

**COUNCIL OF THE COUNTY OF MAUI**  
**LAND USE COMMITTEE**

September 18, 2015

**Committee**  
**Report No. \_\_\_\_\_**

Honorable Chair and Members  
of the County Council  
County of Maui  
Wailuku, Maui, Hawaii

Chair and Members:

Your Land Use Committee, having met on July 22, 2015, makes reference to County Communication 14-137, from the Planning Director, transmitting a proposed bill entitled "A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM R-3 RESIDENTIAL DISTRICT TO B-2 COMMUNITY BUSINESS DISTRICT FOR PROPERTY SITUATED AT KIHEI, MAUI, HAWAII FOR THE PROPOSED KIHANA NURSERY."

The purpose of the proposed bill is to grant a request from Lawrence N. C. Ing, Esq., on behalf of Louis S. Walsh, Steven P. Walsh, and Lauren T. Walsh ("the Walshes"), for a Change in Zoning from R-3 Residential District to B-2 Community Business District for a parcel consisting of 38,879 square feet at 1746-A South Kihei Road, Kihei, Maui, Hawaii. The Change in Zoning would make the subject property's zoning consistent with the Kihei-Makena Community Plan.

Your Committee notes the owners of the property are the Walsh Family Trust, Lauren T. Walsh, and Steven P. Walsh. The property is in the Urban State Land Use District, within the Maui Island Plan's Urban Growth Boundary, and designated Business/Commercial in the Kihei-Makena Community Plan.

Your Committee further notes Kihana Nursery, a plant nursery and garden store owned and operated by Kihana Nursery, Inc., conducts business on the subject property. According to the Department of Planning, the nursery has been operating for years on residentially zoned property in Kihei, pursuant to Conditional Permits. Steven P. Walsh is president, and Louis S. Walsh is vice president of Kihana Nursery, Inc.

According to the Department, changing the property's zoning to B-2 Community Business District would create consistency with the

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underlying land use designations. "Nurseries (flower or plants)" are permitted uses under B-2 zoning.

Your Committee notes the Change in Zoning and associated nursery use would implement the following General Plan objectives and policies:

- "Promote an economic climate that will encourage diversification of the County's economic base and a sustainable rate of economic growth." (Countywide Policy Plan, page 60.)
- "Support economic decisions that create long-term benefits." (Countywide Policy Plan, page 60.)
- "Support and promote locally produced projects and locally owned operations and businesses that benefit local communities and meet local demand." (Countywide Policy Plan, page 60.)
- "Encourage businesses that promote the health and well-being of the residents, produce value-added products, and support community values." (Countywide Policy Plan, page 60.)
- "Encourage and support local businesses." (Maui Island Plan, page 4-6.)
- "Limit commercial services to neighborhood business uses or other low-key business activities with a residential scale on those properties which abut single-family residential areas." (Kihei-Makena Community Plan, page 18.)
- "Increase the availability and variety of commercial services to provide for regional needs and strategically establish small scale commercial uses within, or in close proximity to, residential areas." (Kihei-Makena Community Plan, page 27.)

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At the request of the Chair of your Committee, the Department of the Corporation Counsel transmitted a revised proposed bill, entitled "A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM R-3 RESIDENTIAL DISTRICT TO B-2 COMMUNITY BUSINESS DISTRICT (CONDITIONAL ZONING) FOR PROPERTY SITUATED AT KIHEI, MAUI, HAWAII, FOR THE PROPOSED KIHANA NURSERY," approved as to form and legality, incorporating a proposed condition of zoning and nonsubstantive revisions.

Your Committee notes the proposed condition of zoning would prohibit Kihana Nursery, Inc. from spraying pesticides in such a manner that would result in a negative impact on neighboring residences. It would also require Kihana Nursery, Inc. to notify adjacent residents before using chemicals other than "Roundup," "Bt (Bacillus thuringiensis)," "pyrethrin," and "neem oil." The Council imposed a similar condition by Ordinance 3202 (2004).

The Planning Director advised your Committee that the Department of Planning and the property owners have no objections to the proposed condition. The Director also said the Department is not aware of any complaints concerning the nursery operation on the subject property.

The Chair of your Committee received responses from the Department of Police and the Department of Environmental Management noting issues relating to parking and the installation of a sewer clean out (a capped pipe to provide access to the sewer line), respectively, have been resolved.

Your Committee revised the condition of zoning relating to pesticide use and notification to make it applicable to all potential owners of and operators on the subject property, noting Kihana Nursery, Inc. does not own the property.

Your Committee also added a second proposed condition of zoning to prohibit certain uses specified in the Maui County Code as permitted or accessory for the B-2 Community Business District. Some of the uses

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prohibited under the new condition include automobile services, sports stadiums, communication equipment, drive-in restaurants, car lots, and energy systems. Your Committee noted the location is inappropriate for the types of uses identified in the condition.

Louis S. Walsh, a member of the Walsh Family Trust, said the Walshes agreed with the new condition of zoning.

Your Committee voted 5-0 to recommend passage of the revised proposed bill on first reading and filing of the communication. Committee Chair Carroll and members Baisa, Cochran, Couch, and Crivello voted "aye." Committee Vice-Chair Victorino and member Guzman were excused.

Your Committee is in receipt of a revised proposed bill, entitled "A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM R-3 RESIDENTIAL DISTRICT TO B-2 COMMUNITY BUSINESS DISTRICT (CONDITIONAL ZONING) FOR PROPERTY SITUATED AT 1746-A SOUTH KIHEI ROAD, KIHEI, MAUI, HAWAII, THE SITE OF KIHANA NURSERY," approved as to form and legality by the Department of the Corporation Counsel, incorporating your Committee's recommended revisions and nonsubstantive revisions.

Your Committee is also in receipt of a revised Land Zoning Map L-5120, incorporating nonsubstantive revisions.

Your Committee is also in receipt of an agreement entitled "Unilateral Agreement and Declaration for Conditional Zoning," executed by the property owners, and approved as to form and legality by the Department of the Corporation Counsel.

Your Land Use Committee RECOMMENDS the following:

1. That Bill \_\_\_\_\_ (2015), as revised herein and attached hereto, entitled "A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM R-3 RESIDENTIAL DISTRICT TO B-2 COMMUNITY BUSINESS DISTRICT (CONDITIONAL ZONING)"

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**Report No.** \_\_\_\_\_

FOR PROPERTY SITUATED AT 1746-A SOUTH KIHEI ROAD,  
KIHEI, MAUI, HAWAII, THE SITE OF KIHANA NURSERY," be  
PASSED ON FIRST READING and be ORDERED TO PRINT;

2. That the County Clerk RECORD the unilateral agreement;  
and
3. That County Communication 14-137 be FILED.

This report is submitted in accordance with Rule 8 of the Rules of  
the Council.

  
\_\_\_\_\_  
ROBERT CARROLL, Chair

lu:cr:15026aa:cmn

ORDINANCE NO. \_\_\_\_\_

BILL NO. \_\_\_\_\_ (2015)

A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM R-3 RESIDENTIAL DISTRICT TO B-2 COMMUNITY BUSINESS DISTRICT (CONDITIONAL ZONING) FOR PROPERTY SITUATED AT 1746-A SOUTH KIHEI ROAD, KIHEI, MAUI, HAWAII, THE SITE OF KIHANA NURSERY

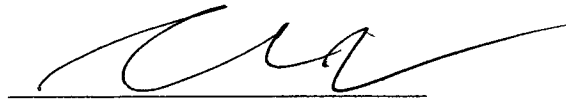
BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Pursuant to Chapters 19.18 and 19.510, Maui County Code, a Change in Zoning from R-3 Residential District to B-2 Community Business District (Conditional Zoning) is hereby granted for that certain parcel of land situated at Kihei, Maui, Hawaii, and identified for real property tax purposes by tax map key (2) 3-9-011:017, comprised of approximately 38,879 square feet, and more particularly described in Exhibit "A," attached hereto and made a part hereof, and in Land Zoning Map L-5120, which is on file at the Office of the County Clerk of the County of Maui, and by reference made a part hereof.

SECTION 2. Pursuant to Section 19.510.050, Maui County Code, the zoning granted by this ordinance is subject to the conditions set forth in Exhibit "B," attached hereto and made a part hereof, and the Unilateral Agreement and Declaration for Conditional Zoning, attached hereto and made a part hereof as Exhibit "C."

SECTION 3. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM  
AND LEGALITY



MICHAEL J. HOPPER  
Deputy Corporation Counsel  
County of Maui

## LAND DESCRIPTION

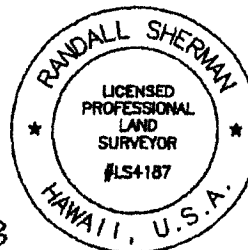
Being all of Lot 22-A-1, being a portion of Lot 22-A of the Waiohuli-Keokea Beach Homesteads and being also a portion of Land Patent Grant 8,972 to John Akina.

Situated at Keokea, Kihei, Kula, Maui, Hawaii  
TMK: (2) 3-9-11:017

Beginning at a 1/2 inch pipe (found) at the southwesterly corner of this parcel of land, being a southeasterly corner of Lot 22-A-2 of the Waiohuli-Keokea Beach Homesteads [TMK: (2) 3-9-11:061] and being also a point on the northerly boundary of Lot 23-A-2 of the Waiohuli-Keokea Beach Homesteads [TMK: (2) 3-9-12:034], the coordinates of said point of beginning referred to Government Survey Triangulation Station "PUU O KALI" being 2,029.66 feet north and 23,177.18 feet west and running by azimuths measured clockwise from true south; thence,

1. 181° 10' 20" 153.91 feet along Lot 22-A-2 of the Waiohuli-Keokea Beach Homesteads [TMK: (2) 3-9-11:061] to a 1/2 inch pipe (found); thence,
2. 271° 10' 20" 197.15 feet along the same to a point; thence,
3. Following along the same along a curve to the right with a radius of 20.00 feet the direct azimuth and distance being,  
309° 03' 10" 24.56 feet to a point; thence,
4. 346° 56' 169.30 feet along the westerly side of South Kihei Road to a point; thence,
5. 96° 45' 40" 259.41 feet along Lot 23-A-2 of the Waiohuli-Keokea Beach Homesteads [TMK: (2) 3-9-12:034] to the point of beginning and containing an area of 38,879 square feet.

This description is based on an actual field survey, and was prepared by me or under my direct supervision.



23 JUN 08

Randall Sherman  
Licensed Professional Land Surveyor  
State of Hawaii Certificate Number LS4187  
License Expiration Date: April 30, 2010  
Land Court Certificate Number 189

Date

## EXHIBIT "B"

### CONDITIONS OF ZONING

1. That for as long as the property is used as a commercial nursery, no owner or operator shall allow pesticides to be sprayed such that there would be a negative impact on neighboring residences, and the owner or operator shall notify adjacent residents before using chemicals other than "Roundup," "Bt (Bacillus thuringiensis)," "pyrethrin," and "neem oil."
2. That the following B-2 Community Business District permitted uses shall be prohibited: auditoriums, theaters, and gymnasiums including fitness centers, private clubs, and dance halls; automobile services; automobile upholstery shops; awning or canvas shops; baseball, football and other sports stadiums or activities; communication equipment, antenna or towers; drive-in restaurants; eating and drinking establishments; new and used car lots; religious, benevolent, or philanthropic societies, civil organizations, and quasi-public uses; sanitariums; sign-painting shops; swap meet or open air market; taxicab, car rental, and U-drive stations and offices. The following B-2 Community Business District accessory uses shall also be prohibited: energy systems, small-scale.



LAND COURT SYSTEM

REGULAR SYSTEM

Return By Mail ( ) Pickup ( ) : To:  
Office of the County Clerk  
County of Maui  
200 South High Street  
Wailuku, Hawai'i 96793

Total Number of Pages: 9

\\SERVER1\Data\Michelle\Rezoning\KIHANA NURSERY INC 5419-02\Unilateral Agreement And Declaration For Conditional Zoning.doc  
Affects Tax Map Key (Maui) **3-9-11:17**

UNILATERAL AGREEMENT AND DECLARATION FOR CONDITIONAL ZONING

THIS INDENTURE, made this 1 day of September, 2015, by **LOUIS SCOTT WALSH** and **MILDRED WALSH**, as Trustees of the Walsh Family Revocable Living Trust dated June 7, 2006, having all powers under said trust agreement, including full power to sell, convey, exchange, mortgage, lease, assign or otherwise deal with and dispose of all lands of the trust estate and interests therein, **LAUREEN T. WALSH** and **STEVEN P. WALSH**, all of whose mailing address is **1746-A S. Kihei Road, Kihei, Maui, Hawai'i 96753**, hereinafter referred to as "DECLARANT", and who is the owner of that certain parcel located at **Kihei, Maui, Hawai'i**, comprised of approximately **38,879 square feet**, and identified for real property tax purposes by Tax Map Key No(s). **(2) 3-9-11:17**, hereinafter referred to as "PARCEL" (or "PROPERTY").

WITNESSETH:

WHEREAS, the Council of the County of Maui, State of Hawai'i, hereinafter referred to as "Council", is considering the establishment of zoning for the Parcel, comprised of approximately **38,879 square feet**, which is more particularly

described in Exhibit "1", which is attached hereto and made a part hereof, and which is more particularly identified in Land Zoning Map No. L-5120, which is on file in the Office of the County Clerk of the County of Maui; and

WHEREAS, the Council recommends through its **Land Use Committee**, Committee Report No. \_\_\_\_\_, that said establishment of zoning be approved for passage on first reading subject to certain conditions, pursuant to Section 19.510.050, Maui County Code; and

WHEREAS, the Declarant has agreed to execute this instrument pursuant to the conditional zoning provisions of Section 19.510.050, Maui County Code;

NOW, THEREFORE, the Declarant makes the following Declaration:

1. That this Declaration is made pursuant to the provisions of Section 19.510.050, Maui County Code, relating to conditional zoning;

2. That until written release by the County of Maui, the Parcel, and all parts thereof, is and shall be held subject to the covenants, conditions and restrictions which shall be effective as to and shall run with the land as to the Parcel, from and after the recording of this Declaration with the Bureau of Conveyances or the Land Court of the State of Hawai'i, without the execution, delivery or recordation of any further deed, instrument, document, agreement, declaration, covenant or the like with respect thereto by the Declarant, the County of Maui, or any heir, devisee, executor, administrator, personal representative, successor, and assign; that the acquisition of any right, title or interest in or with respect to the Parcel by any person or persons, entity or entities, whomsoever, shall be deemed to constitute the acceptance of all of the covenants, conditions and restrictions of this Declaration by such person or persons, entity or entities; and that upon any transfer of any right, title or interest in or with respect to the Parcel the same shall be subject to, and the transferee shall assume and be bound and obligated to observe and perform all of the covenants, conditions and restrictions of this Declaration;

3. That this Declaration and all of the covenants, conditions and restrictions contained herein shall continue to be effective as to and run with the land in perpetuity, or until the Declarant notifies the appropriate County Department that

any of said covenants, conditions and restrictions are satisfied by the Declarant, and the appropriate County Department verifies the satisfaction and provides a written release of the covenant, condition or restriction;

4. That the term "Declarant" and any pronoun in reference thereto, wherever used herein, shall be construed to mean the singular or the plural, the masculine or the feminine, or the neuter, and vice versa, and shall include any corporation, and shall be held to mean and include the "Declarant", the Declarant's heirs, devisees, executors, administrators, personal representatives, successors, and assigns;

5. That the Declaration shall become fully effective on the effective date of the zoning ordinance approving the establishment of **B-2 Community Business** District zoning and this Declaration shall be recorded in the Bureau of Conveyances or Land Court of the State of Hawai'i;

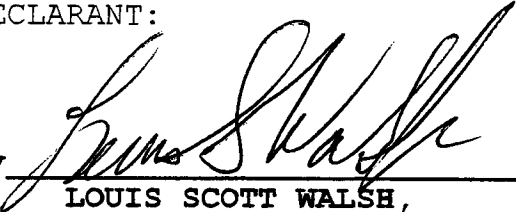
6. That the Declarant agrees to develop said Parcel in conformance with the conditions set forth in Exhibit "2", which is attached hereto and made a part hereof and which shall be made a part of the zoning ordinance;

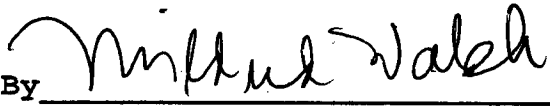
7. That the conditions imposed are reasonable and rationally relate to the objective of preserving the public health, safety and general welfare and such conditions fulfill the need for the public service demands created by the proposed use;


AND IT IS EXPRESSLY UNDERSTOOD AND AGREED that until released in writing by the County, the conditions imposed in this Declaration shall run with the land identified hereinabove and shall bind and constitute notice to all subsequent lessees, grantees, assignees, mortgagees, lienors and any other persons who claim an interest in said land, and the County of Maui shall have the right to enforce this Declaration by appropriate action at law or suit in equity against all such persons, provided that the Declarant or its successors and assigns may at any time file a petition for the removal of the conditions and terminate this Unilateral Agreement, such petition to be processed in the same manner as petitions for change in zoning.

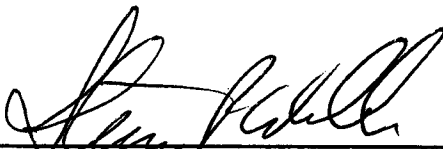
IN WITNESS WHEREOF, the undersigned has executed this Declaration the day and year first above written.

DECLARANT:

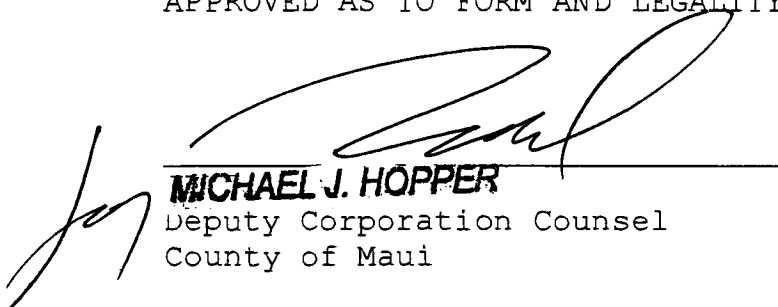
By   
LOUIS SCOTT WALSH,  
Trustee as aforesaid

By   
MILDRED WALSH, Trustee  
as aforesaid

By   
LAUREEN T. WALSH

By   
STEVEN P. WALSH

APPROVED AS TO FORM AND LEGALITY:

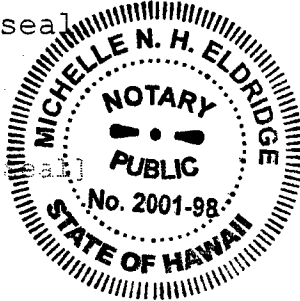
  
MICHAEL J. HOPPER  
Deputy Corporation Counsel  
County of Maui

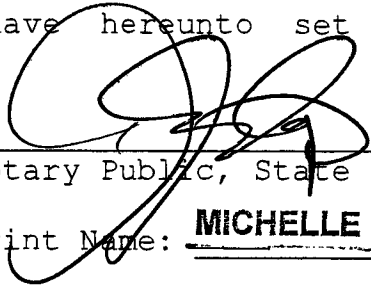
STATE OF HAWAI'I )  
 ) SS.  
COUNTY OF MAUI )

On this 1 day of September, 2015, before me personally appeared **LOUIS SCOTT WALSH** and **MILDRED WALSH**, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal

[Stamp or Seal]



  
Notary Public, State of Hawai'i

Print Name: MICHELLE N.H. ELDRIDGE

My Commission Expires: APR 01 2017

NOTARY PUBLIC CERTIFICATION

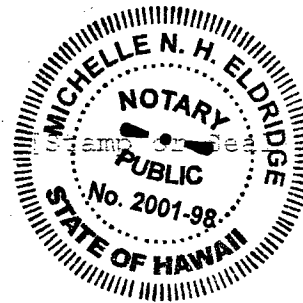
Doc. Date: SEP 01 2015 # Pages: 9

Notary Name: MICHELLE N.H. ELDRIDGE Judicial Circuit: Second

Document Description: UNILATERAL AGREEMENT  
AND DECLARATION FOR CONDITIONAL ZONING

Notary Signature: 

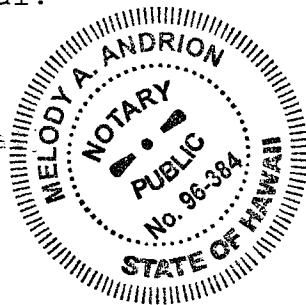
Date: SEP 01 2015



STATE OF HAWAI'I )  
 ) SS.  
COUNTY OF MAUI )

On this 4th day of Sept., 2015, before me personally appeared **LAUREEN T. WALSH**, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



Melody A. Andrion

Notary Public, State of Hawai'i

Print Name: MELODY A. ANDRION

My Commission Expires: JUL 02 2016

NOTARY PUBLIC CERTIFICATION

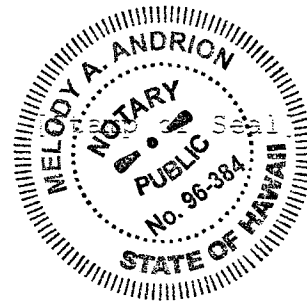
Doc. Date: SEP 01 2015 # Pages: 9

Notary Name: MELODY A. ANDRION Judicial Circuit: Second

Document Description: UNILATERAL AGREEMENT  
AND DECLARATION FOR CONDITIONAL ZONING

Notary Signature: Melody A. Andrion

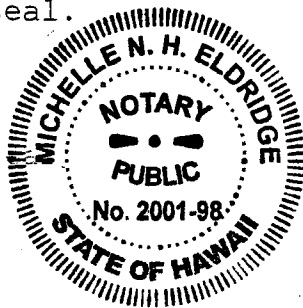
Date: SEP 04 2015

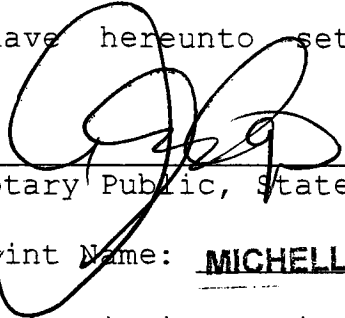


STATE OF HAWAI'I )  
 ) SS.  
COUNTY OF MAUI )

On this 2 day of September, 2015, before me personally appeared **STEVEN P. WALSH**, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



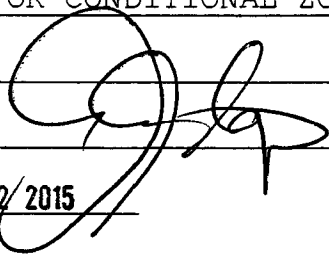
  
\_\_\_\_\_  
Notary Public, State of Hawai'i  
Print Name: MICHELLE N.H. ELDRIDGE  
My Commission Expires: APR 01 2017

NOTARY PUBLIC CERTIFICATION

Doc. Date: SEP 01 2015 # Pages: 9

Notary Name: MICHELLE N.H. ELDRIDGE Judicial Circuit: Second

Document Description: UNILATERAL AGREEMENT  
AND DECLARATION FOR CONDITIONAL ZONING

Notary Signature:   
Date: SEP 02 2015

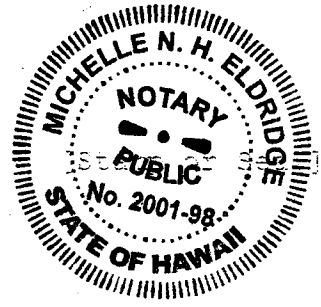


EXHIBIT "1"

**LAND DESCRIPTION**

Being all of Lot 22-A-1, being a portion of Lot 22-A of the Waiohuli-Keokea Beach Homesteads and being also a portion of Land Patent Grant 8,972 to John Akina.

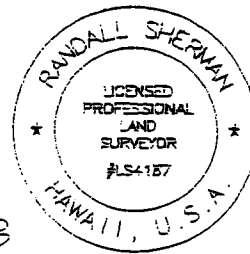
Situated at Keokea, Kihei, Maui, Hawaii

TMK: (2) 3-9-11:017

Beginning at a 1/2 inch pipe (found) at the southwesterly corner of this parcel of land, being a southeasterly corner of Lot 22-A-2 of the Waiohuli-Keokea Beach Homesteads [TMK: (2) 3-9-11:061] and being also a point on the northerly boundary of Lot 23-A-2 of the Waiohuli-Keokea Beach Homesteads [TMK: (2) 3-9-12:034], the coordinates of said point of beginning referred to Government Survey Triangulation Station "PUU O KALP" being 2,029.66 feet north and 23,177.18 feet west and running by azimuths measured clockwise from true south; thence,

1. 181° 10' 20" 153.91 feet along Lot 22-A-2 of the Waiohuli-Keokea Beach Homesteads [TMK: (2) 3-9-11:061] to a 1/2 inch pipe (found); thence,
2. 271° 10' 20" 197.15 feet along the same to a point; thence,
3. Following along the same along a curve to the right with a radius of 20.00 feet the direct azimuth and distance being,  
309° 03' 10" 24.56 feet to a point; thence;
4. 346° 56' 169.30 feet along the westerly side of South Kihei Road to a point; thence,
5. 96° 45' 40" 259.41 feet along Lot 23-A-2 of the Waiohuli-Keokea Beach Homesteads [TMK: (2) 3-9-12:034] to the point of beginning and containing an area of 38,879 square feet.

This description is based on an actual field survey, and was prepared by me or under my direct supervision.



27 JUN 08

Randall Sherman

Date

Licensed Professional Land Surveyor  
State of Hawaii Certificate Number LS4187  
License Expiration Date: April 30, 2010  
Land Court Certificate Number 189



EXHIBIT "2"

CONDITIONS OF ZONING

1. That for as long as the property is used as a commercial nursery, no owner or operator shall allow pesticides to be sprayed such that there would be a negative impact on neighboring residences, and the owner or operator shall notify adjacent residents before using chemicals other than "Roundup," "Bt (Bacillus thuringiensis)," "pyrethrin," and "neem oil."
  
2. That the following B-2 Community Business District permitted uses shall be prohibited: auditoriums, theaters, and gymnasiums including fitness centers, private clubs, and dance halls; automobile services; automobile upholstery shops; awning or canvas shops; baseball, football and other sports stadiums or activities; communication equipment, antenna or towers; drive-in restaurants; eating and drinking establishments; new and used car lots; religious, benevolent, or philanthropic societies, civil organizations, and quasi-public uses; sanitariums; sign-painting shops; swap meet or open air market; taxicab, car rental, and U-drive stations and offices. The following B-2 Community Business District accessory uses shall also be prohibited: energy systems, small-scale.