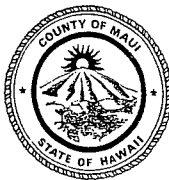


JAMES "KIMO" APANA
Mayor

JOHN E. MIN
Director

CLAYTON I. YOSHIDA
Deputy Director



COUNTY OF MAUI
DEPARTMENT OF PLANNING

February 19, 2002

B. Martin Luna, Esq.
Carlsmith Ball
One Main Plaza, Suite 400
2200 Main Street
Wailuku, Hawaii 96793-1086

Dear Mr. Luna:

Re: Amendments to Special Management Area Use Permit and Shoreline Setback Variance for Various Improvements both Within and Outside of the 150 ft. Shoreline Setback Area at the Kaanapali Beach Hotel, TMK: 4-4-008:003, Kaanapali, Maui, Hawaii (SM1 900040), (SSV 990001)

At its regular meeting on February 12, 2002, the Maui Planning Commission reviewed the above request and after due deliberation voted to grant approval of the Amendments to the SMA Use Permit and Shoreline Setback Variance subject to the conditions of the Decision and Order dated March 27, 2001, per motion on March 13, 2001, as amended as follows:

Amended D&O Conditions:

1. That construction of the proposed project shall be initiated by **February 12, 2004**. Initiation of construction shall be determined as construction of offsite improvements, issuance of a foundation permit and initiation of construction of the foundation, or issuance of a building permit and initiation of building construction, whichever occurs first. Failure to comply within this two (2) year period will automatically terminate this Special Management Area Use Permit and Shoreline Setback Approval unless a time extension is requested no later than ninety (90) days prior to the expiration of said two (2) year period. The Planning Director shall review and approve a time extension request but may forward said request to the Planning Commission for review and approval.

B. Martin Luna, Esq.
February 19, 2002
Page 2

4. That final construction of the project shall be in accordance with revised architectural plans dated January 2002.

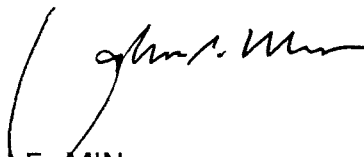
New Condition:

26. That construction of the beach activity hut shall be portable such that it will not be permanently fixed to the foundation. As such, in the unlikely event of a very high surf event, the structure can be unbolted from its foundation and moved to a more mauka location.
27. That the proposed restaurant/canoe hale shall be operated in compliance with all applicable State and County laws relating to liquor.

It should be noted that the Commission reviewed two architectural building designs for the restaurant/canoe hale. The applicant's preferred design includes the use of Ohia wood for the structure with a thatched roofing. A second design which included a wood building with a shingle roof as was originally approved by the Commission was also presented. Architectural plans for both design are dated January 2002. Both design plans were approved by the Commission.

Thank you for your cooperation in this matter. If further clarification is required, please contact Ms. Ann T. Cua, Staff Planner, of this office at 270-7735.

Very truly yours,



JOHNE MIN
Planning Director

B. Martin Luna, Esq.
February 19, 2002
Page 3

JEM:ATC:tlm

c: Clayton I. Yoshida, AICP, Deputy Planning Director
Michael White, Applicant
Rory Frampton, Chris Hart & Partners
LUCA (2) (w/ 1 copy of Enclosure)
Aaron H. Shinmoto, Planning Program Administrator (w/Enclosure)
Charles Fox (w/enclosure)
Office of Planning, CZM Program (w/Enclosure)
Department of Water Supply
02/CZM File (w/Enclosure)
Ann T. Cua, Staff Planner
Project File
General File
(s:\all\ann\kbhsma&ssvamend2002.app)

BEFORE THE MAUI PLANNING COMMISSION

COUNTY OF MAUI

STATE OF HAWAII

In The Matter Of The Application Of) Docket No. SM1 900040
) Docket No. SSV 990001
MR. MICHAEL B. WHITE, General Manager) Kaanapali Beach Hotel
KA'ANAPALI BEACH HOTEL (KBH)) (ATC)
)
To Amend a Shoreline Setback Variance and)
Special Management Area Use Permit to)
Relocate the Approved Restaurant/Canoe)
Hale, Abandon an Existing Beach Activities)
Hut and Construct a New Portable Beach)
Activities Hut, Realign the Beach Walkway,)
and Relocate the Approved Entertainment)
Area and Install Landscaping, All Partially)
Within the 150 ft. Shoreline Setback Area ,)
and Construct a Swimming Pool, Kau Hale,)
and Landscaping Outside of the 150 ft.)
Shoreline Setback Area for the Kaanapali)
Beach Hotel, TMK 4-4-08: 003, Kaanapali,)
Maui, Hawaii)

MAUI PLANNING DEPARTMENT'S REPORT AND RECOMMENDATION
TO THE MAUI PLANNING COMMISSION
FEBRUARY 12, 2002

DEPARTMENT OF PLANNING
COUNTY OF MAUI
250 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793

**Amendment of Shoreline Setback Approval
Special Management Area Use Permit Amendment**
(a:\KBHsmassvamend2002rpt)

BEFORE THE MAUI PLANNING COMMISSION

COUNTY OF MAUI

STATE OF HAWAII

In The Matter Of The Application Of) Docket No. SM1 900040
) Docket No. SSV 990001
MR. MICHAEL B. WHITE, General Manager) Kaanapali Beach Hotel
KA'ANAPALI BEACH HOTEL (KBH)) (ATC)
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To Amend a Shoreline Setback Variance and)
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Relocate the Approved Restaurant/Canoe)
Hale, Abandon an Existing Beach Activities)
Hut and Construct a New Portable Beach)
Activities Hut, Realign the Beach Walkway,)
and Relocate the Approved Entertainment)
Area and Install Landscaping, All Partially)
Within the 150 ft. Shoreline Setback Area ,)
and Construct a Swimming Pool, Kau Hale,)
and Landscaping Outside of the 150 ft.)
Shoreline Setback Area for the Kaanapali)
Beach Hotel, TMK 4-4-08: 003, Kaanapali,)
Maui, Hawaii)

THE REQUEST

This matter arises from a request to Amend a Shoreline Setback Variance and Special Management Area (SMA) Use Permit filed on January 16, 2002 by Mr. Michael White, General Manager, Ka'anapali Beach Hotel (KBH), ("Applicant"); on approximately 10.328 acres of land in the Lahaina District, TMK 4-4-8:3 ("Property"). The request was filed pursuant to Section 12-202-17, Special Management Area Rules and Section 12-5-12 of the Shoreline Setback Rules of the Maui Planning Commission.

The changes result from a Settlement Agreement reached between the applicant and the Intervenor Shirley Schwartz, Rene Shepherd, Dr. Zanell McCullough Zemel, Dr. Simon Zemel and Kent McNaughton (their authorized representative is Charles Fox). The Intervenor had previously appealed the Maui Planning Commission's approval of the Shoreline Setback Variance and the Special

Management Area Use Permit amendment for the restaurant/canoe hale granted by the MPC in March 2001. The intervenors have agreed to "stay" the appeal for 30 days so that KBH may process any applications needed to implement the settlement agreement.

APPLICABLE REGULATIONS

Special Management Area Use Permit Amendment

Chapter 12-202-17, Amendments to and determinations of permit terms, conditions and time stipulations, Special Management Area Rules for the Maui Planning Commission.

The Rules, in part, state that, "Any person who has been issued a Special Management Area Emergency Permit, Minor Permit, or Use Permit may request the director or commission, as appropriate, to amend, delete, or determine any terms, conditions or time stipulations placed upon such permits.

Unless waived by the applicant and the director, notice of the public hearing to amend or determine the permit shall be given pursuant to the procedures set forth in section 12-202-13. A public hearing shall not be waived if a petition to intervene was filed or any person, other than the applicant, was admitted as a party to any prior proceeding on the matter, unless a written waiver from all parties has been received by the department. Instances in which the proposed amendment or determination does not clearly pertain to or could not affect the same rights, privileges or interests on which the intervention was based, a written waiver from all parties shall not be required for purposes of waiving a public hearing.

Shoreline Setback Variance

Standards for reviewing a Shoreline Setback Variance are found under Chapter 5, Rules of the Maui Planning Commission Relating to the Shoreline Area of the Island of Maui.

Pursuant to §12-5-3, the propose of this chapter is to establish shoreline areas which regulate the use and activities of land within the shoreline area in order to protect the health, safety, and welfare of the public.

§12-5-13 (a) states in part that a shoreline area variance may be granted for a structure or activity otherwise prohibited by this chapter, if the authority finds in writing, based on the record presented, that the proposed structure or activity is necessary for or ancillary to:

- (1) Cultivation of crops;
 - (2) Aquaculture
 - (3) Landscaping; provided that, the authority finds that the proposed structure of activity will not adversely affect beach processes and will not artificially fix the shoreline;
 - (4) Drainage;
 - (5) Boating, maritime, or water sports recreational facilities;
 - (6) Facilities or improvements by public agencies or public utilities regulated under Chapter 269 HRS;
 - (7) Private facilities or improvements which are clearly in the public interest;
 - (8) Private facilities or improvements which will neither adversely affect beach processes nor artificially fix the shoreline; provided that, the authority also finds that hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline area;
 - (9) Private facilities or improvements that may artificially fix the shoreline; provided that, the authority also finds that shoreline erosion is likely to cause hardship to the applicant if the facilities or improvements are not allowed within the shoreline area; and provided further that, the authority imposes conditions to prohibit any structure seaward of the existing shoreline unless it is clearly in the public interest; or
 - (10) Moving of sand from one location seaward of the shoreline to another location seaward of the shoreline; provided that, the authority also finds that the moving of sand will not adversely affect beach processes, will not diminish the size of the public beach, and will be necessary to stabilize an eroding shoreline.
- (b) For the purposes of this section hardship shall not include economic hardship to the applicant; county zoning changes, planned developments permits, cluster permits, or subdivision approvals after June 16, 1989; any other permit or approval which may have been issued by the authority. If the hardship is a result of actions by the applicant, such result shall not be considered a hardship for the purpose of this section.
- (c) No variance shall be granted unless appropriate conditions are imposed:

- (1) To maintain safe lateral access to and along the shoreline or adequately compensate for its loss;
- (2) To minimize risk of adverse impacts on beach processes;
- (3) To minimize risk of structures falling and becoming loose rocks or rubble on public property; and,
- (4) To minimize adverse impacts on public views to, from, and along the shoreline.

GENERAL DESCRIPTION

Description of the Property

1. The property which is approximately 10.328 acres is located makai (west) of the Ka'anapali Parkway in the Ka'anapali Resort. (**Exhibit 1**)
2. Land Use Designations
 - a. State Land Use District -- Urban
 - b. West Maui Community Plan -- Hotel
 - c. County Zoning -- H-2 Hotel
 - d. Other -- The site is located within the Special Management Area of the County of Maui.
3. Surrounding Uses -- The property is bounded by the Sheraton Maui Hotel to the North, Kaanapali Parkway and the existing golf course to the East, the Whaler Condominium to the South and the ocean to the West.

BACKGROUND INFORMATION

1. The Kaanapali Beach Hotel is a 430-unit hotel and presently consists of four (4) separate wings; Maui, Lanai, Kauai, and Molokai as well as a central lobby, coffee shop, retail spaces and meeting area. The hotel was constructed in 1964. (**Exhibit 2**)
2. In December, 1990 the Maui Planning Commission approved a Special Management Area Use Permit to expand and renovate the hotel to include the following: (**1990 site plan - Exhibit 3**)
 - a. The addition of 215 guest rooms;
 - b. A five and one half story (542 stall) parking structure and 16 on grade

- beach parking stalls;
- c. 10,200 sq. ft. of meeting and conference facilities and two restaurants;
- d. Overall renovation to the hotel's "back-of-house";
- e. Improvements to the hotel grounds including construction of a Kau Hale, salt water pool for a marine exhibit, landscaping, walkways, relocation of the recreational pool and outdoor luau/stage area, signage, lighting, and the construction of a free standing beach restaurant outside of the 150 ft. setback.

During this 1990 application process, the Planning Department had recently adopted revisions to the Shoreline Setback Rules, such that the shoreline setback of the KBH property, which had previously been 40 ft. was increased to 150 ft. As KBH's priority at that time was to obtain approval of the proposed new hotel rooms, KBH agreed to move the restaurant facility back to the new 150 ft. shoreline setback during the 1990 application process and withdrew its application for a shoreline setback variance. The applicant's withdrawal of the SSV application was with the understanding that they had the ability to build a pool, a luau area, beach activity hut and other recreational uses within the 150 ft. shoreline setback area (see enclosed minutes of the 1990 Planning Commission meeting - **Exhibit 4**). The applicant has submitted the 1991 building permit site plan (**Exhibit 5**) which reflects the 1990 approval to move the restaurant back to the 150 ft. shoreline setback line and a new swimming pool and beach concession stand within the 150 ft. shoreline setback area.

3. In 1991, the applicant filed an application to amend the SMA Permit to provide dormitory housing units (to comply with the project's employee housing policy), and to add two (2) traditional Hawaiian Structures, a canoe house and a wood carving demonstration house. The two Hawaiian structures would serve to compliment a third structure which was already approved, to comprise a Kau Hale, or a group of structures constituting a Hawaiian Home. The Commission approved the SMA Modification and Special Accessory Use permit for the dormitory use on September 24, 1991. The approved site plan is attached as **Exhibit 6**. It should be noted that the swimming pool and beach concession stand were identified on the approved 1991 plan.

4. On October 12, 1993, the Maui Planning Commission granted a two year time extension of the subject Special Management Area Use Permit and Accessory Use Permit.

5. On September 25, 1995, the Commission approved another two (2) year time extension of the SMA Permit and Accessory Use Permit.

6. On April 28, 1998 the Commission granted an amendment to the 1990 SMA permit to reduce the scope of work of the KBH Renovation project so that no additional hotel rooms were proposed. The project instead focused on upgrading existing guestrooms, public service areas and landscaping and construction of a new three level parking structure and free standing beach restaurant. The proposed restaurant was sited outside of the 150 ft. shoreline setback line of the hotel and closest to the Kauai wing. A time extension to commence construction and deletion of Condition No. 16 requiring the applicant to provide employee housing were also approved. The 1998 site plan is attached as **Exhibit 7**.

7. In January, 1999 KBH filed another amendment to the previous SMA approval and a SSV application to construct a proposed restaurant/canoe hale and other minor improvements within the 150 ft. shoreline setback area. (Site plan-**Exhibit 7a**)

8. Two (2) Petitions to Intervene were filed relative to the 1999 requests. The first was filed by the Association of Apartment Owners of the Whaler. This petition to intervene was withdrawn after reaching a settlement agreement with KBH. The Commission accepted the withdrawal at its September 28, 1999 meeting.

The second petition to intervene was filed by Isaac Hall on behalf of various owners within The Whaler. This petition was accepted by the Commission on September 28, 1999 and a Commission voted to have a panel of three (3) members (Robert Carroll, Jeremy Kozuki, and Herman Nascimento) serve as the hearings panel.

9. The contested case hearing on this matter was conducted on April 3, 4, 5, 7, 10, 13, 14, and 18, 2000.

10. The Commission conducted a site visit of KBH on March 1, 2001.

11. On March 13, 2001, the Commission voted to approve a Shoreline Setback Variance and an Amendment to the SMA permit to construct a restaurant/canoe hale partially within the 150 ft. shoreline setback area. (**Decision and Order attached as Exhibit 21**)

12. A settlement agreement was reached between the intervenors and KBH. The agreement is dated November 28, 2001 and is attached as Exhibit 22.

PROCEDURAL MATTERS

1. In accordance with Section 12-202-17 (c) of the SMA Rules for the Maui Planning Commission, the applicant has received a letter from Charles Fox representing various owners at The Whaler waiving the requirement for a public hearing. **(Exhibit 23)** We have also received a letter from Joel August Esq., on behalf of the AOA of The Whaler indicating that the president of the AOA is in the process of contacting all members of the Board relative to gaining their approval for a waiver of the public hearing. **(Exhibit 24)** Once this is received, a copy will be forwarded to the Department and the Commission.

PROJECT DESCRIPTION (Exhibits 8-20)

As a result of the settlement agreement, the applicant, KBH, is requesting the following amendments to the Shoreline Setback Variance and SMA Permit issued in March, 2001.

1. Restaurant/Canoe Hale

This facility will be relocated approximately ninety feet (90') north towards the Sheraton and approximately fifteen feet (15') mauka of the currently approved location. **(Exhibit 8)** The facility will now be located 100 ft. (south makai corner) and 81 ft. (north makai corner) from the shoreline. The total size of the restaurant will be 7,300 sq. ft., the same as the previous design. The design of the structure will feature high pitched Hawaiian hip roofs with wide overhangs. Natural materials will be used to reinforce the Hawaiian tropical theme such as wood flooring, decks, walls, doors and trims. Tapa cloth, rattan lahala, and other natural finished will also be used.

2. Beach Activity Hut

As a result of the relocation of the restaurant/canoe hale, the current beach activities hut (283 sq. ft.) will be abandoned and a new hut will be built (418 sq. ft.). The new hut will be closer to the Whaler in a location adjacent to the beach walkway about 20 ft. north of the walkway intersection north of the Kauai wing. The hut will be designed to be portable such that it will not be permanently fixed to the foundation. As such, in the unlikely event of a very high surf event, the structure can be unbolted from its foundation and moved to a more mauka location. The new beach activity hut will be setback approximately 65 feet from the certified shoreline.

3. **Walkway**

The beach walkway will be slightly realigned to accommodate the new location of the beach activities hut, entertainment area, and restaurant/canoe hale.

4. **Pool**

Because of the relocation of the restaurant/canoe hale, the applicant is proposing to incorporate the swimming pool which was approved in 1990 and 1991 into the current project plans. The new pool will measure approximately 3,695 sq. ft. as opposed to the 3,760 sq. ft. pool identified on the 1990 and 1991 site plans. In addition, the new pool will be located outside of the setback area unlike the previous pool which was located within the setback area. The existing whale shaped pool will remain and be used as a "children's" pool.

5. **Entertainment Area**

The entertainment area which will consist of a raised grassed platform must be moved as a result of the relocated restaurant/canoe hale facility. A low "dry stacked" rock wall will be located directly behind the raised platform. The large Kamani Tree which is located within the courtyard of the property, will be relocated makai of the entertainment area.

6. **Kau Hale and Other Landscape Improvements**

The Kau Hale buildings (3 structures) are open sided and will be used for exhibit/education/demonstration purposes. These structures were approved by the MPC in 1991. The applicant is proposing to include these structures as well as landscape planting as part of the current plans for KBH.

ANALYSIS OF SMA PERMIT AND SSV AMENDMENTS

1. Previous project assessments of 1990, 1991, 1998, and 2001 determined that a restaurant and other uses would not have a significant demand on infrastructure and public services. The initial approval in 1990 included an analysis of the impacts associated with an additional 215 guest rooms, 10,200 sq. ft. of meeting and conference facilities and two restaurants, a Kau Hale, salt water pool, outdoor luau stage area and a freestanding beach restaurant. The project as it is proposed today is significantly reduced in scope and the impacts on infrastructure and public services have also decreased.

2. The new location of the restaurant/canoe hale will not increase impacts to the environment. The structure has been relocated approximately 90 ft. north and 15 ft. mauka of the previous proposed location thus creating less of an impact to the shoreline. A separate restroom will be provided adjacent to the facility, (mauka) outside of the 150-ft. setback area. The design of the restaurant/canoe hale will utilize the most appropriate structural system for this beachfront location. This building floor level will be constructed on concrete piers and raised approximately 3' to 6' above the existing grade which is approximately 9.9 ft. above mean tide level. The structural system is similar to that of a dock or pier, and therefore, in the unlikely event that storm waves would reach inland of the restaurant, the washup would flow unobstructed below the building. The pier design also eliminates potential scouring as the piers will present no barrier, even below grade, that the water could undermine. The columns will continue into the interior of the facility to support wooden trusses that will reinforce the natural rustic quality of the interior and exterior of the building. The open pavilion design will provide an energy efficient environment with natural ventilation and light.
3. The applicant, KBH currently has an arrangement with the Bishop Museum in which cultural artifacts are loaned to the Hotel for educational displays. This program will be continued in the restaurant with displays relating to paddling, navigation, and fishing.
4. KBH will also be sponsoring a Hawaiian canoe club which will store their canoes below the raised portion of the building. The canoes will be suspended on harnesses attached to rolling bearings supported by the concrete floor structure. The applicant maintains that the activity generated by the interaction of the canoe club and the hotel reinforces the commitment of the Hotel as an open experience for local guests. In order to provide shoreline access for the canoe club, a path will be cleared in the naupaka fronting the southern and northern portion of the property.
5. The project as currently proposed remains consistent with the State Land Use Urban District, the Maui County General Plan (1990 Update), the Hotel designation in the West Maui Community Plan and the H-2 Hotel district. The project will be developed using the standards of the H-2 Hotel District.
6. The Planning Commission has determined that the restaurant/canoe hale and related improvements are consistent with the objectives and policies set forth in the Coastal Zone Management Act (CZMA).(pages 47-51 of the D&O) The proposed amendments to the project are also consistent with said objectives and policies.

CRITERIA FOR GRANTING A SHORELINE SETBACK VARIANCE

The project proposes various improvements within the 150 ft. shoreline setback area. The Planning Department has recently established a policy setting a threshold of \$125,000 for cumulative improvements within the shoreline area to differentiate between a Shoreline Setback Approval and a Shoreline Setback Variance. The Department has reviewed each structure/activity within the setback area relative to the criteria for granting a shoreline setback variance.

A variance may be granted for a structure or activity otherwise prohibited, if the authority finds in writing, based on the record presented, that the proposed structure or activity is necessary for or ancillary to:

(3) Landscaping; provided that, the authority finds that the proposed structure or activity will not adversely affect beach processes and will not artificially fix the shoreline;

The proposed landscape planting including trees, shrubs, groundcover and raised grassed platform fall under this category.

(5) Boating, maritime, or water sports recreational facilities;

The proposed beach hut is a recreational facility which falls under this category. Because of the rental of beach equipment, it is important that this structure be located in an area where the beach is clearly visible to assure safety of the equipment and individuals utilizing the equipment.

Relative to the **proposed restaurant/canoe hale facility** the Commission has previously determined (refer to *Decision and Order dated March 28, 2001-Exhibit 21*) that the proposed structure or activity is necessary for or ancillary to:

(5) Boating, maritime, or water sports recreational facilities; (page 15)

(7) Private facilities or improvements that are clearly in the public interest; (pages 15-24 and 55-56)

(8) Private facilities which will neither adversely affect beach processes nor artificially fix the shoreline; provided that, the authority also finds that hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline area.... (pages 25 -29 and 57)

The proposed project also complies with the following recommendations of the Beach Management Plan for Maui County:

- Encourage developers and landowners to pre-consult with various experts and government agencies familiar with coastal erosion in order to get appropriate recommendations of project design.
- Discourage slab-on-grade construction.
- Encourage minor structures to be non-permanent and portable.
- Encourage major structures to be hurricane/tsunami resistant (ie., Built on posts) and located away from areas of high coastal hazard.

Pursuant to the foregoing, the Department believes that the amendment to shoreline setback variance can be granted. There will be minimal risk of adverse affects on beach processes. A thorough discussion of shoreline processes can be found in the Decision and Order on pages 35-39.

OTHER GOVERNMENT APPROVALS

1. The revised project plans, which reflect the settlement agreement between KBH and the intervenors, will be reviewed by the Maui Urban Design Review Board (UDRB) on February 5, 2002. The Board's recommendation will be presented at the Commissions February 12, 2002 meeting.
2. The Maui Planning Commission declared the project's Environmental Assessment to be a Finding of No Significant Impact (FONSI) at its July 13, 1999 meeting. A copy of the draft final EA was circulated to the Commission. Said FONSI was published in the August 8, 1999 OEQC Bulletin. The 30-challenge period ended on September 7, 1999. There has not been significant changes to the project plans. The proposed changes will have a positive impact on the shoreline and will not have significant impacts on the environment.

TESTIMONY

As of January 28, 2002, the Planning Department has received two letters from the intervenors supporting the proposed amendments. **(Exhibits 23 and 24)** No letters in opposition to the project have been received.

CONCLUSIONS OF LAW

In addition to the Conclusions of Law found on pages 54-57 of the Decision and Order dated March 27, 2001, the Planning Department finds that:

Amendment to Special Management Area Use Permit

1. The proposed amendments will not have substantial adverse environmental or ecological effects.
2. The proposed amendments are consistent with the objectives and policies set forth in the Special Management Area Rules and Regulations of the County of Maui.
3. The proposed amendments are consistent with the County general plan, the West-Maui Community Plan, zoning, and other applicable ordinances.

Amendment to Shoreline Setback Variance

The criteria for a shoreline area variance have been met by the Applicant because, as outlined in the Decision and Order dated March 27, 2001 and in the analysis section of this report, the proposed structures and activities are necessary or ancillary to:

1. Landscaping which does not adversely affect beach processes and will not artificially affix the shoreline;
2. Boating, maritime or water sports recreational facilities;
3. Private facilities or improvements that are clearly in the public interest;
4. Private facilities or improvements which will neither adversely affect beach process nor artificially fix the shoreline; provided that the authority also finds that hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline area.

RECOMMENDATION

Based on the above Findings of Fact and Conclusions of Law as well as the Findings of Fact and Conclusions of Law contained in the Decision and Order dated March 27, 2001, the Planning Department recommends approval of the amendments to the SMA and SSV approvals subject to the conditions outlined in the Decision and Order dated March 27, 2001 per motion on March 13, 2001 as

amended as follows:

Amended Condition

4. That final construction of the project shall be in accordance with revised architectural plans dated January 2002.

New Condition:

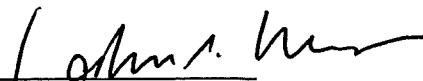
26. That construction of the beach activity hut shall be portable such that it will not be permanently fixed to the foundation. As such, in the unlikely event of a very high surf event, the structure can be unbolted from its foundation and moved to a more mauka location.

27. That a new certified shoreline survey shall be obtained prior to issuance of building permits for the project.

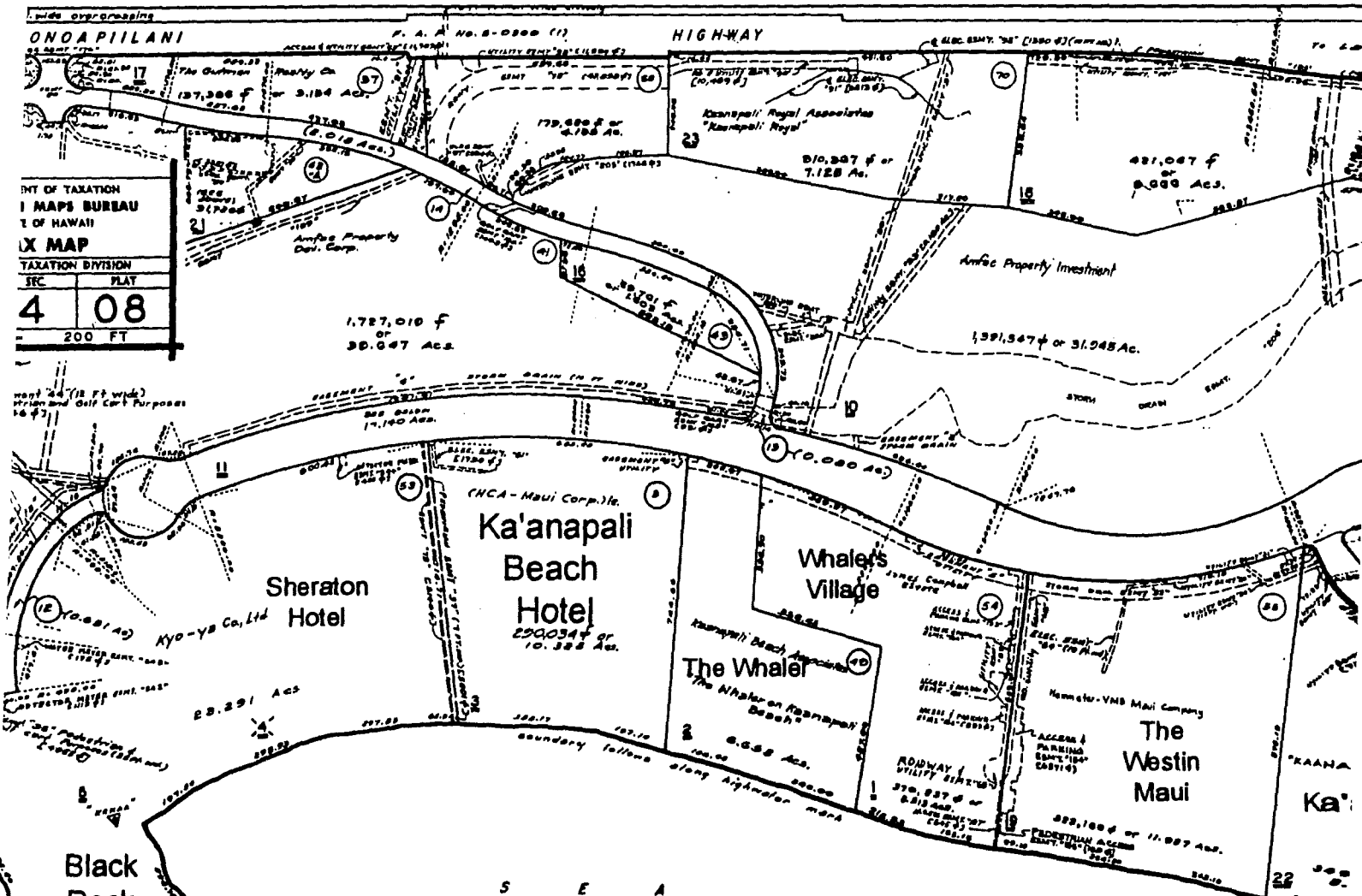
The conditions of the Special Management Area Use Permit shall be enforced pursuant to §12-202-23 and §12-202-25 of the Special Management Area Rules for the Maui Planning Commission.

In consideration of the foregoing, the Planning Department recommends that the Maui Planning Commission adopt the Planning Department's Report and Recommendation prepared for the February 12, 2002 meeting as its Findings of Fact, Conclusions of Law, Decision and Order and authorize the Director of Planning to transmit said Decision and Order on behalf of the Planning Commission.

APPROVED:

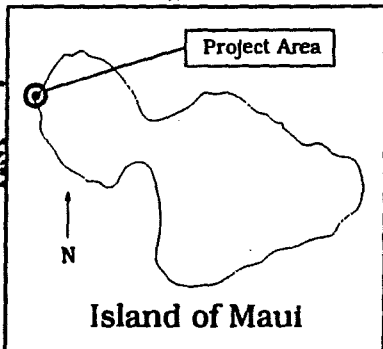
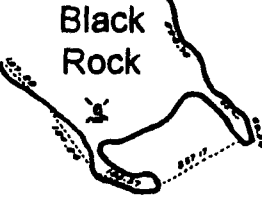


JOHN E. MIN
Planning Director

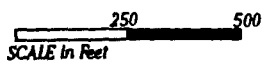


DIVISION OF TAXATION
 MAPS BUREAU
 STATE OF HAWAII
TAX MAP
 TAXATION DIVISION
 SEC. **4** PLAT **08**
 200 FT

Note: 24 (18 FT wide)
 Section and Golf Cart Purposes
 16-47



Area Map



Source: Tax Map Plat Map (2) 4-4-08

Ka'anapali Beach Hotel SMA Amendments

EXHIBIT I

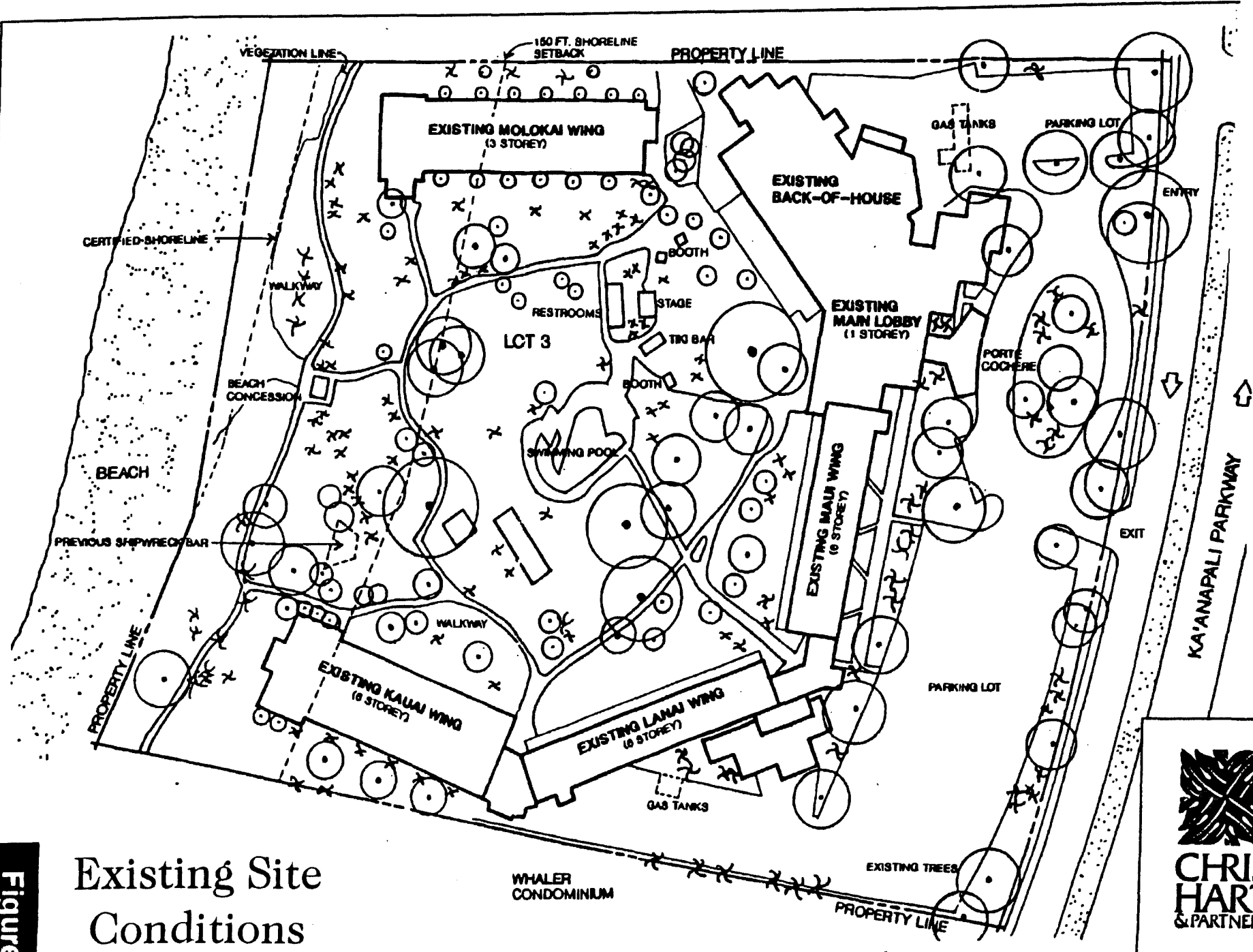


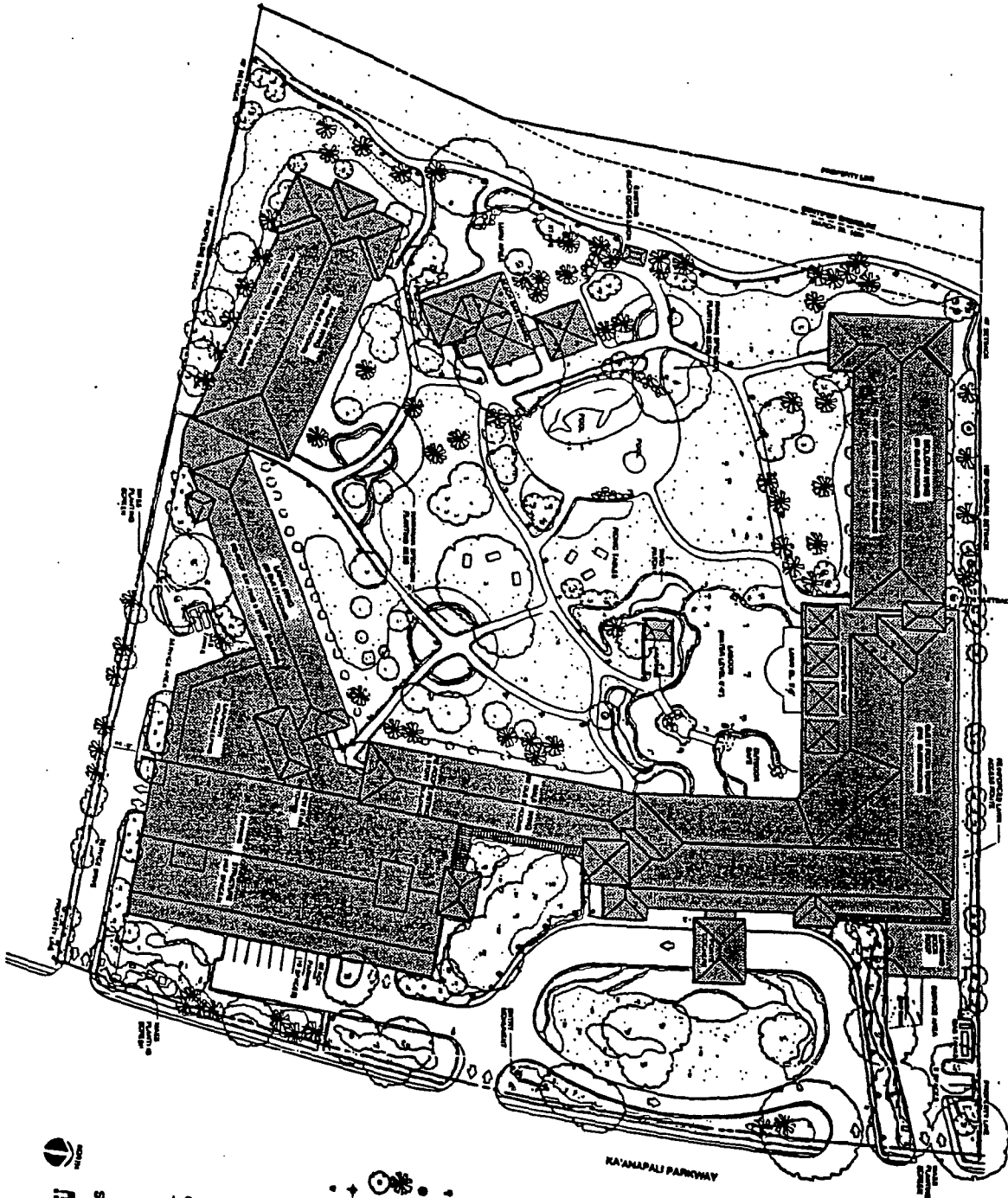
Figure 3

Existing Site Conditions



Figure 3

**EXISTING SMA APPROVED PROJECT
KA'ANAPALI BEACH HOTEL**



SITE / ROOF PLAN



- LEGEND**
- 1. EXISTING BUILDING
 - 2. EXISTING ROOF
 - 3. EXISTING DRIVEWAY
 - 4. EXISTING DRIVEWAY
 - 5. EXISTING DRIVEWAY
 - 6. EXISTING DRIVEWAY
 - 7. EXISTING DRIVEWAY
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 - 100. EXISTING DRIVEWAY

1990 Plan

EXHIBIT " 3"

MAUI PLANNING COMMISSION
PUBLIC HEARING
December 18, 1990

The regular meeting of the Maui Planning Commission was called to order by Chairman Tom Sato at 9:01 a.m. on Tuesday, December 18, 1990, in the Planning Department Hearing Room, 1st Floor, 250 S. High Street, Wailuku, Maui.

A. PUBLIC HEARING

1. ~~MR. MICHAEL BROWN~~ WHITE, General Manager, ~~Kaanapali Beach Hotel~~ requesting a Special Management Area Use Permit and Shoreline Setback Variance for proposed improvements consisting of the construction of a 215-room eight-story addition, a 487-stall five-story parking structure, renovations to the hotel's physical plant and improvements to the grounds of the hotel including the construction of a beach restaurant within the shoreline setback area at ~~Maunaloa~~, Kaanapali, Island of Maui.

Ms. Smythe: Mr. Chairman.

Mr. Sato: Yes.

Ms. Smythe: Everyone here knows that I'm an employee of the Kaanapali Beach Hotel so at this time I would like to excuse myself from the review.

Ms. Suyama presented the Director's Report.

Mr. Sato: Thank you Colleen for a very concise report. Colleen are you saying that there was 16 letters for support, for approval, and 8 letters in opposition?

Ms. Suyama: Yes.

Mr. Sato: Thank you. Mr. Lee, Public Works, do you have any additions to make?

Mr. Lee: I have 2 points. In relation to our comments dated November 3, 1990, we would like to amend that comment on item 7 which says, "The current certification shoreline map shall be submitted." We do have that on file as of today, so we can delete that item.

The second comment I had was in relation to Ho'onoapiilani Highway intersection improvement at Kekaa and Kaanapali Parkway. I know it's the State's responsibility to impose the improvement requirements, however, there is some possibility at some point in time in the future when the by-pass does go in that Honoapiilani Highway will be turned over to the County of Maui.

Maui Planning Commission
Public Hearing #1
December 18, 1990
Page 11

Mr. White (Cont.): and we have always provided the public access laterally here and vertically here and therefore the fact that we got one building at 55 feet setback and one building at 88 feet behind the shoreline we felt that the request for 105 was really very fair and we're ... However Chris Hart's departure on the 28th doesn't mean he's a lame duck, he carries a big club and in our discussions I think we are comfortable with ...

One other thing that I would like to mention with regards to our employee housing, we have -

Mr. Caruther: Mike, excuse me, we want to mention how we would like to develop that area there -

Mr. White: Oh yes. In our discussions with Chris Hart and Colleen Suyama we agreed to withdraw the application for the variance with the understanding that we have the ability to build a pool, a luau area and essentially what ever other recreational uses we need in this area and also have the ability to move the location of our existing beach activity center to a point where we would like to have it within what we would end up with a view corridor ... With that understanding that we're withdrawing our variance request.

With regards to our employee housing, as you know we've been discussing the concept of having dormitory housing for Molokai residents to come over and utilize. It came to us last week that we worked out the place for that should not be off-site because people are going to be coming over without transportation and we should try to develop something on-site. We realize ... presentation on this and just for the record we would like to ... we are considering the development of the dormitories within this area with an open air courtyard and a commons area on the top of this facility here.

That's it. Is there anything that was left out? That concludes my ...

Mr. Sato: Thank you Mr. White. Public Works, do you have any questions that you would like to ask Mr. White?

Mr. Lee: Yes. In relation to your comment in relation to the additional traffic. If you look at your TIA Report, Traffic Impact Analysis Report, it shows that the additional traffic created by development will incur additional vehicles turning right into Kekaa Drive as well as coming out Kekaa Drive and visa versa for the Kaanapali Parkway, it shows additional flow of the traffic in and out created by the development.

M5 Meeks Five
A Design Group
Meeks Five Plaza
345 Queen Street
Honolulu, Hawaii
808-534-7040
Fax 808-538-3535

Architecture
Concept Design
Interior Design
Planning
Programming

Project: KĀ'ANAPĀLE BEACH HOTEL

KĀ'ANAPĀLE BEACH HOTEL



Kūlia i ka nu'i

Contractor: **James Carter & Associates**

Date: **07 OCT 1991**



Scale 1/32"=1'-0"

No.	Rev.	Date	Description
1			
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SITE PLAN

L-1.01

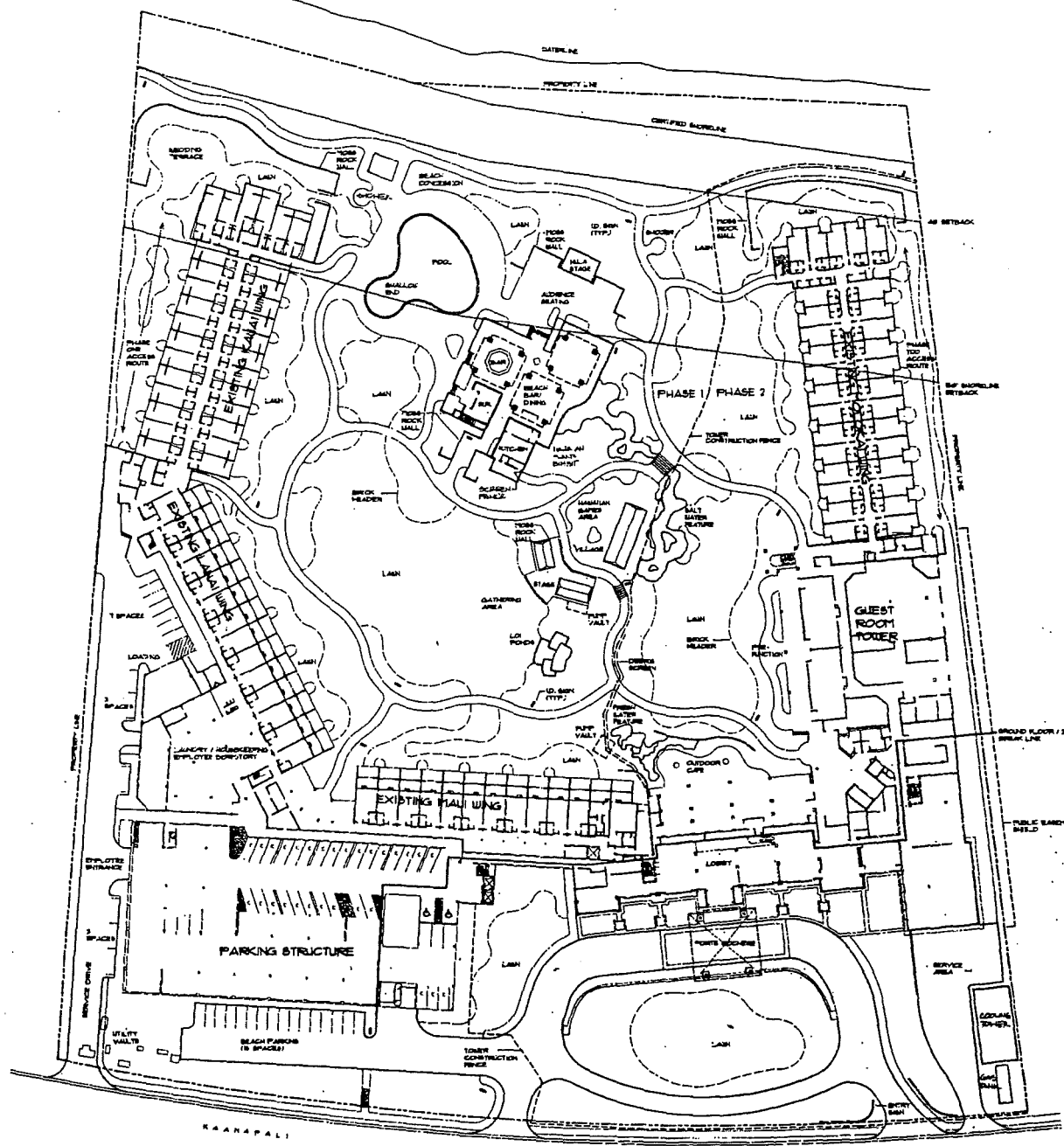


EXHIBIT 5

Oct, 1991 Building Permit "site Plan"

Ka'anapali Beach Hotel

Site Plan

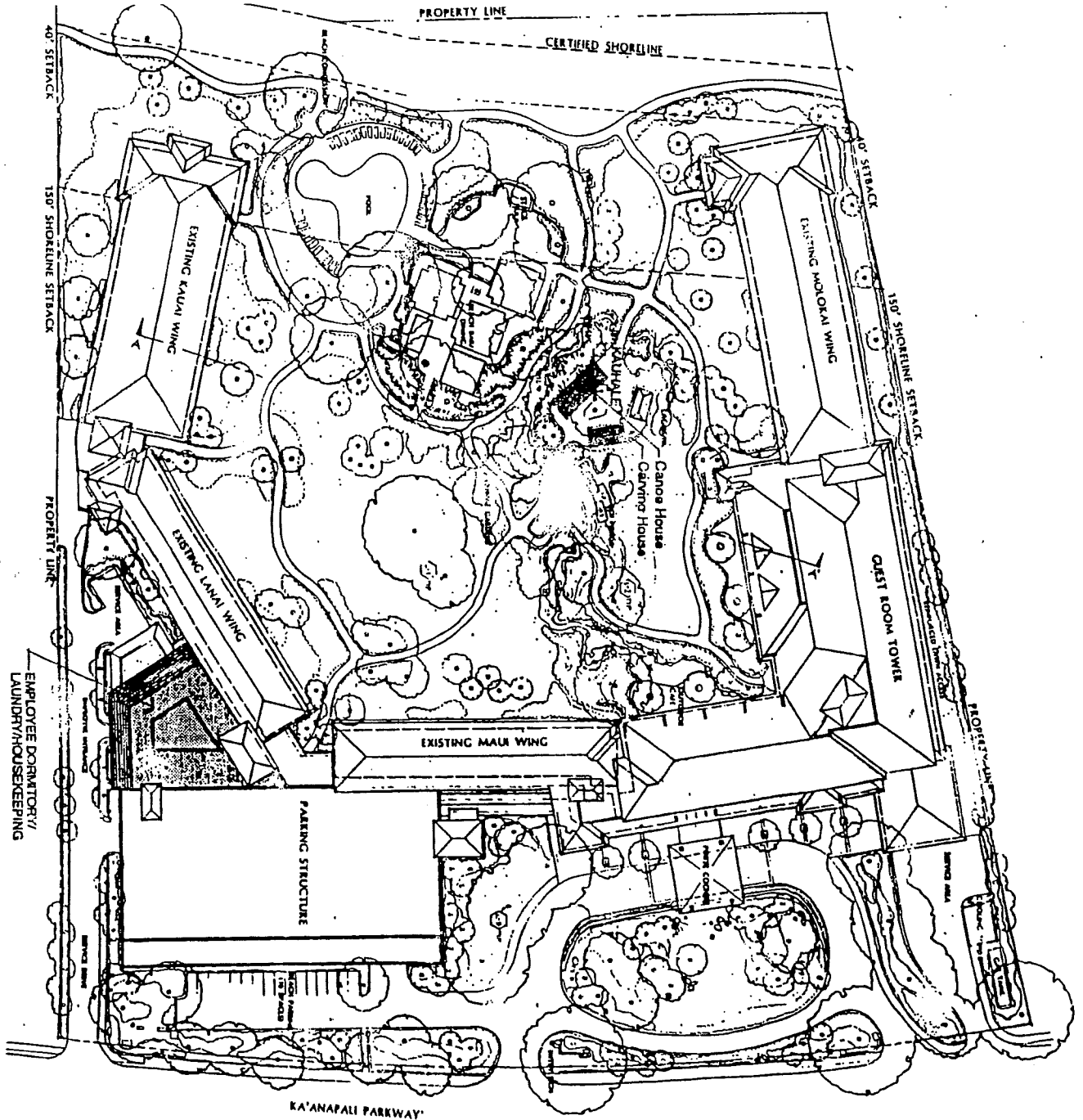


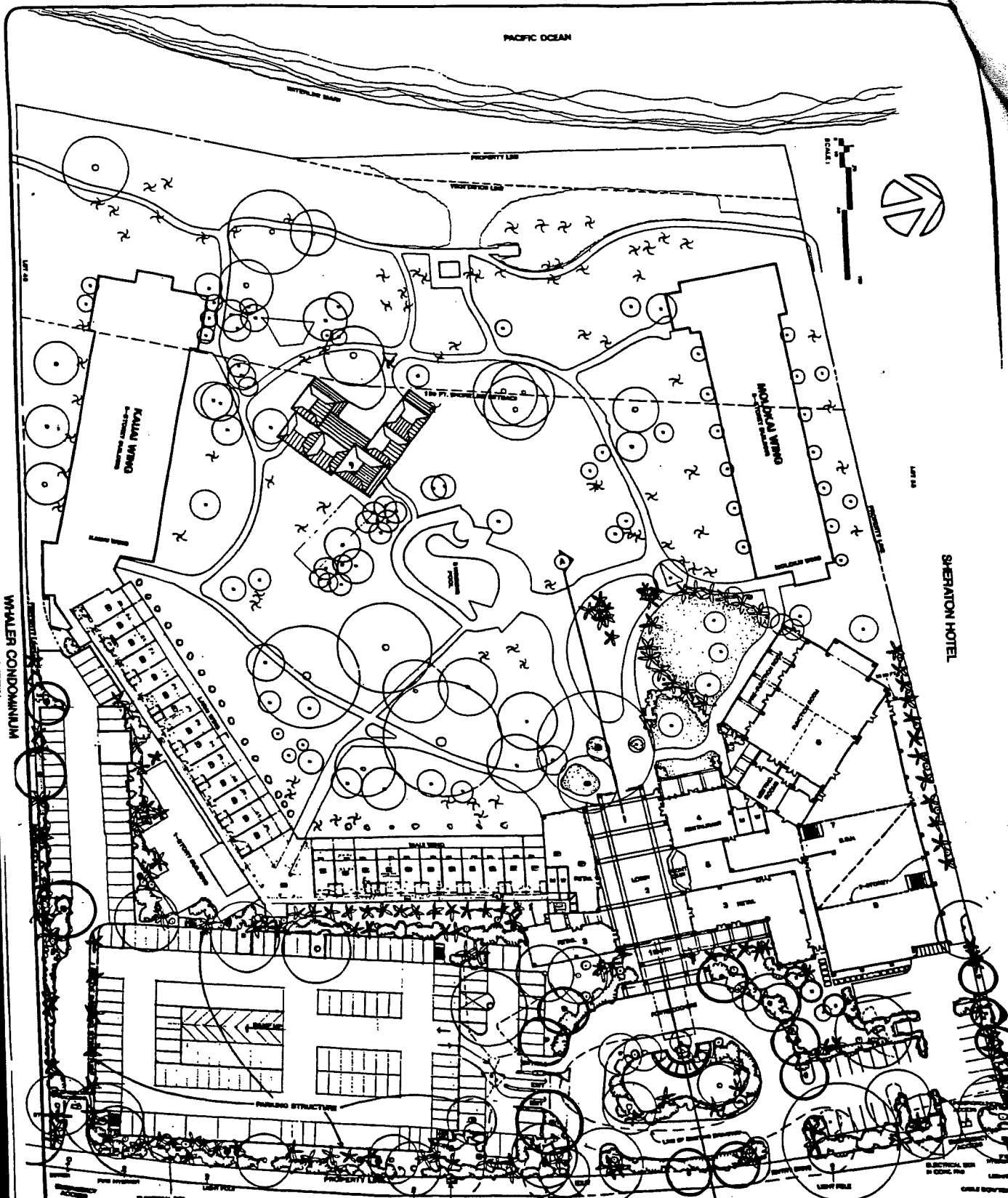
EXHIBIT 6

1991 Site Plan reflecting the proposed
Dormitories + Kauhale

Approved by MPC on 9-24-91

FIGURE 2





1998 Plan

EXHIBIT "7"

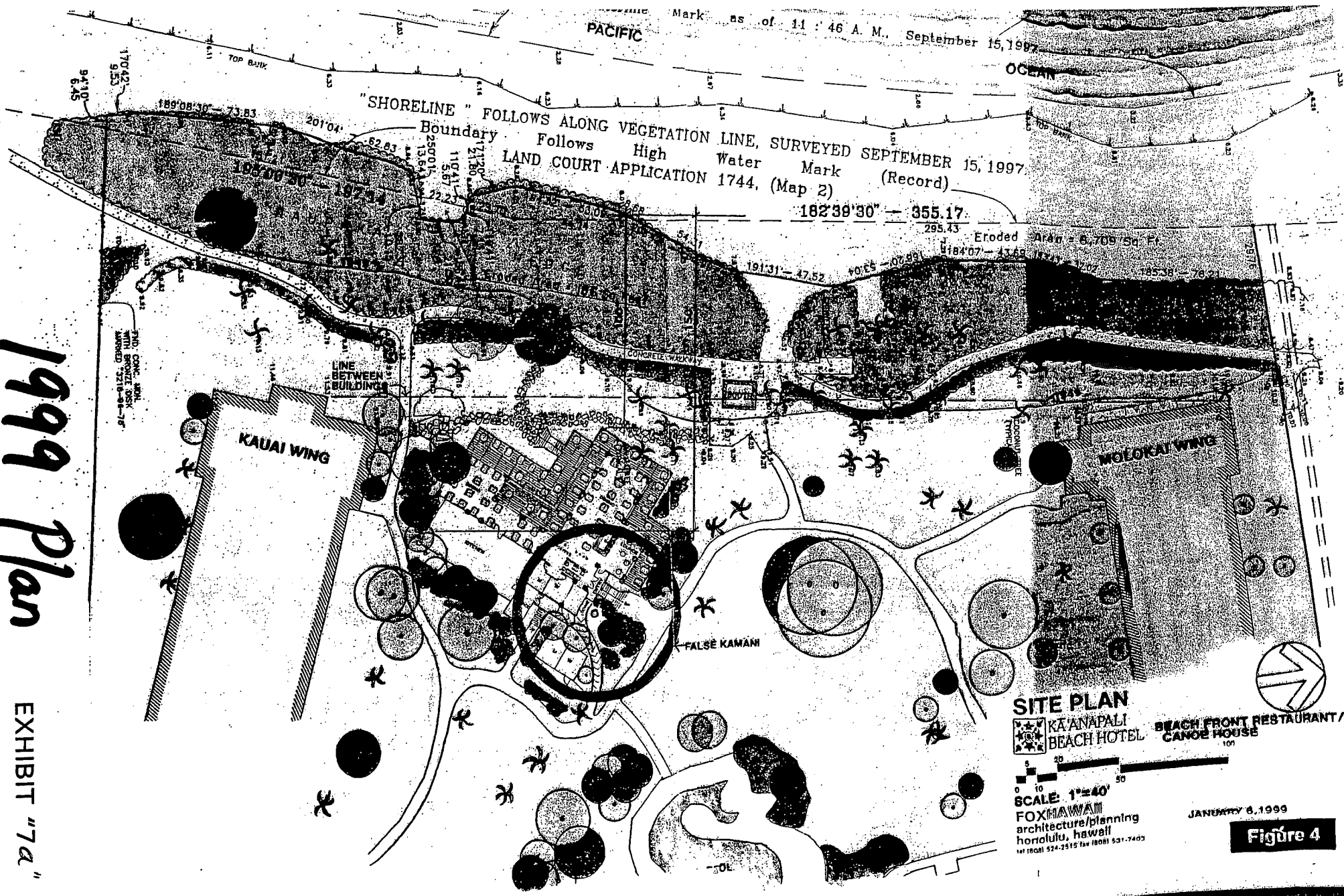
FIGURE 4

KA'ANAPALI

LEGEND	
EXISTING TREE	(Symbol: Circle with a dot)
PROPOSED TREE	(Symbol: Circle with a cross)
PROPOSED LANDSCAPE	(Symbol: Cloud-like shape)
PARKING	
1. NEW REPLACEMENT	1. ADMINISTRATION
2. ENTRY	2. FUNCTION ROOM
3. LOBBY	3. KITCHEN
4. METAL	4. BACK OF HOUSE
5. RESTAURANT	5. BEACHFRONT RESTAURANT
6. ADMINISTRATION	

1999 Plan

EXHIBIT "7a"



SITE PLAN
 KA'ANAPALI BEACH HOTEL
 BEACH FRONT RESTAURANT/
 CANOE HOUSE

SCALE: 1"=40'
 FOXMAWAM
 architecture/planning
 honolulu, hawaii
 tel (808) 524-2515 fax (808) 531-7403

JANUARY 6, 1999

Figure 4

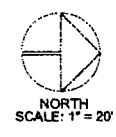
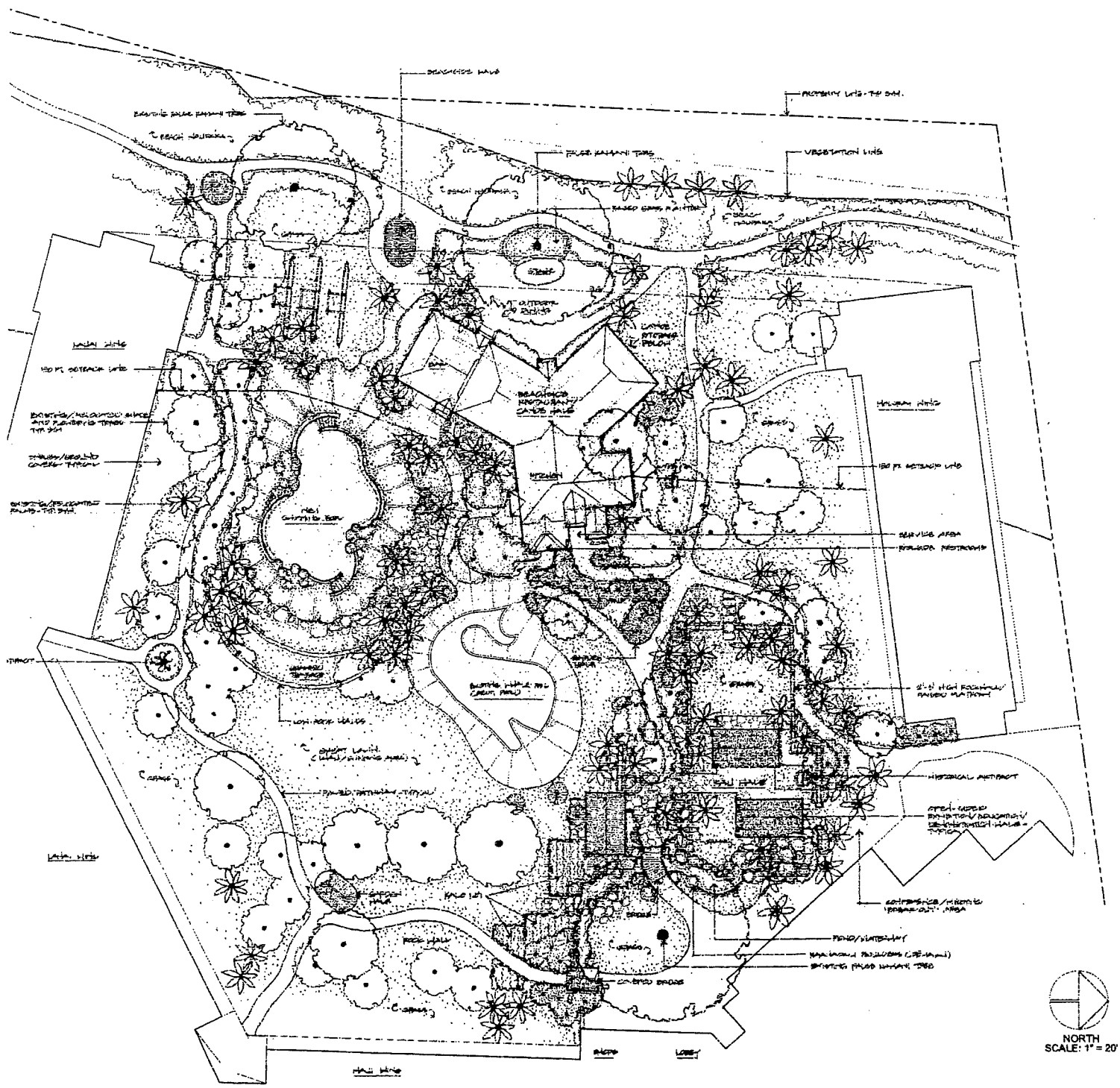
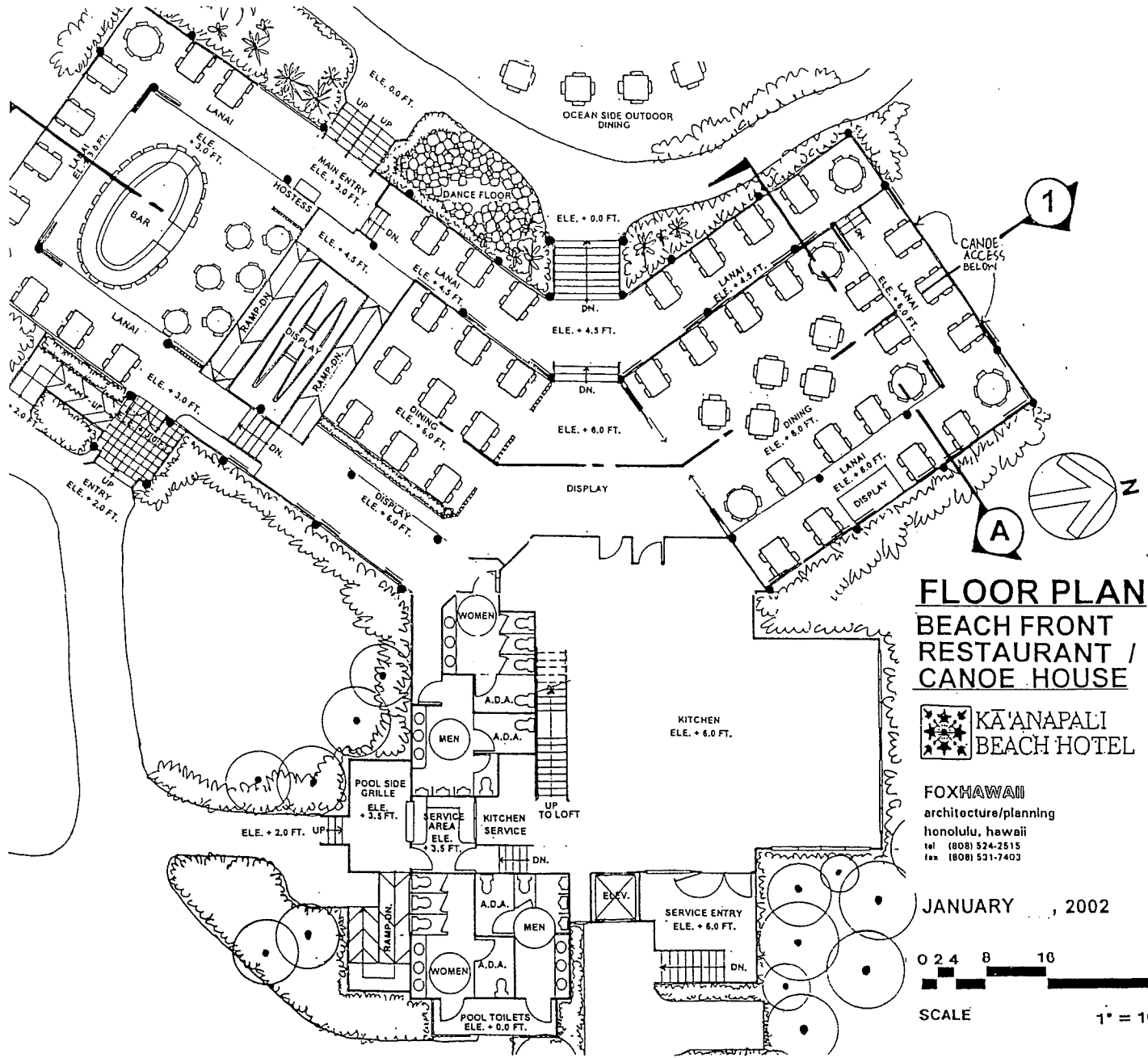


EXHIBIT 8



FLOOR PLAN
BEACH FRONT
RESTAURANT /
CANOE HOUSE

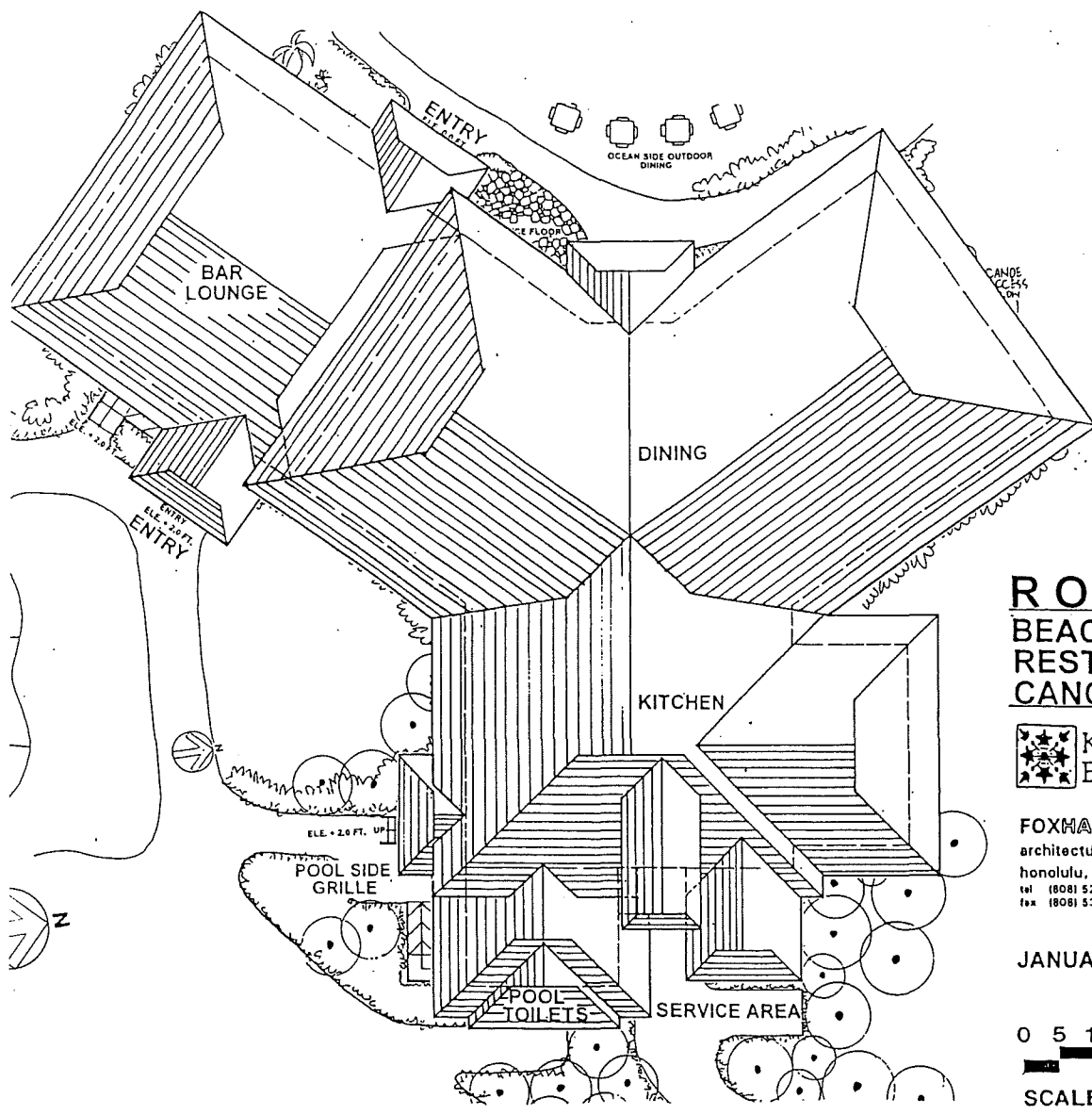
KĀ'ANAPALI
BEACH HOTEL

FOXHAWAII
 architecture/planning
 honolulu, hawaii
 tel (808) 524-2515
 fax (808) 531-7403

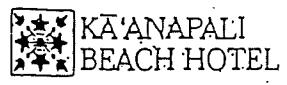
JANUARY, 2002

0 4 8 16 32
 SCALE 1" = 10'-0"

EXHIBIT 9

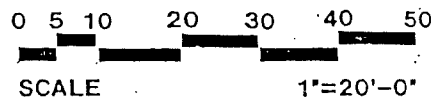


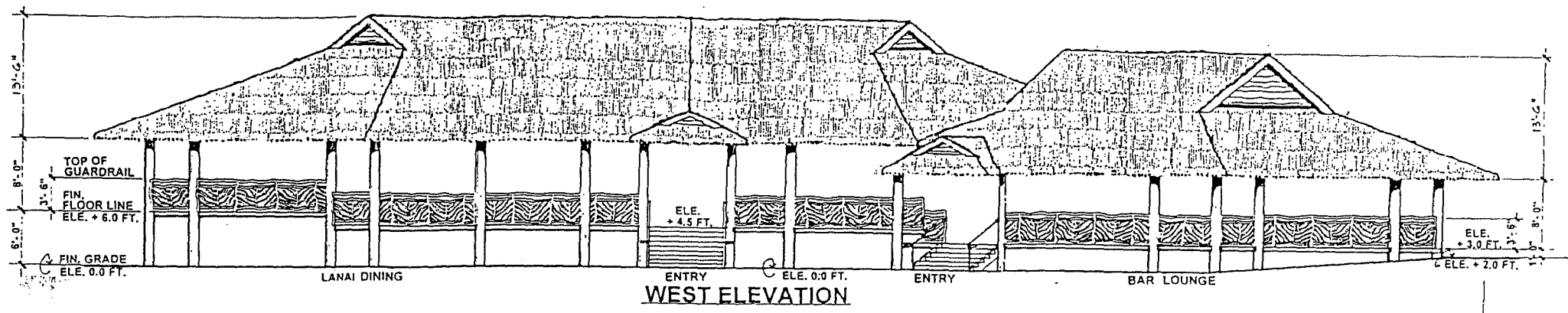
ROOF PLAN
BEACH FRONT RESTAURANT / CANOE HOUSE



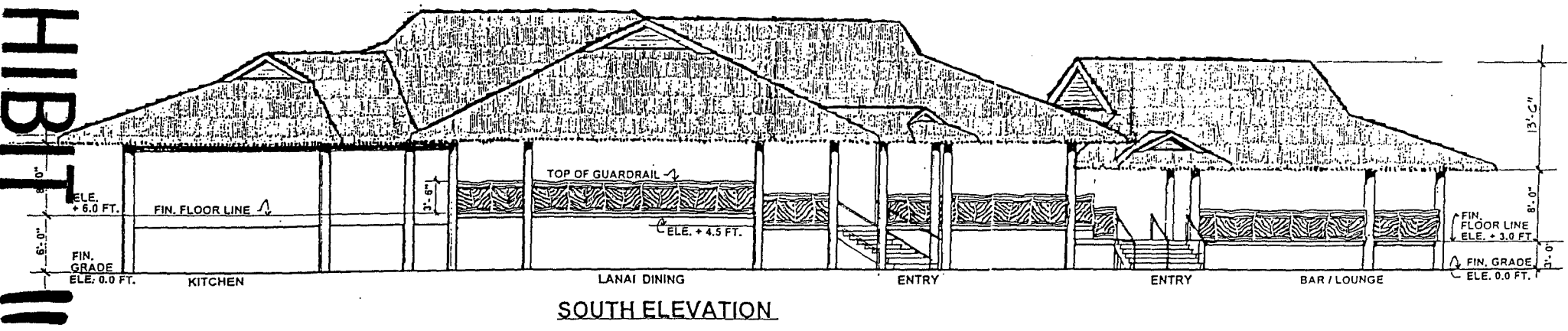
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JANUARY , 2002





WEST ELEVATION



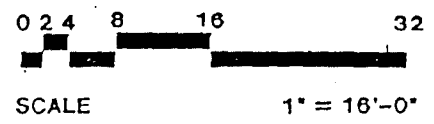
SOUTH ELEVATION

EXHIBIT III

BEACH FRONT RESTAURANT / CANOE HOUSE

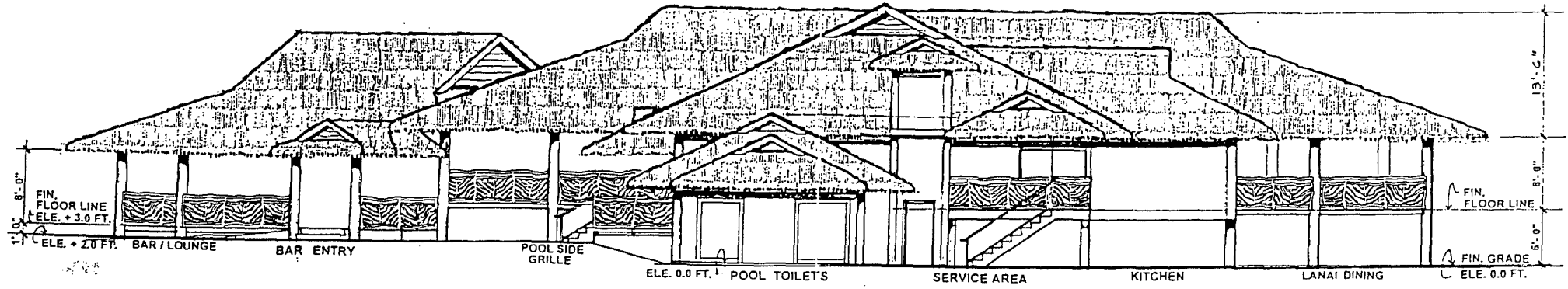


JANUARY , 2002

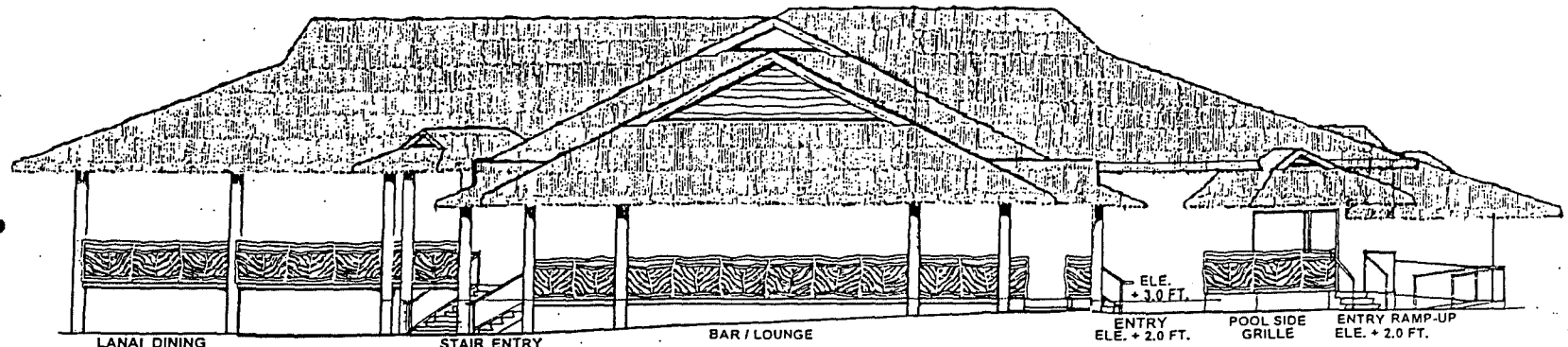


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honolulu, hawaii
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EXHIBIT 12



EAST ELEVATION
 0 2 4 8 12 20 FT.
 SCALE



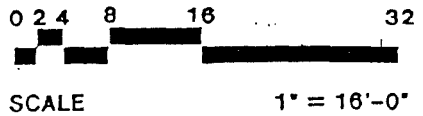
NORTH ELEVATION

BEACH FRONT RESTAURANT / CANOE HOUSE

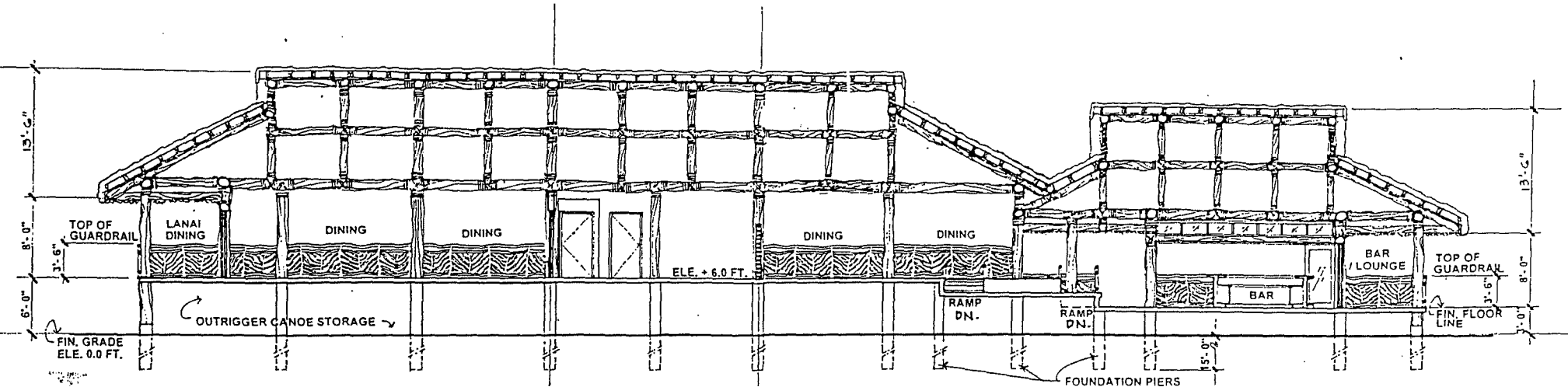


KĀ'ANAPALI
 BEACH HOTEL

JANUARY , 2002



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1 LONGITUDINAL SECTION

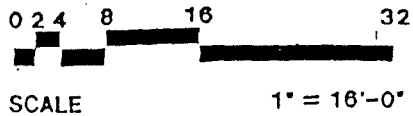
EXHIBIT 13

BEACH FRONT RESTAURANT / CANOE HOUSE



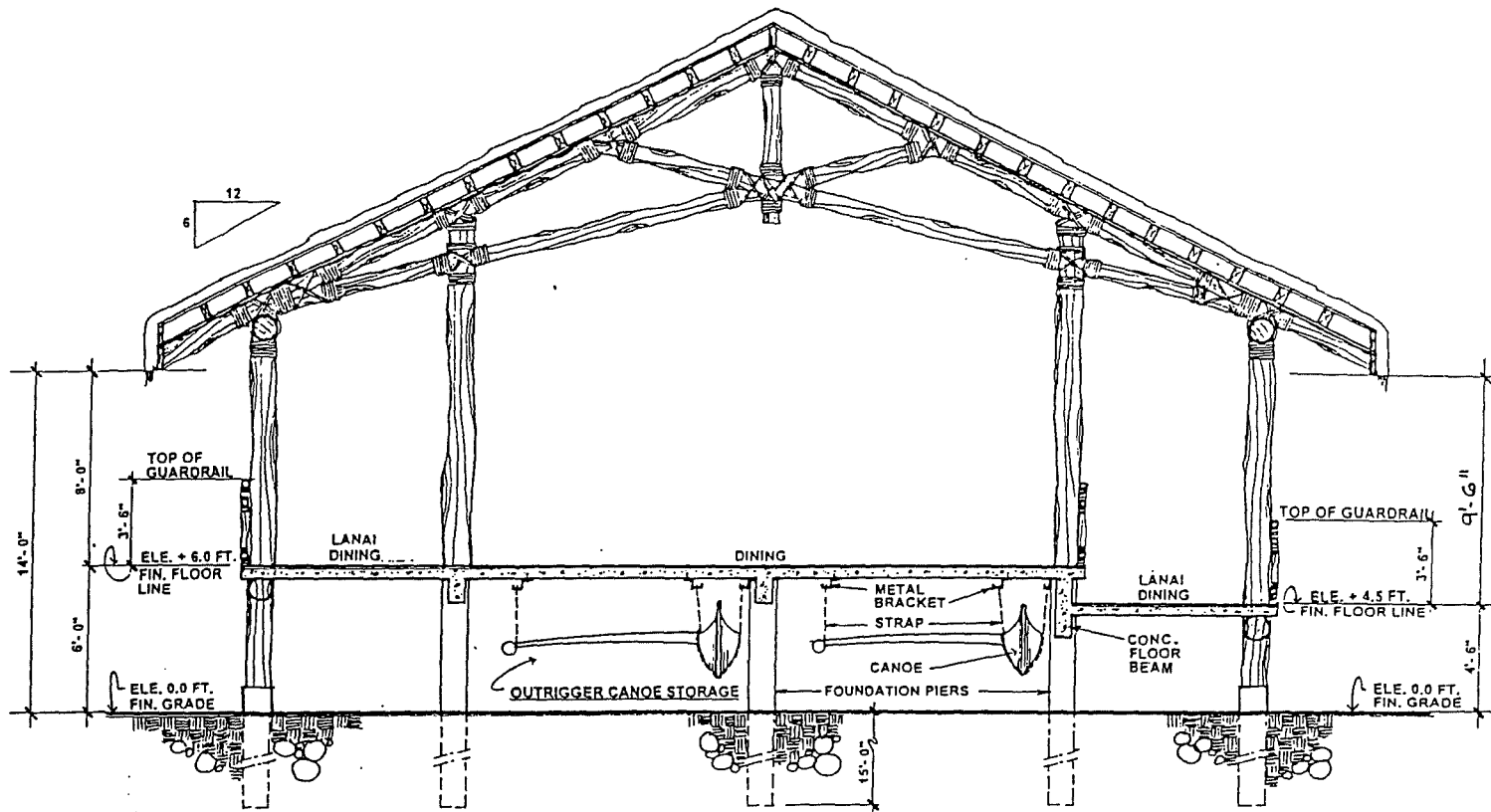
KĀ'ANAPALI
BEACH HOTEL

JANUARY , 2002



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EXHIBIT 14



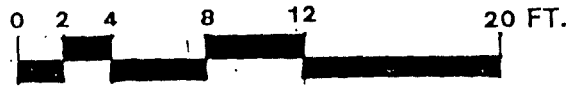
A CROSS SECTION

BEACH FRONT RESTAURANT / CANOE HOUSE



KĀ'ANAPALI
BEACH HOTEL

JANUARY , 2002

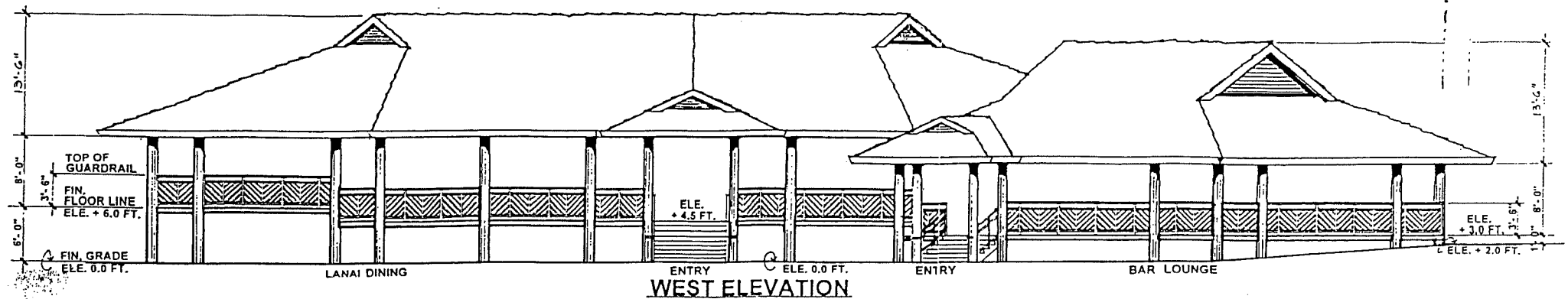


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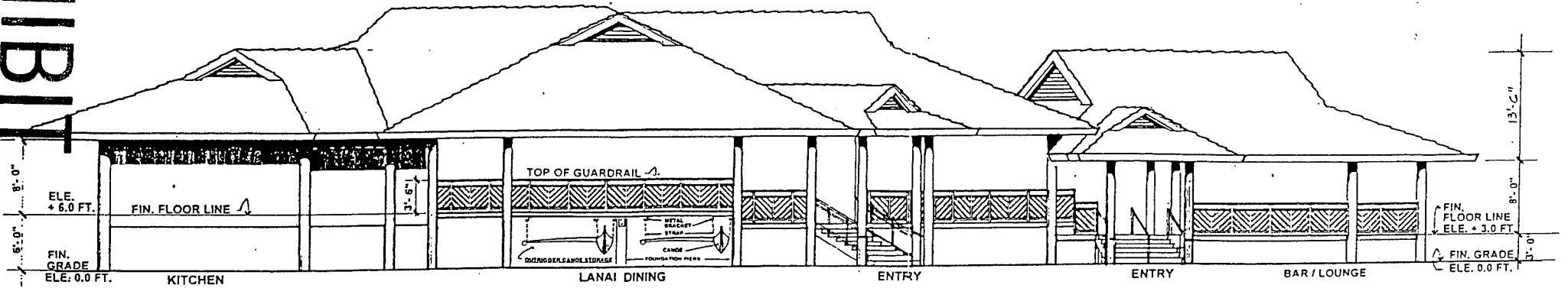
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EXHIBIT 15

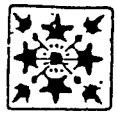


WEST ELEVATION



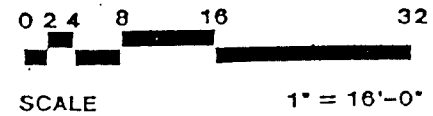
SOUTH ELEVATION

BEACH FRONT RESTAURANT / CANOE HOUSE



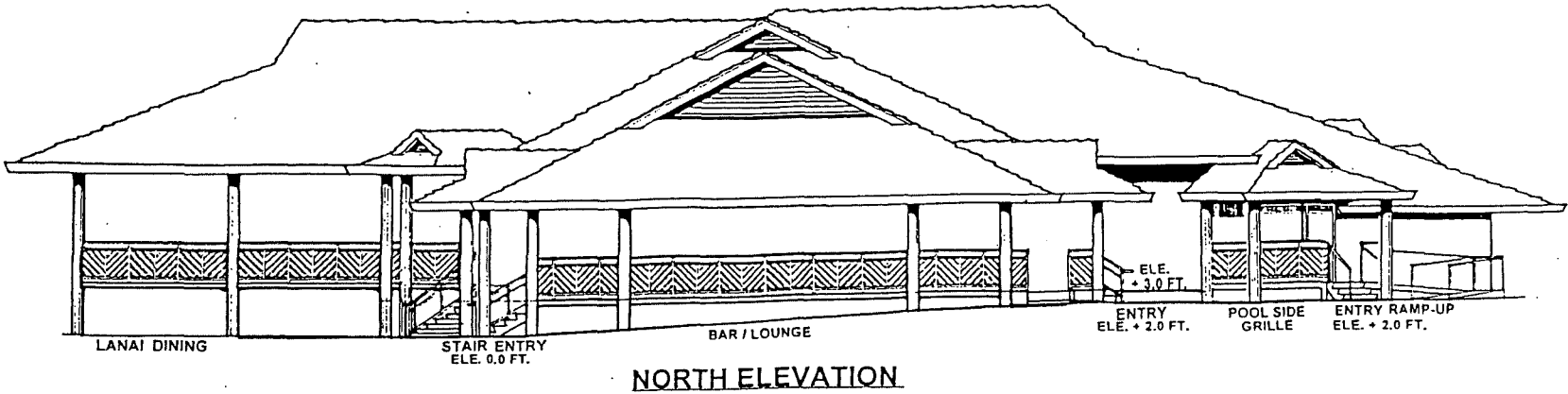
KĀ'ANAPALI
BEACH HOTEL

JANUARY , 2002

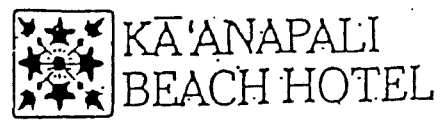


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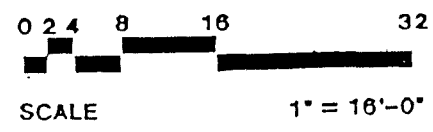
EXHIBIT 16



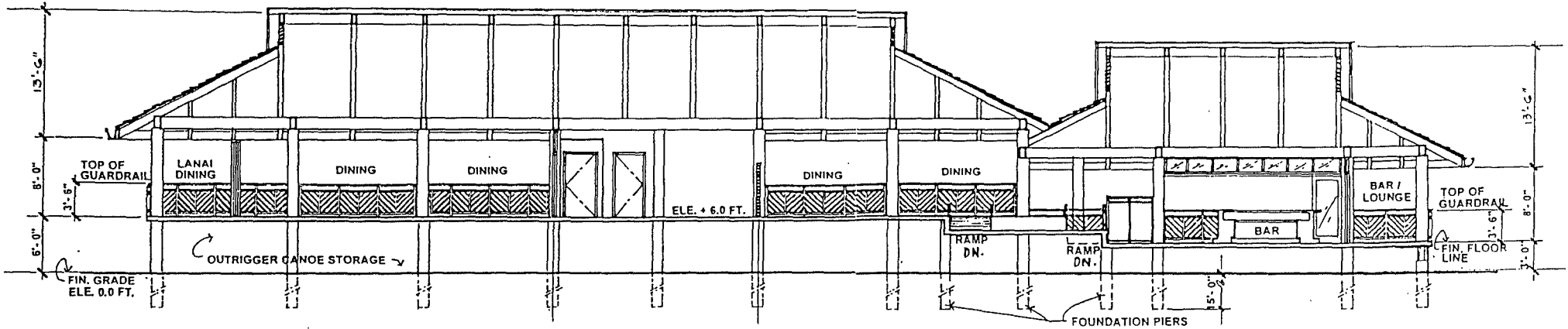
BEACH FRONT RESTAURANT / CANOE HOUSE



JANUARY , 2002



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1 LONGITUDINAL SECTION

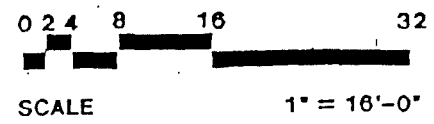
EXHIBIT 17

BEACH FRONT RESTAURANT / CANOE HOUSE



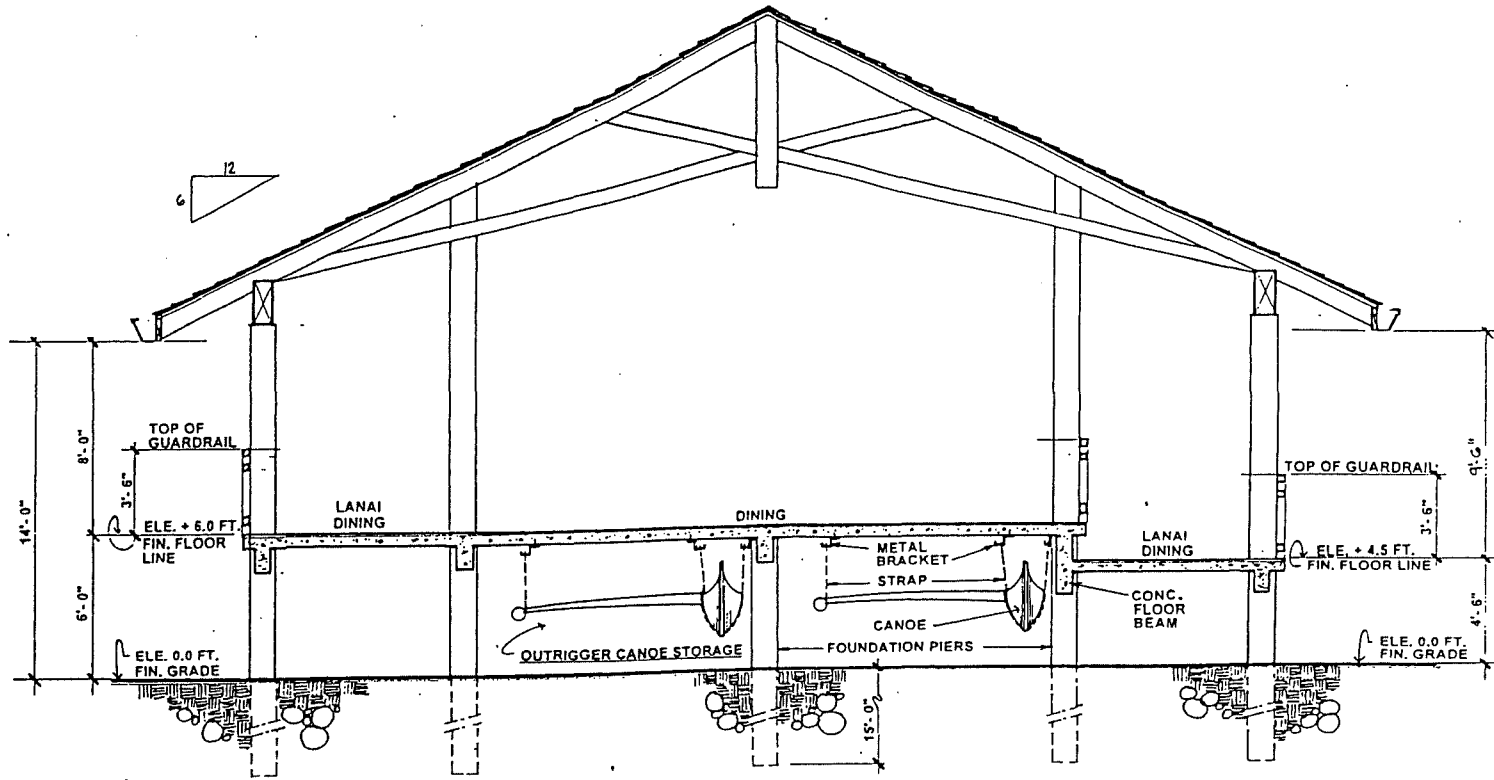
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EXHIBIT 18



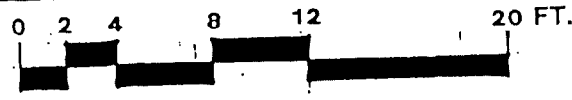
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BEACH FRONT RESTAURANT / CANOE HOUSE



KĀ'ANAPALI
BEACH HOTEL

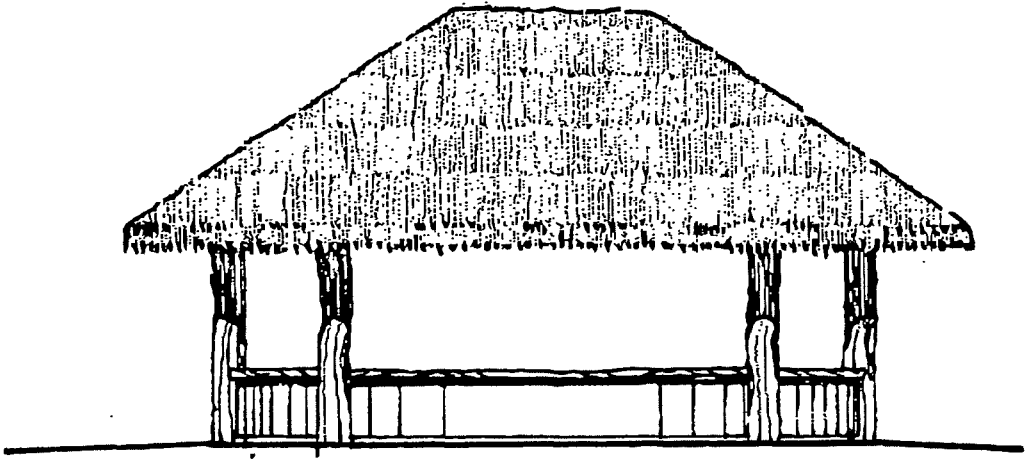
JANUARY , 2002



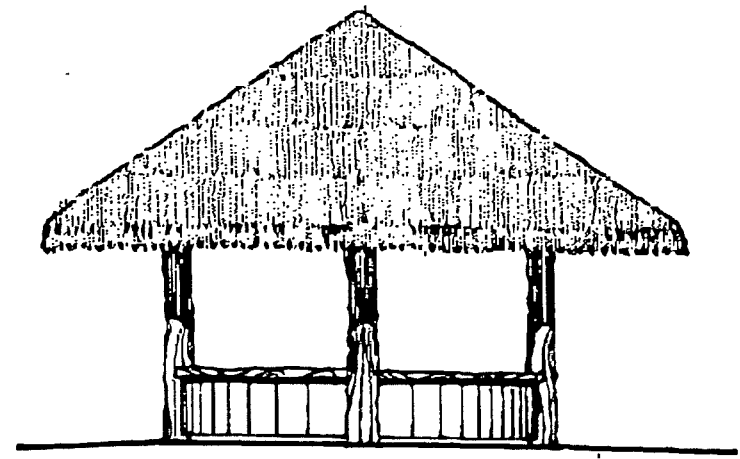
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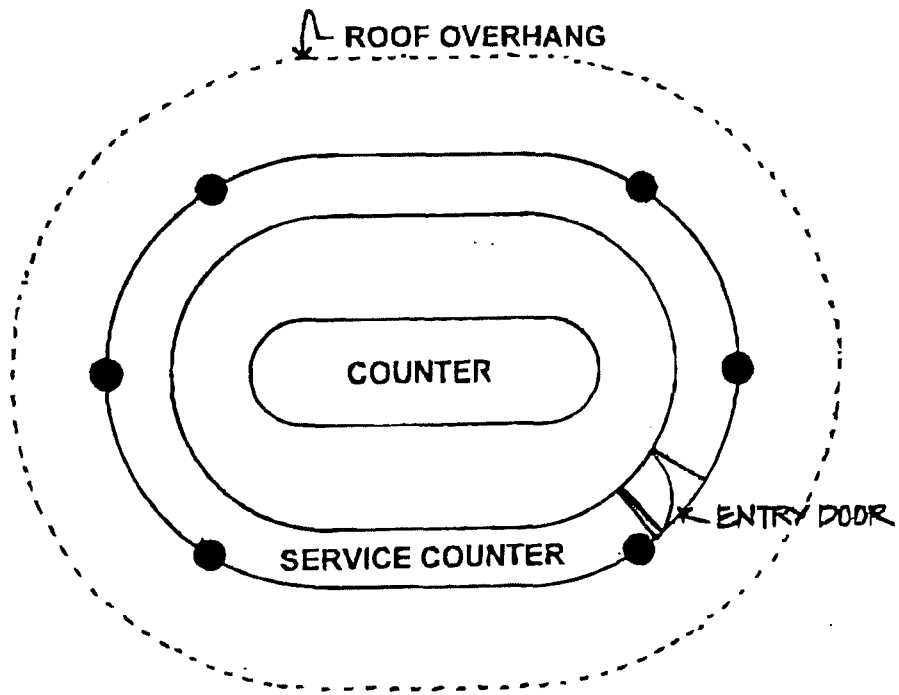
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FRONT ELEVATION



SIDE ELEVATION



FLOOR PLAN

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SCALE : 1/8" = 1'-0"

BEACH SIDE HALE



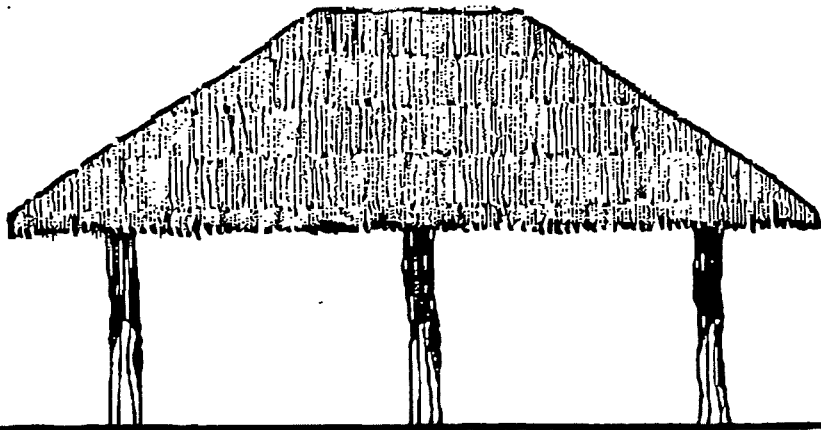
**KĀ'ANAPALI
BEACH HOTEL**

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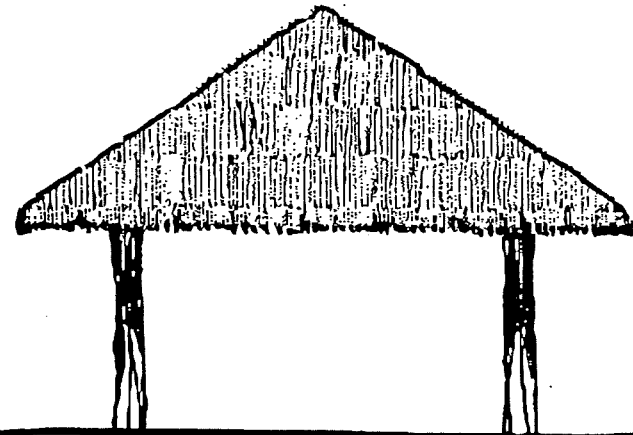
JANUARY , 2002

EXHIBIT **19**

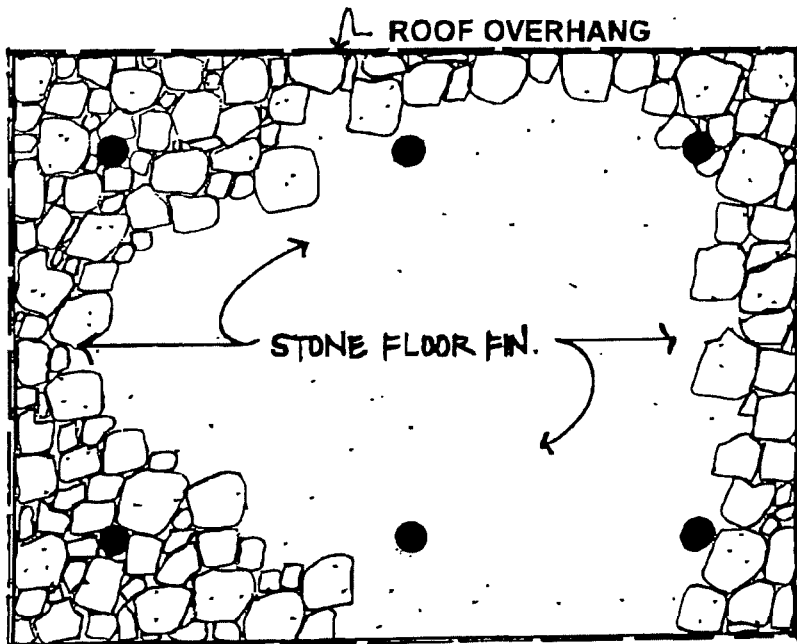
DATE: 1/17/2002 11:11 AM



FRONT ELEVATION



SIDE ELEVATION



FLOOR PLAN



SCALE : 1/8" = 1'-0"

KAUHALE STRUCTURES



KA'ANAPALI
BEACH HOTEL

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fax (808) 531-7403

JANUARY , 2002

BEFORE THE MAUI PLANNING COMMISSION

STATE OF HAWAII

In the Matter of the	)	Nos. SM1 900040, SSV 990001
Application of)	
)	
MR. MICHAEL B. WHITE,	)	FINDINGS OF FACT,
General Manager of the	)	CONCLUSIONS OF LAW, DECISION
Ka`anapali Beach Hotel	)	AND ORDER; CERTIFICATE OF
	)	SERVICE
)	
To Obtain a shoreline setback)	
variance and an amendment to)	
a Special Management Area Use)	
Permit to construct a)	
restaurant/canoe hale)	
partially within the 150 foot)	
shoreline setback area for)	
the Ka`anapali Beach Hotel,)	
TMK: 4-4-008:003,)	
Ka`anapali, Lahaina, Island)	
of Maui.)	
	)	Contested Case April 3-18,
	)	2000; March 1, 2001; March
	)	13, 2001

FINDINGS OF FACT, CONCLUSIONS OF LAW
DECISION AND ORDER

I. INTRODUCTION

Michael B. White, General Manager of the Ka`anapali Beach Hotel ("KBH"), seeks a shoreline setback variance ("SSV") and an amendment to a previously issued Special Management Area ("SMA") permit (90/SM1-040) in order to construct a restaurant/canoe hale/educational facility (the "Facility") partially within the shoreline setback area. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1.) Maui Planning Commissioners Robert Carroll, Herman Nascimento and Jeremy Kozuki were appointed by the Maui Planning Commission ("MPC") to act as the

EXHIBIT 21

hearings panel on the subject application and hereby submit this report pursuant to §12-201-77 of the Rules of Practice and Procedure for the Maui Planning Commission.¹

These findings of fact, conclusions of law, decision and order are based upon the record of the above-entitled matters, including documentary evidence and testimony received during the contested case hearing held on April 3, 4, 5, 7, 10, 13, 14 and 18, 2000, at Wailuku, Maui, Hawaii, and a site inspection held on March 1, 2001, at Kaanapali, Lahaina, Maui, Hawaii.

FINDINGS OF FACT

II. PROCEDURAL HISTORY

A. Permit History of KBH

1. KBH was constructed in 1964 as one of the initial hotels in the Ka'anapali Resort. In 1990, KBH applied for a SMA permit for remodeling and expansion, including the addition of 215 guest rooms, a five and a half-story parking structure, improvements to the exterior and a restaurant facility in approximately the location presently proposed. At that time, the Planning Department had recently passed the Rules of the Maui Planning Commission Relating to the Shoreline Area of the Islands of Kahoolawe, Lanai and Maui ("SSV Rules"), such that the shoreline setback for the KBH property, which had previously been

¹Commissioner Carroll has submitted a dissenting opinion with respect to the application for the shoreline setback variance, and subsequently resigned from the Maui Planning Commission upon election to the Maui County Council.

forty feet (40'), was increased to one hundred fifty feet (150'). As KBH's priority at the time was to obtain approval of the proposed new hotel rooms, KBH agreed to move the restaurant facility back to the new 150' shoreline setback during the 1990 application process and withdrew its application for a shoreline setback variance. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1, I-8, C. Hart, 136:21-139:10.)

2. In 1998, the SMA permit was amended by eliminating the 215 room addition and scaling back other changes. The amendment also included a restaurant similar in size and design to the subject facility to be located just mauka of the 150-foot shoreline setback line. KBH's priority in 1998 was still the hotel and parking improvements, therefore the restaurant facility was left in its previously approved location. The first phase of the renovation program was recently initiated with the completion of the parking structure. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1.)

3. KBH now files the present application with the MPC seeking to amend the previous SMA approval and to obtain a SSV, such that the proposed Facility can be constructed closer to the shoreline. KBH plans to make the Facility a lynchpin in the strong Hawaiian cultural program that KBH has developed. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1.)

B. Intervention

4. The intervenors in this proceeding, Charles and Shirley Schwartz, Rene Shepard, Dr. and Mrs. Zemel and Kent

McNaughton, are owners of units at the Whaler on Kaanapali Beach ("Whaler"), a condominium adjacent to the south of the KBH property. (Exh. CO-MIN-3 (9/28/99 MPC meeting minutes) at 40.)

5. The Association of Apartment Owners of the Whaler also petitioned to intervene, but withdrew its petition after reaching a settlement with the KBH. (Exh. CO-SMA-33.)

6. Contested case hearings were held on April 3, 4, 5, 7, 10, 13, 14 and 18, 2000, before Commissioners Robert Carroll, Jeremy Kozuki and Herman Nascimento.

C. Statement of Issues

7. By order of the Hearing Panel, the issues for the contested case hearing were set forth as:

1. Siting of the project and the shoreline setback variance;
2. Foreclosure of management options;
3. Loss of open space;
4. Shoreline certification;
5. Shoreline processes;
6. Noise and odor;
7. Use of accessway;
8. Improper notice;
9. Drainage; and
10. Grease disposal.

Exh. CO-SMA-42 (Order on Which Issues May be Addressed in the Contested Case Hearing, filed January 12, 2000). No objections were raised by any party to this limitation of issues. No additional issues were raised by the Intervenors in their petition to intervene or position statement.

D. Other prehearing matters

8. The Intervenors filed objections to the panel of hearing officers appointed in this case, alleging that the panel

was not well-balanced and that Commissioner Kozuki had a conflict of interest or was biased. By letter dated November 8, 1999, the hearings panel rejected Intervenor's objections.

9. Intervenor's filed a motion in limine which sought to preclude KBH from introducing evidence of economic hardship to KBH, hardship which results from other permits or approvals issued by the MPC and hardship which has resulted from actions by KBH. The motion was denied by order dated March 31, 2000. Specifically, the hearings panel acknowledged that economic hardship cannot be argued to justify the granting of a shoreline setback variance, however, evidence pertaining to economics was not prohibited as it may be pertinent to other aspects of KBH's application.

10. Intervenor's had also requested to take a telephone deposition of Sir Run Run Shaw, a resident of Hong Kong. At the Fourth Prehearing Conference, Intervenor's request was denied on the basis that Mr. Michael White was available for Intervenor's to depose and was the authorized applicant with respect to the proceedings.

III. EXHIBITS

11. By stipulation among the parties, all of the exhibits listed by the parties were deemed admitted into evidence, except for the following Applicant exhibits which were withdrawn by KBH: A-13, A-35, A-36, A-44, A-85, A-87, A-90, A-91, A-100, A-105, A-106, A-107, A-108, A-109 and A-111; and except for the following Intervenor's exhibits which were

withdrawn by the Intervenors: 9, 28, 29, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 55, 56, 57, 79, 83, 86, 87, 88, 92, 93, 94, 95, 96, 97, 101, 106, 116, 117, 118, 122, 123, 124, 125, 127, 128, 129, 130, 131, 132, 133 and 134. The following additional exhibits were admitted into evidence:

<u>Exh.</u>	<u>Description</u>	<u>Exh.</u>	<u>Description</u>
A-113A & 113B	Rory Frampton written testimony and supplemental written testimony	A-123	Dee Coyle written testimony
A-114	Rob Cole written testimony (except for portions withdrawn as stated on the record).	A-124	John Defries written testimony
A-115	Chris Hart written testimony	A-125	Marsha Weinert written testimony
A-116	Robert Fox written testimony	A-126	Billy Gonsolves written testimony
A-117	William Gebhardt written testimony	A-127 A & 127B	Mary Helen Lindsey written testimony and supplemental written testimony
A-118	Betty Tatar written testimony	A-128	George Kanahale written testimony
A-119	Kirk Tanaka written testimony	A-129	Robert Rocheleau written testimony
A-120	Don Misner written testimony	A-130	Mike White written testimony
A-121	Letter from the Polynesian Voyaging Society, dated March 10, 2000	A-131	Stephen Pitt written testimony
A-122	Lori Sablas written testimony	A-132	Dave Adams written testimony
		A-133	Letter from Floyd Miyazono to the MPC, dated April 12, 2000

IV. PROJECT DESCRIPTION

A. Pier Construction

12. The design of the restaurant/canoe hale/educational facility (the "Facility") will utilize the most appropriate structural system for this beachfront location. The building floor level will be constructed on concrete piers and raised approximately 6 ft. above grade, which is approximately 9.9 feet above mean tide level. The piers will extend approximately 15 feet below grade (five feet below mean tide level), creating a strong foundation for the building. The structural system is similar to that of a dock or pier, and therefore, in the unlikely event that storm waves would reach inland of the restaurant, the washup would flow unobstructed below the building. The structure is oriented in the diagonal to the oceanfront in order to provide the least obtrusive wall to the ocean. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

13. The pier foundation will continue into the interior of the restaurant to support open wooden trusses that will reinforce the natural, rustic quality of the interior and exterior of the building. The pavilion design will provide an energy efficient environment with natural ventilation and light. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

B. Restaurant Use

14. The Facility will feature a commercial restaurant with a bar and lounge. The interior and exterior dining areas of

the restaurant will be approximately 2,100 and 2,400 square feet in size, respectively. The total size of the restaurant, including the dining, kitchen/service, lounge, waiting area and internal restrooms is approximately 7,300 feet. The hours of operation are envisioned to be from approximately 7:00 a.m. to 10:00 p.m. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15, M. White, 4/10/00, 610:25-611:1.)

C. Canoe Club Use

15. The design of the facility incorporates outrigger canoe storage. KBH will be sponsoring a canoe club which will store canoes and accessory items below the raised portion of the building. Various storage methods may be utilized, including suspending the canoes on harnesses attached to rolling bearings supported by the concrete floor structure. The storage area for the canoes will be used primarily in the off-season. During the canoe season, it is anticipated the canoes will be kept on the grass area fronting the restaurant. In order to provide shoreline access for the canoe club, a path will be cleared in the Naupaka fronting the southern portion of the property. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-1, M. White, 4/10/00, 611:14-612:9.)

D. Landscaping

16. Extensive landscaping will be added around the building to buffer service areas from view. Walkways utilizing a non-grouted paving system will connect existing pathways to the

restaurant. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

E. Restrooms

17. A separate stand-alone restroom will be provided adjacent to the restaurant facility, to the east (mauka). The stand-alone restroom will be located outside of the 150-foot setback. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

F. Hula Platform

18. A raised hula platform will be constructed in the lawn area fronting the left portion of the restaurant, mauka of the beach walkway. The platform will be raised using beach quality sand and the surface will be planted with grass. Portable adjacent seating will be provided, with approximately 25 to 30 tables set on either grass or sand, to be placed between the restaurant structure and the walkway. (Exhs. A-113A (written testimony of R. Frampton), A-15; M. White, 4/13/00, 703:7-704:15.)

G. Cost

19. Total estimated construction costs are \$2,000,000. The duration of construction activity is not expected to be longer than nine months. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

H. Selection of the Proposed Location

20. The location of the Facility is not based upon a set distance from the shoreline, which is subject to fluctuation.

Rather, it is based upon all of the factors described herein, including the location of the existing buildings, impacts to shoreline processes, coastal erosion and the Facility's need to be near the ocean. (Exhs. A-113A (written testimony of R. Frampton).)

21. In addition to the "courtyard" site approved as part of the 1998 KBH SMA amendment, two "beachfront" locations were evaluated in the 1999 Environmental Assessment: the proposed location and one immediately adjacent to the lateral beach walkway. The proposed location was selected because it provided more oceanfront open space and was significantly mauka of the historical fluctuations of the shoreline. (Exhs. A-15 (EA), A-113A (written testimony of R. Frampton).)

22. The proposed location is sited between a beachfront and courtyard location, at the mouth of the "horseshoe" comprised by KBH's wings and lobby. At this location, views of the ocean and landmarks are prominent. On the other hand, moving inside the horseshoe, one quickly becomes surrounded by structures, and the existing buildings and vegetation become the dominant element rather than the coastline. In addition, instead of looking under the canopies of the shoreline trees, the increased distance lowers the canopies into the vertical peripheral and further creates the effect of being surrounded in the courtyard. Meeting the objectives of the operational and cultural programs requires that the Facility

remain on the threshold of the makai portion of the courtyard. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

23. The courtyard location does not have the strong connection to the ocean on which the Hawaiian cultural exhibits and teaching will be based upon. The visual connection to legend and history diminishes rapidly as you move back from the proposed location. Lanai and Pu`u Keka`a Point are blocked by existing structures and the view of the beach landing completely disappears as you move into the courtyard. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

24. Also, the interaction between the restaurant and canoe paddlers is an integral part of the cultural experience provided by the new facility. In that respect, it is important that the activity of the paddling crews and canoes be visible to relate the importance of the ocean as an essential element of the early Hawaiians' life. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

25. The courtyard also does not have the beachfront ambiance desired by Ka`anapali visitors. At the proposed location, the facility is already located approximately 30 feet from the beach walkway. Any additional distance would make the facility seem uninviting to walkway patrons. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

26. The proposed location was also carefully selected so that it would have the least possible effect on nearby hotel rooms. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

27. The proposed location is situated in front of an outstanding False Kamani tree. Moving the Facility back would require the removal of this mature tree, or re-siting the Facility mauka (and behind) at approximately 200 feet from the vegetation line. (Exhs. A-113A (written testimony of R. Frampton).)

28. The False Kamani has an exceptionally large canopy, which not only makes it the most massive tree in the KBH courtyard, but makes an ideal backdrop for the structure, providing a natural frame that will blend the facility into the existing vegetation. The removal of such mature trees along the Ka'anapali coast is also contrary to the stated objective of the West-Maui Community Plan to "save and incorporate healthy mature trees in the landscape planting plans of any construction development." (Exhs. A-113A (written testimony of R. Frampton).)

29. Locating the Facility behind the False Kamani tree in the courtyard would require paddlers to carry the 400 pound canoes an additional 130 feet. This physical strain makes the canoe facilities at KBH impractical and undesirable, detrimentally impacting one of the primary purposes of the facility. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

30. An analysis of historical shoreline trends aided in the selection of the proposed location based upon its low risk of coastal erosion. (Exhs. A-113A (written testimony of R.

Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

31. Studies of the beach toe and vegetation line show long term accretion of both features. Nevertheless, a cautious approach was used in siting the restaurant. The proposed site is located twenty-five feet (25') mauka of the worst case erosion event (1949). (Exhs. A-113A (written testimony of R. Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

32. The architecture incorporates an environmentally sensitive pier design which, in the case of an unprecedented erosion event, would neither impact or be impacted by the natural beach processes. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

33. The proposed location is located in an area of very low erosion risk, therefore pushing the facility behind the 150 foot setback line does not offer a reduction in risk. (Exhs. A-113A (written testimony of R. Frampton).)

34. During the site inspection, the hearing officers inspected two nearby restaurants, Leilani's and Hula Grill, and noted their close proximity to the lateral walkway and the shoreline. The Facility is to be located substantially farther mauka by comparison to these restaurants.

V. SITING OF THE FACILITY AND THE SSV

A. Maui County's Shoreline Setback Rules

35. The SSV Rules recognize that the shoreline area is one of the most important natural resources of the County of Maui. The SSV Rules state that "it is imperative 1) that use and enjoyment of the shoreline area be insured for the public to the fullest extent possible, 2) that the natural shoreline environment be preserved, 3) that man-made features in the shoreline area be limited to features compatible with the shoreline area, and 4) that the natural movement of the shoreline be protected from development." Additionally, the SSV Rules serve to prevent against damage to residences and other structures near the shoreline caused by tsunamis and high wave action. SSV Rules §12-5-3.

36. Maui County's shoreline setback lines are based on a percentage of a parcel's average lot depth. Because of the depth of the KBH lot, its setback is at 150 feet, whereas other properties along Kaanapali Beach have varying setbacks due to lot configuration. For instance, the Maui Marriott's and the Hyatt Regency Maui's setback is about 132 feet and the Whaler's is about 134 feet. (Exhs. A-113A (written testimony of R. Frampton).)

B. Variance Criteria of SSV Rules § 12-5-13(a)

37. Shoreline setback variances may be permitted in limited circumstances pursuant to the SSV Rules and the CZMA. KBH presented evidence to justify a variance for the subject facility under the following three tests:

A shoreline area variance may be granted for a structure or activity

otherwise prohibited by this chapter, if the authority finds in writing, based on the record presented, that the proposed structure or activity is necessary for or ancillary to:

- * * *
- (5) Boating, maritime, or water sports recreational facilities;
- * * *
- (7) Private facilities or improvements that are clearly in the public interest;
- (8) Private facilities or improvements which will neither adversely affect beach processes nor artificially fix the shoreline; provided that, the authority also finds that hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline area . . .

SSV Rules § 12-5-13(a).

C. Boating, Maritime or Water Sports Recreational Facilities

38. Since the Facility is a mixture of a restaurant, canoe hale and educational facility, a variance will not be granted based solely on class (5), which allows for "boating, maritime, or water sports recreational facilities" within the shoreline area. However, the canoe facilities are an important part of the structure's use, and therefore, the MPC gives consideration to the application based upon the Facility's use as a water sports recreational facility. (Exhs. A-113A (written testimony of R. Frampton).)

D. Private Facilities or Improvements That Are Clearly in the Public Interest

- (1) **The Facility Will Provide Cultural and Educational Benefits Which Are in the Public Interest**

39. The Facility will be essential to further the objectives of KBH's Po`okela program. The Po`okela program has demonstrated over the years a clear public benefit through the many outreach and educational programs which it offers. The cultural education benefits Maui's population. The educational displays at the proposed Facility will be developed through ongoing relationships with the Bishop Museum and the Polynesian Voyaging Society. The sharing and furthering knowledge of the Hawaiian culture among island residents, especially the Hawaiian connection with the sea, will be enhanced with the construction of this structure. (Exhs. A-31, A-32, A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas 4/4/00, 278:7-289:6, D.Coyle, 4/4/00, 328:1-329:1.)

40. The Facility will be used to educate people as to the history of the area, canoe culture, fishing, navigation and the cultural practices relating to the ocean. A series of artifacts or replicas and interpretive panels relating to navigating, canoeing, surfing and fishing will be displayed in the Facility to illustrate the cultural practices relating to the ocean. It is important to the educational and cultural objectives that the Facility be in close proximity to the ocean. (Exhs. A-118, A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White); E. Tatar, 4/4/00, 253:7-14.)

41. KBH maintains an unprecedented cultural atmosphere and wishes to expand its Hawaiian cultural program, Po`okela,

which began in 1986. While KBH already incorporates Hawaiian values and spirit within its day-to-day operations, the new Facility is designed to enhance Po`okela by enabling it to better express its cultural connection to the area's practices, legends, history, and existing landmarks. (Exhs. A-31, A-32, A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas 4/4/00, 278:7-289:6, D.Coyle, 4/4/00, 328:1-329:1.)

42. The Facility is located where a strong cultural connection to the ocean can be formed and where educational displays, tours, and presentations will have a significant positive impact upon guests and the public. (Exhs. A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas, 4/4/00, 287:16-289:6.)

43. The Po`okela program is an educational program for hotel guests as well as local residents. KBH intends the Facility to be an integral part of the program which includes the forgotten history of the area. It is important that the Facility have visual access to historical landmarks. Such landmarks include Ka`anapali beach, where in legend, Ka-ulu departed Maui in his canoe, and Pu`u Keka`a Point (Black Rock), where spirits leaped into the nether world. (Exhs. A-31, A-32, A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas 4/4/00, 278:7-289:6.)

44. KBH currently has an arrangement with the Bishop Museum in which cultural artifacts are loaned to it for educational displays. This program will be continued in the Facility with displays relating to paddling, navigation and fishing. (Exhs. A-113A (written testimony of R. Frampton), A-118 (written testimony of E. Tatar), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

45. Specific aspects of the Po`okela program include the cultural/property tours, where schools, individuals and organizations visit KBH on an on-going basis. The Facility will provide a venue for the presentation of ocean-related subjects. (Exhs. A-31, A-32, A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

46. In addition, the Guest Services staff present twelve cultural activities on a rotating basis for both guests and non-guests. Once the Facility is completed, new activities will be created to take advantage of the new educational materials available in the Facility. These activities will be geared to the importance of navigation to the Hawaiian culture. KBH plans to work with the Polynesian Voyaging Society and the Kahana Canoe Club to develop this activity into an unfabricated visitor experience. (Exhs. A-31, A-32, A-121, A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

47. Hawaiian entertainment increases cultural knowledge through songs and hula. KBH provides only Hawaiian

music in its restaurant. The new location for the nightly entertainment will greatly enhance its ability to continue its use of songs and hula as an educational medium for guests and residents alike. (Exhs. A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

(2) The Facility Will Provide Canoeing and Recreational Benefits Which Are in the Public Interest

48. The incorporation of an outrigger canoe club facility, to be used by a Maui canoe club, will benefit residents of Maui County. The new site will provide recreational opportunities for local residents in an area which has recently been devoted almost entirely to tourists. (Exhs. A-113A (written testimony of R. Frampton), A-113B, A-126 (written testimony of W. Gonzales); A-127 (written testimony of M. Lindsey); V. Magee, 4/7/00, 503:1-505:9.)

49. The Kahana Canoe Club has been associated with KBH since 1993. KBH supports the club and helps it with fundraising. Some of its crews will train at KBH, where there is less congestion and more room to practice. Presently, there are ten canoe clubs on Maui, with three based at Hanakao Park; about fifteen canoes practice there daily during the season. Kahana Canoe Club has 24 - 28 crews practicing at Hanakao Park. It plans to have 12 - 14 men's and women's crews practice at KBH. Moving 3-5 canoes to KBH will make practice easier, and will reduce the congestion of canoes and crews at Hanakao. (Exhs. A-

126 (written testimony of W. Gonzales), A-133; V. Magee, 4/7/00, 503:1-505:9.)

50. Kahana Canoe Club's canoes are presently stored on the beach, making them vulnerable to theft and vandalism. Allowing them to be stored under the Facility will mean they will be better protected, secure, require less maintenance and last longer. (Exhs. A-126 (written testimony of W. Gonzales).)

51. The parking situation at Hanakao is very bad during paddling season. Parking will be easier at KBH, and will free up parking spaces at Hanakao for the crews that remain there. (Exhs. A-126 (written testimony of W. Gonzales), A-127 (written testimony of M. Lindsey); V. Magee, 4/7/00, 503:1-7, M. Lindsey, 4/5/00, 404:9-405:18..)

52. Moving crews and canoes to KBH will also reduce the competition for parking and beach space at Hanakao Park for the general public. This will allow greater use of the beach park by the general public. (Exhs. A-126 (written testimony of W. Gonzales), A-133; V. Magee, 4/7/00, 503:1-7.)

53. The provision of storage space for the canoe club will also be in the public interest. Protected storage areas are in short supply. The Facility will provide well built areas for boat and equipment storage. (Exhs. A-113A (written testimony of R. Frampton), A-113B, A-126 (written testimony of W. Gonzales).)

54. The location of a canoe facility on the KBH grounds will create additional fundraising opportunities for the club. At KBH there is the potential of tapping into additional

sources of money, i.e., tourist donations. (Exhs. A-113A (written testimony of R. Frampton), A-126 (written testimony of W. Gonzales).)

55. While the canoe hale may not be an authentic replica of a traditional Hawaiian canoe hale, it is still a much needed, practical facility for the storage of canoes and equipment. KBH has never represented that the Facility is supposed to depict a traditional Hawaiian canoe hale. Storing the canoes under the facility does not show a lack of respect for the canoes. Many successful canoe clubs, including Hawaiian Canoe Club here on Maui and Outrigger Canoe Club on Oahu, store their canoes in non-traditional Hawaiian canoe hailes or in commercial buildings. Proper respect for a canoe is based on how it is used, cared for and handled, including how it is stored. Storing the canoes in the Facility will also keep them protected and in better condition than leaving them on the beach, as many clubs do now. (Exhs. A-126 (written testimony of W. Gonzales); A-127 (written testimony of M. Lindsey), A-113B (written testimony of R. Frampton).)

56. No canoe club on Maui utilizes a traditional Hawaiian canoe hale. (L. Kuloloio, 4/13/00, 794:23-795:1.) The modern canoe clubs utilize modern materials such as fiberglass canoes, which are not traditional Hawaiian materials. (M. Lindsey, 4/5/00, 406:19-20.)

(3) Benefits to Tourism and The Creation of a Model for Cultural Tourism Will Be Enhanced by the Facility

57. The Facility may be viewed as a model on how to embrace cultural tourism. "Cultural tourism" refers to an indigenous cultural preservation and incorporation into all aspects of the hospitality industry. It is experiences defined by a host culture and shared with guests in ways that nurture an appreciation and respect for a place and its people, history and traditions. (Exhs. A-124 (written testimony of J. DeFries), A-125 (written testimony of M. Weinert).)

58. The Facility's focus on the Hawaiian's relationship with the sea will provide the visitor with a greater understanding of Hawaii's unique culture. There is a clear public benefit in conveying culturally accurate information to our visitors in a manner and setting that leaves a lasting impression. This Facility has the potential to be a model for cultural based tourism. (Exhs. A-113A (written testimony of R. Frampton), A-124 (written testimony of J. DeFries), A-125 (written testimony of M. Weinert).)

59. It is also in the public interest to provide enriching and rewarding experiences for our visitors in this competitive global visitor industry. Maui needs to set itself apart from other destinations which offer sun, sand and surf, without losing its perspective of environmental and cultural values. This Facility's contribution to KBH's overall cultural tourism approach clearly benefits the State's visitor industry. (Exhs. A-113A (written testimony of R. Frampton), A-124 (written testimony of J. DeFries), A-125 (written testimony of M.

Weinert).), A-39, A-41, A-130 (written testimony of M. White), M. Weinert, 4/5/00, 376:14-378:25.)

(4) The Facility is Likely to Increase State and Local Tax Revenues

60. There will be clear benefits to our local and state economies through enhanced state and local tax revenues. It is anticipated that the addition of the Facility will increase the annual County property taxes by approximately \$20,000. Additionally, the projected \$3.0 million increase in revenues will generate an additional \$120,000 in State excise tax payments. (Exhs. A-42, A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

(5) The Facility Will Allow KBH to Maintain the Operability of the Food Service Program and Create a Competitive Food Service Program

61. The Facility is necessary to allow KBH's food service program to continue and grow into a competitive program, rather than to be discontinued. The proper siting of the Facility is an important factor in the operability of KBH's food service program. KBH's existing restaurant, located inland within the south wing, fails to attract KBH's own guests, much less guests from other hotels or local residents. Consequently, the food service program (employing about 85 workers) has been run at economic loss for many years. Reasonable access to the resort's beach walkway and shoreline will help prevent losses to employment and operational stability. (Exhs. A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

62. In lieu of closing the failing program, KBH opted to invest in a new facility that will combine a restaurant, canoe hale, and a Hawaiian cultural setting for KBH for educational purposes. The proposed location provides the desired beachfront ambiance and has reasonable exposure to the beach walkway. (Exhs. A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

63. The Facility is a tourism-related development that is dependent on its proximity to the coast. It is in the public interest to remain competitive with other resort areas. The heightened experience by the user of Facility will have positive impacts for tourism in Ka'anapali, on Maui and throughout Hawaii. (Exhs. A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

(6) The Facility Will Create a Model for Partnering with the Public

64. This Facility will be a model on how private hotels and other businesses can partner with the community for the benefit of the public. KBH's adoption and support of a local canoe club serves as an example as to how other hotels can support the local community. (Exhs. A-113A (written testimony of R. Frampton); V. Magee, 4/7/00, 511:6-10.)

65. All of the aforesaid benefits render KBH's Facility clearly in the public interest.

E. Private Facilities Which Do Not Adversely Affect Beach Processes Nor Artificially Fix the Shoreline and Hardship Exists

(1) The Facility Will Not Adversely Affect Beach Processes Nor Artificially Fix the Shoreline

66. First, the Facility clearly does not "fix" the shoreline since it is not a sea wall or other such structure. The location of the shoreline is able to fluctuate. Second, the in-depth analysis of Sea Engineering and testimony of Robert Rocheleau prove that the Facility will not adversely affect beach processes. (Exhs. A-113A (written testimony of R. Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

67. The historical shoreline trends show that the proposed location has a low risk of coastal erosion. In addition, the Facility's pier design allows it to neither impact or be impacted by the natural beach processes in the event of unprecedented erosion events. (Exhs. A-113A (written testimony of R. Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

68. The proposed location (partially within the shoreline setback area) was judged superior to a location 150 feet mauka of the shoreline. With the proposed site already located in an area of very low erosion risk, pushing the facility behind the 150-foot setback line does not offer a significant reduction in risk to coastal processes, and causes hardship to KBH. (Exhs. A-113A (written testimony of R. Frampton), A-129 (written

testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

(2) Hardship Will Result to KBH If the Facility Is Not Located Within the Shoreline Area

69. The SSV Rules do not define what constitutes "hardship." However, "hardship" generally refers to the fact that a "zoning ordinance or restriction as applied to a particular property is unduly oppressive, arbitrary or confiscatory." Black's Law Dictionary (6th Ed., 1999) (emphasis added).

70. KBH has shown that not allowing a variance from the 150-foot setback will result in hardship in various forms.

(a) KBH's cultural program would be detrimentally affected

71. KBH maintains an unprecedented cultural atmosphere and wishes to perpetuate it's highly successful Po`okela program . Visual access to the sea and historical landmarks, as well as a strong connection to the ocean is important to the educational mission and cultural objective of the Facility. (Exhs. A-113A (written testimony of R. Frampton), A-123 (written testimony of D. Coyle), A-122 (written testimony of L. Sablas), L. Sablas 4/4/00, 278:7-289:6; D.Coyle, 4/4/00, 328:1-329:1..)

72. The Po`okela Program will be more effective in the proposed location. Therefore, it is a hardship to KBH to not allow the Facility to be located in the proposed location. (Exhs. A-113A (written testimony of R. Frampton), A-123 (written testimony of D. Coyle), A-122 (written testimony of L. Sablas); G. Kanahale, 4/10/00, 550:1-11.)

73. At 150 feet and further mauka locations, views from the Facility become obstructed by buildings and vegetation; landmarks such as Pu`u Keka`a Point (Black Rock), neighboring islands and Ka`anapali Beach canoe landing become obstructed. Locating the Facility mauka of the 150-foot setback line would create an unnecessary hardship to the Hawaiian cultural program, especially since the purpose of the SSV Rules can be fulfilled at the preferred location. (Exhs. A-113A (written testimony of R. Frampton).)

(b) The canoe facility would be detrimentally impacted

74. Not allowing the Facility to be located at the proposed site would create a hardship for KBH because the mauka location imposes an undue burden on canoeing activities. The proposed location defines and limits the canoe activities to an area closer to the ocean, which will alleviate physical strain on paddlers, especially members of the Keiki (children) paddling programs, and will allow for more interaction between the paddlers and hotel guests. (Exhs. A-113A , A-113B (written testimony of R. Frampton); Exhs. A-126 (written testimony of W. Gonzales).)

(c) Hardship from removal of the large Kamani tree

75. A large false Kamani tree located approximately 180 feet mauka of the shoreline complicates siting at the mauka location. At the proposed location, the Facility snugs up to the base of the tree and fits under its large canopy. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

76. If the Facility is kept at the 150-foot setback location, the tree would likely need to be removed. Trees of such scale (approximately 85 feet in diameter) and character are rare along the Ka'anapali coastline and its loss would be an unnecessary hardship considering the availability of the proposed location. (Exhs. A-113A (written testimony of R. Frampton).)

(3) The 1998 SMA approval does not preclude a present finding of hardship

77. SSV Rules § 12-5-13(b) provides that, "If the hardship is a result of actions by the applicant, such result shall not be considered a hardship for the purpose of this section." However, the SMA permit amendment approved by the MPC on April 28, 1998, pursuant to the application of KBH, which included the condition that the new Facility be located mauka of the 150-foot setback line, does not now preclude the finding of hardship for purposes of the present SSV application. ((Exhs. A-113A (written testimony of R. Frampton).)

78. SSV Rules § 12-5-13(b) does not apply to the present situation. The various forms of hardship to KBH described above are not the result of actions by KBH. The hardship that will result to KBH is solely what would result if the Facility is not allowed to be constructed as proposed. (Exhs. A-113A (written testimony of R. Frampton).)

79. In addition, KBH is not bound by the location of the facility previously approved (in the 1998 application), especially since moving the Facility into the shoreline area was not a part of that application and thus the circumstances that

would allow the Facility to be located within the shoreline area were not explained to the MPC in the 1998 application (which focused primarily on the reduction of the original project). (Exhs. A-113A (written testimony of R. Frampton).)

(4) Buildings constructed by KBH do not preclude the finding of hardship

80. Similarly, buildings and vegetation placed on the property by KBH do not preclude a finding of hardship under Rule 12-5-13(b). The buildings and vegetation on the property that affect the siting of the proposed project, were placed at the time that the shoreline setback for the property was forty feet (40'). It is only the increase in the shoreline setback to one hundred fifty feet (150') that necessitated this SSV application. (Exhs. A-113A (written testimony of R. Frampton).)

F. The Requirements of SSV Rules § 12-5-13(c) Have Been Met

81. The proposed project meets the conditions specified in §12-5-13 (c), which provides:

No variance shall be granted unless appropriate conditions are imposed:

- (1) To maintain safe lateral access to and along the shoreline or adequately compensate for its loss;
- (2) To minimize risk of adverse impacts on beach processes
- (3) To minimize risk of structures falling and becoming loose rocks or rubble on public property; and
- (4) To minimize adverse impacts on public views to, from, and along the shoreline.

(1) Safe lateral access to and along the shoreline

82. Lateral access along Ka'anapali beach is provided by a sidewalk system referred to as the beach walkway. The

proposed project's location and scope do not include changes to the walkway or impede access along the corridor. (Exhs. A-113A (written testimony of R. Frampton).)

(2) Minimize risk of adverse impacts on beach processes and risk of structures becoming loose rock on public property

83. Both conditions (b) and (c) of SSV Rules § 12-5-13 have been met by the Applicant. As documented, a primary focus in planning the restaurant/canoe hale was avoiding impacts to and from the shoreline processes. An analysis of historical shoreline trends prepared by Sea Engineering, Inc. aided in the selection of the proposed location based upon its low risk of coastal erosion. Architecturally, the facility is designed on piers which, in the case of an unprecedented erosion event would neither impact nor be impacted by the natural beach processes. (Exhs. A-113A (written testimony of R. Frampton).)

(3) Minimize adverse impacts on public view to, from and along the shoreline

84. The Facility is a single-story building located completely within the "horseshoe" of KBH's existing three and six story buildings. Therefore, the Facility is incapable of obstructing public views towards and along the shoreline. Viewed from the shore, the Facility will be an attractive structure that will blend into the landscaping present in KBH's great courtyard. A 30-70 foot buffer will separate the Facility from the beach walkway. (Exhs. A-113A (written testimony of R. Frampton).)

G. The Location of the Facility Is Identified by the Surrounding Buildings

85. The proposed location which is approved by the MPC is described in KBH's application and illustrated in Figure 4 of the EA (Exh A-15) and Exh. A-2. This location is generally described as the area mauka of the line drawn between the makai end of the Kauai and Molokai wings of KBH, as shown on Figure 4. It is not conditioned upon being a set distance from the shoreline, since said shoreline may change in the future. (Exh. A-15, A-2.)

VI. NO FORECLOSURE OF MANAGEMENT OPTIONS

86. The development will not foreclose any management options. The SMA and SSV granted herein is specific to this particular Facility and its circumstances. The granting of a variance based on a specific set of circumstances does not establish a precedent for future applications. The MPC is bound to evaluate each application for a variance on its own merits.

87. There are numerous unique aspects of this project which will set it apart from other possible applications, such that granting this application does not set any form of precedent that the MPC will have to grant approvals for any development within the shoreline setback. The following aspects of this project set this project apart from virtually all other developments:

a. Project Mauka of Most Inland Shoreline on Record. The Facility is to be located mauka of the most inland shoreline on record (1949).

b. Minimal risk to Shoreline and Coastal Processes.

The project site has a minimal risk of impacting or being impacted by shoreline movement.

c. Siting Behind Existing Structures. The Facility is to be located mauka of existing structures at KBH.

d. Pier Design. The project was designed in a manner which would not impact or be impacted by shoreline processes.

e. Coastal Dependency. The facility has a strong coastal dependency in terms of the importance to the Hawaiian cultural program and to the operation of the canoe club.

f. Public Recreational Use. Incorporation of the outrigger canoe facility establishes a public recreational use component.

88. There is no evidence that other hotels in Ka'anapali will "jump on the bandwagon" and request permission to construct facilities or restaurants within the shoreline setback simply because this project is approved. Furthermore, there is no indication that any other hotels in Ka'anapali would be willing to propose a development that has all of the above features that KBH has presented.

VII. OPEN SPACE

89. The proposed location places the Facility under the large canopy of a false Kamani tree, which will frame the Facility. The site is completely within the "horseshoe" of KBH's three and six story buildings and therefore the Facility will not obstruct public views to and along the shoreline. (Exhs. A-2, A-

15, A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

90. Even with the addition of the Facility, KBH maintains an open space significantly larger than other developments along Ka`anapali Beach, including the Whaler. For example, The Whaler On Kaanapali Beach is close to the maximum density allowed by law, whereas the density of KBH is calculated at approximately 53%. (Exhs. A-113A (written testimony of R. Frampton).)

91. Moreover, as part of the renovation, the currently existing Tiki Bar, Tiki Grill, pool restrooms, two concession booths, substantial concrete decking and entertainment area in the courtyard will be removed, which offsets the area covered by the new Facility. (Exhs. A-15; M. White, 4/13/00, 638:6-22.)

92. KBH's large landscaped courtyard is often referred to as a park. The proposed site is about 85 feet inland from the makai edge of the vegetation line, and therefore does not directly affect public beach resources. Use of the Ka`anapali beach walkway running approximately 40 feet mauka of the said vegetation line will continue to provide lateral access along Ka`anapali beach as well as public use of the makai portion of the KBH property. Therefore, use of the beach itself and related public access will not be infringed by the proposed action. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

93. The West Maui Community Plan has designated the Ka`anapali beach area as "Open Space." However, KBH's property,

including the site of the proposed Facility, is designated "Hotel," (Exh. I-121 (West Maui Community Plan)), which is consistent with its zoning designation of H-2 Hotel. (Exh. A-16.) Therefore, the direction of the Community Plan to set aside certain existing areas as open space should be applied to those properties designated as Open Space, which does not include the proposed site. The hearing panel reviewed the larger version of the West Maui Community Plan Map (Exh. I-121), and Ann Cua testified that the larger map confirms that the Facility will be located within the area designated "Hotel" and not within the area designated "Open Space." (A. Cua, 4/7/00, 460:10-464:23.)

94. Exh. A-126, the photograph showing the Facility in relation to the Whaler and existing KBH buildings demonstrates the lack of impact to open space. (Exh. A-126; A-114 (written testimony of R. Cole).)

95. The proposed site for the Facility aptly balances the Coastal Zone Management Act's ("CZMA") policies addressing open space, HRS §205A-2(c)(3), with those that support appropriate economic uses in the coastal zone. HRS §205A-2(c)(5).

VIII. SHORELINE CERTIFICATION

96. In this case, a survey with a current shoreline certification was submitted, but said certification subsequently expired during the pendency of this application. Thereafter, a new shoreline certification was obtained. (Exhs. A-46.)

97. The SMA Rules require submission of a "shoreline survey" (SMA Rules § 12-202-12(c)(2)(D)), which is defined as:

"Shoreline survey" means the actual field location of the shoreline prepared by a land surveyor registered in the State of Hawaii. Such survey maps developed by the registered land surveyor shall bear the surveyor's signature and the date of field survey and the certifying signature and date of the chairman of the board of land and natural resources.

SMA Rules § 12-202-4. Hence, while one must submit a shoreline survey which has been certified, there is no requirement that the certification remain current throughout the permitting process.

98. The shoreline was certified on or about October 13, 1999, and thus a currently certified shoreline exists. (Exhs. A-46, A-119, K. Tanaka, 4/4/00, 259:22-265:23.) KBH's submissions of its shoreline surveys have complied with the SMA Rules and the SSV Rules.

99. Finally, the shoreline certification simply determines the location of the shoreline, and such location of the shoreline is not significant to this application, in that the proposed location is admittedly within the shoreline area. The fluctuation of the certified shoreline will not change that fact. Further, the location for the Facility is not proposed as being a certain distance from the shoreline.

IX. SHORELINE PROCESSES

100. Robert Rocheleau, a professional engineer in ocean engineering, was qualified as an expert witness to testify as to shoreline processes. He is the founder and president of Sea Engineering, Inc., an engineering firm specializing in coastal engineering, oceanographic and marine environmental studies and

engineering diving services. (Exhs. A-129 (written testimony of R. Rocheleau); A-98 (curriculum vitae of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

101. Sea Engineering Inc. prepared a report dated December 1998, which is included in the 1999 EA for this project (Exh. A-15, Appendix A, Shoreline Evaluation). The report describes the historical vegetation line changes at the site and predicts, to the extent possible, the vegetation line position 30 years from now. (Exhs. A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

102. The north and middle sectors of Hanakao Beach (Ka`anapali Beach) are dynamic, responding to the seasonally varying wave climate. In the summer, the sand moves from Hanakao Point to the north due to the influence of the prevailing south swell. The pattern reverses in the winter when the north Pacific swell is present. While the seasonal changes to the sandy beach are pronounced, the vegetation line is more stable. Significant adverse changes to the vegetation line are usually associated with severe weather events. During the winter of 1997-98, the vegetation line in front of the Sheraton Maui Hotel receded up to 50 feet. This was an unusual occurrence, apparently caused by the El Nino event, which resulted in larger and more frequent north Pacific swells than normal. The erosion was confined primarily to the Sheraton property, with only limited erosion occurring at the north end of the KBH property. Kona storms have in the past caused erosion of the beach and the vegetation line along the

shoreline in front of KBH. Shoreline monitoring indicate that the beach typically recovers quickly after a wave induced erosion event, including the most recent 1998 El Niño related event. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21--601:24.)

103. Hanakao Beach was included in a study which evaluated long term shoreline changes. The method involved computer rectification of available aerial photographs, followed by digitization and plotting of the vegetation line. That 1991 study was updated for this evaluation by adding two additional photos and three shoreline certification surveys to the data base. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21--601:24.)

104. The analysis shows a fluctuating vegetation line at the project site, with a range of movement of 80 feet over the 49 year period. The net change since 1949 was a gain (i.e., accretion) of 71 feet. The historical vegetation line changes were used as a basis for the prediction of the vegetation line position in 30 years. Since future storms and wave patterns that affect the vegetation line cannot be predicted, a probabilistic model was utilized to calculate the probability distribution of future vegetation line positions. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

105. The model results predict a mean position of the vegetation line at the project site in 30 years 43 feet seaward

of the present position. However, a more conservative approach is recommended. With 49 years of data on the movement of the vegetation line at the site representing a wide range of wave events, a conservative approach would be to assume that the vegetation line might fluctuate between the landward and seaward extremes noted over that period. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

106. One of the stated objectives of the West Maui Community Plan is to assure preservation of new major water front developments for 50-100 years by basing the shoreline setback on a rate of shoreline retreat as determined by an appropriate study. (Exh. I-121.) Although Mr. Rocheleau's study predicted the vegetation line in 30 years, he testified that his analysis resulted in a net annual accretion. Therefore, if the forecast is lengthened from 30 years to 100 years, this simply leads to a greater amount of accretion. (R. Rocheleau, 4/10/00, 576:6-20.)

107. This landward extreme is represented by the 1949 shoreline in figure 4 of the report. (Exh. A-15.) The proposed structure will be located approximately 20 feet mauka of this line. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

108. An additional study of the beach toe was completed at the request of the Sea Grant Extension Service. The initial study, based only upon aerial photographs, indicated that the

width of the beach at the site narrowed by 45 feet between 1988 and 1997. However, in July of 1999, actual ground measurements of the beach width (distance from the vegetation line to the beach toe) were taken, which show that the beach width had increased by 40 feet since 1977. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

109. There is no chronic erosion of the beach fronting KBH. While both Sea Engineering, Inc. and the Sea Grant Extension Service note the short-term accretion and erosion trends, neither have concluded that "chronic erosion" is taking place. Both the vegetation line analysis and the beach toe data indicate accretion of the beach since 1949. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

110. It is highly unlikely that the beach will retreat shoreward of the 1949 vegetation line position. The long term record reflects vegetation line changes due to typical seasonal variations as well as a variety of extreme events. As such, it provides a valuable guideline for evaluating future vegetation line positions. This approach resulted in the structure being sited at least 20 feet mauka of the worst case situation over the past 50 years. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

111. In addition to a conservative siting approach, the proposed pier design of the restaurant is a significant mitigation measure which would minimize the potential for negative impacts to or from shoreline processes in an unforeseen extreme wave event. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

112. Hotel landscaping may have somewhat masked the vegetation line by making it move seaward, but only in a temporary manner. This is because "when you have either large seasonal waves or any type of storm wave, although vegetation is promoted . . . it's a temporary buffer, and if you have a wave action for a long enough duration it's cut back." (R. Rocheleau, 4/10/00, 577:10-14; 598:1-13.) Intervenors's witness, Michelle Anderson, agrees that even if the vegetation is growing out towards the ocean that it tends to be cut back naturally by virtue of the wave action. (M. Anderson, 4/14/00, 825:5-18.)

113. The Ka'anapali Beach Plan (Exh. I-120) states on page 15 that "development in shoreline setback should only be considered after an analysis of historical shoreline trends" and "anything larger than a walkway or a small beach activity center should not be located seaward of the most landward vegetation line on record." In this case, such a shoreline study was done, and the 1949 vegetation line is the most landward vegetation line on record. (R. Rocheleau, 4/10/00, 568:5-6.)

X. NOISE

114. David Adams, a professional engineer in electrical engineering, testified as to sound abatement. (Exh. A-132 (written testimony of D. Adams); D. Adams, 4/14/00, 829:9-849:3.)

115. Mr. Adams conducted a sound investigation and submitted a report. (Exh. A-24.) As part of the investigation, he setup a simulation of the planned future live entertainment area near the KBH, and the sound levels of the music were measured at the footprint of the proposed Facility and also in units in Tower No. 1 of the Whaler. Only the end units of the Whaler's two towers have line of sight to the planned outdoor performance area. The remainder of the Whaler is blocked by the Kauai wing of KBH. The measurements are set forth in Table 1 of his report. (Exhs. A-24; A-132 (written testimony of D. Adams); D. Adams, 4/14/00, 829:9-849:3.)

116. The music levels at the Whaler were less than the background noise levels. Under calm wind conditions, the music levels exceeded the background noise levels, but by less than 3 decibels. Three decibels is commonly considered the threshold of perceptible change in noise level. (Exhs. A-24; A-132 (written testimony of D. Adams); D. Adams, 4/14/00, 829:9-849:3.)

117. The music sound levels from the Facility, subject to the conditions set forth in the Decision and Order section below, will not be excessive nor objectionable to the Whaler. (Exhs. A-24; A-132; D. Adams, 4/14/00, 829:9-849:3.)

118. Intervenors provided no contrary evidence to dispute the above facts.

119. KBH's Settlement Agreement with the Whaler AOA provided that KBH would abide by conditions with respect to noise. (Exhs. CO-SMA-33 (withdrawal of petition to intervene by the Whaler AOA, with settlement agreement attached), A-130.) Those conditions are set forth, in part, in the Decision and Order section below.

XI. ODORS

120. William R. Gebhardt, a professional engineer in mechanical engineering, testified as to odor abatement. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

121. A scrubber system in the proposed restaurant's exhaust system will be installed to remove cooking odors that KBH guests could experience from the courtyard or their guestrooms. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

122. Cooking odor abatement is a common practice for food service establishments in proximity to residential buildings. The proposed technology is commonly used in Hawaii, including Maui. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

123. The Vent Master Ecolair Ecology System or similar system is to be added to the kitchen exhaust system. This system is very effective in reducing the amount of smoke and odors emanating from a kitchen. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

124. Intervenors provided no contrary evidence to dispute the above facts.

125. KBH's Settlement Agreement with the Whaler AOA provided that KBH would abide by conditions with respect to odors. (Exhs. CO-SMA-33 (withdrawal of petition to intervene by the Whaler AOA, with settlement agreement attached), A-130.) Those conditions are set forth in the Decision and Order section below.

XII. USE OF ACCESSWAY

126. KBH has no plans to regularly use the access road adjacent to the Whaler to service the Facility. Goods will be delivered to the hotel via the existing loading docks on the north side of the property and transported to the Facility via the courtyard. There is no provision for a restaurant service road between the Whaler and KBH in either the existing approved SMA permit or the proposed SMA permit amendment plans. (Exhs. A-130 (written testimony of M. White).)

127. KBH's Settlement Agreement with the Whaler AOA provided that KBH would abide by conditions with respect to the use of the accessway. (Exhs. CO-SMA-33 (withdrawal of petition to intervene by the Whaler AOA, with settlement agreement attached), A-130 (written testimony of M. White).) Those conditions are set forth in the Decision and Order section below.

XIII. NOTICE TO OWNERS WITHIN 500 FEET

128. Rory Frampton oversaw the providing of notices of a public hearing on this SMA amendment and SSV to neighboring landowners. (Exhs. A-113A (written testimony of R. Frampton).)

129. On July 19 and 20, 1999, the Applicant's consultant obtained the names and addresses of owners and lessees of real property within 500 feet of the KBH by utilizing the County of Maui real property tax records. The notice of public hearing was sent to each of the owners and lessees listed in those records, by certified mail, on August 13, 1999. They later received return receipts from the post office. The public hearing was set for September 14, 1999. (Exhs. A-21, A-22, A-23, A-113A (written testimony of R. Frampton).)

130. The original return receipt cards were filed with the Planning Department. (Exhs. A-113A (written testimony of R. Frampton).)

131. Intervenors do not dispute any of the above facts. Their argument is that certain Whaler units are in time-share programs and those time-share interval owners were not given notice. (C. Fox, 4/14/00, 922:11--923:15.) However, actual notice to each and every owner is not required (nor is it possible since such time-share owners are not listed on the County real property records). Rather, the process of utilizing records of the County Real Property Tax Department, as required by MPC's Rules of Practice and Procedure, was satisfactory.

If there are multiple owners of the property, notification of the person(s) listed by name on the records of the County of Maui real property tax roll shall be deemed adequate notice as to all owners.

SMA Rules §12-202-13(g). It is undisputed that the Applicant utilized the County Tax records and therefore have complied with the notice requirements.

132. Furthermore, none of the Intervenors have claimed that they did not receive actual notice of this proceeding, and thus, the Intervenors have no standing to raise this argument.

XIV. DRAINAGE

133. J. Stephen Pitt, a professional engineer in civil engineering, testified as to drainage. (Exh. A-131 (written testimony of S. Pitt); S. Pitt, 4/13/00, 677:20-684:9.)

134. Mr. Pitt reviewed the project plans, topographic information for the property and the engineering report by Mr. Hirota (who prepared a drainage report for the initial SMA permit obtained in 1990, Exh. A-29). He conducted a percolation test and ran drainage calculations based upon the DPWWM drainage rules. Mr. Pitt prepared and submitted a report of his analysis. (Exh. A-47 (Pitt report); Exh. A-131 (written testimony of S. Pitt); S. Pitt, 4/13/00, 678:14-679:4.)

135. The amount of runoff generated by the construction of the Facility will be very minor, due to the fact that the structure will be on piers which minimizes the reduction in available penetrable surfaces, and due to the relatively small size of the Facility. It is planned to retain on-site any additional runoff generated by the construction of the Facility so that there is no net increase in runoff leaving the KBH property. (Exhs. A-29 (S. Hirota Drainage Report), A-47 (Pitt

report), A-131 (written testimony of S. Pitt); S. Pitt, 4/13/00, 679:10-22.)

136. The percolation tests conducted by Mr. Pitt revealed an average percolation rate of 20.5 feet per hour. In comparison, the inflow rate, based upon a 50-year storm would be only 6 inches per hour. Therefore, the inflow is much less than the percolation rate for the sandy soil at the project site. (A-47 (Pitt report, pp. C-1 to C-3).)

137. The County DPWWM comment letter of March 24, 1999, does not raise any objections regarding drainage and merely requires a detailed drainage report prior to issuance of the grading and building permit, which is its standard comment. (Exh. A-15).

138. This development will not have any substantial adverse environmental or ecological effect with regard to drainage issues. (Exh. A-131 (written testimony of S. Pitt).)

XV. GREASE DISPOSAL

139. Don Misner, building engineer for KBH, testified as to grease disposal. (Exh. A-120 (written testimony of D. Misner); D. Misner, 4/4/00, 266:11-271:15.)

140. There are currently four grease traps in the KBH kitchens. These traps collect grease from the kitchens before it gets into the sanitary sewer. The grease is pumped out of the traps once a month and disposed of by Ahuhana Pumping. There have been no incidents of grease leaking or spilling onto the grounds

of KBH. (Exh. A-120 (written testimony of D. Misner); D. Misner, 4/4/00, 266:11-271:15.)

141. The grease trap in the Facility will be emptied whenever it is full, by evacuating the grease into a temporary container, and transporting it to a holding tank. The holding tank will be emptied on a monthly schedule together with the other grease traps. This is similar to the operation at the Four Seasons Hotel. (Exh. A-120 (written testimony of D. Misner); D. Misner, 4/4/00, 266:11-271:15.)

142. This development will not have any substantial adverse environmental or ecological effect with regard to grease disposal.

XVI. OTHER IMPACTS

143. Other than what has been stated above, Intervenors did not challenge any of the other conclusions of the Applicant and their experts as to lack of impacts caused by the project. Therefore, as to all other potential issues, the facts and conclusions of no adverse impacts contained in the SMA application, as well as the Final EA for the project remain undisputed by the Intervenors, and it is determined that no such adverse impacts exist.

XVII. COASTAL ZONE OBJECTIVES AND POLICIES

144. HRS Chapter 205A (the Coastal Zone Management Act) includes laws relating to the management of the shoreline areas. HRS § 205A-2 sets forth the broad objectives and policies of the CZMA under ten categories:

Recreational Resources
Historic Resources
Scenic and Open Space Resources
Coastal Ecosystems
Economic Uses
Coastal Hazards
Managing Development
Public Participation
Beach Protection
Marine Resources

HRS § 205A-2(c) sets forth the policies for these categories. Any project in the coastal zone must consider all of the CZMA objectives. (Exhs. A-113A (written testimony of R. Frampton).)

145. The Facility in its proposed location is consistent with the objectives and policies set forth in the CZMA. With respect to the more relevant and contested objectives and policies, the following findings of fact are made.

A. Scenic and Open Space Resources and Beach Protection

146. With respect to scenic and open space resources, HRS §205A-2(c)(3) provides, in pertinent part:

- (A) Identify valued scenic resources in the coastal zone management area;
- (B) Ensure that new developments are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and existing public views to and along the shoreline;
- (C) Preserve, maintain, and, where desirable, improve and restore shoreline open space and scenic resources; and
- (D) Encourage those developments which are not coastal dependent to locate in inland areas.

147. Relative to Beach Protection, HRS § 205A-2(c)(9)(A) provides in pertinent part:

- (9) Beach protection

(A) Locate new structures inland from the shoreline setback to conserve open space and to minimize loss of improvements due to erosion.

148. The shoreline history of the fronting beach does not suggest that the Facility site will be subject to erosion or wave action in the future. The structure has been designed to allow for natural movement of the shoreline. The proposed siting of the Facility is more than eighty feet (80') inland from the shoreline, and does not affect public beach resources. The lateral beach walkway, running about 40 feet mauka of the shoreline, will continue to provide lateral access. Therefore, use of the beach itself and related public access will not be infringed upon by the proposed action. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

149. The Facility is designed on piers, which, in the case of an unprecedented erosion event would neither impact or be impacted by natural beach processes. (Exhs. A-113A (written testimony of R. Frampton).)

150. Impacts to coastal open space resources have been minimized by locating the Facility behind the existing hotel wings on the property, at the threshold of the makai portion of the courtyard created by the such structures. (Exhs. A-113A (written testimony of R. Frampton).)

151. See also Section VII. herein for findings relating to the issue of open space.

B. Economic Uses

152. HRS § 205A-2(c)(5) sets forth the "Economic Uses" policy of the CZMA and specifically provides as follows:

(5) Economic uses

(A) Concentrate coastal dependent development in appropriate areas;

(B) Ensure that . . . coastal related development such as *visitor industry facilities* . . . are located, designed, and constructed to minimize adverse social, visual, and environmental impacts in the coastal zone management area; and

(C) *Direct the location and expansion of coastal dependent developments to areas presently designated and used for such developments and permit reasonable long-term growth at such areas, and permit coastal dependent development outside of presently designated areas when:*

(i) Use of presently designated locations is not feasible;

(ii) Adverse environmental effects are minimized; and

(iii) The development is important to the State's economy.

HRS § 205A-2(c)(5) (Emphasis added.)

153. The CZMA recognizes that visitor industry facilities are appropriate in the coastal zone and encouraged in designated areas such as the Ka'anapali Resort. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

154. Potential adverse impacts on the coastal zone from the proposed Facility are minimal. KBH has balanced environmental impacts with the requirements for the Facility, which has been located and designed to minimize environmental impacts. In addition, social impacts to the Maui community are viewed as positive which result from the incorporation of the Hawaiian cultural program into the Facility's design as well as through the provision of space for a local canoe club. In addition, the

Facility will have positive impacts on Maui's visitor industry as well as on State and local tax revenues. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

155. The Facility is in an area "presently designated" for "coastal dependent development." The Ka'anapali Resort area is designated and used for resort-related development. KBH proposes such "reasonable long-term growth" with the new Facility. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

156. The issue of whether the previously approved location of the facility is "feasible" is not even relevant, since KBH is not proposing to develop "outside of presently designated areas." HRS § 205A-2(c)(5)(C). Nevertheless, due to the importance of the success of the restaurant, canoe hale and educational elements of the project, the location of the Facility at the site previously approved is not feasible. (Exhs. A-113A (written testimony of R. Frampton).)

C. Coastal Hazards

157. The CZMA policy for coastal hazards provides in pertinent part:

Control development in areas subject to storm wave, tsunami, flood, erosion, hurricane, wind, subsidence, and point and nonpoint source pollution hazards.

HRS § 205A-2(c)(6)(B). The shoreline history of the fronting beach does not suggest that the proposed project site will be subject to erosion or wave action in the future. Nevertheless, the structure has been designed to allow for natural movement and

maintain structural integrity during extreme erosion events. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

158. According to the FEMA flood area designations, the proposed restaurant site is located in zone "C", an area of little or no flooding. Portions of the parcel along the shoreline are within the A4 and V12 zones, however the Facility is not located in those zones. (Exhs. A-15 (flood map diagram), A-113A (written testimony of R. Frampton).)

159. With a ground elevation of 9-10 feet above the mean sea level ("MSL") and a structural design that supports the facility 6 feet above grade, the Facility will be above tsunami inundation levels (8 feet MSL). (Exhs. A-15, A-113A (written testimony of R. Frampton).)

160. To the extent any of the foregoing findings of fact are more properly construed as conclusions of law, and to the extent any of the following conclusions of law are more properly construed as findings of fact, said findings or conclusions shall be so construed.

161. Any of the proposed findings of fact submitted by the parties to this proceeding not already ruled upon by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

XVIII. OTHER PROCEDURAL MATTERS

162. The Hearing Panel's Proposed Findings of Fact, Conclusions of Law, Decision and Order was dated October 31, 2000.

163. Hearings Officer Robert Carroll's Dissent from Proposed Findings of Fact, Conclusions of Law, Decision and Order were dated November 1, 2000.

164. At its November 14, 2000 meeting, the MPC scheduled the decisionmaking meeting for January 9, 2001. Randall Endo, Esq. and Isaac Hall, Esq. appeared for their clients and stated their positions regarding setting the action meeting date.

165. At its January 9, 2001 meeting, a motion was made to grant the application for an SMA and SSV. The motion did not pass. Thereafter, a motion was made to deny the application for an SMA and SSV. That motion also did not pass. The matter was then deferred.

166. At its meeting of February 13, 2001, the MPC, by its own accord, voted to reopen the contested case hearing in order to conduct a site inspection.

167. The MPC conducted a site inspection on March 1, 2001.

168. At its meeting of March 13, 2001, the MPC voted in favor of the application for an SMA and SSV. Seven members voted in favor and approved the majority's Hearing Panel's Proposed Findings of Fact, Conclusions of Law, Decision and Order. Commissioner Star Medeiros recused herself, and Commissioner Sam Kalalau voted against approval of the report. No new conditions were imposed prior to approval.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the hearing panel makes the following conclusions of law:

1. The MPC is the authority in matters relating to the CZMA, Maui County Charter §8-8.4, and has the sole power to approve or deny applications for SMA and SSV permits.

2. Applicant has the burden of proof. The quantum of proof is a preponderance of the evidence. HRS § 91-10(5). Unless otherwise noted, every finding, conclusions and/or other determination herein is made upon a preponderance of the evidence.

3. Applicant has proven by a preponderance of the evidence that it is entitled to its requested amendment of its SMA permit because the development meets all of the criteria of the SMA Rules and HRS Chapter 205A. Applicant has further proven by a preponderance of the evidence that it is entitled to a SSV.

4. Even if a substantial adverse effect is found, the MPC is required to determine whether the effect can be practicably minimized, and when minimized, whether the effect is clearly outweighed by public health, safety, or compelling public interest. Topliss v. The Planning Commission, 9 Haw. App. 377, 394, 842 P.2d 648, 658 (1993).

5. Applicant's proposed development will not have any substantial adverse environmental or ecological effect; and any adverse effects are minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests. Such adverse effects considered include, but are not

limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect, and the elimination of planning options. (HRS § 205A-26(2)(A).)

6. The proposed development has been reviewed in light of the objectives, policies, and guidelines set forth in HRS Chapter 205A, and recited in § 12-202-10 and § 12-202-11, et. seq., of the SMA Rules, and the SMA guidelines set forth in those rules, and the development complies with same. (HRS § 205A-26(2)(B).)

7. The proposed development is consistent with County General Plan and zoning. (HRS § 205A-26(2)(C).)

8. The criteria for a shoreline area variance have been met by the Applicant because, based on the record presented, the proposed Facility and activity is necessary for and/or ancillary to:

Private facilities that are clearly in the public interest (SSV Rules § 12-5-13(a)(7)).

9. While "public interest" is not defined in the SSV Rules or HRS Chapter 205A, the hearing panel noted various statutes which provide guidance in construing the term.

a. In establishing the Aloha Tower Development Corporation, the Hawaii legislature found the purposes of strengthening the economic base of the community, enhancing the beauty of the waterfront, providing for public use of the waterfront, and stimulating commercial activities in downtown Honolulu were "in the public interest." HRS §206J-1.

b. In the area of historic preservation, the legislature found that "it is in the public interest to engage in a comprehensive program of historic preservation at all levels of government to promote the use and conservation of such property for the education, inspiration, pleasure, and enrichment of its citizens." HRS §6E-1.

c. The Hawaii State Planning Act, HRS Chapter 226, sets forth a number of public interests, including:

i. Increased and diversified employment opportunities to achieve full employment, increased income, and improved living standards for Hawaii's people. HRS §226-6(a)(1).

ii. Promoting and protecting intangible resources in Hawaii, such as scenic beauty and the aloha spirit, which are vital to a healthy economy.

iii. Fostering a business climate in Hawaii, including regulatory policies, that is conducive with the expansion of existing enterprises. HRS §226-6(b)(16).

iv. Achievement of a visitor industry that constitutes a major component of steady growth for Hawaii's economy. HRS §226-8(a).

v. Improvement of the quality of existing visitor destination areas. HRS §226-8(b)(3).

vi. Fostering an understanding by visitors of the aloha spirit and of the unique and sensitive character of Hawaii's cultures and values. HRS §226-8(b)(8).

10. The unique cultural, educational, recreational and economic benefits identified herein which will result from the Facility are clearly in the public interest.

11. Further, the Facility qualifies for a variance under the following:

Private facilities which will neither adversely affect beach processes nor artificially fix the shoreline; and the MPC finds that hardship will result to KBH if the Facility is not allowed within the shoreline area (SSV Rules § 12-5-13(a)(8)).

12. Hardship sufficient to satisfy SSV Rules § 12-5-13(a)(8) would result to KBH if the Facility is not allowed within the shoreline area.

13. Appropriate conditions, set forth below, have been imposed upon the Applicant which satisfy SSV Rules § 12-5-13(c).

14. Each of the above two determinations is independently sufficient basis for granting this SSV. In addition, the proposed Facility and activity is necessary for and/or ancillary to boating, maritime, or water sports recreational facilities (SSV Rules § 12-5-13(a)(5)).

15. The proposed Facility and activity are consistent with the purpose of the SSV Rules, and meets the criteria necessary for a SSV.

DECISION AND ORDER

Based on the above findings of facts and conclusions of law, the MPC hereby grants the requested SMA amendment and SSV, such that the Facility is approved at the proposed location,

subject to the following conditions, which only apply to the development of the Facility sought by this application:

STANDARD CONDITIONS

1. Construction of the proposed project shall be initiated by November 1, 2002. Initiation of construction shall be determined as construction of offsite improvements, issuance of a foundation permit and initiation of construction of the foundation, or issuance of a building permit and initiation of building construction, whichever occurs first. Failure to comply within this two (2) year period will automatically terminate this Special Management Area Use Permit unless a time extension is requested no later than ninety (90) days prior to the expiration of said two (2) year period. The Planning Director shall review and approve a time extension request but may forward said request to the Planning Commission for review and approval.

2. Construction of the project shall be completed within five (5) years after the date of its initiation. Failure to complete construction of this project will automatically terminate the subject Special Management Area Use Permit. A time extension shall be requested no later than ninety (90) days prior to the completion deadline. The Planning Director shall review and approve a time-extension request but may forward said request to the Planning Commission for review and approval.

3. The permit holder or any aggrieved person may appeal to the Planning Commission any action taken by the Planning

Director on the subject permit no later than ten (10) days from the date the Director's action is reported to the Commission.

4. Final construction shall be in accordance with preliminary architectural plans dated January 6, 1999.

5. Appropriate measures shall be taken during construction to mitigate the short term impacts of the project relative to dust and soil erosion from wind and water, ambient noise levels, and traffic disruptions. Precautions shall be taken to prevent eroded soils, construction debris and other contaminants from adversely impacting the coastal waters.

6. The subject Special Management Area Use Permit shall not be transferred without prior written approval in accordance with §12-202-17(d) of the Special Management Area Rules of the Maui Planning Commission. However, in the event that a contested case hearing preceded issuance of said Special Management Area Use Permit, a public hearing shall be held upon due published notice, including actual written notice to the last known addresses of parties to said contested case and their counsel.

7. The applicant, its successors and permitted assigns shall exercise reasonable due care as to third parties with respect to all areas affected by subject Special Management Area Use Permit and shall procure at its own cost and expense, and shall maintain during the entire period of this Special Management Area Use Permit, a policy or policies of comprehensive liability insurance in the minimum amount of ONE MILLION AND NO/100 DOLLARS

(1,000,000.00) naming the County of Maui as an additional named insured, insuring and defending the applicant and County of Maui against any and all claims or demands for property damage, personal injury and/or death arising out of this permit, including but not limited to: (1) claims from any accident in connection with the permitted use, or occasioned by any act or nuisance made or suffered in connection with the permitted use in the exercise by the applicant of said rights; and (2) all actions, suits, damages and claims by whomsoever brought or made by reason of the non-observance or non-performance of any of the terms and conditions of this permit. A copy of the Certificate of Insurance naming County of Maui as an additional named insured shall be submitted to the Department within ninety (90) calendar days from the date of transmittal of the decision and order.

8. Full compliance with all applicable governmental requirements shall be rendered.

9. The applicant shall submit plans regarding the location of any construction related structures such as, but not limited to trailers, sheds, equipment and storage areas and fencing to be used during the construction phase to the Maui Planning Department for review and approval.

10. The applicant shall submit to the Planning Department five (5) copies of a detailed report addressing its compliance with the conditions established with the subject Special Management Area Use Permit. A preliminary report shall be reviewed and approved by the Planning Department prior to the

final subdivision approval and prior to the issuance of the grading permit. A final compliance report shall be submitted 30 days after the completion of the subdivision to the Planning Department for review and approval.

11. The applicant shall develop the property in substantial compliance with the representations made to the Commission in obtaining the Special Management Area Use Permit. Failure to so develop the property may result in the revocation of the permit.

PROJECT SPECIFIC CONDITIONS

12. To maintain safe lateral access to and along the shoreline, the existing lateral access walkway which currently exists within the shoreline area shall not be obstructed by the new Facility, associated landscaping, entertainment areas or portable seating. Further, portable outside seating areas shall be a minimum of ten feet from the existing lateral access walkway.

13. To minimize risk of adverse impacts on beach process and to minimize risk of structures failing and becoming loose rocks or rubble on public property, pier construction (as opposed to slab on grade) shall be used for the new Facility in accordance with the preliminary architectural plans submitted with the application.

14. To minimize adverse impacts on public views to, from, and along the shoreline, the proposed Facility shall be located completely within the "horseshoe" of KBH's existing three and six story buildings, i.e., the Facility shall be located no

further makai than the line drawn between the most makai points of the existing wings of the KBH.

15. The level of sound emanating from performances staged adjacent to and makai of the Facility shall not exceed 60 decibels at any of the lanais of The Whaler, and 75 decibels as measured at the most makai portion of the restaurant structure. In achieving the decibel limits stated herein it is acknowledged that occasionally sound from the performances may unintentionally exceed the stated limits for brief periods of time. A violation is determined when the performance sound level exceeds the background sound level by 3 decibels or more and is above the above-stated decibel levels for more than a total of 10 minutes or for more than 2 consecutive minutes, during the course of one evening's outdoor performance.

16. The applicant shall assure that any outdoor speakers it utilizes shall be of a directional type and shall assure that the sound from said speakers shall not be directed toward The Whaler. The applicant shall not operate any outdoor speakers past 8:30 p.m. except for special occasions, which may occur no more than six times annually.

17. The applicant shall not pave the unimproved vehicle access between The Whaler and the Ka'anapali Beach Hotel and shall use said access only for the following purposes:

- a. Temporary construction and landscaping access during the hours of 9:00 a.m. and 5:00 p.m.;

- b. Emergency access for police, fire trucks, and ambulances; and
- c. Transportation of special function equipment no more than six (6) times a year and occasional transport of racing canoes.

The applicant shall use its best efforts to minimize the noise resulting from its use of the vehicle access and to contain use to reasonable hours.

18. The applicant shall use its best efforts to minimize odors and noxious gases from being emitted into the atmosphere from the Restaurant kitchen and shall install an adequately equipped Vent Master (or equivalent) commercial kitchen ecology exhaust system that is of appropriate size based on the level of use expected at the Restaurant and is acceptable to the Hawaii State Department of Health. Said exhaust system, including its filtration devices, shall be maintained by the applicant according to the recommended instructions of the manufacturer of said equipment.

19. No construction, operation of equipment, storage of materials, excavation or deposition of soil or other materials shall occur seaward of the shoreline as certified on October 13, 1999.

20. Applicant shall implement Best Management Practices ("BMP") for maintaining construction debris, contaminants, and material on site. A plan setting forth the BMPs to be implemented

shall be reviewed and approved by the Planning Department prior to initiation of construction.

21. Construction waste shall not be disposed at the County's Central Maui Landfill. Alternative disposal sites such as the Maui Demolition and Construction Landfill shall be utilized.

22. The drainage system shall be designed and constructed to the satisfaction of the DPWWM according to the applicable laws and accepted engineering practice standards.

23. Pursuant to the recommendations of the State Historic Preservation Division of the Department of Land and Natural Resources ("SHPD") contained in its letter dated May 5, 1999, a limited archaeological assessment of subsurface deposits (with limited sub-surface testing) shall be conducted. Archaeological monitoring is required during any grading or excavation for the Facility. Should historic remains such as artifacts, burials, concentrations of shell or charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, and the find shall be protected from further damage. The contractor and/or landowner shall immediately contact the State Historic Preservation Division, which shall assess the significance of the find and recommend an appropriate mitigation measure, if necessary.

24. The Shoreline Setback Variance granted herein is dependent on the applicant's use of the Facility as a canoe hale and an educational/cultural facility in addition to its use as a

commercial restaurant. Should the Facility cease to be used as a canoe hale as represented by the applicant or cease to be used in the applicant's Po`okela program or an equivalent program promoting Hawaii's culture among employees and patrons, the Facility shall be deemed a nonconforming structure and shall not be reconstructed, enlarged or modified beyond normal repair and maintenance.

25. Prior to issuance of a building permit, the applicant shall meet with the Planning Department and the University of Hawaii, Sea Grant Extension Agent, to develop a mitigation plan for catastrophic erosion events other than shoreline hardening.

The conditions of this Special Management Area Use Permit shall be enforced pursuant to §12-202-23 and §12-202-25 of the Special Management Area Rules for the Maui Planning Commission.

Notice is hereby given (pursuant to MPC Rules § 12-201-82) of the parties' right to appeal under Haw. Rev. Stat. § 91-14.

Done at Wailuku, Maui, Hawaii, this 27th day of March,
2001, per motion on March 13, 2001.

MAUI PLANNING COMMISSION



JERRY EDLAO, Chairperson



JOE BERTRAM, III, Commissioner

~~_____
--dissent--
SAM KALALAU, Commissioner~~

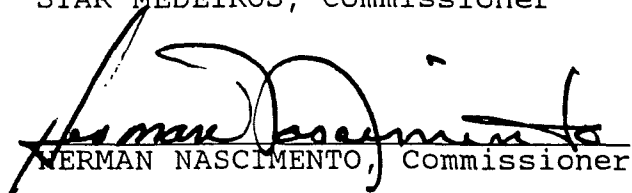


JEREMY KOZUKI, Commissioner



BERNICE LU, Commissioner


~~_____
--recused--
STAR MEDEIROS, Commissioner~~



HERMAN NASCIMENTO, Commissioner



MONA RICHARDSON, Commissioner



RANDY PILCZ, Commissioner

BEFORE THE MAUI PLANNING COMMISSION

STATE OF HAWAII

In the Matter of the	)	Nos. SM1 900040, SSV 990001
Application of)	
	)	CERTIFICATE OF SERVICE
MR. MICHAEL B. WHITE,)	
General Manager of the)	
Ka`anapali Beach Hotel)	
)	
To Obtain a shoreline setback)	
variance and an amendment to)	
a Special Management Area Use)	
Permit to construct a)	
restaurant/canoe hale)	
partially within the 150 foot)	
shoreline setback area for)	
the Ka`anapali Beach Hotel,)	
TMK: 4-4-008:003,)	
Ka`anapali, Lahaina, Island)	
of Maui.)	
)	

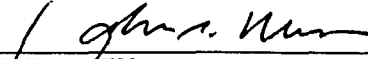
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties listed below, by certified mail, return receipt requested, by depositing same in the United States Mail, postage prepaid, this date, addressed as follows:

Isaac Hall, Esq.	Certified mail, return receipt requested
2087 Wells Street	7000 1670 0012 8899 8392
Wailuku, HI 96793	

Martin Luna, Esq.	Certified mail, return receipt requested
CARLSMITH BALL	7000 1670 0012 8899 8422
2200 Main Street, Suite 400	
Wailuku, HI 96793	

DATED: Wailuku, Maui, Hawaii, March 28, 2001.



JOHN E. MIN
Planning Director

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement"), dated 11-28, 2001, is hereby entered into by KAA NAPALI BEACH HOTEL ("KBH") and DR. JANELL McCULLOUGH ZEMEL (Mrs. Zemel), DR. SIMON ZEMEL, SHIRLEY SCHWARTZ, RENE SHEPARD and KENT McNAUGHTON (the "Appellants"),

WHEREAS, KBH is the owner of that certain parcel of property located in Kaanapali, Maui, Hawaii, designated as TMK Nos. 4-4-08:003, (hereinafter the "Property");

WHEREAS, KBH previously obtained a Special Management Area ("SMA") Use Permit from the Maui Planning Commission ("MPC") for the construction of a restaurant/canoe hale/educational facility (the "Facility") on the Property, and an amendment to the SMA permit (the "Amendment") and a Shoreline Setback Variance ("SSV") to allow the relocation of the Facility to an area makai of the 150-foot shoreline setback line as depicted in Exhibit "A" attached hereto and by reference made a part hereof;

WHEREAS, Appellants have filed an appeal of the MPC's decision granting the Amendment and the SSV in the Circuit Court of the Second Circuit, entitled DR. JANELL McCULLOUGH ZEMEL (Mrs. Zemel), DR. SIMON ZEMEL, SHIRLEY SCHWARTZ, RENE SHEPARD and KENT McNAUGHTON v. THE PLANNING COMMISSION OF THE COUNTY OF MAUI, JEREMY KOZUKI, in his capacity as Chairperson of the Maui Planning Commission of the County of Maui and the KAA NAPALI BEACH HOTEL, Civil No. 01-1-0190(3).

WHEREAS, KBH and Appellants have met and discussed their viewpoints on all significant issues, and have reached a consensus to resolve KBH's and the Appellants' concerns and desire to enter into this Agreement;

NOW THEREFORE, in consideration of the mutual covenants contained herein, KBH and the Appellants hereby agree as follows:

1. Conditions and revisions to the use and design of the Facility and adjacent areas

A. Odor

KBH shall implement measures that it deems appropriate to minimize the emission of odors from the Facility.

B. Road

Use of the access between The Whaler and the Kaanapali Beach Hotel shall be limited to vehicles involved in construction, landscaping, setup for special events, transport of canoes and emergency services. The access way shall not be used for deliveries of supplies to the restaurant, bar or beach activities hut.

C. Sound

Use of the exterior stage and sound system shall be limited to the hours of 3:30 p.m. to 8:30 p.m. The applicant shall assure that any outdoor speakers shall be directed away from The Whaler.

D. Placement and Use of Facility

The Facility shall be moved at least fifty feet (50') towards the Sheraton and fifteen feet (15') mauka of a line drawn between the closest corners of the

Moloka'i and Kaua'i wings of the Kaanapali Beach Hotel. Further, while the Facility shall be used as a restaurant, bar, canoe hale and educational facility, the area provided within the Facility for said uses (except the canoe hale) may be revised within said Facility due to the new location of the Facility.

E. Beach Activities Hut

As a result of the relocation of the Facility, the beach activities hut shall be rebuilt closer to the Whaler in a location adjacent to the beach walkway about 20 feet north of the walkway intersection north of the Kaua'i wing of the Kaanapali Beach Hotel. The new hut will be one-story and will not increase in size by more than fifty percent (50%). The beach walkway will also be realigned.

F. Beach Walkway

The beach walkway shall be realigned to accommodate the new location of the beach activities hut and the relocation of the entertainment area makai of the new location of the Facility.

G. Swimming Pool

Also as a result of the relocation of the Facility, the swimming pool shall be rebuilt on the south side of the new location of the Facility between said Facility and the Kauai wing of the Hotel. Said swimming pool may partially lie within the one hundred fifty feet (150') setback.

H. Building Materials and Configuration of Facility

Building materials for the Facility shall be approved by the Department of Planning and the Department of Public Works and Waste Management and, if

necessary, the Maui Planning Commission. Further, the configuration of the Facility may be revised due to its new location. The materials and revised configuration of the Facility may differ from those depicted in the initial conceptual plans. In the event of any revisions to the Facility, the Appellants hereby fully authorize Charles Fox of The Whaler at Kaanapali Beach to act on their behalf and work with KBH to obtain such revisions as he shall approve on their behalf for approval by the MPC. No further approvals shall be required from Appellants individually.

2. Support for KBH's Revisions

A. Comprehensive Approval by MPC

The relocation of the Facility necessitates the relocation of the beach activities hut, the realignment of the beach walkway and the relocation of the swimming pool. The beach activities hut adversely affects the ocean view of the Facility in its new location and the operation of the entertainment area makai of the Facility. On the other hand, the Facility in its new location hinders access to the beach activities hut. Similarly, the current pool location adversely affects access from the hotel to the Facility and the new location of the Facility adversely impacts the ocean view of the pool users. The beach walkway realignment is needed to accommodate the new location of the beach activities hut and the new location of the entertainment area makai of the Facility. Accordingly, this Settlement Agreement (the "Agreement") requires the MPC'S approval of the relocation of said beach activities hut, the beach walkway and the swimming pool

along with the relocation of the Facility as depicted in Exhibit "B" attached hereto and by reference made a part hereof. The parties shall jointly present the settlement to the MPC to obtain approval of this Agreement by the MPC.

B. Requirement for Separate Approvals

In the event that additional land use permits and approvals are required in order to implement the conditions and revisions pertaining to the Facility and adjacent areas as set forth in Paragraph 1, above, including but not limited to (1) an amendment to the Amended SMA permit and the SSV approval for the Facility, and (2) an SMA permit, an SSV and a Shoreline Certification for the Beach Activities Hut, relocation of the beach walkway and construction of a new pool (the "Approvals"), Appellants agree that they will not intervene, oppose or object to any aspect of the Approvals, so long as the Facility is designed, constructed and maintained in compliance with the terms herein. Furthermore, if asked by KBH, Appellants will concur that no public hearing shall be required for the applications for said Approvals.

C. New Certified Shoreline

KBH may confer with the appropriate government agency to determine whether or not a new certified shoreline will be required before the building permits for the Facility, beach activities hut, beach walkway and swimming pool can be issued. If the government agency determines a new certified shoreline is not required, Appellants shall not appeal or oppose this decision in any way. Likewise, if a new certified shoreline is required, Appellants shall not intervene

in, oppose, object or appeal from the shoreline certification process inasmuch as the location of the Facility, beach activities hut and swimming pool are not based on the distance of said structures from the most recent certified shoreline and will not be based on any future certified shoreline.

D. Support of Appellants' Counsel

Appellants' counsel, Isaac Hall, agrees that he shall not intervene, oppose or object to any aspect of the Approvals, and he shall not represent, advise, assist and/or support in any way, any persons or entities who intervene, oppose or object to any aspect of the Approvals.

3. Application for Approvals and Termination of Agreement

As soon as practicable, KBH shall submit the applications necessary to obtain the Approvals. Effective upon execution of this Agreement, the Appeal in Civil No. 01-1-0190(3) shall be stayed for a minimum of thirty (30) days and the parties agree to execute a Stipulation to Continue Oral Argument and Briefing Deadlines, and such other and further similar stipulations for continuances as may be reasonably required so that KBH may process any application for the Approvals. If the subject Approvals are not granted for the Property, or if they are granted with additional conditions which make the subject projects unfeasible for KBH by its own estimation, or if any interventions are filed in any application for the Approvals, then KBH shall have the right and option to void this Agreement. If no interventions are filed and the subject Approvals are granted to the satisfaction of KBH, the parties, through counsel, shall execute and file a Stipulation for Dismissal of Appeal in Civil No. 01-1-0190(3). Such Stipulation for Dismissal of Appeal shall only be executed and filed

by the parties when (1) the MPC has approved comprehensively the terms specified in this Settlement Agreement, or the MPC has granted the Approvals specified herein and (2) KBH has informed Appellants in writing that it is satisfied with the MPC action with respect to the Facility, the swimming pool, the beach activities hut, and the beach walkway.

4. Enforcement

Should an action be instituted for enforcement of this Agreement by any parties hereto, the prevailing party in any such action shall be entitled to all expenses including, without limitation, reasonable attorneys' fees, costs and expenses that are incurred in prosecuting or defending any parties interests, rights or remedies hereunder.

5. No Admission

The parties hereto do hereby agree that this Agreement and the covenants made hereunder are not to be deemed or construed as an admission of any kind whatsoever, including but not limited to the constitutionality of any of the terms or conditions of this Agreement, by any of the parties hereto or by any other person or entity whatsoever, but are to be construed strictly as a compromise of contested claims.

6. Voluntary Agreement

Each party hereto acknowledges and agrees that he, she or it has been represented by independent counsel of his, her or its own choice throughout the negotiations which preceded the execution of this Agreement. Each party hereto represents that he, she or the person executing this Agreement on its behalf has read this Agreement carefully and knows the contents of this Agreement and that he, she or it has executed this Agreement freely and without coercion.

7. Delay in Enforcement of Agreement

The delay or failure of any party hereto to exercise any of its rights hereunder shall not be deemed by any other party to constitute a waiver of such right, unless the party possessing such right has clearly and expressly given notice of said waiver in writing to all other parties hereto.

8. Successors and Assigns

This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto, and their respective agents, heirs, executors, representatives, successors and assigns.

9. Entire Agreement

The parties to this Agreement understand and agree that this Agreement constitutes the full and entire agreement between the parties with respect to the matters covered in this Agreement and that there are no other understandings, oral or in writing, pertaining to the matters covered in this Agreement, except as specifically set forth herein or therein. This Agreement supersedes all prior agreements, discussions, negotiations or obligations, whether written or oral, between or among the parties with respect to the matters covered by this Agreement.

10. Joint Drafting

This Agreement shall be deemed to have been jointly drafted and, in construing and interpreting this Agreement, no provision of this Agreement shall be construed or interpreted for or against any party hereto because such provision, any other provision, or this Agreement as a whole, was purportedly prepared or requested by such party.

11. Grammar

Whenever in this Agreement the context may so require, the masculine gender shall be deemed to refer to and include the feminine and neuter and the singular number shall be deemed to refer to and include the plural, and vice versa. Reference to the plural shall be deemed to refer to each and every member of the group.

12. Survival of Terms

The terms, conditions, covenants, obligations, representations and warranties of this Agreement shall survive the execution and delivery of all documents to be executed in connection herewith.

13. Incorporation of Recitals

The recitals contained in the preamble of this Agreement are hereby made a part of the terms and provisions of this Agreement and shall be binding upon the parties.

14. Applicable Law

This Agreement and the rights and obligations of the parties hereto will be governed by the laws of the State of Hawaii.

15. Amendment and Modification

This Agreement, or any portion thereof, can not be amended, modified or waived in any way, except by an agreement in writing signed by each of the parties hereto, consenting to such amendment, modification or waiver.

16. No Rights Conferred Upon Third Parties

Nothing herein expressed or implied is intended, or shall be construed, to confer upon or give any person other than the parties hereto any rights or remedies under this Agreement or by reason of any covenant, condition or anything else herein contained.

17. Paragraph Headings

The underscored word or words appearing at the commencement of paragraphs or subparagraphs of this Agreement are intended only as a guide therefor and are not intended, and shall not be construed, as controlling, enlarging, restricting, explaining or modifying in any manner the language or meaning of those paragraphs or subparagraphs.

18. Authority

Each signatory hereto represents that he has read this Agreement carefully and knows the contents of this Agreement and that he has full authority, and approval of any requisite board of directors, if applicable, to execute this agreement on behalf of the represented entity.


19. Counterparts

The parties hereto agree that this Agreement may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same Agreement binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or the same counterparts. For all purposes, including, without limitation, delivery of this instrument, duplicate unexecuted pages of the counterparts shall be discarded and the executed pages of the counterparts shall be combined to form a single document which shall be binding on all parties, provided, however, that the document shall

not be binding upon any party hereto unless and until all parties hereto have executed this document, whether in counterparts or not. Signatures transmitted by facsimile shall be treated and accepted as original signatures, provided that the party transmitting the signatures by facsimile shall promptly transmit to all other parties a signature page bearing such party's original signature.

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the date set forth above.

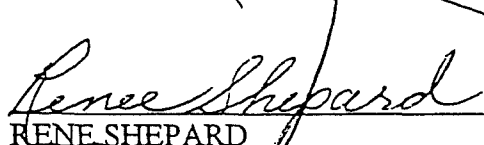
KAANAPALI BEACH HOTEL

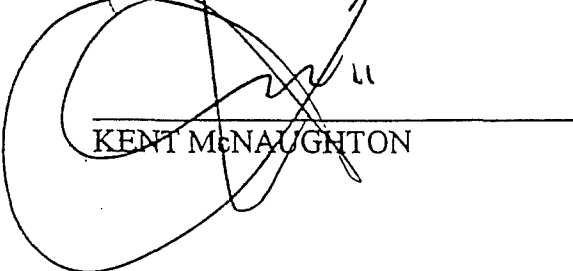
By 
Michael B. White
Its: General Manager

DR. JANELL McCULLOUGH ZEMEL

DR. SIMON ZEMEL


SHIRLEY SCHWARTZ

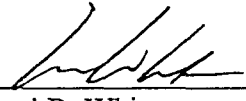

RENE SHEPARD

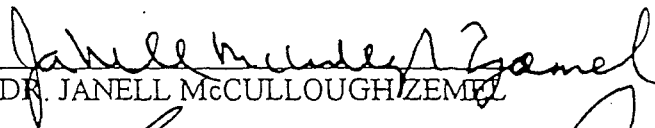

KENT McNAUGHTON

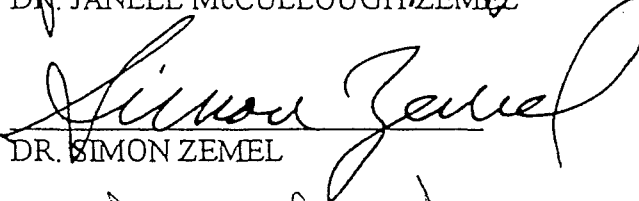
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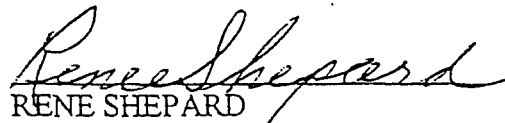
KAANAPALI BEACH HOTEL

By 
Michael B. White
Its: General Manager


DR. JANELL McCULLOUGH ZEMEL

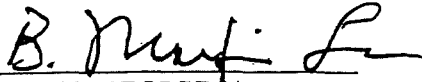

DR. SIMON ZEMEL


SHIRLEY SCHWARTZ


RENE SHEPARD

KENT McNAUGHTON

APPROVED AS TO FORM:

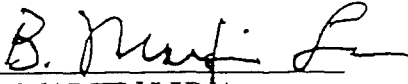


B. MARTIN LUNA
CRAIG G. NAKAMURA
RANDALL H. ENDO
Attorneys for
KAANAPALI BEACH HOTEL

ISAAC HALL

Attorney for DR. JANELL McCULLOUGH
ZEMEL (Mrs. Zemel), DR. SIMON ZEMEL,
SHIRLEY SCHWARTZ, RENE SHEPARD
and KENT McNAUGHTON

APPROVED AS TO FORM:



B. MARTIN LUNA
CRAIG G. NAKAMURA
RANDALL H. ENDO
Attorneys for
KAANAPALI BEACH HOTEL

 (As To Form Only)

ISAAC HALL
Attorney for DR. JANELL McCULLOUGH
ZEMEL (Mrs. Zemel), DR. SIMON ZEMEL,
SHIRLEY SCHWARTZ, RENÉ SHEPARD
and KENT McNAUGHTON

02/3/3

CHARLES FOX

'02 JAN 16 P2:27

January 14, 2002

DEPT OF PLANNING
COUNTY OF MAUI
RECEIVED

Mr. John E. Min
Director of Planning
County of Maui
250 South High Street
Wailuku, Maui, Hawaii 96793

Re: Kaanapali Beach Hotel SMA/SSV Application, Docket No. SM1 900040
and SSV 990001

Dear Mr. Min:

I am writing to you on behalf of Shirley Schwartz, Rene Shepard, Dr. Janell Mccullough Zemel, Dr. Simon Zemel and Kent Mcnaughton, who were the intervenors in the above matter (hereinafter referred to as "Intervenors").

As you know, the MPC granted a SMA and SSV for the above-referenced project. Thereafter, Intervenors appealed the issuance of those permits to the Second Circuit Court. However, the parties have now settled this matter and pursuant to said settlement, Applicant Michael B. White, general manager of the Kaanapali Beach Hotel ("Applicant") is seeking a modification of the development plans approved by said permits in order to implement the terms of the settlement agreement and to mitigate the impact of said terms upon the existing Kaanapali Beach Hotel facilities.

As such, in accordance with Section 12-202-17(c) of the Special Management Area Rules for the Maui Planning Commission, Intervenors hereby waive the requirement for a public hearing. All of the Intervenors approved this action to waive the public hearing and granted me the authority to act on their behalf to submit this letter to you.

EXHIBIT 23

Mr. John E. Min
January 14, 2002
Page 2

Should there be any further information required, please do not hesitate to contact the undersigned. Thank you very much for your kind consideration and assistance with this matter.

Sincerely,



CHARLES FOX

Authorized representative of
SHIRLEY SCHWARTZ, RENE SHEPARD,
DR. JANELL McCULLOUGH ZEMEL,
DR. SIMON ZEMEL and
KENT McNAUGHTON

cc: Michael B. White
B. Martin Luna

5071925.1.033547-00001

LOWENTHAL & AUGUST

ATTORNEYS AT LAW

33 NORTH MARKET STREET, SUITE 101

WAILUKU, MAUI, HAWAII 96793

MAUI: (808) 242-5000

HNL: (808) 545-5688

FAX: (808) 242-1500

PHILIP H. LOWENTHAL*

JOEL E. AUGUST*

*A LAW CORPORATION

January 28, 2002

Via Facsimile and U.S. Mail

(808) 244-4974

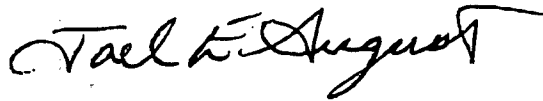
Randall Endo, Esq.
Carlsmith Ball LLP
One Main Plaza
2200 Main Street, Suite 400
Post Office Box 1086
Wailuku, Maui, Hawai'i 96793-1086

RE: Waiver of Public Hearing Requirement Relative to the Modified
Development Plans of the Kaanapali Beach Hotel

Dear Mr. Endo:

I am writing to confirm that the President of the Board of Directors of the AOA of the Whaler is in the process of contacting all members of his Board relative to gaining their approval for a waiver of the public hearing in the above-entitled matter. At this point in time the President cannot predict the outcome of the Board's vote however he has a good faith belief that the majority of the Board will agree with the waiver process.

Very truly yours,



Joel E. August

JEA/alc

c: Robert Schaffhauser, Ph.D.

EXHIBIT 24

BEFORE THE MAUI PLANNING COMMISSION

STATE OF HAWAII

In the Matter of the	)	Nos. SM1 900040, SSV 990001
Application of)	
)	
MR. MICHAEL B. WHITE,	)	FINDINGS OF FACT,
General Manager of the	)	CONCLUSIONS OF LAW, DECISION
Ka`anapali Beach Hotel	)	AND ORDER; CERTIFICATE OF
	)	SERVICE
)	
To Obtain a shoreline setback)	
variance and an amendment to)	
a Special Management Area Use)	
Permit to construct a)	
restaurant/canoe hale)	
partially within the 150 foot)	
shoreline setback area for)	
the Ka`anapali Beach Hotel,)	
TMK: 4-4-008:003,)	
Ka`anapali, Lahaina, Island)	
of Maui.)	
	)	Contested Case April 3-18,
	)	2000; March 1, 2001; March
	)	13, 2001

**FINDINGS OF FACT, CONCLUSIONS OF LAW
DECISION AND ORDER**

I. INTRODUCTION

Michael B. White, General Manager of the Ka`anapali Beach Hotel ("KBH"), seeks a shoreline setback variance ("SSV") and an amendment to a previously issued Special Management Area ("SMA") permit (90/SM1-040) in order to construct a restaurant/canoe hale/educational facility (the "Facility") partially within the shoreline setback area. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1.) Maui Planning Commissioners Robert Carroll, Herman Nascimento and Jeremy Kozuki were appointed by the Maui Planning Commission ("MPC") to act as the

hearings panel on the subject application and hereby submit this report pursuant to §12-201-77 of the Rules of Practice and Procedure for the Maui Planning Commission.¹

These findings of fact, conclusions of law, decision and order are based upon the record of the above-entitled matters, including documentary evidence and testimony received during the contested case hearing held on April 3, 4, 5, 7, 10, 13, 14 and 18, 2000, at Wailuku, Maui, Hawaii, and a site inspection held on March 1, 2001, at Kaanapali, Lahaina, Maui, Hawaii.

FINDINGS OF FACT

II. PROCEDURAL HISTORY

A. Permit History of KBH

1. KBH was constructed in 1964 as one of the initial hotels in the Ka'anapali Resort. In 1990, KBH applied for a SMA permit for remodeling and expansion, including the addition of 215 guest rooms, a five and a half-story parking structure, improvements to the exterior and a restaurant facility in approximately the location presently proposed. At that time, the Planning Department had recently passed the Rules of the Maui Planning Commission Relating to the Shoreline Area of the Islands of Kahoolawe, Lanai and Maui ("SSV Rules"), such that the shoreline setback for the KBH property, which had previously been

¹Commissioner Carroll has submitted a dissenting opinion with respect to the application for the shoreline setback variance, and subsequently resigned from the Maui Planning Commission upon election to the Maui County Council.

forty feet (40'), was increased to one hundred fifty feet (150'). As KBH's priority at the time was to obtain approval of the proposed new hotel rooms, KBH agreed to move the restaurant facility back to the new 150' shoreline setback during the 1990 application process and withdrew its application for a shoreline setback variance. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1, I-8, C. Hart, 136:21-139:10.)

2. In 1998, the SMA permit was amended by eliminating the 215 room addition and scaling back other changes. The amendment also included a restaurant similar in size and design to the subject facility to be located just mauka of the 150-foot shoreline setback line. KBH's priority in 1998 was still the hotel and parking improvements, therefore the restaurant facility was left in its previously approved location. The first phase of the renovation program was recently initiated with the completion of the parking structure. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1.)

3. KBH now files the present application with the MPC seeking to amend the previous SMA approval and to obtain a SSV, such that the proposed Facility can be constructed closer to the shoreline. KBH plans to make the Facility a lynchpin in the strong Hawaiian cultural program that KBH has developed. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1.)

B. Intervention

4. The intervenors in this proceeding, Charles and Shirley Schwartz, Rene Shepard, Dr. and Mrs. Zemel and Kent

McNaughton, are owners of units at the Whaler on Kaanapali Beach ("Whaler"), a condominium adjacent to the south of the KBH property. (Exh. CO-MIN-3 (9/28/99 MPC meeting minutes) at 40.)

5. The Association of Apartment Owners of the Whaler also petitioned to intervene, but withdrew its petition after reaching a settlement with the KBH. (Exh. CO-SMA-33.)

6. Contested case hearings were held on April 3, 4, 5, 7, 10, 13, 14 and 18, 2000, before Commissioners Robert Carroll, Jeremy Kozuki and Herman Nascimento.

C. Statement of Issues

7. By order of the Hearing Panel, the issues for the contested case hearing were set forth as:

1. Siting of the project and the shoreline setback variance;
2. Foreclosure of management options;
3. Loss of open space;
4. Shoreline certification;
5. Shoreline processes;
6. Noise and odor;
7. Use of accessway;
8. Improper notice;
9. Drainage; and
10. Grease disposal.

Exh. CO-SMA-42 (Order on Which Issues May be Addressed in the Contested Case Hearing, filed January 12, 2000). No objections were raised by any party to this limitation of issues. No additional issues were raised by the Intervenors in their petition to intervene or position statement.

D. Other prehearing matters

8. The Intervenors filed objections to the panel of hearing officers appointed in this case, alleging that the panel

was not well-balanced and that Commissioner Kozuki had a conflict of interest or was biased. By letter dated November 8, 1999, the hearings panel rejected Intervenors' objections.

9. Intervenors' filed a motion in limine which sought to preclude KBH from introducing evidence of economic hardship to KBH, hardship which results from other permits or approvals issued by the MPC and hardship which has resulted from actions by KBH. The motion was denied by order dated March 31, 2000. Specifically, the hearings panel acknowledged that economic hardship cannot be argued to justify the granting of a shoreline setback variance, however, evidence pertaining to economics was not prohibited as it may be pertinent to other aspects of KBH's application.

10. Intervenors' had also requested to take a telephone deposition of Sir Run Run Shaw, a resident of Hong Kong. At the Fourth Prehearing Conference, Intervenors' request was denied on the basis that Mr. Michael White was available for Intervenors to depose and was the authorized applicant with respect to the proceedings.

III. EXHIBITS

11. By stipulation among the parties, all of the exhibits listed by the parties were deemed admitted into evidence, except for the following Applicant exhibits which were withdrawn by KBH: A-13, A-35, A-36, A-44, A-85, A-87, A-90, A-91, A-100, A-105, A-106, A-107, A-108, A-109 and A-111; and except for the following Intervenors' exhibits which were

withdrawn by the Intervenors: 9, 28, 29, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 55, 56, 57, 79, 83, 86, 87, 88, 92, 93, 94, 95, 96, 97, 101, 106, 116, 117, 118, 122, 123, 124, 125, 127, 128, 129, 130, 131, 132, 133 and 134. The following additional exhibits were admitted into evidence:

<u>Exh.</u>	<u>Description</u>	<u>Exh.</u>	<u>Description</u>
A-113A & 113B	Rory Frampton written testimony and supplemental written testimony	A-123	Dee Coyle written testimony
A-114	Rob Cole written testimony (except for portions withdrawn as stated on the record).	A-124	John Defries written testimony
A-115	Chris Hart written testimony	A-125	Marsha Weinert written testimony
A-116	Robert Fox written testimony	A-126	Billy Gonsolves written testimony
A-117	William Gebhardt written testimony	A-127 A & 127B	Mary Helen Lindsey written testimony and supplemental written testimony
A-118	Betty Tatar written testimony	A-128	George Kanahela written testimony
A-119	Kirk Tanaka written testimony	A-129	Robert Rocheleau written testimony
A-120	Don Misner written testimony	A-130	Mike White written testimony
A-121	Letter from the Polynesian Voyaging Society, dated March 10, 2000	A-131	Stephen Pitt written testimony
A-122	Lori Sablas written testimony	A-132	Dave Adams written testimony
		A-133	Letter from Floyd Miyazono to the MPC, dated April 12, 2000

IV. PROJECT DESCRIPTION

A. Pier Construction

12. The design of the restaurant/canoe hale/educational facility (the "Facility") will utilize the most appropriate structural system for this beachfront location. The building floor level will be constructed on concrete piers and raised approximately 6 ft. above grade, which is approximately 9.9 feet above mean tide level. The piers will extend approximately 15 feet below grade (five feet below mean tide level), creating a strong foundation for the building. The structural system is similar to that of a dock or pier, and therefore, in the unlikely event that storm waves would reach inland of the restaurant, the washup would flow unobstructed below the building. The structure is oriented in the diagonal to the oceanfront in order to provide the least obtrusive wall to the ocean. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

13. The pier foundation will continue into the interior of the restaurant to support open wooden trusses that will reinforce the natural, rustic quality of the interior and exterior of the building. The pavilion design will provide an energy efficient environment with natural ventilation and light. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

B. Restaurant Use

14. The Facility will feature a commercial restaurant with a bar and lounge. The interior and exterior dining areas of

the restaurant will be approximately 2,100 and 2,400 square feet in size, respectively. The total size of the restaurant, including the dining, kitchen/service, lounge, waiting area and internal restrooms is approximately is approximately 7,300 feet. The hours of operation are envisioned to be from approximately 7:00 a.m. to 10:00 p.m. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15, M. White, 4/10/00, 610:25-611:1.)

C. Canoe Club Use

15. The design of the facility incorporates outrigger canoe storage. KBH will be sponsoring a canoe club which will store canoes and accessory items below the raised portion of the building. Various storage methods may be utilized, including suspending the canoes on harnesses attached to rolling bearings supported by the concrete floor structure. The storage area for the canoes will be used primarily in the off-season. During the canoe season, it is anticipated the canoes will be kept on the grass area fronting the restaurant. In order to provide shoreline access for the canoe club, a path will be cleared in the Naupaka fronting the southern portion of the property. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-1, . M. White, 4/10/00, 611:14-612:9.)

D. Landscaping

16. Extensive landscaping will be added around the building to buffer service areas from view. Walkways utilizing a non-grouted paving system will connect existing pathways to the

restaurant. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

E. Restrooms

17. A separate stand-alone restroom will be provided adjacent to the restaurant facility, to the east (mauka). The stand-alone restroom will be located outside of the 150-foot setback. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

F. Hula Platform

18. A raised hula platform will be constructed in the lawn area fronting the left portion of the restaurant, mauka of the beach walkway. The platform will be raised using beach quality sand and the surface will be planted with grass. Portable adjacent seating will be provided, with approximately 25 to 30 tables set on either grass or sand, to be placed between the restaurant structure and the walkway. (Exhs. A-113A (written testimony of R. Frampton), A-15; M. White, 4/13/00, 703:7-704:15.)

G. Cost

19. Total estimated construction costs are \$2,000,000. The duration of construction activity is not expected to be longer than nine months. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

H. Selection of the Proposed Location

20. The location of the Facility is not based upon a set distance from the shoreline, which is subject to fluctuation.

Rather, it is based upon all of the factors described herein, including the location of the existing buildings, impacts to shoreline processes, coastal erosion and the Facility's need to be near the ocean. (Exhs. A-113A (written testimony of R. Frampton).)

21. In addition to the "courtyard" site approved as part of the 1998 KBH SMA amendment, two "beachfront" locations were evaluated in the 1999 Environmental Assessment: the proposed location and one immediately adjacent to the lateral beach walkway. The proposed location was selected because it provided more oceanfront open space and was significantly mauka of the historical fluctuations of the shoreline. (Exhs. A-15 (EA), A-113A (written testimony of R. Frampton).)

22. The proposed location is sited between a beachfront and courtyard location, at the mouth of the "horseshoe" comprised by KBH's wings and lobby. At this location, views of the ocean and landmarks are prominent. On the other hand, moving inside the horseshoe, one quickly becomes surrounded by structures, and the existing buildings and vegetation become the dominant element rather than the coastline. In addition, instead of looking under the canopies of the shoreline trees, the increased distance lowers the canopies into the vertical peripheral and further creates the effect of being surrounded in the courtyard. Meeting the objectives of the operational and cultural programs requires that the Facility

remain on the threshold of the makai portion of the courtyard. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

23. The courtyard location does not have the strong connection to the ocean on which the Hawaiian cultural exhibits and teaching will be based upon. The visual connection to legend and history diminishes rapidly as you move back from the proposed location. Lanai and Pu`u Keka`a Point are blocked by existing structures and the view of the beach landing completely disappears as you move into the courtyard. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

24. Also, the interaction between the restaurant and canoe paddlers is an integral part of the cultural experience provided by the new facility. In that respect, it is important that the activity of the paddling crews and canoes be visible to relate the importance of the ocean as an essential element of the early Hawaiians' life. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

25. The courtyard also does not have the beachfront ambiance desired by Ka`anapali visitors. At the proposed location, the facility is already located approximately 30 feet from the beach walkway. Any additional distance would make the facility seem uninviting to walkway patrons. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

26. The proposed location was also carefully selected so that it would have the least possible effect on nearby hotel rooms. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

27. The proposed location is situated in front of an outstanding False Kamani tree. Moving the Facility back would require the removal of this mature tree, or re-siting the Facility mauka (and behind) at approximately 200 feet from the vegetation line. (Exhs. A-113A (written testimony of R. Frampton).)

28. The False Kamani has an exceptionally large canopy, which not only makes it the most massive tree in the KBH courtyard, but makes an ideal backdrop for the structure, providing a natural frame that will blend the facility into the existing vegetation. The removal of such mature trees along the Ka'anapali coast is also contrary to the stated objective of the West-Maui Community Plan to "save and incorporate healthy mature trees in the landscape planting plans of any construction development." (Exhs. A-113A (written testimony of R. Frampton).)

29. Locating the Facility behind the False Kamani tree in the courtyard would require paddlers to carry the 400 pound canoes an additional 130 feet. This physical strain makes the canoe facilities at KBH impractical and undesirable, detrimentally impacting one of the primary purposes of the facility. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

30. An analysis of historical shoreline trends aided in the selection of the proposed location based upon its low risk of coastal erosion. (Exhs. A-113A (written testimony of R.

Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

31. Studies of the beach toe and vegetation line show long term accretion of both features. Nevertheless, a cautious approach was used in siting the restaurant. The proposed site is located twenty-five feet (25') mauka of the worst case erosion event (1949). (Exhs. A-113A (written testimony of R. Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

32. The architecture incorporates an environmentally sensitive pier design which, in the case of an unprecedented erosion event, would neither impact or be impacted by the natural beach processes. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

33. The proposed location is located in an area of very low erosion risk, therefore pushing the facility behind the 150 foot setback line does not offer a reduction in risk. (Exhs. A-113A (written testimony of R. Frampton).)

34. During the site inspection, the hearing officers inspected two nearby restaurants, Leilani's and Hula Grill, and noted their close proximity to the lateral walkway and the shoreline. The Facility is to be located substantially farther mauka by comparison to these restaurants.

V. SITING OF THE FACILITY AND THE SSV

A. Maui County's Shoreline Setback Rules

35. The SSV Rules recognize that the shoreline area is one of the most important natural resources of the County of Maui. The SSV Rules state that "it is imperative 1) that use and enjoyment of the shoreline area be insured for the public to the fullest extent possible, 2) that the natural shoreline environment be preserved, 3) that man-made features in the shoreline area be limited to features compatible with the shoreline area, and 4) that the natural movement of the shoreline be protected from development." Additionally, the SSV Rules serve to prevent against damage to residences and other structures near the shoreline caused by tsunamis and high wave action. SSV Rules §12-5-3.

36. Maui County's shoreline setback lines are based on a percentage of a parcel's average lot depth. Because of the depth of the KBH lot, its setback is at 150 feet, whereas other properties along Kaanapali Beach have varying setbacks due to lot configuration. For instance, the Maui Marriott's and the Hyatt Regency Maui's setback is about 132 feet and the Whaler's is about 134 feet. (Exhs. A-113A (written testimony of R. Frampton).)

B. Variance Criteria of SSV Rules § 12-5-13(a)

37. Shoreline setback variances may be permitted in limited circumstances pursuant to the SSV Rules and the CZMA. KBH presented evidence to justify a variance for the subject facility under the following three tests:

A shoreline area variance may be granted for a structure or activity

otherwise prohibited by this chapter, if the authority finds in writing, based on the record presented, that the proposed structure or activity is necessary for or ancillary to:

- * * *
- (5) Boating, maritime, or water sports recreational facilities;
- * * *
- (7) Private facilities or improvements that are clearly in the public interest;
- (8) Private facilities or improvements which will neither adversely affect beach processes nor artificially fix the shoreline; provided that, the authority also finds that hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline area . . .

SSV Rules § 12-5-13(a).

C. Boating, Maritime or Water Sports Recreational Facilities

38. Since the Facility is a mixture of a restaurant, canoe hale and educational facility, a variance will not be granted based solely on class (5), which allows for "boating, maritime, or water sports recreational facilities" within the shoreline area. However, the canoe facilities are an important part of the structure's use, and therefore, the MPC gives consideration to the application based upon the Facility's use as a water sports recreational facility. (Exhs. A-113A (written testimony of R. Frampton).)

D. Private Facilities or Improvements That Are Clearly in the Public Interest

- (1) The Facility Will Provide Cultural and Educational Benefits Which Are in the Public Interest

39. The Facility will be essential to further the objectives of KBH's Po`okela program. The Po`okela program has demonstrated over the years a clear public benefit through the many outreach and educational programs which it offers. The cultural education benefits Maui's population. The educational displays at the proposed Facility will be developed through ongoing relationships with the Bishop Museum and the Polynesian Voyaging Society. The sharing and furthering knowledge of the Hawaiian culture among island residents, especially the Hawaiian connection with the sea, will be enhanced with the construction of this structure. (Exhs. A-31, A-32, A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas 4/4/00, 278:7-289:6, D.Coyle, 4/4/00, 328:1-329:1.)

40. The Facility will be used to educate people as to the history of the area, canoe culture, fishing, navigation and the cultural practices relating to the ocean. A series of artifacts or replicas and interpretive panels relating to navigating, canoeing, surfing and fishing will be displayed in the Facility to illustrate the cultural practices relating to the ocean. It is important to the educational and cultural objectives that the Facility be in close proximity to the ocean. (Exhs. A-118, A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White); E. Tatar, 4/4/00, 253:7-14.)

41. KBH maintains an unprecedented cultural atmosphere and wishes to expand its Hawaiian cultural program, Po`okela,

which began in 1986. While KBH already incorporates Hawaiian values and spirit within its day-to-day operations, the new Facility is designed to enhance Po`okela by enabling it to better express its cultural connection to the area's practices, legends, history, and existing landmarks. (Exhs. A-31, A-32, A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas 4/4/00, 278:7-289:6, D.Coyle, 4/4/00, 328:1-329:1.)

42. The Facility is located where a strong cultural connection to the ocean can be formed and where educational displays, tours, and presentations will have a significant positive impact upon guests and the public. (Exhs. A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas, 4/4/00, 287:16-289:6.)

43. The Po`okela program is an educational program for hotel guests as well as local residents. KBH intends the Facility to be an integral part of the program which includes the forgotten history of the area. It is important that the Facility have visual access to historical landmarks. Such landmarks include Ka`anapali beach, where in legend, Ka-ulu departed Maui in his canoe, and Pu`u Keka`a Point (Black Rock), where spirits leaped into the nether world. (Exhs. A-31, A-32, A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas 4/4/00, 278:7-289:6.)

44. KBH currently has an arrangement with the Bishop Museum in which cultural artifacts are loaned to it for educational displays. This program will be continued in the Facility with displays relating to paddling, navigation and fishing. (Exhs. A-113A (written testimony of R. Frampton), A-118 (written testimony of E. Tatar), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

45. Specific aspects of the Po`okela program include the cultural/property tours, where schools, individuals and organizations visit KBH on an on-going basis. The Facility will provide a venue for the presentation of ocean-related subjects. (Exhs. A-31, A-32, A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

46. In addition, the Guest Services staff present twelve cultural activities on a rotating basis for both guests and non-guests. Once the Facility is completed, new activities will be created to take advantage of the new educational materials available in the Facility. These activities will be geared to the importance of navigation to the Hawaiian culture. KBH plans to work with the Polynesian Voyaging Society and the Kahana Canoe Club to develop this activity into an unfabricated visitor experience. (Exhs. A-31, A-32, A-121, A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

47. Hawaiian entertainment increases cultural knowledge through songs and hula. KBH provides only Hawaiian

music in its restaurant. The new location for the nightly entertainment will greatly enhance its ability to continue its use of songs and hula as an educational medium for guests and residents alike. (Exhs. A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

(2) The Facility Will Provide Canoeing and Recreational Benefits Which Are in the Public Interest

48. The incorporation of an outrigger canoe club facility, to be used by a Maui canoe club, will benefit residents of Maui County. The new site will provide recreational opportunities for local residents in an area which has recently been devoted almost entirely to tourists. (Exhs. A-113A (written testimony of R. Frampton), A-113B, A-126 (written testimony of W. Gonzales); A-127 (written testimony of M. Lindsey); V. Magee, 4/7/00, 503:1-505:9.)

49. The Kahana Canoe Club has been associated with KBH since 1993. KBH supports the club and helps it with fundraising. Some of its crews will train at KBH, where there is less congestion and more room to practice. Presently, there are ten canoe clubs on Maui, with three based at Hanakaoo Park; about fifteen canoes practice there daily during the season. Kahana Canoe Club has 24 - 28 crews practicing at Hanakaoo Park. It plans to have 12 - 14 men's and women's crews practice at KBH. Moving 3-5 canoes to KBH will make practice easier, and will reduce the congestion of canoes and crews at Hanakaoo. (Exhs. A-

126 (written testimony of W. Gonzales), A-133; V. Magee, 4/7/00, 503:1-505:9.)

50. Kahana Canoe Club's canoes are presently stored on the beach, making them vulnerable to theft and vandalism. Allowing them to be stored under the Facility will mean they will be better protected, secure, require less maintenance and last longer. (Exhs. A-126 (written testimony of W. Gonzales).)

51. The parking situation at Hanakaoo is very bad during paddling season. Parking will be easier at KBH, and will free up parking spaces at Hanakaoo for the crews that remain there. (Exhs. A-126 (written testimony of W. Gonzales), A-127 (written testimony of M. Lindsey); V. Magee, 4/7/00, 503:1-7, M. Lindsey, 4/5/00, 404:9-405:18..)

52. Moving crews and canoes to KBH will also reduce the competition for parking and beach space at Hanakaoo Park for the general public. This will allow greater use of the beach park by the general public. (Exhs. A-126 (written testimony of W. Gonzales), A-133; V. Magee, 4/7/00, 503:1-7.)

53. The provision of storage space for the canoe club will also be in the public interest. Protected storage areas are in short supply. The Facility will provide well built areas for boat and equipment storage. (Exhs. A-113A (written testimony of R. Frampton), A-113B, A-126 (written testimony of W. Gonzales).)

54. The location of a canoe facility on the KBH grounds will create additional fundraising opportunities for the club. At KBH there is the potential of tapping into additional

sources of money, i.e., tourist donations. (Exhs. A-113A (written testimony of R. Frampton), A-126 (written testimony of W. Gonzales).)

55. While the canoe hale may not be an authentic replica of a traditional Hawaiian canoe hale, it is still a much needed, practical facility for the storage of canoes and equipment. KBH has never represented that the Facility is supposed to depict a traditional Hawaiian canoe hale. Storing the canoes under the facility does not show a lack of respect for the canoes. Many successful canoe clubs, including Hawaiian Canoe Club here on Maui and Outrigger Canoe Club on Oahu, store their canoes in non-traditional Hawaiian canoe hailes or in commercial buildings. Proper respect for a canoe is based on how it is used, cared for and handled, including how it is stored. Storing the canoes in the Facility will also keep them protected and in better condition than leaving them on the beach, as many clubs do now. (Exhs. A-126 (written testimony of W. Gonzales); A-127 (written testimony of M. Lindsey), A-113B (written testimony of R. Frampton).)

56. No canoe club on Maui utilizes a traditional Hawaiian canoe hale. (L. Kuloloio, 4/13/00, 794:23-795:1.) The modern canoe clubs utilize modern materials such as fiberglass canoes, which are not traditional Hawaiian materials. (M. Lindsey, 4/5/00, 406:19-20.)

(3) Benefits to Tourism and The Creation of a Model for Cultural Tourism Will Be Enhanced by the Facility

57. The Facility may be viewed as a model on how to embrace cultural tourism. "Cultural tourism" refers to an indigenous cultural preservation and incorporation into all aspects of the hospitality industry. It is experiences defined by a host culture and shared with guests in ways that nurture an appreciation and respect for a place and its people, history and traditions. (Exhs. A-124 (written testimony of J. DeFries), A-125 (written testimony of M. Weinert).)

58. The Facility's focus on the Hawaiian's relationship with the sea will provide the visitor with a greater understanding of Hawaii's unique culture. There is a clear public benefit in conveying culturally accurate information to our visitors in a manner and setting that leaves a lasting impression. This Facility has the potential to be a model for cultural based tourism. (Exhs. A-113A (written testimony of R. Frampton), A-124 (written testimony of J. DeFries), A-125 (written testimony of M. Weinert).)

59. It is also in the public interest to provide enriching and rewarding experiences for our visitors in this competitive global visitor industry. Maui needs to set itself apart from other destinations which offer sun, sand and surf, without losing its perspective of environmental and cultural values. This Facility's contribution to KBH's overall cultural tourism approach clearly benefits the State's visitor industry. (Exhs. A-113A (written testimony of R. Frampton), A-124 (written testimony of J. DeFries), A-125 (written testimony of M.

Weinert).), A-39, A-41, A-130 (written testimony of M. White), M. Weinert, 4/5/00, 376:14-378:25.)

(4) The Facility is Likely to Increase State and Local Tax Revenues

60. There will be clear benefits to our local and state economies through enhanced state and local tax revenues. It is anticipated that the addition of the Facility will increase the annual County property taxes by approximately \$20,000. Additionally, the projected \$3.0 million increase in revenues will generate an additional \$120,000 in State excise tax payments. (Exhs. A-42, A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

(5) The Facility Will Allow KBH to Maintain the Operability of the Food Service Program and Create a Competitive Food Service Program

61. The Facility is necessary to allow KBH's food service program to continue and grow into a competitive program, rather than to be discontinued. The proper siting of the Facility is an important factor in the operability of KBH's food service program. KBH's existing restaurant, located inland within the south wing, fails to attract KBH's own guests, much less guests from other hotels or local residents. Consequently, the food service program (employing about 85 workers) has been run at economic loss for many years. Reasonable access to the resort's beach walkway and shoreline will help prevent losses to employment and operational stability. (Exhs. A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

62. In lieu of closing the failing program, KBH opted to invest in a new facility that will combine a restaurant, canoe hale, and a Hawaiian cultural setting for KBH for educational purposes. The proposed location provides the desired beachfront ambiance and has reasonable exposure to the beach walkway. (Exhs. A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

63. The Facility is a tourism-related development that is dependent on its proximity to the coast. It is in the public interest to remain competitive with other resort areas. The heightened experience by the user of Facility will have positive impacts for tourism in Ka'anapali, on Maui and throughout Hawaii. (Exhs. A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

(6) The Facility Will Create a Model for Partnering with the Public

64. This Facility will be a model on how private hotels and other businesses can partner with the community for the benefit of the public. KBH's adoption and support of a local canoe club serves as an example as to how other hotels can support the local community. (Exhs. A-113A (written testimony of R. Frampton); V. Magee, 4/7/00, 511:6-10.)

65. All of the aforesaid benefits render KBH's Facility clearly in the public interest.

E. Private Facilities Which Do Not Adversely Affect Beach Processes Nor Artificially Fix the Shoreline and Hardship Exists

(1) The Facility Will Not Adversely Affect Beach Processes Nor Artificially Fix the Shoreline

66. First, the Facility clearly does not "fix" the shoreline since it is not a sea wall or other such structure. The location of the shoreline is able to fluctuate. Second, the in-depth analysis of Sea Engineering and testimony of Robert Rocheleau prove that the Facility will not adversely affect beach processes. (Exhs. A-113A (written testimony of R. Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

67. The historical shoreline trends show that the proposed location has a low risk of coastal erosion. In addition, the Facility's pier design allows it to neither impact or be impacted by the natural beach processes in the event of unprecedented erosion events. (Exhs. A-113A (written testimony of R. Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

68. The proposed location (partially within the shoreline setback area) was judged superior to a location 150 feet mauka of the shoreline. With the proposed site already located in an area of very low erosion risk, pushing the facility behind the 150-foot setback line does not offer a significant reduction in risk to coastal processes, and causes hardship to KBH. (Exhs. A-113A (written testimony of R. Frampton), A-129 (written

testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

(2) Hardship Will Result to KBH If the Facility Is Not Located Within the Shoreline Area

69. The SSV Rules do not define what constitutes "hardship." However, "hardship" generally refers to the fact that a "zoning ordinance or restriction as applied to a particular property is unduly oppressive, arbitrary or confiscatory." Black's Law Dictionary (6th Ed., 1999) (emphasis added).

70. KBH has shown that not allowing a variance from the 150-foot setback will result in hardship in various forms.

(a) KBH's cultural program would be detrimentally affected

71. KBH maintains an unprecedented cultural atmosphere and wishes to perpetuate it's highly successful Po`okela program . Visual access to the sea and historical landmarks, as well as a strong connection to the ocean is important to the educational mission and cultural objective of the Facility. (Exhs. A-113A (written testimony of R. Frampton), A-123 (written testimony of D. Coyle), A-122 (written testimony of L. Sablas), L. Sablas 4/4/00, 278:7-289:6, D.Coyle, 4/4/00, 328:1-329:1..)

72. The Po`okela Program will be more effective in the proposed location. Therefore, it is a hardship to KBH to not allow the Facility to be located in the proposed location. (Exhs. A-113A (written testimony of R. Frampton), A-123 (written testimony of D. Coyle), A-122 (written testimony of L. Sablas); G. Kanahale, 4/10/00, 550:1-11.)

73. At 150 feet and further mauka locations, views from the Facility become obstructed by buildings and vegetation; landmarks such as Pu`u Keka`a Point (Black Rock), neighboring islands and Ka`anapali Beach canoe landing become obstructed. Locating the Facility mauka of the 150-foot setback line would create an unnecessary hardship to the Hawaiian cultural program, especially since the purpose of the SSV Rules can be fulfilled at the preferred location. (Exhs. A-113A (written testimony of R. Frampton).)

(b) The canoe facility would be detrimentally impacted

74. Not allowing the Facility to be located at the proposed site would create a hardship for KBH because the mauka location imposes an undue burden on canoeing activities. The proposed location defines and limits the canoe activities to an area closer to the ocean, which will alleviate physical strain on paddlers, especially members of the Keiki (children) paddling programs, and will allow for more interaction between the paddlers and hotel guests. (Exhs. A-113A , A-113B (written testimony of R. Frampton); Exhs. A-126 (written testimony of W. Gonzales).)

(c) Hardship from removal of the large Kamani tree

75. A large false Kamani tree located approximately 180 feet mauka of the shoreline complicates siting at the mauka location. At the proposed location, the Facility snugs up to the base of the tree and fits under its large canopy. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

76. If the Facility is kept at the 150-foot setback location, the tree would likely need to be removed. Trees of such scale (approximately 85 feet in diameter) and character are rare along the Ka'anapali coastline and its loss would be an unnecessary hardship considering the availability of the proposed location. (Exhs. A-113A (written testimony of R. Frampton).)

(3) The 1998 SMA approval does not preclude a present finding of hardship

77. SSV Rules § 12-5-13(b) provides that, "If the hardship is a result of actions by the applicant, such result shall not be considered a hardship for the purpose of this section." However, the SMA permit amendment approved by the MPC on April 28, 1998, pursuant to the application of KBH, which included the condition that the new Facility be located mauka of the 150-foot setback line, does not now preclude the finding of hardship for purposes of the present SSV application. ((Exhs. A-113A (written testimony of R. Frampton).)

78. SSV Rules § 12-5-13(b) does not apply to the present situation. The various forms of hardship to KBH described above are not the result of actions by KBH. The hardship that will result to KBH is solely what would result if the Facility is not allowed to be constructed as proposed. (Exhs. A-113A (written testimony of R. Frampton).)

79. In addition, KBH is not bound by the location of the facility previously approved (in the 1998 application), especially since moving the Facility into the shoreline area was not a part of that application and thus the circumstances that

would allow the Facility to be located within the shoreline area were not explained to the MPC in the 1998 application (which focused primarily on the reduction of the original project). (Exhs. A-113A (written testimony of R. Frampton).)

(4) Buildings constructed by KBH do not preclude the finding of hardship

80. Similarly, buildings and vegetation placed on the property by KBH do not preclude a finding of hardship under Rule 12-5-13(b). The buildings and vegetation on the property that affect the siting of the proposed project, were placed at the time that the shoreline setback for the property was forty feet (40'). It is only the increase in the shoreline setback to one hundred fifty feet (150') that necessitated this SSV application. (Exhs. A-113A (written testimony of R. Frampton).)

F. The Requirements of SSV Rules § 12-5-13(c) Have Been Met

81. The proposed project meets the conditions specified in §12-5-13 (c), which provides:

No variance shall be granted unless appropriate conditions are imposed:

- (1) To maintain safe lateral access to and along the shoreline or adequately compensate for its loss;
- (2) To minimize risk of adverse impacts on beach processes
- (3) To minimize risk of structures falling and becoming loose rocks or rubble on public property; and
- (4) To minimize adverse impacts on public views to, from, and along the shoreline.

(1) Safe lateral access to and along the shoreline

82. Lateral access along Ka'anapali beach is provided by a sidewalk system referred to as the beach walkway. The

proposed project's location and scope do not include changes to the walkway or impede access along the corridor. (Exhs. A-113A (written testimony of R. Frampton).)

(2) Minimize risk of adverse impacts on beach processes and risk of structures becoming loose rock on public property

83. Both conditions (b) and (c) of SSV Rules § 12-5-13 have been met by the Applicant. As documented, a primary focus in planning the restaurant/canoe hale was avoiding impacts to and from the shoreline processes. An analysis of historical shoreline trends prepared by Sea Engineering, Inc. aided in the selection of the proposed location based upon its low risk of coastal erosion. Architecturally, the facility is designed on piers which, in the case of an unprecedented erosion event would neither impact nor be impacted by the natural beach processes. (Exhs. A-113A (written testimony of R. Frampton).)

(3) Minimize adverse impacts on public view to, from and along the shoreline

84. The Facility is a single-story building located completely within the "horseshoe" of KBH's existing three and six story buildings. Therefore, the Facility is incapable of obstructing public views towards and along the shoreline. Viewed from the shore, the Facility will be an attractive structure that will blend into the landscaping present in KBH's great courtyard. A 30-70 foot buffer will separate the Facility from the beach walkway. (Exhs. A-113A (written testimony of R. Frampton).)

G. The Location of the Facility Is Identified by the Surrounding Buildings

85. The proposed location which is approved by the MPC is described in KBH's application and illustrated in Figure 4 of the EA (Exh A-15) and Exh. A-2. This location is generally described as the area mauka of the line drawn between the makai end of the Kauai and Molokai wings of KBH, as shown on Figure 4. It is not conditioned upon being a set distance from the shoreline, since said shoreline may change in the future. (Exh. A-15, A-2.)

VI. NO FORECLOSURE OF MANAGEMENT OPTIONS

86. The development will not foreclose any management options. The SMA and SSV granted herein is specific to this particular Facility and its circumstances. The granting of a variance based on a specific set of circumstances does not establish a precedent for future applications. The MPC is bound to evaluate each application for a variance on its own merits.

87. There are numerous unique aspects of this project which will set it apart from other possible applications, such that granting this application does not set any form of precedent that the MPC will have to grant approvals for any development within the shoreline setback. The following aspects of this project set this project apart from virtually all other developments:

a. Project Mauka of Most Inland Shoreline on Record.
The Facility is to be located mauka of the most inland shoreline on record (1949).

b. Minimal risk to Shoreline and Coastal Processes.

The project site has a minimal risk of impacting or being impacted by shoreline movement.

c. Siting Behind Existing Structures. The Facility is to be located mauka of existing structures at KBH.

d. Pier Design. The project was designed in a manner which would not impact or be impacted by shoreline processes.

e. Coastal Dependency. The facility has a strong coastal dependency in terms of the importance to the Hawaiian cultural program and to the operation of the canoe club.

f. Public Recreational Use. Incorporation of the outrigger canoe facility establishes a public recreational use component.

88. There is no evidence that other hotels in Ka'anapali will "jump on the bandwagon" and request permission to construct facilities or restaurants within the shoreline setback simply because this project is approved. Furthermore, there is no indication that any other hotels in Ka'anapali would be willing to propose a development that has all of the above features that KBH has presented.

VII. OPEN SPACE

89. The proposed location places the Facility under the large canopy of a false Kamani tree, which will frame the Facility. The site is completely within the "horseshoe" of KBH's three and six story buildings and therefore the Facility will not obstruct public views to and along the shoreline. (Exhs. A-2, A-

15, A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

90. Even with the addition of the Facility, KBH maintains an open space significantly larger than other developments along Ka'anapali Beach, including the Whaler. For example, The Whaler On Kaanapali Beach is close to the maximum density allowed by law, whereas the density of KBH is calculated at approximately 53%. (Exhs. A-113A (written testimony of R. Frampton).)

91. Moreover, as part of the renovation, the currently existing Tiki Bar, Tiki Grill, pool restrooms, two concession booths, substantial concrete decking and entertainment area in the courtyard will be removed, which offsets the area covered by the new Facility. (Exhs. A-15; M. White, 4/13/00, 638:6-22.)

92. KBH's large landscaped courtyard is often referred to as a park. The proposed site is about 85 feet inland from the makai edge of the vegetation line, and therefore does not directly affect public beach resources. Use of the Ka'anapali beach walkway running approximately 40 feet mauka of the said vegetation line will continue to provide lateral access along Ka'anapali beach as well as public use of the makai portion of the KBH property. Therefore, use of the beach itself and related public access will not be infringed by the proposed action. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

93. The West Maui Community Plan has designated the Ka'anapali beach area as "Open Space." However, KBH's property,

including the site of the proposed Facility, is designated "Hotel," (Exh. I-121 (West Maui Community Plan)), which is consistent with its zoning designation of H-2 Hotel. (Exh. A-16.) Therefore, the direction of the Community Plan to set aside certain existing areas as open space should be applied to those properties designated as Open Space, which does not include the proposed site. The hearing panel reviewed the larger version of the West Maui Community Plan Map (Exh. I-121), and Ann Cua testified that the larger map confirms that the Facility will be located within the area designated "Hotel" and not within the area designated "Open Space." (A. Cua, 4/7/00, 460:10-464:23.)

94. Exh. A-126, the photograph showing the Facility in relation to the Whaler and existing KBH buildings demonstrates the lack of impact to open space. (Exh. A-126; A-114 (written testimony of R. Cole).)

95. The proposed site for the Facility aptly balances the Coastal Zone Management Act's ("CZMA") policies addressing open space, HRS §205A-2(c)(3), with those that support appropriate economic uses in the coastal zone. HRS §205A-2(c)(5).

VIII. SHORELINE CERTIFICATION

96. In this case, a survey with a current shoreline certification was submitted, but said certification subsequently expired during the pendency of this application. Thereafter, a new shoreline certification was obtained. (Exhs. A-46.)

97. The SMA Rules require submission of a "shoreline survey" (SMA Rules § 12-202-12(c)(2)(D)), which is defined as:

"Shoreline survey" means the actual field location of the shoreline prepared by a land surveyor registered in the State of Hawaii. Such survey maps developed by the registered land surveyor shall bear the surveyor's signature and the date of field survey and the certifying signature and date of the chairman of the board of land and natural resources.

SMA Rules § 12-202-4. Hence, while one must submit a shoreline survey which has been certified, there is no requirement that the certification remain current throughout the permitting process.

98. The shoreline was certified on or about October 13, 1999, and thus a currently certified shoreline exists. (Exhs. A-46, A-119, K. Tanaka, 4/4/00, 259:22-265:23.) KBH's submissions of its shoreline surveys have complied with the SMA Rules and the SSV Rules.

99. Finally, the shoreline certification simply determines the location of the shoreline, and such location of the shoreline is not significant to this application, in that the proposed location is admittedly within the shoreline area. The fluctuation of the certified shoreline will not change that fact. Further, the location for the Facility is not proposed as being a certain distance from the shoreline.

IX. SHORELINE PROCESSES

100. Robert Rocheleau, a professional engineer in ocean engineering, was qualified as an expert witness to testify as to shoreline processes. He is the founder and president of Sea Engineering, Inc., an engineering firm specializing in coastal engineering, oceanographic and marine environmental studies and

engineering diving services. (Exhs. A-129 (written testimony of R. Rocheleau); A-98 (curriculum vitae of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

101. Sea Engineering Inc. prepared a report dated December 1998, which is included in the 1999 EA for this project (Exh. A-15, Appendix A, Shoreline Evaluation). The report describes the historical vegetation line changes at the site and predicts, to the extent possible, the vegetation line position 30 years from now. (Exhs. A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

102. The north and middle sectors of Hanakao Beach (Ka`anapali Beach) are dynamic, responding to the seasonally varying wave climate. In the summer, the sand moves from Hanakao Point to the north due to the influence of the prevailing south swell. The pattern reverses in the winter when the north Pacific swell is present. While the seasonal changes to the sandy beach are pronounced, the vegetation line is more stable. Significant adverse changes to the vegetation line are usually associated with severe weather events. During the winter of 1997-98, the vegetation line in front of the Sheraton Maui Hotel receded up to 50 feet. This was an unusual occurrence, apparently caused by the El Nino event, which resulted in larger and more frequent north Pacific swells than normal. The erosion was confined primarily to the Sheraton property, with only limited erosion occurring at the north end of the KBH property. Kona storms have in the past caused erosion of the beach and the vegetation line along the

shoreline in front of KBH. Shoreline monitoring indicate that the beach typically recovers quickly after a wave induced erosion event, including the most recent 1998 El Niño related event. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21--601:24.)

103. Hanakao Beach was included in a study which evaluated long term shoreline changes. The method involved computer rectification of available aerial photographs, followed by digitization and plotting of the vegetation line. That 1991 study was updated for this evaluation by adding two additional photos and three shoreline certification surveys to the data base. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21--601:24.)

104. The analysis shows a fluctuating vegetation line at the project site, with a range of movement of 80 feet over the 49 year period. The net change since 1949 was a gain (i.e., accretion) of 71 feet. The historical vegetation line changes were used as a basis for the prediction of the vegetation line position in 30 years. Since future storms and wave patterns that affect the vegetation line cannot be predicted, a probabilistic model was utilized to calculate the probability distribution of future vegetation line positions. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

105. The model results predict a mean position of the vegetation line at the project site in 30 years 43 feet seaward

of the present position. However, a more conservative approach is recommended. With 49 years of data on the movement of the vegetation line at the site representing a wide range of wave events, a conservative approach would be to assume that the vegetation line might fluctuate between the landward and seaward extremes noted over that period. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

106. One of the stated objectives of the West Maui Community Plan is to assure preservation of new major water front developments for 50-100 years by basing the shoreline setback on a rate of shoreline retreat as determined by an appropriate study. (Exh. I-121.) Although Mr. Rocheleau's study predicted the vegetation line in 30 years, he testified that his analysis resulted in a net annual accretion. Therefore, if the forecast is lengthened from 30 years to 100 years, this simply leads to a greater amount of accretion. (R. Rocheleau, 4/10/00, 576:6-20.)

107. This landward extreme is represented by the 1949 shoreline in figure 4 of the report. (Exh. A-15.) The proposed structure will be located approximately 20 feet mauka of this line. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

108. An additional study of the beach toe was completed at the request of the Sea Grant Extension Service. The initial study, based only upon aerial photographs, indicated that the

width of the beach at the site narrowed by 45 feet between 1988 and 1997. However, in July of 1999, actual ground measurements of the beach width (distance from the vegetation line to the beach toe) were taken, which show that the beach width had increased by 40 feet since 1977. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

109. There is no chronic erosion of the beach fronting KBH. While both Sea Engineering, Inc. and the Sea Grant Extension Service note the short-term accretion and erosion trends, neither have concluded that "chronic erosion" is taking place. Both the vegetation line analysis and the beach toe data indicate accretion of the beach since 1949. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

110. It is highly unlikely that the beach will retreat shoreward of the 1949 vegetation line position. The long term record reflects vegetation line changes due to typical seasonal variations as well as a variety of extreme events. As such, it provides a valuable guideline for evaluating future vegetation line positions. This approach resulted in the structure being sited at least 20 feet mauka of the worst case situation over the past 50 years. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

111. In addition to a conservative siting approach, the proposed pier design of the restaurant is a significant mitigation measure which would minimize the potential for negative impacts to or from shoreline processes in an unforeseen extreme wave event. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

112. Hotel landscaping may have somewhat masked the vegetation line by making it move seaward, but only in a temporary manner. This is because "when you have either large seasonal waves or any type of storm wave, although vegetation is promoted . . . it's a temporary buffer, and if you have a wave action for a long enough duration it's cut back." (R. Rocheleau, 4/10/00, 577:10-14; 598:1-13.) Intervenors's witness, Michelle Anderson, agrees that even if the vegetation is growing out towards the ocean that it tends to be cut back naturally by virtue of the wave action. (M. Anderson, 4/14/00, 825:5-18.)

113. The Ka'anapali Beach Plan (Exh. I-120) states on page 15 that "development in shoreline setback should only be considered after an analysis of historical shoreline trends" and "anything larger than a walkway or a small beach activity center should not be located seaward of the most landward vegetation line on record." In this case, such a shoreline study was done, and the 1949 vegetation line is the most landward vegetation line on record. (R. Rocheleau, 4/10/00, 568:5-6.)

X. NOISE

114. David Adams, a professional engineer in electrical engineering, testified as to sound abatement. (Exh. A-132 (written testimony of D. Adams); D. Adams, 4/14/00, 829:9-849:3.)

115. Mr. Adams conducted a sound investigation and submitted a report. (Exh. A-24.) As part of the investigation, he setup a simulation of the planned future live entertainment area near the KBH, and the sound levels of the music were measured at the footprint of the proposed Facility and also in units in Tower No. 1 of the Whaler. Only the end units of the Whaler's two towers have line of sight to the planned outdoor performance area. The remainder of the Whaler is blocked by the Kauai wing of KBH. The measurements are set forth in Table 1 of his report. (Exhs. A-24; A-132 (written testimony of D. Adams); D. Adams, 4/14/00, 829:9-849:3.)

116. The music levels at the Whaler were less than the background noise levels. Under calm wind conditions, the music levels exceeded the background noise levels, but by less than 3 decibels. Three decibels is commonly considered the threshold of perceptible change in noise level. (Exhs. A-24; A-132 (written testimony of D. Adams); D. Adams, 4/14/00, 829:9-849:3.)

117. The music sound levels from the Facility, subject to the conditions set forth in the Decision and Order section below, will not be excessive nor objectionable to the Whaler. (Exhs. A-24; A-132; D. Adams, 4/14/00, 829:9-849:3.)

118. Intervenors provided no contrary evidence to dispute the above facts.

119. KBH's Settlement Agreement with the Whaler AOA provided that KBH would abide by conditions with respect to noise. (Exhs. CO-SMA-33 (withdrawal of petition to intervene by the Whaler AOA, with settlement agreement attached), A-130.) Those conditions are set forth, in part, in the Decision and Order section below.

XI. ODORS

120. William R. Gebhardt, a professional engineer in mechanical engineering, testified as to odor abatement. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

121. A scrubber system in the proposed restaurant's exhaust system will be installed to remove cooking odors that KBH guests could experience from the courtyard or their guestrooms. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

122. Cooking odor abatement is a common practice for food service establishments in proximity to residential buildings. The proposed technology is commonly used in Hawaii, including Maui. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

123. The Vent Master Ecolair Ecology System or similar system is to be added to the kitchen exhaust system. This system is very effective in reducing the amount of smoke and odors emanating from a kitchen. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

124. Intervenors provided no contrary evidence to dispute the above facts.

125. KBH's Settlement Agreement with the Whaler AOA provided that KBH would abide by conditions with respect to odors. (Exhs. CO-SMA-33 (withdrawal of petition to intervene by the Whaler AOA, with settlement agreement attached), A-130.) Those conditions are set forth in the Decision and Order section below.

XII. USE OF ACCESSWAY

126. KBH has no plans to regularly use the access road adjacent to the Whaler to service the Facility. Goods will be delivered to the hotel via the existing loading docks on the north side of the property and transported to the Facility via the courtyard. There is no provision for a restaurant service road between the Whaler and KBH in either the existing approved SMA permit or the proposed SMA permit amendment plans. (Exhs. A-130 (written testimony of M. White).)

127. KBH's Settlement Agreement with the Whaler AOA provided that KBH would abide by conditions with respect to the use of the accessway. (Exhs. CO-SMA-33 (withdrawal of petition to intervene by the Whaler AOA, with settlement agreement attached), A-130 (written testimony of M. White).) Those conditions are set forth in the Decision and Order section below.

XIII. NOTICE TO OWNERS WITHIN 500 FEET

128. Rory Frampton oversaw the providing of notices of a public hearing on this SMA amendment and SSV to neighboring landowners. (Exhs. A-113A (written testimony of R. Frampton).)

129. On July 19 and 20, 1999, the Applicant's consultant obtained the names and addresses of owners and lessees of real property within 500 feet of the KBH by utilizing the County of Maui real property tax records. The notice of public hearing was sent to each of the owners and lessees listed in those records, by certified mail, on August 13, 1999. They later received return receipts from the post office. The public hearing was set for September 14, 1999. (Exhs. A-21, A-22, A-23, A-113A (written testimony of R. Frampton).)

130. The original return receipt cards were filed with the Planning Department. (Exhs. A-113A (written testimony of R. Frampton).)

131. Intervenors do not dispute any of the above facts. Their argument is that certain Whaler units are in time-share programs and those time-share interval owners were not given notice. (C. Fox, 4/14/00, 922:11--923:15.) However, actual notice to each and every owner is not required (nor is it possible since such time-share owners are not listed on the County real property records). Rather, the process of utilizing records of the County Real Property Tax Department, as required by MPC's Rules of Practice and Procedure, was satisfactory.

If there are multiple owners of the property, notification of the person(s) listed by name on the records of the County of Maui real property tax roll shall be deemed adequate notice as to all owners.

SMA Rules §12-202-13(g). It is undisputed that the Applicant utilized the County Tax records and therefore have complied with the notice requirements.

132. Furthermore, none of the Intervenors have claimed that they did not receive actual notice of this proceeding, and thus, the Intervenors have no standing to raise this argument.

XIV. DRAINAGE

133. J. Stephen Pitt, a professional engineer in civil engineering, testified as to drainage. (Exh. A-131 (written testimony of S. Pitt); S. Pitt, 4/13/00, 677:20-684:9.)

134. Mr. Pitt reviewed the project plans, topographic information for the property and the engineering report by Mr. Hirota (who prepared a drainage report for the initial SMA permit obtained in 1990, Exh. A-29). He conducted a percolation test and ran drainage calculations based upon the DPWWM drainage rules. Mr. Pitt prepared and submitted a report of his analysis. (Exh. A-47 (Pitt report); Exh. A-131 (written testimony of S. Pitt); S. Pitt, 4/13/00, 678:14-679:4.)

135. The amount of runoff generated by the construction of the Facility will be very minor, due to the fact that the structure will be on piers which minimizes the reduction in available penetrable surfaces, and due to the relatively small size of the Facility. It is planned to retain on-site any additional runoff generated by the construction of the Facility so that there is no net increase in runoff leaving the KBH property. (Exhs. A-29 (S. Hirota Drainage Report), A-47 (Pitt

report), A-131 (written testimony of S. Pitt); S. Pitt, 4/13/00, 679:10-22.)

136. The percolation tests conducted by Mr. Pitt revealed an average percolation rate of 20.5 feet per hour. In comparison, the inflow rate, based upon a 50-year storm would be only 6 inches per hour. Therefore, the inflow is much less than the percolation rate for the sandy soil at the project site. (A-47 (Pitt report, pp. C-1 to C-3).)

137. The County DPWWM comment letter of March 24, 1999, does not raise any objections regarding drainage and merely requires a detailed drainage report prior to issuance of the grading and building permit, which is its standard comment. (Exh. A-15).

138. This development will not have any substantial adverse environmental or ecological effect with regard to drainage issues. (Exh. A-131 (written testimony of S. Pitt).)

XV. GREASE DISPOSAL

139. Don Misner, building engineer for KBH, testified as to grease disposal. (Exh. A-120 (written testimony of D. Misner); D. Misner, 4/4/00, 266:11-271:15.)

140. There are currently four grease traps in the KBH kitchens. These traps collect grease from the kitchens before it gets into the sanitary sewer. The grease is pumped out of the traps once a month and disposed of by Ahuhana Pumping. There have been no incidents of grease leaking or spilling onto the grounds

of KBH. (Exh. A-120 (written testimony of D. Misner); D. Misner, 4/4/00, 266:11-271:15.)

141. The grease trap in the Facility will be emptied whenever it is full, by evacuating the grease into a temporary container, and transporting it to a holding tank. The holding tank will be emptied on a monthly schedule together with the other grease traps. This is similar to the operation at the Four Seasons Hotel. (Exh. A-120 (written testimony of D. Misner); D. Misner, 4/4/00, 266:11-271:15.)

142. This development will not have any substantial adverse environmental or ecological effect with regard to grease disposal.

XVI. OTHER IMPACTS

143. Other than what has been stated above, Intervenors did not challenge any of the other conclusions of the Applicant and their experts as to lack of impacts caused by the project. Therefore, as to all other potential issues, the facts and conclusions of no adverse impacts contained in the SMA application, as well as the Final EA for the project remain undisputed by the Intervenors, and it is determined that no such adverse impacts exist.

XVII. COASTAL ZONE OBJECTIVES AND POLICIES

144. HRS Chapter 205A (the Coastal Zone Management Act) includes laws relating to the management of the shoreline areas. HRS § 205A-2 sets forth the broad objectives and policies of the CZMA under ten categories:

Recreational Resources
Historic Resources
Scenic and Open Space Resources
Coastal Ecosystems
Economic Uses
Coastal Hazards
Managing Development
Public Participation
Beach Protection
Marine Resources

HRS § 205A-2(c) sets forth the policies for these categories. Any project in the coastal zone must consider all of the CZMA objectives. (Exhs. A-113A (written testimony of R. Frampton).)

145. The Facility in its proposed location is consistent with the objectives and policies set forth in the CZMA. With respect to the more relevant and contested objectives and policies, the following findings of fact are made.

A. Scenic and Open Space Resources and Beach Protection

146. With respect to scenic and open space resources, HRS §205A-2(c)(3) provides, in pertinent part:

- (A) Identify valued scenic resources in the coastal zone management area;
- (B) Ensure that new developments are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and existing public views to and along the shoreline;
- (C) Preserve, maintain, and, where desirable, improve and restore shoreline open space and scenic resources; and
- (D) Encourage those developments which are not coastal dependent to locate in inland areas.

147. Relative to Beach Protection, HRS § 205A-2(c)(9)(A) provides in pertinent part:

- (9) Beach protection

(A) Locate new structures inland from the shoreline setback to conserve open space and to minimize loss of improvements due to erosion.

148. The shoreline history of the fronting beach does not suggest that the Facility site will be subject to erosion or wave action in the future. The structure has been designed to allow for natural movement of the shoreline. The proposed siting of the Facility is more than eighty feet (80') inland from the shoreline, and does not affect public beach resources. The lateral beach walkway, running about 40 feet mauka of the shoreline, will continue to provide lateral access. Therefore, use of the beach itself and related public access will not be infringed upon by the proposed action. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

149. The Facility is designed on piers, which, in the case of an unprecedented erosion event would neither impact or be impacted by natural beach processes. (Exhs. A-113A (written testimony of R. Frampton).)

150. Impacts to coastal open space resources have been minimized by locating the Facility behind the existing hotel wings on the property, at the threshold of the makai portion of the courtyard created by the such structures. (Exhs. A-113A (written testimony of R. Frampton).)

151. See also Section VII. herein for findings relating to the issue of open space.

B. Economic Uses

152. HRS § 205A-2(c)(5) sets forth the "Economic Uses" policy of the CZMA and specifically provides as follows:

(5) Economic uses

(A) Concentrate coastal dependent development in appropriate areas;

(B) Ensure that . . . coastal related development such as *visitor industry facilities* . . . are located, designed, and constructed to minimize adverse social, visual, and environmental impacts in the coastal zone management area; and

(C) *Direct the location and expansion of coastal dependent developments to areas presently designated and used for such developments and permit reasonable long-term growth at such areas, and permit coastal dependent development outside of presently designated areas when:*

(i) Use of presently designated locations is not feasible;

(ii) Adverse environmental effects are minimized; and

(iii) The development is important to the State's economy.

HRS § 205A-2(c)(5) (Emphasis added.)

153. The CZMA recognizes that visitor industry facilities are appropriate in the coastal zone and encouraged in designated areas such as the Ka'anapali Resort. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

154. Potential adverse impacts on the coastal zone from the proposed Facility are minimal. KBH has balanced environmental impacts with the requirements for the Facility, which has been located and designed to minimize environmental impacts. In addition, social impacts to the Maui community are viewed as positive which result from the incorporation of the Hawaiian cultural program into the Facility's design as well as through the provision of space for a local canoe club. In addition, the

Facility will have positive impacts on Maui's visitor industry as well as on State and local tax revenues. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

155. The Facility is in an area "presently designated" for "coastal dependent development." The Ka'anapali Resort area is designated and used for resort-related development. KBH proposes such "reasonable long-term growth" with the new Facility. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

156. The issue of whether the previously approved location of the facility is "feasible" is not even relevant, since KBH is not proposing to develop "outside of presently designated areas." HRS § 205A-2(c)(5)(C). Nevertheless, due to the importance of the success of the restaurant, canoe hale and educational elements of the project, the location of the Facility at the site previously approved is not feasible. (Exhs. A-113A (written testimony of R. Frampton).)

C. Coastal Hazards

157. The CZMA policy for coastal hazards provides in pertinent part:

Control development in areas subject to storm wave, tsunami, flood, erosion, hurricane, wind, subsidence, and point and nonpoint source pollution hazards.

HRS § 205A-2(c)(6)(B). The shoreline history of the fronting beach does not suggest that the proposed project site will be subject to erosion or wave action in the future. Nevertheless, the structure has been designed to allow for natural movement and

maintain structural integrity during extreme erosion events. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

158. According to the FEMA flood area designations, the proposed restaurant site is located in zone "C", an area of little or no flooding. Portions of the parcel along the shoreline are within the A4 and V12 zones, however the Facility is not located in those zones. (Exhs. A-15 (flood map diagram), A-113A (written testimony of R. Frampton).)

159. With a ground elevation of 9-10 feet above the mean sea level ("MSL") and a structural design that supports the facility 6 feet above grade, the Facility will be above tsunami inundation levels (8 feet MSL). (Exhs. A-15, A-113A (written testimony of R. Frampton).)

160. To the extent any of the foregoing findings of fact are more properly construed as conclusions of law, and to the extent any of the following conclusions of law are more properly construed as findings of fact, said findings or conclusions shall be so construed.

161. Any of the proposed findings of fact submitted by the parties to this proceeding not already ruled upon by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

XVIII. OTHER PROCEDURAL MATTERS

162. The Hearing Panel's Proposed Findings of Fact, Conclusions of Law, Decision and Order was dated October 31, 2000.

163. Hearings Officer Robert Carroll's Dissent from Proposed Findings of Fact, Conclusions of Law, Decision and Order were dated November 1, 2000.

164. At its November 14, 2000 meeting, the MPC scheduled the decisionmaking meeting for January 9, 2001. Randall Endo, Esq. and Isaac Hall, Esq. appeared for their clients and stated their positions regarding setting the action meeting date.

165. At its January 9, 2001 meeting, a motion was made to grant the application for an SMA and SSV. The motion did not pass. Thereafter, a motion was made to deny the application for an SMA and SSV. That motion also did not pass. The matter was then deferred.

166. At its meeting of February 13, 2001, the MPC, by its own accord, voted to reopen the contested case hearing in order to conduct a site inspection.

167. The MPC conducted a site inspection on March 1, 2001.

168. At its meeting of March 13, 2001, the MPC voted in favor of the application for an SMA and SSV. Seven members voted in favor and approved the majority's Hearing Panel's Proposed Findings of Fact, Conclusions of Law, Decision and Order. Commissioner Star Medeiros recused herself, and Commissioner Sam Kalalau voted against approval of the report. No new conditions were imposed prior to approval.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the hearing panel makes the following conclusions of law:

1. The MPC is the authority in matters relating to the CZMA, Maui County Charter §8-8.4, and has the sole power to approve or deny applications for SMA and SSV permits.

2. Applicant has the burden of proof. The quantum of proof is a preponderance of the evidence. HRS § 91-10(5). Unless otherwise noted, every finding, conclusions and/or other determination herein is made upon a preponderance of the evidence.

3. Applicant has proven by a preponderance of the evidence that it is entitled to its requested amendment of its SMA permit because the development meets all of the criteria of the SMA Rules and HRS Chapter 205A. Applicant has further proven by a preponderance of the evidence that it is entitled to a SSV.

4. Even if a substantial adverse effect is found, the MPC is required to determine whether the effect can be practicably minimized, and when minimized, whether the effect is clearly outweighed by public health, safety, or compelling public interest. Topliss v. The Planning Commission, 9 Haw. App. 377, 394, 842 P.2d 648, 658 (1993).

5. Applicant's proposed development will not have any substantial adverse environmental or ecological effect; and any adverse effects are minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests. Such adverse effects considered include, but are not

limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect, and the elimination of planning options. (HRS § 205A-26(2)(A).)

6. The proposed development has been reviewed in light of the objectives, policies, and guidelines set forth in HRS Chapter 205A, and recited in § 12-202-10 and § 12-202-11, et. seq., of the SMA Rules, and the SMA guidelines set forth in those rules, and the development complies with same. (HRS § 205A-26(2)(B).)

7. The proposed development is consistent with County General Plan and zoning. (HRS § 205A-26(2)(C).)

8. The criteria for a shoreline area variance have been met by the Applicant because, based on the record presented, the proposed Facility and activity is necessary for and/or ancillary to:

Private facilities that are clearly in the public interest (SSV Rules § 12-5-13(a)(7)).

9. While "public interest" is not defined in the SSV Rules or HRS Chapter 205A, the hearing panel noted various statutes which provide guidance in construing the term.

a. In establishing the Aloha Tower Development Corporation, the Hawaii legislature found the purposes of strengthening the economic base of the community, enhancing the beauty of the waterfront, providing for public use of the waterfront, and stimulating commercial activities in downtown Honolulu were "in the public interest." HRS §206J-1.

b. In the area of historic preservation, the legislature found that "it is in the public interest to engage in a comprehensive program of historic preservation at all levels of government to promote the use and conservation of such property for the education, inspiration, pleasure, and enrichment of its citizens." HRS §6E-1.

c. The Hawaii State Planning Act, HRS Chapter 226, sets forth a number of public interests, including:

i. Increased and diversified employment opportunities to achieve full employment, increased income, and improved living standards for Hawaii's people. HRS §226-6(a)(1).

ii. Promoting and protecting intangible resources in Hawaii, such as scenic beauty and the aloha spirit, which are vital to a healthy economy.

iii. Fostering a business climate in Hawaii, including regulatory policies, that is conducive with the expansion of existing enterprises. HRS §226-6(b)(16).

iv. Achievement of a visitor industry that constitutes a major component of steady growth for Hawaii's economy. HRS §226-8(a).

v. Improvement of the quality of existing visitor destination areas. HRS §226-8(b)(3).

vi. Fostering an understanding by visitors of the aloha spirit and of the unique and sensitive character of Hawaii's cultures and values. HRS §226-8(b)(8).

10. The unique cultural, educational, recreational and economic benefits identified herein which will result from the Facility are clearly in the public interest.

11. Further, the Facility qualifies for a variance under the following:

Private facilities which will neither adversely affect beach processes nor artificially fix the shoreline; and the MPC finds that hardship will result to KBH if the Facility is not allowed within the shoreline area (SSV Rules § 12-5-13(a)(8)).

12. Hardship sufficient to satisfy SSV Rules § 12-5-13(a)(8)) would result to KBH if the Facility is not allowed within the shoreline area.

13. Appropriate conditions, set forth below, have been imposed upon the Applicant which satisfy SSV Rules § 12-5-13(c).

14. Each of the above two determinations is independently sufficient basis for granting this SSV. In addition, the proposed Facility and activity is necessary for and/or ancillary to boating, maritime, or water sports recreational facilities (SSV Rules § 12-5-13(a) (5)).

15. The proposed Facility and activity are consistent with the purpose of the SSV Rules, and meets the criteria necessary for a SSV.

DECISION AND ORDER

Based on the above findings of facts and conclusions of law, the MPC hereby grants the requested SMA amendment and SSV, such that the Facility is approved at the proposed location,

subject to the following conditions, which only apply to the development of the Facility sought by this application:

STANDARD CONDITIONS

1. Construction of the proposed project shall be initiated by November 1, 2002. Initiation of construction shall be determined as construction of offsite improvements, issuance of a foundation permit and initiation of construction of the foundation, or issuance of a building permit and initiation of building construction, whichever occurs first. Failure to comply within this two (2) year period will automatically terminate this Special Management Area Use Permit unless a time extension is requested no later than ninety (90) days prior to the expiration of said two (2) year period. The Planning Director shall review and approve a time extension request but may forward said request to the Planning Commission for review and approval.

2. Construction of the project shall be completed within five (5) years after the date of its initiation. Failure to complete construction of this project will automatically terminate the subject Special Management Area Use Permit. A time extension shall be requested no later than ninety (90) days prior to the completion deadline. The Planning Director shall review and approve a time-extension request but may forward said request to the Planning Commission for review and approval.

3. The permit holder or any aggrieved person may appeal to the Planning Commission any action taken by the Planning

Director on the subject permit no later than ten (10) days from the date the Director's action is reported to the Commission.

4. Final construction shall be in accordance with preliminary architectural plans dated January 6, 1999.

5. Appropriate measures shall be taken during construction to mitigate the short term impacts of the project relative to dust and soil erosion from wind and water, ambient noise levels, and traffic disruptions. Precautions shall be taken to prevent eroded soils, construction debris and other contaminants from adversely impacting the coastal waters.

6. The subject Special Management Area Use Permit shall not be transferred without prior written approval in accordance with §12-202-17(d) of the Special Management Area Rules of the Maui Planning Commission. However, in the event that a contested case hearing preceded issuance of said Special Management Area Use Permit, a public hearing shall be held upon due published notice, including actual written notice to the last known addresses of parties to said contested case and their counsel.

7. The applicant, its successors and permitted assigns shall exercise reasonable due care as to third parties with respect to all areas affected by subject Special Management Area Use Permit and shall procure at its own cost and expense, and shall maintain during the entire period of this Special Management Area Use Permit, a policy or policies of comprehensive liability insurance in the minimum amount of ONE MILLION AND NO/100 DOLLARS

(1,000,000.00) naming the County of Maui as an additional named insured, insuring and defending the applicant and County of Maui against any and all claims or demands for property damage, personal injury and/or death arising out of this permit, including but not limited to: (1) claims from any accident in connection with the permitted use, or occasioned by any act or nuisance made or suffered in connection with the permitted use in the exercise by the applicant of said rights; and (2) all actions, suits, damages and claims by whomsoever brought or made by reason of the non-observance or non-performance of any of the terms and conditions of this permit. A copy of the Certificate of Insurance naming County of Maui as an additional named insured shall be submitted to the Department within ninety (90) calendar days from the date of transmittal of the decision and order.

8. Full compliance with all applicable governmental requirements shall be rendered.

9. The applicant shall submit plans regarding the location of any construction related structures such as, but not limited to trailers, sheds, equipment and storage areas and fencing to be used during the construction phase to the Maui Planning Department for review and approval.

10. The applicant shall submit to the Planning Department five (5) copies of a detailed report addressing its compliance with the conditions established with the subject Special Management Area Use Permit. A preliminary report shall be reviewed and approved by the Planning Department prior to the

final subdivision approval and prior to the issuance of the grading permit. A final compliance report shall be submitted 30 days after the completion of the subdivision to the Planning Department for review and approval.

11. The applicant shall develop the property in substantial compliance with the representations made to the Commission in obtaining the Special Management Area Use Permit. Failure to so develop the property may result in the revocation of the permit.

PROJECT SPECIFIC CONDITIONS

12. To maintain safe lateral access to and along the shoreline, the existing lateral access walkway which currently exists within the shoreline area shall not be obstructed by the new Facility, associated landscaping, entertainment areas or portable seating. Further, portable outside seating areas shall be a minimum of ten feet from the existing lateral access walkway.

13. To minimize risk of adverse impacts on beach process and to minimize risk of structures failing and becoming loose rocks or rubble on public property, pier construction (as opposed to slab on grade) shall be used for the new Facility in accordance with the preliminary architectural plans submitted with the application.

14. To minimize adverse impacts on public views to, from, and along the shoreline, the proposed Facility shall be located completely within the "horseshoe" of KBH's existing three and six story buildings, i.e., the Facility shall be located no

further makai than the line drawn between the most makai points of the existing wings of the KBH.

15. The level of sound emanating from performances staged adjacent to and makai of the Facility shall not exceed 60 decibels at any of the lanais of The Whaler, and 75 decibels as measured at the most makai portion of the restaurant structure. In achieving the decibel limits stated herein it is acknowledged that occasionally sound from the performances may unintentionally exceed the stated limits for brief periods of time. A violation is determined when the performance sound level exceeds the background sound level by 3 decibels or more and is above the above-stated decibel levels for more than a total of 10 minutes or for more than 2 consecutive minutes, during the course of one evening's outdoor performance.

16. The applicant shall assure that any outdoor speakers it utilizes shall be of a directional type and shall assure that the sound from said speakers shall not be directed toward The Whaler. The applicant shall not operate any outdoor speakers past 8:30 p.m. except for special occasions, which may occur no more than six times annually.

17. The applicant shall not pave the unimproved vehicle access between The Whaler and the Ka'anapali Beach Hotel and shall use said access only for the following purposes:

- a. Temporary construction and landscaping access during the hours of 9:00 a.m. and 5:00 p.m.;

- b. Emergency access for police, fire trucks, and ambulances; and
- c. Transportation of special function equipment no more than six (6) times a year and occasional transport of racing canoes.

The applicant shall use its best efforts to minimize the noise resulting from its use of the vehicle access and to contain use to reasonable hours.

18. The applicant shall use its best efforts to minimize odors and noxious gases from being emitted into the atmosphere from the Restaurant kitchen and shall install an adequately equipped Vent Master (or equivalent) commercial kitchen ecology exhaust system that is of appropriate size based on the level of use expected at the Restaurant and is acceptable to the Hawaii State Department of Health. Said exhaust system, including its filtration devices, shall be maintained by the applicant according to the recommended instructions of the manufacturer of said equipment.

19. No construction, operation of equipment, storage of materials, excavation or deposition of soil or other materials shall occur seaward of the shoreline as certified on October 13, 1999.

20. Applicant shall implement Best Management Practices ("BMP") for maintaining construction debris, contaminants, and material on site. A plan setting forth the BMPs to be implemented

shall be reviewed and approved by the Planning Department prior to initiation of construction.

21. Construction waste shall not be disposed at the County's Central Maui Landfill. Alternative disposal sites such as the Maui Demolition and Construction Landfill shall be utilized.

22. The drainage system shall be designed and constructed to the satisfaction of the DPWWM according to the applicable laws and accepted engineering practice standards.

23. Pursuant to the recommendations of the State Historic Preservation Division of the Department of Land and Natural Resources ("SHPD") contained in its letter dated May 5, 1999, a limited archaeological assessment of subsurface deposits (with limited sub-surface testing) shall be conducted. Archaeological monitoring is required during any grading or excavation for the Facility. Should historic remains such as artifacts, burials, concentrations of shell or charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, and the find shall be protected from further damage. The contractor and/or landowner shall immediately contact the State Historic Preservation Division, which shall assess the significance of the find and recommend an appropriate mitigation measure, if necessary.

24. The Shoreline Setback Variance granted herein is dependent on the applicant's use of the Facility as a canoe hale and an educational/cultural facility in addition to its use as a

commercial restaurant. Should the Facility cease to be used as a canoe hale as represented by the applicant or cease to be used in the applicant's Po`okela program or an equivalent program promoting Hawaii's culture among employees and patrons, the Facility shall be deemed a nonconforming structure and shall not be reconstructed, enlarged or modified beyond normal repair and maintenance.

25. Prior to issuance of a building permit, the applicant shall meet with the Planning Department and the University of Hawaii, Sea Grant Extension Agent, to develop a mitigation plan for catastrophic erosion events other than shoreline hardening.

The conditions of this Special Management Area Use Permit shall be enforced pursuant to §12-202-23 and §12-202-25 of the Special Management Area Rules for the Maui Planning Commission.

Notice is hereby given (pursuant to MPC Rules § 12-201-82) of the parties' right to appeal under Haw. Rev. Stat. § 91-14.

Done at Wailuku, Maui, Hawaii, this 27th day of March,
2001, per motion on March 13, 2001.

MAUI PLANNING COMMISSION


JERRY EDLAO, Chairperson

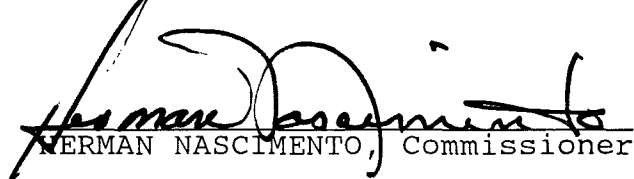

JOE BERTRAM, III, Commissioner

~~---dissent---~~ 
SAM KALALAU, Commissioner

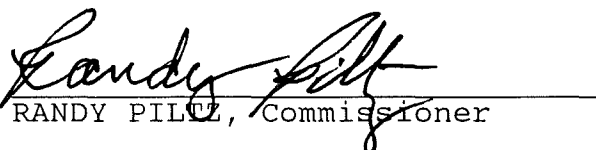

JEREMY KOZUKI, Commissioner


BERNICE LU, Commissioner

~~---recused---~~
STAR MEDEIROS, Commissioner


HERMAN NASCIMENTO, Commissioner


MONA RICHARDSON, Commissioner


RANDY PILUL, Commissioner

BEFORE THE MAUI PLANNING COMMISSION

STATE OF HAWAII

In the Matter of the) Nos. SM1 900040, SSV 990001
Application of)
) CERTIFICATE OF SERVICE
MR. MICHAEL B. WHITE,)
General Manager of the)
Ka`anapali Beach Hotel)
)
To Obtain a shoreline setback)
variance and an amendment to)
a Special Management Area Use)
Permit to construct a)
restaurant/canoe hale)
partially within the 150 foot)
shoreline setback area for)
the Ka`anapali Beach Hotel,)
TMK: 4-4-008:003,)
Ka`anapali, Lahaina, Island)
of Maui.)
_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties listed below, by certified mail, return receipt requested, by depositing same in the United States Mail, postage prepaid, this date, addressed as follows:

Isaac Hall, Esq. Certified mail, return receipt requested
2087 Wells Street 7000 1670 0012 8899 8392
Wailuku, HI 96793

Martin Luna, Esq. Certified mail, return receipt requested
CARLSMITH BALL 7000 1670 0012 8899 8422
2200 Main Street, Suite 400
Wailuku, HI 96793

DATED: Wailuku, Maui, Hawaii, March 28, 2001.



JOHN E. MIN
Planning Director

10767

SVD on VJ7

EXTRA
FILED

ISAAC HALL #2238
2087 Wells Street
Wailuku, Maui, Hawaii 96793
Telephone: (808) 244-9017

2001 APR 17 AM 11:49

Attorney for Appellants
Dr. Janell McCullough Zemel (Mrs.
Zemel), Dr. Simon Zemel, Shirley Schwartz,
Rene Shepard and Kent McNaughton

C. CASIL, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

RECEIVED
COUNTY OF MAUI
DEPT. OF PLANNING
2001 APR 19 AM 11:20

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

DR. JANELL McCULLOUGH)
ZEMEL, (Mrs. Zemel), DR. SIMON)
ZEMEL, SHIRLEY SCHWARTZ,)
RENE SHEPARD and KENT)
McNAUGHTON,)

CIVIL NO. 01-1-0190-3

Appellants,)

NOTICE OF APPEAL TO
CIRCUIT COURT; STATEMENT
OF THE CASE; EXHIBIT "A";
DESIGNATION OF THE RECORD
ON APPEAL; ORDER TO CERTIFY
AND TRANSMIT THE RECORD
ON APPEAL

v.)

THE PLANNING COMMISSION)
OF THE COUNTY OF MAUI,)
JEREMY KOZUKI, in his capacity)
as Chairperson of the PLANNING)
COMMISSION OF THE COUNTY)
OF MAUI and the KAA NAPALI)
BEACH HOTEL,)

Appellees.)

RECEIVED
CORPORATION COUNSELL
2001 APR 19 AM 10:33

wog/kbh/noticeappeal

NOTICE OF APPEAL TO CIRCUIT COURT

NOTICE IS HEREBY GIVEN that Appellants DR. JANELL
McCULLOUGH ZEMEL (Mrs. Zemel), DR. SIMON ZEMEL, SHIRLEY
SCHWARTZ, RENE SHEPARD and KENT McNAUGHTON, pursuant to HRS
§91-14, appeal to the Circuit Court of the Second Circuit from the Findings
of Fact, Conclusions of Law, and Decision and Order of the Maui Planning

I hereby certify that this is a full, true and
correct copy of the Original.

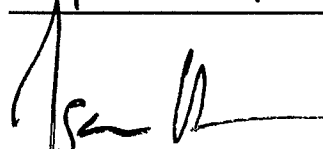
[Signature]
Clerk, Circuit Court, Second Circuit

Commission signed on March 27, 2001 and served by mail on March 28, 2001.

This Court has jurisdiction to hear and decide this Appeal pursuant to HRS §603-21.8. This Appeal is filed pursuant to Rule 72 of the Hawaii Rules of Civil Procedure and is made upon the grounds set forth in the Statement of the Case, filed on this date.

DATED: Wailuku, Maui, Hawaii

4.17.01



Isaac Hall
Attorney for Appellants
Dr. Janell McCullough Zemel (Mrs. Zemel), Dr. Simon Zemel, Shirley Schwartz, Rene Shepard and Kent McNaughton

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

DR. JANELL McCULLOUGH	)	CIVIL NO.
ZEMEL, (Mrs. Zemel), DR. SIMON)	
ZEMEL, SHIRLEY SCHWARTZ,	)	STATEMENT OF THE CASE
RENE SHEPARD and KENT)	
McNAUGHTON,)	
)	
Appellants,)	
)	
v.)	
)	
THE PLANNING COMMISSION)	
OF THE COUNTY OF MAUI,)	
JEREMY KOZUKI, in his capacity)	
as Chairperson of the PLANNING)	
COMMISSION OF THE COUNTY)	
OF MAUI and the KAA NAPALI)	
BEACH HOTEL,)	
)	
Appellees.)	

STATEMENT OF THE CASE

Appellants DR. JANELL McCULLOUGH ZEMEL (Mrs. Zemel), DR. SIMON ZEMEL, SHIRLEY SCHWARTZ, RENE SHEPARD and KENT McNAUGHTON ("Appellants"), for cause of action against Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI, JEREMY KOZUKI, in his capacity as Chairperson of the PLANNING COMMISSION OF THE COUNTY OF MAUI (collectively the "Planning Commission" Appellees) and KAA NAPALI BEACH HOTEL, allege as follows:

I. INTRODUCTION

1. This Appeal is filed by Appellants to seek the reversal of the grant by the Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI of an Amended Special Management Area ("SMA")

permit and a Shoreline Setback Variance to Appellee the KAA NAPALI BEACH HOTEL for its proposed Commercial Restaurant and "Canoe Hale" in the shoreline setback area in Kaanapali, Maui, Hawaii.

2. The amended permit and variance were granted in violation of the substantial rights of the Appellants, in violation of the applicable laws, in the face of substantial, reliable and probative evidence on the record to the contrary such that both the amended permit and variance must be reversed and voided.

II. JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over the claims for relief in this action pursuant to HRS §91-14, HRS §205A and HRS §603-21.8.

4. Venue is properly laid in this judicial circuit pursuant to HRS §603-36(5) because the claims for relief arose here and all of the Appellees are domiciled here.

III. PARTIES

A. Appellants

5. Appellant DR. JANELL McCULLOUGH ZEMEL (Mrs. Zemel) intervened and participated in the administrative contested case proceeding from which this Chapter 91 appeal is taken. She is an adjoining property owner by virtue of her ownership of an interest in Apartment 802 at the Whaler at Kaanapali Beach.

6. Appellant DR. SIMON ZEMEL intervened and participated in the administrative contested case proceeding from which this Chapter 91

appeal is taken. He is an adjoining property owner by virtue of his ownership of an interest in Apartment 802 at the Whaler at Kaanapali Beach.

7. Appellant SHIRLEY SCHWARTZ intervened and participated in the administrative contested case proceeding from which this Chapter 91 appeal is taken. She is an adjoining property owner by virtue of her ownership of an interest in Apartment 252 at the Whaler at Kaanapali Beach.

8. Appellant RENE SHEPARD intervened and participated in the administrative contested case proceeding from which this Chapter 91 appeal is taken. She is an adjoining property owner by virtue of her ownership of an interest in Apartment 202 at the Whaler at Kaanapali Beach.

9. Appellant KENT McNAUGHTON intervened and participated in the administrative contested case proceeding from which this Chapter 91 appeal is taken. He is an adjoining property owner by virtue of his ownership of an interest in Apartments 1221 and 1223 at the Whaler at Kaanapali Beach.

B. Appellees

10. Appellee the PLANNING COMMISSION OF THE COUNTY OF MAUI ("MPC") is that County agency with the primary responsibility for protecting and preserving lands and coastal resources which lie within the special management area and the shoreline setback area in the County of Maui.

11. Appellee JEREMY KOZUKI, in his capacity as Chairperson of the PLANNING COMMISSION OF THE COUNTY OF MAUI is charged with the same duties described in the paragraph immediately above.

12. Appellee the KAA NAPALI BEACH HOTEL ("KBH") is named here as a necessary party only as the applicant for the amended SMA permit and the Shoreline Setback Variance which are the subject matters of these proceedings.

IV. STANDING

13. The Appellants are adjoining property owners.

14. The Appellants participated in formal contested case proceedings below.

15. The substantial rights of the Appellants have been prejudiced by adverse rulings by Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI.

V. GENERAL FACTUAL ALLEGATIONS

16. Appellee KBH filed an application for an SMA permit and a Shoreline Setback Variance for a Commercial Restaurant in the shoreline setback area from the MPC in 1990.

17. On December 18, 1990, the MPC granted the SMA application but required the bar/restaurant building to be constructed outside of the shoreline setback area.

18. Appellee KBH applied for an SMA permit in 1998 for the same Commercial Restaurant and "Canoe Hale" as the one currently proposed behind the 150 foot shoreline setback line.

19. An SMA approval was granted for this Commercial Restaurant and "Canoe Hale" on May 7, 1998 behind the 150 foot shoreline setback line with the following Maui Planning Commissioners voting in favor:

Jeremy Kozuki

Herman Nascimento
Mona Richardson
Jerry Edlau
Joe Bertram
Louise Ross
Barbara Long

Moana Anderson was excused.

20. Less than seven (7) months later, on January 12, 1999, KBH submitted its current SMA amendment and Shoreline Setback Variance application for the identical Commercial Restaurant, Bar and Lounge and "Canoe Hale", approximately 70 feet forward of the location just approved in the last year by the MPC, within the shoreline setback area.

21. Appellants filed a Petition to Intervene which was granted.

22. Members of the MPC were appointed as the Hearing Panel, namely Chairperson Robert Carroll, Herman Nascimento and Jeremy Kozuki.

23. Contested case proceedings were scheduled and took place on April 3, 4, 5, 7, 10, 13, 14 and 18, 2000.

24. At the conclusion of the contested case evidentiary hearings, the parties submitted Proposed Findings of Fact and Conclusions of Law.

25. Hearing Officers Kozuki and Nascimento submitted a Majority Report and Hearing Officer Carroll submitted a Dissenting Report.

26. This matter was placed upon the Agenda of the MPC for oral argument and action on January 9, 2001.

27. After oral argument on January 9, 2001, a Motion to Approve the amended SMA permit, and the Majority Report was made, however this Motion failed and it is the legal position of the Appellants that

the amended SMA permit and Shoreline Setback Variance were both thereby denied as a matter of law.

28. For reasons unknown to Appellants and later objected to by them, this matter appeared upon the Agenda of the MPC and the MPC voted to reopen the docket and conduct a site inspection, over the objections of the Appellants.

29. On March 13, 2001, for reasons unknown to Appellants and over Appellants' objections, this matter appeared on the Agenda of the MPC again and over the objections of the Appellants, a vote was taken to approve the amended SMA permit, the Shoreline Setback Variance and the Majority Report.

30. The "Findings of Fact, Conclusions of Law, Decision and Order" of the MPC granting the Amended SMA permit and Shoreline Setback Variance in this case executed by certain Commissioners on March 27, 2001 was mailed by certified mail on March 28, 2001 to counsel for the Appellants.

31. This timely Appeal follows.

VI. CLAIMS FOR RELIEF

A. FIRST CAUSE OF ACTION: Variance Illegally Issued

32. Appellants hereby incorporate by reference the allegations contained in paragraphs 1 through 31 of this Statement of the Case.

33. Appellee KBH had the burden of satisfying at least one of the tests or criteria for a Shoreline Setback Variance.

34. Appellee KBH did not meet its burden of satisfying at least one of the tests or criteria for a Shoreline Setback Variance.

35. Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI illegally issued the Shoreline Setback Variance as a matter of law and fact.

36. The Shoreline Setback Variance must be reversed and voided.

B. SECOND CAUSE OF ACTION: Amended SMA Permit Illegally Issued

37. Appellants hereby incorporate by reference the allegations contained in paragraphs 1 through 36 of this Statement of the Case.

38. Appellee KBH had the burden of satisfying the three ultimate tests or criteria for an amended SMA permit and other subsidiary tests for an SMA permit.

39. Appellee KBH did not meet its burden of satisfying the three ultimate tests or criteria or other subsidiary tests or criteria for an amended SMA permit.

40. Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI illegally issued the amended SMA permit as a matter of law and fact.

41. The amended SMA permit must be reversed and voided.

C. THIRD CAUSE OF ACTION: Unenforceable Mitigation Measures

42. Appellants hereby incorporate by reference the allegations contained in paragraphs 1 through 41 of this Statement of the Case.

43. The KBH proposed project will cause potentially significant adverse impacts.

44. The KBH proposed project could only be lawfully approved by Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI if mitigation measures were fashioned, incorporated into the project or attached as conditions that actually reduce these significant adverse impacts to acceptable levels.

45. The conditions attached to this amended SMA permit and Shoreline Setback Variance are either unenforceable or will be unenforced such that the significant adverse impacts will not be reduced to acceptable levels and interested persons, including Appellants, will experience the significant adverse impacts of this project unabated.

46. Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI illegally issued the amended SMA permit and Shoreline Setback Variance as a matter of law and fact.

47. The amended SMA permit and Shoreline Setback Variance must be reversed and voided.

D. FOURTH CAUSE OF ACTION: The Three Strikes and You're Out Rule is Illegal

48. Appellants hereby incorporate by reference the allegations contained in paragraphs 1 through 47 of this Statement of the Case.

49. Appellees have the burden of proof in contested case proceedings. HRS §91-10(5).

50. Appellees have the burden of satisfying the tests and criteria for SMA permits and Shoreline Setback Variances.

51. Appellees have the burden of securing five affirmative votes that all the tests and criteria for the permits have been satisfied.

52. Appellants do not have the burden of proof nor do they have the burden of satisfying any tests or criteria for the issuance of permits.

53. Appellees PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI violated the administrative due process rights of Appellants when they failed to declare that the amended SMA permit and the Shoreline Setback Variance had been denied after the Motion to Approve both had failed on January 9, 2001.

54. The rule of the PLANNING COMMISSION OF THE COUNTY OF MAUI to the contrary is illegal, null and void.

55. Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI illegally issued the amended SMA permit and Shoreline Setback Variance as a matter of law and fact.

56. The amended SMA permit and Shoreline Setback Variance must be reversed and voided.

E. FIFTH CAUSE OF ACTION: Procedural Reversible Errors

57. Appellants hereby incorporate by reference the allegations contained in paragraphs 1 through 56 of this Statement of the Case.

58. During the course of the contested case proceedings from which this administrative appeal is taken numerous procedural reversible errors were committed by Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI which include but are not limited to those which follow:

(a) The amended SMA and Shoreline Setback Variance application was and is incomplete and must be dismissed because there was

and is (i) no valid shoreline survey, and (ii) no proper authorization from the landowner.

(b) The required notice was inadequate.

(c) Planning Director Min has a conflict of interest.

(d) Members of the Hearing Panel should have been disqualified.

(e) Appellants' Motions in Limine were wrongfully denied.

(f) Appellants were wrongfully denied the right to take the deposition of the KBH owner, Sur Run Run Shaw.

(g) The 1990 and 1998 determinations of the MPC, by the doctrine of administrative res judicata, compelled the denial of the amended SMA permit and Shoreline Setback Variance.

(h) The MPC wrongfully reopened the docket to conduct the site inspection after it had begun voting on whether or not to issue the amended SMA permit and Shoreline Setback Variance.

59. Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI illegally issued the amended SMA permit and Shoreline Setback Variance as a matter of law and fact.

60. The amended SMA permit and Shoreline Setback Variance must be reversed and voided.

VI. PRAYER FOR RELIEF

WHEREFORE, Appellants pray for judgment against Appellees, and each of them, as follows:

A. For a determination that this Court has jurisdiction over this case;

B. For a determination that Appellees the PLANNING COMMISSION OF THE COUNTY OF MAUI and KOZUKI illegally issued the amended SMA permit and Shoreline Setback Variance to Appellee KBH for its proposed Commercial Restaurant and "Canoe Hale";

C. For a determination that the amended SMA permit and Shoreline Setback Variance are both reversed and are both void;

D. For injunctive relief as may be necessary;

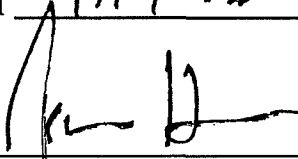
E. For the Court to grant Appellants' expenses and costs of suit, including reasonable expert witness and attorneys' fees;

F. For the Court to retain continuing jurisdiction to review Appellees' compliance with all judgments and Orders issued herein;

G. For such additional judicial determinations as are necessary to effectuate the foregoing; and

H. For such other and further relief as the Court shall deem just and proper.

DATED: Wailuku, Maui, Hawaii

4.17.02

Isaac Hall
Attorney for Appellants:
Dr. Janell McCullough Zemel (Mrs. Zemel), Dr. Simon Zemel, Shirley Schwartz, Rene Shepard and Kent McNaughton

BEFORE THE MAUI PLANNING COMMISSION

STATE OF HAWAII

In the Matter of the Application of) Nos. SM1 900040, SSV 990001)
))
MR. MICHAEL B. WHITE,) FINDINGS OF FACT,)
General Manager of the) CONCLUSIONS OF LAW, DECISION)
Ka`anapali Beach Hotel) AND ORDER; CERTIFICATE OF)
) SERVICE)
))
To Obtain a shoreline setback))
variance and an amendment to))
a Special Management Area Use))
Permit to construct a))
restaurant/canoe hale))
partially within the 150 foot))
shoreline setback area for))
the Ka`anapali Beach Hotel,))
TMK: 4-4-008:003,))
Ka`anapali, Lahaina, Island))
of Maui.))
) Contested Case April 3-18,)
) 2000; March 1, 2001; March)
) 13, 2001)

FINDINGS OF FACT, CONCLUSIONS OF LAW
DECISION AND ORDER

I. INTRODUCTION

Michael B. White, General Manager of the Ka`anapali Beach Hotel ("KBH"), seeks a shoreline setback variance ("SSV") and an amendment to a previously issued Special Management Area ("SMA") permit (90/SM1-040) in order to construct a restaurant/canoe hale/educational facility (the "Facility") partially within the shoreline setback area. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1.) Maui Planning Commissioners Robert Carroll, Herman Nascimento and Jeremy Kozuki were appointed by the Maui Planning Commission ("MPC") to act as the

EXHIBIT "A"

hearings panel on the subject application and hereby submit this report pursuant to §12-201-77 of the Rules of Practice and Procedure for the Maui Planning Commission.¹

These findings of fact, conclusions of law, decision and order are based upon the record of the above-entitled matters, including documentary evidence and testimony received during the contested case hearing held on April 3, 4, 5, 7, 10, 13, 14 and 18, 2000, at Wailuku, Maui, Hawaii, and a site inspection held on March 1, 2001, at Kaanapali, Lahaina, Maui, Hawaii.

FINDINGS OF FACT

II. PROCEDURAL HISTORY

A. Permit History of KBH

1. KBH was constructed in 1964 as one of the initial hotels in the Ka'anapali Resort. In 1990, KBH applied for a SMA permit for remodeling and expansion, including the addition of 215 guest rooms, a five and a half-story parking structure, improvements to the exterior and a restaurant facility in approximately the location presently proposed. At that time, the Planning Department had recently passed the Rules of the Maui Planning Commission Relating to the Shoreline Area of the Islands of Kahoolawe, Lanai and Maui ("SSV Rules"), such that the shoreline setback for the KBH property, which had previously been

¹Commissioner Carroll has submitted a dissenting opinion with respect to the application for the shoreline setback variance, and subsequently resigned from the Maui Planning Commission upon election to the Maui County Council.

forty feet (40'), was increased to one hundred fifty feet (150'). As KBH's priority at the time was to obtain approval of the proposed new hotel rooms, KBH agreed to move the restaurant facility back to the new 150' shoreline setback during the 1990 application process and withdrew its application for a shoreline setback variance. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1, I-8, C. Hart, 136:21-139:10.)

2. In 1998, the SMA permit was amended by eliminating the 215 room addition and scaling back other changes. The amendment also included a restaurant similar in size and design to the subject facility to be located just mauka of the 150-foot shoreline setback line. KBH's priority in 1998 was still the hotel and parking improvements, therefore the restaurant facility was left in its previously approved location. The first phase of the renovation program was recently initiated with the completion of the parking structure. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1.)

3. KBH now files the present application with the MPC seeking to amend the previous SMA approval and to obtain a SSV, such that the proposed Facility can be constructed closer to the shoreline. KBH plans to make the Facility a lynchpin in the strong Hawaiian cultural program that KBH has developed. (Exhs. A-15 (EA), A-130 (written testimony of M. White), CO-SMA-1.)

B. Intervention

4. The intervenors in this proceeding, Charles and Shirley Schwartz, Rene Shepard, Dr. and Mrs. Zemel and Kent

McNaughton, are owners of units at the Whaler on Kaanapali Beach ("Whaler"), a condominium adjacent to the south of the KBH property. (Exh. CO-MIN-3 (9/28/99 MPC meeting minutes) at 40.)

5. The Association of Apartment Owners of the Whaler also petitioned to intervene, but withdrew its petition after reaching a settlement with the KBH. (Exh. CO-SMA-33.)

6. Contested case hearings were held on April 3, 4, 5, 7, 10, 13, 14 and 18, 2000, before Commissioners Robert Carroll, Jeremy Kozuki and Herman Nascimento.

C. Statement of Issues

7. By order of the Hearing Panel, the issues for the contested case hearing were set forth as:

1. Siting of the project and the shoreline setback variance;
2. Foreclosure of management options;
3. Loss of open space;
4. Shoreline certification;
5. Shoreline processes;
6. Noise and odor;
7. Use of accessway;
8. Improper notice;
9. Drainage; and
10. Grease disposal.

Exh. CO-SMA-42 (Order on Which Issues May be Addressed in the Contested Case Hearing, filed January 12, 2000). No objections were raised by any party to this limitation of issues. No additional issues were raised by the Intervenors in their petition to intervene or position statement.

D. Other prehearing matters

8. The Intervenors filed objections to the panel of hearing officers appointed in this case, alleging that the panel

was not well-balanced and that Commissioner Kozuki had a conflict of interest or was biased. By letter dated November 8, 1999, the hearings panel rejected Intervenors' objections.

9. Intervenors' filed a motion in limine which sought to preclude KBH from introducing evidence of economic hardship to KBH, hardship which results from other permits or approvals issued by the MPC and hardship which has resulted from actions by KBH. The motion was denied by order dated March 31, 2000. Specifically, the hearings panel acknowledged that economic hardship cannot be argued to justify the granting of a shoreline setback variance, however, evidence pertaining to economics was not prohibited as it may be pertinent to other aspects of KBH's application.

10. Intervenors' had also requested to take a telephone deposition of Sir Run Run Shaw, a resident of Hong Kong. At the Fourth Prehearing Conference, Intervenors' request was denied on the basis that Mr. Michael White was available for Intervenors to depose and was the authorized applicant with respect to the proceedings.

III. EXHIBITS

11. By stipulation among the parties, all of the exhibits listed by the parties were deemed admitted into evidence, except for the following Applicant exhibits which were withdrawn by KBH: A-13, A-35, A-36, A-44, A-85, A-87, A-90, A-91, A-100, A-105, A-106, A-107, A-108, A-109 and A-111; and except for the following Intervenors' exhibits which were

withdrawn by the Intervenors: 9, 28, 29, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 55, 56, 57, 79, 83, 86, 87, 88, 92, 93, 94, 95, 96, 97, 101, 106, 116, 117, 118, 122, 123, 124, 125, 127, 128, 129, 130, 131, 132, 133 and 134. The following additional exhibits were admitted into evidence:

<u>Exh.</u>	<u>Description</u>	<u>Exh.</u>	<u>Description</u>
A-113A & 113B	Rory Frampton written testimony and supplemental written testimony	A-123	Dee Coyle written testimony
A-114	Rob Cole written testimony (except for portions withdrawn as stated on the record).	A-124	John Defries written testimony
A-115	Chris Hart written testimony	A-125	Marsha Weinert written testimony
A-116	Robert Fox written testimony	A-126	Billy Gonsolves written testimony
A-117	William Gebhardt written testimony	A-127 A & 127B	Mary Helen Lindsey written testimony and supplemental written testimony
A-118	Betty Tatar written testimony	A-128	George Kanahale written testimony
A-119	Kirk Tanaka written testimony	A-129	Robert Rocheleau written testimony
A-120	Don Misner written testimony	A-130	Mike White written testimony
A-121	Letter from the Polynesian Voyaging Society, dated March 10, 2000	A-131	Stephen Pitt written testimony
A-122	Lori Sablas written testimony	A-132	Dave Adams written testimony
		A-133	Letter from Floyd Miyazono to the MPC, dated April 12, 2000

IV. PROJECT DESCRIPTION

A. Pier Construction

12. The design of the restaurant/canoe hale/educational facility (the "Facility") will utilize the most appropriate structural system for this beachfront location. The building floor level will be constructed on concrete piers and raised approximately 6 ft. above grade, which is approximately 9.9 feet above mean tide level. The piers will extend approximately 15 feet below grade (five feet below mean tide level), creating a strong foundation for the building. The structural system is similar to that of a dock or pier, and therefore, in the unlikely event that storm waves would reach inland of the restaurant, the washup would flow unobstructed below the building. The structure is oriented in the diagonal to the oceanfront in order to provide the least obtrusive wall to the ocean. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

13. The pier foundation will continue into the interior of the restaurant to support open wooden trusses that will reinforce the natural, rustic quality of the interior and exterior of the building. The pavilion design will provide an energy efficient environment with natural ventilation and light. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

B. Restaurant Use

14. The Facility will feature a commercial restaurant with a bar and lounge. The interior and exterior dining areas of

the restaurant will be approximately 2,100 and 2,400 square feet in size, respectively. The total size of the restaurant, including the dining, kitchen/service, lounge, waiting area and internal restrooms is approximately 7,300 feet. The hours of operation are envisioned to be from approximately 7:00 a.m. to 10:00 p.m. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15, M. White, 4/10/00, 610:25-611:1.)

C. Canoe Club Use

15. The design of the facility incorporates outrigger canoe storage. KBH will be sponsoring a canoe club which will store canoes and accessory items below the raised portion of the building. Various storage methods may be utilized, including suspending the canoes on harnesses attached to rolling bearings supported by the concrete floor structure. The storage area for the canoes will be used primarily in the off-season. During the canoe season, it is anticipated the canoes will be kept on the grass area fronting the restaurant. In order to provide shoreline access for the canoe club, a path will be cleared in the Naupaka fronting the southern portion of the property. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-1, M. White, 4/10/00, 611:14-612:9.)

D. Landscaping

16. Extensive landscaping will be added around the building to buffer service areas from view. Walkways utilizing a non-grouted paving system will connect existing pathways to the

restaurant. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

E. Restrooms

17. A separate stand-alone restroom will be provided adjacent to the restaurant facility, to the east (mauka). The stand-alone restroom will be located outside of the 150-foot setback. (Exhs. A-113A (written testimony of R. Frampton), A-116 (written testimony of R. Fox), A-15.)

F. Hula Platform

18. A raised hula platform will be constructed in the lawn area fronting the left portion of the restaurant, mauka of the beach walkway. The platform will be raised using beach quality sand and the surface will be planted with grass. Portable adjacent seating will be provided, with approximately 25 to 30 tables set on either grass or sand, to be placed between the restaurant structure and the walkway. (Exhs. A-113A (written testimony of R. Frampton), A-15; M. White, 4/13/00, 703:7-704:15.)

G. Cost

19. Total estimated construction costs are \$2,000,000. The duration of construction activity is not expected to be longer than nine months. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

H. Selection of the Proposed Location

20. The location of the Facility is not based upon a set distance from the shoreline, which is subject to fluctuation.

Rather, it is based upon all of the factors described herein, including the location of the existing buildings, impacts to shoreline processes, coastal erosion and the Facility's need to be near the ocean. (Exhs. A-113A (written testimony of R. Frampton).)

21. In addition to the "courtyard" site approved as part of the 1998 KBH SMA amendment, two "beachfront" locations were evaluated in the 1999 Environmental Assessment: the proposed location and one immediately adjacent to the lateral beach walkway. The proposed location was selected because it provided more oceanfront open space and was significantly mauka of the historical fluctuations of the shoreline. (Exhs. A-15 (EA), A-113A (written testimony of R. Frampton).)

22. The proposed location is sited between a beachfront and courtyard location, at the mouth of the "horseshoe" comprised by KBH's wings and lobby. At this location, views of the ocean and landmarks are prominent. On the other hand, moving inside the horseshoe, one quickly becomes surrounded by structures, and the existing buildings and vegetation become the dominant element rather than the coastline. In addition, instead of looking under the canopies of the shoreline trees, the increased distance lowers the canopies into the vertical peripheral and further creates the effect of being surrounded in the courtyard. Meeting the objectives of the operational and cultural programs requires that the Facility

remain on the threshold of the makai portion of the courtyard. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

23. The courtyard location does not have the strong connection to the ocean on which the Hawaiian cultural exhibits and teaching will be based upon. The visual connection to legend and history diminishes rapidly as you move back from the proposed location. Lanai and Pu`u Keka`a Point are blocked by existing structures and the view of the beach landing completely disappears as you move into the courtyard. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

24. Also, the interaction between the restaurant and canoe paddlers is an integral part of the cultural experience provided by the new facility. In that respect, it is important that the activity of the paddling crews and canoes be visible to relate the importance of the ocean as an essential element of the early Hawaiians' life. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

25. The courtyard also does not have the beachfront ambiance desired by Ka`anapali visitors. At the proposed location, the facility is already located approximately 30 feet from the beach walkway. Any additional distance would make the facility seem uninviting to walkway patrons. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

26. The proposed location was also carefully selected so that it would have the least possible effect on nearby hotel rooms. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

27. The proposed location is situated in front of an outstanding False Kamani tree. Moving the Facility back would require the removal of this mature tree, or re-siting the Facility mauka (and behind) at approximately 200 feet from the vegetation line. (Exhs. A-113A (written testimony of R. Frampton).)

28. The False Kamani has an exceptionally large canopy, which not only makes it the most massive tree in the KBH courtyard, but makes an ideal backdrop for the structure, providing a natural frame that will blend the facility into the existing vegetation. The removal of such mature trees along the Ka'anapali coast is also contrary to the stated objective of the West-Maui Community Plan to "save and incorporate healthy mature trees in the landscape planting plans of any construction development." (Exhs. A-113A (written testimony of R. Frampton).)

29. Locating the Facility behind the False Kamani tree in the courtyard would require paddlers to carry the 400 pound canoes an additional 130 feet. This physical strain makes the canoe facilities at KBH impractical and undesirable, detrimentally impacting one of the primary purposes of the facility. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

30. An analysis of historical shoreline trends aided in the selection of the proposed location based upon its low risk of coastal erosion. (Exhs. A-113A (written testimony of R.

Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

31. Studies of the beach toe and vegetation line show long term accretion of both features. Nevertheless, a cautious approach was used in siting the restaurant. The proposed site is located twenty-five feet (25') mauka of the worst case erosion event (1949). (Exhs. A-113A (written testimony of R. Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

32. The architecture incorporates an environmentally sensitive pier design which, in the case of an unprecedented erosion event, would neither impact or be impacted by the natural beach processes. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

33. The proposed location is located in an area of very low erosion risk, therefore pushing the facility behind the 150 foot setback line does not offer a reduction in risk. (Exhs. A-113A (written testimony of R. Frampton).)

34. During the site inspection, the hearing officers inspected two nearby restaurants, Leilani's and Hula Grill, and noted their close proximity to the lateral walkway and the shoreline. The Facility is to be located substantially farther mauka by comparison to these restaurants.

V. SITING OF THE FACILITY AND THE SSV

A. Maui County's Shoreline Setback Rules

35. The SSV Rules recognize that the shoreline area is one of the most important natural resources of the County of Maui. The SSV Rules state that "it is imperative 1) that use and enjoyment of the shoreline area be insured for the public to the fullest extent possible, 2) that the natural shoreline environment be preserved, 3) that man-made features in the shoreline area be limited to features compatible with the shoreline area, and 4) that the natural movement of the shoreline be protected from development." Additionally, the SSV Rules serve to prevent against damage to residences and other structures near the shoreline caused by tsunamis and high wave action. SSV Rules §12-5-3.

36. Maui County's shoreline setback lines are based on a percentage of a parcel's average lot depth. Because of the depth of the KBH lot, its setback is at 150 feet, whereas other properties along Kaanapali Beach have varying setbacks due to lot configuration. For instance, the Maui Marriott's and the Hyatt Regency Maui's setback is about 132 feet and the Whaler's is about 134 feet. (Exhs. A-113A (written testimony of R. Frampton).)

B. Variance Criteria of SSV Rules § 12-5-13(a)

37. Shoreline setback variances may be permitted in limited circumstances pursuant to the SSV Rules and the CZMA. KBH presented evidence to justify a variance for the subject facility under the following three tests:

A shoreline area variance may be granted for a structure or activity

otherwise prohibited by this chapter, if the authority finds in writing, based on the record presented, that the proposed structure or activity is necessary for or ancillary to:

- * * *
- (5) Boating, maritime, or water sports recreational facilities;
- * * *
- (7) Private facilities or improvements that are clearly in the public interest;
- (8) Private facilities or improvements which will neither adversely affect beach processes nor artificially fix the shoreline; provided that, the authority also finds that hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline area . . .

SSV Rules § 12-5-13(a).

C. Boating, Maritime or Water Sports Recreational Facilities

38. Since the Facility is a mixture of a restaurant, canoe hale and educational facility, a variance will not be granted based solely on class (5), which allows for "boating, maritime, or water sports recreational facilities" within the shoreline area. However, the canoe facilities are an important part of the structure's use, and therefore, the MPC gives consideration to the application based upon the Facility's use as a water sports recreational facility. (Exhs. A-113A (written testimony of R. Frampton).)

D. Private Facilities or Improvements That Are Clearly in the Public Interest

- (1) The Facility Will Provide Cultural and Educational Benefits Which Are in the Public Interest

39. The Facility will be essential to further the objectives of KBH's Po`okela program. The Po`okela program has demonstrated over the years a clear public benefit through the many outreach and educational programs which it offers. The cultural education benefits Maui's population. The educational displays at the proposed Facility will be developed through ongoing relationships with the Bishop Museum and the Polynesian Voyaging Society. The sharing and furthering knowledge of the Hawaiian culture among island residents, especially the Hawaiian connection with the sea, will be enhanced with the construction of this structure. (Exhs. A-31, A-32, A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas 4/4/00, 278:7-289:6, D.Coyle, 4/4/00, 328:1-329:1.)

40. The Facility will be used to educate people as to the history of the area, canoe culture, fishing, navigation and the cultural practices relating to the ocean. A series of artifacts or replicas and interpretive panels relating to navigating, canoeing, surfing and fishing will be displayed in the Facility to illustrate the cultural practices relating to the ocean. It is important to the educational and cultural objectives that the Facility be in close proximity to the ocean. (Exhs. A-118, A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White); E. Tatar, 4/4/00, 253:7-14.)

41. KBH maintains an unprecedented cultural atmosphere and wishes to expand its Hawaiian cultural program, Po`okela,

which began in 1986. While KBH already incorporates Hawaiian values and spirit within its day-to-day operations, the new Facility is designed to enhance Po`okela by enabling it to better express its cultural connection to the area's practices, legends, history, and existing landmarks. (Exhs. A-31, A-32, A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas 4/4/00, 278:7-289:6, D.Coyle, 4/4/00, 328:1-329:1.)

42. The Facility is located where a strong cultural connection to the ocean can be formed and where educational displays, tours, and presentations will have a significant positive impact upon guests and the public. (Exhs. A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas, 4/4/00, 287:16-289:6.)

43. The Po`okela program is an educational program for hotel guests as well as local residents. KBH intends the Facility to be an integral part of the program which includes the forgotten history of the area. It is important that the Facility have visual access to historical landmarks. Such landmarks include Ka`anapali beach, where in legend, Ka-ulu departed Maui in his canoe, and Pu`u Keka`a Point (Black Rock), where spirits leaped into the nether world. (Exhs. A-31, A-32, A-113A (written testimony of R. Frampton), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle), L. Sablas 4/4/00, 278:7-289:6.)

44. KBH currently has an arrangement with the Bishop Museum in which cultural artifacts are loaned to it for educational displays. This program will be continued in the Facility with displays relating to paddling, navigation and fishing. (Exhs. A-113A (written testimony of R. Frampton), A-118 (written testimony of E. Tatar), A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

45. Specific aspects of the Po`okela program include the cultural/property tours, where schools, individuals and organizations visit KBH on an on-going basis. The Facility will provide a venue for the presentation of ocean-related subjects. (Exhs. A-31, A-32, A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

46. In addition, the Guest Services staff present twelve cultural activities on a rotating basis for both guests and non-guests. Once the Facility is completed, new activities will be created to take advantage of the new educational materials available in the Facility. These activities will be geared to the importance of navigation to the Hawaiian culture. KBH plans to work with the Polynesian Voyaging Society and the Kahana Canoe Club to develop this activity into an unfabricated visitor experience. (Exhs. A-31, A-32, A-121, A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

47. Hawaiian entertainment increases cultural knowledge through songs and hula. KBH provides only Hawaiian

music in its restaurant. The new location for the nightly entertainment will greatly enhance its ability to continue its use of songs and hula as an educational medium for guests and residents alike. (Exhs. A-122 (written testimony of Lori Sablas), A-123 (written testimony of Dee Coyle).)

(2) The Facility Will Provide Canoeing and Recreational Benefits Which Are in the Public Interest

48. The incorporation of an outrigger canoe club facility, to be used by a Maui canoe club, will benefit residents of Maui County. The new site will provide recreational opportunities for local residents in an area which has recently been devoted almost entirely to tourists. (Exhs. A-113A (written testimony of R. Frampton), A-113B, A-126 (written testimony of W. Gonzales); A-127 (written testimony of M. Lindsey); V. Magee, 4/7/00, 503:1-505:9.)

49. The Kahana Canoe Club has been associated with KBH since 1993. KBH supports the club and helps it with fundraising. Some of its crews will train at KBH, where there is less congestion and more room to practice. Presently, there are ten canoe clubs on Maui, with three based at Hanakao Park; about fifteen canoes practice there daily during the season. Kahana Canoe Club has 24 - 28 crews practicing at Hanakao Park. It plans to have 12 - 14 men's and women's crews practice at KBH. Moving 3-5 canoes to KBH will make practice easier, and will reduce the congestion of canoes and crews at Hanakao. (Exhs. A-

126 (written testimony of W. Gonzales), A-133; V. Magee, 4/7/00, 503:1-505:9.)

50. Kahana Canoe Club's canoes are presently stored on the beach, making them vulnerable to theft and vandalism. Allowing them to be stored under the Facility will mean they will be better protected, secure, require less maintenance and last longer. (Exhs. A-126 (written testimony of W. Gonzales).)

51. The parking situation at Hanakao is very bad during paddling season. Parking will be easier at KBH, and will free up parking spaces at Hanakao for the crews that remain there. (Exhs. A-126 (written testimony of W. Gonzales), A-127 (written testimony of M. Lindsey); V. Magee, 4/7/00, 503:1-7, M. Lindsey, 4/5/00, 404:9-405:18..)

52. Moving crews and canoes to KBH will also reduce the competition for parking and beach space at Hanakao Park for the general public. This will allow greater use of the beach park by the general public. (Exhs. A-126 (written testimony of W. Gonzales), A-133; V. Magee, 4/7/00, 503:1-7.)

53. The provision of storage space for the canoe club will also be in the public interest. Protected storage areas are in short supply. The Facility will provide well built areas for boat and equipment storage. (Exhs. A-113A (written testimony of R. Frampton), A-113B, A-126 (written testimony of W. Gonzales).)

54. The location of a canoe facility on the KBH grounds will create additional fundraising opportunities for the club. At KBH there is the potential of tapping into additional

sources of money, i.e., tourist donations. (Exhs. A-113A (written testimony of R. Frampton), A-126 (written testimony of W. Gonzales).)

55. While the canoe hale may not be an authentic replica of a traditional Hawaiian canoe hale, it is still a much needed, practical facility for the storage of canoes and equipment. KBH has never represented that the Facility is supposed to depict a traditional Hawaiian canoe hale. Storing the canoes under the facility does not show a lack of respect for the canoes. Many successful canoe clubs, including Hawaiian Canoe Club here on Maui and Outrigger Canoe Club on Oahu, store their canoes in non-traditional Hawaiian canoe hailes or in commercial buildings. Proper respect for a canoe is based on how it is used, cared for and handled, including how it is stored. Storing the canoes in the Facility will also keep them protected and in better condition than leaving them on the beach, as many clubs do now. (Exhs. A-126 (written testimony of W. Gonzales); A-127 (written testimony of M. Lindsey), A-113B (written testimony of R. Frampton).)

56. No canoe club on Maui utilizes a traditional Hawaiian canoe hale. (L. Kuloloio, 4/13/00, 794:23-795:1.) The modern canoe clubs utilize modern materials such as fiberglass canoes, which are not traditional Hawaiian materials. (M. Lindsey, 4/5/00, 406:19-20.)

(3) Benefits to Tourism and The Creation of a Model for Cultural Tourism Will Be Enhanced by the Facility

57. The Facility may be viewed as a model on how to embrace cultural tourism. "Cultural tourism" refers to an indigenous cultural preservation and incorporation into all aspects of the hospitality industry. It is experiences defined by a host culture and shared with guests in ways that nurture an appreciation and respect for a place and its people, history and traditions. (Exhs. A-124 (written testimony of J. DeFries), A-125 (written testimony of M. Weinert).)

58. The Facility's focus on the Hawaiian's relationship with the sea will provide the visitor with a greater understanding of Hawaii's unique culture. There is a clear public benefit in conveying culturally accurate information to our visitors in a manner and setting that leaves a lasting impression. This Facility has the potential to be a model for cultural based tourism. (Exhs. A-113A (written testimony of R. Frampton), A-124 (written testimony of J. DeFries), A-125 (written testimony of M. Weinert).)

59. It is also in the public interest to provide enriching and rewarding experiences for our visitors in this competitive global visitor industry. Maui needs to set itself apart from other destinations which offer sun, sand and surf, without losing its perspective of environmental and cultural values. This Facility's contribution to KBH's overall cultural tourism approach clearly benefits the State's visitor industry. (Exhs. A-113A (written testimony of R. Frampton), A-124 (written testimony of J. DeFries), A-125 (written testimony of M.

Weinert).), A-39, A-41, A-130 (written testimony of M. White), M. Weinert, 4/5/00, 376:14-378:25.)

(4) The Facility is Likely to Increase State and Local Tax Revenues

60. There will be clear benefits to our local and state economies through enhanced state and local tax revenues. It is anticipated that the addition of the Facility will increase the annual County property taxes by approximately \$20,000. Additionally, the projected \$3.0 million increase in revenues will generate an additional \$120,000 in State excise tax payments. (Exhs. A-42, A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

(5) The Facility Will Allow KBH to Maintain the Operability of the Food Service Program and Create a Competitive Food Service Program

61. The Facility is necessary to allow KBH's food service program to continue and grow into a competitive program, rather than to be discontinued. The proper siting of the Facility is an important factor in the operability of KBH's food service program. KBH's existing restaurant, located inland within the south wing, fails to attract KBH's own guests, much less guests from other hotels or local residents. Consequently, the food service program (employing about 85 workers) has been run at economic loss for many years. Reasonable access to the resort's beach walkway and shoreline will help prevent losses to employment and operational stability. (Exhs. A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

62. In lieu of closing the failing program, KBH opted to invest in a new facility that will combine a restaurant, canoe hale, and a Hawaiian cultural setting for KBH for educational purposes. The proposed location provides the desired beachfront ambiance and has reasonable exposure to the beach walkway. (Exhs. A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

63. The Facility is a tourism-related development that is dependent on its proximity to the coast. It is in the public interest to remain competitive with other resort areas. The heightened experience by the user of Facility will have positive impacts for tourism in Ka'anapali, on Maui and throughout Hawaii. (Exhs. A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

(6) The Facility Will Create a Model for Partnering with the Public

64. This Facility will be a model on how private hotels and other businesses can partner with the community for the benefit of the public. KBH's adoption and support of a local canoe club serves as an example as to how other hotels can support the local community. (Exhs. A-113A (written testimony of R. Frampton); V. Magee, 4/7/00, 511:6-10.)

65. All of the aforesaid benefits render KBH's Facility clearly in the public interest.

E. Private Facilities Which Do Not Adversely Affect Beach Processes Nor Artificially Fix the Shoreline and Hardship Exists

(1) The Facility Will Not Adversely Affect Beach Processes Nor Artificially Fix the Shoreline

66. First, the Facility clearly does not "fix" the shoreline since it is not a sea wall or other such structure. The location of the shoreline is able to fluctuate. Second, the in-depth analysis of Sea Engineering and testimony of Robert Rocheleau prove that the Facility will not adversely affect beach processes. (Exhs. A-113A (written testimony of R. Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

67. The historical shoreline trends show that the proposed location has a low risk of coastal erosion. In addition, the Facility's pier design allows it to neither impact or be impacted by the natural beach processes in the event of unprecedented erosion events. (Exhs. A-113A (written testimony of R. Frampton), A-129 (written testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

68. The proposed location (partially within the shoreline setback area) was judged superior to a location 150 feet mauka of the shoreline. With the proposed site already located in an area of very low erosion risk, pushing the facility behind the 150-foot setback line does not offer a significant reduction in risk to coastal processes, and causes hardship to KBH. (Exhs. A-113A (written testimony of R. Frampton), A-129 (written

testimony of R. Rocheleau), A-15 (Appendix A, shoreline evaluation).)

(2) Hardship Will Result to KBH If the Facility Is Not Located Within the Shoreline Area

69. The SSV Rules do not define what constitutes "hardship." However, "hardship" generally refers to the fact that a "zoning ordinance or restriction as applied to a particular property is unduly oppressive, arbitrary or confiscatory." Black's Law Dictionary (6th Ed., 1999) (emphasis added).

70. KBH has shown that not allowing a variance from the 150-foot setback will result in hardship in various forms.

(a) KBH's cultural program would be detrimentally affected

71. KBH maintains an unprecedented cultural atmosphere and wishes to perpetuate it's highly successful Po`okela program . Visual access to the sea and historical landmarks, as well as a strong connection to the ocean is important to the educational mission and cultural objective of the Facility. (Exhs. A-113A (written testimony of R. Frampton), A-123 (written testimony of D. Coyle), A-122 (written testimony of L. Sablas), L. Sablas 4/4/00, 278:7-289:6, D.Coyle, 4/4/00, 328:1-329:1..)

72. The Po`okela Program will be more effective in the proposed location. Therefore, it is a hardship to KBH to not allow the Facility to be located in the proposed location. (Exhs. A-113A (written testimony of R. Frampton), A-123 (written testimony of D. Coyle), A-122 (written testimony of L. Sablas); G. Kanahale, 4/10/00, 550:1-11.)

73. At 150 feet and further mauka locations, views from the Facility become obstructed by buildings and vegetation; landmarks such as Pu`u Keka`a Point (Black Rock), neighboring islands and Ka`anapali Beach canoe landing become obstructed. Locating the Facility mauka of the 150-foot setback line would create an unnecessary hardship to the Hawaiian cultural program, especially since the purpose of the SSV Rules can be fulfilled at the preferred location. (Exhs. A-113A (written testimony of R. Frampton).)

(b) The canoe facility would be detrimentally impacted

74. Not allowing the Facility to be located at the proposed site would create a hardship for KBH because the mauka location imposes an undue burden on canoeing activities. The proposed location defines and limits the canoe activities to an area closer to the ocean, which will alleviate physical strain on paddlers, especially members of the Keiki (children) paddling programs, and will allow for more interaction between the paddlers and hotel guests. (Exhs. A-113A , A-113B (written testimony of R. Frampton); Exhs. A-126 (written testimony of W. Gonzales).)

(c) Hardship from removal of the large Kamani tree

75. A large false Kamani tree located approximately 180 feet mauka of the shoreline complicates siting at the mauka location. At the proposed location, the Facility snugs up to the base of the tree and fits under its large canopy. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

76. If the Facility is kept at the 150-foot setback location, the tree would likely need to be removed. Trees of such scale (approximately 85 feet in diameter) and character are rare along the Ka'anapali coastline and its loss would be an unnecessary hardship considering the availability of the proposed location. (Exhs. A-113A (written testimony of R. Frampton).)

(3) The 1998 SMA approval does not preclude a present finding of hardship

77. SSV Rules § 12-5-13(b) provides that, "If the hardship is a result of actions by the applicant, such result shall not be considered a hardship for the purpose of this section." However, the SMA permit amendment approved by the MPC on April 28, 1998, pursuant to the application of KBH, which included the condition that the new Facility be located mauka of the 150-foot setback line, does not now preclude the finding of hardship for purposes of the present SSV application. ((Exhs. A-113A (written testimony of R. Frampton).)

78. SSV Rules § 12-5-13(b) does not apply to the present situation. The various forms of hardship to KBH described above are not the result of actions by KBH. The hardship that will result to KBH is solely what would result if the Facility is not allowed to be constructed as proposed. (Exhs. A-113A (written testimony of R. Frampton).)

79. In addition, KBH is not bound by the location of the facility previously approved (in the 1998 application), especially since moving the Facility into the shoreline area was not a part of that application and thus the circumstances that

would allow the Facility to be located within the shoreline area were not explained to the MPC in the 1998 application (which focused primarily on the reduction of the original project). (Exhs. A-113A (written testimony of R. Frampton).)

(4) Buildings constructed by KBH do not preclude the finding of hardship

80. Similarly, buildings and vegetation placed on the property by KBH do not preclude a finding of hardship under Rule 12-5-13(b). The buildings and vegetation on the property that affect the siting of the proposed project, were placed at the time that the shoreline setback for the property was forty feet (40'). It is only the increase in the shoreline setback to one hundred fifty feet (150') that necessitated this SSV application. (Exhs. A-113A (written testimony of R. Frampton).)

F. The Requirements of SSV Rules § 12-5-13(c) Have Been Met

81. The proposed project meets the conditions specified in §12-5-13 (c), which provides:

No variance shall be granted unless appropriate conditions are imposed:

- (1) To maintain safe lateral access to and along the shoreline or adequately compensate for its loss;
- (2) To minimize risk of adverse impacts on beach processes
- (3) To minimize risk of structures falling and becoming loose rocks or rubble on public property; and
- (4) To minimize adverse impacts on public views to, from, and along the shoreline.

(1) Safe lateral access to and along the shoreline

82. Lateral access along Ka'anapali beach is provided by a sidewalk system referred to as the beach walkway. The

proposed project's location and scope do not include changes to the walkway or impede access along the corridor. (Exhs. A-113A (written testimony of R. Frampton).)

(2) Minimize risk of adverse impacts on beach processes and risk of structures becoming loose rock on public property

83. Both conditions (b) and (c) of SSV Rules § 12-5-13 have been met by the Applicant. As documented, a primary focus in planning the restaurant/canoe hale was avoiding impacts to and from the shoreline processes. An analysis of historical shoreline trends prepared by Sea Engineering, Inc. aided in the selection of the proposed location based upon its low risk of coastal erosion. Architecturally, the facility is designed on piers which, in the case of an unprecedented erosion event would neither impact nor be impacted by the natural beach processes. (Exhs. A-113A (written testimony of R. Frampton).)

(3) Minimize adverse impacts on public view to, from and along the shoreline

84. The Facility is a single-story building located completely within the "horseshoe" of KBH's existing three and six story buildings. Therefore, the Facility is incapable of obstructing public views towards and along the shoreline. Viewed from the shore, the Facility will be an attractive structure that will blend into the landscaping present in KBH's great courtyard. A 30-70 foot buffer will separate the Facility from the beach walkway. (Exhs. A-113A (written testimony of R. Frampton).)

G. The Location of the Facility Is Identified by the Surrounding Buildings

85. The proposed location which is approved by the MPC is described in KBH's application and illustrated in Figure 4 of the EA (Exh A-15) and Exh. A-2. This location is generally described as the area mauka of the line drawn between the makai end of the Kauai and Molokai wings of KBH, as shown on Figure 4. It is not conditioned upon being a set distance from the shoreline, since said shoreline may change in the future. (Exh. A-15, A-2.)

VI. NO FORECLOSURE OF MANAGEMENT OPTIONS

86. The development will not foreclose any management options. The SMA and SSV granted herein is specific to this particular Facility and its circumstances. The granting of a variance based on a specific set of circumstances does not establish a precedent for future applications. The MPC is bound to evaluate each application for a variance on its own merits.

87. There are numerous unique aspects of this project which will set it apart from other possible applications, such that granting this application does not set any form of precedent that the MPC will have to grant approvals for any development within the shoreline setback. The following aspects of this project set this project apart from virtually all other developments:

a. **Project Mauka of Most Inland Shoreline on Record.** The Facility is to be located mauka of the most inland shoreline on record (1949).

b. Minimal risk to Shoreline and Coastal Processes.

The project site has a minimal risk of impacting or being impacted by shoreline movement.

c. Siting Behind Existing Structures.

The Facility is to be located mauka of existing structures at KBH.

d. Pier Design.

The project was designed in a manner which would not impact or be impacted by shoreline processes.

e. Coastal Dependency.

The facility has a strong coastal dependency in terms of the importance to the Hawaiian cultural program and to the operation of the canoe club.

f. Public Recreational Use.

Incorporation of the outrigger canoe facility establishes a public recreational use component.

88. There is no evidence that other hotels in Ka'anapali will "jump on the bandwagon" and request permission to construct facilities or restaurants within the shoreline setback simply because this project is approved. Furthermore, there is no indication that any other hotels in Ka'anapali would be willing to propose a development that has all of the above features that KBH has presented.

VII. OPEN SPACE

89. The proposed location places the Facility under the large canopy of a false Kamani tree, which will frame the Facility. The site is completely within the "horseshoe" of KBH's three and six story buildings and therefore the Facility will not obstruct public views to and along the shoreline. (Exhs. A-2, A-

15, A-113A (written testimony of R. Frampton), A-130 (written testimony of M. White).)

90. Even with the addition of the Facility, KBH maintains an open space significantly larger than other developments along Ka'anapali Beach, including the Whaler. For example, The Whaler On Kaanapali Beach is close to the maximum density allowed by law, whereas the density of KBH is calculated at approximately 53%. (Exhs. A-113A (written testimony of R. Frampton).)

91. Moreover, as part of the renovation, the currently existing Tiki Bar, Tiki Grill, pool restrooms, two concession booths, substantial concrete decking and entertainment area in the courtyard will be removed, which offsets the area covered by the new Facility. (Exhs. A-15; M. White, 4/13/00, 638:6-22.)

92. KBH's large landscaped courtyard is often referred to as a park. The proposed site is about 85 feet inland from the makai edge of the vegetation line, and therefore does not directly affect public beach resources. Use of the Ka'anapali beach walkway running approximately 40 feet mauka of the said vegetation line will continue to provide lateral access along Ka'anapali beach as well as public use of the makai portion of the KBH property. Therefore, use of the beach itself and related public access will not be infringed by the proposed action. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

93. The West Maui Community Plan has designated the Ka'anapali beach area as "Open Space." However, KBH's property,

including the site of the proposed Facility, is designated "Hotel," (Exh. I-121 (West Maui Community Plan)), which is consistent with its zoning designation of H-2 Hotel. (Exh. A-16.) Therefore, the direction of the Community Plan to set aside certain existing areas as open space should be applied to those properties designated as Open Space, which does not include the proposed site. The hearing panel reviewed the larger version of the West Maui Community Plan Map (Exh. I-121), and Ann Cua testified that the larger map confirms that the Facility will be located within the area designated "Hotel" and not within the area designated "Open Space." (A. Cua, 4/7/00, 460:10-464:23.)

94. Exh. A-126, the photograph showing the Facility in relation to the Whaler and existing KBH buildings demonstrates the lack of impact to open space. (Exh. A-126; A-114 (written testimony of R. Cole).)

95. The proposed site for the Facility aptly balances the Coastal Zone Management Act's ("CZMA") policies addressing open space, HRS §205A-2(c)(3), with those that support appropriate economic uses in the coastal zone. HRS §205A-2(c)(5).

VIII. SHORELINE CERTIFICATION

96. In this case, a survey with a current shoreline certification was submitted, but said certification subsequently expired during the pendency of this application. Thereafter, a new shoreline certification was obtained. (Exhs. A-46.)

97. The SMA Rules require submission of a "shoreline survey" (SMA Rules § 12-202-12(c)(2)(D)), which is defined as:

"Shoreline survey" means the actual field location of the shoreline prepared by a land surveyor registered in the State of Hawaii. Such survey maps developed by the registered land surveyor shall bear the surveyor's signature and the date of field survey and the certifying signature and date of the chairman of the board of land and natural resources.

SMA Rules § 12-202-4. Hence, while one must submit a shoreline survey which has been certified, there is no requirement that the certification remain current throughout the permitting process.

98. The shoreline was certified on or about October 13, 1999, and thus a currently certified shoreline exists. (Exhs. A-46, A-119, K. Tanaka, 4/4/00, 259:22-265:23.) KBH's submissions of its shoreline surveys have complied with the SMA Rules and the SSV Rules.

99. Finally, the shoreline certification simply determines the location of the shoreline, and such location of the shoreline is not significant to this application, in that the proposed location is admittedly within the shoreline area. The fluctuation of the certified shoreline will not change that fact. Further, the location for the Facility is not proposed as being a certain distance from the shoreline.

IX. SHORELINE PROCESSES

100. Robert Rocheleau, a professional engineer in ocean engineering, was qualified as an expert witness to testify as to shoreline processes. He is the founder and president of Sea Engineering, Inc., an engineering firm specializing in coastal engineering, oceanographic and marine environmental studies and

engineering diving services. (Exhs. A-129 (written testimony of R. Rocheleau); A-98 (curriculum vitae of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

101. Sea Engineering Inc. prepared a report dated December 1998, which is included in the 1999 EA for this project (Exh. A-15, Appendix A, Shoreline Evaluation). The report describes the historical vegetation line changes at the site and predicts, to the extent possible, the vegetation line position 30 years from now. (Exhs. A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

102. The north and middle sectors of Hanakao Beach (Ka'anapali Beach) are dynamic, responding to the seasonally varying wave climate. In the summer, the sand moves from Hanakao Point to the north due to the influence of the prevailing south swell. The pattern reverses in the winter when the north Pacific swell is present. While the seasonal changes to the sandy beach are pronounced, the vegetation line is more stable. Significant adverse changes to the vegetation line are usually associated with severe weather events. During the winter of 1997-98, the vegetation line in front of the Sheraton Maui Hotel receded up to 50 feet. This was an unusual occurrence, apparently caused by the El Nino event, which resulted in larger and more frequent north Pacific swells than normal. The erosion was confined primarily to the Sheraton property, with only limited erosion occurring at the north end of the KBH property. Kona storms have in the past caused erosion of the beach and the vegetation line along the

shoreline in front of KBH. Shoreline monitoring indicate that the beach typically recovers quickly after a wave induced erosion event, including the most recent 1998 El Niño related event. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21--601:24.)

103. Hanakao Beach was included in a study which evaluated long term shoreline changes. The method involved computer rectification of available aerial photographs, followed by digitization and plotting of the vegetation line. That 1991 study was updated for this evaluation by adding two additional photos and three shoreline certification surveys to the data base. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21--601:24.)

104. The analysis shows a fluctuating vegetation line at the project site, with a range of movement of 80 feet over the 49 year period. The net change since 1949 was a gain (i.e., accretion) of 71 feet. The historical vegetation line changes were used as a basis for the prediction of the vegetation line position in 30 years. Since future storms and wave patterns that affect the vegetation line cannot be predicted, a probabilistic model was utilized to calculate the probability distribution of future vegetation line positions. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

105. The model results predict a mean position of the vegetation line at the project site in 30 years 43 feet seaward

of the present position. However, a more conservative approach is recommended. With 49 years of data on the movement of the vegetation line at the site representing a wide range of wave events, a conservative approach would be to assume that the vegetation line might fluctuate between the landward and seaward extremes noted over that period. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

106. One of the stated objectives of the West Maui Community Plan is to assure preservation of new major water front developments for 50-100 years by basing the shoreline setback on a rate of shoreline retreat as determined by an appropriate study. (Exh. I-121.) Although Mr. Rocheleau's study predicted the vegetation line in 30 years, he testified that his analysis resulted in a net annual accretion. Therefore, if the forecast is lengthened from 30 years to 100 years, this simply leads to a greater amount of accretion. (R. Rocheleau, 4/10/00, 576:6-20.)

107. This landward extreme is represented by the 1949 shoreline in figure 4 of the report. (Exh. A-15.) The proposed structure will be located approximately 20 feet mauka of this line. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

108. An additional study of the beach toe was completed at the request of the Sea Grant Extension Service. The initial study, based only upon aerial photographs, indicated that the

width of the beach at the site narrowed by 45 feet between 1988 and 1997. However, in July of 1999, actual ground measurements of the beach width (distance from the vegetation line to the beach toe) were taken, which show that the beach width had increased by 40 feet since 1977. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

109. There is no chronic erosion of the beach fronting KBH. While both Sea Engineering, Inc. and the Sea Grant Extension Service note the short-term accretion and erosion trends, neither have concluded that "chronic erosion" is taking place. Both the vegetation line analysis and the beach toe data indicate accretion of the beach since 1949. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

110. It is highly unlikely that the beach will retreat shoreward of the 1949 vegetation line position. The long term record reflects vegetation line changes due to typical seasonal variations as well as a variety of extreme events. As such, it provides a valuable guideline for evaluating future vegetation line positions. This approach resulted in the structure being sited at least 20 feet mauka of the worst case situation over the past 50 years. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

111. In addition to a conservative siting approach, the proposed pier design of the restaurant is a significant mitigation measure which would minimize the potential for negative impacts to or from shoreline processes in an unforeseen extreme wave event. (Exhs. A-15 (Appendix A, Shoreline Evaluation), A-129 (written testimony of R. Rocheleau); R. Rocheleau, 4/10/00, 565:21-601:24.)

112. Hotel landscaping may have somewhat masked the vegetation line by making it move seaward, but only in a temporary manner. This is because "when you have either large seasonal waves or any type of storm wave, although vegetation is promoted . . . it's a temporary buffer, and if you have a wave action for a long enough duration it's cut back." (R. Rocheleau, 4/10/00, 577:10-14; 598:1-13.) Intervenors's witness, Michelle Anderson, agrees that even if the vegetation is growing out towards the ocean that it tends to be cut back naturally by virtue of the wave action. (M. Anderson, 4/14/00, 825:5-18.)

113. The Ka'anapali Beach Plan (Exh. I-120) states on page 15 that "development in shoreline setback should only be considered after an analysis of historical shoreline trends" and "anything larger than a walkway or a small beach activity center should not be located seaward of the most landward vegetation line on record." In this case, such a shoreline study was done, and the 1949 vegetation line is the most landward vegetation line on record. (R. Rocheleau, 4/10/00, 568:5-6.)

X. NOISE

114. David Adams, a professional engineer in electrical engineering, testified as to sound abatement. (Exh. A-132 (written testimony of D. Adams); D. Adams, 4/14/00, 829:9-849:3.)

115. Mr. Adams conducted a sound investigation and submitted a report. (Exh. A-24.) As part of the investigation, he setup a simulation of the planned future live entertainment area near the KBH, and the sound levels of the music were measured at the footprint of the proposed Facility and also in units in Tower No. 1 of the Whaler. Only the end units of the Whaler's two towers have line of sight to the planned outdoor performance area. The remainder of the Whaler is blocked by the Kauai wing of KBH. The measurements are set forth in Table 1 of his report. (Exhs. A-24; A-132 (written testimony of D. Adams); D. Adams, 4/14/00, 829:9-849:3.)

116. The music levels at the Whaler were less than the background noise levels. Under calm wind conditions, the music levels exceeded the background noise levels, but by less than 3 decibels. Three decibels is commonly considered the threshold of perceptible change in noise level. (Exhs. A-24; A-132 (written testimony of D. Adams); D. Adams, 4/14/00, 829:9-849:3.)

117. The music sound levels from the Facility, subject to the conditions set forth in the Decision and Order section below, will not be excessive nor objectionable to the Whaler. (Exhs. A-24; A-132; D. Adams, 4/14/00, 829:9-849:3.)

118. Intervenors provided no contrary evidence to dispute the above facts.

119. KBH's Settlement Agreement with the Whaler AOA provided that KBH would abide by conditions with respect to noise. (Exhs. CO-SMA-33 (withdrawal of petition to intervene by the Whaler AOA, with settlement agreement attached), A-130.) Those conditions are set forth, in part, in the Decision and Order section below.

XI. ODORS

120. William R. Gebhardt, a professional engineer in mechanical engineering, testified as to odor abatement. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

121. A scrubber system in the proposed restaurant's exhaust system will be installed to remove cooking odors that KBH guests could experience from the courtyard or their guestrooms. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

122. Cooking odor abatement is a common practice for food service establishments in proximity to residential buildings. The proposed technology is commonly used in Hawaii, including Maui. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

123. The Vent Master Ecolair Ecology System or similar system is to be added to the kitchen exhaust system. This system is very effective in reducing the amount of smoke and odors emanating from a kitchen. (Exh. A-117 (written testimony of W. Gebhardt); W. Gebhardt, 4/4/00, 246:10-248:23.)

124. Intervenors provided no contrary evidence to dispute the above facts.

125. KBH's Settlement Agreement with the Whaler AOA provided that KBH would abide by conditions with respect to odors. (Exhs. CO-SMA-33 (withdrawal of petition to intervene by the Whaler AOA, with settlement agreement attached), A-130.) Those conditions are set forth in the Decision and Order section below.

XII. USE OF ACCESSWAY

126. KBH has no plans to regularly use the access road adjacent to the Whaler to service the Facility. Goods will be delivered to the hotel via the existing loading docks on the north side of the property and transported to the Facility via the courtyard. There is no provision for a restaurant service road between the Whaler and KBH in either the existing approved SMA permit or the proposed SMA permit amendment plans. (Exhs. A-130 (written testimony of M. White).)

127. KBH's Settlement Agreement with the Whaler AOA provided that KBH would abide by conditions with respect to the use of the accessway. (Exhs. CO-SMA-33 (withdrawal of petition to intervene by the Whaler AOA, with settlement agreement attached), A-130 (written testimony of M. White).) Those conditions are set forth in the Decision and Order section below.

XIII. NOTICE TO OWNERS WITHIN 500 FEET

128. Rory Frampton oversaw the providing of notices of a public hearing on this SMA amendment and SSV to neighboring landowners. (Exhs. A-113A (written testimony of R. Frampton).)

129. On July 19 and 20, 1999, the Applicant's consultant obtained the names and addresses of owners and lessees of real property within 500 feet of the KBH by utilizing the County of Maui real property tax records. The notice of public hearing was sent to each of the owners and lessees listed in those records, by certified mail, on August 13, 1999. They later received return receipts from the post office. The public hearing was set for September 14, 1999. (Exhs. A-21, A-22, A-23, A-113A (written testimony of R. Frampton).)

130. The original return receipt cards were filed with the Planning Department. (Exhs. A-113A (written testimony of R. Frampton).)

131. Intervenors do not dispute any of the above facts. Their argument is that certain Whaler units are in time-share programs and those time-share interval owners were not given notice. (C. Fox, 4/14/00, 922:11--923:15.) However, actual notice to each and every owner is not required (nor is it possible since such time-share owners are not listed on the County real property records). Rather, the process of utilizing records of the County Real Property Tax Department, as required by MPC's Rules of Practice and Procedure, was satisfactory.

If there are multiple owners of the property, notification of the person(s) listed by name on the records of the County of Maui real property tax roll shall be deemed adequate notice as to all owners.

SMA Rules §12-202-13(g). It is undisputed that the Applicant utilized the County Tax records and therefore have complied with the notice requirements.

132. Furthermore, none of the Intervenors have claimed that they did not receive actual notice of this proceeding, and thus, the Intervenors have no standing to raise this argument.

XIV. DRAINAGE

133. J. Stephen Pitt, a professional engineer in civil engineering, testified as to drainage. (Exh. A-131 (written testimony of S. Pitt); S. Pitt, 4/13/00, 677:20-684:9.)

134. Mr. Pitt reviewed the project plans, topographic information for the property and the engineering report by Mr. Hirota (who prepared a drainage report for the initial SMA permit obtained in 1990, Exh. A-29). He conducted a percolation test and ran drainage calculations based upon the DPWWM drainage rules. Mr. Pitt prepared and submitted a report of his analysis. (Exh. A-47 (Pitt report); Exh. A-131 (written testimony of S. Pitt); S. Pitt, 4/13/00, 678:14-679:4.)

135. The amount of runoff generated by the construction of the Facility will be very minor, due to the fact that the structure will be on piers which minimizes the reduction in available penetrable surfaces, and due to the relatively small size of the Facility. It is planned to retain on-site any additional runoff generated by the construction of the Facility so that there is no net increase in runoff leaving the KBH property. (Exhs. A-29 (S. Hirota Drainage Report), A-47 (Pitt

report), A-131 (written testimony of S. Pitt); S. Pitt, 4/13/00, 679:10-22.)

136. The percolation tests conducted by Mr. Pitt revealed an average percolation rate of 20.5 feet per hour. In comparison, the inflow rate, based upon a 50-year storm would be only 6 inches per hour. Therefore, the inflow is much less than the percolation rate for the sandy soil at the project site. (A-47 (Pitt report, pp. C-1 to C-3).)

137. The County DPWWM comment letter of March 24, 1999, does not raise any objections regarding drainage and merely requires a detailed drainage report prior to issuance of the grading and building permit, which is its standard comment. (Exh. A-15).

138. This development will not have any substantial adverse environmental or ecological effect with regard to drainage issues. (Exh. A-131 (written testimony of S. Pitt).)

XV. GREASE DISPOSAL

139. Don Misner, building engineer for KBH, testified as to grease disposal. (Exh. A-120 (written testimony of D. Misner); D. Misner, 4/4/00, 266:11-271:15.)

140. There are currently four grease traps in the KBH kitchens. These traps collect grease from the kitchens before it gets into the sanitary sewer. The grease is pumped out of the traps once a month and disposed of by Ahuhana Pumping. There have been no incidents of grease leaking or spilling onto the grounds

of KBH. (Exh. A-120 (written testimony of D. Misner); D. Misner, 4/4/00, 266:11-271:15.)

141. The grease trap in the Facility will be emptied whenever it is full, by evacuating the grease into a temporary container, and transporting it to a holding tank. The holding tank will be emptied on a monthly schedule together with the other grease traps. This is similar to the operation at the Four Seasons Hotel. (Exh. A-120 (written testimony of D. Misner); D. Misner, 4/4/00, 266:11-271:15.)

142. This development will not have any substantial adverse environmental or ecological effect with regard to grease disposal.

XVI. OTHER IMPACTS

143. Other than what has been stated above, Intervenors did not challenge any of the other conclusions of the Applicant and their experts as to lack of impacts caused by the project. Therefore, as to all other potential issues, the facts and conclusions of no adverse impacts contained in the SMA application, as well as the Final EA for the project remain undisputed by the Intervenors, and it is determined that no such adverse impacts exist.

XVII. COASTAL ZONE OBJECTIVES AND POLICIES

144. HRS Chapter 205A (the Coastal Zone Management Act) includes laws relating to the management of the shoreline areas. HRS § 205A-2 sets forth the broad objectives and policies of the CZMA under ten categories:

Recreational Resources
Historic Resources
Scenic and Open Space Resources
Coastal Ecosystems
Economic Uses
Coastal Hazards
Managing Development
Public Participation
Beach Protection
Marine Resources

HRS § 205A-2(c) sets forth the policies for these categories. Any project in the coastal zone must consider all of the CZMA objectives. (Exhs. A-113A (written testimony of R. Frampton).)

145. The Facility in its proposed location is consistent with the objectives and policies set forth in the CZMA. With respect to the more relevant and contested objectives and policies, the following findings of fact are made.

A. Scenic and Open Space Resources and Beach Protection

146. With respect to scenic and open space resources, HRS §205A-2(c)(3) provides, in pertinent part:

- (A) Identify valued scenic resources in the coastal zone management area;
- (B) Ensure that new developments are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and existing public views to and along the shoreline;
- (C) Preserve, maintain, and, where desirable, improve and restore shoreline open space and scenic resources; and
- (D) Encourage those developments which are not coastal dependent to locate in inland areas.

147. Relative to Beach Protection, HRS § 205A-2(c)(9)(A) provides in pertinent part:

- (9) Beach protection

(A) Locate new structures inland from the shoreline setback to conserve open space and to minimize loss of improvements due to erosion.

148. The shoreline history of the fronting beach does not suggest that the Facility site will be subject to erosion or wave action in the future. The structure has been designed to allow for natural movement of the shoreline. The proposed siting of the Facility is more than eighty feet (80') inland from the shoreline, and does not affect public beach resources. The lateral beach walkway, running about 40 feet mauka of the shoreline, will continue to provide lateral access. Therefore, use of the beach itself and related public access will not be infringed upon by the proposed action. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

149. The Facility is designed on piers, which, in the case of an unprecedented erosion event would neither impact or be impacted by natural beach processes. (Exhs. A-113A (written testimony of R. Frampton).)

150. Impacts to coastal open space resources have been minimized by locating the Facility behind the existing hotel wings on the property, at the threshold of the makai portion of the courtyard created by the such structures. (Exhs. A-113A (written testimony of R. Frampton).)

151. See also Section VII. herein for findings relating to the issue of open space.

B. Economic Uses

152. HRS § 205A-2(c)(5) sets forth the "Economic Uses" policy of the CZMA and specifically provides as follows:

- (5) Economic uses
 - (A) Concentrate coastal dependent development in appropriate areas;
 - (B) Ensure that . . . coastal related development such as *visitor industry facilities* . . . are located, designed, and constructed to minimize adverse social, visual, and environmental impacts in the coastal zone management area; and
 - (C) *Direct the location and expansion of coastal dependent developments to areas presently designated and used for such developments and permit reasonable long-term growth at such areas, and permit coastal dependent development outside of presently designated areas when:*
 - (i) Use of presently designated locations is not feasible;
 - (ii) Adverse environmental effects are minimized; and
 - (iii) The development is important to the State's economy.

HRS § 205A-2(c)(5) (Emphasis added.)

153. The CZMA recognizes that visitor industry facilities are appropriate in the coastal zone and encouraged in designated areas such as the Ka'anapali Resort. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

154. Potential adverse impacts on the coastal zone from the proposed Facility are minimal. KBH has balanced environmental impacts with the requirements for the Facility, which has been located and designed to minimize environmental impacts. In addition, social impacts to the Maui community are viewed as positive which result from the incorporation of the Hawaiian cultural program into the Facility's design as well as through the provision of space for a local canoe club. In addition, the

Facility will have positive impacts on Maui's visitor industry as well as on State and local tax revenues. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

155. The Facility is in an area "presently designated" for "coastal dependent development." The Ka'anapali Resort area is designated and used for resort-related development. KBH proposes such "reasonable long-term growth" with the new Facility. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

156. The issue of whether the previously approved location of the facility is "feasible" is not even relevant, since KBH is not proposing to develop "outside of presently designated areas." HRS § 205A-2(c)(5)(C). Nevertheless, due to the importance of the success of the restaurant, canoe hale and educational elements of the project, the location of the Facility at the site previously approved is not feasible. (Exhs. A-113A (written testimony of R. Frampton).)

C. Coastal Hazards

157. The CZMA policy for coastal hazards provides in pertinent part:

Control development in areas subject to storm wave, tsunami, flood, erosion, hurricane, wind, subsidence, and point and nonpoint source pollution hazards.

HRS § 205A-2(c)(6)(B). The shoreline history of the fronting beach does not suggest that the proposed project site will be subject to erosion or wave action in the future. Nevertheless, the structure has been designed to allow for natural movement and

maintain structural integrity during extreme erosion events. (Exhs. A-15, A-113A (written testimony of R. Frampton).)

158. According to the FEMA flood area designations, the proposed restaurant site is located in zone "C", an area of little or no flooding. Portions of the parcel along the shoreline are within the A4 and V12 zones, however the Facility is not located in those zones. (Exhs. A-15 (flood map diagram), A-113A (written testimony of R. Frampton).)

159. With a ground elevation of 9-10 feet above the mean sea level ("MSL") and a structural design that supports the facility 6 feet above grade, the Facility will be above tsunami inundation levels (8 feet MSL). (Exhs. A-15, A-113A (written testimony of R. Frampton).)

160. To the extent any of the foregoing findings of fact are more properly construed as conclusions of law, and to the extent any of the following conclusions of law are more properly construed as findings of fact, said findings or conclusions shall be so construed.

161. Any of the proposed findings of fact submitted by the parties to this proceeding not already ruled upon by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

XVIII. OTHER PROCEDURAL MATTERS

162. The Hearing Panel's Proposed Findings of Fact, Conclusions of Law, Decision and Order was dated October 31, 2000.

163. Hearings Officer Robert Carroll's Dissent from Proposed Findings of Fact, Conclusions of Law, Decision and Order were dated November 1, 2000.

164. At its November 14, 2000 meeting, the MPC scheduled the decisionmaking meeting for January 9, 2001. Randall Endo, Esq. and Isaac Hall, Esq. appeared for their clients and stated their positions regarding setting the action meeting date.

165. At its January 9, 2001 meeting, a motion was made to grant the application for an SMA and SSV. The motion did not pass. Thereafter, a motion was made to deny the application for an SMA and SSV. That motion also did not pass. The matter was then deferred.

166. At its meeting of February 13, 2001, the MPC, by its own accord, voted to reopen the contested case hearing in order to conduct a site inspection.

167. The MPC conducted a site inspection on March 1, 2001.

168. At its meeting of March 13, 2001, the MPC voted in favor of the application for an SMA and SSV. Seven members voted in favor and approved the majority's Hearing Panel's Proposed Findings of Fact, Conclusions of Law, Decision and Order. Commissioner Star Medeiros recused herself, and Commissioner Sam Kalalau voted against approval of the report. No new conditions were imposed prior to approval.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the hearing panel makes the following conclusions of law:

1. The MPC is the authority in matters relating to the CZMA, Maui County Charter §8-8.4, and has the sole power to approve or deny applications for SMA and SSV permits.

2. Applicant has the burden of proof. The quantum of proof is a preponderance of the evidence. HRS § 91-10(5). Unless otherwise noted, every finding, conclusions and/or other determination herein is made upon a preponderance of the evidence.

3. Applicant has proven by a preponderance of the evidence that it is entitled to its requested amendment of its SMA permit because the development meets all of the criteria of the SMA Rules and HRS Chapter 205A. Applicant has further proven by a preponderance of the evidence that it is entitled to a SSV.

4. Even if a substantial adverse effect is found, the MPC is required to determine whether the effect can be practicably minimized, and when minimized, whether the effect is clearly outweighed by public health, safety, or compelling public interest. Topliss v. The Planning Commission, 9 Haw. App. 377, 394, 842 P.2d 648, 658 (1993).

5. Applicant's proposed development will not have any substantial adverse environmental or ecological effect; and any adverse effects are minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests. Such adverse effects considered include, but are not

limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect, and the elimination of planning options. (HRS § 205A-26(2)(A).)

6. The proposed development has been reviewed in light of the objectives, policies, and guidelines set forth in HRS Chapter 205A, and recited in § 12-202-10 and § 12-202-11, et. seq., of the SMA Rules, and the SMA guidelines set forth in those rules, and the development complies with same. (HRS § 205A-26(2)(B).)

7. The proposed development is consistent with County General Plan and zoning. (HRS § 205A-26(2)(C).)

8. The criteria for a shoreline area variance have been met by the Applicant because, based on the record presented, the proposed Facility and activity is necessary for and/or ancillary to:

Private facilities that are clearly in the public interest (SSV Rules § 12-5-13(a)(7)).

9. While "public interest" is not defined in the SSV Rules or HRS Chapter 205A, the hearing panel noted various statutes which provide guidance in construing the term.

a. In establishing the Aloha Tower Development Corporation, the Hawaii legislature found the purposes of strengthening the economic base of the community, enhancing the beauty of the waterfront, providing for public use of the waterfront, and stimulating commercial activities in downtown Honolulu were "in the public interest." HRS §206J-1.

b. In the area of historic preservation, the legislature found that "it is in the public interest to engage in a comprehensive program of historic preservation at all levels of government to promote the use and conservation of such property for the education, inspiration, pleasure, and enrichment of its citizens." HRS §6E-1.

c. The Hawaii State Planning Act, HRS Chapter 226, sets forth a number of public interests, including:

i. Increased and diversified employment opportunities to achieve full employment, increased income, and improved living standards for Hawaii's people. HRS §226-6(a)(1).

ii. Promoting and protecting intangible resources in Hawaii, such as scenic beauty and the aloha spirit, which are vital to a healthy economy.

iii. Fostering a business climate in Hawaii, including regulatory policies, that is conducive with the expansion of existing enterprises. HRS §226-6(b)(16).

iv. Achievement of a visitor industry that constitutes a major component of steady growth for Hawaii's economy. HRS §226-8(a).

v. Improvement of the quality of existing visitor destination areas. HRS §226-8(b)(3).

vi. Fostering an understanding by visitors of the aloha spirit and of the unique and sensitive character of Hawaii's cultures and values. HRS §226-8(b)(8).

10. The unique cultural, educational, recreational and economic benefits identified herein which will result from the Facility are clearly in the public interest.

11. Further, the Facility qualifies for a variance under the following:

Private facilities which will neither adversely affect beach processes nor artificially fix the shoreline; and the MPC finds that hardship will result to KBH if the Facility is not allowed within the shoreline area (SSV Rules § 12-5-13(a)(8)).

12. Hardship sufficient to satisfy SSV Rules § 12-5-13(a)(8)) would result to KBH if the Facility is not allowed within the shoreline area.

13. Appropriate conditions, set forth below, have been imposed upon the Applicant which satisfy SSV Rules § 12-5-13(c).

14. Each of the above two determinations is independently sufficient basis for granting this SSV. In addition, the proposed Facility and activity is necessary for and/or ancillary to boating, maritime, or water sports recreational facilities (SSV Rules § 12-5-13(a)(5)).

15. The proposed Facility and activity are consistent with the purpose of the SSV Rules, and meets the criteria necessary for a SSV.

DECISION AND ORDER

Based on the above findings of facts and conclusions of law, the MPC hereby grants the requested SMA amendment and SSV, such that the Facility is approved at the proposed location,

subject to the following conditions, which only apply to the development of the Facility sought by this application:

STANDARD CONDITIONS

1. Construction of the proposed project shall be initiated by November 1, 2002. Initiation of construction shall be determined as construction of offsite improvements, issuance of a foundation permit and initiation of construction of the foundation, or issuance of a building permit and initiation of building construction, whichever occurs first. Failure to comply within this two (2) year period will automatically terminate this Special Management Area Use Permit unless a time extension is requested no later than ninety (90) days prior to the expiration of said two (2) year period. The Planning Director shall review and approve a time extension request but may forward said request to the Planning Commission for review and approval.

2. Construction of the project shall be completed within five (5) years after the date of its initiation. Failure to complete construction of this project will automatically terminate the subject Special Management Area Use Permit. A time extension shall be requested no later than ninety (90) days prior to the completion deadline. The Planning Director shall review and approve a time-extension request but may forward said request to the Planning Commission for review and approval.

3. The permit holder or any aggrieved person may appeal to the Planning Commission any action taken by the Planning

Director on the subject permit no later than ten (10) days from the date the Director's action is reported to the Commission.

4. Final construction shall be in accordance with preliminary architectural plans dated January 6, 1999.

5. Appropriate measures shall be taken during construction to mitigate the short term impacts of the project relative to dust and soil erosion from wind and water, ambient noise levels, and traffic disruptions. Precautions shall be taken to prevent eroded soils, construction debris and other contaminants from adversely impacting the coastal waters.

6. The subject Special Management Area Use Permit shall not be transferred without prior written approval in accordance with §12-202-17(d) of the Special Management Area Rules of the Maui Planning Commission. However, in the event that a contested case hearing preceded issuance of said Special Management Area Use Permit, a public hearing shall be held upon due published notice, including actual written notice to the last known addresses of parties to said contested case and their counsel.

7. The applicant, its successors and permitted assigns shall exercise reasonable due care as to third parties with respect to all areas affected by subject Special Management Area Use Permit and shall procure at its own cost and expense, and shall maintain during the entire period of this Special Management Area Use Permit, a policy or policies of comprehensive liability insurance in the minimum amount of ONE MILLION AND NO/100 DOLLARS

(1,000,000.00) naming the County of Maui as an additional named insured, insuring and defending the applicant and County of Maui against any and all claims or demands for property damage, personal injury and/or death arising out of this permit, including but not limited to: (1) claims from any accident in connection with the permitted use, or occasioned by any act or nuisance made or suffered in connection with the permitted use in the exercise by the applicant of said rights; and (2) all actions, suits, damages and claims by whomsoever brought or made by reason of the non-observance or non-performance of any of the terms and conditions of this permit. A copy of the Certificate of Insurance naming County of Maui as an additional named insured shall be submitted to the Department within ninety (90) calendar days from the date of transmittal of the decision and order.

8. Full compliance with all applicable governmental requirements shall be rendered.

9. The applicant shall submit plans regarding the location of any construction related structures such as, but not limited to trailers, sheds, equipment and storage areas and fencing to be used during the construction phase to the Maui Planning Department for review and approval.

10. The applicant shall submit to the Planning Department five (5) copies of a detailed report addressing its compliance with the conditions established with the subject Special Management Area Use Permit. A preliminary report shall be reviewed and approved by the Planning Department prior to the

final subdivision approval and prior to the issuance of the grading permit. A final compliance report shall be submitted 30 days after the completion of the subdivision to the Planning Department for review and approval.

11. The applicant shall develop the property in substantial compliance with the representations made to the Commission in obtaining the Special Management Area Use Permit. Failure to so develop the property may result in the revocation of the permit.

PROJECT SPECIFIC CONDITIONS

12. To maintain safe lateral access to and along the shoreline, the existing lateral access walkway which currently exists within the shoreline area shall not be obstructed by the new Facility, associated landscaping, entertainment areas or portable seating. Further, portable outside seating areas shall be a minimum of ten feet from the existing lateral access walkway.

13. To minimize risk of adverse impacts on beach process and to minimize risk of structures failing and becoming loose rocks or rubble on public property, pier construction (as opposed to slab on grade) shall be used for the new Facility in accordance with the preliminary architectural plans submitted with the application.

14. To minimize adverse impacts on public views to, from, and along the shoreline, the proposed Facility shall be located completely within the "horseshoe" of KBH's existing three and six story buildings, i.e., the Facility shall be located no

further makai than the line drawn between the most makai points of the existing wings of the KBH.

15. The level of sound emanating from performances staged adjacent to and makai of the Facility shall not exceed 60 decibels at any of the lanais of The Whaler, and 75 decibels as measured at the most makai portion of the restaurant structure. In achieving the decibel limits stated herein it is acknowledged that occasionally sound from the performances may unintentionally exceed the stated limits for brief periods of time. A violation is determined when the performance sound level exceeds the background sound level by 3 decibels or more and is above the above-stated decibel levels for more than a total of 10 minutes or for more than 2 consecutive minutes, during the course of one evening's outdoor performance.

16. The applicant shall assure that any outdoor speakers it utilizes shall be of a directional type and shall assure that the sound from said speakers shall not be directed toward The Whaler. The applicant shall not operate any outdoor speakers past 8:30 p.m. except for special occasions, which may occur no more than six times annually.

17. The applicant shall not pave the unimproved vehicle access between The Whaler and the Ka'anapali Beach Hotel and shall use said access only for the following purposes:

- a. Temporary construction and landscaping access during the hours of 9:00 a.m. and 5:00 p.m.;

- b. Emergency access for police, fire trucks, and ambulances; and
- c. Transportation of special function equipment no more than six (6) times a year and occasional transport of racing canoes.

The applicant shall use its best efforts to minimize the noise resulting from its use of the vehicle access and to contain use to reasonable hours.

18. The applicant shall use its best efforts to minimize odors and noxious gases from being emitted into the atmosphere from the Restaurant kitchen and shall install an adequately equipped Vent Master (or equivalent) commercial kitchen ecology exhaust system that is of appropriate size based on the level of use expected at the Restaurant and is acceptable to the Hawaii State Department of Health. Said exhaust system, including its filtration devices, shall be maintained by the applicant according to the recommended instructions of the manufacturer of said equipment.

19. No construction, operation of equipment, storage of materials, excavation or deposition of soil or other materials shall occur seaward of the shoreline as certified on October 13, 1999.

20. Applicant shall implement Best Management Practices ("BMP") for maintaining construction debris, contaminants, and material on site. A plan setting forth the BMPs to be implemented

shall be reviewed and approved by the Planning Department prior to initiation of construction.

21. Construction waste shall not be disposed at the County's Central Maui Landfill. Alternative disposal sites such as the Maui Demolition and Construction Landfill shall be utilized.

22. The drainage system shall be designed and constructed to the satisfaction of the DPWWM according to the applicable laws and accepted engineering practice standards.

23. Pursuant to the recommendations of the State Historic Preservation Division of the Department of Land and Natural Resources ("SHPD") contained in its letter dated May 5, 1999, a limited archaeological assessment of subsurface deposits (with limited sub-surface testing) shall be conducted. Archaeological monitoring is required during any grading or excavation for the Facility. Should historic remains such as artifacts, burials, concentrations of shell or charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, and the find shall be protected from further damage. The contractor and/or landowner shall immediately contact the State Historic Preservation Division, which shall assess the significance of the find and recommend an appropriate mitigation measure, if necessary.

24. The Shoreline Setback Variance granted herein is dependent on the applicant's use of the Facility as a canoe hale and an educational/cultural facility in addition to its use as a

commercial restaurant. Should the Facility cease to be used as a canoe hale as represented by the applicant or cease to be used in the applicant's Po`okela program or an equivalent program promoting Hawaii's culture among employees and patrons, the Facility shall be deemed a nonconforming structure and shall not be reconstructed, enlarged or modified beyond normal repair and maintenance.

25. Prior to issuance of a building permit, the applicant shall meet with the Planning Department and the University of Hawaii, Sea Grant Extension Agent, to develop a mitigation plan for catastrophic erosion events other than shoreline hardening.


The conditions of this Special Management Area Use Permit shall be enforced pursuant to §12-202-23 and §12-202-25 of the Special Management Area Rules for the Maui Planning Commission.

Notice is hereby given (pursuant to MPC Rules § 12-201-82) of the parties' right to appeal under Haw. Rev. Stat. § 91-14.

Done at Wailuku, Maui, Hawaii, this 27th day of March,
2001, per motion on March 13, 2001.

MAUI PLANNING COMMISSION


JERRY EDLAO, Chairperson


JOE BERTRAM, III, Commissioner

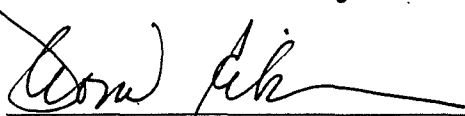
~~Sam Kalalau~~
--dissent--
SAM KALALAU, Commissioner



JEREMY KOZUKI, Commissioner


BERNICE LU, Commissioner

~~Star Medeiros~~
--recused--
STAR MEDEIROS, Commissioner

~~German Nascimento~~
GERMAN NASCIMENTO, Commissioner


MONA RICHARDSON, Commissioner


RANDY PILTZ, Commissioner

BEFORE THE MAUI PLANNING COMMISSION
STATE OF HAWAII

In the Matter of the) Nos. SM1 900040, SSV 990001
Application of)
) CERTIFICATE OF SERVICE
MR. MICHAEL B. WHITE,)
General Manager of the)
Ka`anapali Beach Hotel)
)
To Obtain a shoreline setback)
variance and an amendment to)
a Special Management Area Use)
Permit to construct a)
restaurant/canoe hale)
partially within the 150 foot)
shoreline setback area for)
the Ka`anapali Beach Hotel,)
TMK: 4-4-008:003,)
Ka`anapali, Lahaina, Island)
of Maui.)
_____)

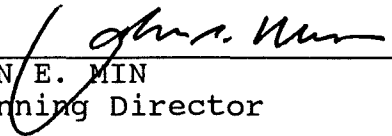
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties listed below, by certified mail, return receipt requested, by depositing same in the United States Mail, postage prepaid, this date, addressed as follows:

Isaac Hall, Esq. Certified mail, return receipt requested
2087 Wells Street 7000 1670 0012 8899 8392
Wailuku, HI 96793

Martin Luna, Esq. Certified mail, return receipt requested
CARLSMITH BALL 7000 1670 0012 8899 8422
2200 Main Street, Suite 400
Wailuku, HI 96793

DATED: Wailuku, Maui, Hawaii, March 28, 2001.



JOHN E. MIN
Planning Director

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

DR. JANELL McCULLOUGH	)	CIVIL NO.
ZEMEL, (Mrs. Zemel), DR. SIMON)	
ZEMEL, SHIRLEY SCHWARTZ,	)	APPELLANTS' DESIGNATION
RENE SHEPARD and KENT	)	OF THE RECORD ON APPEAL
McNAUGHTON,)	
)	
Appellants,)	
v.)	
)	
THE PLANNING COMMISSION)	
OF THE COUNTY OF MAUI,)	
JEREMY KOZUKI, in his capacity)	
as Chairperson of the PLANNING)	
COMMISSION OF THE COUNTY)	
OF MAUI and the KAA NAPALI)	
BEACH HOTEL,)	
)	
Appellees.)	

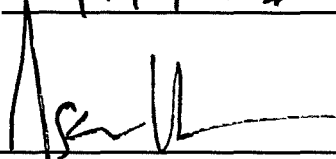
APPELLANTS' DESIGNATION OF THE RECORD ON APPEAL

TO: Clerk, Second Circuit Court, State of Hawaii

Pursuant to Rule 72(d)(1) of the Hawaii Rules of Civil Procedure, Appellants designate as the Record of Appeal the entire record and file of the Planning Commission of the County of Maui, with respect to the application of Mr. Michael B. White, General Manager of Kaanapali Beach Hotel to obtain a Shoreline Setback Variance, to obtain a Special Management Area Use Permit for a proposed Restaurant in 1990, in 1998 and an amended SMA permit in 1999, as well as applications for a Canoe Hale between 1990 and the present.

This record should include, but is not limited to, all papers, transcripts, minutes, documents, exhibits, and the record, as defined in HRS §91-9(e), with regard to the applications cited above.

DATED: Wailuku, Maui, Hawaii 4.17.04



Isaac Hall
Attorney for Appellants
Dr. Janell McCullough Zemel (Mrs. Zemel), Dr. Simon Zemel, Shirley Schwartz, Rene Shepard and Kent McNaughton

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

DR. JANELL McCULLOUGH	)	CIVIL NO.
ZEMEL, (Mrs. Zemel), DR. SIMON)	
ZEMEL, SHIRLEY SCHWARTZ,	)	ORDER TO CERTIFY AND
RENE SHEPARD and KENT	)	TRANSMIT THE RECORD
McNAUGHTON,	)	ON APPEAL
)	
Appellants,)	
)	
v.)	
)	
THE PLANNING COMMISSION)	
OF THE COUNTY OF MAUI,)	
JEREMY KOZUKI, in his capacity)	
as Chairperson of the PLANNING)	
COMMISSION OF THE COUNTY)	
OF MAUI and the KAA NAPALI)	
BEACH HOTEL,)	
)	
Appellees.)	

ORDER TO CERTIFY AND TRANSMIT THE RECORD ON APPEAL

TO: Planning Commission of the County of Maui
250 South High Street
Wailuku, Maui, HI 96793

In accordance with Rule 72(d)(1) of the Hawaii Rules of Civil Procedure, you are ordered to certify and transmit to the Circuit Court of the Second Circuit all of the contents of the Record of Appeal in the above-entitled matter, as set forth in the foregoing Designation of the Record on Appeal, within twenty (20) days of the date of this Order, or within such further time as may be allowed by the Court.

DATED: Wailuku, Maui, Hawaii _____

APR 17 2001

/sgd/C. CASIL (seal)

Clerk of the Court