

JOANN A. YUKIMURA  
MAYOR



DEE CROWELL  
PLANNING DIRECTOR  
OEP OFFICER IN CHARGE

HEATHER M. HARVEY  
OEP MANAGER FOR  
THE KEITH COMPANIES

TELEPHONE (808) 241-7222

COUNTY OF KAUAI  
OFFICE OF EMERGENCY PERMITTING  
4211 RICE STREET  
LIHUE, KAUAI, HAWAII 96786

MEMORANDUM

To: Planning Department  
Attn: Dee Crowell  
Planning Director

Date: February 2, 1994

From: Heather M. Harvey  
OEP - Office Manager

Subject: Building Permit Status  
Cades Schutte Fleming  
& Wright  
Sheraton Kauai Hotel  
TMK #: (4)-2-8-16:3  
Poipu, Kauai, Hawaii

We have been forwarded a copy of a 1/21/94 letter addressed to you from David Schulmeister of Cades Schutte Fleming & Wright, and offer the following information for your use in response to the questions raised in that letter.

We have reviewed all OEP files regarding the referenced TMK. It appears that Mr. Schulmeister is confused regarding the different ordinances, rules and regulations which preside over this property, and the corresponding "grandfathering" criteria or threshold. He appears to intermingle the County's Shoreline Setback 50% policy of "repair" versus "reconstruction" with flood code 50% regulations, along with the Shoreline Setback six (6) point criteria. It should be clarified that all of these regulations overlap.

**BACKGROUND**

Plans for repair of structures 3,4,5,6,7,10 and 17 of the Sheraton Kauai were submitted by the architect as one entire packet. The packet was reviewed by the OEP Planning Division. Upon realizing that the shoreline survey and certification requirements of Shoreline Setback Rules and Regulations could cause delay of the permitting process, the plans were removed from the OEP, separated into structures, and resubmitted individually. The plans proceeded through the remainder of the OEP, and upon receipt by the OEP Building Division, were removed by the architect to clarify the scope of work. Plans for only structures 1 & 2 (A & B), 12, 14, 15, 16 and 19 have been resubmitted. Plans for structures 3,4,5,6,7,10 and 17 were released to the architect on 12/01/93 and have not been resubmitted to date.

**OEP PERMITTING PROCESS** - The OEP represents several government agencies in one, however, the review process proceeds through various divisions similar to the County. Letters of comment are sent out from the division immediately after that division makes the review. Thus, a letter from the OEP Permitting/Planning Division may be received informing an applicant of planning (Zoning, Special Management Area, Shoreline Setback, Historic) regulations, and then later a letter might be received from the OEP Permitting/Engineering Division discussing engineering (flood/grading) issues.

Lotty Burk

## PLANNING DIVISION

**Special Management Area (SMA)** - SMA Rules and Regulations dictate that any "development" proposed within the SMA must obtain a permit prior to any activity. A definition of "development" is provided under Section 1.4 H (1). Section 1.4 H (2) also provides clarification of what activity is not considered "development". Section 1.4 H (2)(f) states that "repair, maintenance, or interior alterations to existing structures" is not considered development. So long as the proposed Hurricane Iniki repair work does not exceed that which was approved under a previous SMA permit issued to a property, the repair work would be deemed exempt, and can proceed from an SMA perspective. However, if no previous SMA permit existed, or if the repair work also includes work not previously approved through an SMA permit, the application submitted to the OEP is forwarded to the County Planning Department for review and approval of a new or additional SMA permit. There is no formal interpretation regarding "repair" for the SMA.

No new work beyond that approved under previous SMA permits issued to the property has been proposed, thus no applications have been forwarded to the County for SMA review and permits.

**Shoreline Setback Rules & Regulations (SSR)** - According to Hawaii Revised Statutes Chapter 205A-44, Prohibitions, Subsection (b) structures are prohibited within the shoreline setback area without a variance pursuant to that part. The Shoreline Setback area is defined as an area 20' to 40' feet from the shoreline, depending on the property size. Structures proposed on properties over 1/2 acre in size must observe a 40' setback from the shoreline. Structures in the shoreline setback area shall not need a variance if one (1) of the six (6) criteria listed are met provided that the permitted structure is "repaired", but shall not be enlarged within the shoreline area without a variance. A copy of that section is provided.

According to the 05/20/93 memo from the previous County Planning Director, a criteria of fifty percent (50%) was used to differentiate between repair and reconstruction, with "repair" being up to and less than 50% damage, and "reconstruction" being more than 50% damage. A determination regarding the extent of repair is critical since only "repair" is permitted within the shoreline setback area regardless of the official shoreline location. "Reconstruction" must either meet the shoreline setback or can be considered within the shoreline setback through a Shoreline Setback Variance (SSV). The Comprehensive Zoning Ordinance (CZO) uses the criteria of 50% of the replacement cost of the structure as a threshold for grandfathering of non-conforming structures.

The SSR require that a current shoreline survey be conducted to determine the location of the "shoreline", and that survey must be certified by the Chairman of the Department of Land and Natural Resources (DLNR). Immediately after the hurricane, the DLNR enacted Emergency Procedures to expedite the survey requirement, and old certified shoreline surveys were considered for recertification without the requirement for a new field shoreline survey. Some factors considered in their recertification was the date of the original survey, and the nature of the shoreline (sandy vs. rocky). These emergency procedures expired in February 1993. The County Planning Director also has the authority to waive the shoreline survey requirement provided there is "evidence that clearly and unmistakably shows that the proposed development will be located at a considerable distance from the shoreline setback".

At the request of the architect/applicant, all applications received to date for the subject property (structures 1&2 (A & B), 3,4,5,6,7,10,11,12,14,15,16 17 and 19) have been forwarded to the County Planning Director requesting waiver of the shoreline survey and certification requirements. Survey and certification requirements have been waived by the Planning Director for only structures 1 & 2 (A & B), 17 and 19. The request was denied for structures 3,6,7,10,11 and 14 was denied on 11/12/93. Since structure 14 appears to comply with flood elevation requirements, it was separated by the applicant from the overall plan submittal packet, and the waiver request for this structure was resubmitted to the Planning Director on 1/18/94 for reconsideration of waiving of the

shoreline survey requirement. That request for structure 14, along with the request for structures 4,5,12,15 & 16 is still pending action by the Planning Director (contrary to Mr. Schulmeister's assumption that the waiver was not granted for structures 4 and 5).

## ENGINEERING DIVISION

**Flood Ordinance No. 630** - This ordinance requires the lowest habitable finished floor elevation of residential structures to be above the base flood elevation, and either elevating or floodproofing of non-residential structures up to the base flood elevation as noted on the Federal Insurance Rate Maps (FIRM) if new construction is proposed or when substantial improvements/damages occur. There is a provision for rebuilding to the pre-hurricane condition under Section 15-1.7 which states that nonconforming structures may continue provided any repair, reconstruction, improvement, or addition not be a "substantial improvement". All "substantial improvements" shall comply with the standards for construction within the flood zone." Sec. 15-1.3 (24) defines substantial improvement to mean "any repair, reconstruction, improvement, or addition to a structure, the cost of which equals or exceeds 50% of the market value of the structure either: (a) before the improvement or repair is started, or (b) if the structure has been damaged and is being restored, before the damage occurred."

Generally structures are reviewed for conformance with flood regulations as the application is received, unless a determination is requested in advance if the structure is located in a flood hazard zone. The finished floor elevation must be noted on the construction plans, a Flood Fringe and/or Coastal High Hazard certificate attesting that the structure can withstand the flood forces must be signed by the architect or structural engineer, and prior to Certificate of Occupancy (CO) a certificate of elevation must be submitted by a licensed land surveyor verifying that the structure was built above the base flood elevation. A preliminary analysis of the required flood elevations affecting the site as well as a preliminary determination of the finished floor elevation of the existing structures was conducted by the OEP in October 1993. Based on existing certificates of elevation completed by Portugal & Associates prior to Hurricane Iniki, it was suggested by the OEP Engineering Division that a topographic survey showing finished floor elevations for all of the site be completed by a licensed land surveyor since these elevation surveys only cover a portion of the structures located on the property. The preliminary results using the Portugal survey were provided via fax to the project architect (copy provided). Although the structures may have complied with the flood ordinance requirements in existence at the time of construction, structures 3,6,7,10,11,17 and 19 appear to have been constructed below the current flood elevations as identified on the FIRM for that specific portion of the site. Portions of structures 4 & 5 appear to have constructed at the flood elevation level, while other portions appear to have been constructed below the flood elevations requirement. Structures 1 & 2 (A & B) and 14 were constructed to meet the required current flood elevation.

The County's Flood Ordinance No. 603 states that "the value of any substantial improvement shall be determined by the County Engineer or his authorized representative." The cost of repairs were determined by the OEP Building Division using the County of Kauai estimated value for Building Permits unit costs. That figure was compared against the pre-Iniki value of the structures using the County Real Property Tax Values. This is a standard procedure used by the County. Structures 3,4,5,6 and 7 estimated costs of repairs exceeded the tax assessed value of the structure, which would indicate that the damages were "substantial". The substantial improvement criteria is not as critical for structures 10,11,12,15 16,17 and 19 since these are non-residential structures and can be floodproofed. It also was not critical for structures 1 & 2 (A & B) and 14 since they were constructed to meet the flood elevation requirement. These preliminary calculations also were faxed to the architect. In the past, an appraisal performed by the tax office, a Certified Real Estate Appraiser, or even insurance value information has been acceptable for determination of the market value, and repair estimates provided by architects or contractors also was acceptable for determination of the repair costs. Also, for smaller residential projects the OEP has been accepting

an independent appraisal to determine the pre-damage market value of the structure, as was approved by the Federal Emergency Management Agency (FEMA). Based on this preliminary analysis, all residential structures except structures 1 & 2 (A & B) and 14 would have to be elevated if the repairs were determined to be "substantial". Structures 10,11,12,15,16 and 17 being non-residential could be floodproofed up the flood elevation as an alternative to elevating if the repairs are determined to be "substantial". Preliminary estimates for repairs were deemed to be substantial by the OEP using the methodology explained above for structures 3,4,5,6,7 & 17. Structure 19 was deemed exempt from flood regulations. Since these elevation surveys only cover a portion of the structures located on the property.

**RESPONSE**

**Building Permit Status**

<u>Structure</u>	<u>Permit Status</u>	<u>Shoreline Survey (SS)</u>	<u>Flood Elevation Met/Substantial Construction</u>
1&2 (A&B)	Issued 10/26/93	Waived 9/29/93	Yes / No 8/26/93 Elev. Cert. provided
3	Pending SS & FS/PR	Required 11/22/93	No / Yes (Prelim. 10/8/93)**
4 & 5	Pending SS Waiver & FS/PR	Pending 9/21/93	No / Yes (Prelim. 10/8/93)**
6 & 7	Pending SS & FS/PR	Required 11/22/93	No / Yes (Prelim. 10/8/93)**
10	Pending SS & FS/PR	Required 11/22/93	No / Pending OEP Determin. or FP*
11	Pending SS & FS/PR	Required 11/12/93	No / Pending OEP Determin. or FP*
12,15,16	Pending SS Waiver & FS/PR	Pending 1/18/94	No / Pending OEP Determin. or FP*
14	Pending SS Waiver	Pending 1/18/94	Appears Yes / Elev. Cert. Required
17	Pending PR	Waived 10/7/93	No / Yes 12/3/93)*
19	Issued 7/17/93	Waived 7/14/93	No / Exempt per Flood Ordinance No. 500

FS/PR - Flood Survey to determine finished floor elevation or Plan Revision to comply with floodproofing or elevating of the structure.

- \*\* Elevating structure to base flood elevation or higher depending on the type of flood zone (AE or VE) required unless survey shows finished floor elevation of structures above flood elevation requirement. Plans must be corrected to reflect such.
- \* Flood Proofing Option Available, plans must be corrected to reflect such.

Question #1: "Repair" versus "Reconstruction" - The County may use different sources to determine "repair" versus "reconstruction", depending on the ordinance being reviewed (clarification offered below). If no acceptable, qualified information is offered by the applicant, the County and OEP will use "County Building Division Estimates" for damage and repair, and County Real Property Tax Office Values to determine the "market value" and "replacement cost" of the structure prior to Iniki. The County has (prior to the hurricane) and will continue to accept, other evidence of the pre-hurricane value of a damaged structure. To date, the OEP has not received any submittal regarding the "market value" of the Sheraton structures prior to Iniki. We have received a 1/20/94 letter submitted from Eric V. Toulon offering a value for an electrical permit issued by the County showing that "the ocean front guest room wing" had an estimated value of \$3,010,720. The OEP is looking into this value. The values offered on Exhibit "D" of Mr. Schulmeister's letter would be acceptable for determining the pre-Iniki market and replacement value of the structures. Other information also may be used.

SMA - There is no official determination of "repair" being 50% or less damage - County Building Division Estimates of damage are used and compared against the County Real Property Tax Office Values prior to damage. Some Architect, structural engineer, or contractor estimates of repair and replacement costs have been accepted by the County in the past.

Shoreline Setback - "Repair" has been established to be 50% or less damage (5/20/93 Planning Department memo) - County Building Division Estimates of damage are used and compared against the County Real Property Tax Office Values prior to damage. Architect, structural engineer, or contractor estimates have been accepted by the County in the past.

Flood - "Repair" is considered anything not a "substantial improvement". "Substantial

Improvement" is defined as any "repair, reconstruction, improvement, or addition to a structure the cost of which equals or exceeds fifty percent (50%) of the market value." County Building Division Estimates are used for repairs against County Real Property Tax Office values for market value. FEMA has authorized the use of independent appraisals to determine the pre-Iniki market value.

**Question #2: Reconsideration of Shoreline Survey Waiver** - Only the County Planning Director can waive the shoreline survey requirement. The Planning Director's determination is not based solely on the extent of damage, but also on the nature of the shoreline (rocky vs. sandy) and provided there is "evidence that clearly and unmistakably shows that the proposed development will be located at a considerable distance from the shoreline setback". The waiver for structures 1 & 2 (A & B) was based on several factors including the fact that the damages were determined to be less than 50%, the shoreline was rocky and experienced comparatively little erosion. The shoreline fronting structures 3,6,7,10,11 and 14 is sandy and experienced significant erosion as a result of Hurricane Iniki, and field investigations show that the structures are within 40' from what appears to be the post Iniki shoreline. The State Surveyor also visited the site on 01/12/94 and indicated that the DLNR would not accept recertification of a pre-Iniki shoreline survey. Based on this information, the Planning Director DENIED the request to waive the shoreline survey requirement on 11/12/93. After the plans were separated from a group submittal, a second request to waive the shoreline survey for structure 14 was resubmitted to the Planning Director on 1/18/93 since it was noted that this structure meets flood elevation requirements. We are not sure how critical the determination that the structures were damaged more than 50% was in the decision to deny waiver of the shoreline survey requirement, and only the Planning Director can reverse that decision.

**Shoreline Survey Certification Requirement Impacts** - Repair versus reconstruction is discussed above, and has not changed from before Hurricane Iniki to present. The extent of damage is not the only consideration in the waiving of the shoreline survey requirement by the Planning Director. Thus, the current waiver or requirement of a shoreline survey as determined by the Planning Director stands, and plans can not be approved nor permits issued until a new certified shoreline is submitted to the OEP, and the project is reviewed in relation to such. The survey should show the relationship of existing structures to the certified shoreline (including roof overhangs, walkways, decks and pool areas). We are unable to answer the question regarding the impact of this new survey until it is submitted and the relationship of structures to the certified shoreline is reviewed by OEP and the Planning Director.

**Question #3: Rejection of Applications** - No applications have been "rejected" by the OEP. The entire initial submittal has been removed from the OEP, and only plans for structures 1 & 2 (A & B), 12,14,15,16 and 19 have been resubmitted. Applications for three (3) structures have been approved, and the balance are pending return of the plans noting the scope of work, submittal of a certified shoreline survey, valuation of the improvements for flood code compliance analysis, submittal of a Certificate of Elevation to confirm that the structure meets the flood elevation requirement, or revisions of the plans to reflect flood proofing of the structure (for non-residential structures).

We hope this voluminous information is of assistance to you in your response to Mr. Schulmeister. Please feel free to contact me should you have any questions or require further clarification.

attachments

a:sheraton.mem

CADES SCHUTTE FLEMING & WRIGHT  
ATTORNEYS AT LAW

JAMES S. CAMPBELL  
ROBERT B. BUNN  
WILLIAM M. SWOPE  
DOUGLAS E. PRIOR  
E. GUNNER SCHULI  
MICHAEL P. POHIT  
DONALD E. SCIFARCE  
RICHARD A. HICHS  
ROGER H. EPSTEIN  
JEFFREY S. PORTNOY  
EDWARD DEL BOYLE  
BERNICE LITMAN  
NICHOLAS C. DREHER  
MARK A. HAZLETT  
PHILIP J. LEAS  
DAVID C. LARSEN  
STEPHEN B. MACDONALD  
LARRY T. TAKUMI  
WILLIAM A. CAROWELL  
C. MICHAEL HARE

RICHARD R. CLIFTON  
ROY A. VITDUSEK III  
NELSON N. S. CHUN  
DARRYL H. W. JOHNSTON  
VITO GALATI  
CARY S. MATSUSHIGE  
DAVID SCHULMEISTER  
THOMAS E. CROWLEY III  
LORRAINE H. AKIBA  
MILTON M. YASUNAGA  
SUSAN OKI MOLLWAY  
GINO L. GABRIO  
COLIN O. MIWA  
MARTIN E. HSIA  
PETER W. OLSON  
JOHN R. CONRAD  
RHONDA L. GRISWOLD  
GAIL M. TAMASHIRO  
GRACE NIHEI KIDO  
DONNA Y. L. LEONG

HONOLULU, HAWAII OFFICE

P O BOX 939  
HONOLULU, HAWAII 96808  
1000 BISHOP STREET  
HONOLULU, HAWAII 96813

TELECOPIER: (808) 531-8738  
TELEX: 7238569  
TELEPHONE: (808) 521-9200

PATRICIA J. MCHENRY  
R. JAMES STEINER JR.  
J. ROBERT ARNETT II  
DAVID F. E. BANKS  
J. THOMAS MALONEY JR.  
DENNIS J. GAUGHAN  
BLANE T. YOKOTA  
JEFFREY D. WATTS  
CAROL L. W. HEE  
ERIC N. ROOSE  
MARJORIE A. LAU  
LAURIE A. KURIBAYASHI  
JAMES H. ASHFORD  
MICHELE M. SUNAHARA  
NANI RAPOZA

OF COUNSEL:  
J. RUSSELL CADES  
WILLIAM L. FLEMING  
HAROLD S. WRIGHT  
A. SINGLETON CAGLE

CYNTHIA M. JOHRO  
JOHN P. POWELL  
DENNIS W. CHONG KEE  
CARLITO P. CALIBOSO  
CATHERINE A. CAREY  
DAVID W. LONBORG  
DANIEL H. DEVANEY IV  
ALYSON J. NAKAMURA  
ALLEN R. WOLFF  
MARK D. LOFSTROM  
KAREN WONG  
MICHAEL H. SHIKUMA  
JEFFREY K. NATORI  
LYNN HIGASHI HIATT

C. FREDERICK SCHUTTE  
(1921-1988)

WRITER'S DIRECT DIAL NUMBER

January 19, 1994

(808) 521-9392

Allan Zawtockki  
First Hawaiian Bank  
132 Bishop Street  
16th Floor  
Honolulu, Hawaii 96813

Re: Obayashi Corporation v. Bishop Trust Company  
Limited, et al.

Dear Mr. Zawtockki:

The purpose of this letter is to provide you with an overview of the status of the above-entitled lawsuit.

CLAIMS

The claims that Obayashi has asserted against the Knudsen Trusts can be summarized as follows:

1. For termination of the lease.
2. For temporary abatement of the ground rent.
3. For a permanent abatement of the ground rent.
4. For an unspecified "reformation" of the ground lease.
5. For a declaration that the Trusts are obligated to restore the shoreline.
6. For damages for "retaliatory eviction" because of the Trusts' counterclaim against Obayashi for interference with the shoreline recertification.

The Trusts have counterclaimed for rent, costs, attorney's fees and for damages arising out of Obayashi's attempts to interfere with the shoreline certification.

JAN 19 1994

The first claim, for termination of the lease, has been disposed of by summary judgment. This means that, unless Obayashi tries to amend its claims, which Obayashi has not done to date, there is no remaining claim by Obayashi that it is entitled to terminate the lease as a result of the hurricane damage, or the "defective" nature of the property due to its vulnerability to hurricanes.

The second claim, for a temporary abatement of rent, was subject to a recent motion for partial summary judgment by the Trusts, and it is presently under advisement by Judge Watanabe. If granted, this will preclude Obayashi from claiming an abatement of rent as a result of the temporary inability to operate the Hotel. If denied, then this issue would have to go to trial, with any other remaining claims that are unresolved as of our January, 1995 trial date.

The sixth claim was dropped by Obayashi, with prejudice, after the Trusts filed a motion to dismiss it for failure to state a legally cognizable claim. The other claims are still pending.

#### PERMITS

The current status of Obayashi's permit applications is summarized in my letter to Dee M. Crowell, attached. This letter was prompted by the fact that Obayashi appears to be dead in the water with regard to moving on its permit applications for the wooden oceanfront structures that Obayashi has alleged would be impossible or impractical to repair. Obayashi continues to claim that the issue is in the hands of the County, but Obayashi appears not to be pursuing the matter with any vigor. Accordingly, we are asking the County for its view on the prospects for obtaining permits to repair the structures. If they cannot be repaired, then we will press Obayashi for a plan to redesign and relocate these structures in order that the lost rooms can be replaced. If a trial becomes necessary, it will likely focus upon whether or not Obayashi has permanently lost the ability to operate a 250 room hotel on the property due to the combined circumstances of the hurricane damage and existing land use restrictions that apply to the Property.

#### SHORELINE RESTORATION

In December of 1992, the Trusts applied to the Board of Land and Natural Resources to recertify the 1986 shoreline. Even though Obayashi had itself previously started to do exactly the same thing, Obayashi has made every effort to prevent the Trusts from being allowed to recertify either the

Page 3

Letter to Alan Zawtocky  
January 19, 1994

1986 shoreline or any pre-Iniki shoreline. The Trusts have countersued Obayashi because of this conduct, and have asked for punitive damages.

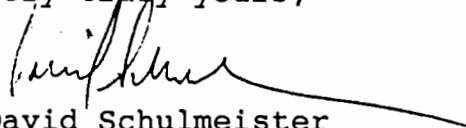
The State Surveyor has been very slow to act, due to the disputed nature of the proceeding, but has twice issued interpretations of where he believes the pre-Iniki shoreline was based on five ground level snapshots taken in July of 1992 showing that a concrete walkway along the shoreline was being undermined by erosion. The walkway was constructed by Obayashi in the Spring of 1991, without a permit, and no one has been able to produce an as-built drawing of exactly where the walkway was. According to the State Surveyor's two "interpretations", the pre-Iniki shoreline eroded from 5-20 feet at various points for a total of from 6-7,000 square feet.

Because we believe these "interpretations" are incorrect, we hired an expert in photogrammetric surveying from Fresno State University to visit the site with a surveying crew from Cesar Portugal's office. The State Surveyor also visited the site, on January 12, 1994, to observe the measurements and procedures our expert is employing to analyze the five ground level photographs the State Surveyor is relying upon for his interpretations. We are presently awaiting the results of his analysis which we hope will show that the shoreline eroded little, if at all, between 1986 and 1992.

It is my understanding that you will be providing a copy of this letter to certain beneficiaries in order to apprise them of what's going on in the lawsuit. Because this letter may not be protected by the attorney-client privilege if shared with such beneficiaries, it is necessarily confined to a brief overview of where we are.

If you have any questions or comments, please do not hesitate to give me a call.

Very truly yours,



David Schulmeister  
for

CADES SCHUTTE FLEMING & WRIGHT



# CADES SCHUTTE FLEMING & WRIGHT

ATTORNEYS AT LAW

HONOLULU, HAWAII OFFICE

P O BOX 939  
HONOLULU, HAWAII 96808  
1000 BISHOP STREET  
HONOLULU, HAWAII 96813

TELECOPIER: (808) 531-8738  
TELEX: 7238569  
TELEPHONE: (808) 521-9200

PATRICIA J. MCHENRY  
K. JAMES STEINER, JR.  
J. ROBERT ARNETT II  
DAVID F. E. BANKS  
J. THOMAS MALONEY, JR.  
DENNIS J. GAUGHAN  
BLAINE T. YOKOTA  
JEFFREY D. WATTS  
CAROL L. W. HEE  
ERIC N. ROOSE  
MARJORIE A. LAU  
LAURIE A. KURIBAYASHI  
JAMES H. ASHFORD  
MICHELE M. SUHAKARA  
NANI RAPOZA

CYNTHIA M. JOHRO  
JOHN P. POWELL  
DENNIS W. CHONG KEE  
CARLITO P. CALIBOSO  
CATHERINE A. CAREY  
DAVID W. LONBORG  
DANIEL H. DEVANEY IV  
ALYSON J. NAKAMURA  
ALLEN R. WOLFF  
MARK O. LOFSTROM  
KAREN WONG  
MICHAEL H. SHIKUMA  
JEFFREY K. NATORI  
LYNN HIGASHI HIATT

OF COUNSEL:  
J. RUSSELL CADES  
WILLIAM L. FLEMING  
HAROLD S. WRIGHT  
A. SINGLETON CAGLE

C. FREDERICK SCHUTTE  
(1921-1988)

JAMES S. CAMPBELL  
ROBERT B. BUNN  
WILLIAM M. SWOPE  
DOUGLAS C. PRIOR  
E. GUNNER SCHULL  
MICHAEL P. PORTER  
DONALD E. SCLARCE  
RICHARD A. NICKS  
ROGER H. EPSTEIN  
JEFFREY S. PORTNOY  
EDWARD DEL BOYLE  
BERNICE LITTMAN  
NICHOLAS C. DREHER  
MARK A. HAZLETT  
PHILIP J. LEAS  
DAVID C. LARSEN  
STEPHEN B. MACDONALD  
LARRY T. TAKUMI  
WILLIAM A. CARDWELL  
C. MICHAEL HARE

RICHARD R. CLIFTON  
ROY A. VITOUSEK III  
NELSON N. S. CHUN  
DARRYL H. W. JOHNSTON  
VITO GALATI  
CARY S. MATSUSHIGE  
DAVID SCHULMEISTER  
THOMAS E. CROWLEY III  
LORRAINE H. AKIBA  
MILTON M. YASUNAGA  
SUSAN OKI MOLLWAY  
GINO L. GABRIO  
COUN O. MIWA  
MARTIN E. HSIA  
PETER W. OLSON  
JOHN R. CONRAD  
RHONDA L. GRISWOLD  
GAIL M. TAMASHIRO  
GRACE NIHEI KIDO  
DONNA Y. L. LEONG

**DRAFT**

WRITER'S DIRECT DIAL NUMBER:

January 18, 1994

(808) 521-9392

Dee M. Crowell  
Planning Director  
County of Kauai  
4444 Rice Street  
Suite 473  
Lihue, Hawaii 96766

Re: Sheraton Kauai Hotel, Poipu  
TMK: 2-8-16:3

Dear Mr. Crowell:

This firm represents First Hawaiian Bank in its capacity as Trustee of the Eric Knudsen Trust, one of the two owners of the property underlying the Sheraton Kauai Beach Resort. As you probably know, the Property is leased to Obayashi Corporation, who owns the improvements on the Property and contracts with The Sheraton Corporation to operate the Hotel.

As Trustee of the Eric A. Knudsen Trust, First Hawaiian Bank is one of several parties who have a vital interest in the restoration or replacement of the improvements on the Property. Others include Bishop Trust Company, Limited, as Trustee of the Augustus F. Knudsen Trust, Obayashi Corporation, The Sheraton Corporation and the County of Kauai, who needs to have this major resort property returned to operation in order to stimulate a revival of the tourism based economic activity in the Poipu area that creates hundreds of jobs for the people of Kauai.

The purpose of this letter is to set forth our understanding of the current status of the building permits that have been applied for to repair the improvements, along with specific questions that we would like you to answer

formally, in your capacity as Planning Director, in order that we can better understand the current situation.

#### BUILDINGS A AND B

We have been advised that permits for the repair of the concrete buildings known as Buildings A and B have been issued. It is our understanding that, in order for these permits to issue, it was necessary for you, as Planning Director, to waive the "shoreline survey requirement of the Shoreline Setback Rules and Regulations (Shoreline Rules) and SMA determination". See September 28, 1993 memorandum from Miles Hironaka to Dee M. Crowell, a copy of which is attached hereto as Exhibit "A". Your decision to waive the shoreline survey requirement appears to have been based upon the fact that the cost of the work was estimated to be less than 50% of the replacement cost of the improvements and upon the fact that, as stated on page 2 of the Memorandum:

Assuming that these structures are now within the 40 foot shoreline setback as a result of the erosion from the hurricane [Haw. Rev. Stat.] Section 205-45(b) allows these buildings to be repaired without a shoreline setback variance. Thus, it would seem senseless to require a shoreline survey to determine if the structures will meet setback requirements when the State Statutes do not require these existing structures to meet setback requirements or to obtain a variance permit.

#### OTHER STRUCTURES

It is our understanding that you have declined, to date, to waive the shoreline survey requirement for any other structures. With regard to Buildings 3, 6, 7, 10, 11 and 14, this is explained in the November 22, 1993 memorandum from Miles Hironaka to Steven Seiler through D. M. Crowell as being based on two factors: 1) the absence of "evidence that clearly and unmistakably shows that the proposed development will be located at a considerable distance from the shoreline setback" and 2) the cost of the work to restore the buildings is estimated to exceed 50% of the "replacement cost (Taxed Assessed Value)." See copy of November 22, 1993 Memorandum, attached hereto as Exhibit "B". Buildings 4 and 5 are not mentioned in the Memorandum, but we understand that they are being treated similarly.

We also have a copy of the December 3, 1993 letter from Joseph J. Mulvihill of the Office of Emergency Permitting to Obayashi Corporation, a copy of which is attached hereto as

Exhibit "C". This letter does not mention the shoreline survey requirement, or whether it has been waived, but states that, because the estimated cost to repair the "Electrical and Mechanic Building" exceeds 50% of its taxed assessed value, that the structure must be brought into compliance with the Flood Control Ordinance in order for a permit to be obtained. Obayashi is advised in this letter, however, that "An Independent Appraisal provided by your firm could be used for a more accurate determination of substantial improvement."

Question Number 1: Will The County Be Basing Its "Repair" versus "Reconstruction" Calculations Solely Upon Tax Assessed Values?

First Hawaiian Bank's first question is whether the County will be basing its "repair" versus "reconstruction" calculations solely upon tax assessed values, and whether the determination that has been made thus far is final, as opposed to being preliminary, based on the absence of better information regarding the true value of the structures.

The reason for this question is that Buildings 3, 4, 5 and 6, for example, which include a substantial number of oceanfront guestrooms, appear to be grossly undervalued for tax purposes. This is reflected in the columns below which compare their tax assessed values with their depreciated book value, as reflected in Obayashi's financial records, and their replacement value used by Obayashi for insurance purposes:

<u>Building No.</u>	<u>Tax Assessed Value</u>	<u>Book Value</u>	<u>Replacement Value</u>
3	865,300	3,625,575	5,508,500
4	255,700	1,516,750	2,041,500
5	254,200	1,568,367	2,041,500
6	623,600	5,200,925	6,965,500

It is our understanding that Obayashi has thus far not submitted any information, such as that set forth above, regarding the true value of the structures. First Hawaiian Bank would like to know whether such information, if submitted, would be considered by the County in determining whether Obayashi's permit application is for a "repair" versus a "reconstruction" of those structures for which Obayashi has thus far not been issued a permit. First Hawaiian Bank obtained the above numbers from Exhibit "D", attached, which is a spreadsheet from the files of Obayashi's insurance broker, Marsh & McLennan.

Question Number 2: If The Damage To These Other Structures Is Determined To Be Less Than 50% Of Their Value, Can The Shoreline Survey Requirement Be Waived, As It Was For Buildings A and B?

A review of Exhibit "D" together with the Cost Comparison and Assessment Table utilized for this Project by the Office of Emergency Permitting, a copy of which is attached hereto as Exhibit "E", indicates that the 50% threshold is not met for the majority of the structures if the depreciated book values are taken to represent their fair market value. If, based on these numbers, or upon independent appraisals, the County were to agree that the 50% threshold is not met, can the shoreline survey requirement then be waived in the same manner as it was for Buildings A and B?

We are somewhat confused on this point because your waiver of the shoreline survey for Buildings A and B appears to be based, in part, on an assumption that even if the structures were determined to be within the shoreline setback, no variance would be required under Hawaii Revised Statutes, Section 205-44(b). Your decision not to waive the shoreline survey requirement for the other structures, however, does not mention Section 205-44(b) and strongly implies that, unless there is "evidence that clearly and unmistakably shows the structure is to be located at a considerable distance from the shoreline setback", that the shoreline survey cannot be waived.

First Hawaiian Bank would like to know whether there is something different about the "repair" versus "reconstruction" analysis for these other structures from the analysis previously done for Buildings A and B, or whether your treatment of the other structures represents a recent change in the policy of your department.

Question Number 3: What Impact Does The Absence Of A Certified Shoreline Have On Obayashi's Pending Permit Applications?

First Hawaiian Bank would like to fully understand what impact the absence of a certified shoreline has on Obayashi's building permit applications. As you may or not know, First Hawaiian Bank and Bishop Trust Company, Limited applied in December of 1992 to recertify the 1986 certified shoreline, the most recent certified shoreline on file with the State Surveyor's Office. Obayashi, however, has objected to the recertification of the 1986 shoreline and continues to "vigorously object" to any attempt by the State Surveyor's Office to determine and certify the pre-Iniki shoreline boundary. Attached hereto as Exhibit "F" is a copy of Obayashi's most recent letter to the State Surveyor insisting that the existing shoreline -- rather than the pre-Iniki shoreline -- be certified.

In view of the fact that no shoreline setback variance would, in any event, be necessary to "repair" rather than "reconstruct" structures that were less than 50% damaged, what

impact, if any, does the absence of a current shoreline certification have on Obayashi's pending building permit applications? Also, if Obayashi successfully blocks First Hawaiian Bank's and Bishop Trust Company, Limited's efforts to preserve the pre-Iniki shoreline boundary of the Property, what impact will this have on the pending permit applications?

Question Number 4: Has There Been A Final Rejection Of Any Of Obayashi's Permit Applications For The Restoration Of The Sheraton Kauai Beach Resort?

As you know, Obayashi has sued First Hawaiian Bank and Bishop Trust Company, Limited, in their capacity as Trustees for the Knudsen Trusts, for a permanent abatement of the ground rent. In that lawsuit, Obayashi has taken the position that the County has refused to issue permits for the restoration of the wooden oceanfront guest wings, which include buildings 3, 4, 5, 6 and 7. First Hawaiian Bank would like to know if this is true, and if so, whether the County's decision is final, and if not final, if Obayashi has supplied the County with all the necessary information to make a final determination.

Please understand that, while First Hawaiian Bank is anxious to see the Hotel restored and operations resumed, First Hawaiian Bank does not mean, by this letter, to be taking a position regarding whether any specific permit should be issued. If, under the applicable laws and policies of the County, certain structures must be demolished or replaced rather than restored, then so be it. First Hawaiian Bank just wants to know whether this is the case. It has been more than fifteen months since Hurricane Iniki struck. Fifteen months after Hurricane Iwa struck, the existing oceanfront wings had already been repaired and reopened after having been more seriously damaged, structurally, than they were by Hurricane Iniki.

If the County has been unable to make a final determination regarding whether these structures can be repaired because Obayashi has failed to diligently pursue the matter, then we need to know that. If the contested status of the shoreline is precluding the County from making the necessary determination, we need to know that as well, along with an explanation of how the location of the shoreline will impact the permits for each structure, and why it is necessary for the shoreline issue to be resolved by the State before the County can act -- in view of the fact that a shoreline certification was apparently unnecessary for the issuance of permits for Buildings A and B.

Page 6  
Letter to Dee M. Crowell  
January 18, 1994

I would like to thank you for your anticipated cooperation in helping First Hawaiian Bank to better understand the current status of the Sheraton Kauai Beach Resort building permit applications.

Very truly yours,

David Schulmeister  
for  
CADES SCHUTTE FLEMING & WRIGHT

cc: Heather Harvey  
Steven Seiler  
Alan Zawtocky  
James A. Kawachika  
Fred Ferguson-Brey  
Ted Peister  
Rick Tsujimura  
Ronald J. Verga

\*\*\*\*\*  
F A X T R A N S M I T T A L M E M O

TO: David Schulmeister  
DEPT: \_\_\_\_\_ FAX #: 531-8738  
FROM: F. Ferguson PHONE: 538-4562  
CO: Brey FAX #: 538-4693  
Post-It brand fax transmittal memo 7671

NO. OF  
PAGES  
  
2

MEMORANDUM

Date: September 28, 1993  
From: Myles Hironaka  
To: Dee M. Crowell  
Planning Director  
Subject: Shoreline Survey Waiver  
SMA Determination  
Sheraton Kauai Hotel, Poipu  
TMK:2-8-16: 3

-----  
The applicant desires to repair the existing Buildings A & B that was damaged by Hurricane Iniki. The Office of Emergency Permitting (OEP) has referred this matter to the Planning Department to ascertain if the Planning Department can waive the shoreline survey requirement of the Shoreline Setback Rules and Regulations (Shoreline Rules) and SMA Determination.

The applicant proposes to repair the existing buildings on the property to its original form and in the same location. No additions or expansion to the structure are proposed. The Office of Emergency Permitting has provided a cost estimate of the repairs to be done to Buildings A & B (\$1,300,000), and also obtained the Real Property Valuation of the buildings (\$2,804,600). Based on these figures, the cost of the work to be done to the buildings do not exceed 50% of the replacement cost of the buildings and thus, constitutes repair and not reconstruction.

Background - In 1983, both the mauka and makai portions of the Sheraton Resort was approved by the Planning Commission via SMA Use Permit SMA(U)-83-2 and Class IV Zoning Permit Z-IV-83-16. In 1986, the Planning Commission approved 120 additional rooms to the makai section of the resort project. In 1989, the Planning Commission approved SMA Use Permit SMA(U)-89-9 to allow the renovation of the entire resort project. Relative to the makai section, the project meet density, lot coverage, and setback requirements of the C20. The project also met the 40 ft. shoreline setback requirement. In fact, portions of the buildings were setback in excess of 40 ft from the shoreline.

DISCUSSION:

Shoreline Survey and Setback Requirements - Section 205A-44 (b) of the Hawaii Revised Statutes states that structures are prohibited in the shoreline area without a variance pursuant to this part. Structures in the shoreline area shall not need a variance if they fall within the 6 point criteria of Section 205A-44 (b). The statute further states that structures falling within any one of the six point criteria may be repaired, but shall not be enlarged without a variance. To arrive at a differentiation between

EXHIBIT "A"

"repair" and "reconstruction", the Planning Department has been using the 50 % criteria. Work to be done on structures that have received more than 50 % damage are considered as "reconstruction".

As noted, the applicant intends to repair (not demolish and reconstruct) Buildings A & B. The cost of the work to be done are less than 50% of the replacement cost and thus, constitutes "repair". Furthermore, the applicants do not propose any enlargements or substantial modification of the buildings. Assuming that these structures are now within the 40 ft. shoreline setback as a result of the erosion from the Hurricane, Section 205-44 (b) allows these buildings to be repaired without a shoreline setback variance. Thus, it would seem senseless to require a shoreline survey to determine if the structures will meet setback requirements when the State Statutes does not require these existing structures to meet setback requirements or to obtain a variance permit.

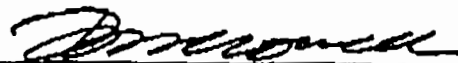
It is also noted that the Planning Staff conducted an inspection of the site on September 22, 1993 and found that Building A is setback approx. 35 ft. and Building B was setback approx. 55 ft. from what was conservatively interpreted as the vegetation line. In consideration of the State's actions regarding the certification of other properties in the vicinity and the Poipu area after the Hurricane, it is likely that the actual "Shoreline" may be situated further makai of the vegetation line used by staff. Should this be the case, the structures may be outside of the 40 ft. shoreline setback area.

SMA Requirements - Section 1.4 H (f) of the SMA Rules state that the "repair, maintenance, or interior alterations to existing structures" are not "Developments" and thus, do not require SMA permits.

RECOMMENDATION:

Based on the foregoing it is recommended that the shoreline survey requirement for the repair of Buildings A & B are not necessary and should be waived. It is further recommended that Section 205A-44 (b), HRS, allows these buildings to be repaired without a variance permit. Finally, it is recommended that the proposed repairs do not require an SMA permit in accordance with Section 1.4 H. (f) of the SMA Rules.

Approved by:

  
DEE M. CROWELL, Planning Director

9/30/93  
Date



RECEIVED  
JUL 11 11:22 AM '93

MEMORANDUM

Date: November 22, 1993

From: Myles Hironaka

Thru: Dee M. Crowell

To: Stephen Seiler, OEP

Subject: Waiver of Shoreline Survey  
 Sheraton Kauai Hotel, Poipu  
 TMK:2-8-16: 3  
 Buildings 3, 6, 7, 10, 11, and 14

-----

This memo is to inform you that the Planning Director has determined that there is not enough evidence to waive the shoreline survey requirement for the reconstruction of the subject buildings based on the findings of a site inspection conducted by OEP and the Planning Department on October 11, 1993 and the cost estimates provided to our office by the OEP. This determination is based on the following:

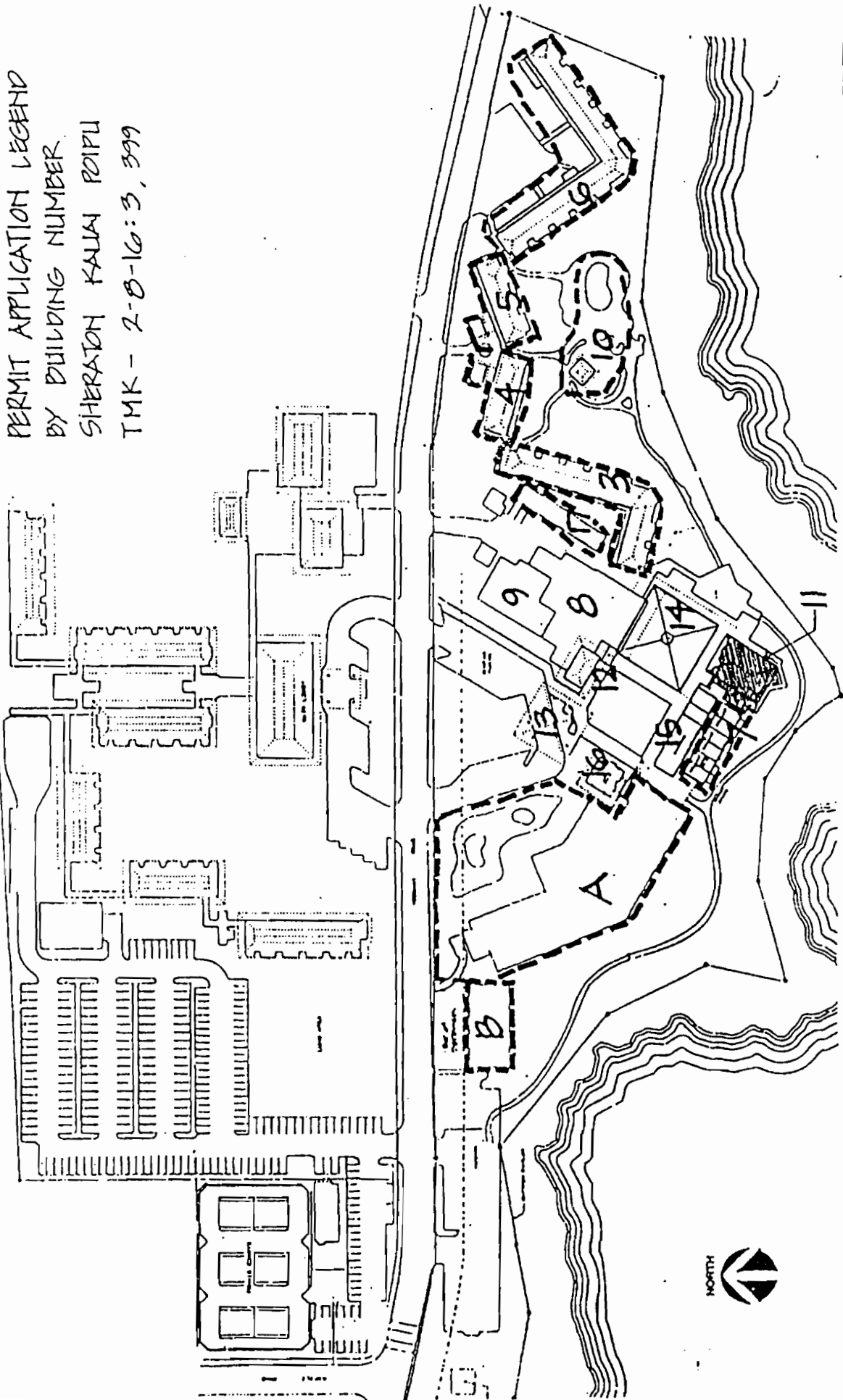
1. Section 8 of the Shoreline Setback Rules and Regulations provides the Planning Director with the authority to waive the shoreline survey requirement whereby there is evidence that clearly and unmistakably shows that the proposed development will be located at a considerable distance from the shoreline setback. The inspection of the site showed that there is not enough evidence to show that the buildings will comply with the 40 ft. shoreline setback requirement due to the extensive disturbance of the shoreline area of the property as a result of the Hurricane.
2. The cost of work to restore the buildings exceed 50% of the replacement cost (Tax Assessed Value) and thus, the work to be done on the buildings constitutes "reconstruction" rather than "repair".

Should you have any questions, please call me at 241-6677.

cc: planning

EXHIBIT "B"

PERMIT APPLICATION LEGEND  
BY BUILDING NUMBER  
SHERATON KAUAI POIPIU  
TMK - 2-8-16:3, 399



JOANN A. YUKIMURA  
MAYOR



DEE CROWELL  
PLANNING DIRECTOR  
DEP. OFFICER IN CHARGE

HEATHER M. HARVEY  
OEP MANAGER FOR  
THE KEITH COMPANIES

**COUNTY OF KAUAI**  
OFFICE OF EMERGENCY PERMITTING  
4211 RICE STREET  
LIHUE, KAUAI, HAWAII 96786

TELEPHONE (808) 241-7222

December 3, 1993

Obayashi Hawaii Corp.  
725 Kapiolani Blvd., 4th Floor  
Honolulu, Hi. 96813  
Attn: Tak Kauchi - Vice President

**Subject: Substantial Improvement Calculations**  
**Sheraton Kauai, Poipu**  
**Electrical and Mechanical Building**  
**Obayashi Corporation**  
**Registration No.: R-102910**  
**TMK: 2-8-16: 3**  
**Koloa, Kauai, Hawaii**

Dear Sir:

Due to the fact that the subject property is located in a Flood Hazard Zone designated Zone AE with a base flood elevation (BFE) of 12 feet mean sea level, the Office of Emergency Permitting (OEP) Engineering Division has checked to determine if substantial improvements exist for the proposed scope of work on the Poipu Sheraton electrical and mechanical building.

Substantial improvements are improvements where the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred. The OEP Building Division has determined the cost of improvements to cost \$400,000. Since the tax assessment does not provide an assessment for this building as a separate, individual structure, a replacement value for the structure was calculated by OEP Building Division to be \$570,000. An Independent Appraisal provided by your firm could be used for a more accurate determination of substantial improvement.

Based on the figures above, substantial improvements exist for the electrical and mechanical building. Since substantial improvements exist, the structure must be brought in to compliance with the County of Kauai Drainage and Flood Control Ordinance (Ordinance No. 630). The following recommendations can be added to the current scope of work in order to insure compliance. First, the entire structure can be elevated so that the finished floor is above the base flood elevation. Since the structure does not have livable space, it is considered a commercial structure. Thus, another option would allow the existing building to be floodproofed up to the base flood elevation or all of the utilities inside the building can be elevated or floodproofed up to the base flood elevation. It should be noted that the finished floor elevation is at approximately 8.25 feet mean sea level.

**EXHIBIT "C"**

Page Two  
Obayashi Corporation

If you have any questions or require additional information regarding this matter, please contact me at 241-7222. Our office hours are Monday through Friday, 8:00 am to 7:00 pm, and Saturdays from 8:00 am to 12:00 noon.

Sincerely,  
Office of Emergency Permitting



Joseph J. Mulvihill, P.E.  
Civil Engineer #

cc: Brian Takahashi, AM Partners  
David Schulmeister, Eric A. Knudsen Trust  
A. Bernard Bays, Augustus F. Knudsen Trust

SHIRAZUKAWA KAIHAI BEACH RESORT / GARDEN HOTEL

Bldg. No.	Name	Use	BLDG.		Insurance Value				CONTENTS			
			OC Tokyo ¥1000	Book Value	Property	Flood	Excess-1	Excess-2	OC Tokyo Book Value	Insurance Value Property	Flood	
M	#3	Guest Rm 30 (15)	435,069	3,625,575	5,508,500	200,000						
A	#4	Guest Rm 12 (6)	182,010	1,516,750	2,041,500	200,000						
K	#5	Guest Rm 12 (6)	108,204	1,568,367	2,041,500	200,000				703,500	200,000	
A	#6	Guest Rm 41 (20)	624,111	5,200,925	6,965,500	200,000				87,500	87,500	
I	#7	Guest Rm 18 (6)	118,214	905,117	3,120,500	200,000				313,500	200,000	
	Mokibana	Snack Bar	67,325	561,042						420,000	200,000	
	#8.9	Kitchen, Storage	236,637	1,971,975	3,444,000							
	#10	Administration	2,640	22,000	515,000					1,033,500		
	#11	Dining, Bar, Waiting	176,357	1,469,642	2,077,500					12,000		
	#12	Shop / Colonade	45,902	382,517	522,500					314,500		
	#13	Port Cochere	70,231	505,258	4,314,000							
	#14	Cocktail Lounge	85,558	712,983								
	#15	Shops	70,272	168,933	496,500							
	#16	Multi-purpose Rm	71,009	591,742	178,500	178,500						
	#17	Utility Bldg	9,720	81,000	133,500	133,500						
	#18	Storage	1,492	12,433	34,000	34,000						
		Drop-off Area	353,783	2,948,192								
		Maintenance Bldg	2,781	23,175	56,500	56,500						
		Pool, Spa & Eqmt	28,722	239,350	118,000							
		Pool Eqmt Bldg		0	15,500	15,500						
		Makai Retaining Wall	16,369	136,408	52,000							
	A	Guest Rm 105 (31)	1,872,966	15,608,050	10,017,000	200,000						
	B	Guest Rm 12 (6)		0	1,283,000	200,000				968,000	200,000	
		Road Pavement	20,166	168,050						113,500	113,500	
		Fence	1,844	15,367								
		Landscape	174,949	1,457,908								
		Pond	1,680	14,000								
		Walkway, Parking	79,420	661,833								
		Underground Utilities	78,355	236,292								
M	A	Guest Rm 40 (10)	282,376	2,353,133	2,763,005	200,000						
A	D	Corridor, Elevator		0	167,000					265,500	200,000	
U	C	Guest Rm 32 (8)	252,639	2,105,325	2,210,000	200,000				7,500		
K	E	Corridor		0	95,500					211,000	200,000	
A	D	Guest Rm 40 (10)	278,794	2,323,283	2,763,000	200,000				8,500		
	F	Corridor		0	91,500					265,500	200,000	
	G	Guest Rm 48 (12)	348,590	2,994,917	3,318,500	700,000				9,500		
	H	Corridor, Elevator		0	159,500					315,000	200,000	
	J	Guest Rm 40 (10)	264,603	2,205,025	2,763,000	200,000				6,500		
	K	Guest Rm 32 (8)	232,790	1,939,917	2,210,000	200,000				265,500	200,000	
	L	Corridor, Elevator	82,687	609,058	236,500	200,000				211,000	200,000	
	M	Main Lobby	331,489	2,762,408	1,283,500	200,000				7,500	7,500	
	N	Walkway		0	49,500					664,000	200,000	
	P	Dining, Kitchen, Function	660,461	5,503,842	2,669,500	200,000				15,000		
	Q	Bar	45,339	378,242	104,500	104,500				253,000	200,000	
	R	Maintenance	95,764	798,033	1,968,000	200,000				87,500	87,500	
	T	Snack Bar	11,124	92,700	36,000	36,000				219,500	200,000	
	V	Pool Eqmt Bldg	9,395	78,292	27,000	27,000				49,500	49,500	
		Pool & Pool Area	18,309	152,575	58,500							
		Tennis Court	74,243	618,692	70,000					34,500		
		Tennis Pro Shop	24,818	206,817	4,500							
		Manager's House	7,024	58,533	132,500							
		Pond	78,790	589,917								
		Landscape	123,670	1,030,583								
		Parking	28,168	234,733								
		Appld. Rd. Improvement	447	3,725								
		Off-site Sewage Plant	99,505	829,208								
GRAND TOTAL			8,258,861	68,823,842	66,114,005	3,985,500	7,000,000	13,000,000		6,960,500	3,033,000	

00020

Decision Exhibit No. 1  
 Decision of NAKAHARA  
 Date 9.11.93

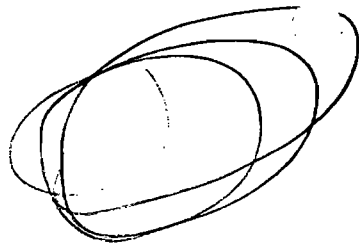
EXHIBIT "D"

COST COMPARISON AND ASSESSMENT TABLE  
 SHERATON KAUAI POIPU - MAKAI

Building Description	OEP Building Number	Tax Office Value	OEP Repair Cost	Architect Repair Cost
Masonry	A	8,085,500.00		
Masonry	B	818,600.00	1,300,000.00	
Wing #1	7	282,600.00	717,600.00	
Wing #2	3	865,300.00	964,100.00	1,631,530.00
Wing #3	4	255,700.00	404,300.00	617,360.00
Wing #4	5	254,200.00	373,200.00	617,360.00
Wing #5	6	623,600.00	1,368,400.00	2,143,500.00
Snack Bar/Pool	10		218,100.00	
Rest./General Bldg.	14	2,626,000.00		
Retail Shops	15	178,600.00		

EXHIBIT 5

24 January 1994



To: Fred Ferguson-Brey

From: Eric Toulon

332-7277 Phone & fax

Pages 5

Note to Steve Seiler (Office of  
Emergency Permitting), regarding a building  
permit I found at the County of  
Kauai's Building Division.

Eric Toulon

MEMORANDUM

Date: May 20, 1993  
From: Jeffrey Lacy,  
Planning Director  
To: Heather Harvey, #  
Office of Emergency Permitting  
Subject: Shoreline Setback Requirements

---

This memo is to confirm the Planning Department's policy as stated in your memorandum of April 22, 1993 regarding the shoreline setback requirements of Chapter 205A-44, HRS. Specifically, Section 205A-44 (b) states that structures are prohibited in the shoreline area without a variance pursuant to this part. Structures in the shoreline area shall not need a variance if they fall within the 6 point criteria of Section 205A-44 (b). The statute further states that structures falling within any one of the six point criteria may be repaired, but shall not be enlarged without a variance. To arrive at a differentiation between "repair" and "reconstruction", the Planning Department has been using the 50 % criteria. Work to be done on structures that have received more than 50 % damage are considered as "reconstruction".

Further, the Shoreline Setback Rules and Regulations of the County of Kauai, authorizes the Planning Director to waive the field survey requirement in certain situations. Since authority to render such a determination rest with the Planning Director, requests for waivers are to be submitted to our office for review whether it be for repairs or reconstruction of existing structures.



## ACT 356

- (3) The clearing of [sand] the materials from existing drainage pipes and canals and from the mouths of streams[;] including clearing for the purposes under section 46-11.5; provided that the sand removed shall be placed on adjacent areas unless such placement would result in significant turbidity; or
- (4) The cleaning of the shoreline area for State or county maintenance purposes, including the clearing for purposes under [section 46-11.5 and] section 46-12; provided that the sand removed shall be placed on adjacent areas unless [such] the placement would result in significant turbidity.

(b) [Except as otherwise provided in this part no structure or any portion thereof, including but not limited to seawalls, groins, and revetments, shall be permitted within the shoreline area; provided that any lawful nonconforming structure existing on June 22, 1970, shall be permitted; provided further that any structure which is necessary for safety reasons or to protect the property from erosion or wave damages shall be permitted. A structure not conforming to this section but for which a building permit application has been filed on or before June 22, 1970, shall also be permitted as a nonconforming structure, subject to the ordinances and regulations of the particular county.] Except as provided in this section, structures are prohibited in the shoreline area without a variance pursuant to this part. Structures in the shoreline area shall not need a variance if:

- (1) They were completed prior to June 22, 1970;
- (2) They received either a building permit, board approval, or shoreline setback variance prior to the effective date of this Act; 6-16-87
- (3) They are outside the shoreline area when they receive either a building permit or board approval;
- (4) They are necessary for or ancillary to continuation of existing agriculture or aquaculture in the shoreline area on the effective date of this section;
- (5) They are minor structures permitted under rules adopted by the department which do not affect beach processes or artificially fix the shoreline and do not interfere with public access or public views to and along the shoreline; or
- (6) Work being done consists of maintenance, repair, reconstruction, and minor additions or alterations of legal boating, maritime, or watersports recreational facilities, which are publicly owned, and which result in little or no interference with natural shoreline processes;

provided that permitted structures may be repaired, but shall not be enlarged within the shoreline area without a variance.

[(c) Any nonconforming structure, including but not limited to residential dwellings, agricultural structures, seawalls, groins, and revetments may be replaced or reconstructed within the shoreline area; provided that no nonconforming structure shall be substantially enlarged or changed to another nonconforming use within the shoreline area. If the use of any nonconforming structure is discontinued or held in abeyance for a period of one year, the further continuation of such use shall be prohibited.]

SECTION 13. Section 205A-45, Hawaii Revised Statutes, is amended to read as follows:

“§205A-45 Shoreline setback lines established by county. (a) The several counties through rules adopted pursuant to chapter 91 or ordinance[s] may require that shoreline setback lines be established at [a distance] distances<sup>1</sup> greater than that established in this part.

CADES SCHUTTE FLEMING & WRIGHT

ATTORNEYS AT LAW

HONOLULU, HAWAII OFFICE

P.O. BOX 939  
HONOLULU, HAWAII 96808  
1000 BISHOP STREET  
HONOLULU, HAWAII 96813

TELECOPIER: (808) 531-8738  
TELEX: 7238589  
TELEPHONE: (808) 521-9200

RECEIVED  
2-24-94

PATRICIA J. MCHENRY  
K. JAMES STEINER, JR.  
J. ROBERT ARNETT II  
DAVID F. E. BANKS  
J. THOMAS MALONEY, JR.  
DENNIS J. GAUGHAN  
BLANE T. YOKOTA  
JEFFREY D. WATTS  
CAROL L. W. HEE  
ERIC N. ROOSE  
MARJORIE A. LAU  
LAURIE A. KURIBAYASHI  
JAMES H. ASHFORD  
MICHELE M. SUNAHARA  
NANI RAPOZA

CYNTHIA M. JOHIRO  
JOHN P. POWELL  
DENNIS W. CHONG KEE  
CARLITO P. CALIBOSO  
CATHERINE A. CAREY  
DAVID W. LONBORG  
DANIEL H. DEVANEY IV  
ALYSON J. NAKAMURA  
ALLEN R. WOLFF  
MARK D. LOFSTROM  
KAREN WONG  
MICHAEL H. SHIKUMA  
JEFFREY K. NATORI  
LYNN HIGASHI HIATT

OF COUNSEL:  
J. RUSSELL CADES  
WILLIAM L. FLEMING  
HARDLO S. WRIGHT  
A. SINGLETON CAGLE

C. FREDERICK SCHUTTE  
(1921-1988)

JAMES S. CAMPBELL  
ROBERT B. BUNN  
WILLIAM M. SWOPE  
DOUGLAS E. PRIOR  
E. GUNNER SCHULL  
MICHAEL P. PORTER  
DONALD E. SCEARCE  
RICHARD A. HICKS  
ROGER H. EPSTEIN  
JEFFREY S. PORTNOY  
EDWARD DEL BOYLE  
BERNICE LITTMAN  
NICHOLAS C. DREHER  
MARK A. HAZLETT  
PHILIP J. LEAS  
DAVID C. LARSEN  
STEPHEN B. MACDONALD  
LARRY T. TAKUMI  
WILLIAM A. CARDWELL  
C. MICHAEL HARE

RICHARD R. CLIFTON  
ROY A. VITOUSEK III  
NELSON N. S. CHUN  
DARRYL H. W. JOHNSTON  
VITO GALATI  
CARY S. MATSUSHIGE  
DAVID SCHULMEISTER  
THOMAS E. CROWLEY III  
LORRAINE H. AKIBA  
MILTON M. YASUNAGA  
SUSAN OKI MOLLWAY  
GINO L. GABRIO  
COLIN O. MIWA  
MARTIN E. HSIA  
PETER W. OLSON  
JOHN R. CONRAD  
RHONDA L. GRISWOLD  
GAIL M. TAMASHIRO  
GRACE NIHEI KIDO  
DONNA Y. L. LEONG

WRITER'S DIRECT DIAL NUMBER:

January 21, 1994

(808)521-9392

Dee M. Crowell  
Planning Director  
County of Kauai  
4444 Rice Street  
Suite 473  
Lihue, Hawaii 96766

Re: Sheraton Kauai Hotel, Poipu  
TMK: 2-8-16:3

Dear Mr. Crowell:

This firm represents First Hawaiian Bank in its capacity as Trustee of the Eric A. Knudsen Trust, one of the two owners of the property underlying the Sheraton Kauai Beach Resort. As you probably know, the Property is leased to Obayashi Corporation, who owns the improvements on the Property and contracts with The Sheraton Corporation to operate the Hotel.

As Trustee of the Eric A. Knudsen Trust, First Hawaiian Bank is one of several parties who have a vital interest in the restoration or replacement of the improvements on the Property. Others include Bishop Trust Company, Limited, as Trustee of the Augustus F. Knudsen Trust, Obayashi Corporation, The Sheraton Corporation and the County of Kauai, who needs to have this major resort property returned to operation in order to stimulate a revival of the tourism based economic activity in the Poipu area that creates hundreds of jobs for the people of Kauai.

The purpose of this letter is to set forth our understanding of the current status of the building permits that have been applied for to repair the improvements, along with specific questions that we would like you to answer formally, in your capacity as Planning Director, in order that we can better understand the current situation.

January 21, 1994

### BUILDINGS A AND B

We have been advised that permits for the repair of the concrete buildings known as Buildings A and B have been issued. It is our understanding that, in order for these permits to issue, it was necessary for you, as Planning Director, to waive the "shoreline survey requirement of the Shoreline Setback Rules and Regulations (Shoreline Rules) and SMA determination". See September 28, 1993 memorandum from Miles Hironaka to Dee M. Crowell, a copy of which is attached hereto as Exhibit "A". Your decision to waive the shoreline survey requirement appears to have been based upon the fact that the cost of the work was estimated to be less than 50% of the replacement cost of the improvements and upon the fact that, as stated on page 2 of the Memorandum:

Assuming that these structures are now within the 40 foot shoreline setback as a result of the erosion from the hurricane [Haw. Rev. Stat.] Section 205-45(b) allows these buildings to be repaired without a shoreline setback variance. Thus, it would seem senseless to require a shoreline survey to determine if the structures will meet setback requirements when the State Statutes do not require these existing structures to meet setback requirements or to obtain a variance permit. (Emphasis added).

### OTHER STRUCTURES

It is our understanding that you have declined, to date, to waive the shoreline survey requirement for any other structures. With regard to Buildings 3, 6, 7, 10, 11 and 14, this is explained in the November 22, 1993 memorandum from Miles Hironaka to Steven Seiler through D. M. Crowell as being based on two factors: 1) the absence of "evidence that clearly and unmistakably shows that the proposed development will be located at a considerable distance from the shoreline setback" and 2) the cost of the work to restore the buildings is estimated to exceed 50% of the "replacement cost (Taxed Assessed Value)". See copy of November 22, 1993 Memorandum, attached hereto as Exhibit "B". Buildings 4 and 5 are not mentioned in the Memorandum, but we understand that they are being treated similarly.

We also have a copy of the December 3, 1993 letter from Joseph J. Mulvihill of the Office of Emergency Permitting to Obayashi Corporation, a copy of which is attached hereto as Exhibit "C". This letter does not mention the shoreline survey requirement, or whether it has been waived, but states that, because the estimated cost to repair the "Electrical and Mechanic Building" exceeds 50% of its taxed assessed value, that the structure must be brought into compliance with the Flood Control Ordinance in order for a permit to be obtained. Obayashi is

Letter to Dee M. Crowell

January 21, 1994

advised in this letter, however, that "An Independent Appraisal provided by your firm could be used for a more accurate determination of substantial improvement."

Question Number 1: Will The County Be Basing Its "Repair" versus "Reconstruction" Calculations Solely Upon Tax Assessed Values?

It has been our understanding to date, based upon conversations with staff members at the Office of Emergency Permitting, that the County will entertain other evidence of the pre-hurricane value of damaged structures besides their Tax Assessed Values. This appears to be corroborated by Exhibit "C". First Hawaiian Bank's first question, therefore, is intended to confirm this understanding. ✓

The reason for this question is that Buildings 3, 4, 5 and 6, for example, which include a substantial number of oceanfront guestrooms, appear to be grossly undervalued for tax purposes. This is reflected in the columns below which compare their tax assessed values with their depreciated book value, as reflected in Obayashi's financial records, and their replacement value used by Obayashi for insurance purposes:

<u>Building No.</u>	<u>Tax Assessed Value</u>	<u>Book Value</u>	<u>Replacement Value</u>
3	865,300	3,625,575	5,508,500
4	255,700	1,516,750	2,041,500
5	254,200	1,568,367	2,041,500
6	623,600	5,200,925	6,965,500

It is our understanding that Obayashi has thus far not submitted any information, such as that set forth above, regarding the true value of the structures. First Hawaiian Bank would like to know whether such information, if submitted, would be considered by the County in determining whether Obayashi's permit application is for a "repair" versus a "reconstruction" of those structures for which Obayashi has thus far not been issued a permit. First Hawaiian Bank obtained the above numbers from Exhibit "D", attached, which is a spreadsheet from the files of Obayashi's insurance broker, Marsh & McLennan. (CORRECT ✓ YES ✓

Question Number 2: If The Damage To These Other Structures Is Determined To Be Less Than 50% Of Their Value, Can The Shoreline Survey Requirement Be Waived, As It Was For Buildings A and B?

A review of Exhibit "D" together with the Cost Comparison and Assessment Table utilized for this Project by the Office of Emergency Permitting, a copy of which is attached hereto as Exhibit "E", indicates that the 50% threshold is not met for the majority of the structures if the depreciated book values are taken to represent their fair market value. If, based on these numbers, or upon independent appraisals, the County were to agree that the 50% threshold is not met, can the shoreline survey

Letter to Dee M. Crowell

January 21, 1994

requirement then be waived in the same manner as it was for Buildings A and B?

We are somewhat confused on this point because your waiver of the shoreline survey for Buildings A and B appears to be based, in part, on an assumption that even if the structures were determined to be within the shoreline setback, no variance would be required under Hawaii Revised Statutes, Section 205-44(b). Your decision not to waive the shoreline survey requirement for the other structures, however, does not mention Section 205-44(b) and strongly implies that, unless there is "evidence that clearly and unmistakably shows the structure is to "be located at a considerable distance from the shoreline setback", that the shoreline survey cannot be waived.

First Hawaiian Bank would like to know whether there is something different about the "repair" versus "reconstruction" analysis for these other structures from the analysis previously done for Buildings A and B, or whether your treatment of the other structures represents a recent change in the policy of your department.

As you may or may not know, First Hawaiian Bank and Bishop Trust Company, Limited applied in December of 1992 to recertify the 1986 certified shoreline, the most recent certified shoreline on file with the State Surveyor's Office. Obayashi, however, has objected to the recertification of the 1986 shoreline and continues to vigorously object to any attempt by the State Surveyor's Office to determine and certify the pre-Iniki shoreline boundary. Attached hereto as Exhibit "F" is a copy of Obayashi's most recent letter to the State Surveyor insisting that the existing shoreline -- rather than the pre-Iniki shoreline -- be certified.

In view of the fact that no shoreline setback variance would, in any event, be necessary to "repair" rather than "reconstruct" structures that were less than 50% damaged, what impact, if any, does the absence of a current shoreline certification have on Obayashi's pending building permit applications? Also, if Obayashi successfully blocks First Hawaiian Bank's and Bishop Trust Company, Limited's efforts to preserve the pre-Iniki shoreline boundary of the Property, what impact will this have on the pending permit applications?

Question Number 3: Has There Been A Final Rejection Of Any Of Obayashi's Permit Applications For The Restoration Of The Sheraton Kauai Beach Resort?

As you know, Obayashi has sued First Hawaiian Bank and Bishop Trust Company, Limited, in their capacity as Trustees for the Knudsen Trusts, for a permanent abatement of the ground rent. In that lawsuit, Obayashi has taken the position that the County has refused to issue permits for the restoration of the wooden oceanfront guest wings, which include buildings 3, 4, 5, 6 and 7.

I ✓  
I ✓  
no final  
agreed  
to be  
ship's of

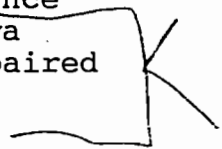
Page 5  
Letter to Dee M. Crowell  
January 21, 1994

First Hawaiian Bank would like to know if this is true, and if so, whether the County's decision is final, and if not final, if Obayashi has supplied the County with all the necessary information to make a final determination.

NO

NO -  
7/3 REQ.

Please understand that, while First Hawaiian Bank is anxious to see the Hotel restored and operations resumed, First Hawaiian Bank does not mean, by this letter, to be taking a position regarding whether any specific permit should be issued. If, under the applicable laws and policies of the County, certain structures must be demolished or replaced rather than restored, then so be it. First Hawaiian Bank just wants to know whether this is the case. It has been more than fifteen months since Hurricane Iniki struck. Fifteen months after Hurricane Iwa struck, the existing oceanfront wings had already been repaired and reopened after having been more seriously damaged, structurally, than they were by Hurricane Iniki.



If the County has been unable to make a final determination regarding whether these structures can be repaired because Obayashi has failed to diligently pursue the matter, then we need to know that. If the contested status of the shoreline is precluding the County from making the necessary determination, we need to know that as well, along with an explanation of how the location of the shoreline will impact the permits for each structure, and why it is necessary for the shoreline issue to be resolved by the State before the County can act -- in view of the fact that a shoreline certification was apparently unnecessary for the issuance of permits for Buildings A and B.

12/1

12/1/94  
Shuttle  
effect  
and  
12/1/94

I would like to thank you for your anticipated cooperation in helping First Hawaiian Bank to better understand the current status of the Sheraton Kauai Beach Resort building permit applications.

Very truly yours,

David Schulmeister  
for

CADES SCHUTTE FLEMING & WRIGHT

cc: Heather Harvey  
Steven Seiler  
Alan Zawtocky  
James A. Kawachika  
Fred Ferguson-Brey  
Ted Peister  
Rick Tsujimura  
Ronald J. Verga

\*\*\*\*\* FAX TRANSMITTAL MEMO \*\*\*\*\*

TO: David Schulmeister  
DEPT: \_\_\_\_\_ FAX #: 531-8738  
FROM: F. Ferguson - Brey PHONE: 538-4562  
CO: \_\_\_\_\_ FAX #: 538-4693  
Post-It™ brand fax transmittal memo 7871

NO. OF PAGES  
2

MEMORANDUM

Date: September 28, 1993  
From: Myles Hironaka  
To: Dee M. Crowell  
Planning Director  
Subject: Shoreline Survey Waiver  
SMA Determination  
Sheraton Kauai Hotel, Poipu  
TMK:2-8-16: 3

The applicant desires to repair the existing Buildings A & B that was damaged by Hurricane Iniki. The Office of Emergency Permitting (OEP) has referred this matter to the Planning Department to ascertain if the Planning Department can waive the shoreline survey requirement of the Shoreline Setback Rules and Regulations (Shoreline Rules) and SMA Determination.

The applicant proposes to repair the existing buildings on the property to its original form and in the same location. No additions or expansion to the structure are proposed. The Office of Emergency Permitting has provided a cost estimate of the repairs to be done to Buildings A & B (\$1,300,000), and also obtained the Real Property Valuation of the buildings (\$2,804,600). Based on these figures, the cost of the work to be done to the buildings do not exceed 50% of the replacement cost of the buildings and thus, constitutes repair and not reconstruction.

Background - In 1983, both the mauka and makai portions of the Sheraton Resort was approved by the Planning Commission via SMA Use Permit SMA(U)-83-2 and Class IV Zoning Permit Z-IV-83-16. In 1986, the Planning Commission approved 120 additional rooms to the makai section of the resort project. In 1989, the Planning Commission approved SMA Use Permit SMA(U)-89-9 to allow the renovation of the entire resort project. Relative to the makai section, the project meet density, lot coverage, and setback requirements of the CZO. The project also met the 40 ft. shoreline setback requirement. In fact, portions of the buildings were setback in excess of 40 ft from the shoreline.

DISCUSSION:

Shoreline Survey and Setback Requirements - Section 205A-44 (b) of the Hawaii Revised Statutes states that structures are prohibited in the shoreline area without a variance pursuant to this part. Structures in the shoreline area shall not need a variance if they fall within the 6 point criteria of Section 205A-44 (b). The statute further states that structures falling within any one of the six point criteria may be repaired, but shall not be enlarged without a variance. To arrive at a differentiation between

EXHIBIT "A"

"repair" and "reconstruction", the Planning Department has been using the 50 % criteria. Work to be done on structures that have received more than 50 % damage are considered as "reconstruction".

As noted, the applicant intends to repair (not demolish and reconstruct) Buildings A & B. The cost of the work to be done are less than 50% of the replacement cost and thus, constitutes "repair". Furthermore, the applicants do not propose any enlargements or substantial modification of the buildings. Assuming that these structures are now within the 40 ft. shoreline setback as a result of the erosion from the Hurricane, Section 205-44 (b) allows these buildings to be repaired without a shoreline setback variance. Thus, it would seem senseless to require a shoreline survey to determine if the structures will meet setback requirements when the State Statutes does not require these existing structures to meet setback requirements or to obtain a variance permit.

It is also noted that the Planning Staff conducted an inspection of the site on September 22, 1993 and found that Building A is setback approx. 35 ft. and Building B was setback approx. 55 ft. from what was conservatively interpreted as the vegetation line. In consideration of the State's actions regarding the certification of other properties in the vicinity and the Poipu area after the Hurricane, it is likely that the actual "Shoreline" may be situated further makai of the vegetation line used by staff. Should this be the case, the structures may be outside of the 40 ft. shoreline setback area.

SMA Requirements - Section 1.4 H (f) of the SMA Rules state that the "repair, maintenance, or interior alterations to existing structures" are not "Developments" and thus, do not require SMA permits.

RECOMMENDATION:

Based on the foregoing it is recommended that the shoreline survey requirement for the repair of Buildings A & B are not necessary and should be waived. It is further recommended that Section 205A-44 (b), HRS, allows these buildings to be repaired without a variance permit. Finally, it is recommended that the proposed repairs do not require an SMA permit in accordance with Section 1.4 H. (f) of the SMA Rules.

Approved by:

Dee M. Crowell  
DEE M. CROWELL, Planning Director

9/30/93  
Date



10/22/93

94- DID WE EVER SEND A LETTER TO CHAYASHI INFORMING THEM OF THIS?

MEMORANDUM

Date: November 22, 1993

From: Myles Hironaka

Thru: Dee M. Crowell

To: Stephen Seiler, OEP

Subject: Waiver of Shoreline Survey  
 Sheraton Kauai Hotel, Poipu  
 TMK:2-8-16: 3  
 Buildings 3, 6, 7, 10, 11, and

-----

This memo is to inform you that the Planning Director has determined that there is not enough evidence to waive the shoreline survey requirement for the reconstruction of the subject buildings based on the findings of a site inspection conducted by OEP and the Planning Department on October 11, 1993 and the cost estimates provided to our office by the OEP. This determination is based on the following:

1. Section 8 of the Shoreline Setback Rules and Regulations provides the Planning Director with the authority to waive the shoreline survey requirement whereby there is evidence that clearly and unmistakably shows that the proposed development will be located at a considerable distance from the shoreline setback. The inspection of the site showed that there is not enough evidence to show that the buildings will comply with the 40 ft. shoreline setback requirement due to the extensive disturbance of the shoreline area of the property as a result of the Hurricane.
2. The cost of work to restore the buildings exceed 50% of the replacement cost (Tax Assessed Value) and thus, the work to be done on the buildings constitutes "reconstruction" rather than "repair".

Should you have any questions, please call me at 241-6677.

cc: planning

EXHIBIT "B"



JOANN A. YUKIMURA  
MAYOR



DEE CROWELL  
PLANNING DIRECTOR  
OEP OFFICER IN CHARGE

HEATHER M. HARVEY  
OEP MANAGER FOR  
THE KEITH COMPANIES

COUNTY OF KAUAI

OFFICE OF EMERGENCY PERMITTING  
4211 RICE STREET  
LIHUE, KAUAI, HAWAII 96786

TELEPHONE (808) 241-7222

December 3, 1993

Obayashi Hawaii Corp.  
725 Kapiolani Blvd., 4th Floor  
Honolulu, Hi. 96813  
Attn: Tak Kauchi - Vice President

**Subject: Substantial Improvement Calculations**  
Sheraton Kauai, Poipu  
Electrical and Mechanical Building  
Obayashi Corporation  
Registration No.: R-102910  
TMK: 2-8-16: 3  
Koloa, Kauai, Hawaii

Dear Sir:

Due to the fact that the subject property is located in a Flood Hazard Zone designated Zone AE with a base flood elevation (BFE) of 12 feet mean sea level, the Office of Emergency Permitting (OEP) Engineering Division has checked to determine if substantial improvements exist for the proposed scope of work on the Poipu Sheraton electrical and mechanical building.

Substantial improvements are improvements where the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred. The OEP Building Division has determined the cost of improvements to cost \$400,000. Since the tax assessment does not provide an assessment for this building as a separate, individual structure, a replacement value for the structure was calculated by OEP Building Division to be \$570,000. An Independent Appraisal provided by your firm could be used for a more accurate determination of substantial improvement.

Based on the figures above, substantial improvements exist for the electrical and mechanical building. Since substantial improvements exist, the structure must be brought in to compliance with the County of Kauai Drainage and Flood Control Ordinance (Ordinance No. 630). The following recommendations can be added to the current scope of work in order to insure compliance. First, the entire structure can be elevated so that the finished floor is above the base flood elevation. Since the structure does not have livable space, it is considered a commercial structure. Thus, another option would allow the existing building to be floodproofed up to the base flood elevation or all of the utilities inside the building can be elevated or floodproofed up to the base flood elevation. It should be noted that the finished floor elevation is at approximately 8.25 feet mean sea level.

**EXHIBIT "C"**

Page Two  
Obayashi Corporation

If you have any questions or require additional information regarding this matter, please contact me at 241-7222. Our office hours are Monday through Friday, 8:00 am to 7:00 pm, and Saturdays from 8:00 am to 12:00 noon.

Sincerely,  
Office of Emergency Permitting



Joseph J. Mulvihill, P.E.  
Civil Engineer

cc: Brian Takahashi, AM Partners  
David Schulmeister, Eric A. Knudsen Trust  
A. Bernard Bays, Augustus F. Knudsen Trust

SHERATON KANAI BEACH RESORT / GARDEN HOTEL

Bldg. Name	Use	DLDG						CONTENTS		
		OC Tokyo		Insurance Value			OC Tokyo	Insurance Value		
		V1000	Bookvalue	Property	Flood	Excess-1	Excess-2	Bookvalue	Property	Flood
M #3	Guest Rm 30 (15)	435,069	3,625,575	5,508,500	200,000					
A #4	Guest Rm 12 ( 6)	182,010	1,516,750	2,041,500	200,000			703,500	200,000	
X #5	Guest Rm 12 ( 6)	108,204	1,568,367	2,041,500	200,000			87,500	87,500	
A #6	Guest Rm 41 (20)	624,111	5,200,925	6,965,500	200,000			87,500	87,500	
I #7	Guest Rm 10 ( 6)	118,214	985,117	3,120,500	200,000			313,500	200,000	
	Mokihana Snack Bar	67,325	561,042					420,000	200,000	
	#8.9 Kitchen,Storage	236,637	1,971,975	3,444,000						
	#10 Administration	2,640	22,000	515,000				1,033,500		
	#11 Dining, Bar, Waiting	176,357	1,469,642	2,077,500				12,000		
	#12 Shop / Colonade	45,902	382,517	522,500				314,500		
	#13 Port Cochare	70,231	505,258	4,314,000						
	#14 Cocktail Lounge	85,558	712,983							
	#15 Shops	20,272	168,933	496,500						
	#16 Multi-purpose Rm	71,009	591,742	178,500	178,500					
	#17 Utility Bldg	9,720	81,000	133,500	133,500					
	#18 Storage	1,492	12,433	34,000	34,000					
	Drop-off Area	353,783	2,948,192							
	Maintenance Bldg	2,781	23,175	56,500	56,500					
	Pool, Spa & Eqpm	28,722	239,350	118,000						
	Pool Eqpm Bldg		0	15,500	15,500					
	Makai Retaining Wall	16,369	136,408	52,000						
	A Guest Rm 105 (31)	1,872,966	15,608,050	10,017,000	200,000					
	D Guest Rm 12 ( 6)		0	1,203,000	200,000			968,000	200,000	
	Road Pavement	20,166	168,050					113,500	113,500	
	Fence	1,844	15,367							
	Landscape	174,949	1,457,908							
	Pond	1,680	14,000							
	Walkway, Parking	79,420	661,833							
	Underground Utilities	28,355	236,292							
M A	Guest Rm 40 (10)	202,376	2,353,133	2,763,005	200,000			265,500	200,000	
A B	Corridor, Elevator		0	167,000				7,500		
U C	Guest Rm 32 ( 8)	252,639	2,105,325	2,210,000	200,000			211,000	200,000	
K D	Corridor		0	95,500				8,500		
A E	Guest Rm 40 (10)	278,794	2,323,283	2,763,000	200,000			265,500	200,000	
F	Corridor		0	91,500				9,500		
G	Guest Rm 48 (12)	348,590	2,904,917	3,316,500	700,000			315,000	200,000	
H	Corridor, Elevator		0	159,500				6,500		
J	Guest Rm 40 (10)	264,603	2,205,025	2,763,000	209,020			265,500	200,000	
X	Guest Rm 32 ( 8)	232,790	1,939,917	2,210,000	200,000			211,000	200,000	
L	Corridor, Elevator	82,687	609,058	236,500	200,000			7,500	7,500	
M	Main Lobby	331,409	2,762,408	1,283,500	200,000			664,000	200,000	
H	Walkway		0	49,500				15,000		
P	Dining, Kitchen, Function	660,461	5,503,812	2,669,500	200,000			253,000	200,000	
Q	Bar	45,399	378,242	104,500	104,500			87,500	87,500	
R	Maintenance	95,764	798,033	1,968,000	200,000			219,500	200,000	
T	Snack Bar	11,124	92,700	36,000	36,000			49,500	49,500	
V	Pool Eqpm Bldg	9,395	78,292	27,000	27,000					
	Pool & Pool Area	18,309	152,575	58,500				34,500		
	Tennis Court	74,243	618,692	70,000						
	Tennis Pro Shop	24,818	206,817	4,500						
	Manager's House	7,024	58,533	132,500				11,000		
	Pond	70,790	589,917							
	Landscape	123,670	1,030,583							
	Parking	28,168	234,733							
	Kapili Rd. Improvement	447	3,725							
	Off-site Sewage Plant	99,505	829,208							
	<b>GRAND TOTAL</b>	<b>0,250,861</b>	<b>68,823,812</b>	<b>66,114,005</b>	<b>3,985,500</b>	<b>7,000,000</b>	<b>13,000,000</b>	<b>6,960,500</b>	<b>3,033,000</b>	

000020

Deposition Exhibit No. 1  
 Deposition of NAKAGAWA  
 Date 3-11-93

**EXHIBIT "D"**

COST COMPARISON AND ASSESSMENT TABLE  
 SHERATON KAUAI POIPU - MAKAI

Building Description	OEP Building Number	Tax Office Value	OEP Repair Cost	Architect Repair Cost
Masonry	A	8,085,500.00		
Masonry	B	818,600.00	1,300,000.00	
Wing #1	7	282,600.00	717,600.00	
Wing #2	3	865,300.00	964,100.00	1,631,530.00
Wing #3	4	255,700.00	404,300.00	617,360.00
Wing #4	5	254,200.00	373,200.00	617,360.00
Wing #5	6	623,600.00	1,368,400.00	2,143,500.00
Snack Bar/Pool	10		218,100.00	
Rest./General Bldg.	14	2,626,000.00		
Retail Shops	15	178,600.00		

EXHIBIT "E"

# DWYER IMANAKA SCHRAFF KUDO MEYER & FUJIMOTO

ATTORNEYS AT LAW ❖ A LAW CORPORATION

J PIONEER PLAZA ❖ 900 FORT STREET MALL ❖ HONOLULU, HAWAII 96813 ❖ POST OFFICE BOX 2727 ❖ HONOLULU, HAWAII 96803  
TELEPHONE: (808) 524-8000 ❖ FACSIMILE: (808) 526-1419

JOHN R. DWYER, JR.  
MITCHELL A. IMANAKA  
PAUL A. SCHRAFF  
BENJAMIN A. KUDO  
WILLIAM G. MEYER, III  
WESLEY M. FUJIMOTO  
RONALD V. GRANT  
JON M. H. PANG  
BLAKE W. BUSHNELL  
KENN N. KOJIMA  
ADELBERT GREEN  
RICHARD T. ASATO, JR.

January 7, 1994

DEAN T. YAMAMOTO  
SCOTT W. SETTLE  
DARCIE S. YOSHINAGA  
TRACY TIMOTHY WOO  
LAWRENCE I. KAWASAKI  
DOUGLAS H. INOUYE

Of Counsel:  
RANDALL Y. IWASE  
JAMES H. SEKI  
R. BRIAN TSUJIMURA

Mr. Stanley Hasegawa  
Acting State Land Surveyor  
Department of Accounting and  
General Services  
Survey Division  
1151 Punchbowl Street, Room 210  
Honolulu, Hawaii 96813

Re: Sheraton Kauai Shoreline Application

Dear Mr. Hasegawa:

We are in receipt of a letter dated January 4, 1994 from Mr. Schulmeister on behalf of the Applicant regarding the application to certify the shoreline fronting the Sheraton Kauai. On December 7, 1993, you wrote to the Applicant that you were rejecting their application to re-certify the 1986 shoreline survey, but are willing to recommend for certification a shoreline determination based on the 1992 photographs submitted by Obayashi.

The Applicants, in their letter January 4, 1994 letter stated that they are "willing to revise their shoreline application to conform to the shoreline as it is reflected in the five ground level photos which were taken in July 1992." In this regard, the Applicants have engaged the services of Dr. Mushtaq Hussain to provide photogrammetric expertise in reviewing the photographs and to re-submit a new map. We request the opportunity to review all of Dr. Hussain's theories, calculations and procedures after he has submitted his opinion to you. We understand that you are inclined to grant the Applicants their request for extension but will condition such an extension upon the Applicants' provision of correspondence, work notes and calculations to Obayashi and that Obayashi will be allowed a period of time to respond.

We do wish to note for the record that it is Obayashi's position that this activity by the Applicant is irregular and without authority in the law, and that the State Surveyor should certify the existing shoreline. We wish to note that as a matter of law the State Surveyor must certify the existing shoreline. It is indisputable that the Emergency Rules adopted by the Board of Land and Natural Resources do not apply. (See pages 4-6, Memorandum in Opposition to Application for Shoreline Certification). Therefore pursuant to Section 13-222-19 the State Surveyor may

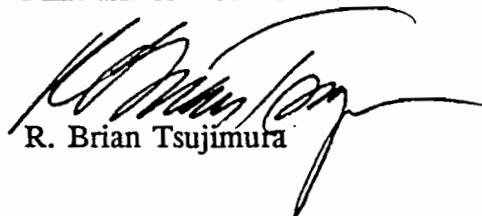
EXHIBIT "F"

Mr. Stanley Hasegawa  
January 7, 1994  
Page 3

only accept for certification a survey map "based on an actual field survey conducted within ninety (90) days prior to the filing for a shoreline certification." The Applicants have not submitted such a map. For these reasons alone, the State should certify the existing shoreline.

Very truly yours,

DWYER IMANAKA SCHRAFF KUDO  
MEYER & FUJIMOTO



R. Brian Tsujimura

RBT:ay

cc: Obayashi Hawaii Corporation  
John Edmunds, Esq.  
David Schulmeister, Esq.  
Mason Young  
Sam Lee  
Mike Laureta