Harry Kim
Mayor

County of Hawai'i

PLANNING COMMISSION

101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720-3043
(808) 961-8288 • Fax (808) 961-8742

November 15, 2004

Mr. Sidney Fuke
100 Pauahi Street, Suite 212
Hilo, HI 96720

Dear Mr. Fuke:

Special Permit (SPP 827)
Request: Time Extension to Condition No. 2
Use Permit (USE 106)
Request: Amendments to Conditions 3, 6, 7 and 9
Applicant: Ainaloa Development Corporation
Tax Map Key: 1-6-4:21 & 57

The Planning Commission at its duly held public hearing on October 22, 2004, voted to accept the attached Planning Department's Proposed Findings of Fact, Conclusions of Law & Recommendation.

Specifically, the Planning Commission voted to approve Ainaloa Development Corporation's request for a 5-year time extension to Condition No. 2 (time to secure final plan approval) of Special Permit No. 827, which allowed an expanded golf clubhouse, recreational facilities, and related improvements on 7+ acres of land situated within the State Land Use Agricultural District.

The Planning Commission also took the following action to Ainaloa Development Corporation's request to amend or delete certain conditions of Use Permit No. 106, which allowed the development of an 18-hole golf course and related improvements on 200 acres of land zoned Agricultural 1-acre (A-1a):

Condition No. 3:	Approved a 5-year time extension to secure final plan approval for the proposed golf course and related improvements.
Condition No. 6:	Approved request to delete condition, which required construction of the Keaau-Pahoa Road/Ainaloa Boulevard intersection.
Condition No. 7:	Retained current language of condition to improve Ainaloa Boulevard.

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Condition No. 9: Retained current language of condition, with the exception of Condition No. 9(D). The requirement to donate funds for/or a water tanker and an asphalt paver to the Ainaloa Community Association was deleted.

The property is located along Ainaloa Boulevard at the extreme northwestern (mauka) end of Ainaloa Subdivision, approximately 3.7 miles from Highway 130, Keaau, Puna, Hawaii.

This approval does not, however, sanction the specific plans submitted with the request as they may be subject to change given specific code and regulatory requirements of the affected agencies.

Should you have any questions, please contact Norman Hayashi of the Planning Department at 961-8288.

Sincerely,

Fred Galdones, Chairman
Planning Commission

LainaloafinalPC
Attachment
cc/att: Department of Public Works
Department of Water Supply
County Real Property Tax Division
State Land Use Commission
Rodney Haraga, Director/DOT-Highways, Honolulu
Ainaloa Development Corporation
Sandra Pechter Song, Esq.
Colin Love, Esq.
Mr. Ole Fulks
Ivan Torigoe, Esq.
Bobby Jean Leithead-Todd, Esq.

SANDRA PECHTER SONG

ATTORNEY AT LAW

101 Aupuni Street, Suite 124
Hilo, Hawaii 96720
Telephone: (808) 933-9212
Fax: (808) 935-3945

2004 DEC 17 PM 4 12
PLANNING DEPARTMENT
COUNTY OF HAWAII

LETTER OF TRANSMITTAL

To: Planning Commission
County of Hawaii
101 Pauahi Street, Suite 3
Hilo, Hawaii 96720

Ole Fulks
HC-1, Box 5664
Keaau, Hawaii 96749

Christopher Yuen
Planning Director.
County of Hawaii
101 Pauahi Street, Suite 3
Hilo, Hawaii 96720

Lincoln Ashida, Esq.
Ivan Torigoe, Esq.
Bobby Jean Leithead-Todd
Office of the Corporation Counsel
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

Date: December 13, 2004

From: Sandra P. Song

Re: *Ainaloa Development Corporation v. County of Hawaii Planning Commission, et al.*, Civil No. 04-1-0421

We are sending you (X) attached ( ) under separate cover the following items:

- File stamped copy of Notice of Appeal to Circuit Court; Statement of the Case; Exhibit "A"; Designation of Record on Appeal; Order for Certification and Transmission of Record; Certificate of Service

[ ] For your information/file
[ ] For review and comment
[ ] For your reference
[ ] For signature in black ink and forwarding as noted below
[ ] For filing or recording
[ ] SEE REMARKS BELOW

[ ] For payment
[ ] For signature in black ink and return
[ ] Per your request
[ ] Per our conversation
[ ] For your approval
[X] For necessary action

REMARKS:

00292

#63421

SANDRA PECHTER SONG 1552
101 Aupuni Street, Suite 124
Hilo, Hawaii 96720
Tel. No. (808) 933-9212
Fax No. (808) 935-3945

Attorney for Appellant
Ainaloa Development Corporation

FILED

2004 DEC 13 PM 3:27

C. OKAWA, CLERK
THIRD CIRCUIT COURT
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

AINALOA DEVELOPMENT CORPORATION, Appellant, vs. COUNTY OF HAWAII PLANNING COMMISSION; CHRISTOPHER YUEN, Planning Director, County of Hawaii; and OLE FULKS, Appellees.	CIVIL NO. 04-1 -0421 (Agency Appeal) NOTICE OF APPEAL TO CIRCUIT COURT; STATEMENT OF THE CASE; EXHIBIT "A"; DESIGNATION OF RECORD ON APPEAL; ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD; CERTIFICATE OF SERVICE

NOTICE OF APPEAL TO CIRCUIT COURT

Notice is hereby given that Appellant Ainaloa Development Corporation, hereby appeals to the Circuit Court of the Third Circuit from the decision rendered by the Hawaii County Planning Commission on November 15, 2004 regarding Use Permit No. USE 106. A copy of the decision is attached hereto as Exhibit "A".

This appeal is brought pursuant to Hawaii Revised Statutes Section 91-14 and Rule 72 of the Hawaii Rules of Civil Procedure.

DATED: Hilo, Hawaii, December 13, 2004

SANDRA PECHTER SONG
Attorney for Appellant
Ainaloa Development Corporation

I hereby certify that this is a full, true and correct copy of the original on file in this office.

Clerk, Third Circuit Court, State of Hawaii

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

AINALOA DEVELOPMENT CORPORATION, Appellant, vs. COUNTY OF HAWAII PLANNING COMMISSION; CHRISTOPHER YUEN, Planning Director, County of Hawaii; and OLE FULKS, Appellees.	)	CIVIL NO._____ (Agency Appeal) STATEMENT OF THE CASE

STATEMENT OF THE CASE

Appellant Ainaloa Development Corporation (hereinafter "Ainaloa"), by and through its above-named attorney, for a Statement of the Case, alleges and avers as follows:

1. Ainaloa is a Hawaii corporation, with its principal place of business in Honolulu, Hawaii, and is the owner of a 200 acre parcel of land situated at Keaau, District of Puna, County and State of Hawaii, and designated by State of Hawaii Tax Map Key Nos: (3) 1-6-004-021 and 057, (hereinafter "Ainaloa's Land").

2. Appellee County of Hawaii Planning Commission (hereinafter "Commission"), is an agency of the County of Hawaii, that is responsible for issuing certain land use permits, including special permits and use permits, and is the agency that issued the decision involved in the subject appeal.

3. Appellee Christopher Yuen (hereinafter "Yuen") is the Planning Director of the County of Hawaii, and is joined as party herein in that he was a party to the Commission proceeding being appealed.

4. Appellee Ole Fulks (hereinafter "Fulks") is a resident of Puna, County and State of Hawaii, and is joined as a party herein in that he was a party to the Commission proceeding being appealed.

5. This appeal involves a decision rendered by the Commission on November 15, 2004, regarding amendments requested by Ainaloa to Use Permit No. USE 106 (hereinafter, "Use Permit No. 106") previously issued on November 4, 1992 for the development of an 18-hole golf course, golf clubhouse and related improvements on Ainaloa's Land. A copy of the decision is attached hereto as Exhibit "A."

6. Ainaloa's Land is zoned Agriculture, with a minimum lot size of one-acre. A golf course is a permitted land use on Ainaloa's Land; however, under Section 25-2-60 of the Hawaii County Zoning Code (hereinafter "Zoning Code"), the Commission must issue a use permit prior to this type of use being established.

7. Section 25-2-60 provides that a use permit is a permit for certain types of permitted uses which require special attention to insure that the uses will not unduly burden public agencies to provide public services or cause substantial adverse impacts upon the surrounding community.

8. Section 25-2-64(b) of the Zoning Code authorizes the Commission to impose conditions when it issues a use permit only if the conditions bear a reasonable relationship to the use permit granted.

9. In September, 2003, Ainaloa filed an application with the Commission to amend four conditions in Use Permit No. 106:

(a) Amendment to Condition No. 3 to allow a five-year time extension to obtain final plan approval from the County Planning Department for the golf course improvements;

(b) Deletion of Condition No. 6, which required Ainaloa to channelize the Keaau-Pahoa Road/Ainaloa Boulevard intersection;

(c) Amendment of Condition No. 7 which would permit Ainaloa to contribute $1,000,000 to the County of Hawaii for improvements to Ainaloa Boulevard, in lieu of improving the entire 3.1 mile length of Ainaloa Boulevard, at a cost of approximately $6,000,000; and

(d) Amendment to Condition No. 9, to delete the requirement of purchasing an asphalt paver and water tanker, and constructing bus shelters for the Ainaloa Community Association.

10. Although the Commission granted Ainaloa's time extension request, amending

Condition No. 3, and deleted the road channelization requirement of Condition No. 6 because the State of Hawaii had already made such improvement, the Commission failed to amend Condition Nos. 7 and 9.

11. None of the other 3,500 lots in the Ainaloa Subdivision, which have access onto Ainaloa Boulevard, are being required by the County of Hawaii to pay for any roadway improvements to Ainaloa Boulevard, as a condition of land use development.

12. The establishment of a golf course on Ainaloa's land would result in a substantially lower impact upon the use of Ainaloa Boulevard than would the subdivision of the same land into individual lots, and the improvement of the entire length of Ainaloa Boulevard would not be required as a condition of the subdivision of Ainaloa's land into individual lots.

13. The use of Ainaloa Land for a golf course does not unduly burden public agencies to provide services, including roadways for the golf course; nor does cause a substantial adverse impact to either Ainaloa Boulevard or the adjoining Ainaloa Subdivision.

14. The Commission's action in maintaining the roadway improvements and equipment purchase requirements of Condition Nos. 7 and 9 imposes unconscionable exactions upon Ainaloa for the development of its golf course.

FIRST CAUSE OF ACTION

(Due Process)

15. Paragraphs 1 through 14 are incorporated by reference herein as if fully set forth.

16. There is not a reasonable connection between the golf course proposed and the exactions required of Ainaloa under Condition Nos. 7 and 9 of Use Permit No. 106; nor, is there a rational nexus between the conditions imposed and the impacts of the golf course development.

17. As such, the Commission's action deprives Ainaloa of its Property without due process of law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 5 of the Hawaii State Constitution.

SECOND CAUSE OF ACTION

(Statutory Violation)

18. Paragraphs 1 through 17 are incorporated by reference herein as if fully set forth.

19. The exactions imposed by the Commission under Condition Nos. 7 and 9 of Use

Permit No. 106 do not bear a reasonable relationship to the golf course development, as required by the County Code.

20. The Commission violated the County Code by maintaining Condition Nos. 7 and 9 of Use Permit No. 106.

THIRD CAUSE OF ACTION

(Exceeding Statutory Authority)

21. Paragraphs 1 through 20 are incorporated by reference herein as if fully set forth.

22. The Commission exceeded its statutory authority by maintaining conditions in Use Permit No. 106 which did not have a reasonable relationship to the golf course development authorized under this permit.

FOURTH CAUSE OF ACTION

(Erroneous Decision)

23. Paragraphs 1 through 22 are incorporated by reference herein as if fully set forth.

24. The Commission's decision in maintaining Condition Nos. 7 and 9 of Use Permit No. 106 was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

FIFTH CAUSE OF ACTION

(Arbitrary Action)

25. Paragraphs 1 through 24 are incorporated by reference herein as if fully set forth.

26. The action of the Commission in denying Ainaloa's request to amend Condition Nos. 7 and 9 of Use Permit No. 106 was arbitrary and capricious, and characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

WHEREFORE, Ainaloa prays as follows:

1. That this Court reverse those certain portions of the Commission's decision of November 15, 2004 in Use Permit No. 106, relating to Condition Nos. 7 and 9;

2. That this Court declare those portions of Condition Nos. 7 and 9 requiring the improvement of Ainaloa Boulevard, the purchase of an asphalt paver and water tanker, and the construction of bus shelters along Ainaloa Boulevard to be invalid and unenforceable;

3. That Ainaloa be permitted to proceed with its golf course development without the

roadway improvement and equipment purchase exactions required under Condition Nos. 7 and 9 of Use Permit No. 106; and

4. That Ainaloa be awarded its costs, including reasonable attorneys' fees, and such other relief as the Court may deem just and proper.

DATED: Hilo, Hawaii, December 13, 2004

SANDRA PECHTER SONG
Attorney for Appellant
Ainaloa Development Corporation

Harry Kim
Mayor

County of Hawai'i

PLANNING COMMISSION

101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720-3043
(808) 961-8288 • Fax (808) 961-8742

November 15, 2004

Mr. Sidney Fuke
100 Pauahi Street, Suite 212
Hilo, HI 96720

Dear Mr. Fuke:

Special Permit (SPP 827)
Request: Time Extension to Condition No. 2
Use Permit (USE 106)
Request: Amendments to Conditions 3, 6, 7 and 9
Applicant: Ainaloa Development Corporation
Tax Map Key: 1-6-4:21 & 57

The Planning Commission at its duly held public hearing on October 22, 2004, voted to accept the attached Planning Department's Proposed Findings of Fact, Conclusions of Law & Recommendation.

Specifically, the Planning Commission voted to approve Ainaloa Development Corporation's request for a 5-year time extension to Condition No. 2 (time to secure final plan approval) of Special Permit No. 827, which allowed an expanded golf clubhouse, recreational facilities, and related improvements on 7+ acres of land situated within the State Land Use Agricultural District.

The Planning Commission also took the following action to Ainaloa Development Corporation's request to amend or delete certain conditions of Use Permit No. 106, which allowed the development of an 18-hole golf course and related improvements on 200 acres of land zoned Agricultural 1-acre (A-1a):

Condition No. 3:	Approved a 5-year time extension to secure final plan approval for the proposed golf course and related improvements.
Condition No. 6:	Approved request to delete condition, which required construction of the Keaau-Pahoa Road/Ainaloa Boulevard intersection.
Condition No. 7:	Retained current language of condition to improve Ainaloa Boulevard.

Condition No. 9: Retained current language of condition, with the exception of Condition No. 9(D). The requirement to donate funds for/or a water tanker and an asphalt paver to the Ainaloa Community Association was deleted.

The property is located along Ainaloa Boulevard at the extreme northwestern (mauka) end of Ainaloa Subdivision, approximately 3.7 miles from Highway 130, Keaau, Puna, Hawaii.

This approval does not, however, sanction the specific plans submitted with the request as they may be subject to change given specific code and regulatory requirements of the affected agencies.

Should you have any questions, please contact Norman Hayashi of the Planning Department at 961-8288.

Sincerely,

Fred Galdones, Chairman
Planning Commission

LainaloafinalPC
Attachment
cc/att: Department of Public Works
Department of Water Supply
County Real Property Tax Division
State Land Use Commission
Rodney Haraga, Director/DOT-Highways, Honolulu
Ainaloa Development Corporation
Sandra Pechter Song, Esq. ✓
Colin Love, Esq.
Mr. Ole Fulks
Ivan Torigoe, Esq.
Bobby Jean Leithead-Todd, Esq.

EXHIBIT A-2

BEFORE THE COUNTY OF HAWAI'I

PLANNING COMMISSION

In the Matter of the Application of AINALOA DEVELOPMENT CORPORATION To Amend Conditions of Use Permit No. 106 and Special Permit No. 827, which allowed the Development of a Golf Course Golf clubhouse, and Related Improvements On Lands within the State Land Use Agricultural District and County's Agricultural 1-acre Zoned District at Keaau, Puna, Hawai'i, TMK: 1-6-04:21 and 57.	USE PERMIT NO. 106 SPECIAL PERMIT NO. 827 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER Hearing Date: October 22, 2004

s:dept\plan\Ainaloa Contested Case BLT/ Final FOF COL 11-8-04 BLTpc.wpd

FINDINGS OF FACT, CONCLUSIONS OF LAW
DECISION AND ORDER

This matter came on for contested case hearing on October 22, 2004 before the County of Hawaii Planning Commission. Applicant, Ainaloa Development Corporation (hereinafter "Applicant") was represented its counsel, by Sandra P. Song. Applicant's representative Sydney Fuke was also present. The County of Hawaii Planning Department (hereinafter "Department") was represented by Deputy Corporation Counsel, Bobby Jean Leithead-Todd. Norman Hayashi was also present on behalf of the Department. Intervener Ole' Fulks (hereinafter "Fulks") represented himself. Hearings Officer, Colin L. Love was also present.

EXHIBIT A-3

After hearing all the evidence presented at the hearing and having reviewed the file, exhibits, and the Hearing's Officer's recommendations from the July 29, 2004 contested case hearing, the Planning Commission makes the following findings of fact and conclusions of law:

Findings of Fact

1. Ainaloa Development Corporation submitted a request for:

   a. 5-year extension to Condition No. 2 (secure plan approval) of Special Permit No. 827, which allowed an expanded golf clubhouse, recreational facilities, and related improvements on approximately 7 acres of land situated within the State Land Use Agricultural District.

   b. 5-year extension to Condition No. 3 (secure plan approval), deletion of Condition No. 6 (intersection improvements), amend Condition No. 7 (roadway improvements) and Condition No. 9 (community benefit program) of Use Permit No. 106, which allowed the development of an 18-hole golf course and related improvements on 200 acres of land zoned Agricultural (A-1a).

2. The properties are located along Ainaloa Boulevard at the extreme northwestern (mauka) end of Ainaloa Subdivision, approximately 3.7 miles from Highway 130, Keaau, Puna, Hawaii, TMK: 1-6-4:21 and 57.

3. On November 9, 1992 the Planning Commission approved Special Permit No. 827 and Use Permit No. 106.

4. On March 14, 1994 Applicant requested a time extension to Condition No. 2 of Special Permit No. 827 and Condition No. 3 of Use Permit No. 106.

5. On April 25, 1994, the Planning Director granted a time extension until November 12, 1995 to comply with Condition No. 2 of Special Permit No,.827 and Condition No. 3 of Use Permit No., 106.

6. On September 18, 1996 the Applicant requested an additional time extension to Condition No. 2 of Special Permit No. 827 and Condition No. 3 of Use Permit No. 106.

7. On November 20, 1998 the Planning Commission granted a five-year extension until December 7, 2003 to comply with Condition No. 3 of Use Permit No. 106. The Planning Commission agreed with the Applicant that the delay could not have been foreseen and was beyond the control of the Applicant. The approval was in part because the initial approvals had been appealed to the Board of Appeals in December 1992. Then it was appealed to the Third Circuit Court in November 1993 and then to the State Supreme court in August 1994. In October 1997, the Supreme Court sustained the decisions of the Planning Commission and the Board of Appeals. The Planning Commission agreed that due to the appeals and global financial and economic conditions, the Applicant was unable to comply with the conditions of approval.

8. Applicant's request for a third time extension is based upon their assertion that their inability to comply with the conditions was a result of circumstances that could not have been foreseen or were beyond the control of the Applicant, and not attributable to any negligence. Applicant asserts that since being granted the five year extension of November 1998, legal challenges, global economic malaise, the residual effects of the SARS epidemic, and the worldwide threat of terrorism affected the applicant's ability to pursue the development.

9. Applicant's request to delete Condition No. 6 of the Use Permit was based upon the fact that the State completed the intersection improvements and the condition is no longer applicable.

10. Applicant is proposing that Condition No. 7 of the Use Permit be amended to allow a $1,000,000.00 contribution in lieu of providing the extensive off-site roadway and related improvements. The Applicant proposes to make a contribution to the County for roadway and related improvements to Ainaloa Boulevard. Applicant proposes that a minimum of $500,000.00

will be contributed prior to issuance of any construction permit for the golf course and the remaining $500,000.00 be paid prior to the opening of the golf course.

11. Applicant is proposing that Condition No. 9 of the Use Permit be amended to delete the requirement to purchase an asphalt paver and water tanker for the Ainaloa Community Association as well as the construction of a bus shelter. Applicant alleges that it has insufficient funds to provide the existing community benefits it agreed to provide.

12. The existing Condition No. 2 of Special permit No. 827 states:

> "2. Plans for the proposed expanded clubhouse and recreational facilities shall be submitted concurrently with plans submitted for Final Plan Approval review for the proposed golf curse and related improvements. To assure adequate time for Plan Approval review, and n 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. In the design and review of any improvements, due consideration shall be entail the minimization of noise and visual impacts through appropriate siting, height, bulk, color schemes, and landscaping. Plans shall identify all structures, landscaping, and paved parking stalls associated with the proposed development."

13. Condition Nos. 3. 6, 7 and 9 of Use Permit No. 106 states:

> "3. Final Plan Approval for the proposed golf curse and related improvements shall be secured from the Planning Department within five (5) years from the effective date of this second 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 forty0five (45) days prior to he date by which plan approval must be secured. Plans shall identify all structures, landscaping, which shall include a 40-foot perimeter landscaping buffer, and paved parking stalls associated with the proposed development."
>
> "6. The Keaau-Pahoa Road/Ainaloa Boulevard intersection shall be fully channelized meeting with the approval of the State Department of Transportation-Highways Division and/or the County Department of Public Works, prior to the issuance of the certificate of occupancy or the opening of the golf course, whichever occurs first."
>
> "7. Ainaloa Boulevard from Keaau-Pahoa Road to the entrance of the project site shall be upgraded to County dedicable standards meeting with the approval of the Department of Public Works. Stop signs and street lights shall also be installed at all lateral roads fronting Ainaloa Boulevard with an existing power pole. In addition, for pedestrian safety, the applicant shall extend the pavement width

within the existing right-of-way of Ainaloa Boulevard, including the striping or installing of a rolled curb. All roadway improvements to Ainaloa Boulevard shall be completed prior to he issuance of the certificate of occupancy or opening of the golf course, whichever occurs first."

"9. To ensure that he goals and policies of the General Plan are implemented, the Planning Director shall formulate a community benefit assessment program which shall include the following: (A) a program for public play at reasonable costs, (B) a program for reasonable access to the proposed recreational facilities by Ainaloa Subdivision residents, (C) a standpipe, providing water for potable and firefighting purposes, to be located on a park site owned by the Ainaloa Community Association, (D) funds for/or a water tanker and an asphalt paver to be donated to the Ainaloa Community Association, (E) bus shelters to be constructed at different locations along Ainaloa Boulevard within the existing right-of-way, and shall not preclude other community benefit assessments as may be approved by the Planning Director. The community benefit assessments, as outlined in the developer's letter of October 2, 1992 to the Planning director, shall also be provided. Such community benefits shall be implemented prior to the official opening of the golf course."

14. At the time both permits were initially approved in 1992, the permits were granted based upon representations made by the Applicant and the understandings of the community that a number of much-needed improvements would be made by the Applicant. These agreements or understandings were included as conditions in the permits. Thirteen years have passed since the original granting of the permit. None of the community benefits in the conditions have been satisfied, with the exception of Condition No. 6 of the Use Permit. This was not completed by the Applicant but was completed by the State.

15. The Planning Director recommended approval of the request for an additional time extension and recommended approval of the amendments to Condition No. 2 of Special Permit No. 827 and Conditions Nos. 3 and 6 of Use Permit No. 106.

16. The Planning Department recommended that Condition No. 7 of the Use Permit No. 106 be retained with its present wording and that the request to amend it be denied. This was based upon the request being contrary to the original reasons for granting the Special Permit. The

original granting of the permit was based in part on the support of the community. Community support was based upon the representations of the developer.

17. The Planning Department's recommendations states that the:

> "Although this request would not be contrary to the General Plan or the Zoning Code as there are no changes to either designation, it would be contrary to the original reasons for granting the Special Permit. In supporting this project, the community had relied in large part to the representations made by the applicant in 1992. The applicant's request to amend Condition No. 9 of the Use Permit, to delete a portion of the requirement to purchase an asphalt paver and water tanker for the Ainaloa Community Association because 'there are insufficient funds to provide a community benefit program that exceeded standard permitting requirements' is unreasonable. The community had supported the project based upon representations made by the applicant at the time the permits were approved, and not to provide the required benefits to the community would negate the good faith efforts of both the applicant and the community. The community had relied on the applicant to provide benefits. The agreements or understandings were included as conditions in the permits to offset the impact of the proposed project on the surrounding community. Therefore, the Planning Director does not support the applicant's request to amend Condition No. 9 of Use Permit No. 106.

18. Mr. Ed Smythe, a member of the Ainaloa Community Association's board of directors testified. He stated a survey had been conducted regarding the donation of one million dollars for improvements to Ainaloa boulevard. The survey was mailed to all 3,600 property owners who are members of the community association. Seven hundred ninety-seven (797) voted in favor. About 100 voted no and 88 did not take a position. The results were printed in the association newsletter. The survey letter sent out to the members of the association asking if they were in favor of the $1,000,000 contribution towards improvements, the water standpipe and access to the golf course did not mention what was being deleted from the conditions. No communication was sent to all the property owners/members of the association that the donation of the asphalt paver and the water tanker was being deleted from the conditions, nor was any

information sent out regarding the original condition requiring improvement of the entire roadway to County dedicable standards or the construction of bus shelters. (Transcript at 94)

19. Mr. Gary Safarik, a resident of Ainaloa subdivision and Council representative of District 5 (which includes Ainaloa) testified. Mr. Safarik stated that the County Council adopted a resolution to acquire the "Puna Emergency Access Road" either through eminent domain or through negotiation. Ainaloa Boulevard is part of the Puna Emergency Access Road. The Ainaloa Community Association has agreed to turn over Ainaloa Boulevard to the County. Upon donation of the roadway, the County would assume ownership, maintenance and liability for the roadway. The Puna Emergency Access Road connects Ainaloa Boulevard to a roadway (8 Road) in Hawaiian Acres. The County is looking into acquiring an easement over the Hawaiian Acres portion of the emergency road. The Council has earmarked $3.5 million dollars to address site distance and safety issues on Ainaloa Boulevard and flooding issues in Hawaiian Acres. The County has already spent two million in federal monies to improve the Puna Emergency Access Road. Even with two million dollars, the County was only able to do a minimal amount of work, basically resurfacing the roadway that is substandard and dangerous in some areas. (Transcript pp. 18-24).

20. At the time the original permit was granted, Ainaloa and Hawaiian Acres were not connected. With the connection of Ainaloa to Hawaiian Acres, the roadway will become an alternate route for people in the Puna region, thus increasing the traffic on Ainaloa Boulevard.

21. If the Applicant is required to improve Ainaloa Boulevard to dedicable standards as required by the original conditions, the County will have the ability to use the $3.5 million earmarked for the Puna Emergency Access Road on the Hawaiian Acres portion of the road. According to Mr. Bruce McClure, Director of Public Works for the County of Hawaii, just the

Hawaiian Acres portion of the emergency roadway would cost between $8 and $10.6 million dollars to improve.

22. Ainaloa Boulevard is 3.7 miles long. Based upon Mr. McClure's estimates of a cost of $1.5 to $2 million dollars per mile of roadway, the cost to improve Ainaloa Boulevard to a county dedicable standard far exceeds the $1 million offered by the Applicant.

23. The original conditions imposed upon the project were estimated in 1992 to cost about $6.8 million dollars. In an October 2, 1992 letter (Planning Dept. Exhibit 9) from Ainaloa Development Corporation to Planning Director, Norman Hayashi, the Applicant stated that:

> "For your information, our consultants have estimated our community benefits proposal (off-site infrastructural improvements costs only) at $6.8 million. The specific breakdown follows:
>
> | | | (In millions) |
> |---|---|---|
> | d. | Upgrade Ainaloa Boulevard | - $6.100 |
> | e. | Channelized intersection | - $ .300 |
> | f. | Street lights | - $ .150 |
> | g. | Potable water line and Standpipe | - $ .050 |
> | e. | Water truck | - $ .075 |
> | f. | Road paver | - $ .125 |
> | | TOTAL | $ 6.800 |
>
> The community benefits program also includes recreational benefits that are not specifically measurable in terms of dollars and cents. This program includes public access to the golf course at reasonable rates and some structure use of the other components of the recreational facility.
>
> Then, too, potable water would be provided to the community at no cost. We have not included this as part of the aforementioned cost. Nonetheless, the availability of a reliable source of potable water should be of benefit to this area.
>
> We trust that the foregoing package of benefits meets the requirements of the County's Community Benefits Assessment program; and if so, we would have no objection to your making this a part of the Commission's condition of approval."

24. Based on 1992 dollars, Applicant is proposing to reduce its community benefit package from $6.8 million to $1.050 million, less than 1/6th of what they offered in 1992. If adjusted for current inflation and current construction prices, the reduction in benefits is much greater.

25. The vast majority of the members of the Ainaloa Community Association were not informed of the difference between what was originally agreed to by the Applicant valued at $6.8 million and the current proposal to only contribute $1 million and build the water standpipe, so they did not have a true opportunity to respond to the proposed changes.

Conclusions of Law

1. The request for amendment of Condition No. 3 of Use Permit No. 106 to authorize a five-year time extension for obtaining plan approval for Ainaloa's golf course would not be contrary to the General Plan or the Zoning Code and is consistent with the requirements for time extension.

2. The request for an amendment to Condition No. 2 of Special Permit No. 827 to authorize a five-year time extension for obtaining plan approval for Ainaloa's expanded golf course clubhouse, recreational facilities and related improvements would not be contrary to the General Plan or the Zoning Code and is consistent with the requirements for time extension.

3. Since the requirements of Condition No. 6 of Use Permit No. 106 have been completed by the State of Hawaii, deletion of Condition No. 6 is appropriate.

4. Reducing Applicant's community benefits assessments from $6.8 million dollars (1992 values) to $1,050,000 (one million roadway and fifty thousand for water standpipe) solely on the basis that the Applicant can no longer afford the benefits is not a reasonable basis for changing the benefits package which was agreed to by the Applicant at the time the permits were originally approved.

5. Reducing the community benefits package on the basis that the condition does not bear a reasonable relationship to the use permit granted should not be the basis for an amendment to conditions agreed to by the Applicant when the permits were granted. The time to raise those objections to the assessments should have been at the time of the original grant of the permits, or by appealing those assessments in 1992.

6. Since there was no objection from the Ainaloa Community Association to elimination of the water truck and road paver from the Community Benefits Assessment, items "d" can be deleted from Condition No. 9 of the Use Permit.

Decision and Order

Based upon the preceding findings of fact and conclusions of law, Ainaloa Development Corporation's request to amend Condition No. 3 of the Use Permit to approve a five-year time extension is granted. Applicant's request to amend Condition No. 2 of Special Use Permit No. 827 to allow a five-year time extension is granted. Applicant's request to delete Condition No. 6 of Use Permit No. 106 is granted. Applicant's request to amend Condition No. 7 is denied. Applicant's request to amend Condition No. 9 of Use Permit No. 106 is denied in part and granted in part. Condition No. 9 is amended by deleting item "9.d", the asphalt paver and water tank.

DATED: Hilo, Hawai'i, November 15, 2004.

Fred Galdones, Chairman
Hawaii County Planning Commission

EXHIBIT A-12

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

AINALOA DEVELOPMENT CORPORATION, Appellant, vs. COUNTY OF HAWAII PLANNING COMMISSION; CHRISTOPHER YUEN, Planning Director, County of Hawaii; and OLE FULKS, Appellees.	)	CIVIL NO._____ (Agency Appeal) DESIGNATION OF RECORD ON APPEAL

DESIGNATION OF RECORD ON APPEAL

Appellant Ainaloa Development Corporation, hereby designates the entire record and file pertaining to this matter, including all transcripts, minutes, notes, correspondence and exhibits.

DATED: Hilo, Hawaii, December 13, 2004.

SANDRA PECHTER SONG
Attorney for Appellant
Ainaloa Development Corporation

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

AINALOA DEVELOPMENT CORPORATION,	)	CIVIL NO._____
	)	(Agency Appeal)
Appellant,	)	
	)	ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD
vs.	)	
	)	
COUNTY OF HAWAII PLANNING COMMISSION; CHRISTOPHER YUEN, Planning Director, County of Hawaii; and OLE FULKS,	)	
	)	
Appellees.	)	
	)	

ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD

TO: CHAIRMAN
COUNTY OF HAWAII PLANNING COMMISSION
101 Pauahi Street, Suite 3
Hilo, Hawaii 96720

YOU ARE HEREBY ORDERED to certify and transmit to this Court within twenty (20) days of the date of this Order, or within such further time as may be allowed by this Court, the entire records of all proceedings pertaining to the above-captioned matter pursuant to Hawaii Revised Statutes, Section 91-9(e).

DATED: Hilo, Hawaii, DEC 13 2004.

C. OKAWA (SEAL)

Clerk of the above-entitled Court

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

AINALOA DEVELOPMENT CORPORATION, Appellant, vs. COUNTY OF HAWAII PLANNING COMMISSION; CHRISTOPHER YUEN, Planning Director, County of Hawaii; and OLE FULKS, Appellees.	)	CIVIL NO._____ (Agency Appeal) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was duly served upon each of the following by mailing the same, postage prepaid on December 13, 2004.

HAWAII COUNTY PLANNING COMMISSION
101 Pauahi Street, Suite 3
Hilo, Hawaii 96720
Appellee

CHRISTOPHER YUEN
Planning Director
County of Hawaii
101 Pauahi Street, Suite 3
Hilo, Hawaii 96720
Appellee

OLE FULKS
HC-1, Box 5664
Keaau, Hawaii 96749
Appellee

LINCOLN ASHIDA, ESQ.
IVAN TORIGOE, ESQ.
BOBBY JEAN LEITHEAD-TODD
Office of the Corporation Counsel
County of Hawaii
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720
Attorney for Appellees
Hawaii County Planning Commission
and Christopher Yuen

DATED: Hilo, Hawaii, December 13, 2004

SANDRA PECHTER SONG
Attorney for Appellant
Ainaloa Development Corporation