Of Counsel:

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Attorney for Petitioner
BRIDGE AINA LE'A, LLC

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition Of	)	DOCKET NO. A87-617
	)	
BRIDGE AINA LE'A, LLC, Successor petitioner to PUAKO HAWAII PROPERTIES	)	BRIDGE AINA LE'A, LLC'S ANNUAL PROGRESS REPORT FOR YEAR 2008; EXHIBITS A-E; CERTIFICATE OF SERVICE
To Amend the Agricultural Land Use District Boundary into the Urban Land Use District for Approximately 1,060 Acres of Land Situated at Waikoloa, South Kohala, Island, County and State of Hawai'i, Tax Map Key Nos.: 6-8-01: Portion 25, Portion 36, Portion 37, Portion 38, Portion 39, Portion 40.	)	

BRIDGE AINA LE'A, LLC'S ANNUAL PROGRESS REPORT 2008

Bridge Aina Le'a, LLC, by and through its attorney, Eric T. Maehara, hereby submits its Annual Progress Report for 2008 to the State Land Use Commission ("Commission") in Docket No. A87-617.

I. GENERAL BACKGROUND

Petitioner Bridge Aina Le'a, LLC ("Petitioner") is the owner of approximately 1,060 acres of undeveloped real property in South Kohala, Island and County of Hawaii, identified on the tax maps of the State of Hawaii as TMK Nos. (3) 6-8-001-025, 36, 37, 38, 39 and 40, which property is commonly referred to as the Villages at Aina Le'a and is the subject of this docket (the "Property"). The Property was reclassified into the urban land use district pursuant to the Commission's Findings of Fact, Conclusions of Law and Decision and Order dated January 17, 1989, as amended on July 9, 1991 ("Order"), and the Findings of Fact, Conclusions of Law, and Decision and Order Granting Petitioner's Motion to Amend Condition 1 and Denying Petitioner's Motion to Amend Condition 8 of Amended Finding of Fact Conclusion of Law, and Decision and Order Dated July 9, 1991, filed November 25, 2005 ("Amended Order").

Petitioner is in the process of developing a master planned community, including a championship 18-hole golf course, along with residential dwellings, single-family and multifamily, and commercial facilities that will service the West Hawaii community. In addition, as part of the development, Petitioner is to provide a minimum of 385 affordable housing units to address the need for affordable housing in West Hawaii. Since the last status report, Petitioner has moved forward with its plans to develop this project.

In its Annual Progress Report of 2007, Petitioner recited, in detail, the undertaking of various tasks in proceeding with the Project, particularly with regard to meeting the provisions of condition 1 of the Amended Order, requiring the completion of the 385 affordable housing units by November 17, 2010.

Among other undertakings, Petitioner was proceeding with the following:

1. Mass grading and excavation work, including but not limited to improving a construction and utility corridor access road;

2. The completion of a critical path schedule to complete Phase 1 of the infrastructure;

3. Negotiations with Innovative Housing Solutions, LLC to construct the vertical construction of the 385 affordable housing units by November 2010; and

4. Continued work in the provision of water, potable and nonpotable, for the project, particularly to service the affordable units.

In paragraph I.H., set forth on page 9 of the 2007 Report, Petitioner set forth plans to accelerate the work on the Project over the next several months. However, simultaneously with undertaking the physical infrastructure work, Petitioner was in the process of undergoing certain zoning changes with the County of Hawaii in order to consolidate sufficient parcels of multifamily zoned lands in the south east portion of the Project for its affordable housing development. The present zoning would have required spreading the 385 affordable units throughout the Project, making it impossible to develop by the November 2010 deadline.

In order to obtain the proper zoning to allow for the commencement of the affordable housing development, Petitioner prepared and filed in October 2007 with the Planning Department of the County of Hawaii a Project District Application and Amendment to

Ordinance No 96-153 (the existing zoning ordinance governing the Project). This application would have substituted the existing zoning for project district zoning, part of which would have consolidated sufficient multifamily zoned parcels in the south east portion of the Project to allow the development of the affordable housing. However, by letter dated October 11, 2007, Mr. Chris Yuen, Planning Director of the County of Hawaii informed Petitioner that the Planning Department, pursuant to its internal Memorandum No. 07-20, "determined that an Environmental Impact Statement is required for this large development since improvements will be required within the state right-of-way." (A copy of the Yuen letter is attached here as Exhibit A for your review.)

In its Memorandum No 07-20, the Planning Director directed department staff that it was to re-evaluate its practices in reviewing application to see whether an environmental assessment is required pursuant to chapter 343, Hawaii Revised Statutes ("HRS"), particularly when a land use application for private development will need improvements within the state or county right-of-way. (A copy of Planning Department Memorandum 07-20 is attached here as Exhibit B for your review.) Since the primary entrance to the Project is to be off of the state Queen Kaahumanu Highway, requiring substantial improvements to be made to the intersection in the highway presently serving the Mauna Lani Resort, the Planning Department determined that compliance with chapter 343, HRS, required the preparation and acceptance of an environmental impact statement ("EIS") for the entire Project prior to proceeding with the review and action on the Project District Application.

All of the infrastructure work set forth above in numbered paragraphs 1 through 4 has now been put on "hold" pending the preparation, review, and acceptance of the EIS. The preparation of the EIS was immediately undertaken following receipt of the Yuen letter in

October 2007. The environmental notice publication date issued by the Office of Environmental quality Control was December 8, 2007. Following is the status, to date, of the various studies, assessments, and other components required for the EIS. Completed are: (1) a Botanical Survey Report; (2) a Survey of the Avifauna and Feral Mammals; (3) a Burial Treatment Plan; and (4) a Cultural Impact Assessment. Studies being updated include: (1) the Preliminary Engineering Report for the Villages of Aina Lea; (2) an Air Quality Report; (3) a Traffic Impact analysis Report; and (4) a Master Drainage Report. Finally, new studies that had to be undertaken and completed for this EIS include: (1) an Ambient Noise Study; (2) a Social-Economic Study; and (3) a Groundwater/Coastal Water Impacts Study. It is presently anticipated that all studies and components of the EIS will be completed by the end of the year and the draft EIS will be submitted for review and acceptance by the Planning Department by sometime in February 2009.

In the meantime, in order to attempt to keep the affordable housing development on schedule, pursuant to section 25-2-45, Hawaii County Code, on April 4, 2008, Petitioner filed a Nonsignificant Zoning Change Application ("NZCA") with the Planning Department. (A copy of the NZCA is attached as Exhibit C for you review.) Section 25-2-45 allows the Planning Director to administratively grant any nonsignificant zoning change, so long as the zoning change does not result in a net increase in the density allowed in the zoning districts containing the affected areas. The NZCA filed would consolidate sufficient RM-4.0 zoned parcels in the south east portion of the Project to allow the development of the affordable housing without resulting in any net increase in density for the Project. The approval of the NZCA would allow the development of the affordable housing following the acceptance of the EIS, pending the subsequent review and approval of the Project District Application by the County of Hawaii Council. However, by letter dated May 22, 2008, the Planning Director denied the NZCA,

claiming "it would be better public policy for a change to the zoning boundaries of 22 acres-a large area-to be made by the county council, not administratively by the planning director." (A copy of the May 22, 2008 letter is attached here as Exhibit D for your review.) A General Petition for Appeal of Decisions by Planning Director appealing the denial of the NZCA by the Planning Director was filed with the County of Hawaii Board of Appeals on June 23, 2008. A tentative hearing date before the Board of Appeals scheduled for September 5, 2008 has been rescheduled for the next available meeting, tentatively scheduled for sometime in November 2008. (A copy of the General Petition for appeal of Decisions by Planning Director is attached here as Exhibit E for your review.)

In summary, it is anticipated that the draft EIS for the Project will be completed and filed with the Planning Department for review sometime in February 2009. Only upon acceptance of the draft EIS will the Planning Department accept the Project District Application for review and processing, followed by review and action by the Planning Commission, and eventually forwarding the application to the County Council for review and adoption. At this time, an estimated time table for the review and final action on the Project District Application by the County Council has not be determined. This determination will probably not be available until after elections and the organization of the new County Council next year. In the meantime, if the NZCA appeal is successful, work may resume on the affordable housing development upon the acceptance of the draft EIS by the Planning Department following its submittal in February 2009.

II. PETITIONER'S RESPONSE TO SPECIFIC CONDITIONS

Condition 1:

Condition No. 1 of the Amended Order provides:

1. Petitioner shall provide housing opportunities for low, low moderate, and moderate income residents of the State of Hawaii by offering for sale at least twenty percent (20%) of the Project's residential units at prices determined to be affordable by the County of Hawaii Office of Housing and Community Development, provided, however, in no event shall the gross number of affordable housing units within the Petition Area be less than 385 units. The affordable housing units shall meet or exceed all applicable County of Hawaii affordable housing standards, and shall be completed in substantial compliance with the representations made to the Commission.

1 b. Petitioner shall obtain, and provide copies to the Commission, the certificates of occupancy for all of the Project's affordable housing units within five (5) years of November 17, 2005.

lc. Petitioner shall submit to the Commission the Petitioner's signed joint venture agreement and a mass grading contract within a reasonable amount of time, not to exceed one (1) year from November 17, 2005.

Progress Report:

Petitioner has and will continue to comply with the condition as amended. As stated above, Petitioner is proceeding with its efforts to develop and complete the affordable housing units; however, progress has been set back by the determination by the Planning Director that an accepted EIS will be required before the Planning Department accepts the Project District Application for review and processing and by the denial of the NZCA, presently on appeal with the Board of Appeals.

In light of the delays and uncertainty imposed on the time table for the provision of the affordable housing development, Petitioner has been in discussions with the County regarding the participation by Petitioner in a transitional and affordable housing project that the County is sponsoring at the Kaloko Industrial Park, just outside of Kailua-Kona, in West Hawaii. The project calls for the immediate development of twenty-four transitional housing units and the eventual development of an additional affordable rental units in the project. Under existing County housing policies, participation in this project by Petitioner could meet County housing requirements as required by this condition; however, it would also require a further amendment of

this condition by the Commission allowing affordable housing units to be provided off site, rather than within the petition area. If Petitioner and the County are successful in coming to agreement on Petitioner's participation in this Kaloko housing project, a motion to amend this condition will be immediately filed with the Commission by Petitioner.

Condition 2:

Condition 2 of the Order provides;

Petitioner shall develop, at its expense and in coordination with the State Department of Land and Natural Resource and the County of Hawaii Department of Water Supply, the necessary water source, storage, and transmission facilities to provide an adequate supply of potable water to the Property. Petitioner shall develop the necessary water source prior to development of the Property.

Progress Report:

The Petitioner will comply. Petitioner is in the process of developing the necessary water sources, storage, and transmission facilities to provide an adequate supply of potable water to the property. On September 26, 2006, Petitioner and the Water Board of the County of Hawaii executed the Water Development Agreement with regards to the allocation of offsite water improvements (the "Water Agreement"). This agreement requires that Petitioner complete and submit hydraulic analyses to the DWS to determine all the improvements necessary to be able to deliver water from the new wells in Ouli throughout DWS's system in the South Kohala coastal area. Petitioner submitted the required analyses to DWS on June 14, 2007. Results of the analyses establish that water put into the DWS system by new wells in the Ouli corridor will be sufficient to enable DWS to supply the Project from its infrastructure in the Lalamilo corridor. Id.

The Water Agreement further calls for the development of three wells in Ouli initially to consist of the outfitting of the existing "Signal" well and development and outfitting of two new wells. Petitioner is in negotiations with Hale Wailana Partners to finalize an agreement for the location of the new well sites. Once this is completed, the drilling contractor, Water Resources International, can be authorized to begin drilling the new wells. Id.

Petitioner has also obtained well construction permits for two brackish irrigation wells to be developed at the northern end of the property and has contracted with Beylik Drilling to drill, case, and pump test these-wells. The several mile long access road to these sites was being constructed, and the drilling work was to commence when the access road is completed; however, all work on the potable and nonpotable water sources and transmission projects have been halted pending the acceptance of the EIS for the Project.

Condition 3:

Condition 3 of the Order provides:

Petitioner shall ensure that a buffer area along the boundary of the Property fronting the Queen Ka'ahumanu Highway right-of-way will be preserved to protect natural open space and scenic views. This buffer area shall be preserved in perpetuity either through the establishment of a conservation easement pursuant to Chapter 198, HRS, as amended, or such other means as shall be reviewed and approved by the Office of State Planning of the State of Hawaii.

The buffer area shall be comprised of approximately two hundred twenty-five (225) acres and shall extend inland from the Queen Ka'ahumanu Highway right-of-way to a depth of approximately one thousand two hundred (1,200) feet. The depth of the buffer area may meander to a lesser or greater depth to accommodate the Project's development plan and

preservation of natural open space and scenic views. Exceptions shall be made for infrastructure improvements or corridors that may be necessary to service the developed portions of the Property. The approximate boundaries of the natural open space buffer area are consistent with the 1,060 acre petition subarea at the project site.

Progress Report:

Petitioner will comply; however, to provide more flexibility in the planning process, Petitioner is considering filing a motion to amend this condition. Any amendment filed by Petitioner will request allowing flexibility in reducing the buffer setback distances along the Queen Kaahumanu Highway while maintaining a total of two hundred twenty-five acre total buffer area.

Condition 4:

Condition 4 of the Order provides:

Petitioner shall participate in the funding and construction of present and future transportation improvements at project access points as identified and deemed necessary by the State Department of Transportation. Such improvements may include a highway overpass or underpass. Petitioner shall also participate in the funding and construction of other on-site and off-site transportation improvements necessitated by the proposed development and in designs and schedules accepted by and coordinated with the State Department of Transportation, provided that the extent of the Petitioner's participation shall not exceed its share of the increased community traffic impacts in the region and provided further that, in the event the County adopts an impact fee for transportation improvements, the foregoing requirements shall not include or double-count the cost of any specific traffic improvements which may also be included in the County's impact fee computation.

Progress Report:

The Petitioner will comply. Petitioner's primary access intersection to the Queen Ka'ahumanu highway has been designed. It has been reviewed by the Department of Transportation ("DOT") and the DOT has provided its initial comments. Petitioner has provided all initial responses to the DOT, with the exception of traffic signal warrant study, which is in progress.

Petitioner, in conjunction with the County of Hawaii, has also completed the construction of a connector road to Waikoloa Village which serves as an emergency ingress and egress route.

Condition 5:

Condition 5 of the Order provides:

Petitioner shall design, locate and construct a sewage treatment plant as may be required by the County of Hawaii and the State Department of Health so as to minimize adverse impacts on adjoining properties.

Progress Report:

Petitioner will comply. Petitioner intends to recycle wastewater by treating it to an R-1 standard allowing the water to be used for irrigation. Petitioner has commenced design of the sewer treatment plant; however, Petitioner has also engaged in discussions with surrounding landowners relating to the joint expansion, maintenance, and use of existing wastewater treatment facilities. Any such undertaking will be done in conjunction with the County of Hawaii and Department of Health and pending an appropriated amendment of this condition by the Commission.

Condition 6:

Condition 6 of the Order provides:

Petitioner shall immediately stop work on the impact area and contact the State Historic Preservation Office should any archaeological resources such as artifacts, shell, bone, or charcoal deposits, human burial, rock or coral alignments, paving or walls be encountered during the Project's development.

Progress Report:

Petitioner will comply. All archeological surveys of the property have been performed and accepted by the Department of Land and Natural Resources Historic Preservation Division.

Condition 7:

Condition 7 of the Order provides:

Petitioner shall provide a maximum of sixteen (16) acres within the Property for public school site(s), as the State Department of Education may determine to be necessary to service the Property, at no cost to the State of Hawaii. These school site(s) shall be provided if there is a need for such site(s), in location(s) designated for community facilities on Petitioner's master plan, or in location(s) as may be mutually agreeable to the Petitioner and the State Department of Education.

Progress Report:

Initially, Petitioner has offered the Department of Education ("DOE") thirty-two acres for school facilities. During a meeting between representatives of Petitioner and Ms. Heidi Meeker and Mr. Sanford Beppu, DOE's Office of School Facilities and Support Services, on July 16, 2008, Petitioner was informed that pursuant to Act 245, Session Laws of Hawaii 2007, relating to school impact fees, DOE has designated the South Kohala school district as the first

school impact district for school impact fees and, as required by section 302A-1605, HRS, and is presently preparing a school impact fee analysis for the district to determine the public school needs of the district, projected cost of improvements required, and resulting school impact fees to be assessed by DOE on private developers. DOE indicated that it would be several months before it has completed this school impact analysis for the south Kohala school impact district.

Condition 8:

Condition 8 of the Order provides:

Prior to the development or transfer or any interest whatsoever in and to the project, Petitioner shall enter into an agreement with the Office of State Planning on the community benefit assessment program and shall file such agreement with the Commission within thirty (30) days of the execution of the agreement.

Progress Report:

Puako Hawaii Properties, Petitioner's predecessor in interest, reached an agreement with the Office of State Planning on a community benefit assessment program. On September 29, 1993, the Commission issued as Order Granting Motion for Declaration of Satisfaction of Condition Number 8 of the Modified Decision and Order dated July 8, 1991.

Petitioner has contacted the Office of State Planning, now known as the Office of Planning, and commenced discussions on modifications to that Community Benefit assessment program. The Department of Human Services Housing and Community Development Corporation of Hawaii has written a letter of support for modifying the community benefit agreement to give the County of Hawaii control of the affordable housing component.

Condition 9:

Condition 9 of the Order provides:

Petitioner shall comply with "the Eight (8) Conditions Applicable to This Golf Course Development", prepared by the State Department of Health dated April 1990 (version 3).

Progress Report:

Petitioner will comply with the conditions as required by the State Department of Health related to golf course development.

Condition 10:

Condition 10 of the Order provides:

Petitioner shall engage the services of a qualified golf course manager to oversee the irrigation of the golf course and application of fertilizers and pesticides to the golf course and who shall be certified by the State Department of Agriculture in the

Progress Report:

The Petitioner will comply.

Condition 11:

Condition 11 of the Order provides:

Petitioner shall make available adequate golf tee times no less than 40 percent of the total daily golf tee times at affordable rates for public play by Hawaii State residents. This condition may be fully satisfied by providing public play on 18-hole golf course(s) developed by Petitioner within and/or outside the Petition area.

Progress Report:

The Petitioner will comply.

Condition 12:

Condition 12 of the Order provides:

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

Progress Report:

This report is being submitted in compliance with this condition.

Condition 13:

Condition 13 of the Order provides:

Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. Failure to develop the Property may result in reversion of the Property to its former classifications, or change to a more appropriate classification.

Progress Report:

The Petitioner will comply.

Condition 14:

Condition 14 of the Order provides:

Petitioner shall give notice to the Land Use Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interest in the Property covered in the petition, prior to development of the Property.

Progress Report:

The Petitioner will comply. On November 16, 2006, Petitioner entered into a joint venture agreement with Bridge Capital, Inc., which was intended to be an interim agreement. Under this Agreement, Bridge Capital, Inc. committed to provide the capital and development expertise and personnel for the project. While Petitioner is still interested in

finding another qualified development partner for the project, at this time, Petitioner is moving forward with the project using funds provided by Bridge Capital, Inc.

Condition 15:

Condition 15 of the Order provides:

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

Progress Report:

This condition is understood by the Petitioner.

III. CONCLUSION

In summary, Petitioner is moving forward with the Project and has complied with the conditions set forth by the Commission relating to this development. With respect to the affordable housing requirements provided in Condition 1, Petitioner understands that the Commission is primarily concerned about providing affordable housing to the community in a timely manner and the ability of Petitioner to meet the time constraints of this condition. Petitioner is doing all it can, moving forward on dual fronts, to continue forward with the affordable housing development through the preparation of the draft EIS for the Project District Application and the NZCA and the possible participation in the Kaloko housing project Petitioner will continue to keep the Commission apprised of its efforts in this regard and will immediately file any motion required to amend condition 1, as required.

Based on the foregoing and in compliance with the Commission's rules and condition 8 of the Order, Petitioner respectfully submits this status report and remains available to participate in any further hearings the Commissions deems appropriate in the premises.

DATED: Honolulu, Hawaii, October 2, 2008.

ERIC T. MAEHARA

Attorney for Petitioner
BRIDGE AINA LE'A, LLC

Harry Kim
Mayor

Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT
101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224
(808) 961-8288 • FAX (808) 961-8742

October 11, 2007

Mr. Sidney Fuke
Planning Consultant
100 Pauahi Street, Suite 212
Hilo, Hawaii 96720

Dear Mr. Fuke:

Project District Application
Bridge Aina Le'a, LLC
TMK: 6-8-1:25, 36-40

This is in regards to the Project District Application filed on behalf of your client, Bridge Aina Le'a, LLC, along with proposed amendments to Ordinance No. 96-153.

In our letter to you dated October 10, 2007, which included staff memorandum no. 07-20, you were informed that because of two recent events, we have re-evaluated our practice in reviewing applications to see whether the proposed project(s) would require compliance with Chapter 343, Hawaii Revised Statutes, particularly when a land use application for private development will require improvements within the state or county road right-of-way. For your information, one of the events was a recent memo from the State Department of Transportation which stated that they would not process applications from a private landowner for improvements within the state right-of-way unless the landowner could show that there had been compliance with Chapter 343 when the permits for the land use were granted. The other event was the State Supreme Court's recent opinion on the Superferry case.

With regards to the Project District application filed on behalf of your client, Bridge Aina Le'a LLC, we have determined that an Environmental Impact Statement is required for this large development since improvements will be required within the state right-of-way. The construction of a wastewater treatment facility will also trigger this requirement. Since this project will require compliance with Chapter 343, it would be best if this were taken care of prior to the submittal of the Project District application. We are, therefore, returning your entire submittal including the $5,000.00 check.

Should you have any questions, please feel free to contact me or Norman Hayashi at (808) 961-8288.

Sincerely,

CHRISTOPHER J. YUEN
Planning Director

Enclosures

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ıeey Kim
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MEMORANDUM
NO. 07-20

October 3, 2007

TO: PLANNERS, ZONING CLERKS, AND EMS

FROM: CHRISTOPHER J. YUEN
PLANNING DIRECTOR

SUBJECT: EA LAW

Because of two recent events, we have to re-evaluate our practices in reviewing applications to see whether an environmental assessment is needed under Chap. 343, Hawaii Revised Statutes, particularly when a land use application for private development will need improvements within the state or county road right-of-way. The two events the state DOT's May 2007 memo and the State Supreme Court's recent opinion in the Superferry case.

DOT's memo said that they would not process applications from landowners for improvements within the state r.o.w., typically for such things as driveways and turn lanes, which are associated with private development on the adjoining land, unless the owner could show that there had been compliance with Chap. 343 when the permits for the land use were granted (typically by the county.)

The end result of the Superferry decision and the DOT memo, along with an earlier Hawaii Supreme Court case (Kahana Sunset) is that when we look at a land use application, such as a special permit, SMA permit, or a rezoning, we have to see whether any new construction on state or county land (including adjoining road rights-of-way) must accompany the development. Very often, it will. There will usually be a need for a new driveway access across the unimproved shoulder of a road, for example. A larger project may need turn lanes constructed within the right-of-way.

Now, typically, these kinds of minor road improvements will be on the "exempt list" for DOT or DPW. This is a list of types of improvements that are normally "exempt" and do

EXHIBIT B

not need an EA, such as paving of shoulder areas. So if DOT or DPW did this type of work it would be considered exempt and would not need an EA. If it is done by a private party in connection with a development, however, the entire development has to be considered. The development can be exempted only if it is the type of development that is in one of the "exempt classes of action" under the OEQC Rules. These are general classes, such as construction of a single-family home not in connection with more than one home.

Planners will have to review the application to see if there is construction on state or county land involved. This may be shown on the site plan. Planners also have to use common sense in looking at the application. For example, if access to the property will require constructing a new road over a "paper" government road, this will trigger this Chap. 343 review.

If we process an application without requiring an EA because there was no road improvement or other EA trigger in the application, but it turns out that during the course of the consideration of the application that there is likely going to be an EA trigger (because there is a comment letter from DPW asking for road improvements, for example) we will continue processing the application, because it is not clear until the permit or rezoning is granted that this will actually be a requirement. In that case, if the improvement is a condition of the approval, the EA will have to be done before the next stage in the process. For example, if the property was rezoned, the EA should be done before the preliminary subdivision plat is submitted. If the road improvement is a condition of tentative subdivision approval, the EA should be done before final subdivision approval, and the tentative approval should include it as a condition.

The end result of this is likely that more applications will need environmental assessments, and, because the entire project has to be considered, some will need full EIS's, even though the only "trigger" is a minor construction on the state or county right-of-way.

In most cases, the Planning Department will then be responsible for submitting the environmental assessment, because we are the agency that received the initial application. We will usually continue our regular practice of having the private applicant actually prepare the information that goes into the EA. We still have to find it acceptable and be the entity that actually submits it, however. We will also make the determination whether there must be a full EIS.

I understand that this may cause a big increase in work for some projects. We have to do this, however, because we have to implement the state environmental impact statement law, Chap. 343.

I expect to have further staff training on this topic soon. In the meantime, however, attached is a checklist for reviewing new applications to see if there will be a requirement for an environmental assessment. This is a checklist for applications that go to the Planning Commission, such as special permits, SMA permits, rezonings, use permits, and state land use boundary amendments, and for new subdivision applications. **Planners who are reviewing these applications should go through the checklist. When completed, a copy of the checklist, initialed by the planner and dated, must be kept in the file of the application.** Planners must keep a copy of the DPW and DOT "exempt lists", and the "exempt categories" handy so that they can make a determination whether these apply. (These are included with the memo.)

I am available for consultation on issues involving EA's and applications but long term this has to be handled by the planners who are reviewing applications.

One further fine point on this: technically, a rezoning or a county council state land use boundary amendment is not the type of approval that will create the need for an EA, because state law defines the EA trigger as an "agency action", and the county council is not an "agency" under Chap. 343. It is not part of the executive branch of government. However, a rezoning is almost invariably followed by a subdivision or plan approval, which is an "agency action." Because Chap. 343 says that the EA should be done at the earliest practicable time, if a rezoning has a "trigger" for an EA, and if it is not exempt, and if the rezoning is going to be followed by a subdivision or plan approval, then the EA should be done prior to the rezoning. In the case of a rezoning that would not be followed by a subdivision or plan approval (which is probably rare), no EA will be required, even if there is a trigger.

I'm sorry for the complexity of this topic, but again, that is the result of state law.

CJY:pak
Wpwin60/Pat/Staff Memo re EA Law.doc

Attachments

cc: Mayor Harry Kim
Corporation Counsel
Department of Public Works

CHAPTER 343 REVIEW CHECKLIST FOR NEW APPLICATIONS THAT GO TO PLANNING COMMISSION AND NEW SUBDIVISIONS

1. Has an EA or EIS already been done for the project? If yes, stop, the requirement has already been taken care of.

2. Is there an EA trigger?
   --use of state or county lands, including construction within r.o.w.
   --use of state or county funds
   --use within conservation district
   --use within shoreline setback
   --use within historic site on national or Hawaii register (see list in GP)
   --reclassification of conservation land
   --building of certain helicopter facilities, see HRS sec. 343-5
   --amendment to county GP or CDP not initiated by county
   --construction of new WWTP serving > 49 residences
   --construction of new fossil-fuel power plant > 5MW
   --expansion of existing fossil-fuel power plant by > 5MW
   --new landfill
   --new waste-to-energy facility
   --new oil refinery

If no trigger, check ___ here. Stop, no EIS/EA needed.

If trigger, check off trigger category or categories, go to #3.

3. Is the trigger on an exempt list or is it an exempt class of action? Review exempt lists and exempt classes of action.

If no, stop. Project needs EA or EIS. Write applicant, explain. Reject application. If PPM, process but send applicant a letter explaining they must do EA and that no TA until this is done.

If yes, list exempt list item or class of action here___, go to #4.

4. Is the project as a whole similar to an exempt class of action?

If no, stop. Project needs EA or EIS. Write applicant, explain. Reject application. If PPM, process but send applicant a letter explaining they must do EA and that no TA until this is done.

If yes, go to #5.

5. Contact the agency whose exempt list it falls under. Let them know that we are considering exempting the project per the category. Ask for any objection.

If no objection, go to #6. If there is objection, see planning director.

6. Is the project in an unusually sensitive area, or are there successive actions planned that may have a cumulative effect? If yes or if in doubt, see planning director. If no, go to #7.

7. Write brief letter to agency whose exempt list it falls under mentioning that we consulted with the agency and have determined this project is exempt from EA requirements under exempt list item ___. CC applicant.

Process is now finished.

Checklist completed by _____. Date:_____

SSFM INTERNATIONAL, INC.
101 Aupuni Street, Suite 315
Phone: (808) 933-2727
Fax: (866) 887-8885
Project Managers, Planners, & Engineers
American Council of Engineering Companies, Member

2008 MAR 25 AM 6 10

PLANNING DEPARTMENT
COUNTY OF HAWAII

March 24, 2008

SSFM 2005_141.001

TO: County of Hawaii
Planning Department
101 Pauahi Street, Suite 7
Hilo, Hawaii 96720

SUBJECT: The Villages of Aina Lea

We transmit herewith the following:

5 Set Non-Significant Zone Change Application

Remarks:

Dear Sir,

Please find attached 5 sets of a non-significant zone change application.

Thank you,

SSFM INTERNATIONAL, INC.

R. Ferguson

Rebecca Ferguson
Project Engineer
Email: rferguson@ssfm.com

EXHIBIT C

NONSIGNIFICANT ZONING CHANGE APPLICATION

COUNTY OF HAWAII
PLANNING DEPARTMENT

APPLICANT: Bridge Puako LLC (Representative: Jim Baldwin)

APPLICANTS SIGNATURE: J S R Bal DATE: March 24, 2008

APPLICANT'S ADDRESS: Bank of Hawaii Building, Suite 303, Marina Heights Business Park, Saipan, MP 96950

APPLICANT'S PHONE (Bus.) (670) 322-3508 (Res.) N/A (Fax) (670) 322-2323

APPLICANTS AGENT: SSFM International, Inc. (Representative: Rebecca Ferguson)

AGENT'S ADDRESS: 99 Aupuni Street, Suite 202, Hilo, HI 96720

AGENTS PHONE: (Bus.) (808) 356-1250 (Res.) N/A (Fax) (808) 887-8885

LANDOWNER: Bridge Puako LLC (Representative: Jim Baldwin)

LANDOWNER'S SIGNATURE: J S R Bal

LANDOWNERS ADDRESS: Bank of Hawaii Building, Suite 303, Marina Heights Business Park, Saipan, MP 96950

TAX MAP KEY: (3) 6-8-01:039

REQUEST: See attached Rezone Map (Existing Zoning)) TO See attached Rezone Map Proposed Zoning)

SIZE OF AFFECTED AREA(S): _____

(See Additional Instructions on Next Sheet)

p:wpwin60\norm\folder\form.nzc (3-9-00)

NONSIGNIFICANT ZONING CHANGE REQUEST
(A-5a to RM-4)
BRIDGE PUAKO LCC
Bank of Hawaii Building, Suite 303
Marina Heights Business Park, Saipan, MP 96950
TMK (3) 6-8-01: portion of 39

PROJECT LOCATION

The area of the requested non-significant zone change is within the Villages of Aina Le'a project. This property, consisting of 3,000 acres, is located in Waikoloa, on the northwestern portion of the Island of Hawai'i in South Kohala. Its western-most edge is approximately two miles inland from the coast. The site is bordered to the west by State Highway Route 19 (Queen Ka'ahumanu Highway). The Mauna Lani and Waikoloa Resorts and Golf Courses occupy large portions of the coastal zone immediately southwest of the site. One mile from the eastern border of the project site is the Waikoloa Village, a residential community. The land surrounding the property on the north and south boundaries is presently undeveloped.

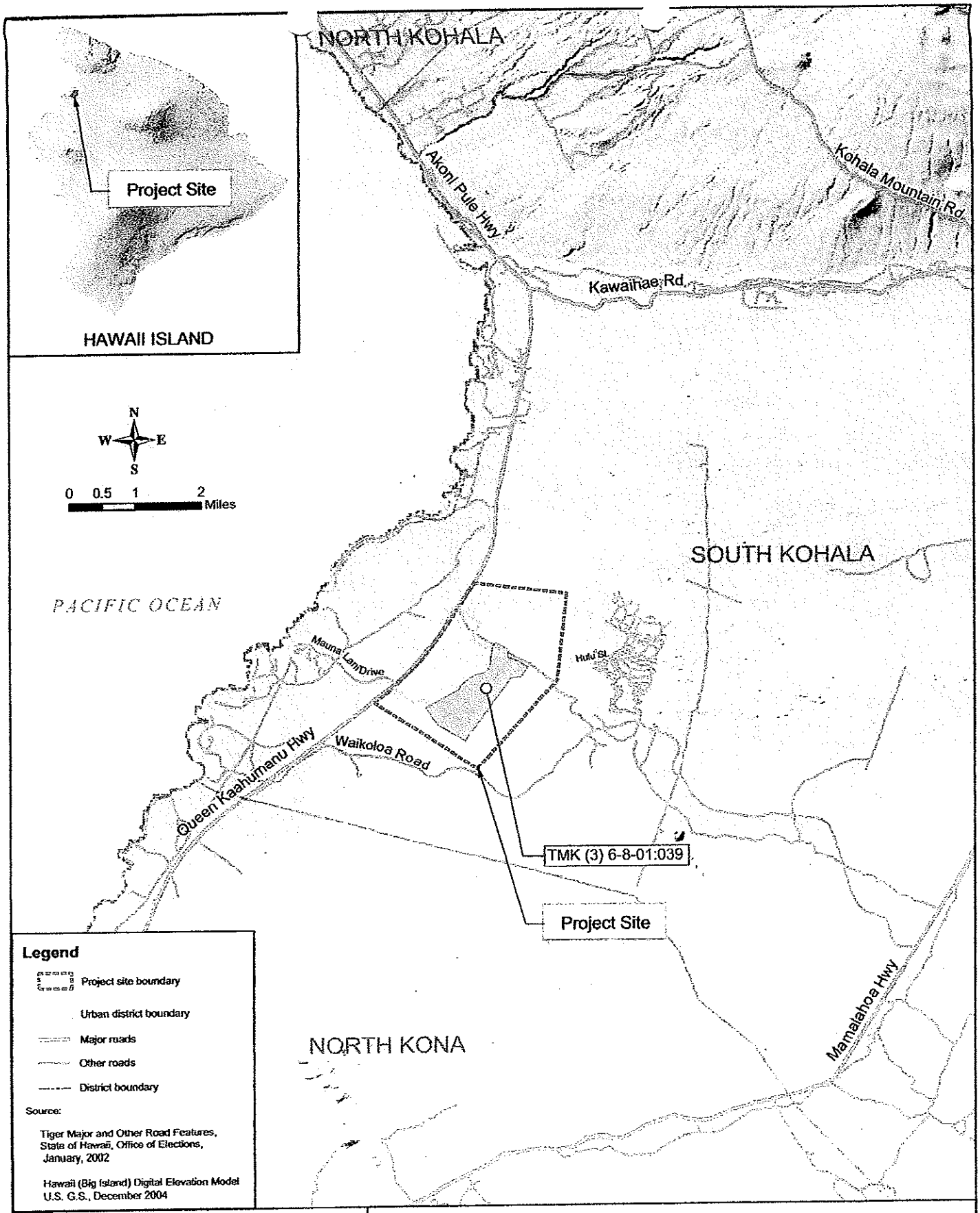
III. NATURE OF REQUEST

The applicant is proposing to relocate RM-4.0 zoning within the property, without increasing the net density. This is in an effort to allow for the development of multi-family, affordable housing by maximizing the use of the land as it relates to the existing topography.

Below is a summary of the proposed zone changes (refer to attached Rezone Map):

"Parcel O"	from RM-4.0 to A-5a	10.933 acres
"Parcel W"	from RM-4.0 to A-5a	11.568 acres
"Parcel G-2"	from A-5a to RM-4.0	5.970 acres
"Parcel A-5a"	from A-5a to RM-4.0	16.321 acres

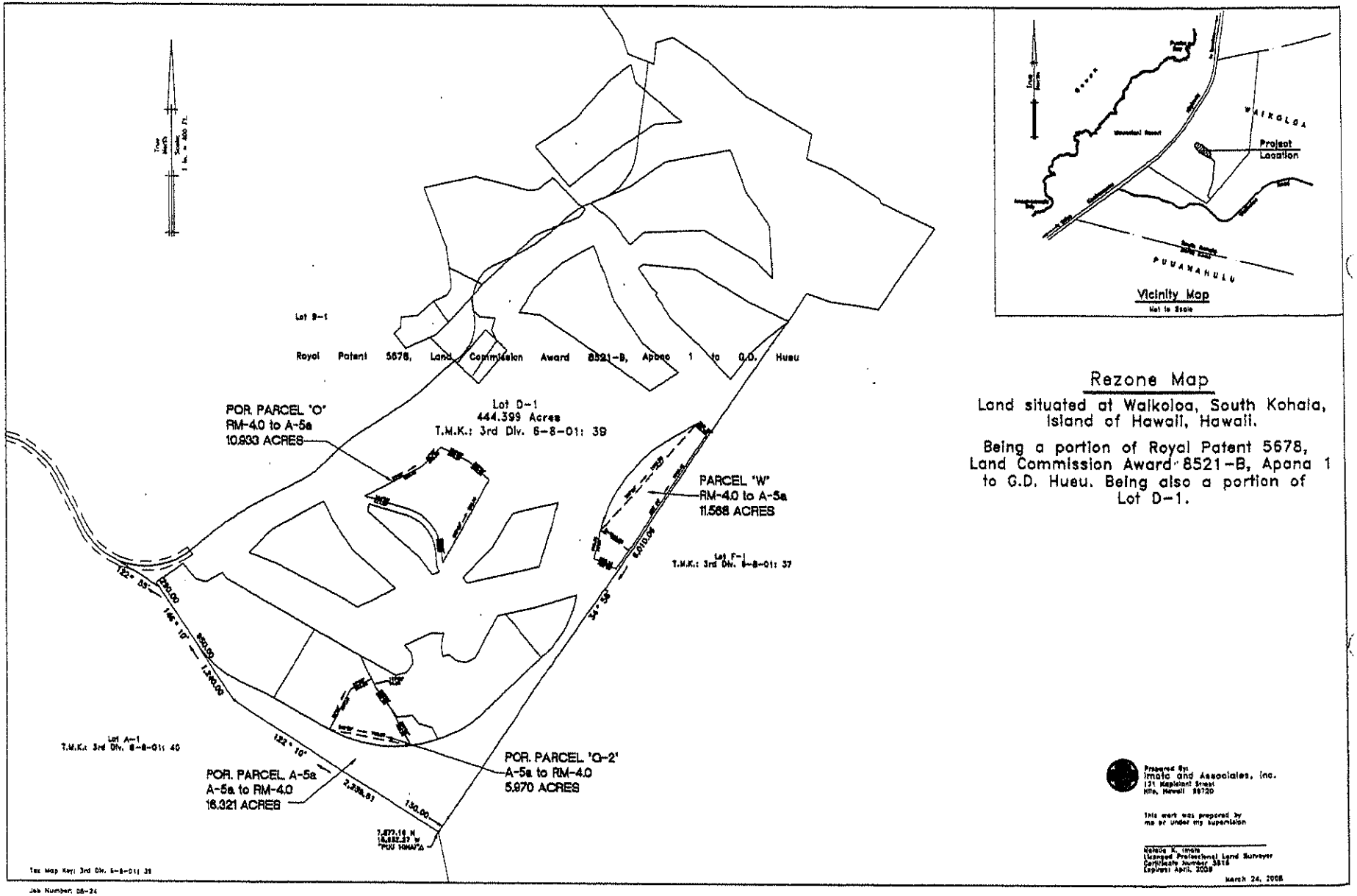
****WILL NOT RESULT IN A NET INCREASE IN DENSITY****



SSFM International, Inc.
501 Sumner Street, Suite 620
Honolulu, Hawaii 96817

LOCATION MAP

SCALE: 1:120,000 DATE: June 2007



Rezone Map

Land situated at Waikoloa, South Kohala, Island of Hawaii, Hawaii.

Being a portion of Royal Patent 5678, Land Commission Award 8521-B, Apana 1 to G.D. Hueu. Being also a portion of Lot D-1.

Prepared By:
Imata and Associates, Inc.
121 Kapiolani Street
Hilo, Hawaii 96720

This work was prepared by me or under my supervision

Nakoa K. Imata
Licensed Professional Land Surveyor
Certificate Number: 3818
Expires: April, 2008

March 24, 2008

Harry Kim
Mayor

Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT
101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224
(808) 961-8288 • FAX (808) 961-8742

May 22, 2008

Mr. Sidney Fuke, Planning Consultant
100 Pauahi Street, Suite 212
Hilo, Hawaii 96720

Dear Mr. Fuke:

SUBJECT : NONSIGNIFICANT ZONE CHANGE APPLICATION
BRIDGE AINA LEA LLC, TMK: 6-8-01: POR OF 39

Your request for a "nonsignificant zone change" dated May 13, 2008, is hereby denied. Sec. 25-2-45, Hawai'i County Code, provides that "the director may administratively grant any nonsignificant zoning change," within certain stated limits. Thus, the director may also deny nonsignificant zone changes, even if they are within the acreage limits in sec. 25-2-45.

This request would involve changing the zoning designations on 22 acres. The zoning designations for this area were made by the county council based upon representations about the development made at that time by the owner, and the detailed metes and bounds zoning was adopted by the council based upon those representations and plans submitted by the owner. Given that, it would be better public policy for a change to the zoning boundaries of 22 acres—a large land area—to be made by the county council, not administratively by the planning director. Ord. 08-48, which took effect on April 21, 2008, expresses generally a policy that only small zoning changes—much smaller than requested here--should be made by administrative action.

The owner has the alternative of applying to the county council to change the zoning designations, or to have the council authorize administrative flexibility through "project district" zoning.

The stated reason for the nonsignificant zoning change is to facilitate construction of affordable housing. This is not a convincing reason because since Ord. 96-153, the major change in the project's affordable housing requirement was that it was reduced from 60% to 20%. It should be easier, not harder, to fulfill the project's affordable housing requirements, and fitting the construction of affordable housing into the zoning is something that the owner should have anticipated doing some time ago.

Sincerely,

CHRISTOPHER J. YUEN
Planning Director

CJY:pak
Wpwin60/Chris08 – Fuke – Bridge Ainalea – Non Significant Zone Change

cc: Ms. Esther Imamura
TMK: 6-8-01:portion of 39

COUNTY OF HAWAII
BOARD OF APPEALS

2008 JUN 23 PM 12 01

COUNTY OF HAWAII

GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR

(Type or legibly print the requested information)

APPELLANT: Bridge Aina Lea LLC (Representative: Jim Baldwin)

APPELLANT'S SIGNATURE: _____ DATE: June 20, 2008

ADDRESS: Bank of Hawaii Building, Suite 303, Mariana Heights, Saipan, MP

TELEPHONE: (Bus.) (670) 322-3508 (Home) (670) 322-2323

APPELLANT'S INTEREST IN THE PROPERTY: Fee simple owner

APPELLANT'S NATURE OF APPEAL AND REQUEST: Appealing the decision of the Planning Director denying a nonsignificant zoning change application.

LAND OWNER: Bridge Aina Lea LLC

TAX MAP KEY: (land in question) TMK: (3) 6-8-01: 39 AREA OF PROPERTY: 44.278 acres

STATE LAND USE DESIGNATION: Urban COUNTY ZONING: A-5a, RM-4.0

STREET ADDRESS OF PROPERTY: N/A

APPELLANT'S REPRESENTATIVE: Mr. Jim Baldwin

REPRESENTATIVE'S SIGNATURE: _____ DATE: 6/20/08

REPRESENTATIVE'S ADDRESS: 2500 Kalakaua Av., Hono., HI 96815

TITLE: PROJECT MANAGER TELEPHONE: (Bus.) (808) 225-4444

THIS PETITION MUST BE ACCOMPANIED BY A FILING FEE OF TWO HUNDRED FIFTY DOLLARS ($250) PAYABLE TO THE COUNTY DIRECTOR OF FINANCE AND:

1. The Original and ten (10) copies of this completed petition with the following:
   a. A description of the property involved in the appeal in sufficient detail for the public to precisely locate the property.
   b. A statement explaining the nature of the appeal and the relief requested.
   c. A statement explaining:
      (i) How the decision appealed from violates the law; or
      (ii) How the decision appealed from is clearly erroneous; or
      (iii) How the decision appealed from was arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.
   d. A clear and concise statement of any other relevant facts.
2. Proof of Service by the Appellant on the Planning Director for an appeal from the Planning Director's decision relating to the Zoning Code.
3. A list of the names, address and tax map keys of all owners of property within boundaries established by Section 8-11(d) of the Board of Appeals Rules of Practice and Procedure.

1106167 5 90-78 1211

OFFICIAL BANK CHECK
First Hawaiian Bank
P.O. Box 3200 Honolulu, HI 96847-8916
HILO

DATE: **06/23/2008**

AMOUNT
$250.00

PAY TO THE ORDER OF **TWO HUNDRED FIFTY DOLLARS AND 00 CENTS**

COUNTY DIRECTOR OF FINANCE

CUSTOMER RECEIPT
NOT NEGOTIABLE

NOTICE TO CUSTOMER

In the event this Official Bank Check is lost, misplaced, or stolen, please call the branch where it was purchased for instructions on submitting a claim.

NSZC Appeal

PLANNING DEPARTMENT
County of Hawaii
101 Pauahi St., Ste. 3
Hilo, Hawaii 96720-3043

NOTES

RECEIPT

DATE 6.23 NO. 9772

RECEIVED FROM BRIDGE ALINALEO

ADDRESS

$ 250.00

FOR NSZC APPEAL FEE

CK #1106167-5

ACCOUNT			HOW PAID		
AMT. OF ACCOUNT			CASH		
AMT. PAID			CHECK	250 00	
BALANCE DUE			MONEY ORDER		

BY

Harry Kim
Mayor

Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT
101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224
(808) 961-8288 • FAX (808) 961-8742

May 22, 2008

Mr. Sidney Fuke, Planning Consultant
100 Pauahi Street, Suite 212
Hilo, Hawaii 96720

Dear Mr. Fuke:

SUBJECT : NONSIGNIFICANT ZONE CHANGE APPLICATION
BRIDGE AINA LEA LLC, TMK: 6-8-01: POR OF 39

Your request for a "nonsignificant zone change" dated May 13, 2008, is hereby denied. Sec. 25-2-45, Hawai'i County Code, provides that "the director may administratively grant any nonsignificant zoning change," within certain stated limits. Thus, the director may also deny nonsignificant zone changes, even if they are within the acreage limits in sec. 25-2-45.

This request would involve changing the zoning designations on 22 acres. The zoning designations for this area were made by the county council based upon representations about the development made at that time by the owner, and the detailed metes and bounds zoning was adopted by the council based upon those representations and plans submitted by the owner. Given that, it would be better public policy for a change to the zoning boundaries of 22 acres—a large land area—to be made by the county council, not administratively by the planning director. Ord. 08-48, which took effect on April 21, 2008, expresses generally a policy that only small zoning changes—much smaller than requested here--should be made by administrative action.

The owner has the alternative of applying to the county council to change the zoning designations, or to have the council authorize administrative flexibility through "project district" zoning.

The stated reason for the nonsignificant zoning change is to facilitate construction of affordable housing. This is not a convincing reason because since Ord. 96-153, the major change in the project's affordable housing requirement was that it was reduced from 60% to 20%. It should be easier, not harder, to fulfill the project's affordable housing requirements, and fitting the construction of affordable housing into the zoning is something that the owner should have anticipated doing some time ago.

Sincerely,

CHRISTOPHER J. YUEN
Planning Director

CJY:pak
Wpwin60/Chris08 – Fuke – Bridge Ainalea – Non Significant Zone Change

cc: Ms. Esther Imamura
TMK: 6-8-01:portion of 39

MEMORANDUM IN SUPPORT OF GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR

This memorandum is filed in support of a General Petition for Appeal of Decisions by Planning Director, filed by Bridge Aina Lea LLC (hereafter the "Petitioner") on even date herewith and attached hereto.

BACKGROUND

The Petitioner is the fee simple owner of TMK: 25, 36, 37, 38, 39, and 40, all situated in Waikoloa, which real property comprises the Aina Lea development, containing a total of 3,000 acres, more or less, (hereafter the "property"). The County General Plan Land Use Pattern Allocation Guide map designates the property *Urban Expansion*. Ordinance No. 93-1, amended by Ordinance No. 96-153 and amended zoning map, allows for the development of a residential development on the property, comprising of golf course, residential, and commercial uses.

By transmittal letter dated March 24, 2008, from SSFM International, Inc, the Petitioner's representative, to the County of Hawaii, Planning Department, the Petitioner filed a nonsignificant zone change application involving four separate zoned parcels, all contained in TMK: 6-8-01: 39, (hereafter the "NZCA") in order to facilitate the development of the affordable housing component of the project pursuant to time constraints imposed on the project by the State Land Use Commission. (A copy of the letter, comprising five pages, is attached hereto for your reference as Exhibit "A".) Following a meeting between a representative of the Petitioner, Sidney Fuke, and the staff of the Planning Department on May 2, 2008, further information clarifying the NZCA was transmitted to the Planning Department on May 13, 2008. (A copy of the letter from Mr. Fuke's office, together with enclosures, is attached for your reference as Exhibt "B".)

As set forth in the original NZCA and further clarified in the transmittal of May 13, 2008 (Exhibit "B"), the NZCA requested a zone change relating to the four separate zoning parcels in TMK: 6-8-01: 39, which parcel comprises of 444.399 acres, with a net effect of a 22.501 acres zone change, as follows:

Parcel	Area	Existing Zoning	Proposed Zoning
O	10.933 acres	RM-4.0	A-5a
W	11.568 acres	RM-4.0	A-5a
TOTAL	**22.501 acres**		
G-2	7.327 acres	A-5a	RM-4.0
G-2-A	15.174 acres	A-5a	RM-4.0
TOTAL	**22.501 acres**		

The NZCA calls for a change in zoning for 22.501 acres presently zoned RM-4.0 to A-5a and a like change in zoning for 22.501 acres presently zoned A-5a to RM-4.0, with no net increase or decrease in the total acreage of RM-4.0 or A-5a on the property.

Further, as shown in the table below, the resultant density for the zoned parcels is decreased by two (2) units.

Parcel	Existing Density	Resulting Density	Total Net Resulting Density
O	119.06 units	2.19 lots/units	-116.87 lots/units
W	125.98 units	2.31 lots/units	-123.66 lots/units
G-2	1.19 lots/units	65.01 units	+63.82 units
G-2-a	3.26 lots/units	177.73 units	+174.47 lots/units
TOTALS	**249.49 lots/units**	**247.25 lots/units**	**-2.24 lots/units**

Finally, the requested NZCA area of 22.501 acres comprises of approximately three-fourths of one per cent (.75%) of the total Aina Lea development owned by the Petitioner and approximately five per cent (5%) of the area of TMK: 6-8-01: 39.

At the time of the filing of the NZCA, March 25, 2008, section 25-2-45, Hawaii County Code provided the following:

> **Section 25-2-45. Nonsignificant zoning changes.**
>
> The director may administratively grant any nonsignificant zoning change. A nonsignificant zoning change must comply with the designations for the property set forth in the general plan and any development plan adopted by ordinance, and must either:
>
> (1) Not result in a net increase in the density allowed in the zoning district(s) containing the affected areas; or
>
> (2) Be the lesser of a five percent or one acre increase or decrease in the area of any zoning district(s).

(Subsequently, the County Council amended section 25-2-45, Hawaii County Code, effective April 21, 2008.)

By letter dated May 22, 2008, a faxed copy of which was not received until May 27, 2008, the Planning Director denied the NZCA citing the fact that "The original zoning designations were adopted by the county council based on representations made about the development at the time by the owner. Given that, it would be better public policy for a change to the zoning boundaries of 22 acres-a large land area- to be made by the county council, not administratively by the planning director." (A copy of the May 22, 2008 letter is attached hereto for your reference as Exhibit "C".)

In response to the denial by the Planning Director, a timely petition appealing that decision is herein made to the Board of Appeals.

POSITION

The Petitioner respectfully requests that the Board of Appeals overturn the decision by the Planning Director and approve the NZCA, as filed, for the following reasons:

(1) The NZCA met the requirements of section 25-2-45(1), Hawaii County Code, as it existed at the time of the filing of the NZCA;
(2) The NZCA meets the criteria for a nonsignificant zoning changes as set forth in Section 8-5, Planning Department Rules of Practice and Procedure; and
(3) The decision of the Planning Director was arbitrary and capricious.

ARGUMENT

(1) THE NZCA MET THE REQUIREMENTS OF SECTION 25-2-45(1), HAWAII COUNTY CODE, AS IT EXISTED AT THE TIME OF THE FILING OF THE NZCA.

Section 25-2-45, Hawaii County Code, as set forth above, remained in effect at the time of the filing of the NZCA. As evidenced by the stamp utilized by the Planning Department, the NZCA was accepted by the department on March 25, 2008, as shown on the copy of the NZCA attached hereto as Exhibit "A". While the language in the ordinance was amended on April 21, 2008, subsequent to the filing of the NZCA, because the NZCA was prior to the amendment, the original language of the ordinance governs with regard to this appeal.

Section 1-3, Hawaii Revised Statutes, provides that: "No law shall have any retrospective operation, unless otherwise expressed or obviously intended." In citing this law in *Clark et al. v. Cassiday et al.* 4 Haw. 74, the Hawaii Supreme Court held:

> It is any established rule that "[n]o law has any retrospective operation, unless otherwise expressed or obviously intended. (Cites omitted.) The rule is particularly applicable where the stature or amendment involves substantive rights. Substantive rights are generally defined as rights "which' take away or impair vested rights acquired under existing laws, or create a new obligation, impose anew duty, or attached a new disability in respect to transactions or considerations already past,'" as distinguished from remedies or procedural laws which mere prescribe methods of enforcing or giving effect to existing rights. Hence, a subsequent amendment involving substantive rights will not be read as operating retrospectively in the absence of a clear legislative expression that such operation is intended."

In a later case involving an amendment of the land use laws contained in chapter 205, Hawaii Revised Statutes, citing the *Clark* case, the Hawaii Supreme Court further stated:

"We note that HRS chapter was amended subsequent to the LUC hearings in this matter, but prior to the date of the Decision. In our review, we apply the provisions of chapter 205 as they existed at the time of the hearings." Kilauea Neighborhood Association v. Land Use Commission, 7 Haw. App., at 230, n. 2.

The right to appeal a finding and decision of the Planning Director being a substantive right and there being no legislative expression by the Hawaii County Council that the amendment to section 25-2-45, Hawaii County Code was meant to apply retroactively, the provisions of that section as they existed at the time of the filing of the NZCA control this appeal. Accordingly, the NZCA was "grandfathered" in and is governed by the original language of the code section in effect at the time of the filing of the NZCA.

Further, a reading of the plain language of the section at the time of the filing of the NZCA, contained the word "either" and the alternative "or" and not the inclusive "and", thereby requiring that the provisions of either subpart (1) or (2) of section 25-2-45 be met to satisfy the requirement of the section.

As shown hereunder, the change in zoning will result in a net loss of two residential units, thereby meeting the requirement of not increasing the density in the zoning districts in the affected areas as set forth in subpart (1) of section 25-2-45.

(2) THE NZCA MEETS THE CRITERIA FOR A NONSIGINFICANT ZONING CHANGE AS SET FORTH IN SECTION 8-5, PLANNING DEPARTMENT RULES OF PRACTICE AND PRICEDURE.

Section 8-5 provides the following:

> **8-5 Criteria for Determination.**
> The Director may administrative grant nonsignificant zoning changes which:
>
> (a) Does not result in a substantial increase or decrease in any zoning designations;
> (b) Does not affect more that five percent or one acre of any parcel of property, whichever is less;
> (c) Does not result in a substantial change in the density of the zoned area; and
> (d) Is in compliance with the General Plan and development plan designations of the property.

Clearly, the subject NZCA meets all the four criteria for approval. The NZCA does not result in any increase of any zoning designations; does not affect more that five percent of TMK: 6-8-01: 39, comprising of 444.399 acres; does not result in a substantial change in density, in fact resulting in a reduction in density with the loss of two (2) residential units; and remains in compliance with the General Plan for the property.

While the Planning Director may exercises some discretion in coming to a decision on any nonsignificant zoning change request, claiming that the affected area is large, that discretion is not unfettered. To deny an application that meets all the criteria contained in section 8-5 and effects a de minimus .75% of the total property and only 5% of the affected parcel, is an arbitrary exercise of that discretion by the Planning Director.

(3) THE DECISION OF THE PLANNING DIRECTOR WAS ARBITRARY AND CAPRICIOUS.

Based upon a number of other nonsignificant zoning change applications that have been approved in the past, the decision of the Planning Director in this NZCA is arbitrary and capricious.

In Planning Department Matter NZC 00-04, the transfer of zoning between two separate parcels comprising of 32.519 acres, without any increase in any zoning designation, was approved.

In Planning Department Matter NZC 00-05, the transfer of zoning between three separate zoning parcels, comprising of 25.597 acres, 22.036 acres, and 10.888 acres, again without any increase in any zoning designations, was approved.

Again, in Planning Department Matter NZC 05-003, a nonsignificant zoning change involving three separate zoned parcels totaling 110.296 acres, was approved.

Finally, it should be noted that the proposed NZCA which is within the Aina Lea development will have no impact on any adjoining or surrounding landowners. All of the land within a three hundred foot radius of the affected property is owned by the Petitioner and no other landowner was notified of the NZCA, as required by the Hawaii County Code. By comparison, in NZC 00-04, fifteen (15) other landowners on fifty-one (51) separate lots were required to be serviced with notice of the proposal; and in NZC 05-003, twelve other landowners required notice, including 122 condominium owners.

SUMMARY

Based upon the foregoing, it is respectfully requested that this Board of Appeals overrule and reverse the decision of the Planning Director in this NZCA and approve the same.

BEFORE THE LAND USE COMMISSION
STATE OF HAWAII

In the Matter of the Petition of

BRIDGE AINA LE`A, LLC

To Amend the Agricultural Land Use District boundary into the Urban Land Use District for Approximately 1,060 Acres of Land Situated at Waikoloa, South Kohala, Island, County and State Of Hawaii, Tax map Nos.:6-8-001: Portion of 25, portion of 36, portion of 37, portion of 38, portion of 40.	)	DOCKET NO. A87-617 CERTIFICATE OF SERVICE

I hereby certify that a Copy of the BRIDGE AINA LE`A, LLC'S ANNUAL PROGRESS REPORT FOR YEAR 2008, along with Exhibits A through E, was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular or certified mail:

ABBEY MAYER, Director
Office of Planning
P.O. Box 2359
Honolulu, Hawaii 96804-2359

BRYAN YEE, Esquire
Deputy Attorney General
Hale Auhau, Third Floor
425 Queen Street
Honolulu, Hawaii 96813

CHRISTOPHER YUEN, Director
Department of Planning, County of Hawaii
Aupuni Center
101 Pauahi Street, Suite 3
Hilo, Hawaii 96720

LINCOLN ASHIDA, Esquire
Corporation Counsel, County of Hawaii
Hilo Lagoon Centre
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

Dated: Honolulu, Hawaii, October 2, 2008

Eric Maehara

ERIC T. MAEHARA
Attorney for Petitioner