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BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

LAND USE COMMISSION
STATE OF HAWAII
2014 APR -4 P 2:14

In the Matter of the Petition of)	DOCKET NO. A76-418
)	
MOANA CORPORATION)	OFFICE OF PLANNING'S RESPONSE TO
)	KIAHUNA MAUKA PARTNERS, LLC'S
To Amend the Agricultural Land Use District)	MOTION TO DELETE CONDITION NOS.
Boundary into the Urban Land Use District)	5, AND 7 THROUGH 22 OF DECISION
for Approximately 457.54 Acres of Land)	AND ORDER; EXHIBITS A-E
Situated at Poipu, Island of Kauai, State of)	
Hawaii, TMK: (4) 2-8-14:05, 07, 08, Por. 19,)	
20, 21, 26-36; 2-8-15: 77; 2-8-29: 1-94.)	
)	

OFFICE OF PLANNING'S RESPONSE TO KIAHUNA MAUKA PARTNERS, LLC'S
MOTION TO DELETE
CONDITION NOS. 5, AND 7 THROUGH 22 OF DECISION AND ORDER

The Office of Planning ("OP") provides the following response to Kiahuna Mauka Partners, LLC's (KMP or Movant) Motion to Delete Condition Nos. 5, and 7 Through 22 of the Decision and Order ("Motion to Delete"). OP objects to the deletion of Conditions 5, 7, 9a, 12, 15, 16, 17, and 18, defers to the County of Kauai on the deletion of Conditions 8, 10, 11, 13, and 14, has no objection to the amendment and deletion of Conditions 9b and 22 respectively, and defers to the LUC on the deletion of Conditions 19, 20, and 21. OP's comments are based on the representations of the Movant and documents filed to date in these proceedings, consultation with affected government agencies, and the statutes and regulations applicable to these proceedings.

I. BACKGROUND

A. Procedural History

In 1977, the State Land Use Commission ("LUC") reclassified approximately 457.54 acres from the Agricultural Land Use District to the Urban Land Use District. In 1978 and 1979, Conditions 7 and 9 were amended at the request of Petitioner, Moana Corporation.

In October 1995, the LUC granted Petitioners' requests to delete Conditions 1 through 4 and 6 because these conditions had been satisfied. Sports Shinko and Eric A. Knudsen Trust were the two major landowners at the time, and filed various motions to amend the 1977 Decision and Order. OP Exhibit A shows the locations of the two landowners' properties, the configuration of the lots, distinguishes the areas which were developed from the areas which were not developed at the time, identifies the location of the 90 single family lots and the Kauai County Park site, and shows the zoning of each lot at the time.

In November 1995, the LUC issued an Order to Show Cause. In 1997, after a variety of motions and continuances, the LUC modified Condition 9, added Conditions 10 through 22, and dismissed the Order to Show Cause proceeding. Condition 9 was amended again in 2004.

In 2008, KMP filed a motion to delete conditions similar to the present Motion to Delete. That motion was subsequently withdrawn.

B. Landowners and Future Development

OP notes that there are now a variety of owners within the Petition Area. OP Exhibit B lists all the owners of the property. Previous annual reports indicate that KMP was formed to represent the various owners under the "Sports Shinko" portion of the Petition area. KMP should either produce documentation or point to documentation already within the file which demonstrates that KMP is authorized to act on behalf of that landowner. As OP Exhibit B also demonstrates, the Petition Area is not fully developed. In reviewing the lot configurations overlaid on the satellite image, it appears that a substantial amount of development has yet to occur. This is confirmed by KMP's 2013 Annual Report.

According to KMP's Motion and the Annual Report dated September 17, 2013, the status of the KMP's various projects is as follows:

PROJECT	DESCRIPTION	STATUS
Project 1 Poipu Beach Estates	106-lot single-family dwellings subdivision	Final Subdivision approved. 27 homes completed or under construction.
Project 2 Royal Palms at Poipu	164-unit condominium project	Land use permits approved by County. Common sewer line completed.
Project 3 Pili Mai	191-unit condominium project	Land use permits approved by County. Some utility completed, and building permits for 128 units were issued by the County.
Project 4 Kiahuna Poipu Golf Resort	280 multi-family subdivision and 2 single-family dwellings	Land use permits approved. Main roadway and utilities within project completed.
Project 5 Wainani at Poipu	70-lot single-family subdivision	Final subdivision approved. Interior roadway and underground utilities within and outside of the subdivision completed. 7 homes constructed and sold. 4 vacant lots sold. 3 lots planned for construction.
Project for 2-lot subdivision		Final Subdivision approval.
Total	178 Single-family dwelling units 635 multi-family units 813 Total	

On September 23, 2011, the Eric A. Knudsen Trust submitted an annual report stating that Final Subdivision approval was issued for a 50-lot subdivision. Thus, this 50-lot subdivision would bring the total number of units proposed on the Petition Area to 228 single-family lots, and 635 multi-family units. As indicated in the 2013 KMP annual report, the original docket proposed 300 single-family units and 1,150 multi-family units. KMP also indicates that since market conditions have changed, that the number and mix of units may be revised or even decreased in number.

ORIGINAL DOCKET	CURRENT KNOWN PROPOSAL
300 single-family <u>1,150 multi-family</u> 1,450 Total units	228 single-family units <u>635 multi-family units</u> 863 Total units

KMP should disclose the actual number of both single-family and multi-family units that have been built to date, and confirm the numbers under its current plan.

Although Petitioner has commenced construction on the minimum number of residential units required under Condition No. 9b, large areas of the Petition Area still appear to be undeveloped. Accordingly, a condition which impacts the manner of development would still be relevant to this case.

II. ARGUMENT

OP objects to the deletion of Conditions 5, 7, 9a, 12, 15, 16, 17, and 18, defers to the County of Kauai on the deletion of Conditions 8, 10, 11, 13, and 14, has no objection to the amendment and deletion of Conditions 9b and 22 respectively, and defers to the LUC on the deletion of Conditions 19, 20, and 21.

Condition No. 5:

Condition No. 5 requires Petitioners to make the amenities of the development, such as the golf course, swimming pool, tennis courts, etc., available for public use at reasonable usage fees.

OP objects to the deletion of Condition No. 5 because the obligation to keep the amenities available for public use at a reasonable fee is a continuing obligation. The deletion of Condition No. 5 would allow Petitioners to prohibit public usage or to charge fees which are not reasonable in the future. Consequently, unlike other conditions which can be completed and satisfied, Condition No. 5 is a continuing obligation which should be retained.

KMP argues that Condition No. 5 is already required by County Ordinance No. PM-31-79. See OP Exhibit E. However, Condition No. 5 is a supplemental rather than a redundant tool for enforcement. Enforcement of the county ordinance cannot result in reversion of the land. The threat of reversion also ensures that future landowners diligently follow these conditions and are not tempted to pressure the county to change its ordinances.

KMP also argues that these amenities are contained within areas of the Petition outside of KMP's properties. However, the golf course is one of the amenities listed in Condition No. 5 and appears to be among the KMP properties. If this is incorrect, KMP may bifurcate the case and ask the LUC to create a subdocket in which Condition No. 5 can be deleted without

eliminating this enforcement tool. KMP must submit additional documentation and explanation regarding the specific lots and landowners on whose behalf KMP is speaking.

Condition No. 7:

Condition No. 7 provides for the protection of archaeological sites and habitats of endangered animals. OP and the United States Department of the Interior Fish and Wildlife Service ("USFWS") are opposed to the deletion of Condition No. 7.

With respect to the archaeological sites, KMP should submit a copy of the letter or letters from the State Historic Preservation Division ("SHPD") approving the Archaeological Inventory Survey ("AIS") and Preservation Plan(s). Petitioner did submit a July 25, 2003 letter stating that the preserve maps were acceptable, and this is indicative that SHPD approval was probably given for the AIS and Preservation Plans. A complete record should include the actual SHPD approvals.

In a letter dated March 24, 2014, the USFWS states that it is very concerned that building in the area surrounding the cave that contains the endangered cave spiders or amphipods could result in a taking. See OP Exhibit C. The USFWS is concerned because the "Kauai cave spider and Kauai cave amphipod could be present in the voids or passage ways on the property that are inaccessible to humans. These species are only known to occur in the Koloa basin on the island of Kauai and [are] further restricted to areas where above and below ground alterations to lava tubes and other cave bearing rock substrates have not occurred."

KMP did submit a one page Critical Habitat Plan for Kiahuna Makai Cave. It is unclear whether the USFWS or the biological consultant specifically approved the plan. Nevertheless, the USFWS notes that the Kauai cave wolf spider and the Kauai cave amphipod are probably still present within the Petition Area in underground voids and passages inaccessible by humans. Future construction, therefore, could impact these endangered species.

In addition to the guidelines created in 2003, the USFWS also recommends additional protections, including an incidental take permit which would include a habitat conservation plan. Because future development appears probable and such development could impact these endangered species, Condition No. 7 is still needed.

Condition No. 8:

Condition No. 8 requires that the Petitioners, to the extent allowed by law, use Kauai contractors and Kauai residents as construction workers. Although this condition would still be applicable to future developments, it involves a primarily county interest. So, OP is willing to defer to the County of Kauai as to whether such a condition should be kept.

Condition No. 9:

Condition 9a pertains to the Eric A. Knudsen Trust and other Knudsen Entities. Because KMP does not represent the Eric A. Knudsen Trust and other Knudsen Entities, OP objects to the deletion of Condition 9a at this time.

Condition 9b pertains to KMP. Condition No. 9b requires final subdivision approval or initial building permits for 300 residential units by August 5, 2009, and the annual reporting of Petitioners' compliance with the conditions. OP acknowledges that KMP has obtained final subdivision approvals or building permits for 300 residential units. Although one might argue about the dates of these approvals, because these approvals have now been obtained, OP has no objection to the deletion of this requirement. Petitioners, however, should still be subject to the requirement for annual reports to the LUC until all major development is completed. When the only unfulfilled conditions are those with continuing obligations, OP would then have no objection to the deletion of the annual reporting requirement.

Condition No. 10:

Condition No. 10 requires the submission of an updated water master plan if required by the County of Kauai. No State agency approval is involved. Because this condition is solely related to the County of Kauai, OP defers to the County as to whether this condition has been satisfied and/or should be deleted.

Condition No. 11:

Condition No. 11 requires the preparation of an updated master drainage plan if required by the County of Kauai. No state agency approval is involved. KMP has stated that individual drainage studies were done for five different projects. Because this condition is solely related to a requirement by the County of Kauai, OP defers to the County as to whether this drainage condition has been satisfied and/or should be deleted.

Condition No. 12:

Condition No. 12 requires, among other things, that the Petitioners submit updated Traffic Impact Analysis Reports ("TIAR") to the State Department of Transportation ("DOT") for their comments prior to approval by the County of Kauai. It also requires that the final approved TIAR be filed with DOT.

OP and DOT object to the deletion of this traffic condition. In a letter dated March 10, 2014, the State DOT stated the following:

1. "The traffic generated by the project will have an impact on Kaumualii Highway, State Route 50, particularly at the intersections of Kaumualii Highway with Maluhia Road and with Koloa Road.
2. The Traffic Impact Analysis Report (TIAR) prepared by Austin, Tsutsumi and Associates, dated December 8, 2003 and finalized September 13, 2005, which we [DOT] reviewed, analyzes the 210-acre Knudsen Property [TMK: (4) 2-8-013:001 and 2-8-014: 001 to 004, 019 and 037].
3. The TIAR identified above did not analyze the other properties in the subject Docket A76-418, including the Sports Shinko Property. If and when the County of Kauai requires an updated TIAR that includes the Sports Shinko Property, the DOT would appreciate the opportunity to review and comment on any updated TIAR, as specified in Condition No. 12."

See OP Exhibit D.

Because further development is pending in the Petition Area, Condition No. 12 has not been completed. Because Condition No. 12 involves a State interest, continued LUC involvement is appropriate.

Condition No. 13:

Condition No. 13 requires wastewater treatment for future development of the Sports Shinko Property. No State agency approval is involved. Because this condition is solely related to a requirement by the County of Kauai, OP defers to the County as to whether this drainage condition has been satisfied and/or should be deleted.

Condition No. 14:

Condition No. 14 requires that the internal roadways within the Sports Shinko Property be private roadways with private trash collection. No State agency approvals are involved. Because this condition is solely related to a requirement by the County of Kauai, OP defers to the County as to whether this drainage condition has been satisfied and/or should be deleted.

Condition No. 15:

Condition No. 15 requires that effective soil erosion and dust control measures be implemented during construction of any undeveloped portions of the Sports Shinko Properties to the satisfaction of both the County of Kauai and the State Department of Health ("DOH").

OP objects to the deletion of this standard condition regarding soil erosion and dust control measures. Because the Petition Area is not yet fully developed and future construction appears likely, this condition has not yet been met. Given the public health concerns and the involvement of the State DOH, continued LUC involvement is appropriate.

Condition No. 16:

Condition No. 16 requires the construction of adequate civil defense measures as determined by both the County of Kauai and State Civil Defense.

OP objects to the deletion of this condition, unless KMP can obtain a written statement from the State Department of Defense that no further civil defense measures will be required for this Petition Area at full build-out. KMP has submitted a letter stating that a civil defense siren was accepted. The letter, however, does not indicate whether this single civil defense siren is the only civil defense measure which the State Department of Defense would require from the Petition Area at full build-out. In the absence of a letter from the State Department of Defense and the County of Kauai, therefore, OP believes there is insufficient information to warrant the deletion of Condition No. 16.

Condition No. 17:

Condition No. 17 requires Petitioners to notify prospective buyers of the surrounding agricultural district lands, the potential impacts of neighboring agricultural uses, the Hawaii Right To Farm Act, HRS Chapter 165, and the limited circumstances under which such agricultural uses may be deemed a nuisance.

OP objects to the deletion of this standard Right-to-Farm provision. Condition No. 17 is a continuing obligation implicating State interests in protecting agricultural activities. Accordingly, a continued LUC involvement is appropriate.

Condition No. 18:

Condition No. 18 requires protections for the Waikomo Stream.

OP objects to the deletion of this condition pertaining to Waikomo Stream. KMP's Motion indicates that a Declaration of Restrictive Covenant for a buffer was recorded in the Bureau of Conveyances and also that KMP final subdivision approval for Project 1 includes a buffer. KMP's obligation to protect Waikomo Stream is a continuing one. The buffer must be not only created, but also maintained. The protection of streams, with all of its impacts on its eco-system, near coastal waters, and the public trust justify a continued LUC involvement.

Condition Nos. 19-21:

Conditions Nos. 19-21 relate to the LUC's ability to release conditions, the separation of responsibilities between Sports Shinko Property and the Knudsen Property, and an accommodation to First Hawaiian Bank due to its role as Trustee of the Eric A. Knudsen Trust. In light of OP's objections above, the deletion of these conditions appears premature. But given the technical nature of these conditions, OP will defer to the LUC as to whether these conditions should be retained.

Condition No. 22:

Condition No. 22 requires that a copy of the Decision and Order be recorded with the Bureau of Conveyances. KMP has stated that it has done so with respect to its properties. OP has no objection to the deletion of this condition once KMP can demonstrate that this condition was completed for all lots within the Petition Area, including the Knudsen Properties.

DATED: Honolulu, Hawaii, this 4th day of April 2014.


LEO R. ASUNCION
Acting Director, Office of Planning

A76-418

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served on the following by depositing the same in the United States Postal Service, postage prepaid, or by hand delivery on this date, addressed to:

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DATED: Honolulu, Hawaii, this 4th day of April 2014.



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