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July 29, 2004

Land Use Commission
Department of Business, Economic
Development & Tourism
State of Hawaii
P.O. Box 2359
Honolulu, Hawaii 96804-2359

Re: Annual Report to the Land Use Commission
LUC Docket No. A00-731
Kapalawai Resort, LLC

Honorable Chairman P. Roy Catalani and Members:

Pursuant to Condition No. 25 of the Findings of Fact, Conclusions of Law, and Decision and Order ("Decision and Order") of the Land Use Commission ("Commission") in the above-entitled docket, Petitioner Kapalawai Resort, LLC hereby submits the third annual report for the year 2003 through the period ending April 2004, regarding the (1) general progress of the project within the approximately 153.696 acre project area, and the (2) status and progress toward compliance with the conditions imposed as set forth in the Decision and Order.

1. General Progress of the Project

The Decision and Order for the above-entitled docket was certified on April 6, 2001. Subsequently, the property was designated Resort by Kauai County Council action on the General Plan Update (Ordinance No. PM-2000-353, Bill No. 1953). Once the approvals related to the State Land Use District Boundary Amendment and County General Plan were obtained, major portions of the property (127.93 acres, more or less) were zoned RR-1 (Ordinance No. PM-2001-356, Bill No. 2004). The remainder of the property was zoned Open (25.77 acres, more or less).

Subsequent to the approval of the zoning amendment, on February 25, 2002, the Petitioner filed an application with the County of Kauai for three permits ("final County zoning permits"): (1) Special Management Area Use Permit; (2) Project Development Use Permit; and (3) Class IV Zoning Permit. These three permits represent the final discretionary permits required for the proposed resort by the County of Kauai. The permits were approved by the Kauai Planning Commission on May 28, 2002. .

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Since that time, the Petitioner has incorporated minor modifications to the site plan which were approved by the Kauai County Planning Commission on August 12, 2003. Additional modifications are now before the Kauai County Planning Commission. A public hearing for these modifications was held on July 13, 2004, and was continued until September 14, 2004. All modifications proposed are consistent with the limits of numbers of units and density approved by the State Land Use Commission. The main change proposed by the Petitioner has been to combine 124 of the visitor units that were initially proposed as "duplex units," into 62 two-bedroom visitor units with kitchens. The remainder of the units (126) will remain as one-bedroom units, without kitchens. A copy of the revised site plan is attached herein.

2. Progress in Complying with Conditions Imposed

According to the Commission's Decision and Order, Petitioner must comply with 27 conditions. These conditions are each numbered as identified in the Decision and Order and set forth below and followed by a brief status summary.

Condition No. 1:

"1. Petitioner shall provide affordable housing opportunities for residents of the State of Hawai'i to include employees of the proposed resort in accordance with applicable affordable housing requirements of the County of Kauai. The location and distribution of the affordable housing shall be under such terms as may be mutually agreeable between the Petitioner and the County of Kaua'i."

Status:

The County Zoning Amendment Ordinance (Ordinance No. PM-2001-356, Bill No. 2004, Draft 2) specifies that the applicant provide 15 employee housing units at affordable rentals (80% of Kauai Median Household Income). The Project site plan submitted with the application for final permits (Exhibit I of the application), includes 15 employee housing units.

Condition No. 2:

"2. Petitioner shall design and construct drainage improvements requirements as a result of the development of the Property to the satisfaction of the Department of Health and the Commission on Water Resource Management of the State Department of Land and Natural Resources."

Status:

This condition will be implemented during review of construction documents for building permits.

Condition No. 3:

"3. Petitioner shall conduct proper and regular maintenance of the existing streambeds and the proposed grass-lined channel which is essential to ensure maximum flood protection for the project as may be required by the County Department of Public Works. In addition, Petitioner shall institute Best Management Practices in the design of the drainage system to reduce the potential for sediments and other pollutants to reach the ocean and on-site streams as may be required by the County of Kaua'i and/or the State of Hawai'i."

Status:

This condition will be documented during preparation and review of construction documents for grading permits, once final zoning permits are granted by the County of Kauai.

Condition No. 4:

"4. Petitioner shall locate all building construction mauka of the Hurricane Iniki inundation line and shall mitigate flood hazards as shown on Petitioner's Exhibit No. 32 to the satisfaction of appropriate Federal, State and County agencies."

Status:

Exhibit I of the application submitted to the County of Kauai Planning Department identifies the Hurricane Iniki Inundation Line. All proposed structures are mauka of this line. Construction drawings will deal with specific flood hazard requirements (County and Federal) for each affected structure, when applications are submitted for building permits.

Condition No. 5:

"5. Petitioner shall provide adequate water source facilities and improvements to accommodate the proposed Project. Water source facilities and improvements shall be coordinated and approved by the Commission on Water Resource Management of the State Department of Land and Natural Resources."

Status:

Approval from the Commission on Water Resource Management will be required to construct the potable well that will service the Kapalawai Resort. Application for approval of the well will not occur until after approval of final County zoning permits.

Condition No. 6:

"6. Petitioner shall provide adequate wastewater treatment, transmission and disposal facilities as determined by the State Department of Health."

Status:

DOH will have oversight for construction plans pertaining to the design of the on-site wastewater treatment plant and other facilities. These plans will be prepared as part of the submittal of construction drawings for building permits.

Condition No. 7:

"7. Petitioner shall fund and construct adequate civil defense measures as determined by the State of Hawai'i Department of Defense, Office of Civil Defense."

Status:

Design and location of required civil defense facilities will be coordinated with the State Department of Defense prior to submittal of building permits.

Condition No. 8:

"8. To ensure that the proposed land uses will not adversely impact endangered species and environmentally sensitive areas such as wetlands, ponds, or streams, the Petitioner shall consult with the appropriate Federal and State agencies whenever, in the course of developing the proposed project, it reasonably appears that an endangered specie or sensitive area may be affected by a particular development activity."

Status:

Appropriate consultations will occur when necessary. Primary agencies of responsibility are the U.S. Fish and Wildlife Service and DLNR Division of Forestry and Wildlife.

Condition No. 9:

"9. Should any previously unidentified human burials, archaeological or historic sites such as artifacts, marine shell concentrations, charcoal deposits, stone platforms, pavings or walls be found, Petitioner shall stop work in the immediate vicinity and the State Historic Preservation Division of the Department of Land and Natural Resources (SHPD) shall be notified immediately. The significance of these finds shall then be determined and approved

by the SHPD. Subsequent work shall proceed upon an archaeological clearance from the SHPD when it finds that mitigative measures have been implemented to their satisfaction."

Status:

Development contractors will be made aware of requirements prior to commencement of construction activities. Archaeological monitoring will be required in sensitive areas during construction. Should any unidentified human burials, archaeological or historic sites such as artifacts, marine shell concentrations, charcoal deposits, stone platforms, pavings or walls be found, SHPD will be notified immediately.

Condition No. 10:

"10. Petitioner shall follow the State Department of Land and Natural Resources, State Historic Preservation Division (SHPD) recommendations for mitigation of impacts resulting from the development and for archaeological data recovery and preservation. An archaeological data recovery plan (scope of work) must be approved by the SHPD. That plan must then be successfully executed (to be verified in writing by SHPD) prior to any grading, clearing, grubbing or other land alteration in these areas. A preservation plan must also be approved by SHPD. This plan, or minimally its interim protection plan phase, must be successfully executed (to be verified in writing by SHPD) prior to any grading clearing, grubbing or other land alteration in these areas."

Status:

SHPD has advised Petitioner of necessity to prepare appropriate data recovery plans. Data recovery and preservation plans will be prepared by the Petitioner and approved by SHPD subsequent to approval of final County zoning permits and prior to submittal of building permits.

Condition No. 11:

"11. Petitioner shall implement efficient soil erosion and dust control measures during and after the development process to the satisfaction of the State Department of Health."

Status:

Project civil engineer will include appropriate soil erosion and dust control plans as part of the requirements for a grading permit.

Condition No. 12:

"12. Petitioner shall participate in the pro-rata funding and construction of local and regional transportation improvements and programs necessitated by the proposed development in designs and schedules accepted and determined by the State Department of Transportation (DOT). Agreement between the Petitioner and the DOT as to the level of funding and participation shall be obtained prior to the Petitioner acquiring County zoning or prior to building permits if county zoning is not required."

Status:

Petitioner has coordinated these requirements with State DOT Highways Division per Exhibit O of the application submitted for final zoning permits. In addition, Petitioner must confirm whether DOT will require Petitioner to pay for access to the State Highway (Kaunualii Highway).

Condition No. 13:

"13. Petitioner, where feasible, shall use indigenous and water conserving plants and turf and incorporate the same into common area landscape planting."

Status:

The Petitioner has addressed this condition by preparing a conceptual landscape plan for the Project, which is included in the application submitted for final zoning permits as Exhibit J. Many native species are listed on the proposed landscape palette, as well as other species already found on the property that currently survive without irrigation.

Condition No. 14:

"14. Petitioner shall notify all prospective buyers of property of the potential odor, noise and dust pollution resulting from surrounding agricultural uses."

Status:

No sale of property has occurred to date. Should a sale in property occur, or be contemplated, prospective buyers will be notified of the potential odor, noise and dust pollution resulting from surrounding agricultural uses.

Condition No. 15:

"15. Building setback lines shall be established during the Zoning Amendment and SMA Permit approval process to ensure proper siting of the proposed buildings and structures to mitigate any adverse visual and/or environmental impacts."

Status:

The Kauai County Zoning Amendment Ordinance (Ordinance No. PM-2001-356, Bill No. 2004, Draft 2) has established specific setback and transition areas designed to mitigate visual and other impacts. These setbacks are respected by a revised sited plan for the Project that has been submitted to the Kauai County Planning Department for review and approval by the Kauai County Planning Commission. A continued public hearing for these revisions will be held on September 13, 2004.

Condition No. 16:

"16. Petitioner shall provide public pedestrian access to the shoreline and shall develop the public restroom facilities, vehicular access to Kaumuali'i Highway and shower and parking facilities substantially as represented by the Petitioner and as shown on Petitioner's Exhibit 53. The public facilities shall be built and maintained by Petitioner, with twenty-four hour security. The duration and term of the public access to the shoreline and to the public facilities shall be coterminous with the term of Petitioner's Lease with the landowner."

Status:

Public facilities presented to the Land Use Commission as part of Petitioner's Exhibit 53 are included in the project site plan (Exhibit I of the application submitted for final zoning permits). A similar requirement has been established by the County of Kauai (Zoning Amendment Ordinance, Section 3(j)).

Condition No. 17:

"17. Petitioner shall dedicate a public easement to the State of Hawai'i for 99 years adequate and reasonable with respect to beach and surfing ingress and egress and shall develop public restroom and shower facilities, vehicular access to Kaumuali'i Highway and public parking facilities as described by the Petitioner and as shown on Petitioner's exhibit 53. The public facilities shall be built and maintained by Petitioner, with twenty-four security. It is the LUC's intent that the duration and term of the public access to the shoreline and to the public facilities shall be coterminous with the term of Petitioner's Lease with the landowner. The facility shall be developed in consultation with the appropriate state and county agencies and the surfing community."

Status:

Easement dedication shall occur prior to submittal of building permits. The term of the easement shall be coterminous with the term of the Petitioner's Lease with the landowner.

Condition No. 18:

"18. Petitioner shall provide public pedestrian access from the Project's proposed parking facility to the rock platform substantially as represented by the Petitioner and as shown on Petitioner's Exhibit 55. No structures or buildings shall be constructed closer than fifty (50) feet from the rock platform. The duration and term of the public access shall be coterminous with the term of Petitioner's Lease with the landowner."

Status:

Exhibit I of the application submitted for final zoning permits identifies pedestrian access to the rock platform. Kauai County has recognized the rock platform and its buffer zone, by creating a Special Treatment-Cultural District (O/ST-C) around it as part of the Zoning Amendment Ordinance (Ordinance No. PM-2001-356, Bill No. 2004, Draft 2).

Condition No. 19:

"19. Relying on its earlier decision in Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Haw. 425, 903 P.2d 1246 (1995), the Supreme Court in Ka Pa`akai o Ka`aina v. Land Use Commission, 94 Haw. 31, 46, 7 P3d 1068, 1083 (2000), declared that "to the extent feasible when granting a petition for reclassification of district boundaries," this Commission must "protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians." To satisfy that obligation, "[s]pecific considerations regarding the extent of customary and traditional practices and the impairment and feasible protection of those uses must first be made before a petition for a land use boundary change is granted." Id., 94 Haw. At 52, 7 P.3d at 1089. The Commission's findings of fact and conclusions of law in land use boundary change proceedings must therefore specify "(1) the identity and scope of 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist." Id."

Status:

Petitioner acknowledges the meaning and intent of Condition No. 19.

Condition No. 20:

"20. There is some evidence of native Hawaiians' entry onto the property to gather and otherwise use it to exercise traditional and customary Hawaiian rights prior to the 1800s, particularly with respect to the fishpond. Native Hawaiian maka`ainana activity appears to have occurred only with the permission of the parcel's ali`i owners, after acquisition of the Property by Victoria Kamamalu. Accordingly and consistent with Petitioner's expressed willingness and commitment to restore, maintain, and operate the Kapalawai Fishpond as a Hawaiian fishpond, the Kapalawai Fishpond shall be restored, maintained, and operated in the manner consistent with traditional and customary Hawaiian practices as provided in P.A.S.H., supra., which the Commission finds to exist in the pond. Petitioner shall utilize recognized ancient Hawaiians [sic] pond experts such as Dr. Kikuchi and Professor Marion Kelly from the University of Hawaii, for guidance and assistance in the effort.

- (a) Restoration shall proceed pursuant to a mitigation plan the Petitioner prepares and submits to the SHPD for review and approval prior to commencement of any restoration activity, and in accordance with the traditional and customary method described by Dr. Kikuchi, see Finding of Fact 109. Restoration shall be done deliberately and with sensitivity to the preservation of the fishpond and any marine and bird life at the site. Because large heavy-equipment could adversely affect the extant pond walls if the full weight of the vehicle is brought to bear on the wall, Petitioner shall make every effort to avoid using such equipment in the pond's restoration. The pohaku on which the fishpond's legendary mo`o wahine is said to have sat will be retrieved from the debris, and it shall be re-placed and preserved in the place at its legendary location before restoration work begins. The public shall have access to the Kapalawai Fishpond to observe its restoration by traditional and cultural native Hawaiian means.

- (b) Petitioner shall establish a management plan for the maintenance and operation of the fishpond which is consistent with traditional and customary historic Hawaiian practices. It shall include provisions for sharing fish harvested from the fishpond, for educating the fishpond's caretakers and Petitioner's staff about Hawaiian fishponds and the Kapalawai Fishpond in particular, and for training fishpond caretakers in the traditional and customary Hawaiian practices for the maintenance and operation of the fishpond. The management plan shall also include provision for a fishpond management entity composed of a representative from the Petitioner and a representative from the West Kaua`i Hawaiian community to be selected by the Hawaiian community. This entity shall manage all aspects of the pond's use and utilization as a natural resource including harvesting, water use, and

visitor access. This entity shall be responsible for the resolution of any dispute which may arise as to the management and operation of the Kapalawai Fishpond in accordance with traditional and customary Hawaiian practices. The selection of the management committee shall take place no later than six months after the approval of the SMA Permit. In addition, the plan shall include a process for the two members of the management entity to select a third member to overcome any stalemate. It is the intent of the Commission that as far as possible, Petitioner select individuals living in the West Kaua'i community who are familiar with the area and have a love for the `aina to maintain and operate the Kapalawai fishpond. The management plan shall remain in effect for the duration of the original term of the Petitioner's lease with the landowner. The Hawaiian gathering rights on the pond shall not be affected by the expiration or termination of the lease. It shall be a further condition of the Commission that Petitioner shall report back to the Commission within one year from the approval of the SMA permit on the understanding that the Commission reserves the power and authority to amend the condition herein to better operate the management committee.

- (c) Further, no Project building or structure shall be constructed closer than one hundred (100) feet from the fishpond. Every effort shall also be made to prevent the contamination of the fishpond during the construction and operation of the Project due to water and waste runoff, the operation of pumps or other machinery in the area, and human access and habitation."

Status:

Initial consultation with Dr. Kikuchi concluded that the current condition of the fishpond could not be improved without the assistance of mechanical equipment. In Dr. Kikuchi's letter report following a site inspection in November 2001, he endorsed the use of an excavator within the pond, based on an immediate need for gross vegetation clearance, economic considerations, and the need for speed in completing the job. SHPD, the County of Kauai Planning Department, and the U.S. Army Corps of Engineers approved this approach to the first step of pond clearance. At this date, no activities have commenced within the pond.

As clearing of the fishpond proceeds, the pohaku will be located, if it is still present, and preserved in place.

A Management Plan shall be prepared in conjunction with the appointment of a management entity. The management entity will be in place within 6 months of the approval of the SMA Permit. The management entity was established on November 26, 2002, and consists of Lewis P. Geysler and Aletha Kaohi. It is with sadness that we report the passing of Dr. Kikuchi this past year. A replacement for him will be found this year.

All of the details of the management plan (including those details specified in LUC Condition #20b) will be implemented subsequent to the approval of the SMA Permit.

Exhibit I (Site plan) of the application submitted for final zoning permits package includes a 100-foot setback from the fishpond, which has been adopted as part of the zoning requirements established by the County Zoning Amendment Ordinance (Zoning district Open/Special Treatment-Cultural).

Condition No. 21:

"21. Petitioner acknowledges and agrees that it has no vested interest or right to develop the Petition Area, as reclassified, until Petitioner has substantially complied with the representations it made to the Commission. Petitioner waives any claims for liability against the State arising from any reversion of the Petition Area."

Status:

Petitioner acknowledges the meaning and intent of Condition No. 21.

Condition No. 22:

"22. Petitioner shall develop the Petition Area in substantial compliance with the representations made by the Petitioner to the Commission, including but not limited to the representation that the Project shall be limited to a 250 visitor unit density with existing and accessory uses as proposed in its Petition. Failure to do so for any reason, including economic feasibility, may result in the imposition of fines as provided by law, removal of improvements by Petitioner at Petitioner's own expense, reversion of the Petition area to its former condition by Petitioner at Petitioner's own expense, reversion of the Petition Area to its former classification, or a change to a more appropriate classification, or any other legal remedies."

Status:

The Petitioner has consistently maintained a desire to adhere to a 250 visitor unit limit. This restriction is now part of the records of approval for both the Commission Kauai County (Zoning Amendment Ordinance, Section 3(h)(i)), and is reflected in the most current site plan (dated April 6, 2004) submitted to the County Planning Department for approval.

Condition No. 23:

"23. Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Property, prior to the development of the Property. The decision herein, including the conditions imposed on Petitioner, shall be binding on Petitioner's successors and assigns according to law."

Status:

By letter dated September 11, 2001, landowner notified LUC of new Option Agreement with Kapalawai Resort, LLC.

Condition No. 24:

"24. Petitioner shall timely provide, without any prior notice, annual reports to the Commission, the Office of Planning, and the County of Kaua'i Planning Department, in connection with the status of the subject Project and Petitioner's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission."

Status:

The first 2002 annual report was submitted to the LUC in compliance with this condition on April 6, 2002. A second annual report was submitted to the LUC on April 30, 2003. This letter constitutes the third annual report submitted to the LUC in compliance with this condition.

Condition No. 25:

"25. The Commission may fully or partially release the conditions provided herein, 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 Petitioner."

Status:

To date, there has been no need for full or partial release from any of the conditions included as part of the April 6, 2001 Decision and Order.

Condition No. 26:

"26. Within seven days of the issuance of Commission's Decision and Order for the subject reclassification, Petitioner shall (a) record with the Bureau of Conveyances, a statement that the Property is subject to conditions imposed herein by the Land Use Commission in the reclassification of the Property, and (b) shall file a copy of such recorded statement with the Commission."

Status:

Petitioner recorded a statement with the Bureau of Conveyances that the property is subject to conditions imposed by the Commission on April 17, 2001 as Doc. No. 2001-054811.

Condition No. 27:

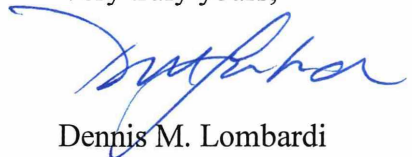
"27. Petitioner shall record conditions imposed herein by the Commission with the Bureau of Conveyances pursuant to Section 15-15-92, Hawai'i Administrative Rules."

Status:

Petitioner recorded the conditions imposed by the Commission with the Bureau of Conveyances pursuant to Section 15-15-92, Hawaii Administrative Rules, on June 14, 2001, as Doc. No. 2001-089516.

The foregoing constitutes Petitioner's third annual status report. Should you have any questions or desire any additional information or clarification with respect to the matters discussed above, please feel free to contact the undersigned as Attorney for the Petitioner, at (808) 547-5400.

Very truly yours,



Dennis M. Lombardi

Enclosure

cc: Planning Department, County of Kauai (with enclosure)
State Office of Planning (with enclosure)
Kapalawai Resort, LLC (with enclosure)