

COUNTY OF KAUAI
PLANNING DEPARTMENT

TO: Subdivision Committee, Planning Commission

SUBJECT: Extension Request

PURPOSE: ☒ File Final Subdivision Maps
☐ Complete Subdivision Improvements
☐ Other: _____

Subdiv. Application No.		Applicant(s)	
S-2006-45 & S-2006-46		Keālia Properties LLC.	
Location:	Keālia	Tax Map Key:	(4) 4-7-003:002 & 4-7-004:001
Extension Request No. (1 st , 2 nd , etc.)	Final Approval Granted On:	Previous Ext. Expired On:	
1 st	September 11, 2007	Not Applicable	
Subdivision Bonded: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Deadline to Complete Improvements: September 11, 2012	

APPLICANT'S REASONS: Additional time is being requested to complete the infrastructure improvements for the subdivision. The delay has been attributed to the complexity and size of the overall project.

**PLANNING DEPARTMENT
EVALUATION & RECOMMENDATION**

EVALUATION: Please refer to next page...


RECOMMENDATION: Please refer to next page...


Staff Planner
05 Sept 2012
Date

☐ Approved and Recommended
to Planning Commission

☒ Denied

Comments:


Planning Director
9/6/12
Date

SEP 11 2012 D.I.a. & b.

**COUNTY OF KAUAI
PLANNING DEPARTMENT**

I. FINDINGS/BACKGROUND

A. PROJECT DESCRIPTION

The Keāliakealanani Agriculture Subdivision is located on the mauka (mountain) side of Kūhiō Highway, just north of Kapaʻa Town, and situated directly across the Keālia Kai Subdivision. The project involves parcels on both sides of Keālia Road and the combined land area of the project is 2,029.432 acres. Once completed, a total of 188 CPR Units will be available for purchase.

The Makeʻe Parcel is being developed in conjunction with the neighboring parcel to the north identified as Tax Map Key: (4) 4-7-04:01, which has been processed through Subdivision Application No. S-2006-46 (Keāliakealanani Agriculture Subdivision– Kumukumu Parcel). The proposed subdivision establishes a total of 44 lots within the Agriculture & Open Zoning Districts and 4 roadway lots. The subject parcel is approximately 944.33 acres in size and extends from Hauaʻala Road to the west and Kūhiō Highway to the east.

The Kumukumu Parcel is being developed in conjunction with the neighboring parcel to the south identified as Tax Map Key: (4) 4-7-003:002, which has been processed through Subdivision Application No. S-2006-45 (Keāliakealanani Agriculture Subdivision – Makeʻe Parcel). The proposed subdivision establishes a total of 24 lots within the Agriculture & Open Zoning Districts and 4 roadway lots. The subject parcel is approximately 1,085.102 acres.

Pursuant to the requirements specified in Section 9-3.6 of the Subdivision Ordinance, Kauaʻi County Code (1987), once the construction plans have been approved, the Applicant has the option to proceed with constructing the necessary improvements prior to seeking final subdivision map approval, OR entering into an agreement with the County guaranteeing the completion of the improvements within a reasonable time period. Once executed by the respective parties (Applicant & County), the Applicant can then obtain final subdivision map approval by the Planning Commission.

In this instance, the subdivision obtained final subdivision approval from the Planning Commission on September 11, 2007 and the Applicant executed a Subdivision Agreement which specified that the improvements would be completed within a five (5) year period. The construction plans for the project were approved in August 2007 and since then, the project has changed ownership twice -- once due to foreclosure (see correspondence from previous owners dating

back to 2009)-- and there has been no construction activity at the project site. Section 9-3.5(e) states that the approved construction plans are in effect for only one (1) year unless construction has started. If the construction plans were to lapse, the subdivider is required to resubmit the plans for review in order to get recertified. The purpose for recertification is to assure that the construction plans are designed to comply with the construction standards that exist at the time of approval.

II. APPLICANT'S REQUEST

A. Justification

As previously noted, due to the complexity and size of the project, the Applicant is requesting additional time to complete the infrastructure improvements and to substitute the existing security (surety bond) for the project with a mortgage held by the County of Kauai (refer to Applicant's July 25, 2012 letter) valued in 2007 at \$18,420,000.00.

The Applicant is also proposing that additional time is necessary to complete "Community Improvements" located on the property, which are as follows:

1. Rodeo Parcel: renovation of the existing rodeo parcel with improvements of up to \$500,000; the rodeo parcel is then proposed to be donated to a non-profit corporation.
2. Community Sports Park: donate a 14.7 acre lot parcel to the County for the purposes of a Community Sports Park.
3. Keālia Store: construct tenant improvements of up to \$350,000 to the store located on the subject property, currently under lease to Keālia Kountry Store, LLC.
4. Poi Mill: construct a poi mill on the Property with improvements of up to \$500,000.

In the request, the Applicant concludes with the following:

- KP (Keālia Properties) is currently negotiating a resolution with the County of real property tax appeals for the Property, if KP is unable to resolve its tax appeals by September 30, 2012, KP shall have the right to request to terminate the Subdivision Agreements and amendment thereto, including any approved extension or substitution of security, and the terms therein shall be void.

III. EVALUATION

In considering the Applicant's request, the Department will breakdown its evaluation into three (3) parts: A) Subdivision Extension, B) Surety Substitution, and C) Final Evaluation Points.

Furthermore, due to the Applicant's unusual request, the issues presented before the Commission may appear disjointed. Many of these issues have never been approached in either the Department or Planning Commission's history, and they have prompted our staff to identify as fully possible the elements that could either pose harm to the County, or set unwanted precedents leading to abuse of the Subdivision Ordinance.

The Department's evaluation and recommendations below apply only to information provided by August 31, 2012. Notwithstanding the deadline, further information may be provided to the Commission by the Applicant whereby the Department did not integrate into this report due to lack of sufficient review time.

A. SUBDIVISION EXTENSION

Extension requests are primarily processed for the purpose of continuing a tentative approval for a subdivision application or in this case, allowing an Applicant to continue construction of the necessary infrastructure improvements for a project. In determining whether additional time should be granted, an evaluation is made of the project's progress and whether the Applicant is **progressively working** towards completion of the improvements.

In considering the extension request, it should be noted that the Applicant has made no progress with the development. A Surety Bond & Contractor's Performance Bond has been posted and accompanies the Subdivision Agreement. The Subdivision Agreement binds the Applicant with the County and it is intended to assure that in the event the Applicant fails to complete the improvements, the County is authorized to utilize the bond to complete the improvements.

The proposed development involves an extensive amount of on-site improvements. Since it is uncertain as to when the required infrastructure improvements will be completed, an extension of time is necessary and being requested. Because there has been no construction activity at the project since final approval was granted five years ago, the Applicant must have the construction plans recertified in order to assure that the construction standards identified in the plans are current. Once approved, the Applicant must also submit an updated construction cost estimate to the reviewing agencies (Public Works & Water) for their review and approval in order to determine that the bond posted for the project is adequate.

1. Subdivision Agreements

After receiving Tentative Subdivision Approval, an applicant required to construct improvements may receive Final Subdivision Approval one of two ways:

- a. complete construction; or,
- b. execute a subdivision agreement and post bonding and/or guarantees.

Under the subdivision code:

- *After approval of the construction plan, the applicant may construct the required improvement prior to seeking approval of the final subdivision map, or the applicant may enter into an agreement with the County guaranteeing the construction of improvements at his own expense within a reasonable time period specified by the Planning Commission in which case he may seek approval of the final subdivision map prior to construction of the required improvements. (Section 9-3.6, Kauai County Code (emphasis added))*

The 2007 subdivision agreement was executed pursuant to this code section. Valuation is a necessary function of the subdivision agreement process to guarantee protection of the County's interests. Under Section 9-3.6(b)(2)(A), Kaua'i County Code, a required estimated valuation of the improvements accompany construction plan review:

- *A surety bond (other than personal surety) in the sum equal to the cost of all work required to be done by the applicant as estimated by the County Engineer and [Water] Manager pursuant to the subdivision agreement and conditioned upon the full and faithful performance of any and all work. The surety bond shall provide that should the applicant fail to complete as required within the time specified by the Planning Commission, the County may complete the work and recover the full cost and expense thereof from the surety. (Emphasis Added)*

Further, the only changes under the code entertained after execution of an agreement are time extensions:

- *A subdivision agreement, as approved by the County Attorney, guaranteeing that the applicant will complete the construction of required improvements free of all liens within a time period specified by the Planning Commission and will make full payment therefore, and providing that if the applicant fails to do so complete the improvements within the time specified, or an extension as may be mutually agreed upon, the County may complete the improvement and recover the full cost of expenses thereof from the applicant. (Section 9-3.6(b)(1), Kauai County Code (emphasis added))*

Beyond extensions of time, amendments to the subdivision agreement require re-approval of the construction plans as prescribed under Section 9-3.5(e), and further discussed, *below*.

Lastly, beyond cash and negotiable bonds, the Commission has the authority to accept other types of securities:

- Cash, negotiable bonds or other securities acceptable to the Planning Commission in an amount equal to that prescribed for a surety bond under Section 9-3.6(b)(2)(A).

These "other securities" must be an amount equal to the valuations determined by the County Engineer and Water Manager.

2. Subdivision Construction Plan Approval

Execution of a subdivision agreement as allowed under the code, and in lieu of actual improvement construction, relies heavily upon the review of the proposed construction plans by other agencies and their valuation. As described *above*, subdivision construction plan approval must come before a subdivision agreement can be executed. Approval of the construction plan is time-limited by Section 9-3.5(e) to one (1) year, and recertification is prescribed by ordinance:

- *The approved construction plans shall be in effect for only one (1) year unless construction is started. If construction is not started within this one (1) year period, the construction plans shall be resubmitted for review and approval by all agencies.*

The law prescribes an expiration as a means to ensure proper compliance with all pertinent construction codes.

B. SURETY SUBSTITUTION

Issues Before the Commission:

- *Has the Applicant Met the Submittal Requirements for a Request Beyond an Extension?*
- *Does A First Mortgage on the Property Meet the Legal Standard as "Other Security?"*
- *If A First Mortgage Meets the Legal Standard, Is the Proposed Mortgage Equal in Value to the Amount Required for Bonding?*

1. Submittal Requirements

The Applicant's proposal and supporting submittal information can be characterized as "problematic" and "lacking." As outlined above, the Department informed the Applicant of its concern regarding the substance of its July 25, 2012 submittal and requested additional disclosure documents and recertified construction plans to derive the proper bonding amounts for the project. To date, the Applicant has failed to provide the Department and the Commission with said documents.

2. A First Mortgage as "Other Security"

Under the Subdivision Ordinance, the phrase "other securities" appears with cash or negotiable bonds as acceptable guarantees. By referencing "cash" and "negotiable bonds" the securities sought by county lawmakers were those with high liquidity.

The first-mortgage as proposed does not provide high liquidity. Subdivision guarantees are meant to ensure timely construction and completion of improvements outlined at tentative approval. Foreclosure proceedings then eventual liquidation would cost the County of Kaua'i substantial amounts of time and money.

Even, if a first mortgage meets the legal standard of an "other security"—which the Department still holds does not—the appropriate evaluation of the property's worth in the context of liquidity is its market value, NOT the potential for development. The risk on this project is high given past defaults and requested length of extension. As such, if a first mortgage is to be considered, it would have to be at an acreage consideration in the higher end of the range.

3. Community Improvements

The proposed request for the extension to allot a sufficient amount of time to complete certain "Community Improvements" gives little to no assurance that said improvements will actually be made. Three (3) of the four (4) proposed improvements (i.e. the Rodeo Parcel, the Keālia Store, and the Poi Mill) are proposed to be improved at an "up to" dollar figure amount (e.g. improvements up to \$500,000); which is to say, the improvements will not exceed that dollar amount. The improvements—as proposed—could be well below the specified dollar amount, with little or virtually no improvement occurring at all.

Given the lack of any assurance that substantial capital improvements will be made to the respective facilities and/or parcels, a time extension is not be warranted.

The one (1) "Community Improvement" that does not propose capital improvements and does require additional time is the donation of a 14.7 acre Community Sports Park. The Applicant states this donation will occur within thirty (30) days of approval of the proposed subject subdivision extension. While this "Community Improvement" could warrant an additional thirty (30) day extension, it certainly does not warrant an eight (8) year extension.

C. FINAL EVALUATION POINTS FOR CONSIDERATION

In reviewing the Applicant's request, the following should be considered:

1. The Applicant has not met the Subdivision Ordinance requirements concerning recertification of the construction plans and their amendment and extension request should be denied. As described above, the construction plans were approved in August 2007 and NO construction activity has occurred at the project site. At the very minimum, the construction plans should be recertified to assure that the improvements are designed to comply with the construction standards that exist at the time of approval.
2. As previously stated, under the Subdivision Ordinance, the phrase "other securities" appears with cash or negotiable bonds as acceptable guarantees. By referencing "cash" and "negotiable bonds" the securities sought by county lawmakers were those with high liquidity.

The first-mortgage as proposed does not provide high liquidity. Subdivision guarantees are meant to ensure timely construction and

completion of improvements outlined at tentative approval. Foreclosure proceedings then eventual liquidation would cost the County of Kauai substantial amounts of time and money that it may not have at that time.

3. Under the Subdivision Ordinance, the voiding of a subdivision approval does not preclude an applicant from reapplying. However, this particular proposal seeks to take one of the state's largest agricultural subdivisions that is meant primarily for residential purposes and exempt it from many of the new requirements instituted by the County of Kaua'i since 2007.
4. Public policy has changed concerning density on Agricultural Subdivisions with mixed zoning. After Final Subdivision Approval was granted in 2007, the County policy makers recognized the negative effects created by the interface between the County's Zoning Ordinance and the density allowed per county zoning district. One particular loophole affording greater density was the presence of county zoned "Open" lands within the State Land Use Agricultural District. The Council moved in 2010 to close the "density bonus" loophole, and when doing so found the following:
 - *The intent of this bill is to close the County Open District "density bonus" as discussed in the County General Plan by imposing controls on development of land zoned County Open and Agricultural Districts within the State Land Use Agricultural District, specifically by imposing a density cap and limitations on the subdivisions containing mixed zoning of County Open and Agricultural districts. ... [T]he public has voiced concerns and has made numerous references to problems and inconsistencies in the regulation of County Open Zoning Districts, particularly the proliferation of exclusive and gated residential communities which in nature runs counter to the stated purpose of the County Open District. [T]he proliferation of agricultural subdivisions has led to development in lands never intended for such residential uses which are not in connection to a farming operation, all of which overtaxes the County's infrastructure with regard to roads, water, wastewater and other services and carries a higher unit cost to service. [T]he County Council believes that the preservation and protection of open areas are of sufficient concern to merit legislation that prevents development and subdivision of County Open Districts at densities appropriate to the stated purposes of the County Open Districts in the CZO and land management goals set forth in the County General Plan. (Findings and Purpose. County of Kauai Ordinance 896)*

The effect of Ordinance No. 896 decreased allowable density by capping open zoned lands at the same density limits as agricultural lands once a certain parcel acreage threshold was met.

The subject parcels are mixed zoning districts Open and Agriculture. Previous to Ordinance No. 896, the parcel was eligible for entitlements up to 240 Farm Dwelling Units (FDU's) although the Developer elected to voluntarily decrease the amount of density to 188 FDU's.

If Ordinance No. 896 was applied to this particular project, it would only be entitled to 115 FDU's. The effect of grandfathering this particular project would run counter to current public policy relating to large-scale agricultural mixed zoned subdivisions by allowing an additional 73 units. The Applicant has not elaborated why its project merits grandfathering from the applicability of this ordinance against current County public policy.

5. Public policy has changed concerning Affordable Housing. County residents have consistently raised concerns regarding the lack of sufficient affordable housing. The County's adoption of Ordinance 860 normalized affordable housing requirements for all developments, and created thresholds for triggering affordable housing requirements. Ordinance 860 was adopted in December 2007.

A total of 56 affordable housing units would be required for construction if Ordinance 860 was applied to a proposed development in the present day. No affordable housing units are proposed either in the original or modified proposal.

6. The Applicant seeks to grandfather itself from the change in public policy concerning the need for affordable housing throughout the County. The Applicant has not elaborated why its project merits grandfathering from the applicability of this ordinance against current County public policy.
7. Typically the Planning Commission is placed as a public authority to judge the impact of a proposed project, and determine whether impacts presented by a project warrant a sufficient nexus to require mitigation efforts. However, the approval and acceptance of a first-mortgage by the County would essentially place the Planning Commission in the position of a financial institution or bank, beyond its traditional quasi-judicial permitting role.
8. A mortgage held by the County saves the Developer the premiums required to maintain financial guarantees as set forth by the subdivision

agreements. The assumption of risk by the County could be compared to the risk held by bonding companies or banks guaranteeing completion of government-required infrastructure through construction bonds or letters of credit. The premium on construction bonds usually run a construction company between 1-4% per year of the guaranteed amount, with a higher premium usually levied on projects with higher risk of default. The Department is unclear whether other County approvals would be required to accept a mortgage in this manner.

9. Given the uncertified value of the improvements from 2007 at \$18,420,000.00, and utilizing the premium range charged by bonding companies, the potential amount saved by the Developer, if the County accepted the mortgage, would range between \$1,500,000.00 to \$6,000,000.00 over eight years.
10. The purchase price of the approximately 2000 acre property with entitlements was \$21,000,000 (see Applicant's letter dated August 30, 2012).
11. The only current direct consideration to the County is 14.7 acres for a park.
12. Other indirect considerations like the Rodeo, Poi Mill and store remodelling appear beneficial notwithstanding their direct benefit to private entities. However, these proposals are superficial and lack an explanation of controls or best practices proposed to ensure enduring benefit to the community and an explanation concerning the broader benefits beyond those to the private entities. Especially troubling is the proposed establishment of a non-profit to run the rodeo without any explanation how such a non-profit would be managed, financed, and made open for public use (see July 25th and August 30th letters).
13. The appropriate evaluation of the property's worth in the context of liquidity is its market value, NOT the potential for development.
14. The risk on this project is high given past defaults and requested length of extension. As such, if a first mortgage is to be considered, it would have to be at an acreage consideration in the higher end of the range, and the land should be conveyed immediately with a release from the Applicant to not claim the consideration precludes the County from voiding the subdivision if conditions of the subdivision agreement are not met.
15. Pursuant to Chapter 343 of the Hawai'i Revised Statutes (HRS), as amended, the subject request by the Applicant to substitute the security for

the project in lieu of the surety and contractor's performance bond may trigger an Environmental Assessment if improved lots were mortgaged. Notwithstanding their objection, the Developer has proposed and we are only considering unimproved lots for the purposes of evaluating the first mortgage. The Department remains unclear whether such segmentation between improved and unimproved lots is allowed, but is proceeding with the Developers "unimproved lots" proposal with the caveat a disclosure document may still be required.

IV. SCENARIOS

In reviewing the Applicant's request, one of the following scenarios can occur:

1. The extension is denied.
2. The extension is approved without changes to the requirements;
3. The extension is approved with modified time frames but no modifications or additions to the requirements; or
4. The extension is approved with modifications and/or additions to the requirements.

A. Scenario 1: The Extension is Denied

Scenario 1 would entail the denial of the Applicant's request on the merits and the premise the Applicant can always reapply for the entitlements. This scenario is recommended by the Department.

Given the totality of considerations, the Department believes the Developer is engaging in land banking at the cost and high risk of County taxpayers. The first mortgage proposition attempts to reduce cash flow liability for a developer and does not reflect well on the developer's capacity and wherewithal to timely complete the project. The direct consideration given in lieu of the County's potential risk (i.e. the 14.7 acre park) is relatively small amount when compared to the potential saved by the applicant. Further concerning is the lack of controls or best practices on indirect benefits proposed.

The Department does not believe the mortgaging of unimproved lots meets the definition of "other securities acceptable to the Planning Commission in an amount equal to that prescribed for a surety bond[.]"

Further, the entitlements sought for grandfathering perpetuate negative societal issues addressed in recent years through County Council public policy changes. The Department believes this project runs counter to the public desire for less residential subdivisions on agricultural lands, and the need for affordable housing.

The Department is also concerned with the precedent setting nature should this proposal be accepted. Subdivision completion depends greatly on financial wherewithal and viability as evidenced by the posting of guarantees. This proposal would create a loophole whereby developers can now request financing through the County of their guarantee requirements.

Lastly, many of the submittal requirements under the Code have not been submitted prior to the expiration date of the subdivision agreement.

This project has floundered over the past five years with NO EVIDENCE the Developer has been PROGRESSIVELY WORKING toward completion. The Department recommends denial of the extension.

B. Scenario 2: The Extension is Approved Without Changes to the Requirements.

The Planning Commission may determine that the Applicant has provided sufficient justification for an extension, but not enough to justify a mortgage substitution. In this case, the Commission may approve an extension for an appropriate period, but deny the mortgage substitution for the bond requirement request.

The Commission may determine that the First Mortgage offered by the Applicant in lieu of their original agreement to post letters of credit is not an acceptable "other securities" to guarantee completion of the subdivision. Under the code outlined above, the phrase "other securities" appears with cash or negotiable bonds as acceptable guarantees. Again, the Department is unclear whether other County approvals would be required beyond Commission action.

The Department believes the Subdivision Ordinance guides the Commission when interpreting the phrase "other securities." In particular, by referencing "cash" and "negotiable bonds" the securities sought by county lawmakers were those with high liquidity.

The Department does not believe the first-mortgage as proposed provides high liquidity. Here, the developer proposes an encumbrance on the actual lands entitled by the subdivision approvals. It is clear to the Department that the code-required subdivision guarantees are meant to ensure timely construction and completion of improvements outlined at tentative approval. Foreclosure

proceedings and eventual liquidation would cost the County substantial amounts of time and money to raise the necessary capital for project completion.

Under this extension scenario, the Applicant should have provided the following as part of their request:

1. Recertified construction drawings;
2. Updated construction cost estimate; and,
3. A bond or letter of credit naming the County of Kaua'i as beneficiary.

Due to the absence of these items, and the impending expiration, the Commission would need to provide time to the Applicant to provide the necessary items for Commission action.

C. Scenario 3: The Extension is Approved with Modified Time Frames But No Modifications or Additions to the Requirements.

A customary extension request is for one year. Certainly, the Planning Commission may determine that the Applicant has provided sufficient justification for an extension. However, eight (8) years is highly unusual and we would recommend the customary extension under this scenario.

The Commission may also determine that there is not enough justification for a mortgage substitution. In this case, the Commission may approve an extension for an appropriate period significantly less than eight (8) years, but deny the mortgage substitution request.

As in Scenario 2 above, the Commission may determine that the First Mortgage offered by the Applicant in lieu of their original agreement to post letters of credit is not an acceptable "other securities" to guarantee completion of the subdivision. Under the code outlined above, the phrase "other securities" appears with cash or negotiable bonds as acceptable guarantees.

As for the extension period, in their 7/25/12 letter, KP represents that:

"Request for Extension" (page 1, Item 1), states "The Subdivisions Agreements contemplated five (5) years to complete the improvements with approved construction plans, thus, KP needs more than five (5) years to resubmit and obtain approved construction plans and complete construction."

KP's statement is unclear why such a long extension is warranted, and how plan approval and actual construction would be broken down. The recent Contractor's

contract and subdivision bond documents produced in their August 30th submittal provide timelines. However, it is difficult to discern with a certainty the viability of this timeline given its reliance on antiquated approvals and the absence of the required and updated construction plan approval and valuations required under law.

Under this extension scenario, the Applicant should have provided the following as part of their request:

1. Recertified construction drawings;
2. Updated construction cost estimate; and
3. A bond or letter of credit naming the County of Kaua'i as beneficiary.

Due to the absence of these items, and the impending expiration, the Commission would need to provide time to the applicant to provide the necessary items for Commission action.

D. Scenario 4: The extension is approved with modifications and/or additions to the requirements.

Scenario 4 would require the commission to evaluate the proposal on its merits and modify the proposal to extend time and accommodate a first mortgage. If the Commission determines the project should be extended on its merits and a first mortgage is acceptable, then the Commission must determine the value of unimproved lands equals the amount to be guaranteed.

As outlined above, if the Commission were to deem the First-Mortgage an acceptable "other security," it also must be equal to that "prescribed for a surety bond under Section 9-3.6(b)(2)(A).

The Department does not believe the first mortgage offered can be considered equal in value.

The current market value of the project, even including the improved lots, would not equal the amount needed for guarantee. The Department has consulted with the County's Real Property Tax (RPT) Division concerning their method of valuation for the property, and how it relates to unconstructed subdivision projects. This consultation was necessary to understand the disparity between RPT assessed values on the project and the actual purchase price.

RPT bases taxable values on potential for development given entitlements. Market value of the property should actually reflect the cost of land with what

infrastructure has actually been constructed. Therefore, in weighing the value of the property, the Department believes Applicant's purchase price in 2010 carries significant weight.

The \$21,000,000 purchase price of the property includes improved lots. As outlined in their August 8th letter, KP is only offering those parcels considered "unimproved" for mortgaging. In their August 30th transmittal, KP submitted a list of what they consider improved parcels. Given a significant reduction in the amount of property proposed to be liened, and absent an independent property assessor's value estimation, the Department can only deduce that the remaining unimproved acreage is less than the \$18,420,000 figure required for bonding in 2007.

The current market value of the project would not equal the amount needed to serve as a guarantee. Additional guarantees are anticipated beyond the first mortgage.

If the Commission determines the project should be extended on its merits and a first mortgage is acceptable, then the Commission should demand fair consideration for the benefit given to the applicant:

1. Request for a mortgage goes beyond normal discussions of impact and nexus and essentially asks the County to act as a financial institution.
2. Typically the Planning Commission is placed as a public authority to judge the impact of a proposed project, and determine whether impacts presented by a project warrant a sufficient nexus to require mitigation efforts. However, the approval and acceptance of a first-mortgage by the County would essentially place the Planning Commission in the position of a financial institution or bank, beyond its traditional quasi-judicial permitting role.

This would be the precedent that may require the Commission to entertain more of these mortgage substitution requests, as applicants seek relief from bonding requirements.

3. A mortgage held by the County saves the Developer the premiums required to maintain financial guarantees as set forth by the subdivision agreements. The assumption of risk by the County could be compared to the risk held by bonding companies or banks guaranteeing completion of government-required infrastructure through construction bonds or letters of credit. The premium on construction bonds usually run a construction company between 1-4% per year of the guaranteed amount, with a higher premium usually levied on projects with higher risk of default.

4. Given the uncertified value of the improvements from 2007, and utilizing the premium range charged by bonding companies, the potential amount saved by the Developer, if the County accepted the mortgage, would range in Developer savings between \$1,500,000 to \$6,000,000 over eight years.
5. The only current direct consideration to the County is 14.7 acres for a Park.
6. The purchase price of the property with entitlements was \$21,000,000.
7. The appropriate evaluation of a property's worth is its market value due to liquidity requirements, NOT the potential for development assessed by RPT.
8. The Commission, acting as a mortgagor, should demand further consideration beyond the 14-acre park in this range after evaluating the risk to the County based on probability of default and length of requested mortgage.
9. The risk on this project is high given past defaults and requested length of extension and the Department would recommend acreage consideration based on market values and the amount saved by the applicant by avoiding traditional subdivision bonding. The Department recommends the land be conveyed immediately with a release from the Applicant to not claim the consideration precludes the County from voiding the subdivision if conditions of the subdivision agreement are not met.

Under this extension scenario, the Applicant should have provided the following as part of their request:

1. Recertified construction drawings;
2. Updated construction cost estimate; and,
3. A bond or letter of credit naming the County of Kaua'i as beneficiary.

Due to the absence of these items and the impending expiration, the Commission would need to provide additional time to the Applicant to provide the necessary items for Commission action.

V. RECOMMENDATION

Based on the foregoing, the department recommends that an extension of time is NOT warranted since the construction plans have lapsed and the department is uncertain as to whether the current bond amount is sufficient to cover the expenses related the infrastructure improvements. Furthermore, it would NOT be in the best interest of the County to approve the Applicant's request to substitute the surety for the project due to the project's high risk and the fact that acceptance of a mortgage with improved parcels may still require an Environmental Assessment, pursuant to Chapter 343 of the Hawai'i Revised Statutes (HRS).