

CERTIFIED MAIL

April 17, 1979

Mr. Steve Johnson
Opihi Hale, Inc.
P. O. Box 777
Kailua-Kona, HI 96740

Dear Mr. Johnson:

Variance Application
Tax Map Key 8-7-14

The Planning Commission at its preliminary hearing on April 12, 1979 considered your application for a variance request to waive the 20-foot pavement requirement for a Homestead Road leading to a proposed subdivision at Opihihale, South Kona, Hawaii.

This is to inform you that the Commission voted to deny your request based on the following findings:

In the past, we have recommended approval of variances from the required minimum roadway improvements. In these previous cases, however, the variances were for roadway improvements within the area to be subdivided. In this particular case, the petitioner is requesting a variance to waive the 20-foot pavement requirement imposed for a unimproved or "paper" Homestead Road leading to the proposed subdivision. In lieu of the 20-foot pavement requirement, the petitioner is requesting to allow the improvement of the Homestead Road with a 20-foot wide oil-treated surface. Although the petitioner's proposal would be an improvement over the existing condition of the Homestead Road, certain conditions will result from this action which may not be in the best interest of the public.

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Presently, the County has no maintenance nor liability responsibilities for "paper" road, even if the roads do belong to the County or State. However, once these roads become passable and usable, the County would have to incur these responsibilities, even if the roads are constructed with substandard improvements. (Referred to DPW's 4/10/79 comments, item No. 2) As compared to a pavement, an oil-treated surface erodes much faster, and as such, would result in a much higher maintenance cost. At the present time, the County is already faced with the reoccurring problem of limited funds for maintenance of its existing roads. Therefore, by allowing another roadway to be constructed with substandard improvements will place additional burden on the county government, and consequently, to the public in general.

Although the requirement of paving the roadway may create some economic difficulties to the petitioner, economic hardship per se is not a basic consideration in granting of variances. As such, it is determined that no unusual circumstances exist either to a degree which would deprive the petitioner of substantial property rights which would otherwise be available or to a degree which obviously interferes with the best use or manner of development of the area proposed to be subdivided.

Furthermore, it is determined that approval of the subject request for complete waiver of the 20-foot pavement requirement would essentially constitute a grant of personal and special privilege inconsistent with the limitations placed or which would be placed upon other properties in similar situations. Other property owners with lands having similar characteristics are or must oblige to comply with the requirements of the Subdivision Control Code. To grant complete waiver of the pavement requirement would create a situation wherein other potential subdividers, not only in the surrounding areas but throughout the County, could make similar request to waive the entire pavement requirement as well as other subdivision requirements. The provision of some sort of requirement is to assure that adequate and safe vehicular access is provided for all lots which are created, and, its potential users, whether they be lot owners or the public in general. It is felt that provision of adequate and safe vehicular access must be assured at this time.

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To grant this particular variance under the above-mentioned circumstances would be contrary to the goal of the General Plan's Transportation element which states to "Provide a transportation system whereby people and goods can move efficiently, safely, comfortably, and economically." (Emphasis added)

As your request has been denied, you may appeal the decision of the Planning Commission if you feel that the action of the Planning Commission was based on an erroneous finding of a material fact, or that the Commission has acted in an arbitrary or capricious manner, or had manifestly abused its discretion.

Should you decide to appeal the decision of the Commission in the denial of your variance request, a petition setting forth the following shall be submitted to the Board of Appeals within thirty (30) days from the date of action and accompanied by a filing fee of ten dollars (\$10.00):

1. Name, mailing address and telephone number;
2. Identification of the property and interest therein;
3. The particular provision of the Zoning Ordinance or Subdivision Ordinance or regulation in question;
4. All pertinent facts;
5. The action of the Commission; and
6. Reasons for the appeal, including a statement as to why the appellant believes that the Commission's action was based on an erroneous finding of a material fact, or that the Commission has acted in an arbitrary or capricious manner, or had manifestly abused its discretion.

Inasmuch as no public hearing will be held on this matter, we will be returning your filing fee as soon as the refund is processed.

We will be forwarding you a certified copy of the Order as soon as the document is prepared. Should you have any questions regarding the above, please feel free to contact the Planning Department at 961-8288.

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Sincerely,



WILLIAM F. MIELCKE
CHAIRMAN, PLANNING COMMISSION

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cc Corporation Counsel
Chief Engineer, Public Works
Kona Service Office

APR 24 1979

PLANNING COMMISSION OF THE PLANNING DEPARTMENT

COUNTY OF HAWAII

In the Matter of the Appeal)
 of)
 OPIHI HALE, INC.)
)
Tax Map Key 8-7-14:13)

Variance No. 572

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND

DECISION AND ORDER

PLANNING COMMISSION OF THE PLANNING DEPARTMENT

COUNTY OF HAWAII

In the Matter of the Appeal)
 of)
 OPIHI HALE, INC.)
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Tax Map Key 8-7-14:13)

Variance No. 572

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND
DECISION AND ORDER

The above-entitled matter was brought on for a preliminary hearing on April 12, 1979, in the Councilroom, County Building, South Hilo, Hawaii, at which time, Steve Johnson, president of Opihi Hale, Inc., appeared before the Planning Commission.

The Planning Commission having heard the testimony and having examined the facts does hereby declare its Findings of Fact, Conclusions of Law, and Decision and Order.

FINDINGS OF FACT

1. An application for a variance to waive the 20-foot pavement requirement imposed for a Homestead Road leading to a proposed subdivision was received on March 13, 1979.

2. The Homestead Road and the lot proposed to be subdivided are located on the mauka side of Mamalahoa Highway and the Opihi Hale House Lots Subdivision, Opihihale, South Kona.

3. The lot to be subdivided is identified as parcel 13 of TMK: 8-7-14. The petitioner intended to subdivide the 57-acre parcel into six (6) lots ranging from 5 acres to 15.2 acres in size. Tentative subdivision approval for the proposed subdivision was granted on August 2, 1977. One (1) of

the conditions of tentative approval was that the petitioner "Provide a 20-foot wide pavement meeting with the approval of the Department of Public Works in the Homestead Road right-of-way beginning from the Mamalahoa Highway and ending at the south side of the subdivision. Secure approval of the Department of Land and Natural Resources for the providing of pavement in the Homestead Road "right-of-way".

4. The Homestead Road is an unimproved or "paper" road with a right-of-way width of thirty (30) feet. The length of the road from Mamalahoa Highway to the south end of the subject property is approximately .9 mile. The roadway presently serves three (3) other lots between the Mamalahoa Highway and the area proposed to be subdivided.

5. In lieu of the 20-foot pavement requirement, the petitioner requested to construct the improvements according to minimum agricultural standard, which is a 20-foot wide oil-treated surface road.

6. In support of the request, the petitioner had, in part, stated the following:

"That there are special or unusual circumstances applying to the subject property or use which do not generally apply to surrounding properties or improvements in the same district.

"(a) Financial hardship: that the county should require a paved road over one mile and one third at the expense of our hui of six farmers is an unusual, unnecessary and excessive county requirement.

"(b) Environmental: that paving the particular stretch of 'Homestead Road' would upset the ecological

balance of the flora and fauna of the area, due to the existence of certain rare plants, fowl, and mammals. Henceforth we believe that paving this road would bring increased traffic to our peaceful country road thereby contributing to the demise of these rare plants through carbon-monoxide pollution, and through noise pollution the rare species of birds will undoubtedly leave the area. (Basically because of these two major factors no one who lives bordering this road wants to see a paved road.)

"The special and unusual circumstances listed exist to a degree that we, the owners, (Opihi Hale, Inc.) would be deprived the rights to develop this agricultural acreage in the best manner available because a county standard road would bring increased traffic on our peaceful county road, (tourists, sight-seers, and pig hunters) some seeking access to the South Kona Forest Reserve through our subdivision thereby depriving us to a degree the Right to privacy and unhindered agricultural development. We would like to keep this property in a natural a state as possible. An invasion of hunters of pig and fowl and specimen collectors of flora is not what any of us desire.

"The granting of this variance will not constitute a grant of personal or special privilege inconsistent with the limitations upon other properties under identical district classification because none of the property owners adjacent to the 'Homestead Road' want to see it paved to county standards.

"The granting of this variance will not be inconsistent with the general purpose of the subdivision and/or zoning codes because, a.) ours is an agricultural subdivision, the area is agricultural in general and all we are asking is that the county be consistent and allow minimum agricultural standard road as access to our agricultural subdivision, b.) will not mitigate the County General Plan because this is a variance which would not set any precedents because of the circumstances we have listed, c.) and will not materially be detrimental to the public welfare nor be injurious to improvements or property rights related to property in the near vicinity because, if allowed to improve the 'Homestead Road' to minimum agricultural standards, use would be limited to owners of the adjacent property and their guests, therefore the public welfare is not affected and the right to privacy of the adjacent property owners maintained and further agricultural development not hindered by the increased traffic a paved road would bring. d.) We would sign a maintenance agreement (if need be) and release of liability with the county is allowed a minimum agricultural standard road. e.) The 'Homestead Road' as set forth on the county map does not exist except on paper. No useful purpose can be secured by rigid application of road standards to what, of necessity, will be a dead end road serving a limited number of local residents, at a cost far beyond their collective means. The Kau side of the 'Homestead Road' never had access to Mamalahoa Highway, but ended mauka of it. The lava flow

of 1950 covers the 'Homestead Road' an estimated 15 to 20 feet, where it terminates in the approximate center of the flow.

"In order to place any access road to the subject property along the path of the original 'Homestead Road' (buried as it is) it has been necessary to obtain an easement across private lands connecting the government road and the site of the former homestead road."

7. As part of the application, the petitioner submitted a petition from other property owners in the area. The petition stated the following:

"We the undersigned, owners of property adjacent to the 'Homestead Road', agree with the aforementioned statement and do hereby request that the county pass the requested variance and allow an agricultural standard road instead of a paved asphalt road."

8. The property proposed for the subdivision is presently vacant of any structures. Surrounding land uses include scattered single family dwellings, agricultural activities, and other vacant lands. The South Kona Forest Reserve abuts the subject property toward the west.

9. Since there are no public water systems serving the area, the petitioner had requested and had received a water waiver from the Department of Water Supply.

10. Per memorandum dated April 3, 1979, the Department of Public Works provided the following comments:

"This application is too far below County standards. The standards that are set are the minimum allowable. The existing right-of-way (30') is too narrow. It will

not allow a 20 ft. pavement with 6 ft. shoulders to be built. The right-of-way should appropriately be 60 ft. for this road. The alignment at Mamalahoa Highway is too steep and the first bend that it makes is too sharp. A private agricultural standard road was not intended for construction within government right-of-ways. If the roadway was to be constructed wholly within private land, we would support the variance but we do not feel that a private road should be built within a public right-of-way. We do not see how the public can be kept from using the road once it is constructed.

"We fear we will be saddled with the maintenance responsibility should this application be approved. If not immediately, then perhaps when the use increases. We feel that this type of road require heavy maintenance."

A subsequent memorandum from that department was received on April 10, 1979. The memo stated the following:

- "1. The 30 ft. Homestead Road Reserve (paper road) is not maintained by the County and the right-of-way is under the jurisdiction of DLNR.
- "2. Should a private party build the road within the paper road, the County will be obligated to maintain and repair such a roadway. (Opinion by County Attorney in 1960 and 1965.)
- "3. In order to construct a County Standard road the 30 ft. right-of-way is not of sufficient width.
- "4. With road open to public, the continued use will eventually bring demand for improvement.

"5. The road reserve is nearly a mile long. As such, this road way would eventually be a collector designation, presently requiring 60 ft. right-of-way. The applicant should be made to dedicate the necessary right-of-way along his parcel.

"6. Some government roads may be substandard to today's requirements but are being maintained regularly by the County and, as such, subdivisions are reviewed accordingly.

"In considering the foregoing conditions, our position would be to recommend denial. Paramount in our thought is the future financial impact on maintenance/improvement by giving variance consideration. As discussion relativeness, consider set backs where we can support, say, 2 or 3 feet variance; but 50-70% difference would be rather unreasonable unless there are mitigating circumstances. Similarly, we can look at the problem concerning paper roads and 'substandard' government maintained roads."

11. Although the Department of Public Works recommends that the right-of-way be increased to a 60-foot right-of-way, as a condition of tentative subdivision approval, the petitioner was required to set aside only a 10-foot road widening strip within the property. As such, the Planning Department considered a future right-of-way width of 50 rather than 60 feet.

12. All other cooperating agencies had no objections to or comments on the subject request.

13. At the preliminary hearing on April 12, 1979, the staff recommended denial of the application based on the following findings:

In the past, we have recommended approval of variances from the required minimum roadway improvements. In these previous cases, however, the variances were for roadway improvements within the area to be subdivided. In this particular case, the petitioner is requesting a variance to waive the 20-foot pavement requirement imposed for an unimproved or "paper" Homestead Road leading to the proposed subdivision. In lieu of the 20-foot pavement requirement, the petitioner is requesting to allow the improvement of the Homestead Road with a 20-foot wide oil-treated surface. Although the petitioner's proposal would be an improvement over the existing condition of the Homestead Road, certain conditions will result from this action which may not be in the best interest of the public.

Presently, the County has no maintenance nor liability responsibilities for "paper" roads, even if the roads do belong to the County or State. However, once these roads become passable and usable, the County would have to incur these responsibilities, even if the roads are constructed with substandard improvements. (Refer to Department of Public Works' April 10, 1979, comments, item no. 2) As compared to a pavement, an oil-treated surface erodes much faster, and as such, would result in a much higher maintenance cost. At the present time, the County is already faced with the reoccurring problem of limited funds for maintenance of its existing roads. Therefore, by allowing another roadway to be constructed with substandard improvements

will place additional burden on the county government, and consequently, to the public in general.

Although the requirement of paving the roadway may create some economic difficulties to the petitioner, economic hardship per se is not a basic consideration in granting of variances. As such, it is determined that no unusual circumstances exist either to a degree which would deprive the petitioner of substantial property rights which would otherwise be available or to a degree which obviously interferes with the best use or manner of development of the area proposed to be subdivided.

Furthermore, it is determined that approval of the subject request for complete waiver of the 20-foot pavement requirement would essentially constitute a grant of personal and special privilege inconsistent with the limitations placed or which would be placed upon other properties in similar situations. Other property owners with lands having similar characteristics are or must oblige to comply with the requirements of the Subdivision Control Code. To grant complete waiver of the pavement requirement would create a situation wherein other potential subdividers, not only in the surrounding areas but throughout the County, could make similar request to waive the entire pavement requirement as well as other subdivision requirements. The provision of some sort of pavement requirement is to assure that adequate and safe vehicular access is provided for all lots which are created, and, its potential users, whether they be lot

owners or the public in general. It is felt that provision of adequate and safe vehicular access must be assured at this time. To grant this particular variance under the above-mentioned circumstances would be contrary to the goal of the General Plan's Transportation element which states to "Provide a transportation system whereby people and goods can move efficiently, safely, comfortably and economically." (Emphasis added)

14. After review of the staff's background and recommendations and the petitioner's testimony, the Planning Commission voted to deny the request for the reasons as presented by the staff. The vote was unanimous with five (5) ayes.

CONCLUSIONS OF LAW

1. Pursuant to Section 5-4.3 (g) of the Hawaii County Charter, the Planning Commission has jurisdiction to hear and determine appeals requesting variances from the subdivision and Zoning Codes.

2. All procedural requirements as prescribed by law have been complied with.

3. Under Section 5-4.3 (g) of the Hawaii County Charter, a variance may not be granted unless there are special or unusual circumstances applying to the subject property which would result in unnecessary hardship if the ordinance were literally enforced, and the granting of the variance would not be contrary to the public interest.

DECISION AND ORDER

Based upon the testimony and exhibits introduced at the preliminary hearing and the foregoing Findings of Fact and Conclusions of Law, it is the decision of the Planning Commission and it is hereby ordered that a variance from the requirement of Chapter 9 (Subdivision Control Code), Article 2, Section 4 pertaining to the minimum roadway standard for a proposed subdivision of Tax Map Key 8-7-14:13 located at Opihihale, South Kona, Hawaii, be and is hereby denied.

Dated at Hilo, Hawaii, this 9th day of May, 1979.



WILLIAM F. MIELCKE, CHAIRMAN
Planning Commission

APPROVED AS TO FORM
AND LEGALITY:



DEPUTY Corporation Counsel
County of Hawaii

Date: MAY 1 1979