

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.

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LAND USE COMMISSION
STATE OF HAWAII

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION AND ORDER

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FINDINGS OF FACT, CONCLUSIONS OF LAW
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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

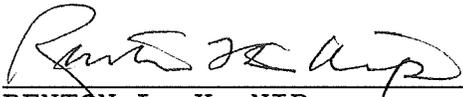
approval. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.

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.

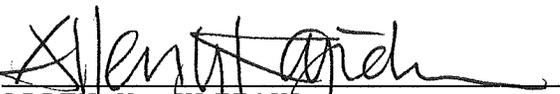
DOCKET NO. SP73-159 - TOYAMA GARDENS HAWAII CORPORATION, dba,
NANI MAU GARDENS, INC.

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

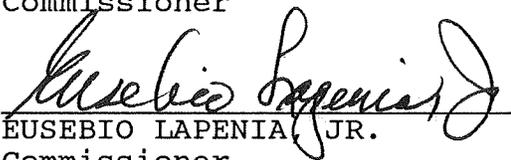
LAND USE COMMISSION
STATE OF HAWAII

By 
RENTON L. K. NIP
Chairman and Commissioner

By 
ALLEN K. HOE
Vice Chairman and Commissioner

By 
ALLEN Y. KAJIOKA
Vice Chairman and Commissioner

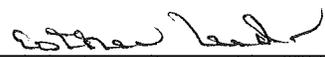
By (absent)
KAREN S. AHN
Commissioner

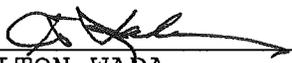
By 
EUSEBIO LAPENIA, JR.
Commissioner

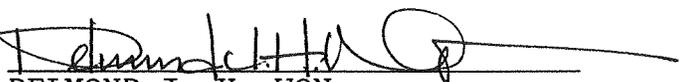
By 
JOANN N. MATTSON
Commissioner

Filed and effective on
July 24, 1991

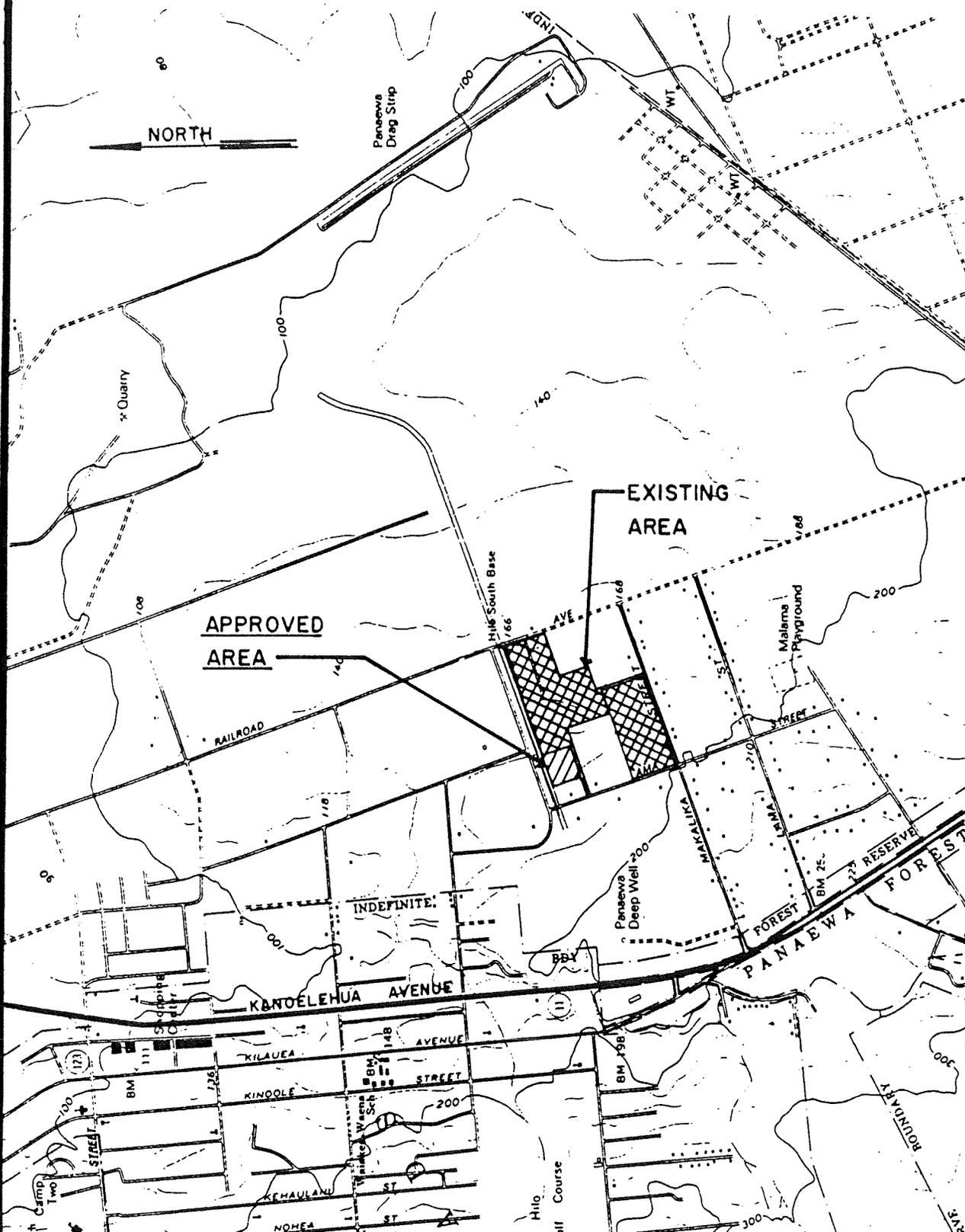
Certified by:


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,))	TOYAMA GARDENS HAWAII
dba, NANI MAU GARDENS, INC.)	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))
_____))

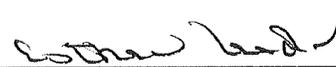
CERTIFICATE OF SERVICE

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
100 Pauahi Street, Suite 212
Hilo, Hawaii 96720

DATED: Honolulu, Hawaii, this 24th day of July 1991.



ESTHER UEDA
Executive Officer