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Kauai ATV, LLC

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition	)	LUC DOCKET NO. SP05-399
	)	
of	)	
	)	2009 ANNUAL STATUS REPORT
KAUAI ATV, LLC, for a Special Permit	)	OF KAUAI ATV, LLC, ON
for recreational activities within the	)	CONDITIONS TO DECISION
Agricultural District at Koloa, Island and	)	AND ORDER APPROVING
County of Kauai, State of Hawaii, on	)	SPECIAL PERMIT;
parcels identified as Kauai Tax Map Keys:	)	CERTIFICATE OF SERVICE
2-9-001: por. 01; 2-9-002: por. 01;	)	
3-4-06: por. 01; and 3-4-01: por. 01.	)	
_____	)	

2009 ANNUAL STATUS REPORT OF KAUAI ATV, LLC, ON  
CONDITIONS TO DECISION AND ORDER APPROVING SPECIAL PERMIT

Comes now KAUAI ATV, LLC, a Hawaii limited liability company, and respectfully submits this as the 2009 annual report with respect to compliance with the conditions imposed by the Decision and Order Approving Special Permit, dated and filed December 6, 2005, in the above referenced docket.

I. GENERAL PROGRESS OF THE PROJECT

The project presently consists of continued all-terrain vehicle (ATV) tours, water activities at the Waita Reservoir, and the makai paintball park. Although permitted under its Special Permit, the second (mauka) paintball park and the speedball tournament field, have not been implemented due to the downturn in the economy and tourism, with a resultant lack of demand at the time for the same. These activities will be placed into operation as soon as demand and market feasibility is attained.

II. STATUS OF COMPLIANCE WITH CONDITIONS

Condition No. 1

*1. The structures for which approval is sought and referred to in the Application are approved. The use of the Waita Reservoir, involving a combined total of 128 persons per day, for the double hull canoe, sailboats, and kayak rentals, is permitted subject to the Use Plan for the reservoir proposed by Grove Farm Company, Inc. dated March 8, 2005. The Applicant's ATV tours, consisting of single persons and multi-person vehicles, shall be limited to a maximum of 200 persons per day. The proposed Paintball Parks (Mauka and Makai Parks) shall be limited to a combined total of 100 persons per day. The proposed speedball tournaments shall be limited to no more than four events per year with a maximum of 200 persons per tournament.*

*After a period of one year from commencement of operations and every year thereafter, the Applicant shall provide the Planning Commission and the State Land Use Commission with an annual report of its operations to include, but not be limited to, the number of tours, customers, and customer vehicles for each of the activities allowed under the subject permit in addition to Applicant's compliance with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the State Land Use Commission. The Planning Commission reserves the right to modify or impose additional conditions if it is found that adverse effects are being generated by the proposed operations allowed under the subject amendment request.*

**Current Status:** As stated above, the makai paintball park and the Waita Reservoir activities have been implemented. The mauka paintball park and the speedball tournament field have not be implemented as of this date. The following is a report on the number of tours, customers and customer vehicles for the ATV tours for the period of January 1 to November 30, 2009:

Customer totals by months:

	<u>Kauai ATV rides</u>	<u>Paintball and Waita</u>
January	828	26
February	599	0
March	850	38
April	1,084	6
May	684	36
June	1,238	9
July	1,389	24

August	1,185	7
September	635	16
October	664	2
November	<u>613</u>	<u>6</u>
Total	9,769	170

Vehicular trips:

Although it does not keep exact records of every vehicle bringing its customers to the staging area, the Applicant represents that except for the rare exception, there are at least two persons per vehicle. At the activity is family oriented, the overall average number of persons per vehicle is about three. In addition, the Applicant provides rides using the Applicant’s 12-passenger vans for the customers who arrive on Kauai on the cruise ships and want to take the ATV tour. Customers from the cruise ships and transported by the Applicant’s vans made up approximately 30% of the Applicant’s business, although this number will fluctuate depending the frequency of cruise ships visiting Kauai.

Condition No. 2

2. *As further represented, the Applicant shall provide fire extinguishers and first aid/CPR kits on at least one of the “lead” vehicles on the tour. In addition, the Applicant shall also work with the Fire Department to establish an Emergency Response Action Plan for the portions of the tour that are not public accessible.*

*The Applicant shall provide a revised Emergency Response Action Plan for the ATV Tours and Paint Ball operations to the Fire Department for review and comments.*

**Current Status:** As noted in the Applicant’s 2006 Annual Status Report, a revised Emergency Response Action Plan was prepared and sent to the Kauai Fire Department by Applicant’s attorney on February 6, 2006, copies of which were attached Exhibits “A-1” and “A-2”, to the 2007 Annual Status Report. To date, the Applicant and its attorney have not received any response to the submittal, and there have been no amendments to the revised Emergency Response Action Plan. The revised plan continues to be implemented and Applicant’s staff and guides have been instructed as to the same.

Condition No. 3

3. *The Applicant shall execute a written agreement stating that due care for public safety will be provided and that the Applicant agrees to indemnify, defend, and hold harmless the County of Kauai, its officers, agents, and employees from and against all claims or demands for damage, including claims for property damage, personal injury or death arising on or about the property in connection with the ATV tours.*

**Current Status:** As stated in the 2006 Annual Status Report, a draft of a proposed Indemnification Agreement in favor of the County of Kauai was submitted to the County Planning Department by Applicant's attorney on February 6, 2006, for review and approval. A copy of the transmittal and the proposed Indemnification Agreement was attached as Exhibits "B-1" and "B-2" to the 2006 Annual Status Report. To date, the Applicant and its attorney have not received any response to the submittal.

#### Condition No. 4

*As presented by the Applicant, the staging area will consist of washing, maintenance, and storage of ATV vehicles used on conjunction with the tour operation. No major engine repair work or underground storage of fuel shall be allowed in the staging area.*

*The Applicant shall resolve the requirements for the wash down area, refueling area, and individual wastewater requirements for the staging area with the Department of Health prior to any increase in ATV tour operations or commencement of the paintball operations.*

**Current Status:** This condition has consistently been met by the Applicant. By letter of February 6, 2006, the Applicant's attorney wrote to the Department of Health to address the requirements regarding the wash down area. These included non major engine repairs in the staging area, storage of fuel in an above-ground storage tank, construction of berms around the refueling area to contain any potential spills, and discharge of runoff from the wash down area unto the abutting coffee fields. The Applicant has also installed properly sized septic tank and leach fields in accordance with plans approved by the Department of Health. These continue to remain in effect.

#### Condition No. 5

5. *The Applicant shall resolve and comply with all applicable requirements or conditions as recommended by the State Department of Health, the State Department of Transportation, County Water, Fire and Public Works Departments.*

**Current Status:** The said departments have not recommended any requirements or conditions.

Condition No. 6

6. *The Planning Commission reserves the authority to impose additional conditions, modify or delete conditions stated herein, or revoke the subject permits through proper procedures should the Applicant fail to comply with the conditions of approval.*

**Current Status:** The Planning Commission has not imposed any additional conditions, nor modified or deleted conditions of the subject permit, nor proceeded to revoke the subject permit for failure of the Applicant to comply with the conditions of approval.

Condition No. 7

7. *The Applicant is advised that prior to and/or during construction and use, additional governmental agency conditions, including additional conditions of the Planning Commission, may be imposed. It shall be the Applicant's responsibility to resolve those conditions with the respective agency(ies) and to resolve those additional conditions as may be imposed by the Planning Commission.*

**Current Status:** No additional conditions have been imposed by governmental agencies.

Condition No. 8

8. *If historical/cultural remains such as archaeological artifacts, charcoal deposits or human burials are found during ground clearing or construction, the Applicant shall stop work in the immediate area, and shall contact the State Historic Preservation Division SHPD (Ph.No. 742-7033) and the Planning Department, to determine appropriate action.*

*The Applicant shall provide the State Historic Preservation Division with any historic interpretive material to be provided on the tour for its review and approval prior to commencement of operations approved under the subject amendment request.*

**Current Status:** No historic/cultural remains have been found, as there has been no ground clearing or construction to date. The Applicant does not provide any historic interpretive materials on its current tours. Should historic interpretive materials be planned, the same shall be first submitted to the State Historic Preservation Division for its review and approval.

Condition No. 9

9. *The special permit is granted for a period of five (5) years commencing upon the approval of the Special Permit by the State Land Use Commission and is subject to extension upon favorable review by the Planning Commission and the State Land Use Commission. To facilitate timely review, any application for extension shall be submitted at least three months prior to expiration of this Special Permit.*

**Current Status:** No action on this permit is required at this time.

Condition No. 10

10. *The Applicant and the owner of the Petition Area, Grove Farm Company, Inc., shall enter into an agreement for the maintenance of the cane haul roadways and trails used by the Applicant's tour operations. Said executed agreement shall be submitted to the Planning Department prior to commencement of operations allowed under the subject amendment request.*

**Current Status:** This condition has been met, with a copy of the letter agreement between the Applicant and Grove Farm Company, Inc., having been attached as Exhibit "D" to the 2006 Annual Status Report.

Condition No. 11

11. *The Applicant is advised that all buildings within the staging area shall meet building setback requirements of the Kauai County Code 1987, as amended. This requirement shall be complied with at time of building permit application.*

**Current Status:** The Applicant has constructed most of its proposed additional improvements at the staging area. Building permits for those structures not completed have required revised building permits from the County, which have been sought but not yet issued. The Applicant and its architect have been working with the County of resolve the outstanding changes to the plans before new building permits can

be issued. All improvements which have been constructed or are under construction are in compliance with applicable setback requirements.

Condition No. 12

*12. This special permit shall be restricted to only those locations and activities within the State Land Use Agricultural District as defined and represented by the Applicant to the County of Kauai and the State Land Use Commission. The State Land Use Commission acknowledges that the uses defined in this special permit may transit portions of the State Land Use Conservation District on established cane haul roads and trails as activities which are not regulated by the State of Hawaii Department of Land and Natural Resources Office of Conservation and Coastal Lands. This special permit shall not be construed as the State Land Use Commission's order granting a special permit in the State Land Use Conservation District.*

**Current Status:** The Applicant has, and will continue to restrict its activities to the State Land Use Agricultural District. Any incursion into the State Land Use Conservation District will be only for the purposes of transiting the same on established cane haul roads and trails. The Applicant continues to recognize and acknowledge that the subject Special Permit is not any authority for uses in the State Land Use Conservation District other than transiting as aforesaid.

Condition No. 13

*13. Applicant shall operate this special permit in substantial compliance with the representations made to the Planning Commission and the State Land Use Commission.*

**Current Status:** The Applicant has and shall continue to conduct its activities in substantial compliance with its representations to the Planning Commission and the State Land Use Commission.

As noted in previous annual reports, an Order to Show Cause was issued on June 6, 2007 by the State Land Use Commission as to the unpermitted construction of a staircase overlooking a waterfall on one of the Applicant's ATV routes. Following a hearing, during which process the offending staircase was removed by the Applicant, the State Land Use Commission determined that no cause existed which required further action by the Commission. The Order Dismissing Order to Show Cause was issued and filed on January 28, 2008.

Dated: Lihue, Hawaii, this 9th day of December, 2009.

Respectfully submitted,

/s/ Walton D. Y. Hong  
Walton D. Y. Hong  
Attorney for Applicant Kauai ATV, LLC



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OF THE STATE OF HAWAII

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parcels identified as Kauai Tax Map Keys:	)	
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_____	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy for the foregoing Annual Status Report was served upon the following by depositing the same in the U. S. Postal Service, postage prepaid and addressed as follows, on this date:

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Dated: Lihue, Hawaii, December 9th, 2009.

/s/ Walton D. Y. Hong  
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LLC