Subd. 70-20

COMPARISON OF DEPARTMENT OF PUBLIC WORKS' "CRITERIA" APPLIED IN CONSOLIDATION/SUBDIVISION APPLICATIONS No. 86-42 (Subdivision No. 5435), No. 90-20, No. 90-39 (Subdivision No. 5917) & No. 90-48 (Subdivision No. 5929)

1] STATUS OF PUBLIC ACCESSWAY TO LOTS IN QUESTION

Appl. No. 86-42

"Kaawaloa Road is a substandard paper road with varying widths of right-of-way."
(DPW, 4/10/86)

Appl. No. 90-20

"Kaawaloa Road is not maintained by the County and is under the jurisdiction of DLNR. Subdivider shall obtain permission from DLNR for use and provisions of all necessary or required road improvements..."
(DPW,2/26/90)

Appl. No. 90-39

"1. Although this application may technically fall under the guidelines of Section 23-7 of the subdivision control code, neither of these parcels fulfill the requirements of Section 23-34. These lots do not abut upon a public street or approved private street where access by a passenger vehicle is possible...

2. The existing dirt road, known as Kaawaloa Road, that bisects Lot 1 appears to be an old government road or an existing public thoroughfare..."
(DPW,4/9/90)

Appl. No. 90-48

"All three lots [of Subd. Appl.#90-48] directly access to a County Road, which can be improved if need be."
(DPW,9/28/90)

"The Hienaloli-Kahului Road is listed on the County's road maintenance inventory...The County does possess deeds conferring road ownership to the Territory [emphasis added], some as early as 1934, for portions [emphasis added] of the Road but not in its entirety...Due to absence of specific documentation [emphasis added], we're unable to establish when County initiated road maintenance and circumstances thereof."
(DPW, 5/29/91)

COMMENTS: The DPW's comments on Application No. 90-39 were written less than 45 days after those for Appl. No. 90-20, yet there is no mention of DLNR's jurisdiction over Kaawaloa Road in the comments on Appl. No. 90-39. What specific change of legal circumstance led to this change the road's status in less than 45 days? Of the three Consolidation/Subdivision applications involving lots that take their legal access from Kaawaloa Road

1] STATUS OF PUBLIC ACCESSWAY TO LOTS IN QUESTION
COMMENTS (continued):

only Appl. No. 90-20 received comments regarding DLNR. Why are the Smiths the only applicants that must get DLNR clearance?

The Smiths wrote to the DLNR asking confirmation of the DPW claim of DLNR "jurisdiction" over Kaawaloa Road. On June 12, 1990 and again on April 15, 1991 Mr. W. Mason Young, Administrator of DLNR's Land Management Division responded that "DLNR is not in the road business...Kaawaloa Road is owned in fee simple by either the State Department of Transportation or the County of Hawaii." The State DOT has written the Smiths that "Kaawaloa Road is not in the state highway system; therefore, we have no jurisdiction over that roadway." By deduction the Smiths claim that Kaawaloa Road is a County Road.

In October 1990 the Smiths' lawyer, Thomas Yeh, presented the DPW extensive evidence that Kaawaloa Road existed as a government maintained, vehicular, public highway prior to 1892. As such it was accepted as an government owned public highway under the Highways Act of 1892 and remains a government road today. At the same time Mr. Yeh presented the DPW with a well supported legal argument that Kaawaloa has become a County highway and a County maintenance responsibility by act of law. The DPW's position was that it takes no maintenance responsibility for roads that have not been officially granted to the County. If the Smiths could not show Mr. Yanabu that the County accepted or approved the dedication or surrender of Kaawaloa Road then it is not DPW's responsibility. It is relevant to note, however, that DPW's opinion on the legal status of Kaawaloa Road can be tailored to meet an objective DPW is seeking and can change from month to month and from paragraph to paragraph in a single memorandum. For example, in Paragraph #1 of DPW's April 9, 1990 comments on Appl. No. 90-39, where Mr. Capellas was trying to develop a rational for requiring roadway improvements, Kaawaloa Road was declared not to be a "public street". But then in Paragraph #2 where Mr. Capellas wanted to require the applicant to grant the public an easement or road right-of-way, he states that Kaawaloa Road "appears to be a old government road or public thoroughfare."

The DPW sent the Smiths' evidence & Mr. Yeh's October 18, 1990 letter to the Office of the Corporation Counsel for a legal opinion. On March 4, 1991, Mr. Michael J. Matsukawa responded with an opinion that supported DPW's stance. While conceding that Kaawaloa was a government owned road, Mr. Matsukawa wrote, "If you can cite me any authority which says that a legislature can convey a road by legislative declaration to a county, I would appreciate reading same. Unless I can be convinced otherwise, I fail to see how a state officer's affidavit [meaning Mr. Mason Young of DLNR] has any meaning..."

Given these professed County "standards" for determining what qualifies as a County highway, the section of Hienaloli-Kahului that provides access to the property in Appl. No. 90-48

1] STATUS OF PUBLIC ACCESSWAY TO LOTS IN QUESTION
COMMENTS (continued):

is not owned by the County. Therefore, that road access is not a County highway. The Smiths asked the DPW why Appl. No. 90-48 was approved without requiring improvements to the accessway Hienaloli-Kahului Road, which is an unimproved, substandard road. Mr. Robert K. Yanabu replied that the road was a "County road" and by implication since it was a County maintenance responsibility no private improvement was necessary. When the Smiths pressed Mr. Yanabu for documentary proof to support his claim that Hienaloli-Kahului Road is a County road, Mr. Yanabu was unable to do so. Mr. Yanabu claimed that the DPW possessed a 1934 deed to the Territory of Hawaii - not to the County, to the Territory - for a portion of the Road. The Smiths looked up this deed in the State Bureau of Conveyances. The deed is from Mariana Gomes to the Territory (Liber 1232, Page 478) and describes the section of road in the land parcel "Hienaloli 2nd" which lies on the North-West or Kohala side of Appl. No. 90-48. This section of the road can never provide the property in Appl. No. 90-48 with safe access for emergency vehicle access, because if you follow it in its northwesterly direction it ends in a dead-end at Honuaula Ahupua'a.

The section of Hienaloli-Kahului Road that does provide access to Appl. No. 90-48 lies in land parcels "Hienaloli 3rd, 4th, 5th & 6th". Mr. Yanabu has produced no evidence that this road section was ever dedicated or surrendered to the County. Mr. Yanabu has produced no evidence that the Hawaii County Board of Supervisors has ever accepted or adopted any section of Hienaloli-Kahului Road, deeded or not. Therefore, by the very "standards" that Mr. Matsukawa and Mr. Yanabu are trying to use to deny responsibility for Kaawaloa Road, Hienaloli-Kahului Road is not County road. The DPW says it will not accept responsibility for Kaawaloa Road because the Smiths can not provide the documentation they require; yet Mr. Yanabu states that the DPW is responsible for a road for which (he admits) the County lacks any "specific documentation" to show why that road is on the County maintenance list. A clear double standard is evident here.

One final note: if the County ever proves that it owns that road section deeded to the Territory in 1934, it will at the same time prove that Kaawaloa Road is a County Road, because the only way ownership of that section could have been transferred to the County without a legal deed is by the act of Hawaii State Legislature.

2] "NECESSARY" PHYSICAL ACCESS IMPROVEMENTS (Roads)

Appl. No. 86-42

The DPW initially commented that the subdivision should provide "a minimum 20 foot wide dedicable standard pavement within Kaawaloa Road fronting the property..." However, at the end of his comments Mr. Hugh Ono stated:

2] "NECESSARY" PHYSICAL ACCESS IMPROVEMENTS (Roads)
Appl. No. 86-42 (continued)

"Proposed subdivision appears to qualify for evaluation under provisions of Section 23-7 (consolidation/resubdivision) of the Subdivision Code [emphasis added]. Request Planning Dept. determine the applicability of the above comments item numbers 4 through 7."
(DPW, 4/10/86)

The Planning Dept. did not require any road improvements in its letter of tentative approval.
(PD, 4/14/86)

"This application (#86-42) was reviewed/approved prior to the current criteria. It would not be approved today"
(DPW, 9/28/90)

Appl. No. 90-20
"Provide minimum 20' foot wide Agricultural pavement within a 50' wide right-of-way along Kaawaloa Road from Napoopoo Road to Parcel #7..."
(DPW,2/26/90, 9/7/90 and 9/25/90)

On 7/7/90 the Smiths & attorney Thomas Yeh met with Mr. Robert K. Yanabu & Mr. Larry Capellas to discuss the DPW's required improvements for Application #90-20. At that meeting the Smiths stated that Consolidation/Subdivision Application No. 86-42 involving lots with access on Kaawaloa Road was approved without road improvement requirements. The Smiths asked that they be granted the same conditions approved in Appl. #86-42. Mr. Yanabu replied that the decision reached in Appl. #86-42 occurred under a previous administration. He stated that different criteria were currently in effect and that he would not be bound by the precedent set by Appl. #86-42.

The Smiths asked if it there was any means of receiving approval of their application without making road improvements. (See Section #3 on Covenants below) Mr. Yanabu replied that road improvements were absolutely essential for public safety, and that he would not approve Appl. #90-20 until the Smiths guaranteed that a road would be built to Parcels 7 & 8. If the Smiths could not build the road immediately, they would have secure a bond that would pay for the construction of the road if the Smiths did not complete the "necessary" improvements in a specified period.

The Smiths then inquired if it was possible to meet the road improvement requirement by building a road with lesser pavement width than the 20 feet initially specified. Mr. Capellas remarked that due to the number and size of lots in the Smiths subdivision that the current "criteria" did not allow for a smaller road width. After lengthy discussion Mr. Yanabu finally stated that his minimum public safety requirements were that all lots had to be accessible to County fire trucks and ambulances. If the County Fire Dept. approved a smaller road width for the

2] "NECESSARY" PHYSICAL ACCESS IMPROVEMENTS (Roads)
Appl. No. 90-20 (continued)

Smiths' subdivision that Mr. Yanabu said he would accept that standard.
(DPW, 7/7/90)

"With regard to the road pavement width, the Department is amenable to a 12 foot wide pavement, provided its width is approved by the Fire Inspector in writing."
(DPW, 9/28/90)

"With the exception of the pavement width, we fail to appreciate your contention that the Department has been unfair or unreasonable to your client."
(DPW, 9/28/90)

Appl. No. 90-39

"1. Although this application may technically fall under the guidelines of Section 23-7 of the subdivision control code, neither of these parcels fulfill the requirements of Section 23-34. These lots do not abut upon a public street or approved private street where access by a passenger vehicle is possible. Dept. of Public Works recommends roadway improvements within Kaawaloa to accommodate vehicular access to both lots. Minimum improvements shall consist of 16' foot wide pavement with 6' wide compacted gravel shoulders on each side."
(DPW,4/9/90)

Appl. No. 90-48

No improved physical access was required.
(DPW,5/1/90)

"All three lots directly access to a County Road, which can be improved if need be."
(DPW,9/28/90)

COMMENTS: The Smiths own TMK 3:8/1/009/003 as tenants-in-common. On November 15, 1989 Planning Dept. Director Duane Kanuha notified the Smiths that the Dept. recognized that TMK 3:8/1/009/003 contained eight (8) separate lots of legal record. The Smiths Application No. 90-20 attempts to resubdivide these 8 irregularly shaped, pre-existing lots into 4 twenty five (25) acre lots and 4 five plus (5+) acre lots. The Smiths need this resubdivision so they can fairly divide their property among family members without having to sell the lots.

The Smiths believe that they should be granted approval of their application (#90-20) under the same conditions and terms required in Appl. No. 86-42 (Subd. No. 5435). In 1986 the DPW comments listed the road improvements for a normal subdivision, but recognized that the application (#86-42) qualified for consideration under Section 23-7 of the Subdivision Code. In 1986 the DPW left the final decision to the Planning Department as to the "improvements" it listed were required under Section 23-7.

2] "NECESSARY" PHYSICAL ACCESS IMPROVEMENTS (Roads)
COMMENTS (continued):

The Planning Dept. did not ask for road improvements or road widening setbacks.

It appears that the DPW currently appropriates to itself the authority to make all decisions and to rewrite any rules regarding which applications qualify for exemption under Section 23-7 of the Subdivision Control Code. For example, in Paragraph #1 of the DPW's comments on Appl. 90-39 (4/9/90) Mr. Larry Capellas attempted to rewrite Section 23-34 of the Subdivision Control Code. Section 23-34 states:

> "**Access to lot from street.** Each subdivided lot shall abut upon a public street or approved private street. No lot shall be platted without access on a street. The director may indicate the side or sides of any lot from which the driveway shall be permitted or prohibited."

This section contains no reference to "physical access by a passenger vehicle". But Mr. Capellas' departmental interpretation of Section 23-34 does contain these words. Mr. Capellas used his augmented version of Section 23-34 as a justification for his recommendation that roadway improvements were required in Appl. No. 90-39.

Mr. Yanabu claims that the DPW has "current criteria" that supersede the conditions set by the precedent decision in Appl. 86-42. This "Comparison..." will demonstrate that the DPW has no consistent set of standards to guide decisions regarding Section 23-7 consolidation/subdivision applications. Has the DPW informed the Planning Department that a their Dept. has conducted a specific formal policy review of Section 23-7 standards? Since the approval of Appl. 86-42 has the DPW sent the Planning Dept. a copy of any newly adopted "criteria" for Section 23-7 decisions?

Application No. 90-20 has eight lots of from 5+ acres to 25 acres in size. Application No. 90-39 had two lots - a 44+ acre lot and a 70 acre lot. The sole legal accessway to <u>all lots in both applications</u> is Kaawaloa Road. The initial comments on Appl. No. 90-20 asked the Smiths to provide 20 foot wide Agricultural standard pavement road in a 50 foot right-of-way. The initial comments on Appl. No. 90-39, written less than 45 days later, asked the applicant to provide a road with 16 foot width pavement and 6 foot wide gravel shoulders. No changes had occurred to Kaawaloa Road, however, the road improvement required in Appl. 90-39 is <u>four feet smaller</u> in pavement width. The applicant <u>was not required to meet the Agricultural pavement standard</u>, and <u>was not required to provide a 50 foot wide right-of-way</u> for the road.

In their July 7, 1990 meeting with Mr. Yanabu and Mr. Capellas, the Smiths specifically asked if a smaller pavement width would be acceptable to the DPW. At that time Mr. Capellas (who drafted the comments for applications #90-20, #90-39, & 90-48) said that the size and number of the Smiths' lots made the

2] "NECESSARY" PHYSICAL ACCESS IMPROVEMENTS (Roads)
COMMENTS (continued):

20' Ag. standard pavement "necessary". It is apparent that Mr. Capellas was applying the general subdivision code street design standards of Section 23-41 to what is a section 23-7 situation. Furthermore, Mr. Capellas initial comments (2/26/90) did not acknowledge that Appl. No. 90-20 fell under the guidelines of Section 23-7. His comments (4/9/90) on Appl. No. 90-39 recognized that application fell under Section 23-7, but Appl. No. 90-20 was treated as a regular subdivision on Ag./5 acre zoned land.

If, as Mr. Capellas said, the lot size in the Smiths' consolidation/resubdivision initially precluded construction of any road with less than 20' Ag. standard pavement, why wasn't the same criterium initially followed in Appl. No. 90-39? A road with 16' wide non-Ag. standard pavement, as specified in the conditions for Appl. 90-39, undeniably was what the code refers to as a "non-dedicable street". Section 23-87 of the County Subdivision code regarding non-dedicable streets states that in the situation where streets serve "areas zoned for lots three acres and over"...their "pavement widths shall conform to the agricultural standards as set forth under section 23-34." The lot sizes in that application were 44+ acres and 70 acres. The zoning of the lots is Ag/5 acres and Ag/Unplanned. The minimum Ag. standard pavement width for such lots is 20 feet. The only place that 16 foot wide pavements are allowed is under the general Subdivision control code is Section 23-88 which applies to "private dead-end streets" serving "only residential lots and those agricultural lots zoned for less than three acres." Kaawaloa Road is a government owned public highway, and the subject lots are many times over three acres in size.

Mr. Capellas set a road improvement standard for Appl. No. 90-39 that was less than the street design criteria and pavement standards for a regular subdivision. When Mr. Capellas and Mr. Yanabu were asked on July 7, 1990 if the DPW could accept a road with a pavement width less than 20 feet, Mr. Capellas did not disclose to the Smiths that he had required only a 16' wide pavement non-Ag standard road when he wrote his initial April 9, 1990 comments for Appl. 90-39. Mr. Capellas said that the size and number of the Smiths lots had set the standard of his initial comments regarding road access improvements. Mr. Capellas knew this statement was false and directly contrary to comments he wrote for Appl. No. 90-39.

Mr. Yanabu finally appeared to modify DPW's stance by saying that the Smiths could ask if the Hawaii County Fire Dept. would approve a lesser road improvement standard for the access of fire trucks.

In August 1990 the Smiths' lawyer, Thomas Yeh, spoke with Kona Fire Dept. Inspector Ward Tiara who said that given the attributes of the Smiths' property a pavement width of twelve (12) feet would be sufficient. On August 15, 1990 Mr. Yeh wrote to Mr. Yanabu informing him of Inspector Tiara's assessment and

2] "NECESSARY" PHYSICAL ACCESS IMPROVEMENTS (Roads)
COMMENTS (continued):

proposed that the Smiths' be allowed to meet the road improvement requirement with a twelve (12) foot Ag. standard pavement with four (4) foot gravel shoulders in a fifty (50) foot right-of-way.

In September 1990 the Smiths' lawyer obtained copies of documents from the County files of approved applications #90-39, #90-48 & #86-42, and learned that Mr. Yanabu's and Mr. Capellas' statements regarding road improvement requirements and covenants had been misleading. On Sept. 20, 1990 Mr. Yeh wrote Mr. Yanabu and asked him to explain the discrepancies between the conditions approved in those three applications and the more stringent requirements set for Appl. #90-20. Mr. Yeh asked that Mr. Yanabu use the conditions set in the approved applications as guides to modify the requirements in Appl. 90-20.

In his Sept. 28, 1990 reply Mr. Yanabu admitted that the pavement width standards in Appls. No. 90-20 & 90-39 were unequal, but <u>made no change</u> to Appl. No. 90-20's road improvement requirements. Instead he now required that the Smiths get a <u>written</u> statement from the Fire Inspector before he would reduce his road pavement standard. The applicant in Appl. 90-39 was not asked to consult the County Fire Dept., nor is there any record of the applicant providing the DPW with a letter from the Fire Dept. regarding its minimum road access standards, yet that application was afforded a lesser road access improvement standard. The physical access standard that the DPW set for Appl. No. 90-39 is to provide for access "by a passenger vehicle". The Smiths' were asked to provide physical access for a fire truck, a more stringent standard.

The point of the discussion above is not to show that the Smiths should be required to build a 20' wide, a 16' wide or even a 12' wide road. The point is that the DPW comments & discussions regarding Appl. No. 90-20 and Appl. No. 90-39 are not consistent.

<u>Appl. No. 90-20</u>	<u>Appl. No. 90-39</u>
20' pavement width	16' pavement width
Agricultural standard pavement	No pavement standard
50' wide right-of-way specified	No road right-of-way width required
Must accommodate fire trucks & emergency vehicles	Must accommodate passenger vehicles
Must obtain written Hawaii County Fire Inspector approval of any road width less than 20' feet	No Fire Dept. approval required

2] "NECESSARY" PHYSICAL ACCESS IMPROVEMENTS (Roads)
COMMENTS (continued):

Appl. No. 90-20	Appl. No. 90-39
Must obtain DLNR permission for all road improvements	No DLNR permission required
Applicant required to guarantee that road improvements would be completed by securing a bond.	Applicant not required to give any guarantee or provide a bond.
Covenants not accepted in lieu of road improvements	Covenants proposed & accepted in lieu of road improvements

The DPW does not have consistent standards regarding applications that fall under Section 23-7 of the Subdivision Control Code. With no consistent standards Mr. Robert Yanabu's claim that he has "current criteria" has no basis in fact. Therefore, the conditions approved in Appl. No. 86-42 continue to be valid precedents for what improvements are/are not "necessary" for the Smiths' Section 23-7 consolidation/subdivision.

In that Sept. 28, 1990 letter, Mr. Yanabu also tried to explain the lack of any road improvement requirements for Hienaloli-Kahului Road in Appl. No. 90-48 by claiming that the County was responsible for the improvement of this "County Road". The Smiths have proof (and the Corporation Counsel has conceded) that Kaawaloa Road is a government owned public highway. The road is currently open to vehicular traffic. This vehicular traffic is continuous and uninterrupted; no government body, department or agency has officially closed Kaawaloa Road or prohibited vehicular traffic on the highway. The Hawaii State Supreme Court has repeatedly ruled that where a public thoroughfare is held open for travel, the government agency responsible for that thoroughfare has a duty to maintain it in a condition safe for travel.

The public thoroughfare Kaawaloa Road can be improved "if need be" by the government division that has the maintenance responsibility for the road. This situation is identical to that of Appl. No. 90-48. If that applicant was not required to improve Hienaloli-Kahului Road because it was the maintenance responsibility of the government (County), to be fair and equitable the Smiths physical access improvement requirements should be decided by the same standards. The DPW's present physical access requirements for Appl. No. 90-20 are an attempt make private citizens assume what is legally a government liability and responsibility.

3] COVENANTS

Appl. No. 86-42

The applicant was not required to grant covenants as a

3] COVENANTS
Appl. No. 86-42 (continued)
condition for obtaining approval of the subdivision.
(PD, 4/14/86)

Appl. No. 90-20

On 7/7/90 the Smiths & attorney Thomas Yeh met with Mr. Robert K. Yanabu to discuss the DPW's list of "necessary" improvements for Application #90-20. At that meeting the Smiths proposed deed covenants regarding access on Kaawaloa Road that were similar to those that were proposed in DPW's April 9, 1990 comments on Application #90-39. The Smiths also proposed to covenant that they would not build residences on any of their eight reconfigured lots until a road was built to the lot. In front of witnesses Mr. Yanabu responded that it was not his practice to accept covenants as a means to alleviate problems of access responsibility. Mr. Yanabu said that the DPW did not accept offers of covenants because they often proved to be an inadequate means of solving improvement problems or protecting the County of Hawaii from liability law suits. He said that he had no confidence in the ability of the lawyers working in the Office of Counsel to properly review any applicant's proposed covenant. He said that the lawyers working for Corp. Counsel were too inexperienced to know how to create a covenant that would protect the County's interests.
(DPW, 7/7/90)

Appl. No. 90-39

"In lieu of Comment #1, Dept. of Public Works may entertain foregoing access requirements if the applicant can provide deed covenants [emphasis added] disclosing the existing physical access constraints along Kaawaloa Road and clarifying that the County will not provide accessways to any lot along Kaawaloa Road."
(DPW, 4/9/90)

The Applicant had a set of deed covenants drafted and submitted them to the County. On May 30, 1990 Mr. Yanabu wrote to the Planning Dept.:

> "We have reviewed the subject subdivision deed covenant and our comments are as follows:
>
> 1] The wording of the covenant appears to satisfy the concerns of the Department of Public Works regarding disclosing the physical access constraints along Kaawaloa Road and clarifying that the County will not provide improved accessways to any lot along Kaawaloa Road.
>
> 2] Request Planning Director verify as to form and legality with Corporation Counsel."

(DPW, 5/30/90)

"It is our understanding that proposed Lot #1 is under contract to be sold to adjacent Lot 8-A and will be used as a

3] COVENANTS
Appl. No. 90-39 (continued)

single project with Lot 8-A, not necessarily to consolidated..." [emphasis added]
(DPW, 5/4/90)

"Lot 1 encompassing 70.0 acres will be consolidated with adjoining Lot 8-A to form a golf course at which time it will have direct access to Napoopoo Road"
(DPW, 9/28/90)

Appl. No. 90-48

No covenants regarding physical access were required.
(DPW, 5/1/90)

COMMENTS: At his July 7, 1990 meeting with the Smiths and Mr. Yeh Robert Yanabu purposely tried to mislead the Smiths. He told the Smiths that it was not his policy to accept covenants when he specifically knew that this was false. He and Mr. Larry Capellas had proposed the use of covenants in their April 9, 1990 comments on Appl. No. 90-39, and they reviewed and approved the applicant's covenants on May 30, 1990.

When Mr. Yeh asked (9/20/90) Mr. Yanabu to review Appl. 90-39, Mr. Yanabu ignored the subject of covenants completely. Instead he tried to fashion a weak justification for the absence of road improvement requirements for that consolidation/ subdivision. Mr. Yanabu tried to claim that access to one of the lots was no longer an issue because the lot was going to be "consolidated with adjoining Lot 8-A to form a golf course at which time it will have direct access to Napoopoo Road." This statement does not agreement with the documents in the Appl. 90-39 file. the last time "Lot 1" is mentioned by Mr. Capellas and Mr. Yanabu is in their May 4, 1990 memorandum where they say that Lot 1 will be used in the "single project with Lot 8-A, not necessarily to be consolidated". It is evident that when Mr. Yanabu and Mr. Capellas negotiated the conditions for Appl. 90-39 with the land owner that they were not concerned that direct legal access to Napoopoo Road be guaranteed. Being "used as a single project" does not give Lot 1 legal access on Napoopoo Road unless it is legally consolidated with Lot 8-A. It has been eleven (11) months since Appl. 90-39 was approved, & it has been nine (9) months since Lot 1 was sold to Kealakekua Bay Partners, however, no application to consolidate Lot 1 and Lot 8-A has been filed. The DPW can not provide any date certain when the lots will be consolidated, if ever. The golf course that Mr. Yanabu refers to is still in the planning stages and has not even begun the approval process. The possibility exists that it may not be approved. There are so many uncertainties that may prevent Lot 1 from being consolidated. Three things that are certain are: 1) that Lot 1 was approved without guarantying improved physical access to the lot, 2) Lot 1 was sold and exists today as a separate piece of property, and 3) Lot 1's sole legal access remains Kaawaloa Road.

3] COVENANTS
COMMENTS (continued):

Another subject Mr. Yanabu evaded in discussing Appl. No. 90-39 was the access to the second piece of property. The application involved two lots - Lot 1 was sold, but the applicant retained ownership of the second (44+ acre) lot. Lot 2 is not going to be part of any proposed golf course project; the owner has no plans to consolidate this lot with Lot 8-A, and no other piece of property can be consolidated with Lot 2 to give it direct access to Napoopoo Road. And the lot's sole legal access is Kaawaloa Road. No agreement exists between the County and the applicant/owner guarantying that a road will be built to the lot, and the applicant/owner was not required to secure a bond to insure the completion of such a road.

The applicant in Appl. No. 90-39 was allowed to pledge covenants in lieu of providing roads improvements, while the Smiths were told that it is not DPW policy to accept covenants. The applicant for Appl. No. 90-39 was able to sell and use his property as he desired, free of any bond or obligation to the County, while the Smiths are told that we will never be allowed to divide and use our land as we desire to until we build a road to Parcel #7 or secure a bond for same. This is inconsistent, arbitrary and unfair.

4] ROAD WIDENING SET BACKS AND PUBLIC ACCESS EASEMENTS

Appl. No. 86-42

The DPW initially commented that the subdivision should provide "future road widening to assure a uniform minimum 50 foot wide right-of-way on both Napoopoo and Kaawaloa Roads." However, at the end of his comments Mr. Hugh Ono stated:

"Proposed subdivision appears to qualify for evaluation under provisions of Section 23-7 (consolidation/resubdivision) of the Subdivision Code. Request Planning Dept. determine the applicability of the above comments item numbers 4 through 7."
(DPW, 4/10/86)

The Planning Dept. did not require any road widening setbacks in its letter of tentative approval.
(PD, 4/14/86)

Appl. No. 90-20

"Provide future road widening setbacks along Kaawaloa Road and Napoopoo Road as necessary for a minimum 50' wide road right-of-way."
(DPW, 2/26/90)

"Provide future road widening setbacks along Napoopoo Road and Kaawaloa Road as necessary to provide 1/2 the difference between 50' and the existing right-of-way width."
(DPW, 9/7/90 and 9/25/90)

Appl. No. 90-39

"The public right of passage [on Kaawaloa Road] should be guaranteed by a 50' wide easement or road right-of-way. (DPW, 4/9/90)

"Applicant shall include 50' wide public access right-of-way delineated by the outside edge of the stone walls which bound Kaawaloa Road. Where section of stone wall has been interrupted by a lava flow, the applicant shall designate the continuation of the right-of-way measuring 50' wide using the remaining wall and the centerline of the existing roadway as guidelines to establish the 50' wide width." (DPW, 5/4/90 and PD,5/22/90)

Appl. No. 90-48

No road widening set backs were required. (DPW, 5/1/90)

"Hienaloli-Kahului Road, which serves as access to Lot 3, is a 40 foot wide right-of-way with a relatively mild grade." (DPW, 9/28/90)

COMMENTS: If the DPW actually had criteria for Section 23-7 applications they would hold all similar applications to the same right-of-way standard. The Smiths are asked to provide road widening setbacks of 1/2 the difference between 50' and the existing right-of-way width. If the DPW was consistent it would have required the applicant in Appl. No. 90-48 to provide the same setback. Hienaloli-Kahului Road is a 40' right-of-way, which is less than the standard set in Appl. No. 90-20. The DPW did not require any setbacks along Hienaloli-Kahului Road.

The easement standards in Appl. No. 90-39 would appear to be more stringent than those in Appl. No. 90-20, but the language in the easement requirement deceptive. The language (in #90-39) talks about a 50' wide public access right-of-way. However, the applicant has explained to Smiths that this 50 foot width only applies to that lower section of Kaawaloa Road that is not bounded by stonewalls. Where Kaawaloa Road is bounded by walls the easement ends at those walls, and the applicant is not obligated to provide the public with any of his property in those road sections where the width of the road is less than 50 feet.

So the boundary walls of Appl. No. 90-39 are sacrosanct, while the Smiths would be required to give up 1/2 the difference between 50' and the existing right-of-way width no matter where their walls are located.

The Smiths wrote the Planning Dept. on February 21, 1991 requesting a clarification of the extent of the public access easement granted in Appl. No. 90-39. The Planning Dept. passed this question on to the Office of the Corporation Counsel for an opinion on March 18, 1991. Todate the Smiths have received no reply. The Smiths hope that an opinion will be forthcoming in the near future as it will provide them with added proof of the DPW's arbitrary standards and lack of criteria.