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ATTORNEYS AT LAW

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Mr. Christopher Yuen, Director
Planning Department
County of Hawaii
100 Pauahi Street, Suite 3
Hilo, HI 96720

In Re: Change of Zone Ordinance 93-109 and 86-82, as amended by Ord. 90-07 and by SMA Permit No. 341 and Final Plan Approval dated March 12, 2008 Mahukona, Kamano, Kou and Kapa'anui at North Kohala TMK Nos. 5-7-02:11, 5-7-03:03 and 10

Aloha Mr. Yuen,

This office represents Kako'o, or Kamakani O'Kohala Ohana, an environmental organization that has long focussed on the North Kohala Coastline. Toni Withington, a member of this organization, has recently written you a letter concerning the upcoming expiration of Kohala Preserve Conservation Trust LLC's (KPCT) building permits at Mahukona, in Kohala. We have reviewed our files, and are concerned that KPCT has sought and been issued permits in a fashion prohibited by the Hawaii Administrative Rules. Our client is also concerned that your office may extend KPCT's permits beyond the July 14, 2008 deadline despite KPCT's failure to comply with permit conditions in a timely fashion.

As you are aware, our client alleges that KPCT has been segmenting its project. We use the term 'segment' to refer to the developer practice of securing a permit for a project that it cannot build, either because it is beyond the developer's capacity or the project is untimely from an economic standpoint, and then attempting to keep the permit alive (thus avoiding further review) by performing small, cheap segments and claiming they represent serious performance. It is a practice that, by its nature, undermines the planning process and cheats the public of its right to a voice. KPCT is trying to take the practice to a new level by asserting that it has a right to segment and that the government agencies charged with planning can do nothing about it.

I refer specifically to KPCT's brazen statement in its March 27, 2008 letter to your office, that said "the Final PA is conditioned upon conditions of the change of zoning and/or SMA approval *which have previously been complied with and are not pertinent to the Final PA.*" KPCT letter to Planning Director, March 27, 2008, page one, emphasis added. There is good reason for the obscure language. What the developer is trying to sell is the concept that the "Final PA" has nothing to do with the project as a whole but is limited to whatever part of the project (segment) the developer has decided to attend to. In other words, KPCT is asserting that the Mahukona project Plan Approval can be subdivided into as many little "Final PAs" as it wishes and the Planning Director can only require adherence to those project conditions that are directly required for the individual piece at hand.

Under this scenario, the developer takes over the planning process, the public is out of the loop, and a project can be stretched out over as much time as the developer, in its own discretion, wants. Once a project has been approved, there is no further use for a Planning Director, Commission or Board of Appeals.

This scheme has been anticipated by the law. HAR §11-200-7 specifically disallows it. This provision says that: "[a] group of actions proposed by an agency or an applicant shall be treated as a single action when:

- (1) The component actions are phases or increments of a larger total undertaking;
- (2) An individual project is a necessary precedent for a larger project;
- (3) An individual project represents a commitment to a larger project; or
- (4) The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action as a whole.

The "or" at the end of item 3 tells us that any one of the individual subsections would trigger HAR §11-200-7. KPCT has triggered all four. KPCT is planning on building a residential community, golf course and larger resort after the duplexes have been built. HAR §11-200-7(1). KPCT has divided the infrastructure (Phase I) from the resort buildings (Phase II), and is obliged to bring potable water and a waste management system to their hotel as a precedent to development. HAR §11-200-7(2) and (3). KPCT has committed to provide potable water and waste management systems to nearby public parks (HAR §11-200-7(3)). There is, of course, a single plan here, however inconvenient that may be to the developer, and the Rule requires that the project be viewed as a whole

rather than as isolated, individual developments. The Rule also requires that the plans KPCT submits must reflect the project in its final build out, not just tiny portions, as it has been doing. HAR §11-200-7(4).

From our community's point of view, a very serious problem with KPCT's proposed permitting scheme is the idea that condition 3e of the Final Plan Approval is tied to development of the proposed residential community, and not to the hotel itself. Providing potable water to the parks is a requirement of KPCT's ordinance, SMA permit and Final Plan Approval. As Mrs. Withington has stated, the failure by KPCT to fulfill its obligations to the parks has gone hand in hand with inaction by the County, apparently in reliance on KPCT's undertakings. Nearly two decades have gone by and both affected parks are in bad shape and deteriorating. By asserting that the wells only need to be permitted in conjunction with the residential community, KPCT is telling us that the parks will not receive potable water until KPCT decides to begin developing the residential community. This is in direct conflict with the Ordinance, SMA permit and Final Plan Approval that your office approved, and is also in violation of HAR §11-200-7. If KPCT fails to provide (1) a Parks & Recreation approved site plan for Kapa'a and Mahukona Beach Park improvements, (2) an agreement with the County to update all studies and perform new studies necessary for any environmental assessment, SMA permit, or a conservation district use permit and (3) an environmental assessment for the park projects for submission by Parks and Recreation, by the July 14, 2008 deadline, KPCT will have failed to meet the obligations imposed by §3a(4) of your office's Final Plan Approval, dated March 12, 2008.

Assuming KPCT fails to perform its obligations by July 14, 2008, our client urges you to let KPCT's permits lapse and not to provide KPCT with any extension. This would make moot any failure to abide by HAR §11-200-7. It would also be in conformance with the Kohala Community Plan. If your office decides to disallow an extension and that decision is appealed to the Board of Zoning Appeals, Kako'o will enter as an intervenor in support of your decision.

Kako'o supports your office and your efforts to bring some order to the planning process. We urge your continued firmness in protecting the North Kohala coastline.

If you have any questions or concerns, or would like to talk about these permits, please feel free to call our office at 885-7559.

Yours Truly,

Achahn Schulze