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• Planning • Variance • Zoning
• Subdivision • Land Use Permits
• Environmental Reports

March 13, 2025

Mr. Jeffrey Darrow, Director
Planning Department
COUNTY OF HAWAII
101 Pauahi Street
Hilo, HI 96720

Dear Mr. Darrow:

Subject: Special Permit (SP 73-159)
Nani Mau Garden Group LLC (formerly Toyama Gardens)
Waiakea, South Hilo, Hawai'i, TMK: 2-02-048: Por 013

In an email, dated February 7, 2025, you returned the applications to revoke the subject permit and for two new Special Permit applications that would essentially separate and subsequently re-establish the Nani Mau Gardens and charter school. The applications were deemed to be “incomplete” and requested more information “to determine the next steps in processing your proposed land use entitlement changes.”

As such, prior to deciding on the next course of action, Nani Mau Garden Group LLC (“NMG”) would appreciate your review of the applicant’s response to your need for additional information, and upon receipt of your response, decide on its next course of action.

Specifically, you requested the following:

1. Existing Uses: Please provide us with detailed information on all the existing uses on the entire 22.345-acre property. This should include the current uses, structures, activities (including activity type, frequency, activity participant numbers, etc.), and associated land areas for the former. Ensure this includes all uses & activities advertised on the applicant’s website and the church use.
2. Compliance Analysis: Based on the preceding, please provide a detailed analysis on what uses, structures, activities, and associated land areas are being operated in compliance with what is approved under the existing Special Permit and associated conditions. Additionally, please articulate what uses and activities are being operated operating outside of the requirements of the existing Special Permit. Finally, please list what existing uses, structures, activities, and associated land areas you think are permitted in the State Land Use Agricultural District (including justification).

The following reflects the existing and/or proposed uses and a discussion of whether the uses are covered by the Special Permit with their specific authority, and, if not, the possible relief(s) being sought.

Nani Mau Gardens

Existing Uses, Authority, and Comment:

- Commercial Arboretum for public tours and the sale of agricultural products on 22.345 acres of land.

Authority: SP 73-159, October 4, 1973 (**Exhibit A**)

Comment: Since then, Chapter 205 was amended which allowed the “*cultivation of crops, including but not limited to crops for bioenergy, flowers, vegetables, foliage, fruits, forage, and timber;*” (Section 205-4.5(1) and “*Public and private open area types of recreational uses, including day camps, picnic grounds, parks, and riding stables, but not including dragstrips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps;* (Section 205-4.5(6). (Emphasis added)

The arboretum with its walking trail takes up about 10-12 acres. There are at least three to four acres that are not part of the trail and used for propagating plants, flowers, etc. to support the arboretum and trail. The three to four acres of area currently under foliage and related cultivation are consistent with and thus should be considered outrightly permitted per subsection (1). The walking trail that makes up the arboretum is a form of “open area” type of recreational use with its picnic grounds and thus could be rationalized as also permitted per subsection (6).

Given that, NMG may consider amending the Special Permit to delete those areas that could be deemed outrightly permitted uses.

- Retail sales of products grown on the premises, gift shop, and retail sales

Authority: 3,840 square feet - 1st Amendment, August 24, 1984;
Expanded to 10,562 square feet - 2nd Amendment, February 18, 1988;

and an additional 25,000 square feet of “open area” - 4th Amendment, July 24, 1991 (**Exhibit B**).

Comment: While the 4th Amendment expanded the area of the Special Permit by five acres to include stockpiling and storage uses, it is more relevant to the existing uses, as it clearly spells out the terms and conditions of those uses.

In that regard, the 4th amendment resulted in expanding

- the closing hours of the secondary uses (i.e., restaurant and commercial uses) from 7:00 p.m. to 11:00 p.m.;
 - the retail functions to occur “*outside of the existing commercial structure but within the Garden proper*”; and
 - the retail commercial activities, including single event functions, “*beyond the existing 10,562 square feet structure to an area no greater than 25,000 square feet to allow for outdoor functions.*” This use is allowed within the commercial arboretum area and not the parking lot. (**See pages 10, 11, and 24 of Exhibit B**)
- Public restaurant/eatery use within the existing structure and lanai area. This is done on a daily basis – lunch and dinner. However, the demand has been sporadic, resulting in opening days been rather limited. The hours for lunch would generally be 11 a.m. to 3:00 p.m, and dinner, 5:00 p.m. to 9:00 p.m. When opened, the restaurant would average around 30 guests for lunch and also for dinner. NMG hopes to see this number increase over time.

Authority: This is permitted and also being operated within the terms of the hours as required by the referenced Amendments, particularly the 4th Amendment.

- Special event functions. There are several types of special events in terms of scale available at NMG. The first is where there would be smaller private events for meetings, dance classes, and the like which occur primarily within the building and patio area. Currently, there are dance classes during weekdays between 5 p.m. to 9:00 p.m. They average around 25 people per class.

The other type of special event would be for functions like a banquet, reception, and non-profit or political fundraisers where they are held both indoors and in the patio area. These average around 2-3 per month, generally on the weekends, and with 100 to 300 guests.

There are also larger special events, such as a wedding reception or cultural events like during the Merrie Monarch that utilize both the indoor area, patio, and 25,000 square feet of outdoor area. In the past, these occurred no more than six (6) times a year with guests ranging between 200 to 500 people. This type of use such as Children's Miracle Network Telethon or International Flower Festival was noted in the 4th amendment (**see page 11 of Exhibit B**).

In terms of the area, although the County Department of Liquor Control has established an outdoor alcohol serving area of approximately 43,000 square feet (**see Exhibit C**), NMG has restricted the alcohol serving area to no more than the 25,000 square foot area.

Authority: These special event types of activity have been authorized by the 4th Amendment (**See pages 10, 11, and 24 of Exhibit B**)

Comment: Because some of the outdoor special event activities have exceeded the 25,000 square foot allocable area but within the "outdoor alcohol serving area", NMG may consider pursuing the appropriate entitlement to increase this area to 50,000 square feet to generally correspond to the "outdoor alcohol serving area", while clearly earmarking this area and establishing its frequency. Until then, however, NMG will establish the boundary or area of this 25,000 square foot area and provide it to the Planning Department.

NMG also recognizes that while outdoor, nocturnal musical concerts could be considered a special event and hence permitted, it will on its own refrain from having that activity unless and until expressly allowed through future permitting process.

Charter School

Existing Use: A charter school (Ka La New Century Public Charter School) currently operates on 5+ acres of the 22.345 acre parcel. There is a pending application to rezone this 5+ acre area from A-10a to A-5a, where, if successful, that portion would be subdivided out of

the 22.345 acre parcel and conveyed in fee or lease to the Charter School

Authority: 10th Amendment to SP 73-159, Dec. 4, 2009 (**Exhibit C**)

Comment: From a land use entitlement standpoint, NMG and the school submitted applications to decouple themselves. The applications were subsequently returned for more information. At this time, they are now reviewing whether their land use entitlements should be separated and, if so, the appropriate process.

Church

Existing Use: A church or house of worship use within an existing 3,500+/- square foot structure. This occurs on a several times a week for Bible Study, generally between the hours of 5:00 pm to 9:00 pm, and Sunday services between 9:00 am to 11:00 am. The average number of worshipers and Bible study members is 40.

Authority: This is currently not authorized.

Comment: NMG has a month to month rental arrangement with the Church and has informed the Church that its use will be terminated or suspended upon receipt of notice of violation from the County. However, any land use entitlement application for this use would be considered by NMG only in conjunction with any application(s) to address the land use needs of the School and NMG.

Based on the above, NMG:

1. maintains that the uses described above, with the exception of the church, are permitted, subject to the uses meeting the pertinent conditions of the Special Permit (such as size, time, etc.);
2. will provide a more detailed description of the location of the 25,000 square foot outdoor area to your office; and
3. will defer the processing of any subsequent land use entitlements, including church use, until a clear, meaningful and acceptable processing path has been established with your office.

Mr. Jeffrey Darrow, Director
March 13, 2025
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Along those lines, we look forward to hearing from you before proceeding further. Thank you very much!

Sincerely,

SIDNEY M. FUKU
Planning Consultant

Enclosures

Copy – Ms. Cindy Cui, Nani Mau Garden Group w/enclosures via email
Ms. Susan Osborne, HO‘OULU-LAHŪI w/ enclosures via email

EXHIBIT A

SPECIAL PERMIT 73-179

October 24, 1973

Mr. Jeffrey Choi
Cook, Choi & Yuda
Attorneys at Law
100 Paualani Street
Suite 204
Hilo, Hawaii 96720

Dear Mr. Choi:

The original of the attached letter approving a special permit to Makoto Nitahara (SP73-159) to allow the operation of a commercial arboretum within the State Land Use Agricultural District at Pannewa Farm Lots, South Hilo, Hawaii, identified as Tax Map Key 2-2-48: 13; subject to the conditions set forth by the Hawaii County Planning Commission; is on file in the office of the Hawaii Planning Department, 25 Aupuni Street, Hilo, Hawaii.

Very truly yours,

TATSUO FUJIMOTO
Executive Officer

Encl.
cc: Makoto Nitahara

October 24, 1973

Hawaii Planning Commission
25 Aupuni Street
Hilo, Hawaii 96720

Attention: Mr. Raymond Suafuji
Planning Director

Gentlemen:

At its meeting on October 17, 1973, the Land Use Commission voted to approve a special permit to Makoto Nishihara (SP73-159) to allow the operation of a commercial arboretum within the State Land Use Agricultural District at Pannawa Farm Lots, South Hilo, Hawaii, identified as Tax Map Key 2-2-48: 13; subject to the conditions set forth by the Hawaii County Planning Commission.

A copy of the staff report is enclosed for your information.

Very truly yours,

TATSUO FUJIMOTO
Executive Officer

Encl.

cc: J. Choi
M. Nishihara
Dept. of Taxation, Hawaii
Property Technical Office, Dept. of Tax.
Tax Maps Recorder, Dept. of Tax.
Real Property Tax Assessor, Dept. of Tax.

STATE OF HAWAII
LAND USE COMMISSION

Minutes of Meeting

County Council Room
Hilo, Hawaii

October 17, 1973 - 10:30 a.m.

Approved

NOV 28 1973

COMMISSIONERS PRESENT: Eddie Tangen, Chairman
Stanley Sakahashi, Vice Chairman
Alexander J. Napier
Shelley M. Mark
James Carras
Mitsuo Oura
Tanji Yamamura

COMMISSIONER ABSENT: Sunao Kido

STAFF PRESENT: Tatsuo Fujimoto, Executive Officer
Ah Sung Leong, Planner
Gordan Furutani, Planner
E. John McConnell, Deputy Attorney General
Dora Horikawa, Clerk Reporter

Chairman Tangen called the meeting to order and swore in persons who would be testifying today.

ADOPTION OF MINUTES

The minutes of the August 30 and 31, 1973 meetings were approved as circulated.

HEARING

PETITION BY KATSUMI NII (A73-369) TO RECLASSIFY 10.89 ACRES FROM AGRICULTURAL TO URBAN AT WAIAKEA HOMESTEADS, SOUTH HILO, HAWAII

It was advised by Mr. Tatsuo Fujimoto, Executive Officer, that a letter, dated October 4, 1973, had been received from Mr. Jeffrey Choi, representing the petitioner, requesting a deferral of the hearing on the petition by Katsumi Nii. (See copy of letter on file.) Mr. Choi explained further that he had only recently been retained by the petitioner and therefore had not had sufficient time to familiarize himself with the details of the petition.

Commissioner Napier moved to approve the special permit, subject to the conditions imposed by the Hawaii County Planning Commission, which was seconded by Commissioner Carras and unanimously carried.

✓ APPLICATION BY MAKOTO NITAHARA (SP73-159) FOR A SPECIAL PERMIT TO ALLOW THE OPERATION OF A COMMERCIAL ARBORETUM WITHIN THE PANAEWA FARM LOTS, SOUTH HILO, HAWAII

Approval of the special permit, subject to the conditions imposed by the County, was recommended in the staff memo presented by Mr. Leong (see copy of memo on file). It was also brought out that a residence existed on the 20-acre parcel, the arboretum was already developed, and anthurium plantings were proposed for the undeveloped area.

In response to a point raised by Vice Chairman Sakahashi, Mr. Leong advised that the special permit was necessary in this instance since the operation involved a commercial activity. In this respect, Mr. Leong felt that the section in the Rules and Regulations relating to permitted uses within the Agricultural District should perhaps be reexamined during the 5-year review.

Mr. Jeffrey Choi, attorney representing the petitioner, reiterated the need for the special permit due to the nature of Mr. Nitahara's operation which involved an admission fee to the arboretum. He added that Mr. Nitahara was pursuing an agricultural activity which was allowed under the law, and that the special permit was merely to satisfy a legal technicality. He also expressed the hope that the County would assume a reasonable approach to condition #2 which limited sales to agricultural products only, to allow perhaps a soda vending machine.

Mr. Choi continued that supportive buildings, such as rest room facilities and showroom were contemplated, but that the major portion of the land would be planted in trees and flowers.

Commissioner Yamamura wondered whether Mr. Nitahara employed anyone in his operation. Mr. Choi replied that although this was not so at the present time, he felt this may become necessary in the future to take care of the guided tours, maintenance of the premises, etc.

Commissioner Carras moved that the special permit be granted subject to the conditions imposed by the County of Hawaii, which was seconded by Commissioner Oura, and carried.

STATE OF HAWAII
LAND USE COMMISSION

VOTE RECORD

ITEM SP73-159 - MAKOTO NITAHARA

DATE October 17, 1973

PLACE County Council Room
Hilo, Hawaii

TIME 10:30 a.m.

| NAME | YES | NO | ABSTAIN | ABSENT |
|--------------------|-----|----|---------|--------|
| MARK, SHELLEY | ✓ | | | |
| NAPIER, ALEXANDER | ✓ | | | |
| KIDO, SUNAO | | | | ✓ |
| YAMAMURA, TANJI | ✓ | | | |
| M CARRAS, JAMES | ✓ | | | |
| SAKAHASHI, STANLEY | ✓ | | | |
| S OURA, MITSUO | ✓ | | | |
| TANGEN, EDDIE | ✓ | | | |
| | | | | |

Comments:

I move to approve the special permit, subject to the conditions imposed by the Hawaii County Planning Commission.

STATE OF HAWAII
LAND USE COMMISSION

MEMORANDUM

October 17, 1973
10:30 a.m.

TO: Land Use Commission

FROM: Staff

SUBJECT: SP73-159 - MAKOTO NITAHARA

A public hearing was held by the Hawaii County Planning Commission on July 19, 1973 on this special permit application submitted by Makoto Nitahara to allow the operation of a commercial arboretum within the Panaewa Farm Lots, South Hilo. The proposed arboretum is situated on a parcel of land within the State's Agricultural District described as Tax Map Key 2-2-48: 13 and comprises approximately 20 acres.

BACKGROUND

The property under consideration lies on the north side of the Belt Road approximately 3,000 feet from the intersection of Belt Road and Makalika Street. The property across Makalika Street comprises the Panaewa Houselots area, which was designated Urban by the Land Use Commission in the 1969 boundary review. The character of the area in the Agricultural District is predominantly agricultural with macadamia, citrus, and pine tree plantings. Within the Panaewa Urban District, residential uses are low density because of the large lot sizes of approximately 2.5 acres.

The land is classified as bare Aa land, class E soil type, or very poor for agricultural pursuits. Slope is 0-5% and rainfall is in the 80 inches or greater range. The elevation is approximately 200 feet.

The Hawaii County General Plan indicates the parcel as orchard use or alternate urban expansion. County zoning is for agricultural use.

The applicant has been working on this project for the last three years. He has substantially planted the area with orchids, and over 225 different varieties, including gingers, anthuriums, papaya, guava, macadamia, woodrose, native Hawaiian herbs, etc. He has also constructed a waterfall, pond areas, and a grass shack, installed toilet facilities and a paved parking area for cars and buses. As part of this petition, the applicant also proposes to build and operate a shop where visitors may purchase agricultural products from Hawaii.

In a letter dated October 3, 1973, Mr. Frederick Erskine of the Department of Agriculture states:

"The Department of Agriculture supports Mr. Nitahara's application for a planned arboretum, botanical garden, and nursery complex for they represent excellent opportunities to promote and market the variety of flowers and foliage grown in Hawaii.

"Moreover, we have encouraged Mr. Nitahara through farm loans to convert his papaya orchard into a flower, foliage, and tree nursery. Mr. Nitahara moved to Panaewa in hopes of raising papayas, but because of replant problems, had to convert to other uses.

"Outstanding growth in our export of flowers and foliage is complementing the growth in papaya as a valued export from Hawaii County. Increased exposure of visitors to plant and flowers will reinforce the export market for flower and foliage products of the State.

"In all developments in agricultural areas we favor establishment of natural screening of working or parking areas to assure preservation of aesthetic values. The use of a display garden arboretum system combined with an on site marketing opportunity represents an addition to the tourist aspects for Hilo.

"Similar arboretum gardens nearer the center of Hilo will eventually be displaced. To assure a continuity of this type of operation it is necessary to plan for the future by encouraging more developments of this type in the Panaewa Farm Lot area and other specialized plantings further from Hilo.

"We feel an arboretum, botanical-garden operation which is a permitted activity in an RA Zone should be permissible in areas having the lower A Zone classification.

"We strongly support this petition."

COUNTY RECOMMENDATION

On August 23, 1973, the County Planning Commission voted to recommend approval of the request on the following bases:

- "1. That the proposed use, with the exception of the admission charge, is a permitted use within the agricultural district; 1/

- "2. That the proposed use would not substantially alter the agricultural character of the area and subject property as agricultural activity is presently being undertaken on the property and on surrounding areas.
- "3. That the proposed use would be in compliance with the objective of promoting agricultural activities."

Approval by the County is subject to the following conditions:

- "1. That development of the complex be substantially as represented.
- "2. That any sale of products be limited to agricultural products.
- "3. That 'plan approval' be secured from the Planning Department before the operation commences to assure compliance with all applicable regulations, i.e., parking, signs, etc."

ANALYSIS

The request essentially meets the "unusual and reasonable" use guidelines established in Section 2.24 of the Land Use District Regulations since:

1. The proposed use would not adversely affect the surrounding property nor alter the essential character of the land. Since the parcel will be substantially in agricultural use, the only direct impact that the use will generate is visitor traffic and parking. However, it is noted that a petition supporting the application has been received signed by 20 residents of the Panaewa Farm Lots subdivision who are immediately in the vicinity of the proposed site except for one family who was not at home.
2. Roads, police protection, and other public facilities will not be unreasonably burdened in meeting the future needs of the arboretum.
3. The proposed use has three beneficial features: 1) it will promote economic development for the County of Hawaii and Hawaiian agriculture as a whole by exposing the visitors to many agricultural products which are grown in Hawaii; 2) an attraction such as this may increase the visitor's length of stay thus benefitting the visitor industry and 3) the applicant proposes to invite school children to the arboretum for field excursions. Such an

arrangement would be extremely educational as the applicant has hundreds of plants native to Hawaii and the Pacific Basin.

Therefore, on the bases of the above findings, the staff recommends that this special permit be approved subject to the conditions of the County. It is particularly noted that this approval extends to the future shop area which under the County's condition #2, would be restricted to sale of agricultural products only.

EXHIBIT B

4TH AMENDMENT

SPECIAL PERMIT 73-179

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
TOYAMA GARDENS HAWAII CORPORATION,)
dba, NANI MAU GARDENS, INC.)
)
For a Fourth Amendment to the)
Special Permit which establishes)
a stockpiling, storage, and forest)
trail area and related uses on)
approximately 5 acres of land)
within the Agricultural District)
at Waiakea, South Hilo, Hawaii,)
Tax Map Key Number: 2-2-48:)
Portion 11)
_____)

DOCKET NO. SP73-159

TOYAMA GARDENS HAWAII
CORPORATION, dba, NANI
MAU GARDENS, INC.

JUL 24 3 59 PM '91
LAND USE COMMISSION
STATE OF HAWAII

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION AND ORDER

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

| | |
|--------------------------------------|------------------------|
| In the Matter of the Petition of) | DOCKET NO. SP73-159 |
| TOYAMA GARDENS HAWAII CORPORATION,) | |
| dba, NANI MAU GARDENS, INC.) | TOYAMA GARDENS HAWAII |
| For a Fourth Amendment to the) | CORPORATION, dba, NANI |
| Special Permit which establishes) | MAU GARDENS, INC. |
| a stockpiling, storage, and forest) | |
| trail area and related uses on) | |
| approximately 5 acres of land) | |
| within the Agricultural District) | |
| at Waiakea, South Hilo, Hawaii,) | |
| Tax Map Key Number: 2-2-48:) | |
| Portion 11) | |
| _____) | |

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION AND ORDER

Toyama Gardens Hawaii Corporation, dba, Nani Mau Gardens, Inc. (hereinafter "Petitioner" or "Applicant") initiated this proceeding pursuant to Section 205-6, Hawaii Revised Statutes, as amended, and Subchapter 12 of the Hawaii Land Use Commission Rules. The Land Use Commission (hereinafter "Commission"), having considered the entire record on this matter, hereby makes the following findings of fact, conclusions of law and decision and order:

FINDINGS OF FACT

Procedural Matters

1. Petitioner filed the fourth amendment to the Special Use Permit (hereinafter "Permit") with the County of Hawaii Planning Department (hereinafter "Planning Department") on March 21, 1991.

2. The Hawaii County Planning Commission (hereinafter "Planning Commission") conducted the public hearing on the Permit on May 5, 1991 pursuant to notice published in the Hawaii Tribune-Herald and West Hawaii Today. The Planning Commission did not receive any public testimony on the Permit.

3. On May 16, 1991, the Planning Commission recommended approval of the Permit to the Commission subject to twelve conditions.

4. The record of the County's proceedings on the Permit was received by the Commission on May 28, 1991.

Background Information

5. On October 17, 1973, the Commission approved a Special Use Permit (SP73-159) for Makoto Nitahara, dba, Nani Mau Gardens, Inc., to establish a commercial arboretum for public tours and the sale of agricultural products subject to the following conditions:

- "1. The development of the complex be substantially as represented.
- "2. That any sale of products be limited to agricultural products.
- "3. That 'plan approval' be secured from the Planning Department before the operation commences to assure compliance with all applicable regulations, i.e., parking, signs, etc."

6. On March 1, 1977, the Commission approved Makoto Nitahara's request for another Special Use Permit (SP77-258) to allow the sale and serving of food and drink as well as provide entertainment at the Nani Mau Gardens Arboretum. A condition of

this permit required the proposed uses to be established within one year from the effective date of approval. In 1981, Mr. Nitahara indicated that he did not plan to pursue the establishment of the proposed uses and the Planning Commission nullified the Special Use Permit (SP77-258).

7. By Decision and Order issued on September 5, 1984, the Commission approved an amendment to Special Permit (SP73-159) to allow the establishment of individual shops for the sale of locally-produced agriculturally-oriented products, a small gift shop and a snack shop subject to the following conditions recommended by the Planning Commission:

- "1. The proposed uses shall only be conducted during the hours in which the arboretum operation is open to the public.
- "2. That all applicable rules, regulations, and requirements, including the requirements of the State Department of Health, shall be complied with.
- "3. Should the Planning Director determine that any of the foregoing conditions have not been met or substantially complied with in a timely fashion, the Special Permit shall be automatically void.",

and the following three additional conditions imposed by the Commission:

- "4. That applicant or its sub-lessee may sell films, post cards and locally-produced agricultural and agricultural-related products on the premises.
- "5. That applicant or its sub-lessee may sell pre-packaged snack foods, including but not limited to soft drinks, chips and ice cream that do not require cooking on the premises.

"6. That applicant may not sell other tourist items or foods requiring cooking or processing on the premises."

8. By Decision and Order issued on February 18, 1988, the Commission allowed the transfer of the existing Permit to Petitioner (Petitioner had acquired Nani Mau Gardens from Makoto Nitahara in 1987), an expansion of the existing building, and limited cooking of food on the 20-acre area in addition to all uses previously permitted by the Commission, subject to the following eight conditions to replace all previous conditions imposed on the Permit:

- "1. The Petitioner shall be responsible for complying with all of the conditions of approval.
- "2. Plans for the proposed addition, including parking, shall be submitted to the County Planning Department for Plan Approval review within one year from the effective date of this amendment.
- "3. Construction of the proposed addition shall commence within one year from the date of receipt of Final Plan Approval and be completed within two years thereafter.
- "4. A drainage system in accordance with the requirements of the County Department of Public Works shall be installed.
- "5. All other applicable laws, rules, regulations, and requirements, including those of the State Department of Health, shall be complied with.
- "6. An annual progress report shall be submitted to the State Land Use Commission, County Planning Commission, and County Planning Department prior to the anniversary date of the approval of this amendment. The report shall address the status of the development and the compliance with the conditions of approval. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning

Director acknowledges that further reports are not required.

"7. An extension of time for the performance of conditions within the permit may be granted by the County Planning Director with the concurrence of the State Land Use Commission, upon the following circumstances: a) the non-performance is the result of conditions that could not have been foreseen or are beyond the control of the Petitioner and that are not the result of their fault or negligence; b) granting of the time extension would not be contrary to the general plan or zoning code; c) granting of the time extensions would not be contrary to the original reasons for the granting of the permit; and d) the time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year). Further, should any of the conditions not be met or substantially complied with in a timely fashion, the Director may initiate procedures to nullify the permit.

"8. The Petitioner may not operate a kitchen or restaurant on the Property, but may operate a snack facility during the hours of operation of the commercial arboretum which shall be subordinate to its commercial arboretum activity provided, however, that it satisfies all applicable county and state sewage, health, drainage, water and building requirements."

9. By Decision and Order issued on October 31, 1989, a third amendment to the Permit was approved by the Commission which allowed the expansion of the Permit area to 53.786 acres and additional uses, including an agricultural museum, aviary and animal exhibits, horse stables and equestrian trails, a fruit and vegetable stand and related improvements subject to conditions as recommended by the Planning Commission. At this time, all previously determined conditions attached to the Permit were replaced with the following twelve conditions:

- "1. Petitioner, successors or assigns shall be responsible for complying with all of the conditions of approval.
- "2. Petitioner shall secure consolidation approval from the Planning Department within one year from the effective date of this amendment showing the Gardens development approved under this permit as one parcel.
- "3. Final Plan Approval for the expanded development shall be secured by Petitioner from the Planning Department within one year from the date of consolidation approval. To assure adequate time for plan approval review and in accordance with Chapter 25-244 (Zoning Code), plans shall be submitted a minimum of forty-five days prior to the date by which plan approval must be secured. Plans shall include a landscaping buffer along the property lines adjacent to Parcels 11, 12, 14, 91, 92 and 97. Parking shall comply with the requirements of Chapter 25, Zoning Code and no parking variance from the Code shall be applied for. Additional parking for buses, vans and cars may be imposed at the time of plan approval. Parking for all functions shall be maintained on the subject properties.
- "4. Construction of the various improvements shall commence within one year from the date of receipt of Final Plan Approval and shall be completed within two years thereafter.
- "5. The hours of operation for the arboretum shall be limited between 8 a.m. and 7 p.m. The secondary uses (i.e., restaurant, retail gift shop, equestrian trails, agricultural museum, exhibits) shall operate only during arboretum hours.
- "6. Retail commercial activities shall be confined to the existing 10,562 square foot structure, the proposed fruit/vegetable stand, and the agricultural museum. For the purposes of this condition, retail commercial activities refer to the gift shop, restaurant, fruit/vegetable stand, and the agricultural museum but do not include the aviary/animal exhibits and equestrian stables and trails.

- "7. Main access to the development from Makalika Street shall be restricted to two entrance/exit driveways as approved by the Department of Public Works. Additional accesses from Awa and Makalika Streets may be permitted as service driveways which shall meet with the requirements of the Department of Public Works. No access shall be allowed from Railroad Avenue unless and until it has been improved to County dedicable standards.
- "8. The Hawaii Belt Highway (Highway 11) shall be improved with a left-turn storage lane leading to Makalika Street which shall meet with the requirements of the Department of Transportation-Highways Division. Highway improvements shall be constructed and approved by the Department of Transportation prior to the approval of an occupancy permit by the Planning Director for any portion of the expanded development approved under this amendment.
- "9. A drainage system in accordance with the requirements of the County Department of Public Works shall be installed.
- "10. All other applicable laws, rules, regulations, and requirements, including those of the State Department of Health, shall be complied with.
- "11. An annual progress report shall be submitted to the State Land Use Commission, County Planning Commission, and County Planning Department prior to the anniversary date of the approval of this amendment. The report shall address the status of the development and the compliance with the conditions of approval. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.
- "12. An extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances: a) the non-performance is the result of conditions that could not have been foreseen or are beyond the control of Petitioner, successors or assigns, and that are not the result of their fault or negligence; b) granting of the time extension would not be contrary to

the general plan or zoning code; c) granting of the time extension would not be contrary to the original reasons for the granting of the permit; and d) the time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year). Further, should any of the conditions not be met or substantially complied within a timely fashion, the Director may initiate procedures to nullify the permit."

Description of the Property

10. The existing Permit area is located in the Panaewa Farm Lots, Waiakea, South Hilo, adjacent to and including the site of the current Nani Mau Gardens complex situated on the corner of Makalika Street and Awa Street. The Permit area, approximately 5 acres, is identified by Tax Map Key Number: 2-2-48: portion of 11 (hereinafter "Property").

11. Nani Mau Gardens is presently composed of TMK Nos.: 2-2-48: 13, 15, 85, 86, 88 and 93. Consolidation of the parcels was approved for recordation on April 18, 1990. A new Tax Map Key number has not been assigned to the resulting 53.786 acre lot.

12. The Property is unimproved and fairly level. According to the U.S. Department of Agriculture, Soil Survey Report, it is of the Papai series (rPAE), consisting of well-drained thin, extremely stony organic soils over fragmental Aa lava.

13. The Land Study Bureau's Overall Master Productivity Rating system classifies the soils as "E" or very poor.

14. In accordance with the classification system (ALISH), the Property is classified as "Other Important Agricultural Lands."

15. Rainfall averages more than 137 inches annually and the slope is about 0 to 5 percent.

16. The Property is located mauka of the Department of Health's Underground Injection Control Line.

17. According to the Flood Insurance Rate Map (FIRM) prepared by the U.S. Army Corps of Engineers, the Property is within Zone X (outside the 500-year flood plain).

18. Surrounding property to the north, west and east across Railroad Avenue are zoned A-10a by the County. Lands south of the Property and immediately adjacent to the east are zoned A-3a.

19. The Property is accessible from the Hawaii Belt Road by Makalika Street, an 18-foot wide pavement within a 50-foot right-of-way. Awa Street is similarly configured.

20. A 12-inch County water line provides water to the Property while a private well situated on the Property supplies water for irrigation. Sewage disposal is by cesspool.

21. The existing facilities comprising the Nani Mau Gardens complex include a gift shop, an office building (containing a restaurant), tram garage, maintenance building, greenhouses and garden pavilions, tram station and an existing dwelling. In addition, intersection improvements at the Hawaii Belt Highway have been completed. According to Petitioner,

plans for the agricultural museum and vegetable/fruit stand have only recently been submitted for Plan Approval.

Description of Proposed Amendment to Special Permit

22. Petitioner is requesting the following amendments to the existing Permit:

1. To expand the area of the existing commercial arboretum by approximately 5 acres of land for stockpiling, storage and to establish forest trails. The total acreage of the Permit area would be approximately 58.786 acres.
2. An amendment of condition no. 5 to allow the hours of operation for secondary uses (i.e., restaurant and commercial uses) from 8:00 a.m. to 11:00 p.m. instead of the current hours from 8:00 a.m. to 7:00 p.m.
3. An amendment of condition no. 6 to allow expanded retail functions, such as coin-operated dispensing machines, outside of the existing commercial structure but within the Gardens proper.
4. An amendment of condition no. 6 to allow expansion of retail commercial activities beyond the existing 10,562 sq. ft. structure to an area no greater than 25,000 sq. ft. to allow for outdoor functions.

5. An amendment of condition no. 7 to allow an additional access from Makalika Street for special events parking.

23. Petitioner provided the following background rationale to summarize its requested amendments:

- "a. Expand the area of the arboretum from 53.786 acres by 5 acres to 58.786 acres.

This expanded 5-acre area is identified as TMK: 2-2-48: portion of 11. The applicant has a lease of this area that extends to October 1, 2000.

The applicant wishes to use a 2-acre portion of this area as part of a forested walking trail. This would provide an added activity to patrons of the facility, especially for those who are more adventuresome.

The remaining 3 acres would be used as a material and equipment stockpile area. In preparing the basic arboretum site, there is a need for cinder, dirt, mulch, and related material to be processed and stored. The equipment associated with this activity would also be stored in this area.

It should be noted that this stockpile area is different from the maintenance area. The maintenance area would be for the trams and smaller tractors to do minor landscaping work. The stockpile area would be for the heavy equipment such as the bulldozers and tractors that are needed to make the initial site preparation work. The maintenance area and equipment are for the 'touch up' activities.

- "b. Expand the scope of the commercial arboretum by allowing for single-event functions and a 3-acre stockpile area up to October 1, 2000.

As discussed in item 'a' above, the stockpile area was not acknowledged in the existing Permit. As such, the request is to make clear that such a use is allowed only for the length of the lease - October 1, 2000.

In the area of the single-event functions, the applicant notes the following. Interest in the area of the commercial arboretum has grown to the point where numerous requests to have single-event functions have been made of the applicant. The requests are motivated by groups or organizations wishing to take advantage of the tranquil surroundings afforded by the arboretum. These include functions for weddings, festivals, Christmas parties, and the like.

Some requests have been accommodated and others have not due to the limitations of the conditions. A case in point was the International Festival of Flowers (IFF) that was held on the grounds last year. The IFF is a non-profit organization designed to promote the agricultural industry. After some adjustments to the time and nature of activities, the festival was able to proceed. A copy of the applicant's consultant's letter to the Planning Department (May 23, 1990) and the Planning Department's response of May 31, 1990 are enclosed for added information.

Then, too, the applicant has received a request by the Kapiolani Medical Center Foundation to have the site serve as a center for the 1991 Children's Miracle Network Telethon. One night of the telethon would exceed the prescribed time limit of 7 p.m. It would extend to 11 p.m.

It is thus anticipated that similar requests will be made in the years to come. Again, these requests are for single-purpose events, events that find the setting of the arboretum conducive to their purpose. This would be comparable to events staged at large passive parks, such as the Wailoa State Park.

- "c. Amend condition 5 by allowing the facilities, including the restaurant, to be opened until 11 p.m. only for special event functions.

As some of these events would extend into the evening, the related commercial facilities (particularly the restaurant) would need to remain open. This amendment also would allow the restaurant to be opened only during the prescribed time, except for these special event

functions. As such, this amendment would fulfill the original intent of not having a standard, free-standing restaurant operate in the Agricultural zone, except as associated with the basic arboretum operations.

- "d. Amend condition 6 by not restricting the retail commercial activities to the existing 10,562 square foot structure, the proposed fruit/vegetable stand, and the agricultural museum.

To better service the single event functions as well as the existing patrons, the applicant seeks to expand the area within which retail commercial functions can occur, particularly the restaurant area. Specifically, the applicant wishes to be able to use the grounds immediately adjacent to the existing building and the patio for outdoor beverage and dining activities.

The present language prohibits the use of the grounds and patio area for these functions. Thus, cocktail receptions and other gatherings must be confined indoors. The applicant wishes to have some of these functions, when the weather and occasion permit, outdoors.

In the event that a structural restriction must be imposed for the main building, the applicant would have no objections to capping the square footage to 25,000 square feet. However, it would still want the ability to use the grounds immediately adjacent to the main building for beverage and snacks.

Furthermore, the applicant is still intent on having various fruit and vegetable stands situated at various parts of the arboretum. Because of manpower constraints, however, the applicant wishes to have the option of providing beverage and snack dispensers throughout various parts of the arboretum. It would also want to have the ability to use mobile snack carts (such as a golf cart) throughout the site. Given the size of the project area (53 to 58 acres), the applicant believes that this flexibility is needed.

The applicant also hopes to install coin-operated amenities in various parts of the project. For example, coin-operated tram tickets would be placed at selected portions of the site to enable those who initially elected not to ride, to board the tram.

Additionally, the applicant hopes to install coin-operated telescopes in the vicinity of the proposed sun dial. The sun dial concept has been modified a bit, as it would also serve as a simulated volcanic mountain with telescopes. Manpower constraints and costs render the coin-operated system more efficient.

In sum, then, the amendment would accomplish the following:

1. allow the use of the grounds for serving food and beverages, with the kitchen function still being centralized in the main building;
 2. if necessary, limit the size of the primary building to 25,000 square feet; and
 3. allow mobile snack and beverage carts, snack and beverage dispensers, and coin-operated amenities such as the telescopes and tram ticket, throughout the arboretum.
- "e. Amend condition 7 to allow for additional access from Makalika Street for special events parking and the relocated museum, subject to the approval of the DPW.

The original location of the museum has shifted. As this museum is also designed to handle exhibitions such as an orchid or anthurium show, the applicant felt that a separate access would be more efficient. The location of this access would also serve the special events parking area."

State and County Plans and Programs

24. The Property is designated within the Agricultural District as reflected on State Land Use District Boundary Map H-66, Hilo.

25. The General Plan Land Use Pattern Allocation Guide (LUPAG) Map designates the Property as Orchards and Alternate Urban Expansion.

26. The Property is located within the County Agricultural-10 acre (A-10a) zoned district.

27. The Hilo Community Development Plan Zone Guide map recommends that the present A-10a zoning be retained.

28. The Property is not within the Special Management Area (SMA) of the County of Hawaii.

Summary of State and County Agency Comments

29. The State Department of Health in its April 16, 1991 memorandum states the following:

"The applicant will need to submit a revised sewage flow calculations prepared by a Registered Engineer to the Chief Sanitarian, Hawaii District, P.O. Box 916, Hilo, HI. 96720. The calculations will need to show existing wastewater flow and proposed additional flow.

"Additional food service facilities including dining facilities, push carts, etc. will need to be reviewed and approved by the Department of Health prior to operation.

"Noise impacts to the surrounding areas is a concern with the Department of Health. The applicant would need to conduct attenuating measures if noise impacts occur."

30. The State Department of Transportation, Highways Division in its April 19, 1991 memorandum offered the following comments:

"1. Provide right-turn deceleration lane from Volcano Road onto Makalika Street.

"2. Widen the intersection for right-turn bus movements from Kakalika Street onto Volcano Road.

"3. Provide additional street lighting along both sides of the Volcano Road at the Makalika Street intersection.

"4. Highway improvements required under this application shall be installed or provided by the applicant, at no cost to the State, and shall be completed prior to final approval."

31. The Department of Water Supply, the County Police and Fire Departments and Real Property Tax Division had no comments or raised no objections to the proposed Permit.

32. The County of Hawaii Department of Public Works in its April 24, 1991 memorandum stated the following:

"1. Building shall conform to all requirements of code and statutes pertaining to building construction.

"2. Onsite parking should be sufficient for the expanded use so that vehicles do not park on the shoulders of the County road."

33. The State Department of Agriculture in its April 29, 1991 memorandum offered the following comments:

"As we stated in our letter of June 7, 1989, regarding the subject permit, we have no objections to the applicant's proposal if, as stated in the original application, the overall concept of the project can be likened to the Maui Tropical Plantation, wherein the principal focus of the activities represents an agricultural theme."

34. Hawaiian Electric Light Company (HELCO), the Office of State Planning, Department of Land and Natural Resources, Department of Parks and Recreation and Soil and Water Conservation District had no comments or raised no objections to the proposed Permit.

Conformance With Special Use Permit Tests

35. The County of Hawaii Planning Department provided the following in support of its recommendation for conditional approval to the Planning Commission:

"The granting of this amendment request would promote the effectiveness and objectives of Chapter 205, Hawaii Revised Statutes, as amended. The proposed 5-acre expansion is complementary to the principal use of the site as a commercial arboretum. A portion of the additional area will be used for necessary support functions and the remainder will be a forest trail addition to the botanical garden. The expanded area will be supportive of the established and proposed uses within the arboretum. Soils of the proposed addition are classified "Other Important" by the ALISH System and are rated very poor in productivity by the Land Study Bureau Master Productivity Rating System. Thus, the proposed addition would not deplete the agricultural resources of the property or the surrounding region and would be consistent with the original reasons for granting the permit.

"Approval of the request for amendment of Condition No. 5 to allow the restaurant and commercial facilities to remain open until 11 p.m. for special event functions would not be contrary to the objectives sought to be accomplished by the State Land Use Law. Various special events which have been held at the garden such as weddings, parties, and fund-raising events for non-profit agencies are compatible with the botanical garden theme and have the added benefit of promoting agriculture and tourism on the Big Island. The use of the restaurant by the general public would remain limited to the hours of operation of the arboretum. Amending the Special Permit to allow expanded hours for special events would not, therefore, have the effect of establishing a free-standing restaurant within the Agricultural District. The proposed special events are a reasonable use connected with the arboretum and it is recommended that the expanded hours associated with such use be approved.

"The proposed amendment of Condition No. 6 to allow the expansion of retail functions would not be contrary to the objectives sought to be accomplished by the State Land Use Law. A condition of the Special Permit was established to limit retail commercial activities to the existing 10,562 square foot structure, the fruit/vegetable stand, and the

agricultural museum in order that the scale of the commercial activity remain subordinate to the arboretum use. The applicant is requesting permission to use the grounds adjacent to the restaurant for outdoor beverage and dining activities and to sell refreshments at outlying areas of the grounds of the arboretum. The use of the grounds for outdoor dining is consistent with the botanical garden theme of the restaurant. The botanical garden now covers 53+ acres and the applicant has requested an expansion to 58+ acres. The applicant has requested permission to establish two additional snack shops and to sell refreshments from vending machines and mobile carts. Considering the large area to be traversed by visitors, the request to provide refreshments at convenient locations at a distance from the main building is not unreasonable. The proposed expansion of the permitted commercial activities will not overshadow the agricultural activities on the property and is not inconsistent with the agricultural theme of the project.

"The desired use will not adversely affect the surrounding properties. In response to the Department of Health's concern for noise impacts, the applicant has stated any live night-time entertainment will be indoors. Special events that have been conducted prior to 7 p.m. have not generated complaints by neighboring property owners. It is not expected that the noise generated by occasional special events will negatively impact surrounding properties. In regard to the proposed additional parking area and access from Makalika Street, it is recommended that a landscaping buffer between the driveway/parking area and adjacent properties to the east be established prior to use.

"The desired use will not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, police and fire protection. All necessary services are, or can be made, available to support the proposed uses. The Department of Water Supply has stated that no additional water service will be required. The Department of Public Works has no objection to the use of a third access from Makalika Street for special events parking and access to the museum, provided that adequate on-site parking is provided. In order to accommodate the added traffic anticipated to result from the proposed amendment, the State Department of Transportation (DOT) has recommended several improvements at the Hawaii Belt Highway (Volcano Road). DOT has recommended that the applicant: 1) provide a right-turn deceleration lane from Volcano Road onto Makalika Street; 2) widen the intersection for right-turn bus movements from

Makalika Street onto Volcano Road; 3) provide additional street lighting along both sides of the Volcano Road at the Makalika Street intersection. The applicant is agreeable to making these improvements. In the interest of the safe flow of traffic on the Hawaii Belt Highway, it is also recommended that the applicant provide an acceleration lane for traffic entering the Hawaii Belt Road from Makalika Street. With the above improvements to the Hawaii Belt Highway-Makalika Street intersection, the proposed use will not unreasonably burden the public roadway.

"The use will not substantially alter or change the essential character of the land and the present use. The proposed additional uses will complement the present arboretum use and are not of a large enough scale to change the character of the existing use.

"The amendment request is not contrary to the General Plan which designates the area for Alternate Urban Expansion. The site is adjacent to an existing State Land Use Urban area and serves as a transitional buffer between higher density residential uses toward Hilo and the agricultural uses in Panaewa. The amendment request is consistent with the following goals and policies of the Economic Element of the General Plan:

'Economic development and improvement shall be in balance with the physical and social environments of the island of Hawaii.'

'The County shall encourage the development of a visitor industry which is consistent with the social, physical, and economic goals of the residents of the County.'

'The county shall identify and encourage primary industries that are consistent with the social, physical, and economic goals of the residents of the County.'

"The granting of this amendment request will allow the applicant to more effectively serve the needs of residents and tourists visiting the arboretum."

Planning Commission Recommendation

36. On May 16, 1991, the Planning Commission voted to recommend approval of the Permit subject to the following

modified conditions of the Commission's October 31, 1989

Decision and Order:

1. Petitioner, successors or assigns shall be responsible for complying with all of the conditions of approval.
2. Petitioner shall provide a metes and bounds and map description of the 5-acre addition to the Special Permit area within one year from the effective date of this amendment.
3. Final Plan Approval for the expanded development shall be secured by Petitioner from the Planning Department within one year from the date of this amendment. To assure adequate time for plan approval review and in accordance with Chapter 25-244 (Zoning Code), plans shall be submitted a minimum of forty-five days prior to the date by which plan approval must be secured. Plans shall include a landscaping buffer along the property lines adjacent to Parcels 12, 14, 91, 92, 97, and portion of 11. Parking shall comply with the requirements of Chapter 25, Zoning Code and no parking variance from the Code shall be applied for. Additional parking for buses, vans and cars may be imposed at the time of plan approval. Parking for all functions shall be maintained on the subject properties.
4. Construction of the various improvements shall commence within one year from the date of receipt of Final Plan Approval and shall be completed within two years thereafter.
5. The regular hours of operation for the arboretum shall be limited between 8 a.m. and 7 p.m., provided, however, that the arboretum may remain open until 11 p.m. for special events. The secondary uses (i.e., restaurant, retail gift shop, equestrian trails, agricultural museum, exhibits) shall operate only during arboretum hours.
6. Retail commercial activities shall be confined to: a) a 25,000-square foot area, including the existing main structure, outdoor dining area, and two proposed snack shops; b) the proposed fruit/vegetable stand and the agricultural

museum; and c) coin-operated dispensing machines and mobile vendors. For the purposes of this condition, retail commercial activities do not include the aviary/animal exhibits and equestrian stables and trails.

7. Main access to the development from Makalika Street shall be restricted to three entrance/exit driveways as approved by the Department of Public Works. Additional accesses from Awa and Makalika Streets may be permitted as service driveways which shall meet with the requirements of the Department of Public Works. No access shall be allowed from Railroad Avenue unless and until it has been improved to County dedicable standards.
8. The Hawaii Belt Highway (Highway 11) shall be improved with a) a right-turn deceleration lane from the Hawaii Belt Highway onto Makalika Street; b) an acceleration lane for traffic entering the Hawaii Belt Highway from Makalika Street; and c) additional street lighting in the vicinity of the Hawaii Belt Highway-Makalika Street intersection. The foregoing improvements shall meet with the requirement of the Department of Transportation-Highways Division. Highway improvements shall be constructed and approved by the Department of Transportation prior to the approval of an occupancy permit by the Planning Director for any portion of the expanded development approved under this amendment or within one year from the date of this amendment, whichever occurs first.
9. A drainage system in accordance with the requirements of the County Department of Public Works shall be installed.
10. All other applicable laws, rules, regulations, and requirements, including those of the State Department of Health, shall be complied with.
11. An annual progress report shall be submitted to the State Land Use Commission, County Planning Commission, and County Planning Director prior to the anniversary date of the approval of this amendment. The report shall address the status of the development and the compliance with conditions of approval. This condition shall remain in effect until all of the conditions of

approval have been complied with and the Planning Director acknowledges that further reports are not required.

12. An extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances: a) the non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence; b) granting of the time extension would not be contrary to the general plan or zoning code; c) granting of the time extension would not be contrary to the original reasons for the granting of the permit; and d) the time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year). Further, should any of the conditions not be met or substantially complied within a timely fashion, the Director may initiate procedures to nullify the permit.

CONCLUSIONS OF LAW

The amendments to the special permit, subject to the conditions in the Order, constitutes an "unusual and reasonable" use as defined in Chapter 205-6, Hawaii Revised Statutes and the amendments are not contrary to the objectives sought to be accomplished by the State Land Use Law to preserve, protect and encourage development of lands in the State for those uses to which they are best suited in the interest of the public health and welfare.

ORDER

IT IS HEREBY ORDERED that the Fourth Amendment to Special Permit Docket Number SP73-159 filed by Toyama Gardens Hawaii Corporation, dba, Nani Mau Gardens, Inc., to allow the

expansion of the Permit area by approximately 5 acres for a total of approximately 58.786 acres, approximately identified on Exhibit A attached hereto and incorporated by reference herein, and to allow additional uses as earlier described, is hereby approved subject to the following conditions as recommended by the County of Hawaii Planning Commission, to replace all previous conditions imposed on the Permit:

1. Petitioner, successors or assigns shall be responsible for complying with all of the conditions of approval.

2. Petitioner shall provide a metes and bounds and map description of the 5-acre addition to the Special Permit area within one year from the effective date of this amendment.

3. Final Plan Approval for the expanded development shall be secured by Petitioner from the Planning Department within one year from the date of this amendment. To assure adequate time for plan approval review and in accordance with Chapter 25-244 (Zoning Code), plans shall be submitted a minimum of forty-five days prior to the date by which plan approval must be secured. Plans shall include a landscaping buffer along the property lines adjacent to Parcels 12, 14, 91, 92, 97, and portion of 11. Parking shall comply with the requirements of Chapter 25, Zoning Code and no parking variance from the Code shall be applied for. Additional parking for buses, vans and cars may be imposed at the time of plan

approval. Parking for all functions shall be maintained on the subject properties.

4. Construction of the various improvements shall commence within one year from the date of receipt of Final Plan Approval and shall be completed within two years thereafter.

5. The regular hours of operation for the arboretum shall be limited between 8 a.m. and 7 p.m., provided, however, that the arboretum may remain open until 11 p.m. for special events. The secondary uses (i.e., restaurant, retail gift shop, equestrian trails, agricultural museum, exhibits) shall operate only during arboretum hours.

6. Retail commercial activities shall be confined to: a) a 25,000-square foot area, including the existing main structure, outdoor dining area, and two proposed snack shops; b) the proposed fruit/vegetable stand and the agricultural museum; and c) coin-operated dispensing machines and mobile vendors. For the purposes of this condition, retail commercial activities do not include the aviary/animal exhibits and equestrian stables and trails.

7. Main access to the development from Makalika Street shall be restricted to three entrance/exit driveways as approved by the Department of Public Works. Additional accesses from Awa and Makalika Streets may be permitted as service driveways which shall meet with the requirements of the Department of Public Works. No access shall be allowed from

Railroad Avenue unless and until it has been improved to County dedicable standards.

8. The Hawaii Belt Highway (Highway 11) shall be improved with a) a right-turn deceleration lane from the Hawaii Belt Highway onto Makalika Street; b) an acceleration lane for traffic entering the Hawaii Belt Highway from Makalika Street; and c) additional street lighting in the vicinity of the Hawaii Belt Highway-Makalika Street intersection. The foregoing improvements shall meet with the requirement of the Department of Transportation-Highways Division. Highway improvements shall be constructed and approved by the Department of Transportation prior to the approval of an occupancy permit by the Planning Director for any portion of the expanded development approved under this amendment or within one year from the date of this amendment, whichever occurs first.

9. A drainage system in accordance with the requirements of the County Department of Public Works shall be installed.

10. All other applicable laws, rules, regulations, and requirements, including those of the State Department of Health, shall be complied with.

11. An annual progress report shall be submitted to the State Land Use Commission, County Planning Commission, and County Planning Director prior to the anniversary date of the approval of this amendment. The report shall address the status of the development and the compliance with conditions of

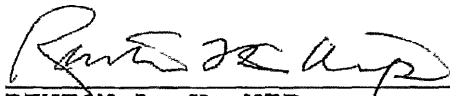
approval. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.

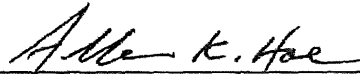
12. An extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances: a) the non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence; b) granting of the time extension would not be contrary to the general plan or zoning code; c) granting of the time extension would not be contrary to the original reasons for the granting of the permit; and d) the time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year). Further, should any of the conditions not be met or substantially complied within a timely fashion, the Director may initiate procedures to nullify the permit.

DOCKET NO. SP73-159 - TOYAMA GARDENS HAWAII CORPORATION, dba,
NANI MAU GARDENS, INC.

Done at Honolulu, Hawaii, this 24th day of July 1991,
per motions on June 27, 1991 and July 18, 1991.

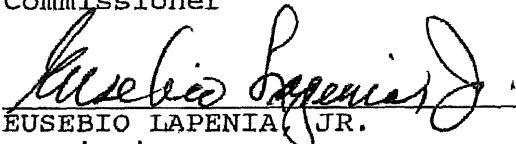
LAND USE COMMISSION
STATE OF HAWAII

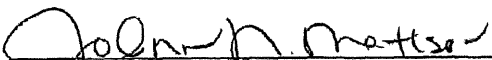
By 
RENTON L. K. NIP
Chairman and Commissioner

By 
ALLEN K. HOE
Vice Chairman and Commissioner

By 
ALLEN Y. KAJIOKA
Vice Chairman and Commissioner

By (absent)
KAREN S. AHN
Commissioner

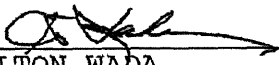
By 
EUSEBIO LAPENIA, JR.
Commissioner

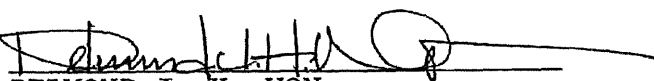
By 
JOANN N. MATTSON
Commissioner

Filed and effective on
July 24, 1991

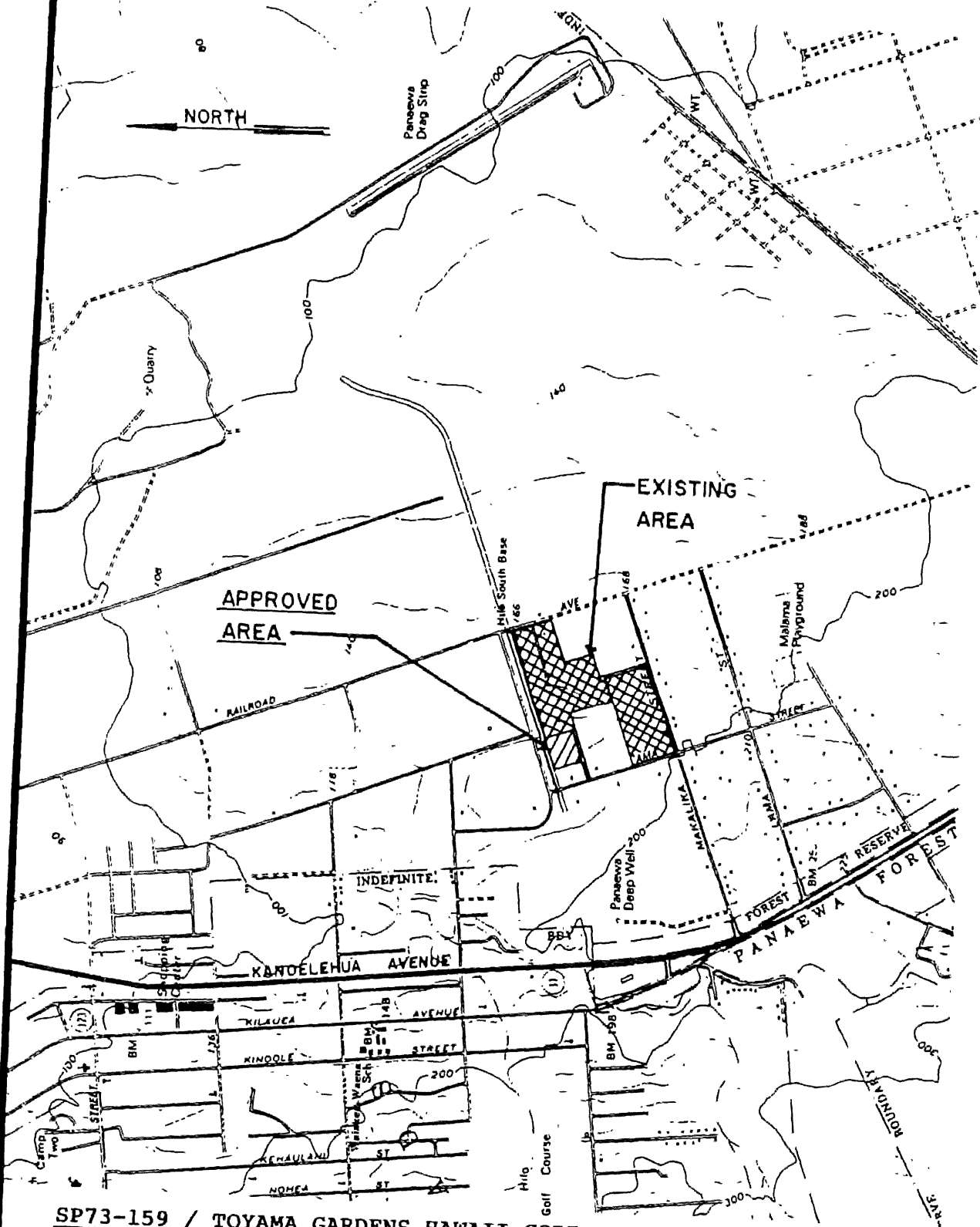
Certified by:


Executive Officer

By 
ELTON WADA
Commissioner

By 
DELMOND J. H. WON
Commissioner

LOCATION MAP



SP73-159 / TOYAMA GARDENS HAWAII CORP., dba, Nani Mau Gardens, Inc.
(FOURTH AMENDMENT)

TAX MAP KEY : 2-2-48: por. 11
WAIAKEA, SOUTH HILO, HAWAII

SCALE : 1"=2,000 ft. ±

EXHIBIT "A"

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

| | |
|--------------------------------------|------------------------|
| In the Matter of the Petition of) | DOCKET NO. SP73-159 |
| TOYAMA GARDENS HAWAII CORPORATION,) | |
| dba, NANI MAU GARDENS, INC.) | TOYAMA GARDENS HAWAII |
| | CORPORATION, dba, NANI |
| | MAU GARDENS, INC. |
| For a Fourth Amendment to the) | |
| Special Permit which establishes) | |
| a stockpiling, storage, and forest) | |
| trail area and related uses on) | |
| approximately 5 acres of land) | |
| within the Agricultural District) | |
| at Waiakea, South Hilo, Hawaii,) | |
| Tax Map Key Number: 2-2-48:) | |
| Portion 11) | |
| _____) | |


CERTIFICATE OF SERVICE

I hereby certify that a copy of the Findings of Fact, Conclusions of Law and Decision and Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

CERT. NORMAN K. HAYASHI, Planning Director
 Planning Department, County of Hawaii
 25 Aupuni Street
 Hilo, Hawaii 96720

CERT. SIDNEY FUKU, Representing Petitioner
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DATED: Honolulu, Hawaii, this 24th day of July 1991.



ESTHER UEDA
Executive Officer