in specific zoning districts should have no bearing in this matter. At the time Ali'i Gardens went before the Planning Commission with their Use Permit Application (USE 95-9), Farmers Markets were not even defined in the Zoning Code, and applying for a use permit was the only option they had. We would argue the same principles of estoppel and basic fairness in allowing Ali'i Gardens to complete their Project including all three phases of development for which they were originally granted the Use Permit in 1995.

Furthermore, in the current Zoning Code, Section 25-2-61(b) states:

"Any use which received an approval as a conditionally permitted use prior to September 25, 1984, or which received prior approval through the use permit process, is considered a legal use of the of the affected parcel and may be expanded or enlarged without obtaining another use permit, provided such expansion, enlargement or addition is in full compliance with this chapter and the applicable district regulations."

Ali'i Gardens was granted the Use Permit and therefore the Open Air Market should be considered a legal use of the Subject Property. Ali'i Gardens is not asking for the Use to be expanded or enlarged, they are simply asking for a time extension to complete all phases of development for the existing Use Permit.

This will request that you send us a formal confirmation as to whether the Planning Department considers the uses authorized by Use Permit No. 142 to constitute the "legal use" on the Subject Property, and whether the Planning Department will honor the Use Permit as to all phases of the development for Ali'i Gardens, including the requested time extension.

While we reserve the right of our client to argue all applicable legal issues, this will also confirm in writing our formal request for a 5-year time extension to complete the remaining

⁶ The amendment to Use Permit No. 142 was granted in 2002 when the Planning Commission approved the addition of 20 umbrellas or tents for a period of 5 years which expires on May 6, 2007.

⁷ Phase I of Ali'i Gardens would accommodate 24 vendors, Phase II would accommodate additional 14 vendors, 120 parking stalls, Phase III would accommodate 80 vendors and 200 parking stalls.

Christopher Yuen
April 11, 2007
Page 4

phases of Ali'i Gardens Marketplace project. The current time period for construction expires on May 6, 2007.

Should you have any questions, please feel free to contact Steve Lim or Jennifer Zelko.

Sincerely,

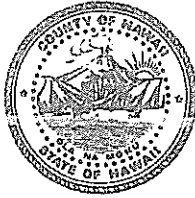
CARLSMITH BALL LLP



Steven S.C. Lim

4843-9888-5377.1

Harry Kim
Mayor



Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT

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

December 22, 2006

Mr. Keith F. Unger
Alii Gardens Marketplace
P.O. Box 181
Honaunau, Hawaii 96726

Dear Mr. Unger:

Special Management Area Use Permit No. 358 (SMA 358)
Use Permit No. 142 (USE 142)
Applicant: Alii Gardens Marketplace
Subject: Time Extension to Comply with Condition No. 5 (Complete Construction)
Tax Map Key: (3) 7-5-020:070

This is in response to your letter dated December 7, 2006, requesting an administrative extension of time in accordance with provisions of Condition No. 13 to comply with Condition No. 5 (complete construction) of Special Management Area (SMA) Use Permit No. 358. Condition No. 13 allows for an administrative time extension for a period not to exceed the period originally granted. According to the approval letter dated May 6, 2002, amending Condition No. 12E, Condition No. 5 was granted a five-year time extension based on Condition No. 13 until January 6, 2006 (or 10 years from the original effective date of the permit). Therefore, to receive an additional extension of time, you will need to submit your request with reasons in writing, along with 20 copies of that request, and a \$250 filing fee to the Planning Commission. Your request will be brought before the Planning Commission for a hearing.

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

Sincerely,


CHRISTOPHER J. YUEN

Planning Director

JWD:smn

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cc/ltr: Planning Commission

Planning Department-Kona

DEC 26 2006



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PLANNING DEPARTMENT
COUNTY OF HAWAII

December 7, 2006

Mr. Chris Yuen
Planning Department
25 Aupuni Street
Hilo, Hawaii 96720

Special Management Area Use Permit No. 358
Use Permit No. 142
Applicant: Alii Gardens Marketplace
Subject: Amendment to extend construction (Condition 5)

Dear Mr. Yuen,

Alii Gardens Marketplace would like to request an extension of time to complete construction from May 6, 2007 to May 6, 2012.

Pursuant to Item 13 of Special Management Area Use Permit No. 358, the Planning Director may grant an administrative extension of time upon the following circumstances:

A. The non-performance is the result of condition that could not have been foreseen or are beyond the control of the applicant that are not the result of their fault or negligence.

Not completing Phase by May 2006 was not Alii Gardens Marketplace's fault or a case of negligence. To the contrary, applicant worked diligently for several years preparing for Phase II of the marketplace. Michael Rhiem of Rhiem Owensby Planners and Architects was the architect hired to oversee the project, Bruce Witcher of Witcher Engineering LLP was hired to design the engineering drawings, Rivera & Sons was selected as excavation contractor and bids were received from various construction contractors. Final Plan Approval was granted by the Planning Department on March 7, 2005 and AGM was prepared to break ground shortly thereafter.

Just prior to finalizing plans and committing to financing and contractors, The Alii Gardens Marketplace was severely and negatively impacted by the opening of the Kona International Marketplace. Upon opening of the Kona International Marketplace, the Alii Gardens Marketplace immediately lost 25% of our vendors, and Phase II became unfeasible.

We are just now regaining momentum and are once again planning to begin construction for

Phase II within the next 3 years with construction to be completed within 5 years.

B. Granting of the time extension would not be contrary to the General Plan or Zoning Code.

The granting of a time extension for completion of Phase II is compatible with the General Plan in that the Planning Department will be encouraging growth and development within urban areas. The Alii Gardens Marketplace is an example of the Planning Department minimizing traffic within the greater Kailua-Kona area by allowing the availability of goods and services within a neighborhood community.

C. Granting of the time extension would not be contrary to the original reasons for the granting of the permit.

D. The time extension requested is does not exceed the period originally granted for the build-out.

I have also included a "Special Use Management Area Use Permit Application". Please let me know if there is any other information required of the Alii Gardens Marketplace in order for you to make a discussion on our request.

Sincerely,



Keith F. Unger
Owner

SPECIAL MANAGEMENT AREA USE PERMIT APPLICATION

COUNTY OF HAWAII
PLANNING DEPARTMENT
(Type or legibly print the requested information)

APPLICANT: Ali'i GARDENS MARKET PLACE / Keith Unger

APPLICANT'S SIGNATURE: [Signature]

DATE: 12/8/06

ADDRESS: POB 181
Honoumou Hi 96726

LIST APPLICANT'S INTEREST IF NOT OWNER: OWNER

LIST PRINCIPAL(S) INCLUDING NAMES OF MAIN OFFICERS: Keith Unger
ERIC von Platen Luder

PHONE: (Bus.) 328 8246 (Res.) 328 2254 (Fax) 328 8671

LANDOWNER(S): KEITH UNGER ERIC von Platen Luder

LANDOWNER SIGNATURE(S): [Signature] [Signature] DATE: 12/8/06

LANDOWNER(S) ADDRESS: KEITH Unger ERIC von Platen Luder
POB 181 75-5828 Kalakoi Rd
Honoumou Hi 96726 Kailua-Kona Hi
 96740

REQUEST: EXTENSION of time to complete
buildout from MAY 6, 2007 to May 6, 2012.

TAX MAP KEY: 3-7-5-20-70 ZONING: Ag-5

SIZE OF PROPERTY OR AFFECTED AREA(S): 5 acres

AGENT: Keith Unger

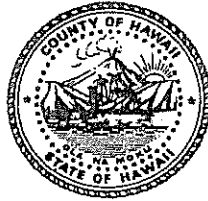
ADDRESS: POB 181
Honoumou Hi 96726

TELEPHONE: (Bus.) 328 8246 (Res.) 328 2254 (Fax) 328 8671

Please indicate to whom original correspondence and copies should be sent.

ORIGINAL: Keith Unger COPIES: ERIC von Platen Luder

Harry Kim
Mayor



County of Hawaii

PLANNING COMMISSION

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252
(808) 961-8288 • Fax (808) 961-8742

CERTIFIED MAIL

7000 0600 0024 2904 9458

Mr. Keith Unger
Alii Gardens Marketplace
P.O. Box 181
Honaunau, HI 96726

Dear Mr. Unger:

Special Management Area Use Permit Application (SMA 358)
Use Permit Application (USE 142) ✓

Request: Amend Condition No. 12E (Allow the Use
of Up to 40 Green or Earth-Tone Colored Umbrellas or White "EZ Up" Tents)

Applicant: Alii Gardens Marketplace

Tax Map Key: 7-5-20:70

The Planning Commission at its duly held public hearing on April 5, 2002, voted to approve the above-referenced request to amend Condition No. 12E of Special Management Area Use Permit No. 358 and Use Permit No. 142 to allow up to 40 umbrellas or tents for a period of up to five (5) years. Presently, Condition No. 12E allows up to 20 umbrellas in place of kiosks during the first twelve months of operation. The permits allow construction of kiosks to accommodate up to 80 vendors. The property is located across the entrance to Alii Point Subdivision and bordered by Ali'i Drive and the proposed Keauhou Parkway right-of-way, approximately 120 feet northwest of Kahakai Elementary School, Puapuaa 2nd, North Kona, Hawaii.

The Planning Director had recommended denial of the request. The Commission, however, approved the request because it meets the criteria for approval under the guidelines for an amendment to a Special Management Area Use Permit and a Use Permit. It should be pointed out that the conditions of approval for both permits are identical. The approval is based on the following reasons:

018347 *MSJ*

MAY 06 2002

Special Management Area Use Permit Application

Use Permit No. 142 and Special Management Area Use Permit No. 358 allowed the development of up to 80 kiosks for a maximum of 80 vendors at the Alii Gardens Marketplace. The construction of the marketplace was to be completed within 5 years of approval or January 3, 2001.

Condition No. 5 of Special Management Area Use Permit No. 358, which requires the construction of the project to be completed within 5 years, is being extended administratively per Condition No. 13 of the Special Management Area Use Permit.

Condition No. 12E of Special Management Area Use Permit No. 358 allowed 20 temporary structures to be used in lieu of permanent kiosks for the first 12 months of operation. The Planning Commission has approved the increase of up to 40 temporary structures to be allowed for an additional 5 years from the date of approval of the amendment. However, the total number of structures (permanent and temporary) and/or vendors may not exceed 80.

The Planning Commission has determined that the applicant desires to provide more affordable vendor spaces at their marketplace coupled with the demand for this type of use during the present downturn in the economy was sufficient reason to grant an extension of time for the use of temporary structures over a five year period from the date of approval of this amendment.

The development will not have any substantial adverse environmental or ecological effect except as such adverse effect is minimized to the extent practicable and is clearly outweighed by public health, safety, or compelling public interest. At its December 14, 1995 meeting, the Planning Commission determined that the marketplace proposed by the applicant would not have any substantial adverse environmental or ecological impact or that any such impact could be mitigated. The approved amendment to Condition No. 12E by the Planning Commission will not expand or increase the intensity of the permitted marketplace. The applicant is still limited to 80 structures (permanent and temporary) and/or vendors. As such, the amendment does not represent any appreciable increased impact on the environment.

The development is consistent with the objectives and policies as provided by Chapter 205A, HRS, and the Special Management Area guidelines as contained herein. The Planning Commission had found that the marketplace was consistent with the objectives and policies of Chapter 205A, HRS, at its December 14, 1995 meeting. The approved amendment will not alter or increase the use of the property as currently permitted by Special Management Area Use Permit No. 358. The amendment still limits the development to 80 structures and 80 vendors allowed on the property. As such, the amendment is determined to be consistent with the objectives and policies of Chapter 205A, HRS.

The development is consistent with the General Plan, Zoning Code and other applicable ordinances. Before granting a Special Management Area Use Permit, the Planning Commission must find that the proposed use is consistent with the General Plan, Zoning Code and other applicable ordinances. The Planning Commission determined that the marketplace was consistent with the General Plan, Zoning Code, and applicable ordinances and approved the issuance of Use Permit No. 142 on December 14, 1995. A similar amendment to Use Permit No. 142 was approved by the Planning Commission at its April 5, 2002 hearing.

Based on these findings, the Planning Commission hereby approves the request to amend Condition 12E of Special Management Area Use Permit No. 358.

Approval of this request is subject to the following conditions: Should any of these conditions not be met or substantially complied with in a timely fashion, the Director may initiate procedures to revoke this permit.

1. The applicant, its successor or assigns shall be responsible for complying with all stated conditions of approval.
2. The applicant, its successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim or demand for the property damage, personal injury or death arising out of any act or omission of the applicant, its successors or assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of the permit.
3. The applicant, its successors or assigns shall be responsible for complying with all conditions of the Special Management Area Use Permit which allowed the proposed development.
4. Final Plan Approval for the proposed improvements shall be secured from the Planning Department in accordance with Chapter 25-243 of the Zoning Code. Plans shall identify the proposed structures, vehicular traffic, paved driveway access and parking stalls associated with the proposed use. Landscaping shall also be indicated on the plans and be provided for the purpose of mitigating any adverse noise or visual impacts to adjacent properties. Landscaping along the project site's boundaries shall be provided to the extent that a continuous, unbroken, heavy planting screen, no less than 5 feet in height, is established prior to the issuance of a certificate of occupancy.
5. Construction of the proposed development shall be completed within five (5) years from the effective date of this permit.
6. Access, roadway and any drainage improvements shall be constructed in a manner meeting with the approval of the Department of Public Works. In order to ensure the safety of bicyclists and pedestrians, the applicant shall extend the paved shoulders to the Alii Drive right-of-way and along the entire frontage of the property meeting with the approval of the Department of Public Works. All these improvements shall be completed prior to the issuance of a certificate of occupancy.

7. Sewer lines shall be constructed, to hook up to the Alii Drive Interceptor Sewer, in a manner meeting with the approval of the Department of Public Works and prior to the issuance of a certificate of occupancy. In the interim, wastewater generated by the proposed development shall be disposed of in a manner meeting with the approval of the Department of Health or Department of Public Works, whichever is applicable.
8. A Data Recovery Plan and Preservation Plan shall be prepared for the review and approval of the State Department of Land and Natural Resources-Historic Preservation Division. Proposed mitigation treatment (preservation in place or disinterment/reinterment) for burial sites must be approved by the Historic Preservation Division's Hawaii Island Burial Council before detailed mitigation plans are finalized for these sites. A copy of the approved Final Data Recovery Plan and Preservation Plan shall be submitted to the Planning Director for its files prior to submitting plans for plan approval review and prior to any approval for any land alteration permits.
9. Should any unidentified sites or remains such as artifacts, shell, bone, or charcoal deposits, human burials, rock or coral alignments, paving, or walks be encountered, work in the immediate area shall cease and the Planning Department shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the Planning Department when it finds that sufficient mitigative measures have been taken.
10. A Solid Waste Management Plan for the development shall be prepared meeting with the approval of the Department of Public Works prior to issuance of a certificate of occupancy for any portion of the project. The Plan shall include, but not be limited to, the management of solid waste generated from the construction and operating phase(s) of the proposed development. Approved recommendations and mitigation measures shall be implemented at a time and in a manner meeting with the approval of the Department of Public Works. A copy of the approved Plan shall be submitted to the Planning Department for its files.
11. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of the approval of the permit. The report shall include, but not be limited to, the status of the development and to what extent the conditions of approval are being complied with, and a detailed listing of public complaints or problems and their disposition. If the applicant fails to comply with the conditions of approval or is unable to resolve any public complaint(s), the Planning Director shall investigate and, if necessary, enforce the appropriate conditions. The Planning Director may, as part of any enforcement action or remedial effort, 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. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.

12. The applicant, its successors or assigns shall be responsible for complying with the following conditions:
 - A. The marketplace will be open to the public no earlier than 8:00 a.m. and will close no later than 5:00 p.m. Vendors will be allowed to enter the property no earlier than 7:00 a.m. and all vendors will be required to leave the property no later than 6:30 p.m. Applicants agree that there will be no market operations, events, performances or activities held after sunset and before sunrise.
 - B. Applicants will ensure that all solid waste materials will be removed from the property on a daily basis and enforce rules prohibiting vendors from using trash facilities located on nearby properties.
 - C. Applicants will pave all areas required by the Planning Department. All other areas of vehicular parking and travel shall be surfaced with a dust-free material.
 - D. Applicant will limit Alii Drive frontage signage to two signs, each no larger than the maximum allowable size per County of Hawaii regulations. One sign will be located at each corner of the property which fronts on Alii Drive. Signs will be of permanent construction, will be constructed of wood or metal, will be of a character consistent with a high quality, Polynesian market and will conform with County sign ordinances. Applicant will not use, nor allow any vendor to use, banners, sandwich signs, signboards, flags, balloons, inflatable signs or features, temporary signs or the like.
 - E. Applicant will develop Polynesian-designed[, thatched] kiosks as sales areas. No umbrellas, tarps, awnings, tents, or other temporary shelters or display areas will be permitted except that up to [20]40 green or earth-tone colored umbrellas or tarps may be used in place of the kiosks [during the first twelve months of operation] for a period not to exceed five (5) years from the date of approval of this amendment.
 - F. Applicant will assign the kiosks or sales display areas nearest to Alii Drive to local artisans and crafts persons selling high quality, handmade products. Applicant will assign the kiosks or sales display areas furthest away from Alii Drive to sellers of imported merchandise and/or previously owned merchandise. Applicant shall strive to attract vendors selling a high quality product and shall insure that all vendors comply with project rules and regulations. At no time will more than one half of the vendors on site be selling primarily imported or previously owned merchandise.
 - G. Applicant will not use or permit any vendor, employee or other user of the marketplace to use, play or perform amplified music, including radios, cassette or CD players or car stereo systems.
 - H. Applicant will institute measures to reduce noise, fugitive dust and traffic problems during construction and operation of facilities on the property.

- I. Applicant will provide adequate parking on the property and will prohibit vendors and patrons from parking on Alii Drive. Applicant will recommend and support designation of both mauka and makai portions of Alii Drive as no-parking zones for 500' on both north and south sides of the entrance(s) to the marketplace. Applicant will cooperate in encouraging patrons and vendors to comply with the no-parking restriction including hiring off-duty police officers, if necessary, to control traffic and parking along Alii Drive.
- J. Applicant will have a designated manager on the property and on duty during all hours of operation of the marketplace. The name and phone number of the designated manager will be provided to all property owners within 300 feet of the property.
- K. Applicant will develop a landscape buffer between the parking and sales areas of the marketplace and Alii Drive, which will include a hedge, shade trees and lawn. Applicant will make reasonable efforts to screen sales areas from nearby residences.
- L. Applicant will request that the State and County permit access from the property to the proposed Alii Highway. If access is permitted, applicant will encourage patrons and require vendors to use Alii Highway for access to the marketplace. Applicant will design and construct its internal traffic circulation pattern in a way that will discourage use of the access road as a connector between Alii Drive and Alii Highway.
- M. Applicant will prohibit the possession, consumption, use, or sale of all alcoholic beverages and illegal drugs on the property.
- N. Applicant will design and develop drainage and flood control improvements which will prevent surface runoff from the property to enter Alii Drive or any of the private properties makai of Alii Drive in the vicinity of the property.
- O. Applicant will utilize environmentally appropriate best management practices in maintaining landscaping and performing pest control on the property.
- P. Applicant will comply with all State and County requirements relating to preservation of historical and cultural resources including, but not limited to, appropriate treatment of burial sites on the property.
- Q. Applicant will, on an ongoing basis, monitor traffic flow on Alii Drive and assess any impacts the marketplace has on traffic. In the event marketplace-related traffic results in disruption of traffic flow on Alii Drive, applicant will take appropriate measures to mitigate the traffic impact. These mitigation measures will include, but are not limited to, hiring off-duty police officers and/or security guards to direct traffic,

adjusting hours of operation or otherwise changing operations, and performance of traffic improvements.

- R. Applicant will take appropriate measures to protect the safety and security of property owners near the marketplace. Applicant will prohibit overnight camping on the property and will prohibit vendors from sleeping in vehicles or camping in the surrounding area. Applicant will prohibit pets or animals on the property.
 - S. Applicant will design and develop a wastewater treatment system to be approved by the State of Hawaii Department of Health and the County of Hawaii. Upon commencement of market operations on the property, no portable toilets will be permitted at any time.
13. An extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances:
- A. The non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence.
 - B. Granting of the time extension would not be contrary to the General Plan or Zoning Code.
 - C. Granting of the time extension would not be contrary to the original reasons for the granting of the permit.
 - 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).

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.

Use Permit

Use Permit No. 142 approved the development of up to 80 kiosks for a maximum of 80 vendors at the Alii Gardens Marketplace. The construction of the marketplace was to be completed within 5 years of approval or January 3, 2001.

Condition No. 5 of Use Permit No. 142, which requires the construction of the project to be completed within 5 years, is being extended administratively per Condition No. 13 of the Use Permit.

Condition No. 12E of Use Permit No. 142 allowed 20 temporary structures to be used in lieu of permanent kiosks for the first 12 months of operation. The Planning Commission has

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approved the increase of up to 40 temporary structures to be allowed for an additional 5 years from the date of approval of the amendment. However, the total number of structures (permanent and temporary) and/or vendors may not exceed 80.

The Planning Commission has determined that the applicant desires to provide more affordable vendor spaces at their marketplace coupled with the demand for this type of use during the present downturn in the economy was sufficient reason to grant an extension of time for the use of temporary structures over a five year period from the date of approval of this amendment.

The granting of the proposed use shall be consistent with the general purpose of the zoning district, the intent and purpose of the Zoning Code, and the County General Plan. The amendment approved by the Planning Commission does not change the scope of the development as it was presented and approved in December 14, 1995. At that time the applicant represented to the Commission that they proposed to build 80 permanent kiosks with up to 80 vendors. The current amendment approved by the Commission does not increase or expand the use as it is permitted on the property. It simply extends the duration of time that temporary structures could be used in lieu of permanent kiosks. Therefore, the use as amended will continue to be consistent with the Zoning Code and the County General Plan.

The granting of the proposed use shall not be materially detrimental to the public welfare nor cause substantial, adverse impact to the community's character or to surrounding properties. On December 14, 1995, the Planning Commission found that the project would not be materially detrimental to the public welfare nor cause substantial, adverse impacts to the community or surrounding properties. This amendment does not increase the allowed intensity or density of use of the property. The amendment continues the limit on the number of kiosks and vendors to 80. As such, the impact to surrounding properties should be the same as without this amendment. In addition, the applicant asserted that they would use temporary structures that would blend in with the surrounding landscape and vegetation. This should further minimize the impact to the surrounding community.

The granting of the proposed use shall not unreasonably burden public agencies to provide roads, streets, sewer, water, drainage, schools, police and fire protection and other related infrastructures. The site should continue to have adequate infrastructure available for their permitted use. The amendment to the Use Permit does not propose any expansion or intensification of the existing permitted use. As such, the proposed amendment is not expected to require any increase in utilities or services. However, the applicant will provide improvements to utilities and services, as they become necessary.

Based on the above findings, the Planning Commission hereby approves the request to amend Condition 12E of Use Permit No. 142.

Approval of this request is subject to the following conditions: Should any of these conditions not be met or substantially complied with in a timely fashion, the Director may initiate procedures to revoke this permit.

1. The applicant, its successor or assigns shall be responsible for complying with all stated conditions of approval.
2. The applicant, its successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim or demand for the property damage, personal injury or death arising out of any act or omission of the applicant, its successors or assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of the permit.
3. The applicant, its successors or assigns shall be responsible for complying with all conditions of the Special Management Area Use Permit which allowed the proposed development.
4. Final Plan Approval for the proposed improvements shall be secured from the Planning Department in accordance with Chapter 25-243 of the Zoning Code. Plans shall identify the proposed structures, vehicular traffic, paved driveway access and parking stalls associated with the proposed use. Landscaping shall also be indicated on the plans and be provided for the purpose of mitigating any adverse noise or visual impacts to adjacent properties. Landscaping along the project site's boundaries shall be provided to the extent that a continuous, unbroken, heavy planting screen, no less than 5 feet in height, is established prior to the issuance of a certificate of occupancy.
5. Construction of the proposed development shall be completed within five (5) years from the effective date of this permit.
6. Access, roadway and any drainage improvements shall be constructed in a manner meeting with the approval of the Department of Public Works. In order to ensure the safety of bicyclists and pedestrians, the applicant shall extend the paved shoulders to the Alii Drive right-of-way and along the entire frontage of the property meeting with the approval of the Department of Public Works. All these improvements shall be completed prior to the issuance of a certificate of occupancy.
7. Sewer lines shall be constructed, to hook up to the Alii Drive Interceptor Sewer, in a manner meeting with the approval of the Department of Public Works and prior to the issuance of a certificate of occupancy. In the interim, wastewater generated by the proposed development shall be disposed of in a manner meeting with the approval of the Department of Health or Department of Public Works, whichever is applicable.
8. A Data Recovery Plan and Preservation Plan shall be prepared for the review and approval of the State Department of Land and Natural Resources-Historic Preservation Division. Proposed mitigation treatment (preservation in place or disinternment/reinternment) for burial sites must be approved by the Historic Preservation Division's Hawaii Island Burial Council before detailed mitigation

plans are finalized for these sites. A copy of the approved Final Data Recovery Plan and Preservation Plan shall be submitted to the Planning Director for its files prior to submitting plans for plan approval review and prior to any approval for any land alteration permits.

9. Should any unidentified sites or remains such as artifacts, shell, bone, or charcoal deposits, human burials, rock or coral alignments, paving, or walks be encountered, work in the immediate area shall cease and the Planning Department shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the Planning Department when it finds that sufficient mitigative measures have been taken.
10. A Solid Waste Management Plan for the development shall be prepared meeting with the approval of the Department of Public Works prior to issuance of a certificate of occupancy for any portion of the project. The Plan shall include, but not be limited to, the management of solid waste generated from the construction and operating phase(s) of the proposed development. Approved recommendations and mitigation measures shall be implemented at a time and in a manner meeting with the approval of the Department of Public Works. A copy of the approved Plan shall be submitted to the Planning Department for its files.
11. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of the approval of the permit. The report shall include, but not be limited to, the status of the development and to what extent the conditions of approval are being complied with, and a detailed listing of public complaints or problems and their disposition. If the applicant fails to comply with the conditions of approval or is unable to resolve any public complaint(s), the Planning Director shall investigate and, if necessary, enforce the appropriate conditions. The Planning Director may, as part of any enforcement action or remedial effort, 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. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.
12. The applicant, its successors or assigns shall be responsible for complying with the following conditions:
 - A. The marketplace will be open to the public no earlier than 8:00 a.m. and will close no later than 5:00 p.m. Vendors will be allowed to enter the property no earlier than 7:00 a.m. and all vendors will be required to leave the property no later than 6:30 p.m. Applicants agree that there will be no market operations, events, performances or activities held after sunset and before sunrise.
 - B. Applicants will ensure that all solid waste materials will be removed from the property on a daily basis and enforce rules prohibiting vendors from using trash facilities located on nearby properties.

- C. Applicants will pave all areas required by the Planning Department. All other areas of vehicular parking and travel shall be surfaced with a dust-free material.
- D. Applicant will limit Alii Drive frontage signage to two signs, each no larger than the maximum allowable size per County of Hawaii regulations. One sign will be located at each corner of the property which fronts on Alii Drive. Signs will be of permanent construction, will be constructed of wood or metal, will be of a character consistent with a high quality, Polynesian market and will conform with County sign ordinances. Applicant will not use, nor allow any vendor to use, banners, sandwich signs, signboards, flags, balloons, inflatable signs or features, temporary signs or the like.
- E. Applicant will develop Polynesian-designed[, thatched] kiosks as sales areas. No umbrellas, tarps, awnings, tents, or other temporary shelters or display areas will be permitted except that up to [20]40 green or earth-tone colored umbrellas or tarps may be used in place of the kiosks [during the first twelve months of operation] for a period not to exceed five (5) years from the date of approval of this amendment.
- F. Applicant will assign the kiosks or sales display areas nearest to Alii Drive to local artisans and crafts persons selling high quality, handmade products. Applicant will assign the kiosks or sales display areas furthest away from Alii Drive to sellers of imported merchandise and/or previously owned merchandise. Applicant shall strive to attract vendors selling a high quality product and shall insure that all vendors comply with project rules and regulations. At no time will more than one half of the vendors on site be selling primarily imported or previously owned merchandise.
- G. Applicant will not use or permit any vendor, employee or other user of the marketplace to use, play or perform amplified music, including radios, cassette or CD players or car stereo systems.
- H. Applicant will institute measures to reduce noise, fugitive dust and traffic problems during construction and operation of facilities on the property.
- I. Applicant will provide adequate parking on the property and will prohibit vendors and patrons from parking on Alii Drive. Applicant will recommend and support designation of both mauka and makai portions of Alii Drive as no-parking zones for 500' on both north and south sides of the entrance(s) to the marketplace. Applicant will cooperate in encouraging patrons and vendors to comply with the no-parking restriction including hiring off-duty police officers, if necessary, to control traffic and parking along Alii Drive.
- J. Applicant will have a designated manager on the property and on duty during all hours of operation of the marketplace. The name and phone

number of the designated manager will be provided to all property owners within 300 feet of the property.

- K. Applicant will develop a landscape buffer between the parking and sales areas of the marketplace and Alii Drive, which will include a hedge, shade trees and lawn. Applicant will make reasonable efforts to screen sales areas from nearby residences.
- L. Applicant will request that the State and County permit access from the property to the proposed Alii Highway. If access is permitted, applicant will encourage patrons and require vendors to use Alii Highway for access to the marketplace. Applicant will design and construct its internal traffic circulation pattern in a way that will discourage use of the access road as a connector between Alii Drive and Alii Highway.
- M. Applicant will prohibit the possession, consumption, use, or sale of all alcoholic beverages and illegal drugs on the property.
- N. Applicant will design and develop drainage and flood control improvements which will prevent surface runoff from the property to enter Alii Drive or any of the private properties makai of Alii Drive in the vicinity of the property.
- O. Applicant will utilize environmentally appropriate best management practices in maintaining landscaping and performing pest control on the property.
- P. Applicant will comply with all State and County requirements relating to preservation of historical and cultural resources including, but not limited to, appropriate treatment of burial sites on the property.
- Q. Applicant will, on an ongoing basis, monitor traffic flow on Alii Drive and assess any impacts the marketplace has on traffic. In the event marketplace-related traffic results in disruption of traffic flow on Alii Drive, applicant will take appropriate measures to mitigate the traffic impact. These mitigation measures will include, but are not limited to, hiring off-duty police officers and/or security guards to direct traffic, adjusting hours of operation or otherwise changing operations, and performance of traffic improvements.
- R. Applicant will take appropriate measures to protect the safety and security of property owners near the marketplace. Applicant will prohibit overnight camping on the property and will prohibit vendors from sleeping in vehicles or camping in the surrounding area. Applicant will prohibit pets or animals on the property.
- S. Applicant will design and develop a wastewater treatment system to be approved by the State of Hawaii Department of Health and the County of Hawaii. Upon commencement of market operations on the property, no portable toilets will be permitted at any time.

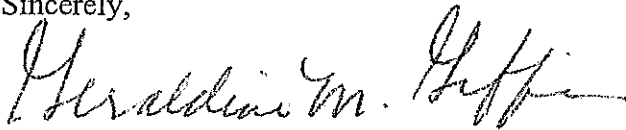
Mr. Keith Unger
Page 13

13. An extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances:
 - A. The non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence.
 - B. Granting of the time extension would not be contrary to the General Plan or Zoning Code.
 - C. Granting of the time extension would not be contrary to the original reasons for the granting of the permit.
 - 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).

These approvals do not, however, sanction the specific plans submitted with the requests as they may be subject to change given specific code and regulatory requirements of the affected agencies.

Should you have any questions, please contact Alice Kawaha of the Planning Department Hilo office at 961-8288 or Daryn Arai of the Kona office at 327-3510.

Sincerely,

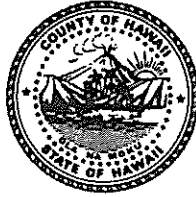


Geraldine M. Giffin, Chairman
Planning Commission

laliigardens01pc

cc: Department of Public Works
Department of Water Supply
County Real Property Tax Division
Planning Department – Kona
Office of Planning, CZM Program (w/Background)
Brian Minaai, Director/DOT-Highways, Honolulu
Mr. Norman Hayashi
Mr. Jeffrey Darrow
Plan Approval Section

Stephen K. Yamashiro
Mayor



County of Hawaii

PLANNING COMMISSION

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252
(808) 961-8288 • Fax (808) 961-9615

CERTIFIED MAIL
P 364 320 023

January 4, 1996

Mr. Keith Unger
Alii Gardens Marketplace
P.O. Box 181
Honaunau, HI 96726

Dear Mr. Unger:

Use Permit Application (USE 95-9)
Applicant: Alii Gardens Marketplace
Request: Establish an Open-Air Market and Related Improvements
Tax Map Key: 7-5-20:70

The Planning Commission at its duly held public hearing on December 14, 1995, voted to approve the above-referenced application. Use Permit No. 142 is hereby issued to allow the establishment of an open-air market place, parking area and related improvements. The property is located across the entrance to Alii Point Subdivision mauka of Alii Drive between Alii Drive and the proposed Alii Highway, approximately 120 feet northwest of Kahakai Elementary School at Puapuaa 2nd, North Kona, Hawaii.

Approval of this request is based on the following:

The proposed use will be consistent with the general purpose of the zoned district, the intent and purpose of the Zoning Code and the County General Plan. The establishment of an open-air marketplace on a parcel located within the State Land Use Urban District and the County's Unplanned zoned district may be permitted through the Use Permit review process. The Use Permit process provides an avenue to review and analyze a proposed project on a case-by-case basis relative to infrastructure and impacts on surrounding properties and existing uses as well as the General Plan goals and policies. The intent and purpose of the Zoning Code is to promote health, safety, morals or the general welfare of the community through regulations and restrictions relative to the location and use of buildings, off-street parking, the percentage of lots that may be occupied, the density of population and land for trade, industry, residence or other purposes.

Although the Kona Regional Plan designates the area for Residential (RES-10), the subject property is situated within the Urban Expansion area of the General Plan Land Use Pattern Allocation Guide (LUPAG) Map. The Urban Expansion designation allows for high and medium density uses which include commercial activities provided all applicable goals, policies and standards of the General Plan can be met. Mindful of the type of service the

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applicant will provide to the residents of West Hawaii, the proposed use will compliment the following goals, policies and standards of the Land Use and Commercial Elements of the General Plan:

- o Designate and allocate land uses in appropriate proportions and mix and in keeping with the social, cultural and physical environments of the County.
- o The County shall encourage the development and maintenance of communities meeting the needs of its residents in balance with the physical and social environment.
- o Provide for commercial developments that maximize convenience to users.
- o Commercial facilities shall be developed in areas adequately served by necessary services, such as water, utilities, sewers and transportation systems.
- o Distribution of commercial areas shall be such as to best meet the demands of neighborhood, community and regional needs.
- o The development of commercial facilities should be designed to fit into the locale with minimal intrusion while providing the desired services. Appropriate infrastructure and design concerns shall be incorporated into the review of such developments.

The proposed use would also conform to the following goals and policies of the Economic Element:

- o Provide residents with opportunities to improve their quality of life.
- o Economic development and improvement shall be in balance with the physical and social environments of the island of Hawaii.
- o The County of Hawaii shall strive for diversification of its economy by strengthening existing industries and attracting new endeavors.

The Kona Regional Plan adopted by the Planning Commission in 1984 is intended to provide short and middle range implementation strategies for the goals, policies and land use pattern presented in the General Plan. The Kona Regional Plan and its Zone Guide Map, adopted over 10 years ago, suggested a Residential (RES-10) designation for the project site, and recognized the need for interim village and neighborhood commercial uses for the project site. The property is situated midway between the urban/retail/employment centers of Kailua Village and Keauhou, and the proposed use will support diversification of the economic base for the County. Approval of the subject request would be consistent with the policy direction established by the General Plan.

The desired use will not be materially detrimental to the public welfare nor cause substantial adverse impact to the community's character or surrounding properties. The lands surrounding the subject parcel are currently vacant. The Alii Gardens Marketplace will be contained within the boundaries of the subject parcel with visual and noise impacts buffered by means of landscaping zones along the parcel boundaries. The view onto the subject parcel from surrounding uses/properties in the area will be screened by the trees

which will be incorporated into the landscaping. All parking for customers and vendors will be off-street and parking activities will likewise be screened by the surrounding landscape buffer. Due to the undeveloped nature of the subject property and the immediate vacant surrounding areas, it is not anticipated that endangered or threatened candidate species of flora or fauna are located within the project site, nor has the area been identified as a significant botanical or biological habitat.

The proposed use will not substantially alter or change the essential character of the land. The rock wall fronting Alii Drive will be preserved except at the proposed driveway entrance where a new rock wall will be constructed along either side of the driveway. This will maintain the present character along either side of the driveway which is the most visible boundary of the project. The extensive use of landscaping within the kiosk and umbrella area and along the parcel boundaries ensures the project will be harmonious with the existing conditions. The existing topography will be preserved where possible and a minimum amount of grading is planned for the project.

The proposed use will not adversely affect similar or related existing uses within the surrounding area, community or region. The number of small farmers, vendors and craftspeople in and around the Kona area who need a facility as Alii Gardens Marketplace to offer their goods and produce for sale has grown considerably and continues to grow. This facility will encourage local commerce and create additional outlets for locally produced goods. The project location, midway between Kailua and Keauhou, is ideally situated for vendors and customers from both North and South Kona. The concept of an open air marketplace where small businesses can operate independently with low overhead, yet with the benefit of an organized, centrally controlled facility equipped with basic infrastructure has proven to be a commercial success benefitting both sellers and consumers. The advent of large warehouse type retail outlets that stock their shelves with discounted goods from off island has deprived many of the smaller local merchants and vendors of suitable venues to offer their locally produced goods for sale. Alii Gardens Marketplace will provide such a venue for the economic community.

The desired use will not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, police and fire protection and other related infrastructure. The project site is located within an area adequately served with essential services and facilities such as water, transportation systems, and other utilities. According to Department of Public Works, the proposed project will have a moderately negative effect on the Alii Drive/Royal Poinciana Drive intersection. Proper layout design of the parking lot, sight distances and driveway entrance will ensure safe ingress and egress to the project site while minimizing congestion associated with turning movements on Alii Drive. The traffic increase associated with the project will moderately affect traffic along Alii Drive. A bike lane exists along Alii Drive fronting the subject property. In order to ensure the safety of bicyclists as well as pedestrians, the Department of Public Works stated that the applicant should extend the paved shoulders to the Alii Drive right-of-way and along the entire frontage of the property. A condition of approval will be included to ensure the public safety. Water is readily available from existing utilities. Improvements to existing utilities are necessary for the project and will be provided by the applicant. Police and fire protection services are provided by existing facilities and manpower. According to the Department of Public Works, the applicant should install sewer lines to tie in with the Alii Drive Interceptor Sewer which is currently under construction. A condition of approval will

be included that the applicant hook up to the County's sewer system when in operation. In the interim, wastewater generated from the proposed development should be treated and disposed of in accordance with the regulations of the State Department of Health.

Approval of this request is subject to the following conditions:

1. The applicant, its successor or assigns shall be responsible for complying with all stated conditions of approval.
2. The applicant, its successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim or demand for the property damage, personal injury or death arising out of any act or omission of the applicant, its successors or assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of the permit.
3. The applicant, its successors or assigns shall be responsible for complying with all conditions of the Special Management Area Use Permit which allowed the proposed development.
4. Final Plan Approval for the proposed improvements shall be secured from the Planning Department in accordance with Chapter 25-243 of the Zoning Code. Plans shall identify the proposed structures, vehicular traffic, paved driveway access and parking stalls associated with the proposed use. Landscaping shall also be indicated on the plans and be provided for the purpose of mitigating any adverse noise or visual impacts to adjacent properties. Landscaping along the project site's boundaries shall be provided to the extent that a continuous, unbroken, heavy planting screen, no less than 5 feet in height, is established prior to the issuance of a certificate of occupancy.
5. Construction of the proposed development shall be completed within five (5) years from the effective date of this permit.
6. Access, roadway and any drainage improvements shall be constructed in a manner meeting with the approval of the Department of Public Works. In order to ensure the safety of bicyclists and pedestrians, the applicant shall extend the paved shoulders to the Alii Drive right-of-way and along the entire frontage of the property meeting with the approval of the Department of Public Works. All these improvements shall be completed prior to the issuance of a certificate of occupancy.
7. Sewer lines shall be constructed, to hook up to the Alii Drive Interceptor Sewer, in a manner meeting with the approval of the Department of Public Works and prior to the issuance of a certificate of occupancy. In the interim, wastewater generated by the proposed development shall be disposed of in a manner meeting with the approval of the Department of Health or Department of Public Works, whichever is applicable.
8. A Data Recovery Plan and Preservation Plan shall be prepared for the review and approval of the State Department of Land and Natural Resources-Historic Preservation Division. Proposed mitigation treatment (preservation in place or disinternment/reinternment) for burial sites must be approved by the Historic Preservation Division's Hawaii Island Burial Council before detailed mitigation plans

are finalized for these sites. A copy of the approved Final Data Recovery Plan and Preservation Plan shall be submitted to the Planning Director for its files prior to submitting plans for plan approval review and prior to any approval for any land alteration permits.

9. Should any unidentified sites or remains such as artifacts, shell, bone, or charcoal deposits, human burials, rock or coral alignments, paving, or walks be encountered, work in the immediate area shall cease and the Planning Department shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the Planning Department when it finds that sufficient mitigative measures have been taken.
10. A Solid Waste Management Plan for the development shall be prepared meeting with the approval of the Department of Public Works prior to issuance of a certificate of occupancy for any portion of the project. The Plan shall include, but not be limited to, the management of solid waste generated from the construction and operating phase(s) of the proposed development. Approved recommendations and mitigation measures shall be implemented at a time and in a manner meeting with the approval of the Department of Public Works. A copy of the approved Plan shall be submitted to the Planning Department for its files.
11. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of the approval of the permit. The report shall include, but not be limited to, the status of the development and to what extent the conditions of approval are being complied with, and a detailed listing of public complaints or problems and their disposition. If the applicant fails to comply with the conditions of approval or is unable to resolve any public complaint(s), the Planning Director shall investigate and, if necessary, enforce the appropriate conditions. The Planning Director may, as part of any enforcement action or remedial effort, 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. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.
12. The applicant, its successors or assigns shall be responsible for complying with the following conditions:
 - A. The marketplace will be open to the public no earlier than 8:00 a.m. and will close no later than 5:00 p.m. Vendors will be allowed to enter the property no earlier than 7:00 a.m. and all vendors will be required to leave the property no later than 6:30 p.m. Applicants agree that there will be no market operations, events, performances or activities held after sunset and before sunrise.
 - B. Applicants will ensure that all solid waste materials will be removed from the property on a daily basis and enforce rules prohibiting vendors from using trash facilities located on nearby properties.

- C. Applicants will pave all areas required by the Planning Department. All other areas of vehicular parking and travel shall be surfaced with a dust-free material.
- D. Applicant will limit Alii Drive frontage signage to two signs, each no larger than the maximum allowable size per County of Hawaii regulations. One sign will be located at each corner of the property which fronts on Alii Drive. Signs will be of permanent construction, will be constructed of wood or metal, will be of a character consistent with a high quality, Polynesian market and will conform with County sign ordinances. Applicant will not use, nor allow any vendor to use, banners, sandwich signs, signboards, flags, balloons, inflatable signs or features, temporary signs or the like.
- E. Applicant will develop Polynesian-designed, thatched kiosks as sales areas. No umbrellas, tarps, awnings, tents, or other temporary shelters or display areas will be permitted except that up to 20 green or earth-tone colored umbrellas may be used in place of the kiosks during the first twelve months of operation.
- F. Applicant will assign the kiosks or sales display areas nearest to Alii Drive to local artisans and crafts persons selling high quality, handmade products. Applicant will assign the kiosks or sales display areas furthest away from Alii Drive to sellers of imported merchandise and/or previously owned merchandise. Applicant shall strive to attract vendors selling a high quality product and shall insure that all vendors comply with project rules and regulations. At no time will more than one half of the vendors on site be selling primarily imported or previously owned merchandise.
- G. Applicant will not use or permit any vendor, employee or other user of the marketplace to use, play or perform amplified music, including radios, cassette or CD players or car stereo systems.
- H. Applicant will institute measures to reduce noise, fugitive dust and traffic problems during construction and operation of facilities on the property.
- I. Applicant will provide adequate parking on the property and will prohibit vendors and patrons from parking on Alii Drive. Applicant will recommend and support designation of both mauka and makai portions of Alii Drive as no-parking zones for 500' on both north and south sides of the entrance(s) to the marketplace. Applicant will cooperate in encouraging patrons and vendors to comply with the no-parking restriction including hiring off-duty police officers, if necessary, to control traffic and parking along Alii Drive.
- J. Applicant will have a designated manager on the property and on duty during all hours of operation of the marketplace. The name and phone number of the designated manager will be provided to all property owners within 300 feet of the property.

- K. Applicant will develop a landscape buffer between the parking and sales areas of the marketplace and Alii Drive, which will include a hedge, shade trees and lawn. Applicant will make reasonable efforts to screen sales areas from nearby residences.
 - L. Applicant will request that the State and County permit access from the property to the proposed Alii Highway. If access is permitted, applicant will encourage patrons and require vendors to use Alii Highway for access to the marketplace. Applicant will design and construct its internal traffic circulation pattern in a way that will discourage use of the access road as a connector between Alii Drive and Alii Highway.
 - M. Applicant will prohibit the possession, consumption, use, or sale of all alcoholic beverages and illegal drugs on the property.
 - N. Applicant will design and develop drainage and flood control improvements which will prevent surface runoff from the property to enter Alii Drive or any of the private properties makai of Alii Drive in the vicinity of the property.
 - O. Applicant will utilize environmentally appropriate best management practices in maintaining landscaping and performing pest control on the property.
 - P. Applicant will comply with all State and County requirements relating to preservation of historical and cultural resources including, but not limited to, appropriate treatment of burial sites on the property.
 - Q. Applicant will, on an ongoing basis, monitor traffic flow on Alii Drive and assess any impacts the marketplace has on traffic. In the event marketplace-related traffic results in disruption of traffic flow on Alii Drive, applicant will take appropriate measures to mitigate the traffic impact. These mitigation measures will include, but are not limited to, hiring off-duty police officers and/or security guards to direct traffic, adjusting hours of operation or otherwise changing operations, and performance of traffic improvements.
 - R. Applicant will take appropriate measures to protect the safety and security of property owners near the marketplace. Applicant will prohibit overnight camping on the property and will prohibit vendors from sleeping in vehicles or camping in the surrounding area. Applicant will prohibit pets or animals on the property.
 - S. Applicant will design and develop a wastewater treatment system to be approved by the State of Hawaii Department of Health and the County of Hawaii. Upon commencement of market operations on the property, no portable toilets will be permitted at any time.
13. An extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances:

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- A. The non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence.
- B. Granting of the time extension would not be contrary to the General Plan or Zoning Code.
- C. Granting of the time extension would not be contrary to the original reasons for the granting of the permit.
- D. The time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year).

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

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

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

Sincerely,



Edward E. Crook, Chairman
Planning Commission

AK:syw
LAlilG02.PC

cc: Honorable Stephen K. Yamashiro, Mayor
Department of Public Works
Department of Water Supply
County Real Property Tax Division - Kona
West Hawaii Office
Department of Land and Natural Resources
Department of Health
Reid and Associates