

Harry Kim
Mayor



Christopher J. Yuen
Director

Brad Kurokawa, ASLA
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County of Hawaii
PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224
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January 16, 2008

Michael J. Matsukawa, Esq.
75-5751 Kuakini Highway, Room 201
Kailua-Kona, HI 96740

Dear Mr. Matsukawa:

SUBJECT: ORDINANCE NO. 96-8
HOKULI'A PROJECT REZONING

This is in response to your letter of November 26, 2007, essentially asking that the time period of the "Coupe" condemnation suit be added to the "tolling" we previously recognized for the agricultural use requirements of Ord. 96-8.

We had previously recognized that the "Kelly" litigation, from the filing of the first amended complaint which attacked the validity of the project under Chap. 205, H.R.S., to the court approval of the Settlement Agreement and the dismissal of the case, tolled the various deadlines contained in Ord. 96-7 and 96-8, and other related land use approvals for the Oceanside 1250 project. We based this upon case law from other states holding that when a legal action is taken to invalidate a land use approval, and it would be imprudent for the landowner to expend funds and time trying to fulfill the conditions of the permit while the ultimate validity was in doubt, the time to perform the conditions of approval would be tolled while the litigation was pending. The cases that I am aware of involve direct legal challenges to the basic land use approval, such as a judicial appeal of an administratively-granted permit, or a suit against the validity of a rezoning action. If successful, the judgment in these cases would have invalidated the land use approval.

The "Kelly" litigation fits that pattern. The "Coupe" case, on the other hand, essentially involved the County's attempt to condemn property necessary for construction of the Mamalahoa Bypass Highway. The landowner alleged that the Development Agreement was illegal, as a defense against the condemnation action. The landowner made affirmative claims for relief that included the invalidation of the Development

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Agreement. The landowner did not, however, present a claim for relief that directly asked for the invalidation of the Oceanside 1250 land use approvals, and it does not appear that the case, as pleaded, could have led to the invalidation of the zoning ordinances, SMA permit, or other land use approvals on the Oceanside 1250 property, or to an injunction against further development based on Chap. 205.

So, for these reasons, we will not add the time of the Coupe case to the "tolling" period already granted for the agricultural use provisions in Ord. 96-8, or to the various other time-sensitive requirements in the land use approvals generally. It is certainly possible that the Coupe litigation could toll time frames for the completion of the Mamalahoa Bypass Highway because of its effect on the ability to build the highway, but I would prefer to have a specific request and justification before making that decision.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

CJY:pak

Wpwin60/Chris 08 - Matsukawa - Oceanside reply to Coupe tolling (2)

cc: Ordinance 96-7
Corporation Counsel
SMA 345
SMA 356
SMA 401
SMA 402
SMA 403
SMA 404
SPP 1056
USE 115

SMA 401

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June 1, 2007

Mr. Robert A. Stuit
Vice President of Development
1250 OCEANSIDE PARTNERS
78-6831 Alii Drive, Suite K-15
Kailua-Kona, HI 96740-2440

Dear Mr. Stuit:

**SUBJECT: HOKULI'A PROJECT, ORDINANCE NOS. 96-7 AND 96-8
SMA PERMIT NOS. 345, 356, 401-404, USE PERMIT NO. 115,
SPECIAL PERMIT NO. 1056**

This letter is in response to a request that the Planning Department issue a more general letter on the subject of time extensions due to the litigation involving this project. We wrote a letter to you dated April 20, 2007, stating that the litigation, Civ. No. 00-1-0192K, would have the effect of extending time for performance, from the filing of the complaint, October, 2000, to the approval of the Settlement Agreement and dismissal of the case, March 2, 2006. That letter referred only to SMA Permit Nos. 401-404.

There is legal precedent that litigation challenging the validity of land use approvals has the effect of tolling deadlines for performance contained in those approvals, when it would not be prudent for the defendant landowner to proceed with investments necessary to meet those time deadlines. We applied this general rule in our April 20, 2007 letter.

We will apply this same tolling of deadlines to other deadlines in the various other land use approvals for the Hokuli'a project. The operative land use approvals currently, other than SMA Permit Nos. 401-404, are Ord. 96-7 and 96-8, SMA Permit Nos. 345 and 356, Special Permit No. 1056, and Use Permit No. 115.

We were asked specifically about Condition (P) of Ord. 96-8, which requires that agricultural activity be demonstrated on the subdivided lots within three years of final

Mr. Robert A. Stuit
Vice President of Development
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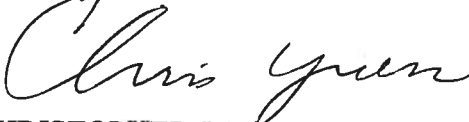
subdivision approval, for P(1) and P(2). Final subdivision approval was September 18, 1999, with respect to the lots affected by Ord. 96-8. We had written a letter dated August 26, 2002, granting a three-year extension to perform under P(1) or P(2), at Oceanside's request. We believe that the time to perform was actually extended by the period of the litigation, hence the original three years will expire January 20, 2008, and the Planning Department can, thereafter, administratively extend time for another three years if you give us a written request containing information justifying this administrative time extension. On the other hand, Condition P(3) provided that the agricultural activity could be proven by dedicating the property for agricultural use and recording the appropriate covenants with the Bureau of Conveyances within one year of final subdivision approval. This one year had already passed by the time that the suit was filed, and even if administratively extended for the maximum one year allowed under the ordinance, that time would also have run out, even with tolling the period of the lawsuit. Hence, P(3) is no longer available as an option for satisfying the agricultural use requirement of Condition P.

We note the obligation to keep various bonds in effect, despite the tolling of deadlines.

We also note that the Development Agreement calls for the completion of the Bypass Highway within five years of the start of construction (paragraph 13(d)), subject to paragraph 39 (force majeure). The question of the applicability of this clause to the paragraph 13(d) deadline should be brought up with the Office of the Corporation Counsel; the Planning Department does not have the power to make this determination.

We ask that the various annual reports continue to be provided on their original anniversary dates, ignoring the tolling because of the litigation. We understand that this is different from what we said in our April 20, 2007 letter, but on further thought, it is much simpler this way and will result in a more consistent reporting period.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

CJY:pak
Wpwin60/Chris 07/Stuit - Hokuia Time Extension

Mr. Robert A. Stuit
Vice President of Development
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June 1, 2007

cc: Mr. Bob Rice, 1250 OCEANSIDE PARTNERS
Corporation Counsel
Mr. Daryn Arai
Mr. Bennett Mark
Change of Zone Ordinance No. 96-7
Change of Zone Ordinance No. 9608
Special Management Area Use Permit Nos. 345, 356, 401-404
Use Permit No. 115
Special Permit No. 1056