

June 8, 1979

CERTIFIED MAIL

Mr. Francis J. Cushingham, Jr.  
P. O. Box 93  
Kealahou, HI 96750

Dear Mr. Cushingham:

Planned Development Permit Application  
Variance Application  
Tax Map Key: 8-1-12:9 and 55

This is to inform you that the Planning Commission at its meeting on May 31, 1979, voted to approve your Planned Development Permit (PDP) application. The approval, however, was for sixteen (16) rather than the requested eighteen (18) units. Further, approval of the Planned Development Permit application is subject to the following conditions:

1. That the petitioner or his authorized representative shall submit plans and receive final plan approval within one (1) year from the effective date of approval of the Planned Development Permit (PDP).
2. That construction shall commence within one (1) year from the date of receipt of final plan approval and be completed within two (2) years thereafter.
3. That the rules, regulations and requirements of the State Department of Health shall be complied with.

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4. That access to the proposed developments shall meet with the approval of the Department of Public Works and the Planning Department.
5. That all other applicable rules, regulations, and requirements shall be complied with.

Should any of the foregoing conditions not be met, the Planned Development Permit may be deemed null and void by the Planning Commission.

In regards to your variance application to allow the construction of the proposed building at a height of three (3) stories and thirty-five (35) feet in lieu of the maximum allowable height limit of two (2) stories and thirty (30) feet, the Planning Commission voted to deny the request based on the following findings:

That the purpose and intent of the variance provisions of the Zoning Code is to allow reasonable deviations to accommodate those circumstances in which the strict and literal enforcement of the law would cause undue hardship to the petitioner and would deprive him of substantial property rights. The petitioner has not shown that strict application of the height requirements would be confiscatory or would effectively destroy the economic utility of the proposed development. In this particular case, the mere showing of financial disappointment or of deprivation of the possible number of units is not enough to justify the granting of the variance. The allowable density defined within a zoned district establishes a maximum ceiling on the number of units which may be constructed. However, the actual number of units is contingent upon the compliance of that development with certain requirements and standards of the Zoning Code and General Plan including ground cover ratio, parking, setbacks, etc. Compliance with these requirements and standards may therefore result in a reasonable development of that property with a density which is less than the maximum ceiling.

As such, it is determined that there are no special and unusual circumstances applying to the subject property or use existing 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 subject property.

The subject property does not have any adverse topographical constraints which would necessitate the granting of the height variance. The average grade of the subject property is approximately 12.6 percent from the property line along Mamalahoa Highway to the makai property line. There is a gradual drop in elevation of approximately thirty-eight (38) feet from the mauka to the makai property line, over a distance of about 258 feet. It is felt that this difference in elevation is not a deterring factor as this condition can be adequately mitigated through normal developmental practices of grading the land to some extent. It is therefore determined that the denial of this particular variance request will not substantially inhibit or interfere with the development of this area for its intended multiple residential use.

It should be pointed out that if the petitioner's sole intent for the additional height is to provide the maximum number of units possible and still meet such requirements as the building ground cover, parking and open space ratios, etc., then this may be accomplished by other means. The most logical alternative would be to reduce the size of the proposed units. According to the plans submitted with the application, the floor area of the proposed units range from about 1,211 square feet to 1,619 square feet, including a lanai or patio area (1,211; 1,315; 1,418; 1,526; and 1,619 square feet). Typically, these units include a master bedroom, another bedroom or a den, sewing room, 2 baths, a living room, dining room, kitchen, and a lanai or patio. It is felt that by reducing the size of and amenities within the units, the petitioner would be able to increase the density of the units within a maximum allowable two (2) story building. It would appear that any limitations, if any, on the proposed development is attributed to the petitioner's own action of trying to develop larger units.

Based on the above, it is determined that should this particular request be granted, it will constitute a grant of personal or special privileges inconsistent with the limitations placed upon other properties under identical zone district classifications, as well as circumstances.

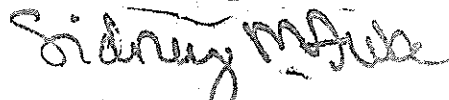
Further, as requested, enclosed is a copy of the Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

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As indicated by the Planning Commission Chairman at the meeting, you have ten (10) days upon receipt of the proposed document to submit any rebuttal to it. If no word is received within that period, the proposed document will become official and will be so certified.

Should you have any questions on the motion, please feel free to contact the Planning Department at 961-8288.

Sincerely,

A handwritten signature in dark ink, appearing to read "Sidney M. Fuke", written in a cursive style.

Sidney M. Fuke  
Planning Director

NH/smn

Enclosure

cc: Corporation Counsel

PLANNING COMMISSION OF THE PLANNING DEPARTMENT  
COUNTY OF HAWAII

In the Matter of the Appeal	)	
of	)	
FRANCIS CUSHINGHAM, JR.	)	Variance No. 577
	)	
Tax Map Key 8-1-12:9 and 55	)	
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PROPOSED  
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	)	
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FRANCIS CUSHINGHAM, JR.	)	Variance No. 577
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Tax Map Key 8-1-12:9 and 55	)	
_____	)	

PROPOSED  
FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND  
DECISION AND ORDER

The above-entitled matter was brought on for preliminary hearings on February 22 and March 29, 1979, in the Kealakehe School Cafetorium, Kealakehe, North Kona, Hawaii, and for public hearings on April 26, 1979, in the First Hawaiian Bank Meeting Room, Kailua-Kona, North Kona, Hawaii, and May 31, 1979, in the Kealakehe School Cafetorium, Kealakehe, North Kona, Hawaii, at which times, Francis Cushingham, Jr. appeared before the Planning Commission.

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

FINDINGS OF FACT

1. An application for a variance to allow the construction of a condominium building at a height of three (3) stories and thirty-five (35) feet in lieu of the maximum allowable height limit of two (2) stories and thirty (30) feet as stipulated within the Village Commercial (CV) zoned district was officially received on December 26, 1978.

2. The property involved is located along the makai side of Mamalahoa Highway, between the Kona Library and Ishida Building, Kealahou Village, Ke'eke'e 1st, South Kona, TMK: 8-1-12:9 & 55.

3. According to the petitioner, the units were to be specifically designed for the elderly i.e., retirees and/or semi-invalids requiring wheelchairs. The purpose was for six (6) units on each floor. The building also included a basement and an elevator.

4. The proposed building would have been set back approximately 50 feet from the front property line and 20 feet from the rear property line. The side yard setbacks would have been 12 feet. The minimum setback requirements within the CV zoned district are 15 feet front or rear and none for the sides, except by plan approval.

5. The land in question has a total area of 38,107 square feet. Within the CV zoned district, condominium units are permitted at a maximum density of 1,250 square feet of land area per unit. Based on the total land area, a maximum of thirty (30) units may be allowed on the subject property.

6. The General Plan LUPAG Map designates the area for Medium Density Urban Development. Such a designation may allow multiple and commercial uses.

7. According to the U.S.D.A., Soil Conservation Service's Soil Survey Report (December 1973), the land is of the Punalu'u Series which consists of well-drained, thin organic soils over pahoehoe lava bedrock. The surface layer is black peat about 4 inches thick and is underlain by pahoehoe lava bedrock. The peat is rapidly permeable. The pahoehoe lava is very slowly permeable, although water moves rapidly through the cracks. Run-off is slow, and the erosion hazard is slight. The average grade

of the subject property is approximately 12.6 percent from the property line along Mamalahoa Highway to the makai property line, a distance of approximately 258 feet (1570 feet to 1538 feet).

8. A single family dwelling presently on the property will be removed. The property in question is bordered by the Kona Library (south), Ishida Building (north), and the Kishi Subdivision (west and northwest).

9. According to the preliminary plans submitted with the application, a sewerage treatment plant was proposed at the makai corner of the lot. The petitioner, however, had requested a variance from the State Department of Health to allow use of cesspools. The variance request, however, was for 15 units, rather than for 18 units. The Department of Health has reviewed the application before the Planning Commission and commented that "The final disposition of Mr. Cushingham's Sewage Disposal Variance request for fifteen (15) dwelling units utilizing cesspools is pending."

On January 25, 1979, the Department of Health granted the variance to the petitioner. The variance was granted for a maximum period of ten (10) years. The variance was granted subject to the following conditions:

- "1. The density of this project is limited to sixteen (16) units per acre.
- "2. When the County Sewer System becomes available to these units, the current owner will abandon the cesspool, and connect to the sewer system.
- "3. This variance may be revoked if the proposed method of sewage disposal proves to be inadequate."

As a matter of information, cesspools may be allowed for a development which does not exceed a density greater than eight dwelling units per acre.



10. Upon review of the request, the Department of Water Supply offered the following comments:

"Water to accommodate the 18 units for the proposed condominium will not be available until the completion of Phase III of the Kahaluu Shaft Development Project. The scheduled completion date is around April 1979.

"We have no objections to the construction of this proposed condominium with the understanding that water service will not be granted unless the said Phase III project is completed.

"For your information, the proposed water service shall be tapped from the 8-inch waterline along Mamalahoa Highway.

"The applicant is requested to submit the water utility plans for our review."

11. Accesses to the property will be from the Mamalahoa Highway and the Kishi Subdivision roadway. Mamalahoa Highway has a right-of-way width of sixty (60) feet with a 22-foot pavement, while the subdivision road is forty (40) feet wide with a 20-foot pavement.

12. In regard to the traffic situation, the Department of Public Works offered the following: "The area is congested. If this application is approved, a study should be made on the driveway location which should have adequate sight distance and be safe in relation to adjacent driveways, topography and parking spaces."

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

14. In support of the request the petitioner had stated the following:

"This project, which would be located on two adjacent lots situated at Ke'eke'e, South Kona, County and Island of Hawaii,

would consists of one structure containing 18 separate units with open space, parking requirements, Dept. of Health requirements and any other County requirements to be fulfilled. The main purpose for the construction of this project is for the convenience of retirees and/or the semi-invalid requiring wheelchairs. This project does not relate to any other projects in the vicinity.

"Because of its location, this type of condominium would be most suitable for the elderly who may be semi-invalid or require wheelchairs. This type of facility would also be for older residents who no longer have children living at home and who do not want to be tied down by having to care for either large homes or yards. Most important, I feel, is the proximity of the property to stores, the post office, banks, and, in particular, being only moments away from the only hospital in the whole of the Kona district, Kona Hospital. My only wish is that I could provide more such units for retiree/semi-invalid residents who may be ambulatory, able to care for themselves, but do not need daily hospital or nursing care. It would be most beneficial for these types of residents to be so conveniently located.

"Due to zoning code, CV-10, which quotes two (2) stories, I am requesting permission to construct a building with three (3) stories. These units would not exceed the variance option and would not exceed the height of the existing building or the neighboring building at that elevation. It would be financially unfeasible to utilize this property without the third story because of the area necessary to conform with such various requirements as covered area, open space, set back, parking area, etc. The additional story would not be a detriment or an imposition to either person or surrounding properties in any way.

"No adverse affects from this project to people or property can be foreseen. Should the three stories be permitted, there would be no obstruction of view as only Mamalahoa Highway is directly East (at a slightly higher elevation) with a bank across the street.

"As to alternative uses, this property, due to its present designation of CV-10, could be utilized for commercial and/or business offices, or for the type of structure I am proposing. However, at the present time, there are sufficient commercial and business offices in this locale, I feel.

"This would not be a short-term project and should be of benefit to the community.

"Sewage disposal requirements will be met upon granting of a requested variance now before the Dept. of Health (see Notice of Application for Variance, enclosed, together with a letter dated 11/20/78 to me from S. Soneda seeking public comment on this variance request). In my request for this variance, I have stated my intent to cooperate with the DOH at such time that a Central Kona Sewerage System (Kealahou) is implemented. At 1700 feet elevation on the slopes of Mauna Loa, the drainage is excellent.

"Security and fire prevention installation will be considered upon recommendation, if financially feasible. Both Police and Fire stations are within ten minutes drive of the building, being located in nearby Capt. Cook.

"There are two County roads approaching subject property with both roads running North-South. One is Mamalahoa Highway fronting the property; the other is a dead-end county road located in the Kishi Subdivision behind the Finance Factors building.

"The property is bounded by the State Library to the South, one commercial building to the North, and a residential area to the West.

"Konawaena High and Elementary School is approximately five minutes drive away.

"Water is available at present, and permission has been granted by the County Water Dept. so that adequate water will be available to the property for construction purposes (see enclosed copy of letter from Akira Fujimoto, Manager, Dept. of Water Supply, dated October 10, 1978). As mentioned in Mr. Fujimoto's letter, sufficient water supply would be available for the condominium in April, 1979.

"This area is not considered a watershed area and there is no hazard from flooding. Being at 1700 feet elevation, there is no fear of tsunami inundation, though there is always the hazard of seismic activity. Being on solid pahoehoe-type lava, there is no possibility of landslides here. There is nothing unique in the physical form or vegetation of this site. There are, however, un-unique mongooses and rats! The area is predominantly rural.

"There are no hotels in the vicinity and the project is not designed as a resort facility. The project would not alter any employment level, family income, or housing. At the present time, there is one building which houses one family. By construction of this condominium, the property would be able to accommodate more family units.

"As the structure would occupy most of the area, recreational facilities would not be built-in. There is nothing of historical or cultural significance on this site.

15. The application was brought on for a preliminary hearing by the Planning Commission on February 22, 1979, at which time the Planning Department recommended denial of the variance request based on the following findings:

That the purpose and intent of the variance provisions of the Zoning Code is to allow reasonable deviations to accommodate those circumstances in which the strict and literal enforcement of the law would cause undue hardship to the petitioner and would deprive him of substantial property rights. The petitioner has not shown that strict application of the height requirements would be confiscatory or would effectively destroy the economic utility of the proposed development. In this particular case, the mere showing of financial disappointment or of deprivation of the possible number of units is not enough to justify the granting of the variance. The allowable density defined within a zoned district establishes a maximum ceiling on the number of units which may be constructed. However, the actual number of units is contingent upon the compliance of that development with certain requirements and standards of the Zoning Code and General Plan including ground cover ratio, parking, setbacks, etc. Compliance with these requirements and standards may therefore result in a reasonable development of that property with a density which is less than the maximum ceiling.

As such, it is determined that there are no special and unusual circumstances applying to the subject property or use existing 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 subject property.

The subject property does not have any adverse topographical constraints which would necessitate the granting of the height variance. The average grade of the subject property is approximately 12.6 percent from the property line along Mamalahoa Highway to the makai property line. There is a gradual drop in elevation of approximately thirty-eight (38) feet from the mauka to the makai property line, over a distance of about 258 feet. It is felt that this difference in elevation is not a deterring factor as this condition can be adequately mitigated through normal developmental practices of grading the land to some extent. It is therefore determined that the denial of this particular variance request will not substantially inhibit or interfere with the development of this area for its intended multiple residential use.

It should be pointed out that if the petitioner's sole intent for the additional height is to provide the maximum number of units possible and still meet such requirements as the building ground cover, parking and open space ratios, etc., then this may be accomplished by other means. The most logical alternative would be to reduce the size of the proposed units. According to the plans submitted with the application, the floor area of the proposed units range from about 1,211 square feet to 1,619 square feet, including a lanai or patio area (1,211; 1,315, 1,418; 1,526; and 1,619 square feet). Typically, these units include a master bedroom, another bedroom or a den, sewing room, 2 baths,

a living room, dining room, kitchen, and a lanai or patio. It is felt that by reducing the size of and amenities within the units, the petitioner would be able to increase the density of the units within a maximum allowable two (2) story building. It would appear that any limitations, if any, on the proposed development is attributed to the petitioner's own action of trying to develop larger units.

Based on the above, it is determined that should this particular request be granted, it will constitute a grant of personal or special privileges inconsistent with the limitations placed upon other properties under identical zone district classifications, as well as circumstances.

16. After hearing from the Planning Department staff and the petitioner, the Planning Commission, at the same meeting, voted to continue the preliminary hearing in order to allow the petitioner time to discuss and resolve the height variance with the staff.

17. The preliminary hearing on the application was continued on March 29, 1979. On that same day, the Planning Commission conducted an on-site investigation of the subject property. All of the Commissioners appointed at that time, as well as the Planning Department staff and the petitioner, were present at the site. After hearing from the staff and the petitioner, the Planning Commission voted to schedule the matter for a public hearing. The Department's recommendation was still for denial.

18. A public hearing on the matter was held on April 26, 1979. At that meeting, the Planning Commission voted to continue the

public hearing in order to afford the three (3) newly appointed Commissioners an opportunity to conduct an on-site inspection of the property.

19. The public hearing was continued on May 31, 1979. Prior to the meeting, the Commission conducted an on-site inspection. All of the Commissioners present at the meeting were in attendance at the site. Also in attendance were the Planning Department staff and the petitioner.

20. After the close of the public hearing, the Commission voted to deny the subject request based on the reasons as outlined by the Planning Department. The vote was recorded as five (5) ayes and one (1) no.

#### 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 variance 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 and Chapter 8 (Zoning Code), Article 1, Section 7.01, a variance cannot be granted unless the Planning Commission finds the following:

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

B. That said special or unusual circumstances exist either to a degree which deprives the owner or applicant 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 subject property.



C. That the granting of the "variance" shall not constitute a grant of personal or special privilege inconsistent with the limitations upon other properties under identical district classification.

D. That the granting of the "variance" shall not be inconsistent with the general purpose of the district or the intent and purpose of this Chapter will not militate against the County General Plan and shall not be materially detrimental to the public welfare or injurious to improvements or property rights related to property in the near vicinity.

E. That the evidences to support the decision shall be recorded specifically.

#### DECISION AND ORDER

Based upon the testimony and exhibits introduced at the preliminary hearings, public hearings, on-site inspections, and the foregoing Findings of Fact and Conclusions of Law, it is the proposed decision of the Planning Commission that a variance from the requirements of Chapter 8 (Zoning Code), Article 13, Section 4, pertaining to the maximum allowable height limit for Tax Map Key 8-1-12:8 and 55 located at Ke'eke'e 1st, South Kona, Hawaii, be denied.

In the event that the petitioner disagrees in whole or in part with these Proposed Findings of Fact, Conclusions of Law and Decision and Order, petitioner may file with the Planning Commission written objections to these proposed findings within ten (10) days of his receipt of the same. If no written objections are received by the Planning Commission within the stated time period, these Proposed Findings of Fact, Conclusions of Law and Decision and

Order shall become final and a final order of the Planning Commission shall be issued forthwith."

Dated at Hilo, Hawaii, this 19th day of July,  
1979.



WILLIAM F. MIELCKE, CHAIRMAN  
PLANNING COMMISSION

APPROVED AS TO FORM  
AND LEGALITY:



Deputy Corporation Counsel

Date: JUL 10 1979