

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 an Eighth Amendment to the)
Special Permit Which Establishes A)
Commercial Arboretum For Public)
Tours And The Sale Of Agricultural)
Products On Approximately 23 Acres)
Of Land Situated Within The State)
Land Use Agricultural District At)
Waiakea, South Hilo, Hawaii, Tax)
Map Key Number: 2-2-48: Portion of)
13)
_____)

DOCKET NO. SP73-159
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER

LAND USE COMMISSION
STATE OF HAWAII
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Toyama Gardens Hawaii Corporation, dba, Nani Mau Gardens, Inc. (hereinafter "Applicant"), initiated this proceeding pursuant to Section 205-6, Hawai'i Revised Statutes and Sections 15-15-95 and 15-15-96 of the Hawai'i Administrative Rules. The Land Use Commission (hereinafter "LUC"), 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. On March 12, 1999, the Applicant filed an Eighth Amendment to the Special Use Permit (hereinafter "Eighth Amendment"), requesting a time extension to comply with Condition Number 7 of Findings of Fact, Conclusions of Law, and Decision

and Order dated March 23, 1998 (hereinafter "Seventh Amended Order"), with the County of Hawai'i Planning Department.

2. On May 21, 1999, the County of Hawai'i Planning Commission (hereinafter "Planning Commission") conducted the public hearing on the Eighth Amendment. The Planning Commission received testimony from Sidney Fuke on behalf of the Applicant.

3. At the May 21, 1999 public hearing, the Planning Department recommended approval of the Eighth Amendment to the Planning Commission.

4. On June 9, 1999, supporting documents of the Eighth Amendment as well as a copy of the record of the Planning Commission's proceedings were received by the LUC.

5. On June 9, 1999 the LUC received a letter dated June 8, 1999 from Mr. Leonard S. Tanaka, Chairman of the Planning Commission. Mr. Tanaka informed the LUC that the Planning Commission held a public hearing on the Eighth Amendment and recommended approval. Said letter was admitted into evidence by the LUC, with no objections from the parties, on June 9, 1999.

6. On June 30, 1999, the LUC staff informed the Applicant and the Planning Department there were discrepancies with the configuration represented in the Permit Area that was submitted with the Eighth Amendment. The Permit Area was represented as a contiguous area approximately 23 acres in size, which was different from the maps of the Permit Area in the County's record which showed a larger area. Also, the LUC maps had shown the Permit Area as two non-contiguous areas. LUC staff

had requested clarification from the Applicant as to the actual configuration and approximate acreage of the Permit Area.

7. On July 6, 1999, the LUC received from Sidney Fuke a facsimile copy of the letter and map attachments to the Planning Department regarding the discrepancies and clarifying that the Permit Area is approximately 23 acres within a contiguous area.

8. On July 7, 1999, the LUC received a letter from the Planning Department agreeing with the Applicant's clarification of the configuration and size of the Permit Area.

DESCRIPTION OF SUBJECT PROPERTY

9. The subject property, consisting of approximately 23.793 acres, is identified as TMK: 2-2-48: portion of 13 (hereinafter "Property").

10. The Property currently includes greenhouses and garden pavilions, an office building (containing a restaurant), a snack shop, a gift shop, fruit and vegetables stands, stables and equestrian trails, a maintenance building, and an existing dwelling.

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

12. The Land Study Bureau Detailed Land Classification Report designates the Property as Class "E" lands.

13. In accordance with the Agricultural Lands of Importance to the State of Hawaii (ALISH) system, the Property is classified as "Other Important Agricultural Lands."

14. The Property is surrounded by mixed residential and agricultural uses.

15. The Property is situated at the corner of Makalika Street and Awa Street. Access to the Property is Makalika Street via Hawai'i Belt Highway.

16. Electrical, telephone and water services are available to the Property.

DESCRIPTION OF PROPOSED AMENDMENT TO SPECIAL PERMIT

17. Pursuant to Condition Number 7 of the Seventh Amended Order, the Applicant was required to complete highway improvements within five (5) years, or by October 24, 1999 (As originally required in the Commission's Sixth Amended Order dated October 24, 1995).

18. The request is for an additional five (5) year time extension from the date of the order granting the Eighth Amendment to complete the deceleration and acceleration lanes at the intersection of the Hawai'i Belt Highway and Makalika Street in the Permit Area.

19. Due to non-favorable economic conditions, roadway improvements to support the anticipated traffic, have not been completed.

20. According to the Applicant, required highway improvements to Hawai'i Belt Highway are estimated to cost over \$455,000.

21. According to the Applicant, a left-turn storage lane has been completed, and a street light was installed in 1995, making these costs at \$300,000.

22. The Applicant has made every effort to keep its staff of 35 full and part-time employees and maintain solvency of the existing operations.

23. The Applicant is still desirous of implementing the planned roadway improvements and will proceed upon improvement of economic conditions.

24. In light of the request for a time extension to comply with Condition Number 7 of the Seventh Amended Order, and the justification provided for the time extension by the Applicant, the Planning Department recommended that Condition Number 7 of the Eighth Amendment to the Planning Commission be retained, and allow the requested five (5) year extension of time.

STATE AND COUNTY PLANS AND PROGRAMS

25. The State Land Use District Classification of the Property is Agricultural, as reflected on State Land Use District Boundary Map H-66 (Hilo).

26. The County of Hawai'i General Plan Land Use Pattern Allocation Guide Map designates the Property as Low Density Urban.

27. Current zoning for the Property is County Agricultural-10 acres (A-10a) and County Agricultural-1 acre (A-1a).

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

29. The Property is not within the Special Management Area of the County of Hawai'i.

SUMMARY OF STATE AND COUNTY AGENCIES COMMENTS

30. The County of Hawai'i Department of Public Works, the County of Hawaii Fire and Police Departments, and the County of Hawai'i Department of Water Supply had no objections or comments to offer on the Eighth Amendment.

31. The County of Hawai'i Real Property Tax Office commented that the Property is receiving agricultural use value and real property taxes were paid through June 30, 1999.

32. The State Department of Health did not provide any comments for the Eighth Amendment.

33. The State Department of Transportation-Highways Division had no objections to the Eighth Amendment.

CONFORMANCE WITH SPECIAL USE PERMIT TESTS

34. The Planning Department, in its recommendation to the Planning Commission in support of the Eighth Amendment, provided the following recommendation to Planning Commission:

The granting of this request would promote the effectiveness and objectives of Chapter 205, Hawai'i Revised Statutes, as amended. The State Land Use Law Rules and Regulations are intended to preserve, protect, and encourage the development of land for those uses to which they are best suited in the interest of the public welfare of the people of the State of Hawai'i. Seven previous amendments for the subject property and related uses have been approved by the State Land Use Commission. The subject request for a five (5) year extension of time to complete the deceleration and acceleration lanes at the intersection of the Hawai'i Belt Highway and Makalika Street would not be contrary to Chapter 205, Hawai'i Revised Statutes. A favorable recommendation of the Petitioner's request for a time extension would not compromise the integrity of the existing Nani Mau Gardens complex or the substance of the State Land Use Commission's initial approval of Special Permit No. 247 (LUC Docket No. SP73-159) and amendments thereto.

The desired use will not adversely affect surrounding properties. The Nani Mau Gardens development was approved

by the State Land Use Commission through the issuance of Special Permit No. 247 (LUC Docket No. SP73-159) and amendments thereto upon findings that the development would not have an adverse impact to surrounding properties. A favorable recommendation of the request would not affect the general scope of the development as an arboretum. The State Land Use Commission approved the sixth amendment to Special Permit No. 247 (LUC Docket No. SP73-159) on October 24, 1994. Condition No. 7 required the completion of deceleration and acceleration lanes at the intersection of the Hawai'i Belt Highway and Makalika Street within five (5) years, or by October 24, 1999. The applicant is requesting an extension of time to complete highway improvements s required under Condition No. 7, which states in part, "highway improvements, with the exception of additional street lighting, shall be constructed within five (5) years from the date of this permit or when traffic intersection reach level warranting such improvements..."¹. The applicant cites the sluggish economy and attendant lack of finances as the principal reasons for the request. In addition, according to the applicant, the amount of traffic generated by the project relative to the overall ambient level appears to be insignificant. According to the applicant, there has been an increase in the use of Railroad Avenue as another access route into the business and industrial areas, resulting in the dominant use of Makalika Street by users other than patrons of Nani Maui Gardens.

The desired use will also not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, police and fire protection. The applicant is requesting a five (5) year extension of time to complete the deceleration and acceleration lanes at the intersection of the Hawai'i Belt Highway and Makalika Street. Existing utilities and facilities are or will be made available to accommodate the existing development and its future expansion as approved under Special Permit No. 247 (LUC Docket No. SP73-159).

Agencies reviewing the request, including the State Department of Transportation, had no objections to the request.

PLANNING COMMISSION RECOMMENDATION

¹ The portion of the citation from Condition No. 7 of the Land Use Commission's Finding of Fact, Conclusions of Law, and Decision and Orders Dated October 24, 1994 and March 23, 1998 should read, "highway improvements, with the exception of additional street lighting, shall be constructed within five (5) years from the date of this amendment or when traffic volumes at the Hawaii Belt Highway-Makalika Street intersection reach levels warranting such improvments..."

35. At its meeting of May 21, 1999, the Planning Commission recommended approval of the Eighth Amendment to the LUC by recommending a time extension of five (5) years to comply with Condition Number 7 of the Seventh Amended Order, as proposed the Planning Department, and as provided above.

CONCLUSIONS OF LAW

The Eighth Amendment request for a time extension of five (5) years to complete required deceleration and acceleration lanes 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 Eighth Amendment to allow a time extension to comply with Condition Number 7 of the Seventh Amended Order shall be GRANTED.

IT IS HEREBY FURTHER ORDERED that all conditions imposed in the Decision and Order are hereby reaffirmed and shall continue in effect:

1. Petitioner, successors or assigns shall be responsible for complying with all of the conditions of approval.
2. Final Plan Approval for the expanded development, as approved under the fourth amendment by the State Land Use Commission - Decision and Order effective July 24, 1991, and exclusive of the 5-acre addition to the Special Permit area (portion of Parcel 11), 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

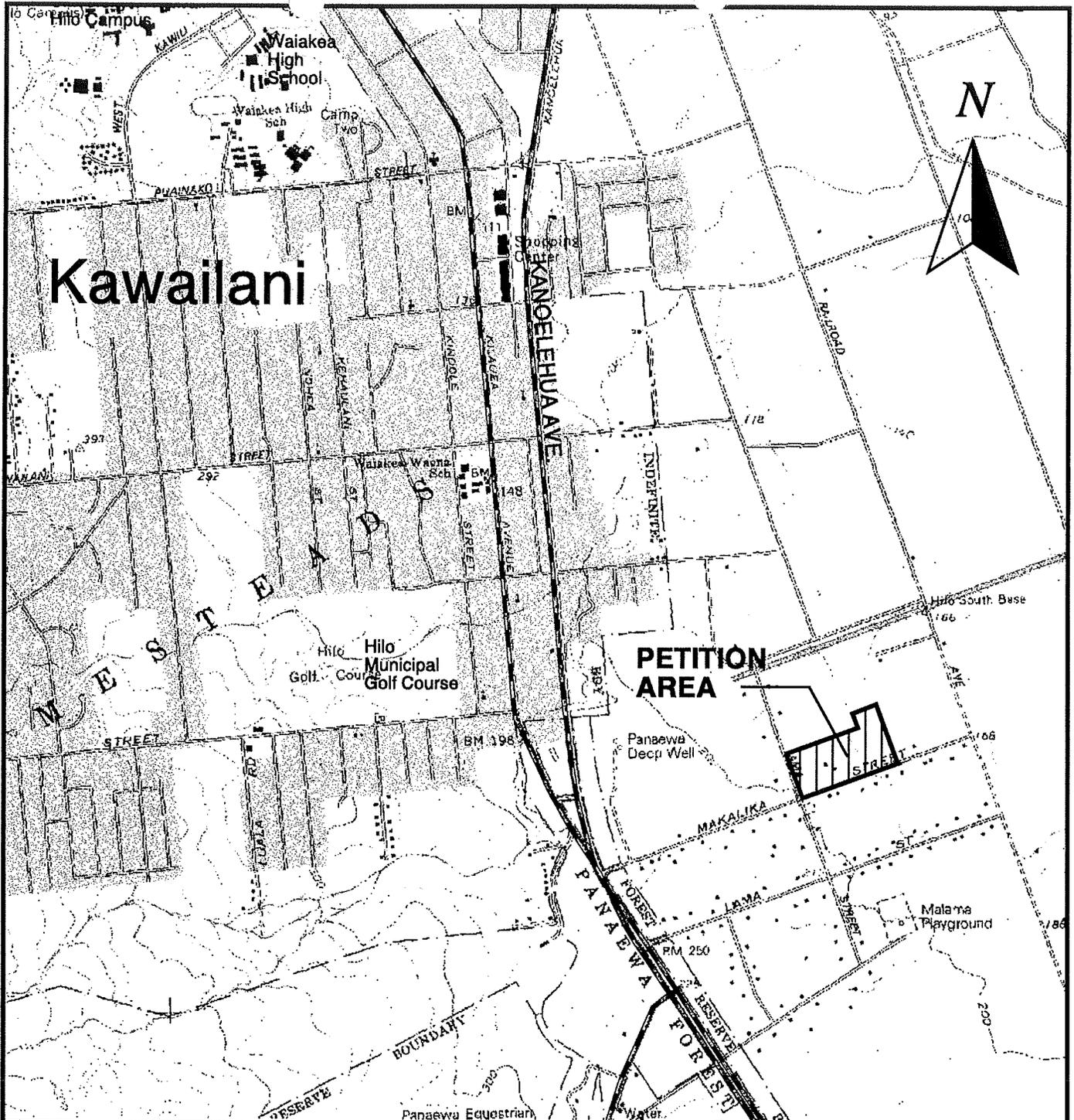
lines adjacent to Parcels 12, 14, 91, 92, and 97. Parking shall comply with the requirements of Chapter 25, Zoning Code and no parking variance from the Code shall be applied for. Additional parking for buses, vans and cars may be imposed at the time of plan approval. Parking for all functions shall be maintained on the subject properties.

3. 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.
4. 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.
5. 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.
6. 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.
7. The Hawai'i 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 Hawai'i Belt Highway from Makalika Street; and c) additional street lighting in the vicinity of the Hawai'i Belt Highway-Makalika Street intersection. The foregoing improvements shall meet with the requirements and approval of the Department of Transportation-Highways Division. Highway improvements, with the exception of additional street lighting, shall be constructed within five (5) years from the date of this amendment or when traffic volumes at the Hawai'i

Belt Highway-Makalika Street intersection reach levels warranting such improvements as determined by the State Department of Transportation or Department of Public Works, whichever occurs first and by whichever agency is applicable. The Petitioner shall submit annual traffic volume counts to the State Department of Transportation for traffic turning onto Makalika from the Hawai'i Belt Highway and from Makalika Street onto the Hawai'i Belt Highway. The initial report shall be submitted within 6 months from the effective date of this amendment and annually thereafter. Additional street lighting in the vicinity of the Hawai'i Belt Highway-Makalika Street intersection shall be provided within one (1) year from the effective date of this amendment.

8. A drainage system in accordance with the requirements of the County Department of Public Works shall be installed.
9. All other applicable laws, rules, regulations, and requirements, including those of the State Department of Health, shall be complied with.
10. 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.
11. Should any of the conditions not be met or substantially complied within a timely fashion, the Planning Director of the County of Hawaii may initiate procedures to nullify the Permit.

IT IS FURTHER ORDERED that the Permit Area shall be reconfigured to accurately show the actions from previous amended orders, as shown on Exhibit "A" attached hereto and incorporated herein as reference.



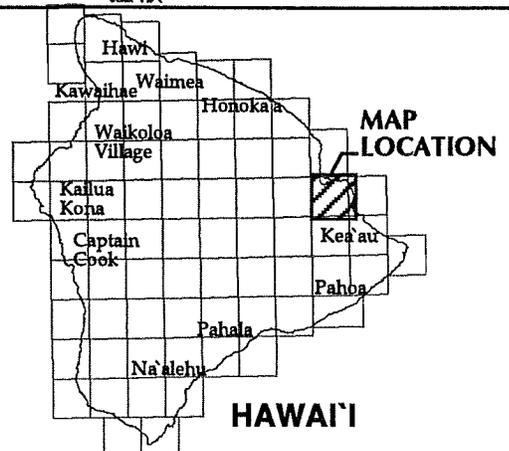
LOCATION MAP

DOCKET NO. SP73-159 / TOYAMA GARDENS
 HAWAII, INC., dba Nani Mau Gardens, Inc.
 (8th Amendment)

TAX MAP KEY NO. : 2-2-48: por. 13

WAIAKEA, SOUTH HILO, HAWAII

EXHIBIT "A"



Done at Honolulu, Hawai'i, this 16th day of August 1999,
per motions on July 8, 1999 and August 5, 1999.

LAND USE COMMISSION
STATE OF HAWAI'I

By M. Kelai
MERLE A. K. KELAI
Chairperson and Commissioner

By Lawrence N.S. Ing
LAWRENCE N.S. ING
Vice Chairperson and Commissioner

By P. Roy Catalani
P. ROY CATALANI
Commissioner

By Pravin Desai
PRAVIN DESAI
Commissioner

By Isaac Fiesta, Jr.
ISAAC FIESTA, JR.
Commissioner

By (absent)
M. CASEY JARMAN
Commissioner

By (resigned)
HERBERT S.K. KAOPUA, SR.
Commissioner

By Stanley Roehrig
STANLEY ROHRIG
Commissioner

By Peter Yukimura
PETER YUKIMURA
Commissioner

Filed and effective on
August 16, 1999

Certified by:
[Signature]
Executive Officer

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CERTIFICATE OF SERVICE

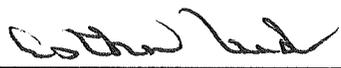
I hereby certify that a copy of the Findings of Fact, Conclusions of Law, and Decision and Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

CERT. VIRGINIA GOLDSTEIN, Planning Director
Planning Department, County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720

CERT. RICHARD D. WURDEMAN, ESQ.
Corporation Counsel
County of Hawaii
The Hilo Lagoon Center
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

CERT. SIDNEY FUKU, Representing Petitioner
100 Pauahi Street, Suite 212
Hilo, Hawaii 96720

DATED: Honolulu, Hawaii, this 16th day of August 1999.



ESTHER UEDA
Executive Officer