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## PLANNING & TRAFFIC COMMISSION

COUNTY OF MAUI

POST OFFICE BOX 1407

KAHULUI, MAUI, HAWAII 96732

March 23, 1966

Public Works Committee  
Board of Supervisors  
County of Maui  
Wailuku, Hawaii

Gentlemen:

The Maui Planning and Traffic Commission, at its meeting of March 22, 1966, approved an Interim Zoning Variance to Mr. Winston Watanabe to operate a hotel resort with liquor dispenser, restaurant, miniature golf course, and other uses at the development known as Kuau Estates. The approval is for any use applicable under the hotel district in the Comprehensive Zoning Ordinance. The votes of the Commission were as follows: 6 ayes; none dissenting; 1 excused.

Kuau Estates is located at the northernmost end of Kuau on 3.89 acres of land. In addition, 0.5 acre of beach property was leased from Alexander and Baldwin. At the present time there are ten aluminum residential units. Mr. Watanabe would like to use the entire development as a hotel resort, converting one unit into a bar and restaurant, and adding a miniature golf course. In the future, he plans to construct three-story apartment buildings.

At the time of the public hearing there was no protest against the operation of a resort hotel with accessory uses listed hereinabove. The action of the Commission is referred to your Committee for recommendation to the Board of Supervisors, pursuant to Section 5 of Ordinance No. 267.

Very truly yours,

ROBERT O. OHATA  
Planning Director

January 7, 1970

Mr. Meyer M. Ueoka  
Attorney at Law  
P.O. Box 433  
Wailuku, Maui 96793

Dear Mr. Ueoka:

Re: Kuau Plaza Condominium

The Maui Planning Commission at its meeting of January 6, 1970, voted unanimously to approve the construction of a proposed three story, 30-unit condominium at Kuau, Maui as shown on plans submitted to the Planning Department dated May 1969, with later revisions regarding bedroom size.

The Commission, in taking this action confirmed that this proposed development was in accordance with the original variance granted to Mr. Winston Watanabe by the County of Maui on April 1, 1966. However, it was also noted that approval of this apartment complex completes the development as originally proposed and any future development will be subject to appropriate action by the Commission and County Council.

Please also note that the Commission expressed concern over the fact that construction on the project was initiated prior to the obtaining of a building permit from the County of Maui. Please advise your client that he should exercise appropriate restraint in the future.

Yours very truly,

HOWARD K. NAKAMURA  
Planning Director

cc Mr. James Watanabe  
cc Building Department

DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI

200 South High Street

Wailuku, Hawaii 96793

INTEROFFICE CORRESPONDENCE

November 4, 1997

MEMO TO: Sol P. Kaho'ohalahala, Chair  
Land Use Committee

F R O M: Kelly A. Cairns, Deputy Corporation Counsel *KAC*

SUBJECT: Paia-Haiku Urban Interim Zoning (LU-30)

This is in response to your memo dated October 15, 1997, wherein you pose several questions pertaining to the Kuau Estates parcels in Kuau, which include Mama's Fish House Restaurant. We will answer each question separately.

1. Is the 1996 Interim Use Variance still valid (see enclosed correspondence)?

Yes, the use variance is still valid. A zoning variance does not expire unless a time limit is specifically stated on its face. Hogan v. Hayes, 474 N.E.2d 1158 (Mass. App. 1985). The variance awarded by the Board of Supervisors does not specify an expiration date, and thus continues to be valid.

It is clear that the hotel uses can legally continue under the variance. However, there is a question of whether Fearless Inc., the owner of the majority of the parcels in Kuau Estates, can engage in further development of structures under the variance. The letter from Planning Director Howard Nakamura to Meyer Ueoka dated January 7, 1970, which you included as enclosed correspondence, indicates that the development under the variance was completed with the approval of the three story condominium.

However, according to the Planning Department's file on the original variance, the variance was granted to allow the applicant

*received at the 11/4/97 Lu mtg.*

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"to operate a Hotel Resort, including Restaurant and Bar; Miniature Golf Course and other uses . . ." Board of Supervisors Committee Report No. 56, dated April 1, 1966. Other documents reference the applicant's plans for further development of six lots for additional hotel or apartment units and future plans of utilizing the area set aside for a miniature putting golf course as apartment units instead if demand for units increases. Thus, it is not clear from the file upon what basis Planning Director Nakamura reached his conclusion.

The question is then raised as to how much more development Fearless, Inc. can do on the property under the variance. We have determined that Fearless, Inc. can expand present structures or construct new structures only to the extent that the density requirements set forth for H-1 Hotel Districts in chapter 19.14 of the Maui County Code ("MCC") are not exceeded.

The use variance granted by the Board of Supervisors is broad in that it essentially permits any use allowed by the hotel district zoning, thus the variance approval was similar to a legislative zoning decision. At the time, the Board of Supervisors considered all of the parcels as a whole, with the existing structures, and determined the complex should be used for hotel purposes. Although it appears future structures were anticipated by the Board of Supervisors, the 1966 use variance does not grant additional variances from lot coverage and floor area-lot area ratio requirements. Variances are to be construed strictly because they permit a use otherwise forbidden by the zoning ordinance. Hazel v. Metropolitan Development Comm'n of Marion County, 289 N.E.2d 308, 313 (Ind. App. 1972). Since there is no language in the variance approval allowing for deviations from the density requirements for H-1 districts, we interpret the variance to allow development for hotel purposes up to the H-1 density restrictions.

2. If so, is the variance only valid if the parcels are zoned Interim? In other words, if the zoning were changed for those parcels subject to the variance, would the variance still be valid?

Rezoning of the parcels out of Interim zoning would not extinguish the variance. Although there is no Hawaii case law on point, other jurisdictions follow the general rule that "a governing body may not reopen a variance, once granted, and rescind the same." Dimitrov v. Carlson, 350 A.2d 246, 250 (1975); see also, Thomson v. Village of Tequesta Bd. Of Adjustment, 546 So.2d 457 (1989). However, a variance, once granted, does not necessarily insulate the property from all subsequent land use regulations. The effect of a zoning amendment on a prior variance depends upon whether the property owner has vested rights in the variance. The Dimitrov Court explained the analysis as follows:

If such owner of property has devoted his property to a permitted use, his right to continue such use cannot be denied by the subsequent adoption of a zoning ordinance which provides that such use is no longer permitted. On the other hand, if an owner has never devoted his property to a permitted use and a subsequent ordinance bans such use in the future, he has no right thereafter to utilize his property for the prohibited use. However, if he takes steps to devote his property to a conforming use but he has not yet completed such steps and fully exercised his right to such use, the effect of a subsequent amending ordinance depends on the extent to which he has gone in his efforts to carry such use into fruition. He may or may not be barred.

350 A.2d at 250.

It is our opinion that Fearless, Inc. has vested rights in the variance, as they have taken substantial steps in exercising their rights and carrying out the original plans approved by the Board of Supervisors in 1966. Thus, the rezoning of the parcels would not affect Fearless, Inc.'s ability to further develop the property for hotel uses to the extent allowed by the variance.

The rezoning of the parcels presently being used as short term vacation rentals may, however, have an affect on Fearless, Inc.'s right to use the property for hotel purposes should the buildings

be destroyed by fire, tsunami or other disaster. The Dimitrov Court stated that "the holder of a variance is in no better or different position than other conforming owners in his zone." Id. The Council can amend the zoning of a property, turning previously conforming uses into nonconforming uses. If the structures used under the variance were destroyed, the vested rights analysis may shift away from Fearless, Inc.'s interest in preserving the conditions under which it originally developed towards the County's interest in controlling development according to its community plan and zoning decision. In such case, the provisions for nonconforming uses, as set forth in section 19.500.110, MCC, would apply.

3. Pursuant to subsection 19.510.040.A.4, Maui County Code, "the county council may grant a change of zoning if . . . the proposed request is consistent with the applicable community plan land use map . . . ." Therefore, would your Department advise the Committee against granting H-1 Hotel District zoning for the vacation rental parcels, which are designated Single Family in the Community Plan, and against granting B-CT Country Town Business District zoning for the upper parking lot parcel, which is designated Open Space in the Community Plan?

H-1 Hotel District zoning is inconsistent with the community plan map designation of Single Family, therefore we would advise the Committee against recommending such zoning designation without a community plan amendment.

Likewise, B-CT Country Town Business District zoning, without conditions, is not consistent with a community plan Open Space designation. This does not mean that the use of the property as a parking lot is inconsistent with the Open Space designation, since the definition of Open Space in the Paia-Haiku Community Plan provides that "other urban and non-urban uses may be allowed on a permit basis."

The Committee could make a determination that B-CT Country Town Business District zoning, with a condition that the use of the

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property be limited to parking lots, is consistent with the community plan Open Space designation. However, in such case, we would advise the Committee to process such zoning separate from the comprehensive zoning for the Paia-Haiku region so the conditional zoning process under section 19.510.050, MCC, does not interfere with the comprehensive zoning.

The other alternative is to zone the parking area Urban Reserve. The property owner could then seek a conditional permit for use of the property as a parking lot.

4. The Maui Planning Commission reviewed this proposal based on criteria established by the Department of Planning, most notably that the proposed zonings conform to the Paia-Haiku Community Plan designations. If the Committee were to consider the zonings referenced in question 3 above, which deviate substantially from the original proposal, would your Department advise that the matter be reviewed by the Maui Planning Commission again?

There is no legal requirement that the Committee return an item to the planning commissions for further public hearings and comment when a proposed land use regulation is transformed at the Land Use Committee level. However, if the deviations are substantial, resulting in a proposal which would create significantly different impacts, and especially if greater impacts would result, affected persons should be given notice of the changed proposal and an opportunity to voice their opinions and concerns. This could be done at the Committee level, or the Committee could choose to send the item back to the planning commission.

5. If the Committee were to approve the Department of Planning's recommendation to grant R-1 Residential District zoning to the vacation rental parcels and Urban Reserve zoning to the upper parking lot parcel, would the existing uses be allowed to continue?

With respect to the vacation rental parcels, see our answer to

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question 2.

With respect to the upper parcel, use of the parcel as a parking lot would be allowed to continue as a legal, nonconforming use, subject to the provisions of 19.500.110, MCC. If the property owner wished to further develop the parking lot, then a conditional use permit would have to be obtained in order to enable the property owner to meet the Special Management Area permit requirements.

**6. Can your Department recommend any other alternatives, or does your Department have any additional comments to this proposal?**

As this matter is quite complicated, and there are numerous combinations of land use decisions which could be made involving the subject parcels, we will be happy to discuss them with the Committee in detail at its November 4, 1997 meeting.