

County of Hawai'i

PLANNING COMMISSION

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DEC 05 2008

Steven S. C. Lim, Esq.
121 Waiuanue Avenue
Hilo, HI 96720

Dear Mr. Lim:

Special Management Area Use Permit Application (SMA 08-000027)

Request: To Allow For Construction of Approximately 2,000 Feet Pedestrian
Path and Landscaping (After-the-Fact)

Applicant: E. Commerce Enterprises Corporation

Tax Map Key: 5-5-8:66 and 67

The Planning Commission at its duly held public hearing on November 24, 2008, voted to approve the above-referenced request for a Special Management Area (SMA) Use Permit to allow the construction of an approximately 2,000 lineal feet pedestrian path and landscaping (after-the-fact). The properties involved are a part of the Pahoa Beach Estates Subdivision located along the western banks of Waipiele Gulch, Pahoa, North Kohala, Hawaii.

This approval is based on the following findings:

The applicant is currently requesting an after-the-fact Special Management Area Use Permit to allow the retention of a road cut into Waipiele Gulch (see segments "4" and "5" of Exhibit "1".) This will be accompanied by the closure of an approximately 2,000 lineal foot road cut along the western banks of Waipiele Gulch (Exhibit "2").

The applicant had previously received Revised Final Subdivision Approval for a 5-lot agricultural subdivision on March 4, 2003, which had a condition "to clear and grade the pedestrian public access easement to safe walkable condition within 6 months of final subdivision approval, from the southwest corner of Lot 21-C to the sea, and thereafter shall maintain the easement in safe walkable condition free from obstruction." The grading that occurred did not follow the approved public access easement, which resulted in the several SMA violations as discussed below. A 2nd Revised Final Plat Map was approved on May 21, 2007, which identified the new pedestrian public access

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easement, which is basically what is shown on Exhibit "2." This new public access easement lined up with the pathway (or roadway) that occurred from the unpermitted grading done by the applicant (the second violation).

On December 22, 2003, the applicant was issued a Notice of Violation for unpermitted grading along Waipele Gulch and a steep access road in the SMA without any permits. This was the first violation. The grading was essentially segments #4 and #5 of Exhibit "1." The applicant was required to conduct corrective action including remedial action, payment of a fine and submitting an after-the-fact SMA permit.

On September 20, 2004, the Planning Department issued another Notice of Violation for four (4) separate unauthorized activities within the SMA. These included the unpermitted grading of another road, which was twenty-four (24) feet wide and approximately 3/10 of a mile in length, re-grading of the area done in the previous violation, grading of a parking area on parcel 66, and grading of a parking area on parcel 67. The Planning Department found that the actions constituted four (4) separate violations and assessed \$100,000 for each violation, totaling \$400,000. Additionally, the Planning Director fined the applicant \$10,000 a day until the applicant hired a licensed civil engineer to design, implement and complete the erosion control measures to stabilize the cut slopes, loose dirt, and other erosion-prone areas resulting from the violations. The applicant has appealed the decision of the Planning Director's September 20, 2004 Notice of Violation. The appeal action is still pending as of the date of this writing. The erosion control measures were implemented and the accrued \$10,000 daily fines were stayed.

As a result of the unauthorized work in the Special Management Area, the applicant was required to submit an after-the-fact SMA permit. The need for a SMA Major Use Permit was required because the grading may have a substantial adverse effect in the Special Management Area. There are no structures or further development proposed as part of this project.

The Planning Department does not condone the illegal grading within the Special Management Area that occurred here. The landowner cut a 24-foot wide road into the sides of the gulch. The vertical cuts into the side of the gulch exceed 20 feet in height in some places. The Department has evidence that the owner promised this road to purchasers of lots in the subdivision to give vehicular access to the shoreline to these lot owners. The landowner would have had great difficulty obtaining a grading permit to build this road unless a soils engineer verifies that a cut slope will be stable, or unless a retaining wall is built, the grading ordinance does not permit cuts steeper than 2 to 1 vertical to horizontal ratio in "unweathered rock." In "decomposed rocks or rock and soil mixture," the cuts cannot be steeper than 2 to 3 vertical to horizontal ratio. The cuts greater than 15 feet in height require terraces or benches. The cuts and resulting fill made

on this property are much steeper than these allowed slopes (Hawaii County Code, Section 10-18).

The question is what to do now that the grading has occurred. The violator should have to pay a substantial fine to deter this kind of conduct. It is, however, very difficult to restore the cut slope to its previous natural condition. This would require moving huge amounts of fill and stabilizing the resulting bank. There does not seem to have been significant rockfall from the cut slopes in the four years since it was cut, which included the major October 2006 earthquake.

The proposed SMA permit would require that this road cut be permanently blocked by making rock and dirt barriers at either side, as shown on Exhibit "2." Thus, the applicant would obtain no benefit from the illegal grading. This will also safeguard the public and subdivision residents from possible rockfalls from the cut slopes.

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. In considering the significance of potential environmental effects, the Director shall consider the sum of those effects that adversely affect the quality of the environment and shall evaluate the overall and cumulative effects of the action. Such adverse effect shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect and elimination of planning options.

A "substantial adverse effect" is determined by the specific circumstances of the proposed use, activity or operation. In determining whether a proposal may have a substantial adverse effect on the environment, the Director shall consider every phase of a proposed action and expected consequences, either primary or secondary, or the cumulative as well as short or long-term effect of the proposal.

In reviewing the proposed development against the factors that may constitute a substantial adverse effect as listed under Planning Commission Rule 9-10 (H) (1 through 10), it has been determined that the closure of the road cut along the western banks of Waipiele Gulch will not have a significant adverse environmental or ecological effect to the Special Management Area, and that the limited use of the road cut as shown on Segments "4" and "5" of Exhibit "1" will not have a significant adverse environmental or ecological effect on the special management area, with the implementation of further erosion control measures and landscaping.

The proposed pathway will not create significant adverse impacts upon nearby and adjacent properties, as the immediate area has not been developed. The surrounding

properties are larger agricultural parcels (20+ acres in size) that are mainly vacant or used as pasture for cattle with scattered dwellings. The pathway will be a public benefit for the people of the North Kohala Community to provide public access to Pahoehoe Beach and the ocean.

Essential services and facilities such as water, transportation systems and other utilities are available to the area, but are not necessary for the pedestrian path. Water is available for irrigation of the proposed landscaping. Access to the property from Akoni Pule Highway will be via Hawi Road, which is a County owned and maintained roadway, to Uli Road, which is a private 2-lane roadway. The pathway begins at the end of the cul-de-sac on Uli Road and will serve as a public access to Pahoehoe Beach for the public.

The proposed development is consistent with the County General Plan and Zoning Code and other applicable ordinances. The General Plan Land Use Pattern Allocation Guide (LUPAG) Map designation for this area is Important Agricultural Lands and Open. The proposed public access pedestrian pathway will complement the following goals, policies and standards of the Natural Resources & Shoreline and Recreation Elements of the General Plan.

Natural Resources and Shoreline

- Ensure public access is provided to the shoreline, public trails and hunting areas, including free public parking where appropriate.

Recreation

- Public access to the shoreline shall be provided in accordance with an adopted program of the County of Hawaii.

Public access to the ocean and mountains have special recreational and cultural significance to the residents of this island community. Public access to coastal and mountain areas have been an essential element in the gathering of food, the transport of goods, and recreational purposes for both the island's residents and their ancestors. In recognition of the need to provide residents with the right of free movement in public space and access to and use of these public coastal and mountain areas, the Hawaii County Council adopted Ordinance No. 96 17 in 1996 to require the dedication of land for public rights-of-way as part of subdivision approval or the issuance of a building permit for the construction of a multiple-family residential development, under certain circumstances. The County may also require the establishment of public rights-of-way as part of the issuance of other types of land use approvals, such as changes of zone or Special Management Area Use Permits.

Originally, this public access easement was part of a 5-lot subdivision to provide public access for the public to Pahoia Bay and the ocean. Subsequently, as a part of corrective action for violations that have occurred, the public access easement and related improvements are now required through the approval of this Special Management Area Use Permit.

The North Kohala Community Development Plan was enacted by the County Council on Oct. 22, 2008, and took effect on its approval by the Mayor on Nov. 5, 2008. Technically, it doesn't control this SMA permit application because it was received and accepted by the Planning Department before the CDP took effect, but the proposed SMA permit is consistent with the CDP. The CDP, at p. 43, requests vehicular access from Hawi Rd. to the end of the Uli Rd. cul-de-sac, and for a lateral pedestrian access along the top of the sea cliff on T.M.K. No. 5-5-008:067 (which is basically segment #7 of Exhibit "1.") This SMA permit would achieve the lateral pedestrian access, and as much of the vehicular access as can be obtained from this applicant.

The proposed project is consistent with the objectives and policies as provided by Chapter 205A, HRS, and Special Management Area guidelines contained in Rule No. 9 of the Planning Commission Rules of Practice and Procedure. 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. In reviewing the proposed development, it has been determined that it is consistent with the objectives and policies listed under Chapter 205A, HRS, which includes protecting, preserving and providing recreational resources, historic resources, scenic and open space resources, coastal ecosystems, economic uses, coastal hazards, beach protection, and marine resources. This project will promote access to coastal recreational resources along the shoreline by providing a public access easement to Pahoia Bay and the ocean.

There is no evidence of any traditional and customary Native Hawaiian rights being practiced on the site, nor existence of any known valued cultural, historical or native resources on the property. The project site is located within a gulch and the pathway has been previously graded. The shoreline is used for fishing and gathering; the exercise of these rights will be enhanced.

The project will to the extent feasible, reasonably protect native Hawaiian rights if they are found to exist. In view of the Hawaii State Supreme Court's "PASH" and "*Ka Pa'akai O Ka 'Aina*" decisions, the issue relative to native Hawaiian rights, such as 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: There was no flora or fauna survey, or archaeological survey submitted with the application.

The valuable cultural, historical, and natural resources found in the area: The proposed project is a graded pathway within Waipiele Gulch. The botanical resources of the gulch are predominately introduced trees, shrubs, and grasses. The dominant tree is ironwood, followed by the common guava. The land above the gulch is mixed grasses. The gulch has not been identified as a protected habitat for threatened or endangered plant or animal species.

The applicant is unaware of any known traditional and customary native practices within the project area. The properties are not listed on the National and/or State Historic Places nor are any historical sites listed in the General Plan Historic Element. The applicant has sent a letter dated August 26, 2005 to the Department of Land and Natural Resources-State Historic Preservation Division requesting for a "no-effect" letter. As of the date of this writing there has been no response to the request.

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: To the extent that traditional and customary native Hawaiian rights are exercised, the proposed action will not affect traditional Hawaiian rights. The proposed project will not restrict the use of natural resources along the shoreline, as the project is to allow a public access easement to the shoreline. A condition of approval will protect any unidentified cultural, historical, and natural resource in the event any are encountered during construction.

Based on the above findings, it is determined that the proposed pathway and related improvements will not have 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, its successors and assigns shall allow mauka-makai and lateral pedestrian public access, as generally depicted in black dots on **Exhibit 1** attached hereto and incorporated herein by reference. Pedestrian public access will be open generally from sunrise or 6:00 a.m., whichever is earlier, to one-half hour beyond sunset or 6:00 p.m., whichever is later. It is intended that the pedestrian public access be utilized for non-commercial, recreational purposes. The Grantee and its successors and assigns will also have the right to control or prevent access to the public access easements in the event of a County or State declared emergency. Access for night fishing past 6:00 p.m. shall be allowed for those individuals who are actively engaged in night fishing activities through a permit system managed by the Planning Department pursuant to Planning Department Rule 21, and does not include the right to overnight camping.
3. The applicant shall file with the Planning Department, a 4th revised final plat map designating the location of the mauka-makai and lateral pedestrian public access easements, as generally depicted in black dots on **Exhibit 1** attached hereto and incorporated herein by reference. Upon issuance of final subdivision approval of the 4th revised final plat map, the County shall agree to accept and process the recordation of the Grant of Pedestrian Public Access Easements for the relocated mauka-makai and lateral pedestrian public access easements (the "New Public Access Easements") in favor of the County of Hawaii with the Bureau of Conveyances of the State of Hawaii within 90 days from issuance of the 4th revised final plat map.
4. The applicant shall permanently close off all pedestrian and vehicular access to and along the alignment of the sloped portion of the existing Easement A for pedestrian public access easement as shown on the Third Revised Final Plat Map of Subdivision No. 7640-Revised(2) dated May 21, 2007 (the "Existing Public Access Easement"), as depicted in "#####" on **Exhibit 2** attached hereto and incorporated herein by reference, by erecting a structural earth and rock barrier at the eastern end of the Uli Road cul-de-sac and at an appropriate location at the northern end of Easement A, as generally depicted in "•" on **Exhibit 2** attached hereto and incorporated herein by reference, with the details of the structural barrier to be approved by the Planning Director.
5. The applicant shall within 90 days after the granting of this permit, submit to the Planning Director a landscaping and erosion control plan to install a temporary irrigation system and appropriate foliage within the cut-slope of

the graded area of the New Public Access Easements within Waipiele Gulch.

6. The applicant shall grant a 10-foot wide mauka-makai pedestrian public access easement across the New Public Access Easements, as shown on **Exhibit "1"**, which shall run from the western end of Uli Road to the eastern end of Uli Road at the cul-de-sac, (#1 on **Exhibit "1"**) then adjacent to and along the west side of the paved driveway within the pole portion of TMK: 5-5-8:67 (#2 on **Exhibit "1"**), then through TMK: (3) 5-5-08:66 and/or 67 (#3 on **Exhibit "1"**) and leading into Waipiele Gulch by way of the graded road going down into Waipiele Gulch (#4 on **Exhibit "1"**), then along the graded road within Waipiele Gulch, at or near the east boundary of TMK No. (3)5-5-08:67 (#5 on **Exhibit "1"**), as generally depicted in black dots on **Exhibit 1** attached hereto and incorporated herein by reference. To the extent that applicant may legally agree to do so, applicant agrees that the County of Hawaii and the general public shall be guests or invitees of the Applicant solely for the limited purpose of utilizing Applicant's access rights over and across Easements "51" and "52" within TMK: (3) 5-5-08:48 and Easement "1" within TMK: (3) 5-5-08:22, under the same terms and conditions as stated in condition no. 2. The side entry gate at Hawi Road shall include a pass-through to allow unimpeded pedestrian public access.
7. The applicant shall grant a 10-foot wide lateral pedestrian public access easement to and along the shoreline of TMK: 5-5-8:67, as generally depicted in black dots on **Exhibit 1** attached hereto and incorporated herein by reference (#6 and #7 on **Exhibit "1"**), under the same terms and conditions as stated in condition no. 2. The lateral pedestrian public access easement shall be located along the top of the sea cliff on TMK: 5-5-8:67, not less than 10 feet and not more than 40 feet from the top of the sea cliff.
8. There shall be no vehicular public access on the pedestrian public access easement from Hawi Road to the end of the cul-de-sac on Uli Road and to the shoreline, with the exceptions of vehicles responding to emergency situations, and except as stated in condition no. 8. The Paho Beach Subdivision No.7640-Revised(2) lot owners, and their successors and assigns may utilize segments "4" and "5" of the New Public Access easements for vehicular access solely for the limited purpose of dropping off equipment and persons at Paho Beach, which shall not include parking for periods longer than necessary to allow the drop off of equipment and persons, and, provided however, that the Applicant and

each Pahoa Beach Subdivision lot owners, and their successors and assigns, shall provide the Planning Department with the vehicle identification (i.e., color, make and model) of the one (1) vehicle permitted per lot in Pahoa Beach Subdivision No. 7640-Revised (2) to be used for the vehicular access to Pahoa Beach, which vehicle identification may be amended by the lot owner's written notification to the Planning Department.

9. Upon the precondition that the County is able to obtain all necessary vehicular public access rights from Hawi Road across Easements "51", "52" and "1", and obtain consent from the Pahoa Beach Estates Association, the applicant shall: (a) allow vehicular public access on Uli Road from the western end on TMK:5-5-8:68 to the eastern end of the Uli Road cul-de-sac, and (b) install a graveled parking area for at least four (4) vehicles at the eastern end of the Uli Road cul-de-sac. If the vehicular public access is implemented, vehicular public access shall be allowed through a permit system managed by the Planning Department, to include without limitation, prior notification to the Pahoa Beach Estates Association and execution of a written release waiver.
10. Within 120 days, the applicant shall submit an updated certified Conservation District Boundary Interpretation Map, showing the location of the pedestrian public access pathway through Waipiele Gulch within TMK: (3) 5-5-08:67 in relation to the Conservation District Boundary.
11. Should any undiscovered remains of historic sites, such as 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-SHPD) shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the DLNR-SHPD when it finds that sufficient mitigation measures have been taken.
12. The applicant shall not do any further work on Segments "4" and "5" of the New Public Access Easements, or on the closed portion of the road shown on **Exhibit "2,"** such as surfacing or re-grading, except as specifically allowed in writing by the Director.
13. The applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements.

14. A final status report shall be submitted in writing to the Planning Director upon compliance with all conditions of approval.
15. 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.

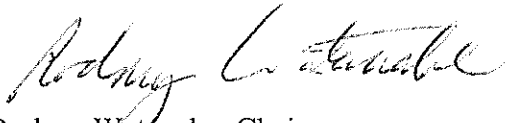
Should any of the foregoing conditions not be met or substantially complied with in a timely fashion, the Planning Director may initiate procedures to revoke the permit.

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.

Steven S. C. Lim, Esq.
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Should you have any questions, please contact Norman Hayashi of the Planning Department at 961-8288.

Sincerely,



Rodney Watanabe, Chairman
Planning Commission

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Attachments: Exhibits 1 and 2

cc/att: Ms. Rachel Mohammadi

Department of Public Works

Department of Water Supply

County Real Property Tax Division

Planning Department - Kona

Department of Land and Natural Resources/HPD

DOT-Highways, Honolulu

Ms. Alice Kawaha

Zoning Inspector

Subdivision Section

Mr. Gilbert Bailado