BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of HEMMETER-VMS KAUAI COMPANY V To Amend the Agricultural Land Use District Boundary into the Urban Land Use District For Approximately 91.479 Acres At Kalapaki, Lihue, Kauai, Hawai'i, Tax Map Key No.: 3-5-01: portion of 102	DOCKET NO. A88-631 HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

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FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

On November 16, 1994, the Land Use Commission ("Commission") moved to issue an Order to Show Cause upon Kauai Lagoons Resort Company, Ltd., as successor petitioner to Hemmeter-VMS Kauai Company V ("Petitioner"), in LUC Docket No. A88-631, pursuant to Section 205-4(g), Hawai'i Revised Statutes ("HRS") and Section 15-15-93, Hawai'i Administrative Rules ("HAR").

On September 14, 1995, the Commission took action on its motion to issue an Order to Show Cause and granted said motion.

By resolution dated September 21, 1995, pursuant to motion granted on September 14, 1995, Commissioner Trudy K. Senda was duly appointed as Hearing Officer for the Order to Show Cause proceedings.

On September 29, 1995, an Order Granting Motion to Issue Order to Show Cause was filed. Also on September 29, 1995, the Order to Show Cause was filed.

The duly-appointed Hearing Officer, having heard and examined the testimony, evidence and arguments presented during the proceeding, Petitioner's Proposed Findings of Fact, Conclusions of Law, Decision and Order, and the Office of State Planning's ("OSP") Response to Petitioner's Proposed Findings of Fact, Conclusions of Law, and Decision and Order, hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

PROCEDURAL MATTERS

Background

1. On October 17, 1988, Petitioner filed a petition to reclassify approximately 91.479 acres of land, identified as TMK: 3-5-01: portion of 102 ("Property"), from the State Land Use Agricultural District to the State Land Use Urban District for development of a 18-hole golf course, golf academy, and related support facilities.

2. On June 28, 1989, the Commission acted to approve Petitioner's request to reclassify the Property.

3. On July 31, 1989, the Commission filed its Findings of Fact, Conclusions of Law, and Decision and Order ("Decision and Order") in the subject docket. Said Decision and Order included 14 conditions of approval.

4. On March 5, 1990, Petitioner filed a motion to amend the Decision and Order. Said motion requested deletion of Condition Nos. 1 and 6, and amendment to Condition No. 10 of the Decision and Order.

5. On March 14, 1990, the Commission granted Petitioner's motion filed on March 5, 1990.

6. On March 19, 1990, the Commission filed its Order Granting Motion for Amendments to Decision and Order.

7. The conditions of approval, pursuant to the Decision and Order filed on July 31, 1989, and subsequently amended by Order dated March 19, 1990, read as follows:

> 2. Petitioner shall comply with all State Department of Health environmental health requirements. Petitioner shall also develop and adhere to a Wastewater Reuse Plan affecting the project site which shall be reviewed and approved by the State Department of Health.
>
> 3. Petitioner shall fund and install the sewer outfall "dry line" across the subject Property and other wastewater improvements as may be required by the County of Kauai.
>
> 4. A detailed preservation and archaeological data recovery plan shall be prepared for the project site and shall be submitted for review and approval by the State Historic Sites Section and the Planning Department of the County of Kauai. These same agencies shall also verify the successful execution of this plan.
>
> In addition, should any previously unidentified archaeological resources such as artifacts, shell, bone or charcoal deposits, human burial, rock or coral alignments, pavings or walls be encountered during the project's development, the Petitioner shall immediately stop work and contact the State Historic Preservation Office.
>
> 5. Petitioner shall fund the design and construction of all necessary water facility improvements, including source development, as required by the

County of Kauai Department of Water, to provide adequate quantities of potable and non-potable water to the project site.

7. Petitioner shall grant an avigation (right of flight) easement as prescribed by the State of Hawaii over any portion of the proposed project subject to noise levels of 55 Ldn or greater. The avigation easement shall run with the land and apply equally to any future owners of the subject Property.

8. Where flight operations at Lihue Airport are in any way affected by the bird population at the subject site, Petitioner shall undertake appropriate measures to control the bird population at the project site in accordance with the regulatory requirements of the Department of Land and Natural Resources or the United States Department of Agriculture Animal Damage Control Unit in Honolulu.

9. Petitioner shall ensure that no portion of the 18-foot wide access road leading into the subject Property is located within any portion of the Runway Safety Area of Lihue Airport.

10. Petitioner shall provide on the project site access to shoreline and beach areas as may be required by the County of Kauai.

11. Petitioner shall complete the development on the Property in substantial compliance with the representations made before the Commission.

12. Petitioner shall notify the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interest in the Property prior to visible commencement of construction on the Property; provided, however, that Petitioner may transfer ownership in the Property to an affiliate or in a manner consistent with prior representations to the Commission, and may mortgage the Property at any time without notice to the Commission.

13. Petitioner shall provide annual reports to the Land Use Commission, the Office of State Planning and the County of Kauai Planning Department in connection with the status of the subject project and Petitioner's progress in complying with the conditions imposed.

14. The Commission may fully or partially release these conditions as to all or any portion of the Property upon timely motion, and upon the provision of adequate assurance of satisfaction of these conditions by the Petitioner.

8. On January 30, 1991, the Commission received a letter from Petitioner informing the Commission of the sale of the Property to Shinwa Golf Kabushiki Kaisha.

9. Shinwa Golf Kabushiki Kaisha is the parent company of Kauai Lagoons Resort Company, Ltd. ("Successor Petitioner"), who is listed as the current fee title holder of the Property as of January 30, 1991.

10. Pursuant to a condition imposed in the Decision and Order, Successor Petitioner has filed annual reports with the Commission since 1992. The annual reports provided the Successor Petitioner's progress in developing the proposed project and its efforts in complying with the conditions imposed.

11. In the 1992 annual report, Successor Petitioner represented that it was proposing to develop a 9-hole golf course instead of an 18-hole golf course. The annual report also stated that grading for the 9-hole golf course would commence in October 1992, with completion in early 1994.

12. In the 1993 annual report, Successor Petitioner represented that due to Hurricane Iniki, grading of the 9-hole golf course was moved back to May 1994, with completion in 1996.

13. In the 1994 annual report, Successor Petitioner represented that due to the impact of Hurricane Iniki and economic conditions, construction of the 9-hole golf course has been postponed indefinitely.

Order to Show Cause

14. On November 16, 1994, the Successor Petitioner provided a status report on the proposed project before the Commission. Upon completion of the status report, the Commission continued the matter to allow the Successor Petitioner and parties to re-examine the proposed project to determine if the proposed project was still feasible. The Commission requested the Successor Petitioner to provide an updated status report at a subsequent Commission meeting. The Commission also moved to consider a motion to issue an Order to Show Cause in the subject docket.

15. On September 14, 1995, the Successor Petitioner appeared before the Commission to provide an updated status report. Testimony provided during the Successor Petitioner's presentation indicated that the current cumulative impacts of economic conditions on Kauai would preclude the Successor Petitioner from moving forward with the proposed project. Additionally, the Successor Petitioner represented that the grading permit and Special Management Area ("SMA") permit for the proposed project had lapsed, and the use permit, special permit, shoreline setback variance, and class IV zoning permit were nullified by the County of Kauai Planning Commission on July 13, 1995.

16. Upon review of the testimony provided by the parties on September 14, 1995, the Commission acted to approve its motion to issue an Order to Show Cause, and set the matter for hearing. On September 29, 1995, the Commission filed its

Order Granting Motion to Issue Order to Show Cause and Order to Show Cause.

17. By resolution dated September 21, 1995, pursuant to motion granted on September 14, 1995, Commissioner Trudy K. Senda was duly appointed as Hearing Officer for the Order to Show Cause proceedings.

18. On November 29, 1995, a prehearing conference on the Order to Show Cause proceedings was held at Honolulu, Oahu. At the prehearing conference, the parties reviewed exhibit and witness lists submitted prior to or at the prehearing conference.

19. On December 12, 1995, the Order to Show Cause hearing was held before the duly-appointed Hearing Officer pursuant to a public notice published in the Garden Island and the Honolulu Advertiser on September 28, 1995 and October 20, 1995.

20. At the December 12, 1995 hearing, Mr. Brad Synder, General Manager of the Kauai Marriott Resort, testified as a public witness.

21. No petitions for intervention were filed.

DESCRIPTION OF THE PROPERTY

22. The Property consists of approximately 91.479 acres and is identified as Tax Map Key: 3-5-01: portion of 102.

23. The Property is located adjacent to the Lihue Airport on the eastern portion of the island of Kauai.

24. The Property is also located in close proximity to the Kauai Marriott Resort, which is near Kalapaki Beach and Nawiliwili Bay, and two existing 18-hole golf courses.

25. Soils in the area include two types of Lihue silty clay, Koloa stony silty clays, and Hanalei silty clay.

26. Approximately ninety percent (90%) of the Property is classified by the Agricultural Lands of Importance to the State of Hawaii (ALISH) classification system as "Prime."

27. The Land Study Bureau detailed land classification overall (master) productivity rating for the Property is essentially "B," with a small portion rated as "C."

Existing Uses

28. No existing uses are currently present within the Property.

29. The Property has been previously utilized for agricultural purposes. The Lihue Plantation Company cultivated sugarcane on the Property until 1986.

Surrounding Uses

30. The Property is bounded to the west by the Urban District, which includes a runway for the Lihue Airport. This Urban district area was reclassified by the Commission, from the Agricultural District to the Urban District, on April 20, 1981 under LUC Docket No. A80-474.

31. The Property is bounded by Conservation District lands to the east, and Conservation/Urban District lands to the north and south.

32. The Kauai Marriott Resort (formerly known as the Westin Kauai and Kauai Surf) is located approximately 5,000 feet to the west of the Property. The Kauai Marriott Resort currently

has 354 hotel rooms and 232 time-share villas. Previously, the Westin Kauai operated as a 840 room hotel.

33. The Successor Petitioner owns a portion of the resort area located immediately west of the Lihue Airport runway. Among the uses within this area are: two 18-hole golf courses, two shopping area known as Fashion Landing and Artisan's Landing, a golf and racquet club, and parking lot. Restaurant and shopping facilities located at the Fashion Landing and Artisan's Landing are closed, and there were no representations regarding definite plans or timeframes with which these facilities are to be rebuilt or reopened.

34. A portion of one of the two adjacent 18-hole golf courses is currently within the Agricultural District. The portion of the golf course is permitted through a special permit granted by the Commission under LUC Docket No. SP86-361.

35. A portion of the remainder of the resort area is owned by the Kauai Marriott Resort, upon which hotel rooms and time-share villas are located.

36. A portion of the remainder of the resort area was proposed to include expansion of the then Westin Kauai, and development of a second resort hotel. The expansion and second resort hotel has not been developed.

Proposed Uses

37. The Successor Petitioner represented that it will develop a golf course on the Property. However, it has not committed to whether a 9-hole golf course, or an 18-hole golf course will be developed.

38. Determination of whether to develop a 9-hole golf course versus an 18-hole golf course by the Successor Petitioner is dependent upon economic conditions, anticipated visitor counts, and popularity of golf as a sport.

39. Although the Successor Petitioner intends to develop a golf course, it cannot provide a prospective timeframe within which the golf course will be developed.

40. The Successor Petitioner has estimated that upon receipt of necessary permits and approvals from State and County agencies, an 18-hole golf course developed on the Property would take approximately twenty (20) months.

41. The Successor Petitioner has represented that it will not develop a physical facility for a golf academy of the size represented in the Decision and Order. The Successor Petitioner has represented that, in all likelihood, no physical facilities will be built for any "golf academy" purposes. Actual development of a physical facility will depend upon market situations, which, at this time, are depressed and uncertain.

STATE AND COUNTY PLANS AND PROGRAMS

42. The Property is currently within the State Land Use Urban District as shown in Land Use District Boundary Map K-11 (Lihue).

43. The Property is within the Coastal Zone Management area as established in HRS Chapter 205-A.

44. A portion of the Property is located within the Special Management Area as established by the County of Kauai.

45. The Property is designated by the Kauai General Plan as Open and Agriculture. The Development Plan designations for the Property is also Open and Agriculture.

46. The Property is currently zoned Open and Agriculture by the County of Kauai. Petitioner Hemmeter-VMS Kauai Company V obtained a number of County permits for the development from the County of Kauai Planning Commission on January 12, 1989, prior to obtaining reclassification of the Property on July 31, 1989 by the Commission. These permits include a Use Permit, Special Management Area, Shoreline Setback Variance Permit, and Class IV Zoning Permit.

47. The National Pollutant Discharge Elimination System (NPDES) permit and County grading permit was obtained subsequent to receipt of the County permits.

48. The Use Permit, Special Management Area, Shoreline Setback Variance Permit, and Class IV Zoning Permit have lapsed and have been nullified pursuant to the Successor Petitioner's request and subsequent action by the County of Kauai Planning Commission. The grading permit for the proposed project has also lapsed.

49. The Successor Petitioner has represented that it would obtain new permits for the proposed project and it would take approximately twenty-four (24) months to re-secure the necessary permits.

50. The Successor Petitioner has acknowledged that development of the golf course may also occur if the lands are reclassified from the Urban District to the Agricultural

District, dependent upon the Land Study Bureau classification rating for the Property.

POSITION OF PARTIES

51. The County of Kauai Planning Department has represented that it has no objection to retaining the Property within the Urban District since the Urban designation would be consistent with the County's goal to complete urban "infill of the Lihue District, reclassification of the Property to the Agricultural District would not be suitable for, or be supportive of agricultural uses, the Urban designation will keep development options open for recreational uses, the Property has limited potential for intensive urban development, and the Urban designation may be appropriate in relation to surrounding land uses and long range plans for the County.

52. The Office of State Planning has represented that the Property should remain within the Urban District if the Successor Petitioner can demonstrate that a golf facility as presented before the Commission and as represented in the Decision and Order, is feasible within the Property, and if the Successor Petitioner can propose a reasonable timeframe for its development.

PROGRESS OF PROPOSED DEVELOPMENT

53. The Property has remained undeveloped since reclassification from the Agricultural District to the Urban District by the Commission on July 31, 1989.

54. The Successor Petitioner has done engineering work and a proposed layout for the Property based on 18-holes.

However, the Successor Petitioner stopped engineering work and examined a 9-hole golf course configuration, for which it obtained a grading permit. Said grading permit was extended, but has since lapsed.

55. The Decision and Order stated that the Petitioner, Hemmeter-VMS Kauai Company V, "proposed to commence construction of the golf course immediately upon securing all of the governmental permits..." The Successor Petitioner obtained the final permit to commence construction in 1992.

56. The Successor Petitioner represented in annual reports submitted to the Commission that construction of the golf course would begin in 1992 and be completed in 1994. Subsequently, the Successor Petitioner represented that construction of the golf course would be pushed back due to Hurricane Iniki. Finally, the 1994 annual report represented that development of the golf course would be postponed indefinitely.

57. The Successor Petitioner has not provided any timeframe in which development of the golf course would commence and be completed.

58. The Successor Petitioner has represented that an informed business decision as to whether or not funding will be committed to the proposed project may occur if utilization rate of the existing courses is in the high-50 percent to 60 percent. Other factors include the status of the economy of Japan, and proof to the parent company and banks in Japan that the Successor Petitioner is able to return profits on a constant basis. The

Successor Petitioner has represented that profits may be required for a number of years.

59. The Successor Petitioner has projected by the year 2000, course utilization would be approximately 60 percent (78,000 rounds), and that would prompt a desire to commence the construction of the golf course on the Property.

60. The Successor Petitioner has represented that although the economy of Kauai may recover to a point that the Successor Petitioner feels that development of the proposed project is feasible, the economy of Japan may not recover in order for the rendering of necessary funding for the proposed project.

RULING ON PROPOSED FINDINGS OF FACT

Any of the proposed findings of fact submitted by the Successor Petitioner or the other parties not already ruled upon by the Commission by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

Any conclusion of law herein improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

Section 205-4(g), Hawai'i Revised Statutes ("HRS"), reads as follows:

> (g) Within a period of not more than three hundred sixty-five days after the proper filing of a petition, unless otherwise ordered by a court, or

> unless a time extension, which shall not exceed ninety days, is established by a two-thirds vote of the members of the commission, the commission, by filing findings of fact and conclusions of law, shall act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change. The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification. Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances. (Emphasis added.)

Section 15-15-93, Hawai'i Administrative Rules ("HAR") reads in relevant part as follows:

> (a) Whenever the commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, the commission shall issue and serve upon the party bound by the conditions an order to show cause why the property should not revert to is former land use classification or be changed to a more appropriate classification.

The Hearing Officer concludes that the Property has not been substantially developed, as represented to the Commission, since issuance of the Decision and Order on July 31, 1989.

The non-development of the Property, the actions of the Successor Petitioner to have County permits declared nullified by the County of Kauai Planning Commission, and the representations made by the Successor Petitioner in the Order to Show Cause proceedings demonstrate that the Successor Petitioner does not

intend to, or is unable to, proceed with the proposed project on the Property in accordance with Condition No. 11 imposed in the Decision and Order within any reasonable timeframe. The Successor Petitioner has not provided a timeframe in which development of the proposed project will occur, nor has the Successor Petitioner sufficiently examined the feasibility of proceeding with the proposed project.

HRS Section 205-2(d) reads as follows:

> (d) Agricultural districts shall include activities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, aquaculture, and game and fish propagation; aquaculture, which means the production of aquatic plant and animal life for food and fiber within ponds and other bodies of water; wind generated energy production for public, private, and commercial use; bona fide agricultural services and uses which support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, whether or not conducted on the same premises as the agricultural activities to which they are accessory, including but not limited to farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, vehicle and equipment storage areas, and roadside stands for the sale of products grown on the premises; wind machines and wind farms; small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land, provided that such facilities shall not be used as or equipped for use as living quarters or dwellings; agricultural parks; <u>and open area recreational facilities, including golf courses and golf driving ranges; provided that they are not located within agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B.</u>
>
> These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of

topography, soils, and other related characteristics. (Emphasis added.)

HRS Section 205-4.5, reads in relevant part:

(a) Within the agricultural district all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be restricted to the following permitted uses:

* * *

(6) Public and private open area types of recreational uses including say camps, picnic grounds, parks, and riding stables, but not including dragstrips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps;

HRS Section 205-6, reads in relevant part:

The county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's lands within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition.

* * *

Special permits for land the area of which is greater than fifteen acres shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting such approval, including the adherence to representations made by the applicant.

* * *

A portion of the adjacent golf course is currently upon lands designated within the State Land Use Agricultural District.

Said portion of the golf course was approved by the Commission under a Special Permit, pursuant to HRS Section 205-6 (LUC Docket No. SP86-361).

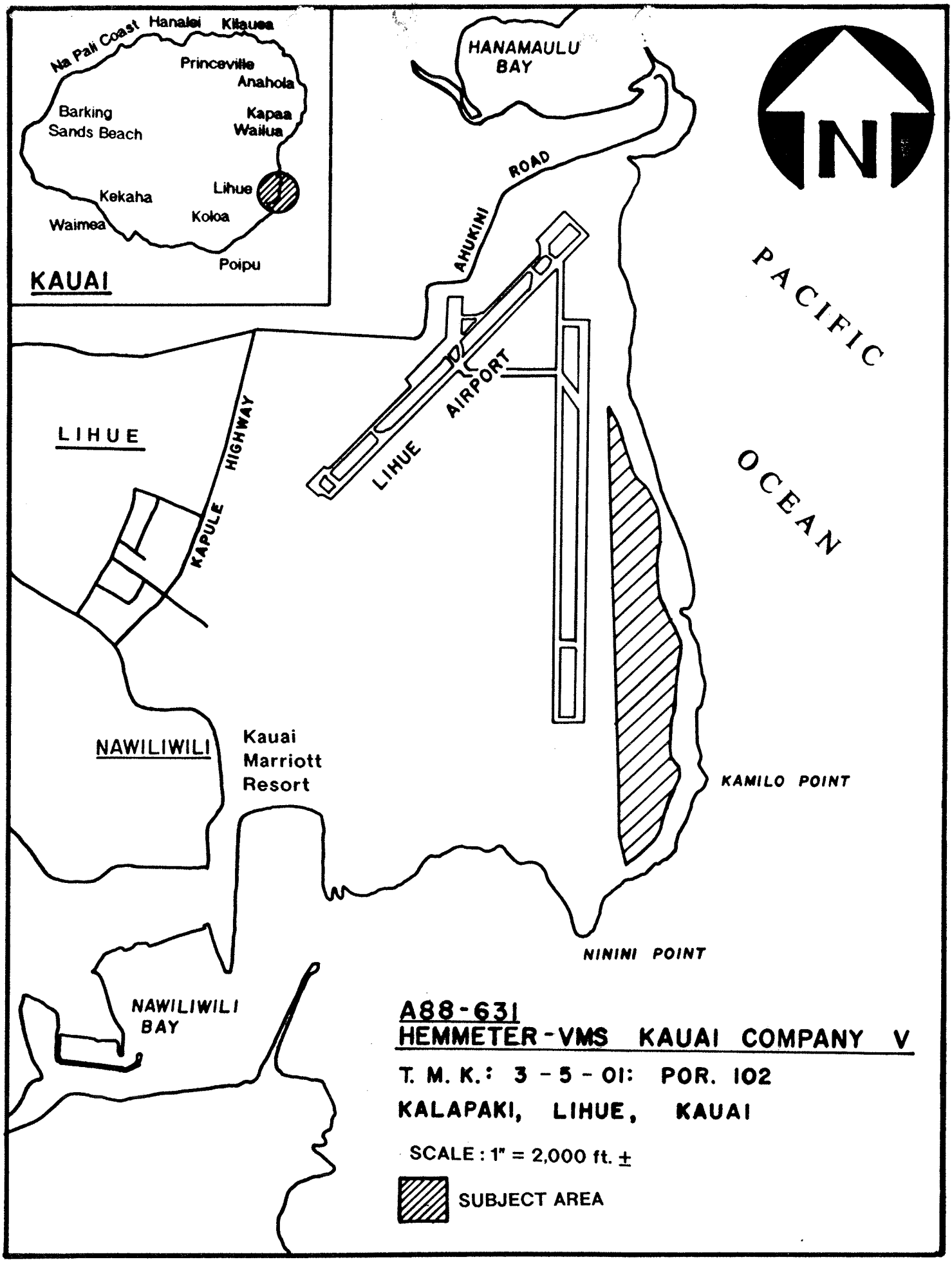
Inasmuch as the land study bureau detailed land classification overall (master) productivity rating for the Property is essentially "B," with a small portion rated as "C," if the Property is reverted to the State Land Use Agricultural District, the development of the proposed project, being the golf course, could be accomplished under a Special Permit, pursuant to HRS Section 205-6, and an Urban designation would not be required.

PROPOSED DECISION AND ORDER

IT IS HEREBY ORDERED that the Property, being the subject of this Docket No. A88-631/Hemmeter-VMS Kauai Company V, consisting of approximately 91.479 acres of land currently within the State Land Use Urban District situated at Kalapaki, Lihue, County of Kauai, State of Hawai'i, identified as Tax Map Key No.: 3-5-01: portion of 102, and approximately shown on Exhibit "A" attached hereto and incorporated by reference herein, shall be and is hereby reverted to the State Land Use Agricultural District, and that the State Land Use District Boundaries are amended accordingly.

Dated: Kauai, Hawai'i, this 15th day of February, 1996.

By Trudy K. Senda
TRUDY K. SENDA
Hearing Officer



A88-631
HEMMETER-VMS KAUAI COMPANY V

T. M. K.: 3 - 5 - 01: POR. 102

KALAPAKI, LIHUE, KAUAI

SCALE: 1" = 2,000 ft. ±

SUBJECT AREA

EXHIBIT "A"

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of HEMMETER-VMS KAUAI COMPANY V To Amend the Agricultural Land Use District Boundary into the Urban Land Use District For Approximately 91.479 Acres At Kalapaki, Lihue, Kauai, Hawai'i, Tax Map Key No.: 3-5-01: portion of 102	DOCKET NO. A88-631 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

CERT. GREGORY G.Y. PAI, PH.D., Director
Office of State Planning
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CERT. HARTWELL H.K. BLAKE, ESQ.
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CERT. LORNA A.N. ROSA, ESQ.
3135-A Akahi Street
Lihue, Hawaii 96766

DATED: Honolulu, Hawaii, this 15th day of February 1996.

ESTHER UEDA
Executive Officer