

## County of Hawai'i

### PLANNING COMMISSION

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December 2, 2008

Thomas L. H. Yeh, Esq.  
85 W. Lanikaula Street  
Hilo, HI 96720-4199

Dear Mr. Yeh:

Special Management Area Use Permit Application (SMA 08-000029)  
Request: Construction of Second Single Family Dwelling  
Applicant: John and Sandra Barsell  
Tax Map Key: 1-4-2:36

The Planning Commission at its duly held public hearing on November 6, 2008, voted to approve the above-referenced request to allow the construction of a second single family dwelling and related improvements on 16.9 acres of land situated within the Special Management Area. The property is located at 14-4934 Laimana Road in the Kapoho Beach Lots Subdivision, Puna, Hawaii.

Approval of this request is based on the following:

The applicants are requesting a Special Management Area Use Permit to allow the construction of a second single-family dwelling and related improvements on a 16.9-acre property. The project will consist of an elevated 2-bedroom/1-bath single-family dwelling, approximately 1,174 square feet in size, a 208-square foot lanai, an individual wastewater system and a grassed or cinder driveway.

The property consists of a 1,600-square foot single-family dwelling and existing improvements including sea walls and man-made fishponds that were in existence in the 1800's, with a makaha built in approximately 1920. There has been several Special Management Area Minor Permits issued previously on this property and a Special Management Area Assessment was issued with conditions for the single-family dwelling. Additionally, Conservation District Use Application (CDUA) HA-3447 was approved by the Board of Land and Natural Resources on May 23, 2008 to restore and rebuild a fishpond (referred to as Kapoho Fishpond) on the subject property.

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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 proposed development of a second single-family dwelling and related improvements on 16.9 acres of land in this area will not have a significant adverse environmental or ecological effect to the Special Management Area. It should be noted that under Planning Commission Rule 9-10 (H) (9), a proposed use, activity or operation may constitute a substantial adverse if it affects an environmentally sensitive area, such as flood plain, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh water or coastal water.

The Kapoho area, including the Kapoho Beach Lots, is reported to have subsided .8 feet (from USGS – Hawaii Volcano Observatory, 1995) during the 1975 earthquake in Kalapana. Since then there have been numerous reports of monthly inundation of properties, which has created difficulty in determining the shoreline and has created complications with administering the SMA rules and regulations because of the frequent inundation. The Kapoho area has a history of ongoing slow subsidence and more rapid subsidence associated with major earthquakes (1823, 1868 and 1975).

A study focusing on coastal subsidence in Kapoho, Puna, and the Island and State of Hawaii was prepared for the Hawaii County Planning Department by Dennis J. Hwang, Reinwald O’Connor & Playdon. The report was prepared to help address the many shoreline and hazard issues associated with the Kapoho area. Based on InSAR studies conducted at the University of Hawaii, the relative sea level rise for Kapoho has been estimated to be ~0.8 to 1.7 cm/yr +/- 0.8 cm/yr (2 standard deviations) over the last three years. This figure is in agreement with the separate GPS measurements taken for nearby areas by the Hawaii Volcano Observatory. This report recommends that hazard

mitigation issues be given serious consideration during all stages of development for the area.

Another concern for any coastal property, including the subject property, is sea level rise due to global warming. The International Panel on Climate Change (IPCC) current report projects that the sea level will rise approximately 0.5 feet to 2.0 feet by the year 2100. This figure is considerably low compared to other more current studies, which are estimating the sea level to rise approximately 3.0 feet to 6.0 feet by the end of the century.

The property is located within Flood Zones VE and AE, and Zone X. It is also located within the Tsunami Evacuation Zone. Although the location of the second dwelling is proposed to be outside of the FEMA flood zones, which have a base flood elevation of 16 feet, the area is prone to flooding due to subsidence and, in the future, will be affected by tidal change. Based on these factors, a condition of approval will be added requiring the applicants to build the dwelling at the height of the base flood elevation of the Flood Zone VE with an additional 2 feet to be added beyond the base flood elevation to account for subsidence and sea level rise. With these added conditions, the proposed development will not create a substantial adverse effect on these environmentally sensitive areas.

The proposed development will not create significant adverse impacts upon nearby and adjacent properties as the immediate area has been developed with similar uses (single-family dwellings). Surrounding properties are zoned Single-Family Residential (RS-10) located within the Kapoho Beach Lots Subdivision. The property borders Laimana Avenue and Alapai Point Road on the mauka (west) side and the coastline on the makai (east) side. There are dwellings to the north and south of the subject property within the subdivision.

The property is located within an area that is adequately served with essential services and facilities such as water, transportation systems and other utilities. Access to the property is from Laimana Avenue within the Kapoho Beach Lots subdivision. Water is serviced to the property via a private water system. Electricity and telephone are available to the property.

The property is located within the Critical Wastewater Disposal Area. All lots within this designated area are subject to the use of a septic tank system approved by the Department of Health. Based on the evidence of subsidence in the Kapoho Beach Lots area, the Planning Director is adding a condition requiring the applicants to install an aerobic septic system for the second single-family dwelling.

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. 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.

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 Open along the shoreline and Low Density Urban, which allows for residential, with ancillary community and public uses, and neighborhood and convenience-type commercial uses; overall residential density may be up to six units per acre.

The subject property is zoned Single-Family Residential (RS-10) by the County. Single-family dwellings are listed as a permitted use within the RS zoning in the Zoning Code. The applicants are proposing to construct a second single-family dwelling on the property. Therefore, the proposed development is consistent with the County General Plan and with County zoning.

Lastly, the Puna Community Development Plan was adopted by Ordinance 08-116 by the Hawaii County Council on September 10, 2008. In Chapter 2, Section 4 (Shoreline Area) of the plan, it discusses the subsidence problem in the Kapoho area and recommends that the County develop and adopt special zoning and development regulations for the greater Kapoho area (Kipu Point to Pualaa) to take into account the problems associated with ongoing and catastrophic subsidence and property loss, pressure to develop lots for residential and commercial use, and increasing demand for access to the shoreline area for recreational use. In response to this portion of the plan, the Planning Director has added several conditions of approval relating to subsidence and public access.

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 and preserving

recreational resources, historic resources, scenic and open space resources, coastal ecosystems, economic uses, coastal hazards, beach protection, and marine resources. The Planning Director has waived the submission of a certified shoreline survey because the applicants have proposed to setback the residence approximately 80 feet from the nearest shoreline.

There are identified recreational resources along the coast in Kapoho. These include snorkeling, scuba diving, spearfishing, fishing, boating, and other similar types of activities. Kapoho Beach Lots subdivision is a gated subdivision. There are several areas accessed by the public to the shoreline near the subject property within the subdivision and along the outside northern boundary of the property. Although the subdivision is gated and does not allow for vehicular public access, pedestrians are not prevented from accessing the subdivision. A condition of approval will require the applicants to submit a shoreline public access plan to allow for public access to and along the shoreline area of the property.

The proposed development will not substantially affect scenic vistas or viewplanes from any State Highway nor have an adverse impact on coastal recreational or visual resources to the shoreline and coastal ecosystems. With the added public access requirement, the project will not restrict access to coastal recreational resources along the shoreline.

There were no listed, candidate or proposed threatened or endangered plant species that found or would be expected in the area, and no rare plant species or ecosystems are present or nearby. An Archaeological Inventory Survey was conducted of the project site by Archaeological Consultants of the Pacific, Inc. from June 6 through June 8, 2006 and was revised in February of 2007. The report concludes that one site of significance to the interests of historic preservation was identified during the investigations, which was the loko kuapa type fishpond located on Kapoho Bay. The report recommends that the fishpond be preserved and that any dilapidated sections be restored/stabilized using historically appropriate materials and methods consist with existing conditions. The details of the preservation of the fishpond will be presented in a separate Archaeological Preservation Plan. The applicants received approval of Conservation District Use Application (CDUA) HA-3447 by the Board of Land and Natural Resources on May 23, 2008 to restore and rebuild a fishpond (referred to as Kapoho Fishpond) on the subject property.

The property has been previously hand cleared by the applicants and no archaeological or historic sites were observed. 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, other than the fishpond that is being restored.

The development will 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: The following information was submitted with the application:

- An Archaeological Inventory Survey report conducted by Archaeological Consultants of the Pacific, Inc. from June 6 through June 8, 2006 and revised in February of 2007.
- A Cultural Impact Assessment conducted by Archaeological Consultants of the Pacific.

The valuable cultural, historical, and natural resources found in the area: The property is improved with a single-family dwelling. The Archaeological Inventory Survey report concluded that one site of significance to the interests of historic preservation was identified during the investigations, which was the loko kuapa type fishpond located on Kapoho Bay. The report recommends that the fishpond be preserved and that any dilapidated sections be restored/stabilized using historically appropriate materials and methods consist with existing conditions.

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 dwelling will not restrict the use of natural resources along 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 development 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 applicants, its successor or assigns shall be responsible for complying with all stated conditions of approval of this permit.
2. The applicants shall comply with all conditions required by previous SMA Minor Permits and Conservation District Use Application (CDUA) HA-3447.
3. The applicants shall pay the prevailing facilities charge to the Department of Water Supply for the second single-family dwelling within one hundred and eighty days from the effective date of this permit. The applicants shall contact and coordinate with the Kapoho Water Company to determine any necessary water system improvements required to support the proposed second dwelling.
4. Construction of the proposed second single-family dwelling shall be completed within five (5) years from the effective date of this permit.
5. The applicants shall erect a construction barrier meeting with Planning Department approval along the length of the 40-foot setback line, as measured from the 4-foot elevation, fronting the location of the proposed second dwelling. No construction activity shall be conducted within the barrier area. The construction barrier shall remain in place until final inspection for all building and land alteration permits has been secured.
6. The following improvements, uses and/or activities are prohibited within 40 feet of the 4-foot elevation anywhere on the subject property without first securing a written determination regarding the permissibility of the proposed improvement, use or activity under Rule 9, PC Rules and Rule 11, PD Rules from the Planning Department: 1) Storage of construction materials, tools, equipment or supplies; 2) Land alteration (including grading filling, excavation or mechanized grubbing); 3) Landscaping; 4) Construction activities; 5) Fence erection; or 6) Rock wall construction or repair.
7. The applicants shall secure a National Pollutant Discharge Elimination System (NPDES) permit or written confirmation from the Department of Health that a NPDES permit is not required prior to any construction activities on the subject property. A copy of the NPDES permit or the written confirmation that a NPDES permit is not required shall be submitted to the Planning Department prior to the approval of any land alteration or building permits.

8. The applicants shall install an aerobic septic system for the second single-family dwelling.
9. All development-generated runoff shall be disposed of on-site and shall not be directed toward any adjacent properties.
10. The dwelling shall be constructed meeting the requirements of construction within the Flood Zone VE in accordance with Chapter 27, Flood Control, Hawaii County Code, with an additional 2 feet added to the base flood elevation to account for subsidence and future sea level rise. The base flood elevation shall be considered to be 16 feet above mean sea level, so that the lowest habitable floor shall be not less than 18 feet above mean sea level.
11. All earthwork and grading shall conform to Chapter 10, Erosion and Sediment Control of the Hawaii County Code.
12. If a pedestrian or vehicular public access from the Kapoho-Kalapana Road to the applicant's property is obtained via agreement, recognition, or determination of legal right, within six (6) months of that determination, the applicant shall submit a public access plan providing for a 10-foot wide walkable pedestrian right-of-way from a public access point to a point on the shoreline on the applicant's property, which may, at the applicant's option, be on the southern end of the applicant's property, and in that case, shall be on a direct access, subject to adjustment for physical obstacles. The access shall be for non-commercial and recreational pedestrian use and limited to daylight hours. The applicant may post signs indicating hours and terms of use and prohibit entry in the fish pond and along pond walls. This public access condition shall be deemed to satisfy the public access requirements of Chapter 34, Hawaii County Code, as to any future subdivision or multiple family development consisting of six (6) or fewer lots or six (6) or fewer dwelling units on the property, inclusive of any existing dwelling units. This access condition will supercede any previous SMA permit access condition applicable to the property. This access condition is without prejudice to any party, including the County of Hawaii, as to any future determination that there is a public road or access leading up to the applicant's property.
13. 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.



14. The applicants shall comply with all applicable County, State and Federal laws, rules, regulations and requirements.
15. The applicants shall submit a final status report upon completion of all conditions of approval.
16. 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 applicants, 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 applicants 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.

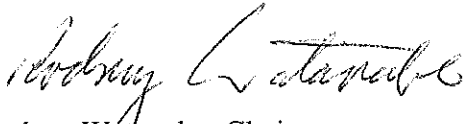
This approval does not, however, sanction the specific plans submitted with the application as they may be subject to change given specific code and regulatory requirements of the affected agencies.

Thomas L. H. Yeh, Esq.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Rodney Watanabe".

Rodney Watanabe, Chairman  
Planning Commission

Lbarsell01PC

cc: John and Sandra Barsell  
Department of Public Works  
Department of Water Supply  
County Real Property Tax Division  
Department of Land and Natural Resources/HPD  
DOT-Highways, Honolulu  
Ms. Alice Kawaha  
Zoning Inspector-Hilo  
Mr. Gilbert Bailado