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COUNTY OF HAWAII

BEFORE THE BOARD OF APPEALS

COUNTY OF HAWAII

CITIZENS AGAINST NOISE, a non-profit corporation, Appellant, v. COUNTY OF HAWAI'I PLANNING COMMISSION, Respondent, and MANUIWA AIRWAYS, INC., a Hawai'i corporation, et al., Real Parties in Interest.	Docket No. 97-08 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

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FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

The Board of Appeals of the County of Hawaii (hereinafter, "the Board"), having considered the entire record and file in this appeal and having heard and examined the evidence and argument of the parties presented, makes the following Findings of Fact, Conclusions of Law, Decision and Order.

FINDINGS OF FACT

1. This is an appeal by CITIZENS AGAINST NOISE (hereinafter, "Appellant CAN") from the decision dated April 4, 1997 of the HAWAII COUNTY PLANNING COMMISSION (hereinafter, the "Commission") approving an amendment to Condition No. 4 (life of permit) of Use Permit No. 21, which allowed the establishment of the Volcano Heliport, extending the life of the Permit for an additional ten years and amending other conditions. The property is located within the Volcano Golf and Country Club property in the vicinity of the 18th fairway, Keauhou, Ka'u, Hawaii, TMK: 9-9-06:07.

2. In 1984, Real Party in Interest Manulwa Airways, Inc. (hereinafter, "Manulwa") applied for a use permit to build and operate a heliport near the 18th hole of the Volcano Golf and Country Club. County of Hawaii Planning Department Background Report ("Background Report"), Record on Appeal ("ROA") at 219. The Volcano heliport site is county zoned "Open." Id., ROA at 222. At that time, the Zoning Ordinances expressly authorized the Commission to issue use permits for heliports in all

zoning districts. Hawai'i County Code §25-28(a)(8) (1984); Background Report at 4, ROA at 222.

3. The Volcano Golf and Club Subdivision consisting of Single Family Residential (RS-15) zoned parcels is located approximately 2,000 feet to the North of the heliport. The Volcano Golf Course lots zoned Agricultural (A-1a) are located approximately 1,100 feet to the southeast, the Kilauea Military Camp is located approximately 500 feet to the southwest (across Highway 11) and the Hawaii Volcanoes National Park is approximately 50 feet to the south and west of the heliport. The heliport is approximately 1,200 feet away from the golf clubhouse and 2,300 feet from the nearest residence. ROA, p. 222.

4. Public testimony in support of and against the [special] <u>use</u> permit was taken at Commission hearings on August 2 and September 12, 1984. Use Permit No. 21 was approved by the Commission to allow the establishment of a heliport for operation of two helicopters and related improvements subject to conditions, for a period of one year starting with the date of commencement of operations. Operations began August 15, 1985. ROA, pp. 219, 220. The permit could be extended by the Commission "at its discretion." ROA, p. 226.

5. Manulwa applied for permanent establishment of Use Permit No. 21, but on July 24, 1986 the Commission approved a five-year extension of the Use Permit until

August 15, 1991 with an added condition requiring submittal of written reports on the Nene population. The Commission found:

> We have determined that the original findings and recommendation on the establishment and continued use of the heliport use are still valid. The community benefits that this operation has provided for the County should also be recognized and commended. In addition, there were no complaints filed with the Planning Department during the first year of operation. Nevertheless, it is felt that the one-year time period was not adequate to fully assess the impact of this use and its operation to the residents and the nene population in the area. As such, it would be prudent to continue to monitor the operation of the heliport for at least another five-year period. By continuing to monitor the operation, we can be more fully informed about the need to apply other conditions, if necessary, to protect the public's health and safety and the nene habitat from this operation in this area. ROA, pp. 220, 227-8.

6. On May 12, 1987, the Commission held a public hearing to determine whether Manulwa had violated conditions of approval regarding an alleged unauthorized landing and "before-hours" activities. The unauthorized landing was explained as an emergency landing and before-hours activities involved ground maintenance activities. A motion to hold contested case hearings on the complaints failed to pass. The Commission received and filed the complaints with no further action. ROA, p. 220.

7. On June 25, 1991, Manulwa requested a 90-day extension to allow continued use of the heliport until additional information could be provided and a hearing held for an additional 5-year extension. On August 15, 1991, the Commission approved the 90-day extension.

8. On February 27, 1992, the Commission approved another 5-year extension to Condition F (life of permit), with additional conditions to limit the hours of operation, number of landings and to avoid noise sensitive areas within the National Park pending further regulations affecting park overflights. ROA, p. 220. The Commission found:

> The granting of a time extension is consistent with the original reasons for the granting of the Use Permit. The continued use will not cause substantial adverse impact to the surrounding properties. The applicant's acoustic study indicated that the heliport is sufficiently separated from the surrounding residential areas to avoid excessive noise impacts. The study states that the "ambient less 5Ldn"complaint criteria can be met at an average of 8 tour flights per day as long as the indicated ingress and egress routes are followed and as long as static operations (ground idle, flight idle, and hover) are not excessive. No evidence has been submitted to indicate that the heliport use has negatively impacted the nene population.
>
> The superintendant of the National Park and some neighboring property owners have stated that the use of the heliport has resulted in negative noise and visual impacts . . .
>
> It is, therefore, recommended that additional conditions be included to mitigate impacts to surrounding properties and the National Park . . .
>
> This recommendation is to allow temporary use of the site in order to allow the applicant time to work toward relocation of his operation to an approved heliport. It should be noted that the applicant has been diligent in complying with the stated conditions of approval of the permit and has attempted to limit negative impacts of his operation. The applicant's participation in emergency helicopter support services to the community is also recognized. For these reasons, it is recommended that the heliport be restricted to use by only Manulwa Airways, Inc. except in the case of any emergency.

The Commission also removed the provision for extension at its discretion, instead stating that there was "no requirement to renew" ROA, pp. 239-240.

9. On December 5, 1996, Manulwa filed a Request for Deletion of Condition No. 4 (life of the permit) or Extension of Time for 10 Years. ("Extension Request") ROA, p. 4. The Extension Request noted that "By March 11, 1997, the Permit will require an extension of the Permit's effective period for heliport to continue its operations." ROA, p.2. Manulwa presented written testimony in support of the Extension Request ROA, pp. 11-30.

10. Because of scheduling problems, the Planning Department asked Manulwa to waive its right under Planning Commission Rule 7 to a public hearing within 60 days of filing the Extension Request. ROA, p.49. Manulwa agreed, asking for an extension of the life of the permit to accommodate the delay in the hearing process. ROA, p. 47, 54

11. By letter of January 31, 1997, Manulwa submitted supplemental materials relevant to the Extension Request. These included testimony showing no impact on the nene population, Special Federal Aviation Regulation (SFAR) No. 71, a letter from Hawaii Volcanoes National Park Superintendent James F. Martin asking that the Use Permit have a life limit for "periodic review to ensure it has not become an unacceptable impact on the National Park," Manulwa's licenses and permits, and letters in support of and against the Extension Request. ROA, pp. 89-123.

12. Appellant CAN submitted objections to the Extension Request, in particular to the requested elimination of the limit on life of the permit. ROA, pp. 79-87. CAN also submitted information on pending federal bills on National Park overflights, urging that the permit not be extended pending action on those bills. ROA, pp.132-172.

13. The Volcano Community Association wrote to the Planning Department by letter dated February 10, 1997, stating that its Board was equally divided about the extension of the permit, but unanimous that any extension should be limited in time. ROA, p. 175.

14. By letter of February 14, 1997, Manulwa submitted verification of notice to surrounding landowners. The parties have not disputed the sufficiency of said notice. ROA, pp. 176-194.

15. The Planning Commission and Department received several letters from surrounding residents opposing the Extension Request, ROA, pp. 195-200, and in support of the Extension Request. ROA, pp. 203-208, 587. The U.S. Geological Survey wrote in support as well. ROA, p. 599.

16. Appellant CAN submitted a Petition for Standing in Contested Case Hearing on the Extension Request. ROA, pp.209-213.

17. There was no objection or comment on the Extension Request from the Hawaii County Fire Department, Department of Public Works, Police Department, Department of Water Supply, or Real Property Tax Office. The State Department of

Transportation, Highways Division deferred to the Planning Department as to whether this was best handled by Zoning change or Use Permit. ROA, p. 223. The State Department of Health "found no environmental health concerns with regulatory implications in the submittals." ROA, p. 578.

18. The Commission held a public hearing on the Extension Request on February 27, 1997. Appellant CAN submitted written testimony opposing the Request. ROA, pp. 582-585. Counsel for the Commission advised that the Board of Appeals would be the appropriate forum for a contested case on the matter. The Commission voted unanimously to extend the life of the Use Permit to March 20, 1997, and to continue the hearing to that date. ROA, 596, 590-591.

19. Virginia Goldstein, Planning Director of the County of Hawai'i, recommended that the request to extend the life of the permit be approved for five years rather than the ten years requested. She noted, ". . . it is not recommended that a permanent heliport facility be established. Instead, extending the life of the permit for five years, would allow Manulwa Airways, Inc. to continue it's(sic) operations and allow the Planning Commission opportunity to further review and reassess the appropriateness of its location. Should it be determined that this facility poses substantial adverse impacts to the community's character or surrounding properties, the use permit could be revoked." ROA, pp. 615-620.

20. At the Commission continued hearing on March 20, 1997, Appellant CAN submitted further written testimony. ROA, 630-645. The Commission voted to approve a 10-year time extension to the life of the permit, with other conditions recommended by the planning director, deleting condition No. 2, and adding a condition that Manulwa submit a letter to the Planning Department that the heliport will be available for emergency and governmental uses. ROA, pp.647-663.

21. The Commission issued its written decision on the Extension Request on April 9, 1997. ROA, 664. On May 2, 1997, Appellant CAN filed its appeal to the Board of Appeals from the Commission's action. Manulwa moved to intervene and was granted intervention as a party.

22. Appellant CAN alleged that the Commission did not have legal authority to grant the extension of the time limit on the Use Permit. CAN argued that under the amended Zoning Code effective December 7, [1997] 1996, heliports were no longer permitted uses in the Open district, but were nonconforming uses, which could not be expanded or extended, and filed a Motion for Summary Judgment to that effect. CAN reserved the right to contest the merits of the decision to grant the extension of the life of the permit if the Board did not dispose of the appeal on the basis of lack of authority.

23. The Board held duly noticed hearings on the appeal on July 11, 1997, July 18, 1997, September 19, 1997, October 30, 1997, November 14, 1997 and December 18, 1997.

24. The parties stipulated to certain facts, as set forth in the "Stipulated Facts" dated September 12, 1997, a true copy of which is attached as "Exhibit A."

25. The parties also stipulated for the Board to hear legal arguments prior to a full contested case hearing, to allow the Board to rule on the legal issues which the parties argued might be dispositive of the case, similarly to the procedure on a motion for summary judgment. A true copy of The Stipulation Of Scope and Procedure of Hearing is attached as "Exhibit B."

26. Manulwa and the Commission argued, contrary to CAN, that no further extensions were ever required once the Use Permit had been issued and the Zoning Code had been amended, since the heliport was established as a "legal use" under code §25-2-61(b). Hence, Manulwa and the Commission argued that the heliport was now a permanently established legal use under the "grandfathering" provisions of the code. The Commission further argued that the heliport could be considered as within the definition of a permitted use in the Open district, such as "major outdoor recreational facility."

27. CAN moved to bar the testimony of Planning Director Virginia Goldstein and Sandra Schutte, who had been identified as witnesses by other parties. CAN argued that their testimony would improperly cover questions of law regarding interpretation of the Zoning Code rather than fact, and that Ms. Goldstein would not be available at the next hearing, causing delay. At the September 19, 1997 hearing, the Chairperson denied the

motion, reserving CAN's right to object to specific questions. Ms. Goldstein testified on October 30, 1997.

28. In the course of the hearings, Manulwa moved to continue the hearings due to a recent Third Circuit Court ruling that the County Council acted in violation of the State of Hawai'i Sunshine Law, HRS Chapter 91, when the Council enacted the new Zoning Code in December 1997. Because this might result in the new Zoning Code being voided, and CAN's arguments on lack of authority were based on the new Zoning Code, Manulwa urged the Board to continue the hearings pending the outcome of the Circuit Court case. At the October 30, 1997 hearing, the Board heard the arguments on the Motion to Continue, and the Chairperson denied the motion, noting the parties' investment in the case, and the uncertainty of the wait for the Circuit Court decision.

29. On November 7, 1997, Manulwa again moved to continue the hearings due to its filing of a Petition for Declaratory Ruling with the Planning Director, on whether §25-2-61(b) of the Zoning Code applies to Manulwa so as to make the prior Request for Extension unnecessary, mooting the Appeal. On November 14, 1997, the Chairperson denied the Motion, noting that the doctrine of primary jurisdiction did not apply.

30. The Board heard legal arguments at the hearing on November 14, 1997, and the parties stipulated to final written arguments being submitted for hearing on December 18, 1997.

31. At the hearing on December 18, 1997, Appellant CAN withdrew its appeal of the factual merits of the decision to grant the extension of the Use Permit, reserving only its legal argument regarding the authority of the Commission for the Board to consider.

32. In the 1986 extension, the Commission noted, "the original findings and recommendation on the establishment and continued use of the heliport use are still valid." ROA, p. 237. The Commission also provided, "[t]he Planning Commission shall terminate the permit if it finds that the heliport use is a nuisance to either the nene population or to surrounding property owners." ROA, p. 238. In the 1992 and 1997 Extensions, the Commission noted, "[t]he granting of a time extension is consistent with the original reasons for the granting of the Use Permit." ROA, p. 239, 653. The 1992 extension also provided, " [i]f the heliport is found to be negatively impacting the Nene population, the Planning Director shall initiate revocation of the Use Permit." ROA, p. 242. This clause was amended in the 1997 extension to trigger revocation if the heliport negatively impacted "surrounding properties" or the Nene population. ROA, p. 651.

33. Ordinance No. 85-40, which created the section which was to become §25-2-61(b), stated its purpose as follows: "The Council finds that the present language of the Code is silent relative to uses approved prior to the adoption of Ordinance No. 84-62 which became effective on September 25, 1984. This bill intends to clarify the Code by stating that a use previously approved as a conditionally permitted use or which was

granted a use permit need not obtain another use permit for any expansion of that approved use." ManuIwa Exhibit "A."

34. Admitted into evidence before the Board were Appellant CAN's Exhibits 1 through 7, ManuIwa's Exhibits A through C, and the Commission's Exhibits 1 through 3. The Board considered the Exhibits and the Record on Appeal, in addition to the testimony and argument presented at the hearings.

35. After much deliberation, the Board voted 4-2 to modify the Use Permit, to remove Condition 4, life of the permit, and establish the heliport use as a permanent legal use subject to the other conditions of the Use Permit, subject to review by the Commission every 5 years for compliance with the stated conditions. [This in effect] The Board thus denied the appeal.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter and the parties to the Appeal.

2. Under the new Zoning Code Ordinance No. 96-160, enacted effective December 7, 1996, applications for permits or approvals under the Zoning Code accepted for processing by December 1, 1996 may be processed according to the prior Zoning Code, subject to time limits. The instant Extension Request was filed December 5, 1996, and must be processed pursuant to the new Zoning Code. The parties orally stipulated to the same on the record.

3. Under the prior Zoning Code, heliports could be established under a Use Permit in the Open district.

4. Under the new Zoning Code, heliports are specifically identified as permissible only in certain districts, such as ML (Limited Industrial) or MG (General Industrial) districts, or in A (Agricultural) districts, provided a special permit is obtained if within the state land use agricultural district. They are not specifically permitted in the Open district. While a heliport might arguably be a "major outdoor amusement or recreation facility," which is allowed in the Open district with a Use Permit, the specific identification of heliports as such, shows that heliports were intended to be treated distinctly from other amusement or recreational facilities. Hence, the heliport will not be construed as such an outdoor amusement or recreation facility. Nor will the heliport be construed to be any other expressly permitted use in the Open district under the new Zoning Code. Under the new code, a heliport is a "nonconforming use" as defined under §25-1-5(b)(79).

5. Under §25-1-5(b)(79), a "non-conforming use" means a use lawfully in existence on September 21, 1966 or on the date of any amendment under this chapter, but which does not conform to the regulations for the zoning district in which it is located. Under §25-4-61(a), "any nonconforming use may continue to the extent it existed at the time of adoption of this chapter or any amendments thereto," and may be enlarged within

the building it occupies. The intent of §25-4-61(a) is to generally allow continuation of existing uses which may become non-conforming due to Zoning Code amendments.

6. Under §25-2-61(b), "Any use which received an approval as a conditionally permitted use prior to September 25, 1984, or which received prior approval through the use permit process, is considered a legal use of the affected parcel and may be expanded or enlarged without obtaining another use permit, provided such expansion, enlargement or addition is in full compliance with this chapter and the applicable district regulations." The intent of this section is to specifically provide for continuation of uses conditionally permitted, or established under use permits, when they become impermissible due to Zoning Code amendments.

7. Neither §25-4-61(a) nor §25-2-61(b) expressly address the instant facts, where a use has been established pursuant to a Use Permit with a condition *limiting the lifetime* of the permit. These facts in effect represent the granting of a Temporary Use Permit subject to conditions. Nothing in the Zoning Code expressly addresses or authorizes the granting of Temporary Use Permits.

8. Under §25-2-64(b), "in approving any use permit application, the commission may issue the approval subject to conditions, including hours of daily operation and terms of the use permit. The conditions imposed by the commission shall bear a reasonable relationship to the use permit granted."

9. Some courts have construed such general authority to set conditions, as broad enough to include, where appropriate, time limitations. See, *Nance v. Council of City of Memphis*, 672 S.W. 208 (Tenn. App. 1983). Other authorities have found that absent express authority to set lifetime limitations, the power to do so is doubtful. 7 Rohan, Zoning and Land Use Controls, §44.04[1]; Anderson's American Law of Zoning, §21.33; *Scott v. Zoning Board of Appeals*, 88 A.D.2d 767, 451 N.Y.S.2d 499 (1982); *Room & Board Homes v. Gribbs*, 67 Mich. App. 381, 241 N.W.2d 216 (1976).

10. The question of whether a zoning authority has power to issue permits with lifetime limits depends on the language of the applicable ordinances. Chapter 25 nowhere authorizes or addresses the granting of temporary use permits, with limited lifetimes. In fact, neither §25-2-61(b), (the Use Permit grandfathering clause), nor §25-4-61(a), (the nonconforming use grandfathering clause) appear to have contemplated the possibility of a Temporary use permit, with a lifetime limit. Neither these sections, nor any other part of Chapter 25 cited by the parties, specifically provides for grandfathering or other disposition of a Temporary Use Permit with a lifetime limit, when the Zoning Code is amended and the use becomes otherwise nonconforming.

11. Appellant CAN notes that §25-2-61(b) indicates that any "expansion, enlargement or addition" to a legal use grandfathered under a Use Permit must be "in full compliance with this chapter and the applicable district regulations. CAN argues that an extension of the lifetime of the Use Permit would be such an "expansion, enlargement or

addition" to the use. Since heliports are no longer permitted in the Open district, CAN argues, any extension of the lifetime of the permit would now be in violation of, not compliance with Chapter 25. [Hence, CAN argues, the extension of the life of the Use Permit was in violation of §25-2-61(b) and the Commission had no power to grant such an extension.]

12. However, the expressed intent of §25-2-61(b) was not to terminate uses established under Use Permits, but to grandfather them, to *allow them to continue* when changes in the zoning code result in their no longer being normally permitted. §25-2-61(b) simply does not address the instant facts, where a use has been established under a Use Permit, but was made subject to a limited life of the permit. Moreover, the requirement of compliance with district regulations addresses expansion, enlargement or addition "without obtaining another use permit;" it does not address the Commission's power to set or modify conditions. [Therefore, the Board will not adopt CAN's interpretation of §25-2-61(b).]

13. CAN further argues that the temporal expansion of Manulwa's use of the Volcano heliport violated §25-4-61(a), which prohibits the expansion of this nonconfirming use beyond "the extent it existed" on December 7, 1996, when the new Zoning Code took effect. CAN contends that the "extent" of Manulwa's use of the Volcano heliport includes Condition No. 4 of the 1992 Permit, which required Manulwa to cease its operations no later than March 11, 1997.

14. However, §25-4-61(a) does not define "extent" of the use. Neither does it address modification of conditions. It does address spatial extent, but not temporal extent. To imply preclusion of modification of time conditions would be inconsistent with the Commission's general power to set and amend conditions. Morever, the Board now concludes that the imposition of a prospective expiration date was invalid. Thus, the "extent" limitations become irrelevant.

15. [13.] Manulwa and the Commission note that §25-2-61(b) says "[a]ny use which . . . received prior approval through the use permit process, is considered a legal use. . ." Manulwa and the Commission argue that the heliport use is therefore permanently established as a legal use. They argue that there was no need get any further extensions of the life of the permit, and that the Appeal is moot.

16. [14.] Although the general intent of §25-2-61(b) is to establish grandfathered uses under prior use permits, there is no indication in the language of the ordinance or the legislative history to indicate that the ordinance was intended to *nullify conditions* which the Commission may have applied to the establishment of the use. To so hold would be contrary to the Commission's authority to establish conditions generally. The record amply reflects that the Commission has always expressed concern about the possibility that the heliport use might at some point prove to be injurious to the surrounding wildlife or residents, and wanted to retain some review authority. Moreover, Manulwa's interpretation is contrary to twelve years and three prior extensions'worth of

administrative interpretation to the contrary, which show that all parties and the Commission regarded Manulwa's permit as time-limited. Therefore, the Board will not adopt Manulwa's and the Commission's interpretation of §25-2-61(b).

17. [15.] The Board's rejection of both camps' positions, after much rumination, hand-wringing and six(6) hearing dates reflects that Chapter 25 simply does not appear to have contemplated the granting of use permits with lifetime limits. The parties have had difficulty arguing their positions, and the Board had trouble deciding on those positions, because Chapter 25 does not authorize Temporary Use Permits, nor does it account for them in its grandfathering provisions. The parties and the Board have spent time and effort reaching for something that was not there.

18. [16.] The Commission may grant a use permit under conditions which require periodic review for compliance with conditions. See, *Fiol v. Howard County Board of Appeals*, 67 Md.App. 595, 508 A.2d 1005 (1986). However, a lifetime limitation is not an authorized or recognized condition under Chapter 25; a lifetime limit is not a proper condition, but a truncation of the use altogether, a granting of a Temporary Use Permit. The granting of a Use Permit "is tantamount to a legislative finding that the use is in harmony with the general zoning plan and that it will not adversely affect the neighborhood." Repeated extensions indicate that the use meets the necessary criteria; under such circumstances, denial of the permit would be arbitrary and capricious. *Scott v. Zoning Board of Appeals*, 88 A.D.2d 767, 451 N.Y.S.2d 499(1982).

19. [17.] Here, the Commission has repeatedly found that the heliport use met the criteria for issuance and continuation of the Use Permit, under specific conditions. The Commission could impose a condition for periodic review for compliance with those conditions. However, it was not authorized to issue a Temporary Use Permit that would automatically terminate. Such an automatic termination would be contrary to its prior repeated findings of conditional acceptability, and would be arbitrary and capricious. It would prejudge the future compliance or noncompliance of the use with respect to the criteria for permit issuance. Land users and the public should be able to rely on the Commission's findings of conditional acceptability, and the Commission should be fully aware of the long-term impact of its decisions.

20. [18.] Twice, in 1986 and again in 1992, the Commission granted Manulwa five (5) - year permit extensions. In 1997, the Commission granted a ten (10) - year extension. In all three extensions, the Commission noted that the reasons for granting the original use permit were still valid. In all three permit extensions, the Commission provided for termination should the use become a nuisance or be in breach of conditions. In granting the latest 10-year extension, the Commission evidently found that less frequent monitoring was sufficient, and that the use had established a substantially favorable track record of compliance with conditions.

21. Under §25-2-23 of the Zoning Code, the Board may affirm the decision of the Director or the Commission, or it may reverse or modify the decision or remand the

decision with appropriate instructions if based upon the preponderance of evidence the Board finds that:

(1) The director or commission, as appropriate, erred in its decision; or

(2) The decision violated this chapter or other applicable law; or

(3) The decision was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

22. [19.] Based on the foregoing, the Board concludes, by a preponderance of the evidence, by a 4 to 2 vote, that the Commission was in error, and acted arbitrarily and capriciously by issuing a further Temporary Extension to the Temporary Use Permit which had been previously issued. The history of this case shows that the Commission has repeatedly found that the heliport use met the criteria for conditional establishment of the heliport use. Therefore, the Use Permit will be modified to establish the use as permanent. In light of this permanence, the permit will be conditioned upon a new Condition 4, requiring that ManuIwa appear before the Commission every five (5) years for review of compliance with and review of conditions. Of course, the Commission retains the discretion to modify the applicable conditions upon a showing of cause, including deletion of the review condition. The Commission also retains jurisdiction to revoke the Use Permit upon a showing of sufficient cause.

DECISION AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, this Appeal is hereby denied, and the Planning Commission's decision to grant a ten (10) year extension of time modifying Condition 4 (life of the permit) of Use Permit No. 21 is modified as follows:

1. Condition 4 (life of the permit) is deleted. A new Condition 4 replaces it, to provide: "The petitioner shall appear before the Commission within five years of the date of this approval for review of compliance with all conditions of this Use Permit. Violation of any condition of this Use Permit [shall] may be cause for revocation. Notice of the review hearing shall be given to all persons who would be entitled to notice of an application for Use Permit under the Zoning code in effect at the time. Petitioner shall appear before the Commission for periodic review of compliance with conditions every five years thereafter."

2. References to the life of the permit being 10 years shall be deleted.

Dated: _____, Hawaii, _____.

BOARD OF APPEALS, COUNTY OF HAWAII

By_____
Deanna Hammersley