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and Daniel Kanahele

COUNTY OF MAUI

DEPARTMENT OF PLANNING

BOARD OF VARIANCES AND APPEALS

In the Matter of: Decision of County of Maui
Public Works Director David Goode to Issue
Mass Grading Permit Numbers: G2012/0030
and G2012/0039

Affected Landowner and Properties: Pi`ilani
Promenade North, LLC, TMK No: (2) 3-9001-
016; and Pi`ilani Promenade South, TMK
Nos.: (2) 3-9-00-117, 171, 172, 173 & 174

NOTICE OF APPEAL AND REQUEST FOR
CONTESTED CASE, filed by: Maui Tomorrow
Foundation, Inc., South Maui Citizens for
Responsible Growth and Daniel Kanahele

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Exhibit	Description
1	Maui County Online Map Information for: Parcel (2) 3-9-001-016, 30.13 acres, owned by Pi’ilani Promenade North, LLC Parcel (2) 3-9-001-170, 18.52 acres, owned by Pi’ilani Promenade South, LLC Parcel (2) 3-9-001-171, 19.54 acres, owned by Pi’ilani Promenade South, LLC Parcel (2) 3-9-001-172, 4.9 acres, owned by Pi’ilani Promenade South, LLC Parcel (2) 33-9-001-173, .92 acres, owned by Pi’ilani Promenade South, LLC Parcel (2) 3-9-001-174, .86 acres, owned by Pi’ilani Promenade South, LLC Parcel (2) 3-9-001-169, 13.13 acres, owned by Honua`ula Partners, LLC
2	Grading permits number G2012/0030 and G2012/0039; and maps showing the respective grading areas
3	Project map and layout presented to the LUC depicting a typical light industrial park configuration
4	Grading plan information submitted by Fewell Geotechnical Engineering, Ltd.
5	Retail Shop Information, Eclipse Development Group, LLC website

APPELLANTS' NOTICE OF APPEAL

Appellants Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Daniel Kanahale (“Appellants”), through their attorney Tom Pierce, Esq., hereby give notice of their appeal of a decision of David Goode, in his capacity as the Director of the Department of Public Works, County of Maui. This Notice of Appeal is filed pursuant to sections 12-801-79, *et seq.*, of the Department of Planning, Board of Variances and Appeals, Rules of Practice and Procedure for the Board of Variances and Appeals (“**BVA Rules**”).

I. INTRODUCTION

This is an appeal of the Director of Public Works’ decision to issue grading permits to developers for two major retail shopping centers that will cover 68 acres of land *mauka* of Piilani Highway in North Kihei.

The Director issued the grading permits even though the retail shopping center use clearly violates the 1995 Hawaii Land Use Commission order which encumbers the land and expressly limits the permitted use to light industrial. The proposed retail shopping center also violates the current light industrial (M-1) zoning for the property, and is inconsistent with the current light industrial (LI) community plan designation for the property. Discovery is ongoing and additional legal issues may be presented.

The difference in impacts to the public from the retail use versus light industrial use may be seen by the traffic impacts alone. The Land Use Commission approved the light industrial project on the understanding that it would generate on average 4,800 trips per day. In comparison, the retail project will, according to the developer, generate 38,000 daily trips per day.

Appellants have been, and will continue to be, substantially harmed by the Director’s decision. Appellants have standing to bring this appeal, as well as the right to a contested case hearing pursuant to the Maui County Charter, the Hawaii Revised Statutes, and the BVA Rules, as set forth in further detail below.

The Director’s decision to issue the grading permits must be reversed by the Board of Variances and Appeals because it is based on clearly erroneous facts and law, is arbitrary and capricious, and constitutes a clearly unwarranted abuse of discretion.

A grading permit should not be issued until the developers submit a proposed use that is consistent with the 1995 LUC Order, zoning, and community plan, or, alternatively, until the developers have gone through the required planning process, including a review and new order by the Land Use Commission, county rezoning, and a community plan amendment.

II. PARTIES, AFFECTED PROPERTIES, AND DIRECTOR’S DECISION

A. Parties

Maui Tomorrow Foundation, Inc. (“**Maui Tomorrow**”) is a Hawaii Nonprofit corporation that is tax exempt pursuant to Internal Revenue Code section 501(c)(3) and is dedicated to the responsible planning and sound management of Maui’s natural and cultural resources with its principle place of business at 55 N. Church Street, Suite A5, Wailuku, Hawaii.

South Maui Citizens for Responsible Growth (“**South Maui Citizens**”) is a Hawaii nonprofit corporation with its principle place of business at 4320 E. Waiola Loop, Kihei, Hawaii, formed to advance, defend, and communicate the principles of responsible growth in South Maui, County of Maui, Hawaii.

Daniel Kanahele is a Maui County resident, and owns and occupies a residence in Kihei, Hawaii, and travels Pi’ilani Highway multiple times per week, and is also a concerned and active citizen on planning and other community issues on Maui.

David Goode is the Director of the Department of Public Works, County of Maui (“**Director**”), and in that capacity rendered the decision to issue the grading permits, which are the subject of this Appeal.

According to state and county records, **Piilani Promenade South, LLC** (“**PPS**”) and **Piilani Promenade North, LLC** (“**PPN**”), both Hawaii limited liability companies, both with mailing address: 17802 Skypark Circle, Suite 200, Irvine, California 92604.

PPS owns five of the parcels, and PPN owns one of the parcels, which collectively make up the “Property,” as specified further below.

According to state records, the sole member of PPS and PPN is **Piilani Promenade Partners, LLC (“PPP”)**, state of organization, unknown.

According to online sources, the Developers are associated with **Eclipse Development Group, LLC (“Eclipse”)**, a California Limited Liability Company, with an address at 17802 Sky Park Circle, Suite 200, Irvine, California. Eclipse is already offering retail space for the development at this internet link:

http://eclipsedevelopmentgroup.com/CS_maui.htm.

(PPS, PPN, PPP, and Eclipse are collectively referred to as the “**Developer.**”)

B. The Property Affected by this Appeal

The six tax map parcels affected by this appeal (collectively the “**Property**”) are the following, with the ownership specified in parentheses:

1. Parcel (2) 3-9-001-016, 30.13 acres, owned by PPN;
2. Parcel (2) 3-9-001-170, 18.52 acres, owned by PPS;
3. Parcel (2) 3-9-001-171, 19.54 acres, owned by PPS;
4. Parcel (2) 3-9-001-172, 4.9 acres, owned by PPS;
5. Parcel (2) 33-9-001-173, .92 acres, owned by PPS; and
6. Parcel (2) 3-9-001-174, .86 acres, owned by PPS.

An adjacent property (the “**Honua`ula Parcel**”), also referred to in this appeal, is Parcel (2) 3-9-001-169, 13.13 acres, owned by Honua`ula Partners, LLC.

County tax maps of the various parcels, including the Honua`ula Parcel are provided in **Exhibit 1**, attached here to and incorporated herein by reference.

C. Land Use Designations for the Property

The Property and the Honua`ula Parcel are (a) designated “LI” light industrial in the Kihei-Makena Community Plan (b) zoned M-1 Light Industrial by the County of Maui and (c) subject to 20 conditions imposed on the land by the Hawaii Land Use

Commission (Land Use Commission Docket No. A94-706). Specifics for these land use designations are set forth further below.

D. The Director’s Decision to Issue the Grading Permits Violates the Land Use Designations for the Property

Appellants appeal the decision of the Director to issue mass grading permit number G2012/0030 on April 11, 2012, and mass grading permit number G2012/0039 on April 18, 2012 (collectively the “**Decision**”).

G2012/0030 permits 44,000 cubic yards of fill and 42,400 yards of excavation over a graded area of 29 acres relating to grading for an extension of Kaonoulu Street. G2012/0039 allows for 364,800 cubic yards of fill, 430,300 cubic yards of excavation over 68 acres relating overall grading for the retail shopping malls. Copies of the two grading permits, and maps showing the respective grading areas, are attached hereto as **Exhibit 2** and incorporated herein by reference.

The Decision constitutes official County approval of the Development even though the Development violates state and county zoning limitations, specifically:

1. The conditions contained in a document entitled “Findings of Fact, Conclusions of Law, Decision and Order” (“**LUC Order**”) issued by the Hawaii Land Use Commission (“**LUC**”) in Docket No. A94-706, dated February 10, 1995, which are recorded against the property in the Hawaii Bureau of Conveyances, and which run with the land, have not been modified or retracted in relevant part, remain in effect and continue to restrict and limit the permitted uses of the Property. *Among other conditions, the LUC Order required any owner of the Property to “develop the Property in substantial compliance with the representations made to the Commission.” Those representations were a proposed light industrial use – not retail shopping centers;*
2. The Property is zoned “M1-Light Industrial” under Maui County Code (“**MCC**”) section 19.24, (Maui County Ordinance 2772.), *which provides for “mostly warehousing and distribution types of activity;”* and
3. The Kihei-Makena Community Plan (“**KMCP**”) identifies the Property’s land use as “LI,” *defined as “warehousing, light assembly, service and craft-type industrial operations.”*

(The land use designations are discussed in greater detail further below.)

Therefore, the Director’s Decision is (1) based on a clearly erroneous finding of material facts and erroneous finding of the law, (2) arbitrary and capricious, and (3) a clearly unwarranted abuse of discretion, and it therefor harms the substantial rights of Appellants.

III. JURISDICTION

A. Appellants Have a Right of Appeal

Appellants have a right of appeal before the BVA because they constitute aggrieved persons with express rights of appeal pursuant to the Maui County Charter.

Section 12-801-79(b) of the BVA Rules provides a right of appeal for any “appeal permitted by law from the decision or order of any department.” An express right of appeal is provided by section 8-8.7 of the Maui County Charter, which provides in pertinent part: The board of variances and appeals shall . . . [h]ear and determine appeals alleging error from *any person aggrieved by a decision* or order of any department charged with the enforcement of zoning, subdivision, and building ordinances” (Emphasis added). The Department of Public Works oversees subdivision through its Development Services Administration, as well as building ordinances, and thus appeals may be taken from decisions of the Director of Public Works, including decisions to issue grading permits.

Appellants Maui Tomorrow and South Maui Citizens are persons *aggrieved* by the Director’s decision. Maui Tomorrow is dedicated to the responsible planning and sound management of Maui’s natural and cultural resources. South Maui Citizens seeks to advance, defend, and communicate the principles of responsible growth in South Maui. Both of these nonprofit organizations are, under the law, *aggrieved persons* because the Director’s Decision entirely disregards the a Land Use Commission order, County zoning and the community plan designation, as set forth in further detail below. The people served by Maui Tomorrow’s and South Maui Citizens’ nonprofit missions are likewise harmed by the Directors Decision, which is paving the way for a significant retail shopping center that has failed to go through any planning or review process, and without appropriate procedures and safety requirements.

Likewise Daniel Kanahale is a person aggrieved by the Director's decision. Among other things, Mr. Kanahale will be personally impacted by the five-fold or more increase in traffic from the retail shopping use as opposed to the light industrial use, including the fact that the roads will be not only be more congested but also unsafe because they have been designed only to meet the much lesser light industrial impacts.

B. Appellants Have a Right to a Contested Case

Section 12-801-80.1, entitled "Procedure concerning appeals," provides "the board shall hold a contested case hearing on the appeal." Under that section, Appellants are parties to the proceeding, with all party rights associated with contested case procedures and post hearing procedures, as set forth in subchapters 4 and 5 of the BVA Rules.

IV. STATEMENT OF FACTS

A. The LUC Granted a State Boundary Designation Based on Representations the Property Would Be Used for Light Industrial

One of the Developer's predecessors in interest, Kaonoulu Ranch, petitioned the LUC for a boundary amendment on July 6, 1994, seeking to amend the existing land use district boundary for the Property (then tax map key nos. 2-2-02: portion of 15 and 3-9-01:16) from the Agricultural District to the Urban District, "to develop a 123 lot commercial and light industrial subdivision," aptly named "Kaonoulu Industrial Park." LUC Order at 1; "Petition for Land Use District Boundary Amendment, Kaonoulu Industrial Park" ("**Petition**"). (Copies of the LUC Order and Petition, which are both lengthy, will be provided by Appellants upon request.) The project map and layout presented to the LUC depicted a typical light industrial park configuration, as set forth in **Exhibit 3**, attached hereto and incorporated herein by reference.

The Petition was heard on November 1, 1994. Kaonoulu Ranch's presentation and testimony focused solely on development of an industrial park. Kaonoulu Ranch's Petition made no reference to a retail shopping center or malls. The Petition spoke only to a boundary amendment to allow construction of a light industrial park. *See, e.g.*, Petition at § VIII, at 4; § XIII, at 10; § XIV, at 13; and § XV, at 14.

Likewise, the marketing study submitted to the LUC by Kaonoulu Ranch focused entirely on the development and sale of individual parcels for light industrial use; no evidence was submitted for a retail shopping mall or malls:

Petitioner proposes to develop the Property as the Kaonoulu Industrial Park, a 123-lot commercial and light industrial subdivision. Improved lots are proposed to be sold in fee simple or leased on a long-term basis. The size of the lots will range from approximately 14,000 square feet to 54,000 square feet.

LUC Order, ¶ 21.

The LUC Order also laid out a timeline in which its conditions were to be construed, which expired over a decade ago:

Petitioner anticipates that the Project will be available for sales in the fourth quarter of 1996 and that the entire Project can be marketed by the year 2000, assuming the orderly processing of necessary land use approvals and avoidance of undue delays.

LUC Order ¶ 23.

The traffic impact analysis report submitted with Kaonoulu Ranch's petition (Appendix B to Petition; "Traffic Impact Analysis Report: Kaonoulu Industrial Park" ("**Traffic Report**")) spoke entirely to the "potential impact of the industrial park" on nearby roadways and the capacity of those roadways to carry expected traffic generated by the industrial park. No analysis of the impact of retail shopping malls was submitted or considered by the Land Use Commission. The Traffic Report optimistically concluded that "Because the project is expected to provide industrial space in support of resort, residential, and other development in the South Maui area, regional traffic impacts would be positive in that travel into and out of the South Maui area would be lessened."

During the hearing, Commissioners expressed both concern and desire that the industrial park remain as such and not allow any substantial commercial or retail uses to intrude. To address the Commissioners' concerns, counsel for the petitioner caused Mr. Henry Rice, managing partner of Kaonoulu Ranch, to testify that he would personally see that the property be developed as represented – into a light industrial park:

Q. (By Mr. Luna): Mr. Rice, I just had one or two final questions. I guess concern on maybe others in the room would be that the ranch would not be directly involved if a sale does take place with a developer. Can you make a commitment

that the ranch will still be involved to make sure that all these conditions that may be imposed will be carried out?

A. The ranch would absolutely make that commitment. It's to our advantage that we keep the integrity of the park as we have been talking about with respect to the integrity of the properties we have around it for some generation after me, I presume.

Action A94-708 Office of State Planning, State of Hawaii; Hearing A94-706 Kaonoulu Ranch (Maui), Reporter's Transcript, at 128, line 23 – 129, line 9.

B. The LUC Order Conditioned the State Boundary Amendment Change on the Condition the Property Would Be Used for Light Industrial

Based upon the representations made by Kaonoulu Ranch, the Land Use Commission approved a boundary amendment, converting the Property from agricultural to urban, but subject to 20 conditions. Among them were the following pertinent ones (condition numbers in original):

1. The Petitioner shall obtain a Community Plan Amendment and Change in Zoning from the County of Maui.
5. Petitioner shall fund, design and construct necessary local and regional roadway improvements necessitated by the proposed [light industrial] development Petitioner shall provide for a frontage road parallel to Piilani Highway and other connector roads within the Petition area
14. In the event Petitioner sells its interest in the Project, Petitioner shall subject the Property to deed restrictions to run with the land *which shall require the successors and assigns to comply with the terms and conditions set forth in the Commission's Decision and Order.*
15. Petitioner shall develop the *Property in substantial compliance with the representations made to the commission. Failure to develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification.*
16. Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Property, prior to development of the Property.
17. Petitioner shall timely provide without any prior notice, *annual reports* to the Commission, the Office of State Planning, and the County of Maui Planning Department in connection with *the status of the subject Project* and Petitioner's progress in complying with the conditions imposed herein. . . .
18. Petitioner shall record the conditions imposed herein by the Commission with the Bureau of Conveyances

(Emphasis added).

C. All Landowners of the Property Have Agreed to Take the Property Subject to the LUC Conditions Limiting the Use to Light Industrial

In 1995, the LUC Order and the conditions therein were duly recorded with the Bureau of Conveyances. Those conditions show on title today as evidenced by title reports maintained by the Maui County Department of Public Works. *See, e.g.*, Policy of Title Insurance issued by the Talon Group to Piilani Promenade North, LLC, dated September 16, 2012, Schedule B [exclusions], item 5, which identifies: “Document Listing Conditions to Reclassification of Land,” dated April 11, 1995; Status Report issued by Title Guaranty of Hawaii, Inc. dated June 30, 2006, to Maui Industrial Partners, LLC, item 7 [Exceptions], entitled “Document Listing conditions to Reclassification of Land.”

D. A Community Plan Amendment Was Obtained Based on Representations the Property Would Be Used for Light Industrial

In 1998, the KMCP was amended and restated, at which time the Property was identified on the plan’s land use map as “LI,” which is defined as “warehousing, light assembly, service and craft-type industrial operations.” KMCP at 55. (Also see the discussion of the KMCP and zoning in subsequent sections below.) Upon information and belief, Kaonoulu Ranch represented to the [community plan committee] the same information provided to the LUC, including that the Property would be used for light industrial.

E. A Change in Zoning Was Obtained Based on Representations the Property Would Be Used for Light Industrial

Effective May 25, 1999, the Property was re-zoned M-1 Light Industrial. The application for rezoning described an industrial park identical to that presented to the LUC four years earlier, including the same project layout. The Maui County Planning Commission conducted a public hearing. The traffic engineer who presented to the Land Use Commission updated his analysis and again optimistically reported that the light industrial project would benefit area traffic: “Because the project is expected to provide *industrial space* in support of the resort, residential, and other development in the South Maui area, regional traffic impacts would be positive in that travel into and out of the

South Maui area would be lessened.” Update to Traffic Analysis, Kaonoulu Industrial Park at 1 (April 1998) (emphasis added).

F. Kaonoulu Ranch Continued to Inform the LUC that the Property Would Be Used for Light Industrial

As required by the LUC Order, Kaonoulu Ranch filed annual reports with the Land Use Commission, all of them stated, without reservation, it would develop the Property and the Honua’ula Parcel in compliance with all conditions contained in the LUC Order, including those requiring development of an industrial park and construction of a frontage road parallel to Pi’ilani Highway.

G. The Subsequent Owner Obtained Subdivision Approval by Representing the Property Would Be Used for Light Industrial

On May 12, 2005, Kaonoulu Ranch, after never developing the Property, conveyed it to Maui Industrial Partners, LLC.

In or about August 2006, Maui Industrial Partners, LLC, filed for a “Subdivision Application Form” or forms with the County of Maui Department of Public Works & Environmental Management, Development Services Administration, seeking to subdivide the Property under the name “Kaonoulu Light Industrial,” stating that the purpose of the proposed subdivision was “*To provide much needed industrial lots in South Maui.*” (Emphasis added).

Upon information and belief, Maui Industrial Partners, LLC was successful in obtaining final subdivision approval by representing that the Property would be used for light industrial, therefore being consistent with the LUC Order and with M-1 County zoning and L1 KMPC designation.

H. The First Breach of Representation – an Affordable Housing Use

After acquiring the entire Property, Maui Industrial Partners, LLC, conveyed a portion of the Property, the Honua’ula Parcel, to Honua’ula Partners, LLC. The Honua’ula Parcel is no longer intended to be used for light industrial use, but for workforce housing associated with another large south Maui development known as Wailea 670 or Honua’ula. (See condition 5 contained in Maui County Ordinance 3554, enacted into law in 2008 that predicates Wailea 670’s rezoning on that property’s owner

constructing 250 workforce housing units in the “Kaonoulu Industrial Park Subdivision,” the same as that subject to the LUC Order.)

Review of LUC files reveal that this material change has not been reported to the LUC by the County of Maui or by the Honua’ula Parcel owner as required by HRS 205-11.

I. The Second Breach of Representation – a Shopping Center

In or about September, 2010, Maui Industrial Partners, LLC conveyed the remaining parcels (the Property) to PPS and PPN. In addition, by agreement dated September 13, 2010, entitled, “Assignment and Assumption of Agreement for Subdivision Approval,” Maui Industrial Partners, LLC, assigned all right, title and interest in previous subdivision agreements for the Property to PPS, and presumably PPN.

Subsequent to purchase, PPS and PPN have rapidly established a full blown plan to build retail shopping malls on the Property. This is evidenced by various reports in the media, web sites maintained by the owners and their agents, and grading reports and plans submitted to the County of Maui, some of which are briefly described below.

For example, the Subsurface Investigation Reports generated by Fewell Geotechnical Engineering, Ltd. in 2011 were submitted to the Maui County Department of Public Works in support of the application for grading permits (“**Grading Plans**”). Those documents provide numerous references to the newly proposed retail uses, such as this: “Both shopping centers will house a number of retail shops of varying sizes, including national retailers.”). Excerpts from the Fewell reports are attached hereto as **Exhibit 4**, and incorporated herein by reference.

An article appearing in January 29, 2012, edition of the Maui News describes the outlet mall component of the development as what “would be the largest outlet mall in Hawaii.”

As earlier noted, the website for Eclipse describes one of the malls, “Pi’ilani Promenade,” as a “415,000 square foot retail development with national and local

retailers.” See generally excerpts from website, attached hereto as **Exhibit 5**, and incorporated herein by reference.

In another link on the Eclipse web site, the “Maui Outlets” component of the retail shopping malls is described as a “first-class outlet shopping destination” with “gross leasable area of approximately 300,000 square feet.” The retail shopping malls will, according to the Developer, “result in the project becoming the shopping focal point of the island where tenants will enjoy unprecedented market presence.” *See Exhibit 5.*

Importantly, unlike the Traffic Report submitted to the Land Use Commission in 1994 and to the Maui County Planning Commission in 1998, which argued traffic would be lessened by the light industrial use, now with the proposed retail use the intersection of Pi’ilani Highway and the proposed Kaonoulu Street is predicted by the Developer to generate over 38,000 cars per day. The intersection itself is described on the website as “what is projected to be the largest intersection on the Island.” The Developer further predicts the traffic will “almost double when the expansion of the “Up Country Road” is completed” **Exhibit 5.**

Additionally, the layout for the retail shopping malls is entirely different from that presented to the Land Use Commission. The shopping malls feature acres of parking lots fronting both Pi’ilani Highway and the to-be-created Kaonoulu Street extension, with a mix of “big box” stores, fast food restaurants and other retail shops; the shopping malls bear no resemblance to the light industrial site plan presented to the Land Use Commission. Furthermore, no frontage road is depicted, either on the web site or on grading plans submitted to the County, even though this is a condition of the LUC Order.

The retail shopping malls represent classic urban sprawl and are inconsistent with contemporary concepts of community planning. They fail to meet the community development standards, goals and objectives contained in the Maui County Code, the Countywide Policy Plan and the KMCP.

V. THE LAW REQUIRES REVERSAL OF THE DIRECTOR'S DECISION

Under section 12-801-81 of the BVA Rules, the BVA has the power to reverse the Director's Decision where the substantial rights of the petitioner have been prejudiced because the decision and order is:

1. Based on a clearly erroneous finding of material fact or erroneous application of the law; or
2. Arbitrary or capricious in its application; or
3. A clearly unwarranted abuse of discretion.

As explained below, all three of these criteria are applicable here because the Director permitted grading permits to issue for a project that is not permitted, and therefore, the Decision must be reversed.

A. County Approvals Must Be Consistent with the Law

It is fundamental that the Director has an obligation to assure that applications presented to the Department of Public Works for evaluation (like grading permit applications) are generally lawful and consistent with state and county land use requirements. *See* Maui County Charter § 8-5.3 (2003) (setting forth the Director's job responsibilities). *Cf. Lanai Co., Inc. v. Land Use Com'n ("Lanai Co.")*, 105 Hawai'i 296, 317 (2004) ("It is well established that an administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted.").

The obligation to enforce consistency at the time of issuing permits is not a passive one. Instead, due diligence and scrutiny of a proposed project is necessary to assure consistency with State and County land use laws. The obligation is actually in the form of an obligation to *enforce* the law. The State Legislature has expressly delegated the responsibility to ensure consistency with the LUC Order at issue here upon the Director of Public Works, and the Director of Planning, among possibly others. Hawaii Revised Statutes ("**HRS**") section 205-12 (the State Land Use Commission Law) mandates that county officials "shall enforce within each county the use classification districts adopted by the land use commission *and the restriction on use* . . . and shall

report to the commission all violations.” (Emphasis added.) The Hawaii Supreme Court confirmed this obligation in *Lanai Co.*:

The power to enforce the LUC’s conditions and orders . . . lies with the various counties. . . . Pursuant to their enforcement duties under § 205–12, counties have the responsibility to take necessary action against violators. A.G. Opinion 70–72 (1970). Such enforcement covers all land use district classifications and land use district regulations. *Id.*

(Footnotes omitted).

The same obligation rests on the Director to ensure the Development’s consistency with County zoning and the KMCP. *See, e.g.*, MCC § 19.04.020 (requiring projects’ compliance with the Maui County Comprehensive Zoning Ordinance (“CZO”)); MCC § 19.04.015(C) (providing that the CZO is intended to “implement the community plans of the County.”)

B. The Director Failed to Ensure Consistency with the State and County Land Use Laws Before Granting the Developer the Grading Permits

Grading permits are, for most projects, the first physical act of development, and therefore should be carefully scrutinized for consistency. The Maui County Code bears out this line of reasoning. The Director or his authorized agent must review and approve grading permits. MCC § 20.08.020. That includes a mandatory review of *specific plans and specifications* prepared by the applicant. *Id.* § 20.08.060. Moreover, the Director has an affirmative obligation to suspend or revoke a grading and grubbing permit “whenever the permit has been issued on the basis of incorrect information supplied by the permittee.” *Id.* § 20.08.120.

Here, it is undisputed that the Developer presented the Director with a grading plan for a large retail shopping center, *not* a light industrial use. *See, supra*, Statement of Facts, Part IV(I); *see* excerpts from Grading Plan, **Exhibit 5**. The Developer’s new intended use is entirely inconsistent with the restrictions set forth in the LUC Order, M-1 zoning and the KMCP designation. *See, supra*, Statement of Facts, Parts IV(A – E).

In essence, the Director has entirely failed to ensure consistency before issuing a critical initial document permitting the Developer to substantially move forward with the illegal Development. Under the BVA Rules, the Director’s decision must be reversed.

C. No Proper Interpretation of the Law Will Permit a Determination of Consistency Between the Proposed Retail Uses and the Existing Land Use Restrictions

The State boundary district amendment change from Agriculture to Urban obtained by Kaonoulu Ranch in 1995 was not a blank slate to do any kind of urban use. Instead it was limited by the express conditions and restrictions set forth in the LUC Order, and the LUC Order, recorded in the Bureau of Conveyances against the Property, provides constructive notice of the LUC's specific decisions and conditions with respect to the Property to all prospective landowners, including the Developer.

This is made clear by reviewing the LUC statute. The law provides that the LUC, when it acts to approve a petition for a district boundary change, will file findings of fact and conclusions of law and “impos[e] conditions necessary to uphold the intent and spirit of [HRS ch. 205] or the policies and [the LUC decision-making] criteria . . . *or to assure substantial compliance with representations made by the petitioner in seeking a boundary change.*” HRS § 205-4(g) (emphasis added). In fact, among the ten Land Use Commission decision-making criteria, one of them is “[t]he representations and commitments made by the petitioner in securing the boundary change.” HRS § 205-17(5). Cf. *Lanai Co.* 105 Hawai'i at 317.

Here, the representations made by Kaonoulu Ranch to the LUC in 1994 were very clear – all of the representations, including engineering and architectural designs, and traffic analyses, were geared entirely for a *light industrial use*. The LUC Order and the conditions therein must be read from that perspective, as required by Chapter 205. A large retail shopping center with outlets and retail stores is certainly not a light industrial use. This is particularly evident from the former and current developer's representations regarding traffic, which have gone up five-fold with the changed use.

The obligation to enforce the LUC Conditions falls squarely on the shoulders of the various county agencies implementing the LUC Order and its conditions. *Lanai Co.* at 318. Therefore, the Director has an obligation to interpret the LUC Order in a similar manner to the way the LUC would interpret it – not in some novel, creative, way, which appears to be the current case.

In reviewing the M-1 zoning designation for the property and community plan designation, it must be done from the perspective of the fact that the LUC Order may be more restrictive. It is fundamental that where there are overlapping land use laws and restrictions, the most restrictive will apply. Therefore, assuming *arguendo* that the zoning and community plan designations were less restrictive, the Director must nonetheless look to the more restrictive LUC Order.

However, the M-1 zoning designation for the property is *not* less restrictive. The M-1 zoning requires a use that is “**mostly** warehousing and distribution types of activity.” MCC § 19.24.010 (emphasis added). The new proposal is 100% retail shopping center uses over the entire Property. That cannot be construed as “mostly light industrial” under any stretch of the imagination. The Director has an obvious obligation to assure the permits it issues are for projects that are consistent with the County zoning. The Development is inconsistent and therefore the grading permits must be rescinded by the Director.¹

Finally, the Director has an obligation in issuing the grading permits to assure consistency with the KMCP. The Maui County Code requires all administrative agencies to comply with the general plan. MCC § 2.80B.030.B (“All agencies **shall** comply with the general plan.”) (Emphasis added). Part V of the KMCP entitled “Land Use Map” specifically designates “Light Industrial” or “LI” use for the Property. The KMCP provides Light Industrial is “for warehousing, light assembly, service and craft-type industrial operations.” KMCP at 55. Significantly, the same language was used in LUC Order: “Light industrial uses including warehousing, light assembly, and service and craft-type industrial operations.” LUC Order at 8-9, ¶¶ 32.

Reading the above together, neither the Director nor any other County agency may turn a blind eye to any of land use designations for the Property, but most especially the LUC Order, which has encumbered the Property for over 17 years.

¹ It should also be noted that MCC § 19.24.010 expressly excludes “residential uses” from M-1 zoning. While “apartment houses” are permitted, MCC § 19.24.020A.32. In light of § 19.24.010, that section must be read to be limited to “quarters used by watchmen or custodians of industrially used property,” as set forth in § 19.24.020.A.1. Therefore, the proposed use for the Honua`ula Parcel is also inconsistent with M-1 zoning.)

VI. CONCLUSION AND REQUEST FOR REVERSAL

The Director has issued grading permits to the Developer for a retail use, when the land being graded is expressly restricted to light industrial uses. The Director's decision to issue the grading permits must be reversed by the Board of Variances and Appeals because it is based on clearly erroneous facts and law, is arbitrary and capricious, and constitutes a clearly unwarranted abuse of discretion.

DATED: Makawao, Maui, Hawaii, May 10, 2012.

TOM PIERCE
Attorney for Maui Tomorrow
Foundation, Inc., South Maui Citizens
for Responsible Growth, and Daniel Kanahele

EXHIBIT 1



N Selected Parcel(s)

0 100 200 300 400 ft

Maui County Assessor

Parcel: 390010160000 Acres: 30.13	
Name:	PIILANI PROMENADE NORTH, LLC
Site:	0 PIILANI HWY
Sale:	\$ on Vacant= Qual=
Mail:	17802 SKYPARK CIR STE #200 IRVINE CA 92614
Land Value:	\$10,749,800.0
Building Value:	\$0.00
Misc Value:	\$0.00
Just Value:	\$0.00
Assessed Value:	\$10,749,800.0
Exempt Value:	\$0.00
Taxable Value:	\$10,749,800.0



The Maui County Assessor's Office makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. The assessment information is from the last certified taxroll. All data is subject to change before the next certified taxroll. PLEASE NOTE THAT THE PROPERTY APPRAISER MAPS ARE FOR ASSESSMENT PURPOSES ONLY NEITHER MAUI COUNTY NOR ITS EMPLOYEES ASSUME RESPONSIBILITY FOR ERRORS OR OMISSIONS —THIS IS NOT A SURVEY—
Date printed: 04/23/12 : 14:05:49



N Selected Parcel(s)

0 420 840 1260 1680 ft

Maui County Assessor

Parcel: 390011700000 Acres: 18.52

Name:	PIILANI PROMENADE SOUTH LLC	Land Value:	\$7,623,200.00
Site:	0 PIILANI HWY	Building Value:	\$0.00
Sale:	\$ on Vacant= Qual=	Misc Value:	\$0.00
	17802 SKYPARK CIR STE 200	Just Value:	\$0.00
Mail:	IRVINE CA 92614	Assessed Value:	\$7,623,200.00
		Exempt Value:	\$0.00
		Taxable Value:	\$7,623,200.00



The Maui County Assessor's Office makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. The assessment information is from the last certified taxroll. All data is subject to change before the next certified taxroll. PLEASE NOTE THAT THE PROPERTY APPRAISER MAPS ARE FOR ASSESSMENT PURPOSES ONLY NEITHER MAUI COUNTY NOR ITS EMPLOYEES ASSUME RESPONSIBILITY FOR ERRORS OR OMISSIONS —THIS IS NOT A SURVEY—
Date printed: 04/23/12 : 13:44:41



 Selected Parcel(s)

0 420 840 1260 1680 ft

Maui County Assessor

Parcel: 390011710000 Acres: 19.54

Name:	PIILANI PROMENADE SOUTH LLC	Land Value:	\$7,864,300.00
Site:	0 PIILANI HWY	Building Value:	\$0.00
Sale:	\$ on Vacant= Qual=	Misc Value:	\$0.00
	17802 SKYPARK CIR STE 200	Just Value:	\$0.00
Mail:	IRVINE CA 92614	Assessed Value:	\$7,864,300.00
		Exempt Value:	\$0.00
		Taxable Value:	\$7,864,300.00



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Date printed: 04/23/12 : 13:49:04



Selected Parcel(s)

0 100 200 300 400 ft

Maui County Assessor

Parcel: 390011720000 Acres: 4.9

Name:	PIILANI PROMENADE SOUTH LLC	Land Value:	\$100.00
Site:	0 PIILANI HWY	Building Value:	\$0.00
Sale:	\$ on Vacant= Qual=	Misc Value:	\$0.00
Mail:	17802 SKYPARK CIR STE 200	Just Value:	\$0.00
	IRVINE CA 92614	Assessed Value:	\$100.00
		Exempt Value:	\$100.00
		Taxable Value:	\$0.00



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Date printed: 04/23/12 : 14:01:27



Selected Parcel(s) 0 100 200 300 400 ft

Maui County Assessor

Parcel: 390011730000 Acres: 0.92

Name:	PILANI PROMENADE SOUTH LLC	Land Value:	\$100.00
Site:	0 PILANI HWY	Building Value:	\$0.00
Sale:	\$ on Vacant= Qual=	Misc Value:	\$0.00
	17802 SKYPARK CIR STE 200	Just Value:	\$0.00
Mail:	IRVINE CA 92614	Assessed Value:	\$100.00
		Exempt Value:	\$100.00
		Taxable Value:	\$0.00



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Date printed: 04/23/12 : 13:53:49



N Selected Parcel(s)

0 420 840 1260 1680 ft

Maui County Assessor

Parcel: 390011740000 Acres: 0.86

Name:	PIILANI PROMENADE SOUTH LLC	Land Value:	\$100.00
Site:	0 PIILANI HWY	Building Value:	\$0.00
Sale:	\$ on Vacant= Qual=	Misc Value:	\$0.00
	17802 SKYPARK CIR STE 200	Just Value:	\$0.00
Mail:	IRVINE CA 92614	Assessed Value:	\$100.00
		Exempt Value:	\$100.00
		Taxable Value:	\$0.00



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Date printed: 04/23/12 : 13:40:35



N Selected Parcel(s)

0 100 200 300 400 ft

Maui County Assessor

Parcel: 390011690000 Acres: 13.13	
Name:	HONUA'ULA PARTNERS LLC
Site:	0 PIILANI HWY
Sale:	\$ on Vacant= Qual=
Mail:	1999 AVE OF THE STARS, STE 2850 LOS ANGELES CA 90067
Land Value:	\$5,884,800.00
Building Value:	\$0.00
Misc Value:	\$0.00
Just Value:	\$0.00
Assessed Value:	\$5,884,800.00
Exempt Value:	\$0.00
Taxable Value:	\$5,884,800.00



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Date printed: 04/23/12 : 13:58:22

EXHIBIT 2



COUNTY OF MAUI
 DEPARTMENT OF PUBLIC WORKS
 DEVELOPMENT SERVICES ADMINISTRATION
 250 SOUTH HIGH STREET
 WAILUKU, HAWAII 96793
 Ph: (808) 270-7242 Fax: (808) 270-7972

GRADING AND GRUBBING PERMIT APPLICATION

Subd 22795

PROJECT/PROPERTY INFORMATION

PROJECT NAME: Kaonoulu Market Place
 TAX MAP KEY: (2) 3-9-01:16 ADDRESS:

OWNER / PERMITTEE INFORMATION
DECLARATION: *The undersigned accepts the permit subject to conditions described in the General Provisions, construction plans, County Code Section 20.08, and any other document associated with the permit.*

OWNER NAME: Piilani Promenade South, LLC

ADDRESS: 17802 Sky Circle, Suite 200 Irvine, CA 92614

PHONE: (949) 251-1161 EMAIL: dgray@eclipsedevelopmentgroup.com

SIGNATURE: [Signature] PRINT NAME: Douglas Gray

If Permittee different from owner:

PERMITTEE NAME: Goodfellow Bros., Inc.

ADDRESS: 500 Welekahao Road, Kihei, HI 96753

PHONE: (808) 879-8868 EMAIL: coryu@goodfellowbros.com

SIGNATURE: [Signature] PRINT NAME: Cory Uchima

PERMIT INFORMATION

<input checked="" type="checkbox"/> GRADING PERMIT	Fill:	44,000	(cubic yards)
	Excavate:	42,400	(cubic yards)
	Graded Area:	29.0	(<input checked="" type="checkbox"/> acres <input type="checkbox"/> sq. ft.)
	Maximum height/depth of excavation or fill:	12.0	(feet)
<input type="checkbox"/> GRUBBING PERMIT	Grubbed Area:		(<input type="checkbox"/> acres <input type="checkbox"/> sq. ft.)

IDENTIFY CRITICAL AREAS LOCATED ON OR AFFECTING THE PROPERTY

- Yes No Is any portion of the property located in the Special Management Area?
- Yes No Are there Special Flood Hazard Areas or drainageways on the property?
- Yes No Is the property located along the shoreline?
- Yes No Are there wetlands located on the property?
- Yes No Are there known burials, cemeteries, or other historic sites on the property?
- Yes No Will grading affect an existing slope with a height greater than 15 feet and with a grade steeper than 35% (10H:3.5V)?

Estimated Dates: Start: April 15, 2012 Completion: July 15, 2013

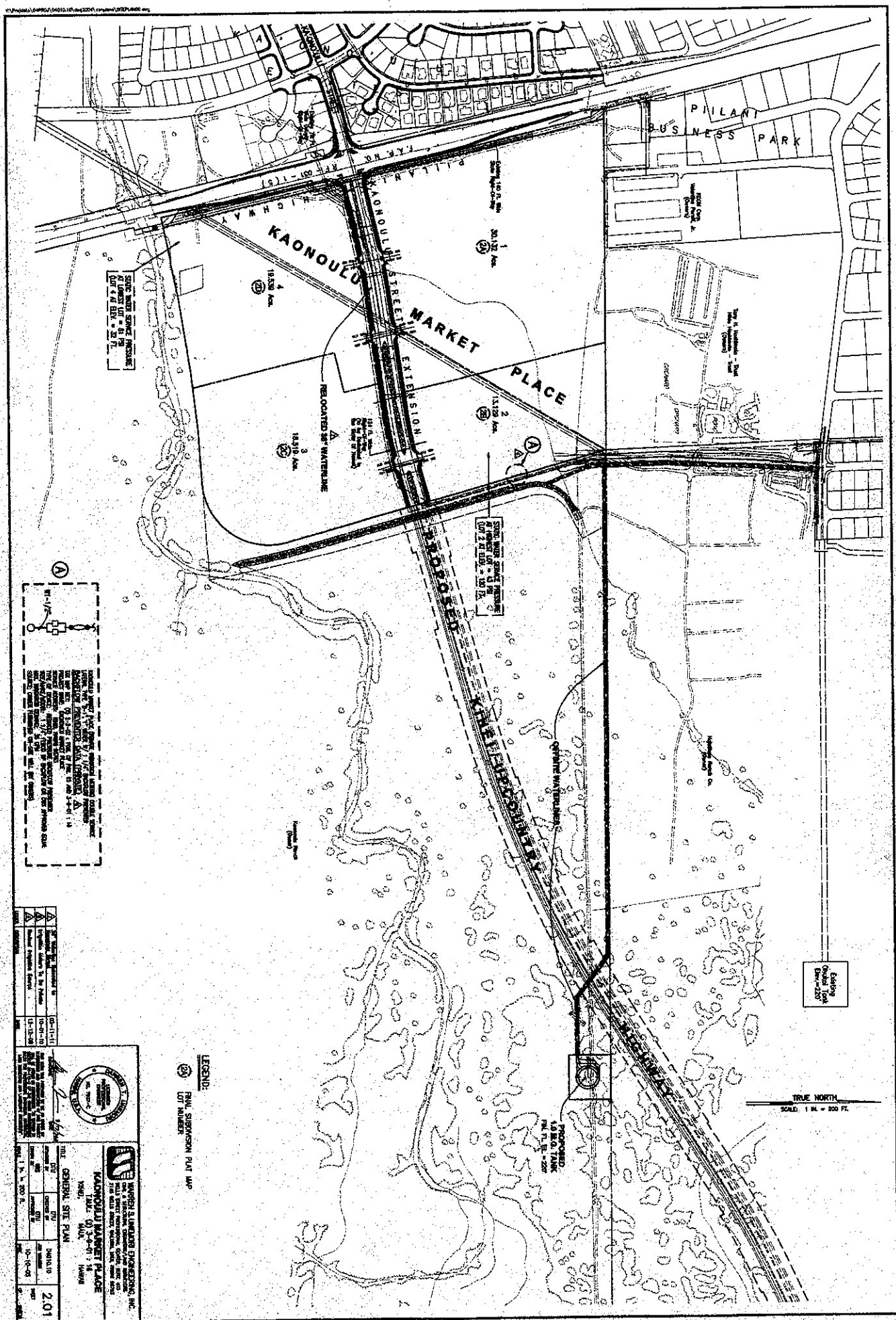
PERMIT APPROVAL (For county use only) APPLICATION NUMBER:

Fee \$ 1,162 Bond \$ 182,000 #105756403 Travelers Casualty &

SPECIAL CONDITIONS: *ARCHAEOLOGICAL MONITORING 8/10/11 Surety Co. - D. Abner*

APPROVED BY: [Signature] For: Department of Public Works
 PERMIT NUMBER: *42012/0030*
 DATE OF ISSUANCE: *4/11/12*

GENERAL PROVISIONS are considered a part of this permit and are included herein by reference. Hard copy is available at Development Services Administration or can be viewed/downloaded online at County website: www.co.maui.hi.us



STREET LIGHT SPACING
 AT INTERSECTION - 60 FT
 AT 45 DEGREE - 85 FT

RELOCATED WATERLINE
 15,500 AM
 15,100 AM
 15,100 AM
 15,100 AM
 15,100 AM

▲	PROPOSED	(0-11-11)
▲	EXISTING	(0-12-12)
▲	PROPOSED	(1-13-13)



WONGSI S. LINDAJO ENGINEERING, INC.
KAONO'OU MARKET PLACE
 TABLE (0) 2-1-11
 2.01

LEGEND:
 FIRM SURVEYING PLAT MAP

Existing
 Utility Lines
 100-200

TRUE NORTH
 SCALE: 1 IN. = 200 FT.



COUNTY OF MAUI
 DEPARTMENT OF PUBLIC WORKS
 DEVELOPMENT SERVICES ADMINISTRATION
 260 SOUTH HIGH STREET
 WAILUKU, HAWAII 96793
 Ph: (808) 270-7242 Fax: (808) 270-7972

GRADING AND GRUBBING PERMIT APPLICATION

PROJECT/PROPERTY INFORMATION

PROJECT NAME: Mass Grading Piilani Promenade
 TAX MAP KEY: (2) 3-9-01:16, 170 & 171 ADDRESS

OWNER / PERMITTEE INFORMATION

DECLARATION: The undersigned accepts the permit subject to conditions described in the General Provisions, construction plans, County Code Section 20.08, and any other document associated with the permit.

OWNER NAME: Pillani Promenade LLC
 ADDRESS: 17802 Sky Park Circle, Suite 200, Irvin CA, 92614
 PHONE: (949) 251-1161 EMAIL: dgray@eclipsedevelopmentgroup.com
 SIGNATURE: [Signature] PRINT NAME: Douglas Gray

If Permittee different from owner
 PERMITTEE NAME: Goodfellow Bros., Inc.
 ADDRESS: 500 Waiakahao Road, Kihei, HI 96753
 PHONE: (808) 887-8868 EMAIL: coryu@goodfellowbros.com
 SIGNATURE: [Signature] PRINT NAME: Cory Uchima

PERMIT INFORMATION

GRADING PERMIT
 Fill: 364,800 (cubic yards)
 Excavate: 430,300 (cubic yards)
 Graded Area: 68 (acres sq. ft.)
 Maximum height/depth of excavation or fill: 12.0 (feet)
 GRUBBING PERMIT
 Grubbed Area: (acres sq. ft.)

IDENTIFY CRITICAL AREAS LOCATED ON OR AFFECTING THE PROPERTY

- Yes No Is any portion of the property located in the Special Management Area?
- Yes No Are there Special Flood Hazard Areas or drainageways on the property?
- Yes No Is the property located along the shoreline?
- Yes No Are there wetlands located on the property?
- Yes No Are there known burials, cemeteries, or other historic sites on the property?
- Yes No Will grading affect an existing slope with a height greater than 15 feet and with a grade steeper than 35% (10H:3.5V)?

Estimated Dates: Start: April 2012 Completion: July 2013

PERMIT APPROVAL (For county use only)

Fee \$ 8,148 Bond \$ 680,300 APPLICATION NUMBER: GT2011/14
 SPECIAL CONDITIONS: - ARCHAEOLOGICAL MONITORING
 - GRADING REPORT
 - PRE-CON
Travelers Casualty & Security Co of Am. No. 105750407

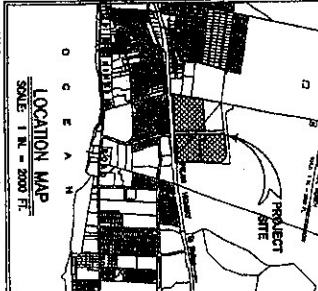
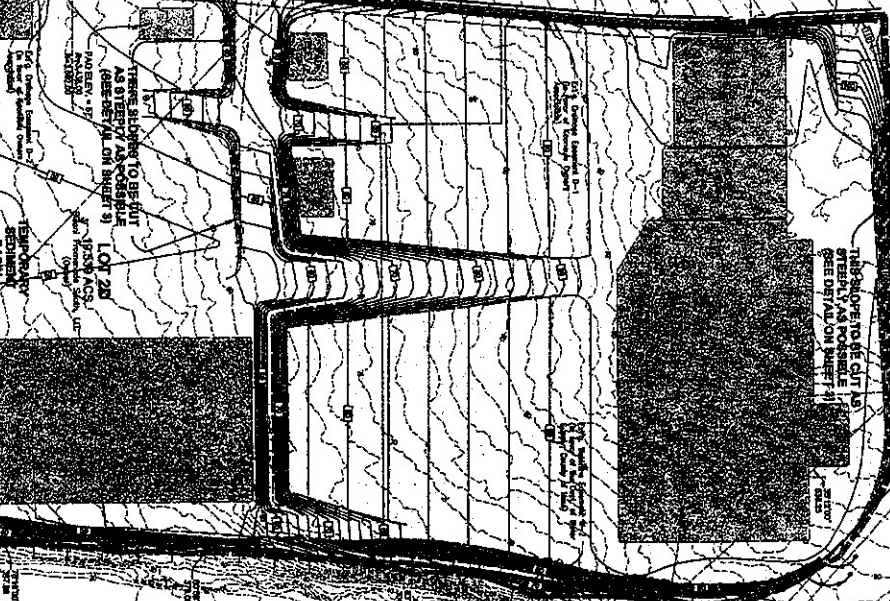
APPROVED BY: [Signature] PERMIT NUMBER: 92012/0039
 For: Department of Public Works DATE OF ISSUANCE: 4/18/12

GENERAL PROVISIONS are considered a part of this permit and are included herein by reference. Hard copy is available at Development Services Administration or can be viewed/downloaded online at County website: www.co.maui.hi.us
 (Rev. 1/12)

ADJOINING ROADWAY AND UTILITY IMPROVEMENTS TO BE CONSTRUCTED UNDER SEPARATE PERMIT AS PART OF KAONDULU RANCH LARGE LOT SUBDIVISION NO. 2 DBA SUBDIVISION FILE NO. 2785

ADJOINING ROADWAY AND UTILITY IMPROVEMENTS TO BE CONSTRUCTED UNDER SEPARATE PERMIT AS PART OF KAONDULU RANCH LARGE LOT SUBDIVISION NO. 2 DBA SUBDIVISION FILE NO. 2785

KAONDULU STREET EXTENSION



- NOTES:
1. ONE THRESHOLD SHALL BE BEING ADOPTED. ALL SURFACES SHALL BE FINISHED TO THE FINISHED GRADE SHOWN ON THIS PLAN AND SHOWN IN THE SCHEDULED SURFACES.
 2. SLOPES SHALL NOT BE LESS THAN 2% UNLESS OTHERWISE NOTED. ALL SLOPES SHALL BE FINISHED TO THE FINISHED GRADE SHOWN ON THIS PLAN AND SHOWN IN THE SCHEDULED SURFACES.
 3. ALL SURFACES SHALL BE FINISHED TO THE FINISHED GRADE SHOWN ON THIS PLAN AND SHOWN IN THE SCHEDULED SURFACES.

APPROXIMATE EARTHWORK QUANTITIES (CUBIC YARDS VOLUMES)

ITEM	QUANTITY	UNIT
LOT 2A	30,000	CU YD
LOT 2B	20,000	CU YD
LOT 2C	10,000	CU YD
LOT 2D	15,000	CU YD
LOT 2E	25,000	CU YD
TOTALS	100,000	CU YD

PROPOSED PAVING

ITEM	QUANTITY	UNIT
LOT 2A	30,000	CU YD
LOT 2B	20,000	CU YD
LOT 2C	10,000	CU YD
LOT 2D	15,000	CU YD
LOT 2E	25,000	CU YD
TOTALS	100,000	CU YD

WARRICK S. LINDQUIST ENGINEERING, INC.
 2145 10TH AVENUE, SUITE 200
 DENVER, CO 80202
 PHONE: 303.733.1100
 FAX: 303.733.1101
 WWW: WSEINC.COM

PROJECT NO. 2

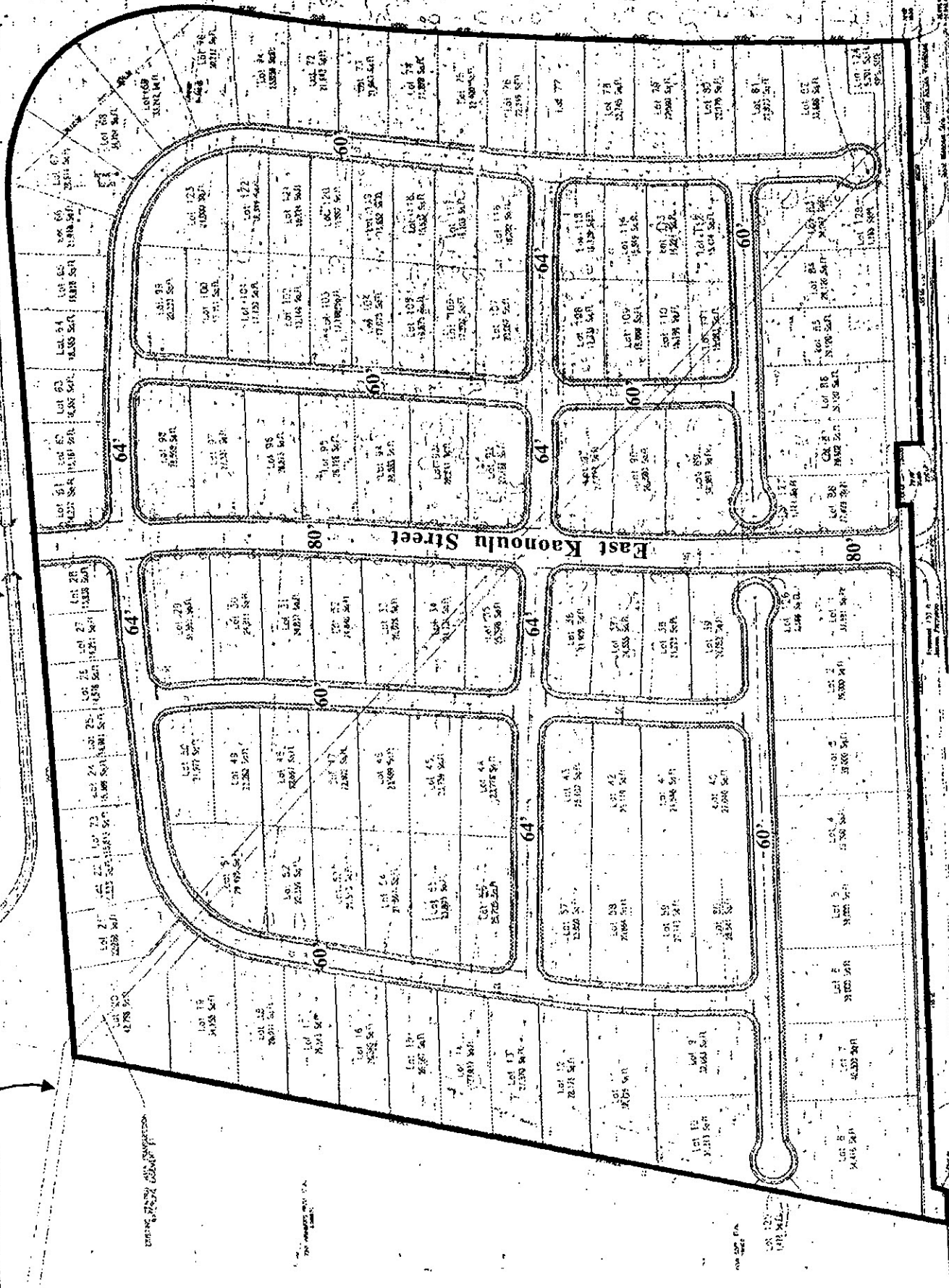
DATE: 11/15/2011

SCALE: 1" = 100 FT.

EXHIBIT 3

Waterline Easement #2

Kulanihakoi Gulch



← To Maalaea

Pilihi Highway

Warren S. Unemori Engineering, Inc.

Kaonoulu Industrial Park

Site Plan

Page 2

EXHIBIT 4



**FEWELL
GEOTECHNICAL
ENGINEERING, LTD.**

Oahu Office
96-1416 Waihona Place
Pearl City, Hawaii 96782-1973
(808) 455-6589
FAX (808) 456-7062
E-mail: tge@tgettd.com

Maul Office
360 Papa Place, Suite 103
Kahului, Hawaii 96732-2464
(808) 873-0110
FAX (808) 873-0906

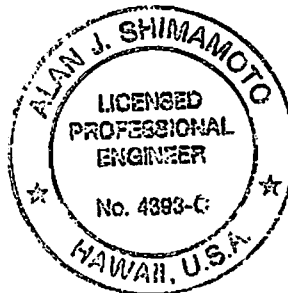
SUBSURFACE INVESTIGATION REPORT
MASS GRADING FOR LOT 2A
PIILANI PROMENADE NORTH SHOPPING CENTER
KIHEI, MAUI, HAWAII

for

PIILANI PROMENADE NORTH, LLC

by

FEWELL GEOTECHNICAL ENGINEERING, LTD.



This report was prepared by
me or under my supervision.

By Alan J. Shimamoto, P.E.

Alan J. Shimamoto

August 15, 2011

SUBSURFACE INVESTIGATION REPORT

**Mass Grading for Lot 2A
Piilani Promenade North Shopping Center
Kihei, Maui, Hawaii**

INTRODUCTION

We have completed a subsurface investigation for Lot 2A to assist Piilani Promenade North, LLC with the geotechnical aspects of its mass grading. Lot 2A will be the site of the Piilani Promenade North Shopping Center in Kihei, Maui, Hawaii. This report presents our findings and conclusions. This work was completed in general accordance with our March 3, 2011 Proposal and your authorization to proceed dated April 6, 2011.

Two related shopping center complexes are planned by affiliated developers, Piilani Promenade North, LLC (PPN) and Piilani Promenade South, LLC (PPS), for the parcels designated as Lots 2A, 2C and 2D in Kihei, Maui, Hawaii. Lot 2A will be developed for the proposed Piilani Promenade North Shopping Center, while the adjoining Lots 2C and 2D will be developed to support the Piilani Promenade South Shopping Center.

Lot 2A is separated from Lots 2C and 2D by the future Kaonoulu Street Extension, which together with an additional street extension and an off-site water tank, is part of the off-site infrastructure improvements for the shopping center. The geotechnical aspects of the design and construction of the off-site infrastructure improvements, including the future Kaonoulu Street Extension, have been previously addressed by others and are not part of this investigation.

Both shopping centers will house a number of retail shops of varying sizes, including large national retailers. Although the proposed footprints of the new buildings are shown on the mass grading plans, the tenants have not been finalized at this time. Additionally, national retailers often perform their own geotechnical engineering for their stores.

Due to the uncertainty with regard to the actual tenants and their geotechnical engineering requirements, the scope of the investigations has been limited to addressing the mass grading of the lots in support of the new shopping centers. We understand that additional geotechnical investigations for the actual building construction will be performed as necessary once the users or tenants of the shopping centers have been determined.

PURPOSE AND SCOPE

At the request of both PPN and PPS, subsurface investigations were undertaken by Fewell Geotechnical Engineering, Ltd. (FGE) for the above three parcels to assist PPN and PPS, and



**FEWELL
GEOTECHNICAL
ENGINEERING, LTD.**

Oahu Office
96-1416 Waihona Place
Pearl City, Hawaii 96782-1973
(808) 455-6569
FAX (808) 456-7062
E-mail: fge@fgeltd.com

Maui Office
360 Papa Place, Suite 103
Kahului, Hawaii 96732-2464
(808) 873-0110
FAX (808) 873-0906

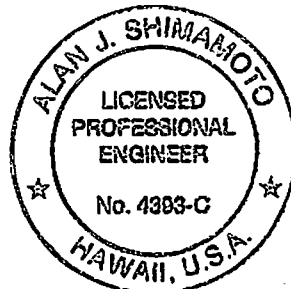
SUBSURFACE INVESTIGATION REPORT
MASS GRADING FOR LOTS 2C & 2D
PIILANI PROMENADE SOUTH SHOPPING CENTER
KIHEI, MAUI, HAWAII

for

PIILANI PROMENADE SOUTH, LLC


by

FEWELL GEOTECHNICAL ENGINEERING, LTD.



This report was prepared by
me or under my supervision.

By Alan J. Shimamoto, P.E.



August 3, 2011

SUBSURFACE INVESTIGATION REPORT

Mass Grading for Lots 2C & 2D

Piilani Promenade South Shopping Center

Kihei, Maui, Hawaii

INTRODUCTION

A subsurface investigation has been completed to assist Piilani Promenade South, LLC, with the Mass Grading of Lots 2C & 2D. Lots 2C and 2D will be the site of the Piilani Promenade South Shopping Center in Kihei, Maui, Hawaii. This report summarizes our findings and conclusions. This work has been completed in general accordance with our March 3, 2011 Proposal and our Agreement with Piilani Promenade South, LLC, dated April 6, 2011.

Two related shopping center complexes are planned by affiliated developers, Piilani Promenade North, LLC (PPN) and Piilani Promenade South, LLC (PPS), for the parcels designated as Lots 2A, 2C and 2D in Kihei, Maui, Hawaii. Lot 2A will be developed for the proposed Piilani Promenade North Shopping Center, while the adjoining Lots 2C and 2D will be developed to support the Piilani Promenade South Shopping Center.

Lots 2C and 2D are separated from Lot 2A by the future Kaonoulu Street Extension, which together with an additional street extension and an off-site water tank, is part of the off-site infrastructure improvements for the shopping center. The geotechnical aspects of the design and construction of the off-site infrastructure improvements, including the future Kaonoulu Street Extension, have been previously addressed by others and are not part of this investigation.

The shopping centers will house a number of retail shops of varying sizes, including large national retailers. Although the proposed footprints of the new buildings are shown on the grading plans, the tenants have not been finalized at this time. Additionally, national retailers often perform their own geotechnical engineering for their stores.

Due to the uncertainty with regard to the actual tenants and their geotechnical engineering requirements, the scope of the investigations has been limited to addressing the mass grading of the lots in support of the new shopping centers. We understand that additional geotechnical investigations for the actual building construction will be performed as necessary once the users or tenants of the shopping centers have been determined.

EXHIBIT 5

ECLIPSE DEVELOPMENT GROUP

RETAIL SPACE AVAILABLE PIILANI PROMENADE 415,000 SQUARE FOOT POWER CENTER PART OF A 65 ACRE RETAIL DEVELOPMENT MAUI, HAWAII

Eclipse Development Group is pleased to offer for lease a truly irreplaceable first class retail development located on the Island of Maui. The development is located on Piilani Highway, the major north/south arterial for the west side of the Island. Piilani Highway is also the only route into the higher end resort communities of Makena and Wailea. With over 700,000 total square feet of retail Piilani Promenade will capture shoppers from the entire Island.

Piilani Promenade is situated with primary frontage along Piilani Highway (over $\frac{3}{4}$ of a mile of frontage), the islands major traffic arterial (over 38,000 cars per day), and will be bisected by what will become the "Up County Road" which will ultimately provide direct and quick access to Kahului Airport. Piilani Highway is the connector between the higher end hotel travel destinations of Makena and Wailea, the Kahului Airport and Cruise Ship ports in Kahului; and the northern road to Lahaina, Ka'anapali and Kapalua. These two roads and unparalleled 1st class architectural design put this development at "Main & Main" and help make this the new retail and entertainment focal point for tourists and locals alike.

The location of Piilani Promenade benefits from sitting at what is projected to be the largest intersection on the Island which provides easy access to; the tourist population (whose average stay is roughly 9 days on the Island); the permanent population on the Island; and the vacation home owners. In addition to all the high end residential growth planned immediately surrounding Piilani Promenade as well as planned developments further

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down Piilani Highway in Makena (2 planned communities) there is a brand new high school projected for 2014 opening on Piilani Highway roughly a half a mile from the site.

With significant barriers to entry in the market, Piilani Promenade is the shining example of prime retail sites. Taking over 14 years to entitle and being located at Main & Main for traffic on the west end of the Island, this development is one that will likely never be duplicated on the Island of Maui.

Maui currently provides approximately 61 hotels with over 10,600 rooms; 103 condominium projects with over 7,300 rooms; and 40 different Bed and Breakfast properties. Maui attracts approximately 2,900,000 visitors each year which only adds to the already strong demographic base of the Island.

Piilani Promenade will be a roughly 415,000 square foot retail development with national and local retailers which will provide a one-stop shopping experience for the Island. We have tenants that will range from 1,000 square feet up to over 150,000 square feet, and space is available now for those ready to move on this dynamic retail opportunity.

WALEA

FUTURE
BUSINESS
PARK

PLANNED COMMUNITY
DEVELOPMENT

NEW HIGH
SCHOOL

PLANNED
COMMUNITY
DEVELOPMENT

UP COUNTRY ROAD

PLANNED COMMUNITY
DEVELOPMENT

KIHEI

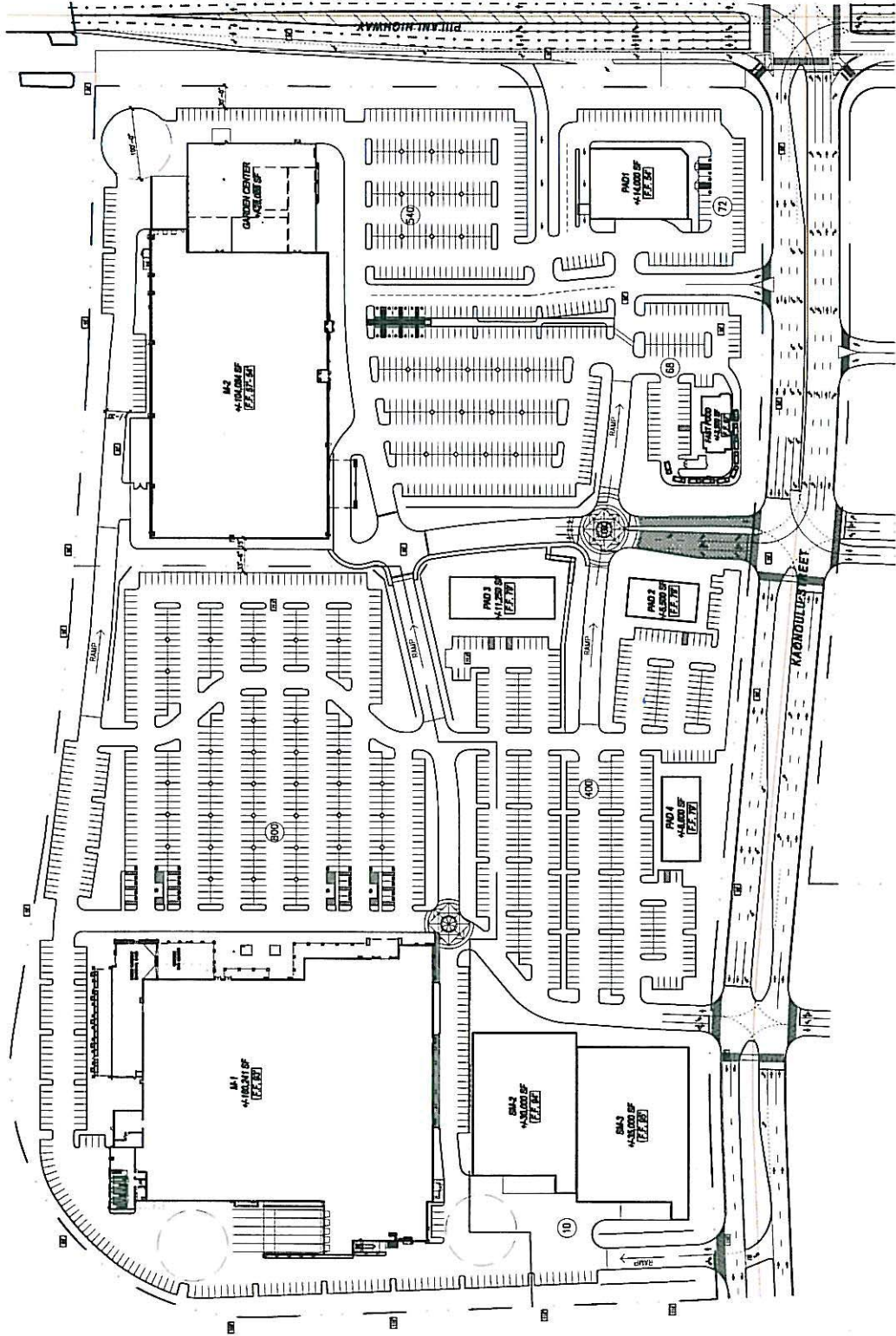
KONOULI STREET

PIILANI HIGHWAY

NORTH TO
KAHULUI AIRPORT
AND LAHAINA

ECLIPSE
DEVELOPMENT
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SITE SUMMARY:	
BLDG AREA:	370,175 SF
TOTAL:	415,175 SF
PARKING PROVIDED:	1,690 STALLS
RATIO:	5.1/1,000 SF



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SITE PLAN

MAUI, HAWAII

ECLIPSE MAUI RETAIL CENTER



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was submitted to the Department of Planning and has been duly served upon the following at their addresses of record by hand delivery or United States Mail, postage prepaid on the date indicated below.

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via hand delivery

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DATED: Makawao, Maui, Hawaii, May 10, 2012.

TOM PIERCE
Attorney for Maui Tomorrow
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