

## County of Hawai'i

### PLANNING COMMISSION

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720  
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October 5, 2007

Mr. Alan Dickler  
75-399 Wehilani Drive  
Kailua-Kona, HI 96740

Dear Mr. Dickler:

Special Management Area Use Permit Application (SMA 06-000009)  
Applicant: D-Bar Ranch, LLC  
Request: 120-Unit Condominium Project and Related Improvements  
Tax Map Key: 7-7-8:21 and 23

The Planning Commission at its duly held public hearing on September 21, 2007, conducted further proceedings on remand pursuant to State of Hawaii Third Circuit Court decision on appeal in Civil No. 06-1-172K regarding the application for a Special Management Area (SMA) Use Permit to allow the 120-unit condominium project and related uses. The property is located between Alii Drive and the proposed Kahului-Keauhou Parkway (aka Alii Parkway), mauka of the Kona Magic Sands Condominium and north of the White Sands Beach Estates Subdivision, Pahoehe 2<sup>nd</sup>, North Kona, Hawaii.

The Commission voted to approve the application based on the following:

The applicant is requesting a SMA Use Permit for a 120-unit condominium project and related uses. The site plan indicates the following:

- Fifteen (15) two-story structures, each structure to accommodate eight (8) two-bedroom units
- Proposed height of the structures - maximum 35 feet
- Minimum 165 on-site parking stalls
- Extensive landscaping.

The estimated cost of construction is \$30,000,000.00 and the project is scheduled for completion in 2007 or 2008.

*Hawai'i County is an Equal Opportunity Provider and Employer*

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The purpose of Chapter 205A, Hawaii Revised Statutes (HRS), and Special Management Area Rules and Regulations of the County of Hawaii, is to preserve, protect, and where possible, to restore the natural resources of the coastal zone areas. Therefore, special controls on development within an area along the shoreline are necessary to avoid permanent loss of valuable resources and the foreclosure of management options. The proposed development will not have any significant adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interest.

The proposed project will not create significant adverse impacts upon nearby properties as the immediate area is developed with condominium projects, a restaurant, parks and single-family residences. Magic Sands Beach Park and Pahoehoe Park are located makai of Alii Drive. Properties to the north and south are zoned Agricultural 5-acres (A-5a), and properties to the west along Alii Drive are zoned Resort 1,250 square feet (V-1.25).

While the proposed development will not have a direct impact upon coastal recreational resources, review of developments within the Special Management Area must also consider the cumulative impacts of such developments upon these resources. The proposed development will not substantially affect scenic vistas or viewplanes of nearby residents nor have an adverse impact on coastal recreational or visual resources to the shoreline and coastal ecosystems. The project site is located mauka of Alii Drive and will not restrict access to coastal recreational resources along the shoreline nor will it restrict existing visual viewplanes from Alii Drive. As the project site is makai of the Kuakini Highway, there may be issues related to possible coastal visual impacts. The applicant states that "given the distance of the proposed site to Kuakini Highway (approximately ½ mile) and the elevation of the highway relative to the project site, the views of the coastline should not be significantly impeded. The proposed structures are intended to be less than 35 feet in height, less than the allowable 45 foot height limit for structures within the RM zone. The visual impact from the Alii (Kahului to Keauhou) Parkway could be more pronounced. However, since this road has not been constructed, there is no existing public view plane. The proposed structures would be less than 35 feet in height and situated in a mauka/makai orientation. As such, there would be a potential to retain some future view corridors."

As a condition of approval, the applicant will be required to comply with all applicable conditions of Ordinance No. 94 124. Specific traffic-related conditions, in addition to those required by Ordinance No. 94 124, are necessary so that the project is not inconsistent with the objectives and policies of the Coastal Zone Management program. Specifically, conditions related to improvements on Alii Drive which require disclosure to future residents and potential noise mitigation along the future Kahului to Keauhou parkway are necessary to ensure that the project is not inconsistent with the

following Coastal Zone Management objective and policies, which state: "Provide coastal recreational opportunities accessible to the public" (Section 205A-2(b)(1)(A)) and "Reduce hazards to life and property from tsunami, storm waves....." (Section 205A-2(b)(6)(A)). Both highways are important for present and future public shoreline access for recreational purposes, and for the evacuation of the coastal area in case of tsunami or storm waves. With these precautionary measures, the proposed development is not anticipated to have any substantial adverse effects on the coastal resources or environment.

The proposed project is consistent with the objectives and policies as provided by Chapter 205A, HRS, and Special Management Area guidelines in Rule No. 9 of the Planning Commission Rules of Practice and Procedure. There are no identified recreational resources or public access to the shoreline or mountain areas, scenic and open space preserves, coastal ecosystems, marine resources or other natural and environmental resources in the project area. The properties are located on the mauka side of Alii Drive and will not be impacted by coastal hazard and beach erosion. No scenic or open space resources to the shoreline or coastal view plane or coastal ecosystem will be negatively impacted by the proposed action. There is no evidence of any traditional and customary Native Hawaiian rights being practiced on the site.

County water is available to the site. The project will connect to the County sewer system. Any potential runoff or discharge that could reach ocean waters can be handled by on-site improvements consistent with the requirements of the Department of Public Works. Any impacts from soil erosion and runoff during site preparation and construction phases can be adequately mitigated through compliance with existing regulations and proper construction practices. Air emissions generated during the construction phase for the proposed project can be mitigated by existing construction regulations. With these precautionary measures in place, the proposed development is not anticipated to have any substantial adverse effects upon nearby coastal resources or the surrounding environment. Conditions of approval will be included relating to wastewater, solid waste and public safety to ensure that impacts on coastal resources are minimized.

Air quality in the area is predominantly affected by emissions from natural and vehicular sources. Both short-term air and noise quality impacts associated with the construction of the proposed improvements are expected during construction, especially during grubbing and grading activities. These impacts can be mitigated through the utilization of best management practices. Given the limited nature of the improvements, no significant long-term air and noise quality impacts are anticipated.

In conjunction with the State Land Use Boundary Amendment and Ordinance No. 94 124, an archaeological survey was conducted by Paul H. Rosendahl, Inc. (Appendix D

of application). Within the project site, the survey identified twenty features. Of these, there were eight habitation, three burials, four agricultural, three livestock/ranching sites, one trail and one heiau. The three burials, heiau, and the trail will be preserved. The survey has been accepted by the DLNR-HPD by letter dated May 22, 2006, which stated "the report satisfies the historic preservation review process requirements." A Burial Treatment Plan will be prepared for the review and approval of DLNR-HPD and the Hawaii Island Burial Council. The approved mitigation, which will afford access to lineal descendants, will be implemented in conjunction with the development of the project. A Site Preservation Plan will also be prepared for the trail and heiau and submitted for review and approval of DLNR-HPD. The approved mitigation will be incorporated into the final plan of the project. A Data Recovery Plan will also be prepared for eight sites submitted for review and approval of the DLNR-HPD. No further work is planned for the remaining features, all of which were used for agriculture and ranching.

According to the applicant, the site is not a coastal property and does not have a history of providing indirect access to the shoreline. However, there is a trail bisecting the property. This trail will be preserved and, should the Site Preservation Plan deem it appropriate, access will be provided. If legitimate claims for gathering are made, the project will be designed and managed to accommodate such claims.

A botanical survey was prepared by Palmer & Associates Consulting in June, 2005. The study found that the vegetation consists almost entirely of introduced invasive species, and concluded that no federal or state listed threatened, endangered, or species of concern were found on the site (Appendix B of application). A Survey of Avian and Terrestrial Mammalian Species was conducted by Rana Productions, Ltd. in May, 2005. Although domestic cattle, cats and mongoose were found on the site, the endangered Hawaiian hoary bat was not detected during the survey. All of the avian species on the site were considered to be alien. No species currently listed as endangered, threatened or proposed for listing under the federal or state endangered species programs were detected on the site (Appendix C of application).

The proposed development is consistent with the County General Plan and the Zoning Code. The General Plan Land Use Pattern Allocation Guide (LUPAG) Map establishes the basic urban and non-urban form for areas within the County. The project area is designated Open (makai portion of the property), Medium Density Urban (bulk of the project area) and Urban Expansion Area (small mauka portion of the property) by the LUPAG map. The Medium Density Urban designation includes village and neighborhood commercial and single family and multiple family residential and related functions. Thus, the proposed development would be consistent with the LUPAG Map designation. The property is presently zoned Multiple-Family Residential 3,500 square feet (RM-3.5). While the zoning allows 132 units on the project site, the applicant

proposes to construct 120 units. It should be noted that the applicant may reduce the density and product mix (i.e., allow for a mix of multiple-family residential units and single-family residential units) of the project, provided that the development generally conforms to the proposed site plan.

This proposed development would complement, among others, the goals, policies and standards of the Land Use and Housing Elements of the General Plan. The project will add to the variety of housing inventory for the district of North Kona, and provide housing in areas that are appropriately located and serviced. The proposed project will be in harmony with the character of the surrounding neighborhood and result in an intensity of land utilization no higher than as permitted or as otherwise specified for the district in which this proposed development occurs.

Access is proposed through an adjoining parcel (TMK: 7-7-8: 23) adjacent to Alii Drive. This 6,862-square foot parcel serves as access to the County's wastewater pump station and is improved with a 50-foot wide pavement.

In view of the recent Hawaii State Supreme Court's "PASH" and "*Ka Pa'akai O Ka'Aina*" decisions, the issue relative to native Hawaiian gathering and fishing rights must be addressed. These rights must be addressed in terms of the cultural, historical, and natural resources and the associated traditional and customary practices of the site.

Investigation of valued resources: The applicant has submitted the following studies:

- *Botanical Survey, TMKs 7-7-008:21, 7-7-0-08: 23 and 7-7-008: 120, Kailua-Kona, Hawaii*, prepared by Palmer & Associates Consulting, June 2005 (Appendix B)
- *A Survey of Avian and Terrestrial Mammalian Species, D-Bar Ranch, TMK: 7-7-008: 21, 23 and 120, North Kona District, Island of Hawaii*, prepared by Rana Productions, Ltd., May 2005 (Appendix C)
- *Archaeological Inventory Survey, TMK: 7-7-08: 21, 23 and 120, Land of Pahoehoe 2 North Kona District, Island of Hawaii*, prepared by Haun and Associates, July 2005 (Appendix D)

The valuable cultural, historical, and natural resources found in the area:

- A Burial Treatment Plan will be prepared for the review and approval of DLNR-HPD and the Hawaii Island Burial Council.
- A Site Preservation Plan will also be prepared for the trail and heiau and submitted for review and approval of DLNR-HPD. The approved mitigation will be incorporated into the final plan of the project.
- A Data Recovery Plan will also be prepared for eight sites submitted for review and approval of the DLNR-HPD.

The applicant will be required to notify the DLNR-HPD should any undiscovered remains of historic sites, such as rock walls, terraces, platforms, marine shell concentrations or human burials be encountered on the site. Subsequent work shall be allowed to proceed upon an archaeological clearance from the DLNR-HPD when it finds that sufficient mitigation measures have been taken.

Possible adverse effects or impairment of valued resources: Native vegetation may be destroyed by ground alteration. There is no evidence that the flora in the area are particularly desired or used for cultural practices.

Feasible actions to protect native Hawaiian rights: The property is located mauka of Alii Drive, and will not be impacted by coastal hazard and beach erosion. There are no identified recreational resources or public access to the shoreline or mountain areas, scenic and open space preserves, coastal ecosystems, marine resources or other natural and environmental resources in the project area. Thus, to the extent to which traditional and customary native Hawaiian rights are exercised, the proposed action will not affect traditional Hawaiian rights; therefore, no action is necessary to protect these rights.

Based on the above findings, it is determined that the proposed development and related improvements will not have any substantial adverse impacts on the surrounding area, nor will its approval be contrary to the objectives and policies of Chapter 205A, HRS, relating to Coastal Zone Management and Rule No. 9 of the Planning Commission relating to the Special Management Area.

Approval of this request is subject to the following conditions:

1. The applicant, its successor or assigns shall be responsible for complying with all stated conditions of approval of this permit.
2. The applicant shall comply with all applicable conditions of approval under Ordinance No. 94 124.
3. The applicant may reduce the density and product mix (i.e., combination of multiple-family residential and single-family residential units) of the project, subject to the approval of the Planning Director, provided that the development generally conforms to the proposed site plan.
4. Construction of the proposed development shall be completed within five (5) years from the effective date of this permit. Prior to construction, the applicant, successors or assigns shall secure Final Plan Approval for the proposed development from the Planning Director in accordance with Section 25-2-70, Chapter 25 (Zoning Code), Hawaii County Code. Plans shall identify all existing

and/or proposed structures, paved driveway access and parking stalls associated with the proposed development. Landscaping shall also be indicated on the plans for the purpose of mitigating any adverse noise or visual impacts to adjacent properties in accordance with the requirements of the Planning Department's Rule No. 17 (Landscaping Requirements). The installation and maintenance of landscaping within the common area of the project maintained by the homeowner's association shall use only slow-release fertilizers. This requirement shall be recorded as a deed covenant.

5. The applicant shall provide a 5-foot wide road widening setback along the Alii Drive frontage and dedicate it to the County at no cost upon request by the Department of Public Works.
6. Access to Alii Drive, including the provision of adequate sight distances, shall meet with the approval of the Department of Public Works. As required by Ordinance No. 94 124, the applicant shall provide a left turn storage lane from Alii Drive to the subject property and a paved shoulder extending to the right-of-way property line. Provide pavement transitions, signs and markings, drainage improvements and relocation of utilities, as required by the Department of Public Works. Install streetlights, signs and markings, meeting with the approval of the Department of Public Works, Traffic Division.
7. An access and circulation plan providing for interconnection of adjoining parcels and access to the Kahului to Keauhou Parkway shall be submitted to the Planning Director and the Department of Public Works prior to Final Plan Approval. No access to the Kahului to Keauhou Parkway shall be permitted unless approved by the Department of Public Works. The plan shall be implemented according to the approved plans as a required site improvement at no cost to the County.
8. Until the completion of the Kahului to Keauhou Parkway through the subject property(ies), covenants in all deeds to the subject property(ies), including deeds to individual units and to any lots subdivided from the subject property and promotional and sales materials given to prospective purchasers, shall provide notice to prospective owners of the following concepts. Sales materials and covenants for the project do not have to follow the exact wording of this condition, but shall inform the prospective purchasers of the substance of this condition:

“Plans for the area involve the construction of the Kahului to Keauhou Parkway within a right-of-way shown on the attached map. The Kahului to Keauhou Parkway will be a major highway that is expected to carry a high volume of traffic. The County of Hawaii has determined that the

construction of this highway is important to the proper development of Kona as a whole. The construction of the Kahului to Keauhou Parkway will create noise, dust and other impacts. The contractor building the Kahului to Keauhou Parkway will be required to follow some regulations to reduce noise and dust, but some impacts will occur. After completion, traffic on the Kahului to Keauhou Parkway will cause noise and other effects that must be expected from a busy roadway. A prospective purchaser who cannot accept the future construction of the Kahului to Keauhou Parkway in this area is advised to seek another area to reside. This property was issued a Special Management Area Use Permit on condition that if noise abatement measures are desired to mitigate the noise from the Kahului to Keauhou Parkway, such measures must be provided by the subject project owner(s) on private property at their own expense.”

9. Any vehicular security gate shall be installed more than 60 feet from the Alii Drive right-of-way with a turnaround on the Alii Drive side of the gate and shall be shown on plans submitted with the access and circulation plan required under Condition No. 7.
10. As represented by the petitioner, on-site parking shall be provided at a ratio of 2.0 parking stalls per multiple-family residential unit or whatever the prevailing parking requirement may be at the time of Plan Approval; provided that all parking stalls in excess of the minimum parking stall requirement at the time of Plan Approval need not fully conform to the parking standards of the Zoning Code. These stalls could be tandem, narrower than standard width or length, or provide shorter back up aisle space.
11. All development-generated runoff shall be disposed of on-site and shall not be directed toward any adjacent properties.
12. If required by the Department of Public Works, a drainage study shall be prepared by a licensed civil engineer and submitted to the Department of Public Works prior to the issuance of a construction permit. If required, drainage improvements shall be constructed, meeting with the approval of the Department of Public Works, prior to the receipt of a Certificate of Occupancy.
13. If required, the applicant shall submit a flood study prepared by a licensed professional civil engineer to the Federal Emergency Management Agency (FEMA) for a Letter of Map Change (LOMC).



14. There shall be no construction of dwellings and related improvements or other substantial buildings within areas designated "AE" or shaded Zone "X" by the Flood Insurance Rate maps (FIRM).
15. The proposed development shall connect to the County sewer system.
16. Comply with Chapter 11-55, Water Pollution Control, Hawaii Administrative Rules, Department of Health, which requires an NPDES permit for certain construction activity.
17. During construction, measures shall be taken to minimize the potential of both fugitive dust and runoff sedimentation. Such measures shall be in compliance with construction industry standards and practices utilized during construction projects of the State of Hawaii.
18. All earthwork and grading shall conform to Chapter 10, Erosion and Sediment Control of the Hawaii County Code.
19. A Solid Waste Management Plan shall be submitted to the Department of Environmental Management for review and approval prior to the issuance of a Certificate of Occupancy.
20. The heiau (Site 6991), trail (Site 6350) and three burial sites (Sites 6348, 24541 and 6994) within the project area shall be preserved.
21. A Burial Treatment Plan shall be prepared for the review and approval of DLNR-HPD and the Hawaii Island Burial Council for the burial sites prior to any land alteration activity. Access to the burial sites' descendants shall be allowed, consistent with the requirements of the Archaeological Burial Treatment Plan approved by the DLNR-HPD.
22. A Site Preservation Plan for the heiau and the trail shall be prepared and submitted for review and approval of DLNR-HPD. The approved mitigation shall be incorporated into the final plan of the project.
23. An Archaeological Data Recovery Plan shall be submitted for the review and approval of the Department of Land and Natural Resources - State Historic Preservation Division (DLNR-HPD). A copy of the approved final report shall be submitted to the Planning Director prior to the submittal of plans for the issuance of any land alteration permits.

24. No land disturbance permits shall be issued until the Data Recovery Plan, Burial Treatment Plan, and Site Preservation Plan have been approved by the DLNR-HPD.
25. The finished grade of the building pads shall not be greater than ten feet above the existing grade.
26. Plans for providing public parking spaces on TMK: 7-7-8: 23 and the site of the County sewer pump station identified by TMK: 7-7-8: 115 shall be submitted in conjunction with the Plan Approval process and shall be implemented according to the approved plans at no cost to the County with the development of the proposed project.
27. A minimum of 25,000 square feet of land within the subject area shall be devoted to on-site recreational uses, such as a swimming pool, tennis court and community meeting place.
28. A tsunami evacuation plan shall be submitted for the review and approval of the County Civil Defense Agency prior to the issuance of an occupancy permit.
29. Should any undiscovered remains of historic sites, such as rock walls, terraces, platforms, marine shell concentrations or human burials be encountered, work in the immediate area shall cease and the Department of Land and Natural Resources-Historic Preservation Division (DLNR-HPD) shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the DLNR-HPD when it finds that sufficient mitigation measures have been taken.
30. The U.S. Department of Army Corps of Engineers shall be contacted to identify whether a Federal Permit (including a Department of Army permit) is required for this project. The Planning Director shall be notified in writing as to whether such permit is required for the development of the project.
31. The applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements.
32. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of this permit. The report shall include, but not be limited to, the status of the development and the extent to which the conditions of approval are being satisfied. This condition shall remain in effect until all of the conditions of approval have been satisfied and the Planning Director acknowledges that further reports are not required.

33. An initial extension of time for the performance of conditions within this permit may be granted by the Planning Director upon the following circumstances:
- A. The non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence.
  - B. Granting of the time extension would not be contrary to the General Plan or Zoning Code.
  - C. Granting of the time extension would not be contrary to the original reasons for the granting of this permit.
  - D. The time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year).
  - E. If the applicant should require an additional extension of time, the Planning Department shall submit the applicant's request to the Planning Commission for appropriate action.


Should any of the conditions not be met or substantially complied with in a timely fashion, the Planning Director may initiate procedures to revoke the permit.

This approval does not, however, sanction the specific plans submitted with the application as they may be subject to change given specific code and regulatory requirements of the affected agencies.

Mr. Alan Dickler  
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Should you have any questions, please contact Norman Hayashi of the Planning Department at 961-8288.

Sincerely,



William Graham, Chairman  
Planning Commission

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cc: Mr. Sidney Fuke  
Roy A. Vitousek, III, Esq.  
Ivan Torigoe, Esq.  
Ms. Debra Mendes, Office of Planning  
Department of Public Works  
Department of Water Supply  
County Real Property Tax Division  
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