SIERRA CLUB Kaua`i Group of the Hawai`i Chapter
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April 18, 2011

Kauai Planning Commission
c/o County Planning Department
444 Rice Street, Suite 473
Lihue, HI 96766

**Re: Kilauea Pavilion (part of the Anaina Hou project) Special Permit SP-2010-3, Use Permit U-2010-14, and Class IV Zoning Permit Z-IV-2010-15.**

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Aloha Planning Commissioners,

The Kauai Group of the Sierra Club desires to bring to your attention its serious concerns in regard to the Planning Commission's April 12th approval of a Special Permit (SP-2010-3) for Kilauea Pavilion.

We believe that: 1) the Special Permit process is not appropriate for granting uses to commercial projects such as the proposed Kilauea Pavilion on lands zoned State Agriculture and County Open; 2) the Kilauea Pavilion component of the Anaina Hou project does not, in any event, meet the criteria required for approval of a Special Permit; and 3) if it were allowed to stand, the April 12th decision to grant a Special Permit for a commercial project of this nature could have far-reaching, long-term negative consequences for agricultural lands throughout Kauai.

## 1. The Special Permit process is not appropriate for granting non-agriculture-related commercial uses on agricultural lands.

The appropriate procedure for considering applications for commercial uses that have no relation to agriculture on Agricultural land is to apply for a **variance or a rezoning**, and to make the showing that the proposed uses would meet the standards associated with a variance or rezoning. If the proposed uses met those standards, then the application for the variance or rezoning could legitimately be considered on its own merits.

Instead, the Kilauea Pavilion permit application has used the vehicle of a "Special Permit" as an end-run around compliance with the necessary variance or rezoning standards.

## 2. Hawaii Supreme Court precedent: Special Permits should not be used in the manner proposed for the Kilauea Pavilion.

In *Neighborhood Board No. 24* [1] the Hawaii Supreme Court applied the **"unusual and reasonable"** 5-point test from HRS Sec. 205 and Land Use District Regulations, under which all five of the following standards must be met for a Special Permit to be approved:

*(1) Such use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations;*

*(2) The desired use would not adversely affect surrounding property;*

*(3) The use would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, and police and fire protection;*

*(4) Unusual conditions, trends and needs have arisen since the district boundaries and regulations were established; and*

*(5) The land upon which the proposed use is sought is unsuited for the uses permitted within the District.*

In *Neighborhood Board No. 24*, the proposed use of agricultural lands was for an amusement park, which would have consisted of cultural theme rides, restaurants, fast food shops, retail stores, exhibits, theaters, amphitheater, nurseries, parking, sewage treatment and other related support services.

- The Kilauea Pavilion project proposes a similar commercial, non-agriculture-related use of agricultural land.

In *Neighborhood Board No. 24*, the Hawaii Supreme Court held that such a use did not constitute "unusual and reasonable use" and did not qualify for a Special Permit.

- **The Kilauea Pavilion project similarly does not qualify for a Special Permit.**

[1] 64 Haw. 265, 639 P.2d 1079, Supreme Court of Hawai'i. NEIGHBORHOOD BOARD NO. 24 (WAIANAE COAST) et al., Appellants, v. STATE LAND USE COMMISSION, State of Hawaii; Oahu Corporation and City and County of Honolulu Planning Commission, Appellees, No. 7112, Jan. 22, 1982.

**3. <u>The Kilauea Pavilion proposal does not pass the 5-point test that must be met under statute and *Neighborhood Board No. 24*</u>.**

(1) Commercial use of this Agricultural district land is contrary to the objectives of the Land Use Laws and Regulations.

(2) Uncontrollable crowd-generated noise of more than 55 decibels within 1000 yards of over 50 residences on similarly-zoned land would adversely affect those surrounding properties.

(3) The applicant has not made an adequate showing that public agencies would not be unreasonably burdened or liable for fire protection or sewage:

(a) Fire hydrant water for the project is being drawn from a likely unreliable reservoir rather than county water.

(b) The wastewater system has not been fully designed nor disclosed in the proposal, likely conflicts with the lot coverage limitations for the project,[2] and would be inadequate to handle the impacts of the outdoor amphitheater's potential audience size, which could be far greater than the indoor theater's capacity.

(4) No unusual conditions, trends or needs have arisen requiring that this Agricultural land be used for commercial purposes. If anything, current local and global trends strongly suggest that, to the contrary, Kauai needs to protect and conserve Agricultural lands for agricultural purposes.

(5) The parcel of land under consideration is still suited for agricultural use. The primary reason it varied from that use in the past was because it is near a significant transportation thoroughfare; but the land currently grows vegetation and is not unsuited for associated agricultural purposes.

We believe that an unbiased assessment would conclude that the five necessary conditions - <u>all</u> of which must be met - have <u>not</u> been met by the Kilauea Pavilion proposal, requiring denial of the Special Permit for the proposed commercial amphitheater on this Agricultural land.

**4. <u>The ramifications of approval of a Special Permit in this case could be staggering, threatening agricultural lands everywhere on Kauai</u>.**

If the Planning Commission were to leave standing its decision to grant a Special Permit for this commercial project - **a project that clearly does not meet the "unusual but reasonable" standards laid out in statute and case law** - how could it <u>not</u> grant Special Permits for future commercial projects on agricultural lands in Hanalei or Waimea or Kalaheo? Indeed, future developers' attorneys

[2] Note: The acreage figure stated on the public notice for the Special Permit conflicts with the impervious lot coverage requirement.

will demand that precedent and the requirements for equitable treatment and consistency of decision-making leave the Planning Commission with no alternative but to grant such Special Permits.

## Conclusion

The consequences of allowing the approval of this Special Permit to stand would be far-reaching and staggering. We therefore urge the Commission to seriously consider those consequences while there is still opportunity to do so.

Significant public relations campaigns have been waged both in support of, and in opposition to, this project's proposed commercial use of agricultural lands. We would therefore like to emphasize that the Kauai Group's testimony does not take a position in opposition to, or in favor of, the project *per se*:

- Our concern is focused on the fact that granting a Special Permit in this case could initiate an "open season" on all of Kauai's remaining agricultural lands.
- Our concern is focused on the fact that the appropriate process for considering this and similar projects that propose non-agriculture-related commercial uses on agricultural land is through deliberation on a request for a variance or rezoning.[3]
- Our concern is for the negative precedent that would be established by a decision to grant a Special Permit for a project of this nature.

We respectfully ask that the Commission consider the importance of upholding the integrity of Kauai's planning process and the county and state zoning and land use laws that have been established to protect Kauai's agricultural lands.

Mahalo Commissioners, for your consideration of these important issues,

Brad Parsons, on behalf of the
Sierra Club Kauai Group Executive Committee

[3] Indeed, the Commission's reconsideration and withdrawal of the approval of the Special Permit that was granted on April 12 would not necessarily mean rejection of the project, as the applicant could still request consideration of a variance or a rezoning for the project - the appropriate processes for considering the project - and the Commission could then consider whether the project meets the appropriate standards for a variance or rezoning.