

EVERY H. YOUN, ARCHITECT

LAND USE COMMISSION
STATE OF HAWAII

TRANSMITTAL SHEET

2007 NOV -5 P 1:16

TO:
Land Use Commission

FROM:
Avery Youn

DATE:
11/2/07

ADDRESS:

ADDRESS:

FAX NUMBER:

PHONE NUMBER:

RE:
Kapalawai Resort, LLC

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

Transmitted herewith in is a copy of the Annual Report LUC Docket No. A00-731.
Any questions, please call me at 808-246-9414.

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OCTOBER 12, 2007

October 12, 2007

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

Kauai Planning Department
4444 Rice St. Ste. 473
Lihue, Hawaii 96766

Re: Annual Report to the Land Use Commission, State Planning Office and
to the County of Kauai Planning Department
LUC Docket No. AOO-731
Special Management Area Use Permit SMA (U) –2002-6
Kapalawai Resort, LLC

Gentlemen,

Pursuant to LUC Docket No. A00-731, Condition No. 24 of the Decision and Order of the Land Use Commission, and Condition #8 of the Special Management Area Use Permit SMA (U)–2002-6, Petitioner Kapalawai Resort Development Group, LLC (formerly Kapalawai Resort, LLC) hereby submits the Annual Report for the year 2007, describing the general progress of the project to date and status toward compliance with the conditions of approval.

1. General Progress of the Project

A. Background Information

- 1.) April 6, 2001: Land Use Commission Decision and Order approved.
- 2.) November 30, 2000: The Kauai General Plan Update, Ord. No. PM-2000-353, designated the project site as "Resort".
- 3.) February 25, 2002: Ordinance No. PM-2001-356 (Bill No. 2004), amends zoning to

Resort Residential (RR-1) for 127.93 acres, and Open District (O) for the remaining 25.77 acres.

- 4.) May 28, 2002: Kauai Planning Commission approves:
- (a) Special Management Area Use Permit SMA (U)-2002-6;
 - (b) Project Development Use Permit PDU-2002-15; and
 - (c) Class IV Zoning Permit Z-IV-2002-20

The status report requirement stems from the following previously approved conditions:

Special Management Area Use Permit SMA(U)-2002-6, Condition # 8 states:

- "8. Commencing on May 28, 2003, and on every May 28 thereafter until completion of the project, the applicant shall submit a written report to the Planning Department stating the status of the project and the manner in which the applicant has complied with these conditions of approval."

LUC Docket No. A))-731, also approved the project, of which Condition #24 states:

- "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."

This report is being filed subsequently to the above date because the applicant is still awaiting a decision from the State Surveyor's Office of the Department of Accounting and General Services and the Land Division of the Department of Land and Natural Resources on the status of an appeal filed by an area resident on the acceptance of an updated shoreline certification map prepared for the project site. The appeal was filed in April of 2006, and still has not been resolved by those State agencies as of this date. The following section describes the series of events that occurred. We had hoped that the State would have resolved the issue of the shoreline certification appeal first before we submitted the Annual Status Report for review, however we were concerned that the delay in reaching a decision could jeopardized project's future.

B. Progress since 2006 Update

A series of events took place in 2006, which required the project to be reviewed by the Kauai Planning Commission and the Kauai County Council.

On January 28, 2006, the annual status report was presented to the Planning Commission for review. At that time, the Planning Department concluded that the Special Management Area Use Permit (SMA) –U- 2002-6 had expired, and an extension of time on that permit must be first obtained. Prior to acceptance of the annual status report, an application for an extension of time for the SMA permit was

applied for and reviewed by the Planning Commission at their meeting, at which time both the acceptance of the status report and extension request was deferred.

To further complicate the issue, the Planning Department concluded that a new updated certified shoreline survey for the project had to be submitted before an SMA time extension request could be granted.

The certified shoreline survey was prepared by Esaki Surveying and initially submitted to the State Surveyor for certification review on November 25, 2005. It was resubmitted on February 23, 2006, for re-certification and subsequently appealed by Bruce Pleas, a Waimea resident. The appeal delayed the approval of the shoreline survey to the point where it still has not been resolved.

During the review of the SMA time extension application by the Planning Commission, comments from the State Department of Land and Natural Resources made reference to a new Coastal Erosion Management Study being prepared by Dr. Chip Fletcher of the University of Hawaii, and that it may affect the location of the building setbacks along the shoreline. Because this new information will affect the decision on the SMA time extension, it was concluded that the shoreline certification must first be resolved before the new building setbacks can be established. Because of the appeal of the shoreline certification submitted, it became apparent that a decision would take several months or longer.

To add to the dilemma, Zoning Amendment (Ord. PM-2006-385) Condition 3(t), had a five (5) year time period for the project to complete substantial construction, of which the deadline was December 24, 2006. Without an approved certified shoreline, an overall site plan with the required building setbacks cannot be set; thus the construction plans necessary for building permits cannot be completed in time in order to achieve substantial construction by the December 24, 2006, deadline. As such, the applicant had to apply to the County Council for an extension of time beyond the December 24, 2006 deadline to complete substantial construction.

The following chronology describes the series of events that occurred in order to obtain the necessary extensions to keep the project alive.

November 25, 2005:	Shoreline survey map submitted by Esaki Surveying
January 28, 2006:	Planning Commission Review of Status Report
February 23, 2006:	Revised shoreline survey re-submitted to State Surveyor
April 11, 2006:	Status Report and Revised Site Plan Approval by Planning Commission
April, 2006:	Certified Shoreline survey appealed
May 23, 2006:	Planning Commission presentation on shoreline erosion and SMA extension
July 11, 2006:	SMA Extension Request approval by Planning Commission

August 7, 2006:	Zoning Amendment Request for an extension of time to complete substantial construction submitted to County Council
September 26, 2006:	Planning Commission approval of Zoning Amendment extension.
October 25, 2006:	Council Review, First Reading of Zoning Amendment request
November 9, 2006:	Council Public Hearing
December 13, 2006:	Council approval, Third Reading
December 19, 2006:	Mayor approval of Ord. PM-2006-385, granting a time extension for the project

The Special Management Area Use Permit extension approval granted in July, 2006, included the following conditions:

“In the event the County Council amends the substantial construction date deadline in PM-2001-356, the subject SMA extension date shall be extended to May 28, 2008, or the date established by Ordinance, whichever shall first occur.

21. A building setback line shall be established from the most current shoreline certified by the State of Hawaii at the time of building permit application. This setback line shall take into consideration the “red line” (the 70-year erosion hazard line plus 40 feet as established by the preliminary erosion study by Dr. Chip Fletcher dated June, 2006), or 200 ft., whichever is closer to the shoreline, or other acceptable setback based on other models developed by the County of Kauai shoreline erosion study. All criteria and requirements establishing transition zones 1, 2 and 3 as contained in Ordinance No. PM-2001-356 shall apply to the location of all structures and reflected in the final site plan.
22. As represented, Kapalawai Resort LLC and its heirs or assigns shall subsidize a portion of any costs incurred by the County of Kauai to update aerial photography used in the analysis of shoreline erosion on West Kauai, not to exceed average annual payment of \$3,000.00 (in 2006 dollars) over the course of the next 60 years.
23. The 50 feet wide public lateral beach access established by PM-2001-356 (condition 3.j.vi) shall be floating, moveable and perpetual easement that will remain constant at 50 feet wide, measured inland from the current or any future certified shoreline(s).”

Relative to the above condition, the County Council did amend Ord. PM-2001-356 by adopting Ord. PM–2006-385, which amended condition (t) to read as follows:

- (t) Substantial construction of the hotel, defined as completion of at least fifty

percent (50%) of building foundations, shall be completed within eighteen (18) months from the date that the appeal of the project's shoreline certification currently pending before the Chair of the Board of Land and Natural Resources has been resolved. If substantial construction is not completed within this time, the Planning Commission shall initiate proceedings to rezone the property to the designations existing prior to the date of this ordinance."

Upon obtaining this extension in December of 2006, the applicant waited for a ruling on the appeal of the shoreline certification and to date, we have not been informed as yet on the outcome of the appeal.

In 2007, the applicant, Kapalawai Resort LLC, could not secure financing commitment for the project and the landowner sought a new developer. In August of 2007, the new applicant is:

Kapalawai Resort Development Group LLC
P.O. Box 223129
Princeville, HI 96722

Contact Person:
Steven Oldfield

2. Progress in Complying with Conditions Imposed

The Land Use Commission's Decision and Order, requires compliance with 27 conditions.

The Zoning Amendment sets forth a list of 24 conditions of approval.

The SMA, Project Development and Class IV permits established 20 conditions to be complied with.

Many of the above conditions are repetitious, being listed in all three of the approvals above. The Land Use Commission's conditions and the Zoning Amendment conditions have been incorporated as part of the SMA approval, conditions 1 and 2. The repetitive conditions are outlined in the following. The status of other non-repetitive conditions will be addressed separately.

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 Ordinance No. PM-2001-356 requires provision of 15 employee housing units at affordable rentals (80% of Kauai Median Household Income). The revised project site plan to be developed after approval of the certified shoreline will include the 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:

A grading and drainage plan was approved by the County prior to obtaining a time extension. It will be amended to conform to the new site plan that will be developed upon approval of the certified shoreline.

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 accommodated during preparation and review of the revised grading permits to be submitted to the County of Kauai once the shoreline certification is approved. SMA condition #10 and #14 are related to this condition and requires a flood study and the utilization of "Best Management Practices" during all phases of construction. The flood study was prepared as part of the grading and drainage plans previously approved by the County public Works Department.

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:

The building setback line of the July, 2006 SMA extension approval

established by condition #21 (the 70-year erosion hazard line plus 40 feet as established by the preliminary erosion study by Dr. Chip Fletcher dated June, 2006, or 200 ft., whichever is closer to the shoreline) will place the proposed buildings much further inland of the tsunami inundation line, thus assuring compliance with this condition.

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:

Preliminary design studies for a potable well have been performed and an application to the Commission on Water Resource Management with their findings will be filed as part of the application for the appropriate permits.

Condition No. 6:

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

Status:

Preliminary design and engineering for the wastewater treatment plant and other facilities were begun. Zoning Amendment Condition 3g and SMA Condition #14 relates to compliance with Department of Health requirements.

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 and incorporated into the construction plans.

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, if it reasonably appears that an endangered species or sensitive area may be affected by a particular development activity."

Status:

Appropriate consultations have not occurred as yet but will occur after completion of the new site plan, with the primary responsible agencies, these being the U.S. Fish and Wildlife Service and DLNR Division of Forestry and Wildlife. SMA Conditions #12 and #13 are related, in that it refers to shielded lights to protect Newell's shearwaters, Hawaiian monk seals and green sea turtles. The site, landscaping and exterior building electrical lighting plans will be reviewed by the Planning Department prior to building permit approval.

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. On-site archaeological monitoring will be provided in sensitive areas during the removal of mature vegetation, grading and excavation of foundations. Should any unidentified human burials, archaeological or historic sites, artifacts, or data be found work must be stopped and SHPD be notified immediately. SMA condition #15 similarly refers to the discovery of historic/cultural remains, requiring a work stoppage also.

Zoning Amendment Condition #3(c)(i) and 3(c)(ii) requires a preservation plan and a data recovery plan to be approved by the SHPD. Zoning Amendment Condition 3(c)(iii) and SMA Condition #3c refer to preservation of a burial site and the provision of a burial treatment plan, and Condition 3(c)(iv) require an archaeological monitoring plan. SMA Condition #3d also requires an archaeological monitoring plan. The following provides the status of each plan:

- (a) Archaeological Survey: Completed and approved by SHPD.
- (b) Preservation Plan: Submitted to and reviewed by State Historic Preservation

Division, letter dated March 23, 2006. Further discussions relative to suggestions made in the letter, are needed with the SHPO and with KHPRC prior to final approval of the plan.

- (c) Monitoring Plan: Reviewed and approved by the State Historic Preservation Division, letter to Dr. Hal Hammat dated March 24, 2006.
- (d) Data Recovery Plan:
- (e) Burial Treatment Plan: Submitted but not approved as yet by SHPO. Approval awaiting GPS information and burial registration in the Bureau.

Approval of the above plans will be secured subsequent to final approval of County grading permits and prior to submittal of building permits. In addition, SMA Condition #3 requires the preparation of a preservation plan for the five sites to be preserved, which has been approved as mentioned above. SMA Condition #3b requires a mitigation plan for the restoration of the fishpond, which is still in the process of being developed.

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: See status described in Condition No. 9 above.

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:

Soil erosion and dust control plans are included in the previously approved rough 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:

Off-site construction plans have been completed for the Ka'umualii Highway improvements and review comments from the State Dept. of Transportation have been made. The revisions will be made and re-submitted to the State for review and approval.

Zoning Amendment Condition 3f and 3(n) requires compliance with State Highways Division comments, and SMA Condition #9 requires compliance with State Highways Division regarding the resort's main entry/exit, service access, beach access and parking, etc., which have been incorporated into the construction plans.

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:

A conceptual landscape plan for the Project, was included in the application submitted for final zoning permits as Exhibit J. Native species will be used on the proposed landscape palette, as well as other species already found on the property. A new landscape plan is being prepared that will be consistent with the new revised master plan that will be provided once the shoreline certification has been approved.

Zoning Amendment Condition #3(o) also requires preparation of a landscape plan to be approved by the Planning Commission and required an inventory of all major plants, of which has been completed.

SMA Condition #7, refers to the Conceptual Landscaping Plan approved by the Planning Commission. The revised landscape plan will be submitted to the Planning Director at time of revised site plan approval.

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:

It will be disclosed to prospective buyers 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:

Specific setback and transition areas designed to mitigate visual and other impacts are established by Ordinance No. PM-2001-356.

The Special Management Area Use Permit extension approval granted in July, 2006, further established additional setback requirements along the shoreline which will be addressed in the revised site plan for the project once the shoreline certification has been approved. These are:

"21. A building setback line shall be established from the most current shoreline certified by the State of Hawaii at the time of building permit application. This setback line shall take into consideration the "red line" (the 70-year erosion hazard line plus 40 feet as established by the preliminary erosion study by Dr. Chip Fletcher dated June, 2006), or 200 ft., whichever is closer to the shoreline, or other acceptable setback based on other models developed by the County of Kauai shoreline erosion study. All criteria and requirements establishing transition zones 1, 2 and 3 as contained in Ordinance No. PM-2001-356 shall apply to the location of all structures and reflected in the final site plan.

Condition No. 16:

"16. Petitioner shall provide public pedestrian access to the shoreline and shall develop the public restroom facilities, vehicular access to Kaunali'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. A similar requirement has been established by Zoning Amendment Condition 3(j)). The SMA Condition #4 is also related to this condition in that it requires the establishment of public access easement documents. The SMA extension also added the following condition to address lateral shoreline access along the shoreline.

"23. The 50 feet wide public lateral beach access established by PM-2001-356 (condition 3.j.vi) shall be floating, moveable and perpetual easement that will remain constant at 50 feet wide, measured inland from the current or any future certified shoreline(s)." Petitioner is following these requirements.

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 Kaunualii 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 per SMA condition #4 mentioned above, and in accordance to SMA condition #23 relating to lateral shoreline access as stated above, 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:

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), and this requirement will be provided by the applicant.

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 and will accommodate such rights to persons if they can demonstrated that these traditionally existed. It should be noted however, that the Robinson family has not allowed such rights to occur on their propert(ies) since their purchase 136 years ago.

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:

The use of an excavator within the pond, based on an immediate need for gross vegetation clearance, economic considerations, and for speed in completing the job, has been approved by SHPD, the County of Kauai Planning Department, and the U.S. Army Corps of Engineers. This approach is the first step of pond clearance which the applicant will begin immediately upon status report approval due to the fact that deterioration of the pond has progressed significantly since the initial project approval.

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

The management entity was established on November 26, 2002, and consisted of Lewis P. Geyser and Aletha Kaohi. Mr. Geyser will be replaced by Steven Oldfield and re-confirmation of Aletha Kaohi will be pursued.

All of the details of the management plan (including those details specified in LUC Condition #20b) will be implemented in accordance with the SMA Permit, including the 100-foot setback from the fishpond.

SMA Condition #3b requires the development of a mitigation plan for the fishpond that will address all of the issues mentioned above. This plan is still in the process of being developed.

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 record of approval as established by Zoning Amendment Ordinance, Condition 3(h)(i)), which also reflects the 250 unit maximum density.

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:

In August, 2007, the landowner began negotiating a new lease and development agreement with:

Kapalawai Resort Development Group, LLC
P.O. Box 223129
Princeville, HI 96722

The above is a new development entity headed by Mr. Steven Oldfield, who will replace 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 fourth annual report was submitted to the LUC in January, 2006, and accepted by the Planning Commission on April 11, 2006. The submission of this fifth report was delayed because of the above change in the applicant identified in condition #23 above (Kapalawai Resort Development Group, LLC), which was not established until September, 2007.

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:

Recordation occurred 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:

Recordation occurred on June 14, 2001, as Doc. No. 2001-089516.

ZONING AMENDMENT CONDITIONS

Additional conditions established at time of zoning amendment approval that were not listed as part of the LUC conditions are summarized below with a brief status provided.

Condition No. 3(b):

Applicant shall provide appropriate documentation pertaining to historic preservation philosophy and methodology, including the preservation of the carriage house and green house. SHPD and KHPRC shall be given the opportunity to provide further comments as more detailed historic preservation information and plans become available.

Status:

Conceptual Preservation plans for the historic buildings were previously prepared and it will be reviewed by the new applicant for continued implementation. Preservation implementation will be done in accordance with SHPD and KHPRC approval. The preservation plan will include two older buildings including the main residence, the pond, and the archaeological sites identified for preservation.

Condition No. 3(c)(i):

Applicant shall prepare a preservation plan for the five historic sites to be preserved. The plan must include buffer zones, interim protection measures and long range preservation measures. Before land alteration can occur, minimum buffer zones and interim protection measures need to be approved and the SHPD must verify in writing that this plan has been successfully executed.

Status:

See 3(b) above.

Condition No. 3(d):

*The applicant shall comply with requirements of the Fire Department...
Water storage tank should increase to 0.3 MG, private water system shall comply with installation / testing / maintenance standards of NFPA 22, Water Tanks for Fire Protection, NFPA 24, Private Fire Service Mains, NFPA 25, Water based Fire Protection Systems, and appropriate installation / testing / maintenance standards of County Dept. of Water and State Dept. of Health. Fire alarm system for the cottages shall be incorporated into the museum*

building and other major structures. The museum building should be fire-sprinklered to further protect and preserve the historic structure.

Status:

This condition will be complied with during preparation of the revised site plan, grading plan and subsequent construction plans for the above facilities. The engineering consultant(s) has already begun review of the requirements and codes for compliance.

Condition No. 3(h)(iii)

One parking space shall be provided for each resort unit.

Status:

This requirement will be incorporated into the new site plan for the project.

Condition No. 3(h)(iv)

Maximum height will be set at 35 feet for non-resort buildings.

Status:

This condition was addressed in the construction plans submitted for foundation permits.

Condition No. 3(h)(v) and (vi)

Resort units restricted to duplex attachment; units limited to 800 s.f., with max. 200 s.f. deck, or deck 1/3 the floor area, whichever is smaller.

Status:

The unit sizes will be revised to be at 800 s.f. each for the units and 200 s.f. for the decks.

Condition No. 3(h)(vii)

Resort units shall be limited to 30 feet height.

Status:

The re-designed cottages will comply with this 30 feet height requirement.

Condition No. 3(j)

Prior to occupancy, the applicant shall provide facilities for public use (comfort station, outdoor shower, 2.5 ac. Passive recreation area, 50 feet wide lateral beach access easement along entire shoreline to be open 24 hours per day.

Status:

The above items have been incorporated into the project and is in the preliminary development stages.

Condition No. 3(k)

No encroachment of commercial buildings or resort units allowed within the Open / Special Treatment District.

Status:

This requirement will be addressed in the new site plan.

Condition No. 3(l)

Existing foliage along the highway within the Open – Special Treatment - Resource District shall not be removed.

Status:

This item has already been addressed per the approved landscape plan submitted at time of SMA permit approval and will be carried out in the final revised landscape plan.

Condition 3(m)

Signs shall comply with county Sign Ordinance; No direct lighting shall be allowed. Indirect lighting is allowed.

Status:

This requirement will be complied upon applying for the applicable sign permits.

Condition No. 3(o)

Applicant must prepare a landscape plan to be approved by the Planning Commission as part of issuance of applicable land use permits for the project. Landscape plan to include inventory of all major landscape elements covering major plants that are to be removed, retained and new landscaping.

Status:

The Landscape Plan has been approved by the SMA permit process (SMA Condition #7) and the inventory completed. The detailed landscape plan will be re-developed in accordance with the revised site plan once shoreline certification is obtained.

Condition No. 3(p)

Density for single family residential within the Open District with special treatment overlays shall be established at 1 unit/acre. This open density shall be transferred to RR-1 portion of the project and be used only to cover part of the density for the eight existing plantation homes...

Status:

The project is designed in compliance with this condition.

Condition No. 3(s)

Sufficient employee parking above and beyond the requirement for the hotel units shall be required during the permitting stage.

Status:

The one (1) parking stall per hotel unit already exceeds the CZO requirement. SMA Condition #5 also requires the provision of 656 parking stalls and overflow parking areas.

Condition 3(t)

Substantial construction of the hotel shall be completed within 5 years from the effective date of the Zoning Amendment Ordinance.

Status:

Relative to the above condition, the County Council did amend Ord. PM-2001-356 by adopting Ord. PM-2006-385, which granted a time extension beyond the Dec.24, 2006 deadline, by amending condition (t) to read as follows:

- (t) Substantial construction of the hotel, defined as completion of at least fifty percent (50%) of building foundations, shall be completed within eighteen (18) months from the date that the appeal of the project's shoreline certification currently pending before the Chair of the Board of Land and Natural Resources has been resolved. If substantial construction is not completed within this time, the Planning Commission shall initiate proceedings to rezone the property to the designations existing prior to the date of this ordinance."

A ruling on the appeal of the shoreline certification has not been made to date.

SMA CONDITIONS

Most of the SMA conditions have been addressed by the LUC and Zoning Amendment conditions described above. The following provides the status for those not covered by other conditions above.

Condition #3e

The applicant shall implement the guidelines and recommendations set forth in the Rural Historic Landscape Plan and incorporate them into the overall development scheme of the project. Implementation measures for the guidelines shall be addressed and incorporated into the timelines, milestones and priorities component set forth in Condition #5 of this approval.

Status:

These requirements are being presently incorporated into the ongoing design plans.

Condition #6

The applicant shall develop project timelines and milestones and identify development priorities. The timelines, milestones and priorities shall be developed in consultation with the Planning Department and other relevant agencies and organizations, and be subject to the review and approval of the Planning Director, prior to submittal of applications for building permits. Public, environmental and cultural amenities, and project mitigation measures shall be developed concurrently with construction and opening of resort facilities, and the timeliness and milestones shall include these amenities and measures.

Status:

Condition #17

An environmental Impact Assessment fee of \$1000.00 per unit for each of the 250 cottage units for a total of \$250,000.00, shall be paid prior to building permit approval.

Status:

This condition will be paid to the Planning Department upon submittal of building permit applications.

Condition #18

The new applicant will develop project timelines to meet the new schedule that will be dependent upon the date of the decision of the appeal on the shoreline certification. Once determined and a shoreline has been certified, the project schedule will be geared to meeting the 18 month deadline for completion of substantial construction.

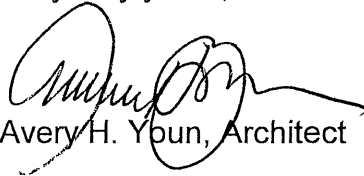
The applicant shall pay a Park Dedication Fee pursuant to the park Dedication Ordinance. An appraisal report and price list shall be provided to the Planning Department to forward to the Real Property Division to help calculate the fee.

Status:

Similar to the above condition, the Park Dedication Fee will be paid at time of building permit application.

The foregoing constitutes Petitioner's fifth 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 Authorized Agent for the Applicant, at (808) 246 9414.

Very truly yours,



Avery H. Youn, Architect