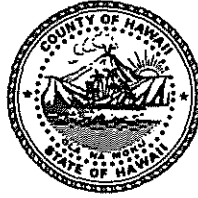


Stephen K. Yamashiro  
Mayor



## County of Hawaii

### PLANNING COMMISSION

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252  
(808) 961-8288 Fax (808) 961-9615

CERTIFIED MAIL

OCT 28 1994

Mr. Michael J. Krochina  
PO Box 4613  
Kailua-Kona, HI 96745

Dear Mr. Krochina:

Shoreline Setback Variance (SSV 94-1)  
Applicant: Kona Magic Sands Condominium Association  
Request: Allow Construction of Certain Improvements to  
Kona Magic Sands Condominium Complex Located within  
the 40-Foot Shoreline Setback Area

Tax Map Key 7-7-8:22

The Planning Commission at its duly advertised public hearing on October 20, 1994, considered the above-referenced request for a Shoreline Setback Variance in accordance with Chapter 205A, Hawaii Revised Statutes, as amended, and Rule 8 of the Planning Commission Rules of Practice and Procedure, to allow the following; 1) replacement of the existing mansard with a metal railing, 2) the use of the third floor roof as a lanai, 3) installation of a new steel-framed flat roof and support system over the existing second floor roof, and 4) the extension of the east-end wall along Unit 301. The property is located on the makai side of Alii Drive on the Kohala side of Magic Sands Beach, Pahoehoe 2nd, North Kona, Hawaii.

The Planning Commission voted to approve portions of the request. Shoreline Setback Variance No. 649 is hereby issued to allow the replacement of the existing mansard with a metal railing and the use of the third floor roof as a lanai. However, within the Shoreline Setback area, the installation of the new steel-framed flat roof and support system over the existing second floor roof and the extension of the east-end wall along Unit 301 is denied.

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The approval of portions of the request are based on the following findings:

The Shoreline Setback Law was enacted by the State Legislature in 1970 for the protection of the shoreline from undue man-made improvements. Many of the improvements have disturbed the natural shoreline process and have caused erosion of the shoreline. To prevent unnecessary encroachment of structures and other improvements upon the shoreline, the Legislature felt that it is in the best interest of the public to establish shoreline setbacks and to regulate the uses and activities within the shoreline setback area. These regulations are further articulated within Rule No. 8 of the Planning Commission regarding Shoreline Setback. The purpose of Rule No. 8 is stated as follows:

"The growing population and expanding development have brought about numerous cases of encroachment of structures upon the shoreline. Many of these structures have disturbed the natural shoreline processes and caused erosion of the shoreline. Concrete masses along the shoreline are contrary to the policy for the preservation of the natural shoreline and the open space. Unrestricted removal of sand, coral, rocks, etc., for commercial uses can only deteriorate the shoreline and remove it from public use and enjoyment. Moreover, the Hawaiian Islands are subject to tsunamis and high waves which endanger residential dwellings and other structures which are built too close to the shoreline. For these reasons, it is in the public interest to establish shoreline setbacks and to regulate the use and activities within the shoreline setbacks."

The Legislature, however, also recognized that certain activities and improvements may be required to be done or constructed within the shoreline setback area for protection of certain shoreline properties. In recognizing this need, the Legislature authorized the respective authorities within the various counties, in this case the Planning Commission, to grant variances for certain activities and improvements within the shoreline setback area. In accordance with Section 205-35(b) of the Hawaii Revised Statutes, and Section 8-14(a) and (b) of the Planning Commission's Rule 8, relating to Shoreline Setback, the Planning Commission may

grant variances from the shoreline setback regulations provided such a request conforms to any one of the following criteria for approval:

1. A variance may be granted for a structure or activity otherwise prohibited by these rules if the Planning Commission finds in writing, based on the record, that the proposed structure or activity is necessary for or ancillary to the cultivation of crops, aquaculture or landscaping [Section 8-14(a)(3)];
2. A variance may also be granted upon a finding that, based on the record, the proposed structure or activity meets a Shoreline-dependant Facility Standard [Section 8-14(b)(1)];
3. A variance may be granted for a private facility or improvement which is undertaken by a private entity and is clearly in the public interest; provided that the proposal is the practicable alternative which best conforms to the purpose of Rule 8 [Public Interest Standard-Section 8-14(b)(2)]; and
4. A variance may also be granted upon grounds of hardship (Hardship Standard-Section 8-14(b)(3)).

The Kona Magic Sands Condominium complex was constructed in 1966. Section 8-7(a)(1) states that structures or activities completed prior to June 22, 1970, are not prohibited within the shoreline setback area without a variance. The 37-unit complex, along with the swimming pool, seawall, restaurant area and its second floor roof and lanai facilities are considered non-conforming structures in compliance with the requirements of Rule No. 8.

The applicant proposes the construction of portions of the following improvements within the 20-foot shoreline setback area as part of its repair and upgrade of the existing Kona Magic Sands Condominium complex and which may affect only Units 301 and 302. The following proposed improvements for Units 303 and 304 appear to be located outside of the 20-foot shoreline setback area.

- A. Install a new steel framed flat roof and support system over existing second floor roof. The new steel framed flat roof will not extend beyond exterior dimension of

existing second floor roof nor exceed existing height of condominium complex. A portion of the new roof will be located within the 20-foot shoreline setback area and will approach to within 6.5 feet from the certified shoreline.

- B. Existing second floor roof will be converted to a lanai (third floor) upon completion of the new steel framed flat roof.
- C. Install metal railings on new third floor lanai to replace existing wood-framed mansard.
- D. Extend east-end wall along Unit 301 to the new roof extension on new third floor lanai.

According to the application, the applicant cites the following reason as justification for the issuance of a Shoreline Setback Variance by the Planning Commission:

"The proposed new roof and the use of the existing roof as a lanai for Apartments 301, 302, 303 and 304 enhances the use of this particular space without affecting the shoreline. This proposed roof will not encroach or project outside of the current existing footprint of overall structure.

"The existing roof at the 3rd floor is structurally sound and will support a floor live load of 60 psf in addition to the proposed new roof system. The lateral loads from wind and seismic events at the area in question meets current applicable Uniform Building Code requirements."

PROPOSED NEW THIRD FLOOR ROOF AND EXTENSION OF WALL ALONG UNIT 301

The proposed construction of a portion of a new third floor roof and the extension of the east-end wall of Unit 301 are structural modifications which will increase the exterior dimensions of the existing condominium complex and the visual obstruction within the 20-foot shoreline setback area. The standard available to the applicant in the granting of a Shoreline Setback Variance would be conformance with the Hardship Standard, which states that a variance may be granted upon the grounds of hardship only if:

- "(i) The applicant would be deprived of reasonable use of the land if required to comply fully with this rule; and

"(ii) The request is due to unique circumstances and does not draw into question the reasonableness of this rule; and

"(iii) The request is the practicable alternative which best conforms to the purpose of this rule."

The denial of the construction of that portion of the third floor roof and the east-end wall of Unit 301 within the 20-foot shoreline setback area would not deprive the applicant of a reasonable use of the subject property. The affected units are and will continue to be utilized for residential purposes. A denial of the subject variance request will not prevent or diminish these residential uses, as demonstrated by the 37 condominium units currently existing on the subject property. The Planning Director has no objection to the use of the second floor roof area as a lanai, but feels that to allow additional structural improvements within the 20-foot shoreline setback area would be contrary to the intent and purpose of Rule No. 8 to protect and preserve the natural shoreline and the open space.

The request is due to unique circumstances and does not draw into question the reasonableness of this rule. The purpose of Rule No. 8 is to regulate use and activities within the shoreline setback area which have, in the past, encroached upon the shoreline disturbing the natural shoreline processes and causing erosion of the shoreline. Encroachments such as concrete masses and other structural features are contrary to the policy for the preservation of the natural shoreline and the open space. There are no unique circumstances or property characteristics which would restrict the applicant's reasonable use of the subject property. As demonstrated by the extent of existing improvements located on the subject property and within the 20-foot shoreline setback area, the applicant has been able to utilize the subject property for residential purposes to a great degree. Therefore, the imposition of a shoreline setback area has not severely hindered the use of the subject property for residential purposes. The Commission would be remiss in its duties were it to allow the requested improvements to encroach within the shoreline setback area for no other reason than to further enhance the livability of existing residential units by providing for a covered lanai. Such structural improvements are clearly for the benefit of the individual unit owners and should not compromise the preservation of the shoreline for the general public.

A reasonable alternative is to not construct that portion of the roof and east-end wall improvements which will encroach within the 20-foot shoreline setback area. This alternative is considered reasonable since the applicant will not be deprived of the use of the project site for residential uses.

Based on the above, the construction of a portion of a new roof over the second floor roof and the extension of the east-end wall of Unit 301 within the 20-foot shoreline setback area would not be consistent with the Shoreline Setback Law pursuant to Chapter 205-31, HRS and the criteria established in Rule No. 8 of the Planning Commission's Rules of Practice and Procedure and should, therefore, be denied.

PROPOSED USE OF SECOND FLOOR ROOF AS LANAI AND REPLACEMENT OF EXISTING MANSARD ROOF WITH NEW METAL RAILING

The proposed replacement of the existing mansard with metal railings and the use of the second floor roof area as a lanai would not be contrary to the intent and purpose of Rule No. 8. The requested improvements would simply replace an existing structural feature with railing which would promote a greater open visual character than the opaque mansard roof treatment. The use of the second level roof as a lanai would not require additional structural improvements beyond the installation of the new railing. Therefore, a denial of this portion of the request would deprive the applicant of reasonable use of the land if required to comply fully with this rule and would draw into question the reasonableness of this rule. Only a portion of the new railing and lanai area will be located within the 20-foot shoreline setback area. These improvements will not exceed the exterior dimensions of the existing condominium complex. Therefore, the installation of railings to replace an existing mansard and use of the second floor roof as a lanai is the best practical alternative which best conforms to the purpose of this rule."

Approval of this request is subject to the following conditions:

1. The applicant, successors, or assigns shall be responsible for complying with all of the stated conditions of approval;

2. The applicant, its successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim or demand for the property damage, personal injury and death arising out of any act or omission of the applicant, its successors or assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of this permit.
3. Plans for the replacement of the existing second floor roof mansard with a metal railing and the use of the second floor roof as a lanai shall be submitted to the Planning Department for review and approval.
4. The replacement of the existing second floor roof mansard with a metal railing shall be completed within two (2) years from the effective date of this variance.
5. 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 original reasons for the granting of the permit; and
  - (c) 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). Further, should any of the conditions not be met or substantially complied with in a timely fashion, the Director shall initiate procedures to revoke this permit.

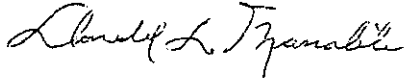
This approval does not, however, sanction the specific plans submitted with the application as they may be subject to change given specific code and regulatory requirements of the affected agencies.

As stated in Rule 8-19(b), of the Planning Commission Rules of Practice and Procedure, "A decision of the Commission is appealable to the Third Circuit Court."

Mr. Michael J. Krochina  
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Should you have any questions on this matter, please feel free to contact Rodney Nakano or Daryn Arai of the Planning Department at 961-8288.

Sincerely,



Donald L. Manalili, Chairman  
Planning Commission

RKN:jdk  
LKonaM01.PC

xc: Honorable Stephen K. Yamashiro, Mayor  
Planning Director  
Department of Public Works  
Department of Water Supply  
Corporation Counsel  
County Real Property Tax Division  
Office of State Planning, CZM Program w/background  
West Hawaii Office  
Plan Approval