

ORIGINAL

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Application Of	)	DOCKET NO. SP73-159
)	
TOYAMA GARDENS HAWAII	)	DECISION AND ORDER
CORPORATION dba NANI MAU GARDENS,	)	APPROVING A NINTH
INC.	)	AMENDMENT TO A
	)	SPECIAL USE PERMIT
For A Ninth Amendment To The Special Use)	
Permit Which Established A Commercial)	
Arboretum For Public Tours And The Sale Of)	
Agricultural Products On Approximately)	
23.793 Acres Of Land Within The State Land)	
Use Agricultural District At Panaewa Farm)	
Lots Subdivision, Waiakea, South Hilo,)	
Hawai`i, Tax Map Key: 2-2-48: Por. 13)	
_____)	

DECISION AND ORDER APPROVING A NINTH
AMENDMENT TO A SPECIAL USE PERMIT

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Application Of	)	DOCKET NO. SP73-159
)	
TOYAMA GARDENS HAWAII	)	DECISION AND ORDER
CORPORATION dba NANI MAU GARDENS,	)	APPROVING A NINTH
INC.	)	AMENDMENT TO A
	)	SPECIAL USE PERMIT
For A Ninth Amendment To The Special Use)	
Permit Which Established A Commercial)	
Arboretum For Public Tours And The Sale Of)	
Agricultural Products On Approximately)	
23.793 Acres Of Land Within The State Land)	
Use Agricultural District At Panaewa Farm)	
Lots Subdivision, Waiakea, South Hilo,)	
Hawai`i, Tax Map Key: 2-2-48: Por. 13)	
_____)	

DECISION AND ORDER APPROVING A NINTH
AMENDMENT TO A SPECIAL USE PERMIT

On October 19, 2004, Nani Mau Inc. ("Applicant")¹ filed a written request to amend the special use permit issued in the above-entitled docket ("Request") with the County of Hawai`i Planning Department ("Planning Department"), pursuant to section 205-6, Hawai`i Revised Statutes ("HRS"), and sections 15-15-95 and 15-15-96, Hawai`i Administrative Rules ("HAR"). The Applicant requested the deletion of Condition Number 7 of the Findings Of Fact, Conclusions Of Law, And Decision And

¹ The Applicant acquired Nani Mau Gardens from Toyama Gardens Hawaii Corporation on December 15, 1999.

Order ("Decision and Order") dated August 16, 1999. Condition Number 7 states as follows:

7. The Hawai`i Belt Highway (Highway 11) shall be improved with a) a right-turn deceleration lane from the Hawai`i 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.

The Land Use Commission ("Commission") has jurisdiction over the Applicant's Request. Section 205-6, HRS, and sections 15-15-95 and 15-15-96, HAR, authorize this Commission to approve special use permits and amendments thereto for areas greater than 15 acres.²

On December 17, 2004, the Planning Commission conducted a hearing on the Applicant's Request. There was no public testimony provided on the Request.

² The original special use permit area consisted of approximately 20 acres. The current special use permit area is approximately 23.793 acres.

After due deliberation, the Planning Commission recommended approval of the Applicant's Request to delete Condition Number 7 to this Commission, and further recommended that Condition Numbers 4 and 5 be amended to reflect the actual uses of the special use permit area as follows:

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, 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 and outdoor dining area; and b) coin-operated dispensing machines and mobile vendors. For the purposes of this condition, retail commercial activities do not include the aviary/animal exhibits.

On January 11, 2005, the Commission received a copy of the decision and a portion of the record of the Planning Commission's proceedings on the Applicant's Request. On February 14, 2005, the Commission received the remaining portion of the record.

On March 16, 2005, the Commission met in Hilo, Hawai'i, to consider the Applicant's Request. Ken Fujiyama and Chian Hsu appeared on behalf of the Applicant. Bobby Jean Leithead-Todd, Esq., and Norman Hayashi appeared on behalf of the County of Hawai'i. John W. K. Chang, Esq., and Abe Mitsuda also were present on behalf of the State Office of Planning ("OP").

At the meeting, the Commission acknowledged receipt of written testimony from David Kimo Frankel dated March 12, 2005, pursuant to section 92-3, HRS. In his testimony, Mr. Frankel requested that the Applicant be required to comply with state and county signage laws when advertising events at the Applicant's facility. Mr. Frankel further requested that the Applicant be required to enforce the provisions of section 11-60.1-34(c), HAR, regarding the operation of a motor vehicle engine while the motor vehicle is stationary by informing tour bus operators of these regulations.

Following the Commission's questioning of Mr. Hayashi on the County of Hawai'i's position on the Request, the Commission heard a presentation by the Applicant on the Request. The Applicant noted, among other things, that it concurred with the State Department of Transportation's ("DOT") recommendation on the Request that should the Applicant propose any amendment to increase the activities/uses and acreage of the property covered by the special use permit, an evaluation and assessment should be submitted to the DOT to determine applicable mitigative measures. The Applicant also represented that it will comply with state and county signage laws and inform tour bus drivers to its facility of the provisions of section 11-60.1-34(c), HAR. Subsequent to the Applicant's presentation, the OP represented that it had consulted with the DOT and confirmed that the DOT's recommendation on the Request was made with the understanding that the Applicant

has a right to expand its facility's retail commercial activities up to 25,000 square feet without amending the special use permit.

Following discussion by the Commissioners, a motion was made and seconded to approve the Applicant's Request to delete Condition Number 7, subject to the condition that in the event the Applicant seeks to amend the special use permit and said amendment involves either additional uses beyond those which are currently allowed or the expansion of the retail commercial area beyond 25,000 square feet, the Applicant shall prepare a traffic impact analysis report ("TIAR") that (i) identifies the traffic impacts attributable to the proposed development and recommended mitigative measures; (ii) reflects the latest planning efforts for transportation; and (iii) is subject to the review and approval of the DOT and the County of Hawai'i. The Applicant shall further provide the appropriate mitigative measures pursuant to the TIAR. The motion was subsequently amended and seconded to include the following amendments to Condition Numbers 4 and 5 as recommended by the Planning Commission:

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, 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 and outdoor dining area; and b) coin-operated dispensing machines and mobile vendors. For the purposes of this condition, retail commercial activities do not include the aviary/animal exhibits.

Following deliberation by the Commissioners, a vote was taken on the amended motion. There being a vote tally of 6 ayes, 0 nays, and 2 absent, the amended motion carried.

ORDER

Having duly considered the complete record of the Applicant's Request and the oral arguments presented by the parties present in the proceeding, and an amended motion having been made at a meeting on March 16, 2005, in Hilo, Hawai'i, and the amended motion having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the amended motion, this Commission hereby APPROVES the Applicant's Request to delete Condition Number 7, subject to the condition that in the event the Applicant seeks to amend the special use permit and said amendment involves either additional uses beyond those which are currently allowed or the expansion of the retail commercial area beyond 25,000 square feet, the Applicant shall prepare a traffic impact analysis report ("TIAR") that (i) identifies the traffic impacts attributable to the proposed development and recommended mitigative measures; (ii) reflects the latest planning efforts for transportation; and (iii) is subject to the review and approval of the DOT and the County of Hawai'i. The Applicant shall further provide the appropriate mitigative measures pursuant to the TIAR. Condition Numbers 4 and 5 shall be further amended to read as follows:

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, 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 and outdoor dining area; and b) coin-operated dispensing machines and mobile vendors. For the purposes of this condition, retail commercial activities do not include the aviary/animal exhibits.

All other conditions to the Decision and Order dated August 16, 1999, are hereby reaffirmed and shall continue in effect.

ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 24th day of May, 2005. This ORDER and its ADOPTION shall take effect upon the date this ORDER is certified and filed by this Commission.

Done at Honolulu, Hawai'i, this 24th day of May, 2005, per motion on March 16,, 2005.

APPROVED AS TO FORM

Maane Jackson
Deputy Attorney General

LAND USE COMMISSION
STATE OF HAWAII

By P. Roy Catalani
P. ROY CATALANI
Chairperson and Commissioner

By Randall Sakumoto
RANDALL SAKUMOTO
Vice-Chairperson and Commissioner

By Steven Lee Montgomery
STEVEN LEE MONTGOMERY
Vice Chair and Commissioner

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

By Michael Formby
MICHAEL FORMBY
Commissioner

By (absent)
KYONG-SU IM
Commissioner

By Lisa M. Judge
LISA M. JUDGE
Commissioner

Filed and effective on
MAY 24 2005

By Peter Yukimura
PETER YUKIMURA
Commissioner

Certified by:

Anthony Ching
ANTHONY CHING

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Application Of) DOCKET NO. SP73-159
)
TOYAMA GARDENS HAWAII) CERTIFICATE OF SERVICE
CORPORATION dba NANI MAU GARDENS,)
INC.)
)
For A Ninth Amendment To The Special Use)
Permit Which Established A Commercial)
Arboretum For Public Tours And The Sale Of)
Agricultural Products On Approximately)
23.793 Acres Of Land Within The State Land)
Use Agricultural District At Panaewa Farm)
Lots Subdivision, Waiakea, South Hilo,)
Hawai`i, Tax Map Key: 2-2-48: Por. 13)
_____)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Decision and Order Approving a Ninth Amendment to a Special Use Permit was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

DEL. LAURA THIELEN, Director
Office of Planning
P. O. Box 2359
Honolulu, Hawaii 96804-2359

