

ORIGINAL

FILED IN THE UNITED STATES DISTRICT COURT DISTRICT OF HAWAII

SEP 27 2007 Ag

at 9 o'clock and 00 min A.M. SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

KOLOA MARKETPLACE, LLC, a Delaware limited liability company,

Plaintiff,

vs.

COUNTY OF KAUAI, KAUAI COUNTY PLANNING DEPARTMENT, KAUAI COUNTY PLANNING DIRECTOR, AND KAUAI COUNTY PLANNING COMMISSION,

Defendants.

CIVIL NO. CV06-00570 HG BMK

ORDER

ORDER

On October 20, 2006, Plaintiff Kōloa Marketplace, LLC ("KM"), filed a Complaint against Defendants County of Kaua'i, Kaua'i County Planning Department, Kaua'i County Planning Director, and Kaua'i County Planning Commission (collectively, "County") asserting various claims related to its application for Project Development Use Permit, Use Permit and Class IV Zoning Permit ("Permits") for the development of a retail shopping center and office complex in Kōloa Town on the island of Kaua'i.

Pursuant to Rule 16 of the Local Rules of Practice for the United States District Court for the District of Hawai'i, the Court mandated that KM and the

Case 1:06-cv-00570-HG-BMK Document 95 Filed 09/27/2007 Page 2 of 8

County enter into discussions with the active participation of the Court to resolve the issues in this matter without protracted litigation. The parties have stipulated to certain matters and the Court, having been fully apprised of the facts and issues of this matter, hereby orders that the Planning Commission of the County of Kaua'i and its necessary subcommittees shall issue to KM the Permits with the following conditions:

1. KM shall submit to the County Planning Department final building elevations, and site plans ("Site Plans") and Master Landscaping Plans, which will address design considerations such as roofs, canopies, building shape, building height and elevations above the street and site, materials, color, scale, circulation, and integration of ADA accessibility. KM will retain the right to make non-material changes to door types, window types and configurations to such plans and design considerations and shall provide notice to the County Planning Department of any such changes. Non-material changes are defined as permitted changes to the exterior design of the buildings the elevations of which are shown in The Shops at Koloa Town, Progress Submittal Dated: 9-24-07, hereinafter "9-24-07 Submittal".
2. KM shall establish and maintain a designated fund, in the amount of Three Hundred Eighty Three Thousand, Two Hundred and One dollars (\$383,201), by partition of funds at a financial institution or by establishing an escrow account for the use and benefit of the County of Kaua'i, for the purposes of satisfying

Case 1:06-cv-00570-HG-BMK Document 95 Filed 09/27/2007 Page 3 of 8

County-imposed impact fees or assessment(s) for transportation-related improvements for the Kōloa /Poipu area. KM will partition the funds or establish the escrow upon the County's issuance of KM's building permit. KM will not be subject to imposition by the County of any further assessments or impact fees in excess of this amount for transportation- and circulation-related improvements for the Kōloa/Poipu area. The partitioned funds and/or escrow account will be interest-bearing and interest will accrue to the benefit of the County. Any monetary amounts, including any interest, remaining at the expiration of 15 years after this Order will revert to KM.

3. KM shall conform to applicable federal and state requirements for exterior lighting in order to minimize adverse impacts on the Federally Listed Threatened Species, including Newell's Shearwater and other seabirds. All external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. KM shall not use spotlights aimed upward or spotlighting of structures or landscaping. Motion sensors shall not be required.

4. The County shall review, process and/or approve all applications for permits and approvals submitted by KM and its initial tenants in good faith and in a timely manner in accordance with the following schedule; provided, however, that (i) KM or its initial tenants have submitted a completed application in accordance

with the County's ordinances, rules and regulations (collectively referred to herein as "County's Laws") and (ii) this provision shall expire on December 31, 2010.

Permit	Deadline for issuance
Grubbing and Grading Permits	Within 30 days of this Order upon submission of all appropriate documentation as required by County's Laws
Final Subdivision/Consolidation Approval	Within 60 days of this Order upon the submission of all appropriate documentation as required by County's Laws
Foundation Permit and Building Permit for Building 40 (Post Office)	180 days after submission of all appropriate documentation as required by County's Laws
Building Permit (entire project except Building 40)	180 days after submission of all appropriate documentation as required by County's Laws
Building Permits for initial Tenant Spaces and improvements (all except restaurant tenants)	60 days after submission of all appropriate documentation as required by County's Laws
Building Permits for initial Restaurant Tenant Spaces and Improvements	90 days after submission of all appropriate documentation as required by County's Laws

5. In regard to the subdivision consolidation approval listed above, KM will dedicate land, or at its election grant perpetual easements, equal to five (5) feet along its Kōloa and Maluhia Road frontages to the County of Kaua'i for the widening of those roads, as shown on the plans submitted, not later than ninety (90) days after issuance of the building permit for the entire project, plus any delays due to force majeure. KM will construct the road addition along Kōloa and Maluhia Roads to create acceleration, deceleration, stacking and left-turn lanes as specified

Case 1:06-cv-00570-HG-BMK Document 95 Filed 09/27/2007 Page 5 of 8

by KM's traffic engineer and engineering standards administered by the County Department of Public Works.

6. KM will comply with the development and construction standards for construction within a floodway, contained in the *Requirements for Development within a Flood District* (KCC §8-12.3), the *Flood Plan Management Ordinance* (KCC §15-1), and the *Drainage Ordinance* (KCC §16-1), and will submit a *Drainage Study* and a *No Rise* determination by KM's civil engineer upon the effective date of this Order.

7. KM shall be allowed to relocate, replace and/or remove existing monkeypod or other trees consistent with its landscaping plan. In the event the relocation or removal results in the loss of any tree: a) if the tree to be replaced has *less than* a 12 inch caliper, the new tree will be of a similar specie and will have a caliper that is at *least equal* to the tree it replaces; and b) if the tree to be replaced has *more than* a 12 inch caliper, the tree that replaces it will be of a similar specie and will have *at least* a 12 inch caliper. KM agrees to use all accepted practices in the relocation of trees.

8. KM will construct a single two-way access from Maluhia Road. KM will construct a single two-way access from Kōloa Road, to be located at the existing County-approved drive access to the current Post Office parking lot. KM will

Case 1:06-cv-00570-HG-BMK Document 95 Filed 09/27/2007 Page 6 of 8

construct the bank drive-through access as an ingress only from Kōloa Road, which will include an adjacent bypass lane, all as set forth in the "9-24-07 Submittal".

9. No parking will be constructed in the right-of-way or within the project property along Kōloa and Maluhia Roads within 150 feet of the intersection of Kōloa and Maluhia Roads as depicted on the "9-24-07 Submittal". KM may construct other parallel parking only along these roads as long as such parking is wholly within the project property, and is not located in the County's right-of-way.

10. With regard to the building setback along Maluhia Road Scenic Road Corridor, KM shall comply with and implement the building setbacks required by the Comprehensive Zoning Ordinance and as shown on the "9-24-07 Submittal".

11. KM shall provide landscaping in accordance with the project's Master Landscape Plan previously submitted to the County.

12. KM shall construct sidewalks along the project site's Kōloa and Maluhia road frontages of a width compliant with the applicable County Standards Building Code and Americans with Disabilities Act requirements. The sidewalks shall be completed prior to issuance of a certificate of occupancy. KM may post a 100% completion bond for the sidewalks and the County will issue certificates of occupancy for each building in the project. With the exception of the post office building, all improvements except sidewalks located within the right-of-way, shall

be dedicated and accepted by the County before a certificate of occupancy will be issued.

13. KM will utilize Low Impact Development techniques to the extent such techniques are required by the Building and Construction Regulations (KCC, Title V) and other applicable ordinances of the county of Kaua'i in force at the time the Permits are issued.

14. KM shall substantially commence construction (as evidenced by completion of site grading and building foundations) within one year of the last building permit required to construct the project, plus any delays due to force majeure.

15. KM will pay the Environmental Impact Assessment Fee pursuant to Chapter 11A of the Kaua'i County Code, which is \$100 per the minimum number of parking stalls required by the Comprehensive Zoning Code.

16. KM will comply with all applicable ordinances and laws which are administered by the County, State, and Federal agencies and which are in force as of the date the Permits are issued.

17. KM shall provide a yearly status report to the Planning Department and the Planning Commission, providing KM's compliance with these conditions of approval until compliance with all conditions and final construction of the project is complete.

Case 1:06-cv-00570-HG-BMK Document 95 Filed 09/27/2007 Page 8 of 8

18. In the event additional governmental agency conditions are lawfully imposed in connection with issuance of permits and approvals other than the Permits, it shall be KM's responsibility to resolve those conditions with the respective agency or agencies.

Enforcement of this Order in the event of an unresolvable dispute between the parties related to monitoring and compliance shall be directed to Magistrate Judge Barry M. Kurren of the District Court. Based on the terms and conditions imposed by this Order, the Court finds that this Order resolves all claims asserted by Plaintiff in this matter. As there are no remaining claims or parties, this Court dismisses all claims herein with prejudice.

DATED: Honolulu, Hawai'i, September 26, 2007

[Signature]
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO CONTENT AND FORM:

[Signature] 9/24/07
GARY G. GRIMMER, ESQ.

KARL K. KOBAYASHI, ESQ.

Attorneys for Plaintiff KOLOA MARKETPLACE, LLC

[Signature]
MATTHEW S.K. PYUN, JR., ESQ.

JAMES K. TAGUPA, ESQ.

Attorneys for Defendants COUNTY OF KAUA'I,
KAUA'I COUNTY PLANNING DEPARTMENT,
KAUA'I COUNTY PLANNING DIRECTOR,
AND KAUA'I COUNTY PLANNING COMMISSION

Koloa Marketplace, LLC vs. County of Kaua'i, et al., Civil No. 06-00570 HG BMK; U.S. District Court; ORDER