

KAKO'O
Kamakani O Kohala Ohana

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July 2, 2008

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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

As a preface to the following letter, I'd like to remind you that the North Kohala Community Development plan, recently submitted to you by the people of Kohala, reflects community dissatisfaction at continued extensions of deadlines for development, and calls on you to adhere to those deadlines. Specifically, page 23 of the Plan asks that you:

7. Minimize speculation that drives up land values, property taxes, and the cost of housing; and encourage developers that wish to invest in the long-term health of North Kohala.

---County permits and approvals for North Kohala, including but not limited to zoning changes, subdivision approvals, and building permits, shall have expiration dates, and these expiration dates shall be adhered to. Any requested extensions of expiration dates shall be carefully evaluated.

July 14 is fast approaching – the date to complete construction of the Mahukona resort – yet despite a recent flurry of marginal activity, KPCT is not even at the starting gate 18 years after issuance of the Change of Zone (COZ) and Special Management Area (SMA) Permit. Kako'o, a community group with active standing in the Mahukona rezoning issue (granted by the Hawaii State Supreme Court in 1999) asks that you void the Change of Zone Ordinance No. 93-109, its predecessors and SMA Permit No. 341 or alternatively let them expire on July 14 with cause.

We intend to show you:

1. How Kohala Preserve Conservation Trust (KPCT) has improperly segmented the entire resort-residential-golf course project to avoid required overall review by the public and by State and County agencies.
2. Conditions set by the CZO, the SMA permit and Plan Approval which have not or are unlikely to be met within compliance deadlines.
3. KPCT has an obligation to perform all conditions of the original ordinance and permits, not to amend the agreement 18 years later to meet a scaled-back, phased project.

1. SEGMENTATION -- KPCT has been segmenting the project into small phased chunks so as to avoid the public review processes mandated by County and State statutes. Many of the required plans and documents are missing from pertinent agencies, and many of the agencies are unaware of material changes to the development plan. These omissions will be brought out in the discussion of conditions below. This segmentation should not be allowed. The entire proposed build-out -- including the expanded resort, subdivision, public access amenities and the still-possible golf course -- needs to be considered in entirety at every level of review. It is clear that this has not been the case. In June 2008, there was still no definitive plan of the project's build-out and attendant public amenities in the Planning Department files. Plan Approvals for construction of a sales pavilion and a 6-unit, phase 1 of the project were granted this year before necessary infrastructure such as water and highway improvements are in place, and historic sites and marine water quality reviews complete. Such infrastructure, or at least plans for such infrastructure, should have been in place prior to the granting of any construction approval.

2. CONDITIONS AND COMPLIANCE -- The following conditions of the COZ, SMA and subsequent Resort Plan Approval, dated March 12, 2008, have either not been met or KPCT's ability to meet them within deadlines is highly doubtful. Specifically:

- I. Plans for improvements to Mahukona and Kapa'a Parks do not meet conditions numbered 3a(2) and 3a(3) in the Final Plan Approval dated March 12, 2008.
- II. Potable water systems have not been provided for the project or the parks. (3a2; 3a3).

- III. Waste water systems have not been provided for the project or the parks. (3a2; 3a3).
- IV. Public issues such as access through the subdivision and resort and along the shoreline Conservation District have not been worked out. (3b).
- V. Road improvements have not been worked out with the county Department of Public Works (DPW) or the State Department of Transportation (DOT). (3n).
- VI. The Historic sites mitigation plan has not been updated nor approved by the State Historic Preservation Division (SHPD) (3f).
- VII. The Required Marine Water Quality Baselines have not been set. (February 25th letter from CPD to KPCT).
- VIII. KPCT has refused to irrevocably forego construction of a golf course. (3e).
- IX. KPCT has failed to submit the required annual report for 2007. (3q).

Each of these are explained below in greater detail.

I. Plans For Improvements To Mahukona and Kapa'a Parks Do Not Meet Conditions Set By County.

Condition 3a(1) of Plan Approval requires completion of Phase I and II of the improvements to Mahukona and Kapa'a parks as required by the COZ and SMA permit. Parks and Recreation planners have met with KPCT and drawn up maps for Phase II only. Phase I includes the infrastructure – water, power, waste water treatment, roads -- that should have been put into place during golf-course construction. By abandoning their plan to construct the golf course, KPCT has sidestepped triggering the due date for necessary improvements to Mahukona and Kapa'a Parks, effectively segmenting the development and permitting process into individual chunks. The result is that KPCT has proposed construction without accepted plans to provide the required water, electrical and sewage infrastructure for the construction site and the attendant public parks.

Those parks have languished with little or no repairs, port-a-potty toilets and potholed parking areas for the 18 years since the agreement was

made between the County and KPCT. Because KPCT is required to improve those parks, the County has not. The end result is a public forced to use old and deteriorating park facilities.

The required environmental review of the park improvements and the State's environmental review of use permits needed for the Conservation District are expected to take many months. These steps should have been taken much earlier in order to bring public review into the process. Phase I should be happening now, not later. An agreement between the County and KPCT on only Phase II will not meet the conditions as written. Any extension request based on a department's need to review the planning for Phase I should be denied. Such plans should have been submitted for a timely review. Allowing an extension because of a late filing would effectively reward KPCT for tardy planning and should be avoided on policy grounds.

II. Potable Water Systems Have Not Been Provided For The Project Or The Parks

Conditions of the COZ, SMA Permit and Resort Plan Approval all require proof that KPCT can supply water to the entire project as well as to Mahukona and Kapa'a parks. Yet only a few days before the deadline to complete construction of the project, KPCT does not have potable water to the site or parks and there are no plans anywhere that would indicate how this will be accomplished. It is unrealistic that KPCT would be able to get the drawing, approval and implementation of such plans done by the expiration of their permits, or even within any reasonable extension.

While the two wells at Kealahewa, situated on property owned by Yap Ranch, have been drilled and pumps installed, Kako'o has been unable to find any evidence in Department of Water Supply (DWS) or Department of Health, Safe Drinking Water Branch (SDWB) files indicating that the water from the wells is safe. Neither is there any evidence in either department that KPCT has permits to use the water in a Community Water System.

As of June 25, 2008, no application for use of the water has been filed with SDWB. The process for permit approval for the source, transmission lines and operators of the system takes months according to a SDWB official. The DOH looks at the full build out of any system when permitting community water systems. This would include the final phase (I and II) resort, subdivision and the park usage. Considering that complete Phase I and II plans have not been created, submitted or

approved, it is unrealistic that KPCT will be able to provide the necessary improvements prior to the July 14, 2008 deadline.

All water supplied to Mahukona Park in recent history has been non-potable water. For years this water came from the Kohala Ditch system which supplied non-potable water for agriculture. Ever since the ditch system was damaged by the 2006 earthquake it no longer provides water to Mahukona Park. It appears that water for Mahukona park has been supplied by the unapproved wells at Kealahewa through the existing 3-inch Kohala Ditch system line. These wells are considered non-potable. If KPCT intends to use an "existing" line it must prove to the State and County that the line is capable of transmitting potable water in adequate volumes to the parks and resort.

The proposed 3-inch "existing water line" as the alternative transmission system for water, spelled out in the March 27 letter to you from KPCT, has not been approved as an alternative to the original plan to use new transmission lines, nor is it expected to meet current standards for providing potable water. In fact, it is unclear whether a 3-inch line has enough capacity to supply water to all the proposed elements of the resort and park. This uncertainty is at least partially rooted in the fact that nobody is sure what kind of water demands the development will have. It is another example of how the planning of this development has been systematically segmented, and how that segmentation inhibits effective County and community oversight of development.

Converting the 3-inch pipe to potable water is unrealistic in light of the deadlines that your department has set. Kako'o informed the Planning Department of the development's water shortcomings in an extensive e-mail in June 2007. None of the questions brought up in the e-mail or in this letter have been answered. There is still no potable water at Mahukona, nor are there realistic plans to provide any. KPCT's statement in their March 27th, 2008 letter instead asks that requirement 3e be dropped altogether because it "is more applicable to the project's subdivision related component." This highlights KPCT's dismissive attitude towards their obligation to fix the community parks, as condition 3d applies to both the resort and the park improvements. As far as Kako'o is concerned, such improvements are directly related to all parts and phases and components of the development, not just the subdivision component. This is yet another instance of segmentation and is unacceptable insofar as it would negate any requirement for potable water to be brought to either the parks or the construction site until such a time as KPCT deems it appropriate to develop the community component (if it ever decides to do so).

III. Waste Water Systems Have Not Been Provided For The Project Or The Parks

Despite plans for building a resort, KPCT has failed to provide for or even plan a wastewater system for the resort or the public parks. Developing waste water systems for both parks are pertinent to all stages of development, not just certain ones, and are required by condition 3a(1), 3a(2), 3a(3) and 3a(4) of your department's Final Plan Approval. KPCT's failure to comply with 3a(4) by July 14, 2008 harms the community as a whole. KPCT's commitment to provide waste water systems to the parks has prevented the County from doing the job themselves. KPCT's delay and failure to adhere to your office's deadlines has forced the community to use deteriorating facilities. Port-a-potties are unacceptable waste water systems, and should not be considered adequate substitutes for the park, the resort or any other permanent construction.

IV. Public Issues Such As Access Through The Subdivision, Resort And Along The Shoreline Conservation District Have Not Been Worked Out.

Condition 3b requires that there be shoreline access and four parking lots including 15 public parking spaces near the resort. The Shoreline Access Plan has been altered considerably since first put forth in 1992. The plan submitted in 1996 is not in your files. Instead it was replaced in March 2007 with a version (Revision 3) that moves the parking for lot A from the Conservation District line to a location far mauka, near the old railroad tracks. Another 5-space parking lot is provided on the cliff above the navigational heiau. It is unlikely that this lot will meet the public's need for ocean access as it is difficult and dangerous to get to the ocean from that location.

Revision 3 does not show the roadway access to the public parking lots through the new proposed subdivision. Except for one conceptual map of the new subdivision, no maps of the subdivision layout were found in County files, either in Planning or Public Works. Plans for public parking at the temporary Phase 1 resort submitted May 20, 2008 show a total of 15 parking spaces for the rooms and reception area. All are marked for public parking and none are designated for use by the resort's guests or employees. Does this mean that resort guests and employees will not be allowed to park in Mahukona? Or does this mean that the public will have to vie for those 15 spots with the guests and employees of the resort on a first come first serve basis?

Reference is made in letters within the files to a document from Na Ala Hele stating the entire Conservation District land shoreward of the project will be dedicated to public use. The document is not available, and therefore the public has not been able to view this document during the permitting process. This leaves major questions open such as: (1) Is this agreement between KPCT and Na Ala Hele or is it between KPCT and the DLNR? Are the Land Board and DLNR bound by the agreement? How does the planned trail through the CD relate to the Federal Trail System Ala Kahakai? How does the lateral trail relate to the trail system proposed by the recent North Kohala Community Development Plan? How does the agreement relate to erosion control measures required of the resort and subdivision development? Why have grading and building permits been issued before the document has been seen or approved by the County? Or the public?

Without these documents there is no way for the public to have a say in the development of Mahukona, which is a North Kohala community resource. Mahukona has been a very public place throughout history, and the public has a duty and a right to give input into any development which is contemplated there. Such input has been prevented by the closed-door nature of this particular permitting process and by the segmented planning process utilized by KPCT.

V. Road Improvements Have Not Been Worked Out with The County Department of Public Works (DPW) or The State Department of Transportation (DOT)

Building of the resort and subdivision, and possibly the golf course, are expected to require work on the State's Akoni Pule Highway, the County's Mahukona Park Road and the intersection between them. Possible upgrades to the drainage system beneath the highway are also proposed. These are spelled out in condition 3n of the Plan Approval to include channelization of the highway, dedication of additional rights of way, street lighting and guard rails. All of this work will require Chapter 343 environmental review as spelled out in your March 31, 2008 letter.

No plans are underway at DOT for the work, no environmental review has been called for, and no cost estimate of such requirements is available in DOT or Planning Department files. A cost sharing estimate by the Planning Department of \$34,000 for all infrastructure improvements based on the segmented 6 units of the Phase 1 resort could not possibly cover the shared cost of the highway improvements.

If the subdivision plans provide access to the project off of Mahukona Park Road instead of Akoni Pule Highway, as originally proposed, participation of KPCT in the upgrading of the now dangerous intersection of the Highway and Park Road should be mandatory as required by the COZ conditions.

Regardless, KPCT's assertion that such improvements and EAs are unnecessary because they are no longer tying into the Akoni Pule Highway were unilaterally made. Such assertions do not have bearing on KPCT's COZ and SMA permit obligations to make improvements or conduct EAs.

VI. The Historic Sites Mitigation Plan Has Not Been Updated Or Approved By State Historic Preservation Division (SHPD)

Final Plan Approval calls for a detailed Historic Sites Mitigation Plan. While such a plan was submitted in 1990, it was for the layout of the original resort, golf course and subdivision plan. The new Plan has structures, roadways and lot boundaries in different locations. In a letter to you dated March 27, 2008, KPCT states that a "[f]inal detailed mitigation plan, including sub-plans, is 50 % complete and will be submitted for approval prior to implementation." On May 20, 2008 KPCT told the county the following: "A draft long-term cultural stewardship agreement with a prominent local Hawaiian culture organization is currently under internal review. A Kohala-born specialist in Hawaiian cultural interpretation has been retained and is currently on-site gathering information to be included in the detailed long term preservation plan for Mahukona." Despite clear knowledge that a new mitigation plan was required and in the making, the Planning Department never relayed this information or the condition requirement to the SHPD or the DPW when KPCT applied for grading and building permits. This is another example of how segmentation of development plans hampers the effectiveness of agency review. Grading of the land at Mahukona is currently taking place under Permit #9-1897(June 3, 2008), which was signed by the Planning Department despite the fact that nobody, Planning Department included, has seen the required new mitigation plan.

VII. Required Marine Water Quality Baselines Have Not Been Set.

In addition to the Historic Sites Mitigation Plan, the new Marine Water Quality Baseline and Quarterly Monitoring Plan should have been in place before any grading permits were issued. A letter from you to KPCT dated February 25, 2008 quotes the conditions of the SMA Permit as

saying “[p]rior to commencement of construction of any portion of the proposed development, an overall monitoring plan on potential pollution to the groundwater and coastal waters shall be submitted to the Planning Director for approval in consultation with the Department of Health.” While a monitoring program for the golf course was submitted in 1997, it was never approved.

Your February 25th letter calls for additional baseline and monitoring criteria as well as quarterly rather than bi-annual testing and reporting of the marine water, the reservoir and well sites. A letter from KPCT dated March 18, 2008 acknowledges the new criteria and says they are “in the process of upgrading” the monitoring plan. No copy of the new plan or baseline monitoring is in your files, nevertheless the Planning Department has signed off on grading and building permits.

This is yet another example of how planning for the Mahukona development has been segmented and conducted behind closed doors, and how that segmentation allows developers to sidestep important planning criteria.

VIII. KPCT Has Refused To Irrevocably Forgo Construction Of A Golf Course.

Condition 3d of the plan approval requires KPCT to “[s]ubmit a letter stating irrevocable decision to forgo the golf course, within 30 days of Final Plan Approval.” That deadline was on April 11, 2008. On March 27 KPCT wrote “we have voluntarily decided not to construct a golf course for this phase of the project.” On May 20 KPCT said again “no golf course will be built for this phase of the project.” This is hardly an irrevocable decision to forgo the golf course. In fact the March 27th letter expressly refused to irrevocably forgo construction of a golf course. Forgoing construction of a golf course “for this phase of construction” as KPCT put it, clearly contemplates golf course construction at a later phase of development, and therefore is in direct violation of the “irrevocable” language of condition 3d.

Allowing KPCT to construct a golf course at a later date is another way of letting KPCT segment the planning of this project, thereby allowing them to delay EA assessments and DOT building requirements.

IX. Failure to submit annual reports.

Condition U of the COZ and SMA and Condition 3q of the Plan Approval for the resort requires that KPCT submit annual reports to the Planning

Director prior to the anniversary date for the Change Of Zone. The reports for 2003 and 2004 were not filed until 2006, and the 2007 report, due November of last year, is not in your files. Neither the community nor your department can expect to successfully monitor the development of Mahukona without these reports. Failure to adhere to this requirement should be, in and of itself, valid grounds to deny extensions.

3. KPCT'S COMMITMENT TO COMPLY WITH CONDITIONS

Ordinance No. 93-109 approved an overall development of 311 resort units, 150 lot/units and an 18-hole golf course. KPCT entered an agreement with the County to fulfill the conditions of that ordinance. Now, 15 years later, KPCT has decided to scale down the project and is using this decision to demand that the public scale down the conditions agreed to in 1993.

In KPCT's March 27, 2008, letter to the Planning Director, they quoted Hawaii County Code Sec. 25-2-70, which directs the County ". . .to ensure pertinent conditions of previous approvals related to the development have been implemented." KPCT's letter begs off conditions of the previous ordinance and permits for providing water, the public access improvements, the park improvements and the letter to irrevocably forgo construction of the golf course. KAKO'O considers these conditions to be critically pertinent to development, especially at a location that has such a long history of public use. To forgo any of these conditions would send a message to KPCT and all other developers that all County Planning Department conditions are eventually negotiable. The County Planning Department should avoid sending such a message at all costs, as it undermines the exact purpose for the Department's existence.

KAKO'O members appreciate your future efforts to hold KPCT to the conditions of the COZ and SMA. We request that you stick to the dates for performance and refuse the granting of any extension, just as we did in February of 2007, when the time to complete construction first expired on this project. If the deadlines are not met, we ask that you void the zoning ordinance, SMA permit and golf course permit.

Malama na lihikai o Kohala nei,

Toni Withington