

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of) DOCKET NO. SP73-159
)
MAKOTO NITAHARA dba NANI MAU) MAKOTO NITAHARA dba
GARDENS, INC.) NANI MAU GARDENS, INC.
)
For an Amendment to the Special)
Permit which establishes a)
commercial arboretum and related)
uses on approximately 20 acres of)
land within the Agricultural)
District at Waiakea, South Hilo,)
Hawaii, Tax Map Key Number:)
2-2-48: Parcel 13)
_____)

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION AND ORDER

Toyama Garden Hawaii Corporation dba Nani Mau Gardens (hereinafter "Petitioner") 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 the "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 special permit amendment ("Amendment") application with the County of Hawaii Planning Department on October 2, 1987. The Hawaii Planning Commission

conducted the public hearing on November 17, 1987. No public testimony was presented at the hearing.

2. On November 17, 1987, the Hawaii Planning Commission recommended approval of the Amendment with seven conditions to replace all previous conditions imposed on the existing special permit. A copy of the decision together with the record of the proceeding before the Hawaii Planning Commission was received by the Commission on December 2, 1987.

Description of Property and Proposed Use

3. The subject property is located at the northern corner of the Makalika Street-Awa Street intersection in the Panaewa Farm Lots, Waiakea, South Hilo, Island of Hawaii, Tax Map Key Number: 2-2-48: parcel 13 ("Property").

4. The Property consists of approximately 20 acres and is currently used for a commercial arboretum for public tours and the sale of agricultural products and snacks.

5. The operation, known as Nani Mau Gardens, was first established by special permit filed by Makoto Nitahara dba Nani Mau Gardens, Inc. ("Nitahara") in 1973. Petitioner recently purchased the Property from Nitahara and intends to retain the name of the current operations.

6. The existing facilities includes a 5,000 square feet building housing restrooms, an office, snack shop, retail activities and a lounge area. Also included are two garage structures, an existing dwelling, and parking.

7. Petitioner is proposing to improve the existing use of the Property by expanding the variety of plants and flowers, increase the size of the existing building to 10,360 square feet by expanding the first floor and adding a second floor, some design changes to the building to create an "oriental" motif, and expansion of parking to provide 11 paved bus stalls and another 45 full-sized, standard parking stalls.

8. Petitioner is also requesting that the special permit be issued to Toyama Garden Hawaii Corporation, the new owner, and to amend the existing conditions of the special permit to allow the sale of limited types of cooked or processed food on the premises. Petitioner proposes to install a hot dog cooker and a microwave oven for warming up food such as pastry, sandwiches, etc., similar to the type of cooked and/or processed food offered at a "7 Eleven" store.

Background

9. On October 17, 1973, the Commission approved special permit Docket Number SP73-159 to 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."

10. On March 1, 1977, the Commission approved Mr. Nitahara's request for another special permit in docket number 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 SP77-258.

11. On July 9, 1984, the Commission approved an amendment to 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 three conditions recommended by the Hawaii 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:

- "1. That applicant or its sub-lessee may sell films, post cards and locally-produced agricultural and agricultural-related products on the premises.

- "2. 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.
- "3. That applicant may not sell other tourist items or foods requiring cooking or processing on the premises."

State and County Plans and Programs

12. The Commission's State Land Use District Map designates the Property in the Agricultural District as reflected in map H-66 Hilo.

13. At the time of the July 9, 1984 amendment, the County Planning Department Staff Report dated May 3, 1984, indicated that the Property was designated as "Orchards and Alternate Urban Expansion" by the County's General Plan Land Use Pattern Allocation Guide Map.

The Hilo Community Development Plan Zone Guide Map (CDP) suggested that the Property retain its then Agricultural-10 acre (A-10a) zoning. The CDP also suggested that the area be zoned for Alternate Residential Expansion should the need arise.

14. The Property is not located within the County Special Management Area.

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

Summary of Agency Concerns

16. The County Department of Public Works indicated that buildings shall conform to all requirements of code and

statutes pertaining to construction and all development generated runoff shall be disposed of on-site and shall not be directed toward any adjacent properties.

In addition, Petitioner should be made aware of the requirements of the Department of Health for the operation of drywells for runoff disposal.

17. The State Department of Health requested that Petitioner submit sewage flow calculations and proposed plans of the sewage treatment and disposal system prepared by a Registered Engineer to the Chief Sanitarian of the Hawaii District.

Conformance With Special Permit Tests

18. The issuance of a special permit to Petitioner is not contrary to the objectives sought to be accomplished by the Land Use Law.

19. Petitioner's proposed deletion of conditions which prohibit the sale of food which require cooking on the Property is not contrary to the objectives sought to be accomplished by the Land Use Law.

Petitioner proposes to operate a snack facility as an amenity to the primary use which is a commercial arboretum for public tours. No restaurant or kitchen facilities are proposed on the Property.

20. The proposed expansion of the existing operations is not anticipated to adversely affect surrounding properties.

Petitioner estimates the proposed expansion will generate 4 to 5 tour buses daily on Makalika Street and would not adversely affect nearby residences.

21. The proposed expansion will not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, and police and fire protection.

Prior to building permit approval, Petitioner must satisfy the concerns of the State Department of Health relating to wastewater disposal.

Petitioner also states that water source and transmission lines are available to the Property.

22. On November 17, 1987, the Hawaii Planning Commission recommended approval of the Amendment subject to seven conditions as proposed by the Planning Department to replace all previous conditions imposed on the existing special permit as follows:

- "1. The applicant, successors or assigns 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 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 applicants, 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 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."

CONCLUSIONS OF LAW

The proposed amendment is an "unusual and reasonable" use as defined in Chapter 205-6, Hawaii Revised Statutes and the proposed use is 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 Amendment to Special Permit Docket Number 73-159 - Makoto Nitahara dba Nani Mau Gardens, Inc. filed by Toyama Garden Hawaii Corporation to allow the issuance of the special permit to Toyama Garden Hawaii Corporation, an expansion of the existing Nani Maui Gardens Arboretum, and limited cooking of food on the Property in addition to all uses previously permitted by the Commission, is hereby approved subject to the following conditions to replace all previous conditions imposed on the special 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.

DOCKET NO. SP73-159/MAKOTO NITAHARA dba NANI MAU GARDENS, INC.

Done at Honolulu, Hawaii, this 18th day of February 1988,
per motions on January 5, 1988 and February 16, 1988. .

LAND USE COMMISSION
STATE OF HAWAII

By *T. P. Tacbian*
TEOFILO PHIL TACBIAN
Chairman and Commissioner

By *[Signature]*
RICHARD B. F. CHOY
Commissioner

By *[Signature]*
RENTON L. K. NIP
Commissioner

By *[Signature]*
TORU SUZUKI
Commissioner

By *[Signature]*
EVERETT L. CUSKADEN
Commissioner

By *[Signature]*
SHARON R. HIMENO
Commissioner

By *[Signature]*
ROBERT S. TAMAYE
Commissioner

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2-2-48: Parcel 13)
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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:

ALBERT LONO LYMAN, Planning Director
Planning Department
County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720

SIDNEY FUKU, Planning Consultant
100 Pauahi Street, Suite 212
Hilo, Hawaii 96720

MELVIN JITCHAKU
100 Pauahi Street, Suite 215
Hilo, Hawaii 96720

Dated: Honolulu, Hawaii, this 18th day of February, 1988.



ESTHER UEDA, Executive Officer

DOCKET NO. SP73-159 - MAKOTO NITAHARA dba NANI MAU GARDENS,
INC.

A copy of the Land Use Commission's Decision and
Order was served upon the following by regular mail on
February 18, 1988.

Real Property Tax Office
County of Hawaii
865 Piilani Street
Hilo, Hawaii 96720