



COUNTY OF  
HAWAII

## BOARD OF APPEALS

25 AUPUNI STREET • HILO, HAWAII 96720

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PLANNING DEPT.  
COUNTY OF HAWAII

June 22, 1992

Mr. Norman Hayashi, Director  
Planning Department  
County of Hawaii  
25 Aupuni Street  
Hilo, HI 96720

Dear Mr. Hayashi:

Board of Appeals (BOA 91-10)  
Appellant: Dexter Smith et al.  
Appeal of the Planning Director's Decision to Require Road  
Improvements for a Consolidation-Resubdivision Action  
Tax Map Key: 8-1-09:03

At its June 12, 1992, meeting, the Board of Appeals voted to adopt the attached Findings of Fact, Conclusions of Law and Decision and Order which reversed your decision and granted appellant's appeal, with conditions.

Should you have any questions in the meantime, please contact Donald Tong of the Planning Department who serves as staff to the Board.

Sincerely,

Donald Ikeda, Chairman  
Board of Appeals

7161d

Att.

cc: Board of Appeals (with att.)  
Corporation Counsel (with att.)  
Chief Engineer (with att.)  
Deputy Fire Chief (with att.)  
Masa Onuma (with att.)



BOARD OF APPEALS OF  
THE COUNTY OF HAWAII

In the Matter of the Appeal of	)	Case No. 91-154
DEXTER SMITH, et al.,	)	
	)	FINDINGS OF FACTS,
Appellants.	)	CONCLUSIONS OF LAW, AND
	)	DECISION AND ORDER
	)	
	)	
	)	

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FINDINGS OF FACTS,  
CONCLUSIONS OF LAW, AND DECISION AND ORDER

The County of Hawaii Board of Appeals (hereinafter "Board"), having heard and examined the testimony and other evidence presented during the hearing and having considered the parties' stipulated finds of fact and oral arguments, hereby adopts the following findings of fact, conclusions of law, and decision and order.

I. FINDINGS OF FACT

A. PROCEDURAL FACTS

1. Appellants filed a timely notice of appeal on November 27, 1991.

2. The Board conducted a hearing on this appeal on March 20, 1992; April 9, 1992; and April 10, 1992.

B. BACKGROUND OF SUBDIVISION NO. 90-20

3. Dexter Allen Smith, Alexander Davis Smith, Millicent Lee Smith, James Davis Smith, and their spouses, Jaline Marie Coman, Mae Sonoda Smith, Peter Salter, and Theresa Hogue Smith, respectively, are applicants in a matter referred to as

"Subdivision No. 90-20", as well as Appellants herein.

4. The subject property is property designated as TMK No. (3) 8-1-09:03 and is located at Kaawaloa, South Kona, Hawaii (hereinafter "the property"). The property abuts Napoopoo Road and Kaawaloa Road at its eastern and southern boundaries, respectively.

5. The property comprises a total of 123.05 acres and includes eight (8) parcels of land created before the 1930s and recognized by the County of Hawaii Planning Department ("Planning Department") as legal lots of record pursuant to a letter dated November 16, 1989, from Duane Kanuha to Dexter Smith.

6. On January 20, 1990, the Appellants (through Dexter Smith) submitted to the Planning Director of the County of Hawaii ("Planning Director") an application for consolidation and resubdivision approval, along with the proposed preliminary plat map. The proposed consolidation/resubdivision sought to reconfigure the eight (8) pre-existing lots into eight (8) lots of more uniform size and shape. The proposed lot configuration is for the purpose of allowing each of the Appellants and their families own two parcels having roughly equal sizes and shapes.

7. On February 26, 1990, the Division Chief of the Department of Public Works of the County of Hawaii ("DPW") submitted the DPW's comments on the subject subdivision application and commented that the applicants should, among other things, indicate the location and direction of any water courses and any areas that may be subject to inundation by a 100-year storm, submit a contour map, provide future road widening setbacks along Kaawaloa

Road and Napoopoo Road as necessary for a minimum 50' wide road right-of-way, removing any encroaching structures from the Napoopoo Road right-of-way, that the Applicant have the option of providing the required physical access to each parcel by either providing a minimum 20' wide agricultural standard pavement with a minimum 50' wide right-of-way along Kaawaloa Road or to provide the same type of roadway within the proposed access easement from Napoopoo Road all the way to Parcels 7 and 8, which were to be located at the makai end of the property to provide a 10' wide no vehicular access easement along the frontage of Napoopoo Road, to provide street lights and a sewage disposal system as required, that no additional storm run-off to roadways or adjacent properties due to the subdivision development be allowed, that all generated storm flow would be disposed of within the subdivision, and finally that Kaawaloa Road was not maintained by the County and was under the jurisdiction of the Department of Land and Natural Resources ("DLNR"). The comments provided that the subdivider must obtain permission from DLNR to use Kaawaloa Road for access to the subdivision.

8. On March 13, 1990, the Planning Director wrote a letter to the Appellants and advised that the Planning Department was deferring action on the application for the reasons for the applicants must submit contour maps at five (5) foot intervals where the ground exceeds a 10% slope, and that in addition, Kaawaloa Road was not maintained by the County of Hawaii and was indeed under the jurisdiction of DLNR and that the subdivider

should obtain permission from DLNR for the use and provisions for the improvement of Kaawaloa Road. The deferral was based upon a determination that the application was incomplete at that time and that additional information was needed before the application would be processed further.

9. The Appellants' application for consolidation/resubdivision approval was deferred until October 30, 1991 when the Planning Director issued his letter of tentative approval, along with a number of conditions. According to the Planning Director, the deferral of the application contained in the March 13, 1990 letter constituted the taking of action on the application within 45 days after submission of the preliminary plat pursuant to section 23-62(b) of the Subdivision Control Code.

C. BACKGROUND OF OTHER CONSOLIDATION/RESUBDIVISION APPLICATIONS  
Consolidation/Resubdivision Application of William J. Paris;  
Subdivision No. 86-42

10. On February 28, 1986, William J. Paris, the owner of the real property designated as TMK No. (3) 8-1-09:2 and 14, filed an application for consolidation/resubdivision approval for 14 lots taking access from Kaawaloa Road and abutting Napoopoo Road.

11. On April 10, 1986, the DPW submitted its comments, which included a request for a future road widening easement to assure a minimum 50' wide right-of-way, the limitation on the number of lots that would access Kaawaloa Road, the consolidation of access to certain lots, the requirement that all development and run-off should be disposed of on-site and should not be directed

toward any adjacent properties, that appropriate drainage calculations should be submitted for review, a minimum 20' wide dedicable standard pavement fronting the property within Kawaalooa Road should be provided with appropriate drainage facilities, that the intersection of Kawaalooa Road and Napoopoo Road should be improved with adequate vertical and horizontal sight distances along with appropriate signage and traffic striping. The DPW also mentioned, however, that the proposed subdivision appeared to qualify for evaluation under the provisions of Section 23-7 of the Subdivision Control Code and requested that the Planning Department determine the applicability of the comments made by it.

12. On April 14, 1986, the Planning Department issued a letter granting tentative subdivision approval for Subdivision No. 86-42, providing only that the following non-standard conditions (relating to staking and submission of final plat map) be met:

a. Provide a common access easement for Lots 3A and 4A at the government road frontage;

b. Dedicate a 10' wide no vehicular access along the government road frontage, exclusive of the above stated common access easements;

c. That the applicants delineate a joint access easement over poles of flag lots seeking access over Kawaalooa Road;

13. On June 17, 1986, the DPW wrote a memorandum to the Planning Department requesting that its memorandum, dated April 10, 1986, be augmented by the inclusion of a comment which required a minimum 20' pavement within a 50' wide road easement and which

required roadways to be built to code standard where grades are 8 percent or greater.

14. On July 17, 1986, the DPW wrote another memorandum to the Planning Department requesting a deletion of the comments in its June 17, 1986 memorandum and stating that road improvements would not be required pursuant to section 23-7 of the Hawaii County Code.

15. On July 22, 1986, the final plat map of the subdivision under 86-42 received final approval for recordation.

Consolidation/Resubdivision Application of Christopher Norrie;  
Subdivision No. 90-39

16. On March 12, 1990, Christopher Norrie submitted an application for consolidation/resubdivision for TMK No. (3) 8-1-09:27 and 8-1-10:02.

17. The DPW submitted its comments to the application in Subdivision No. 90-39 and stated that, although the application was under the guidelines of Section 23-7, neither the proposed lots abutted upon a public street or an approved private street, where physical access by vehicle was possible and recommended roadway improvements within the Kaawaloa Road right-of-way to accommodate vehicular access to both lots with minimum improvements of a 16' wide pavement with 6' wide compacted gravel shoulders. The DPW further commented that Kawaaloa Road appeared to be an old government road or existing public thoroughfare and that the right of passage should be guaranteed by a road right-of-way. Finally, the DPW commented that in lieu of roadway improvements within the



Kawaalooa Road right-of-way, it would allow deed covenants disclosing the existence of physical access constraints and the fact that neither the State or County not provide physical access to any lot along Kawaalooa Road.

18. On May 4, 1990, the DPW submitted amended comments to Subdivision Application No. 90-39, indicating that it was willing to delete comments with respect to road improvements in lieu of the applicant providing deed covenants relating to all of the applicants lots taking legal access to Kawaalooa Road. The amended comments of DPW were made during the time the Appellants' application was pending, and Appellants request to have a similar declaration of covenants was rejected in a meeting of July, 1990.

19. On May 11, 1990, Christopher Norrie executed a Declaration of Covenants relating to all of the parcels then owned by him which took access from Kaawalooa Road, declaring that the lots would be held, conveyed and encumbered subject to the requirement that the condition of Kawaalooa Road was recognized by the Declarant and that notice of this condition would be given to his successors in interest and that the owners would assume the risk of using Kaawalooa Road for the purpose of ingress and egress to the property would hold the State and County harmless from any liability arising out of the condition or maintenance of Kaawalooa Road and would not make any demand on the State or County to make any improvements whatsoever to Kawaalooa Road.

20. On May 22, 1990, the Planning Department issued tentative approval for Subdivision Application No. 90-39, which

required the following non-standard conditions be met before final approval could be granted:

a. Provide a deed covenant to all of applicant's lots taking access off Kaawaloa Road and which discloses existing physical constraints along Kawaaloa Road;

b. Include a 50' wide public access right-of-way delineated by the outside edge of the stone wall bounding Kawaaloa Road;

c. No ground disturbing activities to take place until such time as an archeological inventory and a mitigation plan has been approved;

d. On June 13, 1990, final approval of the application and plat map for recordation was issued after the Corporation Counsel issued an opinion that the restrictive covenant was an acceptable means of protecting the County from future claims arising from the lack of improvements or maintenance of Kaawaloa Road.

21. The position of the DPW is that of the two lots being consolidated and resubdivided in Subdivision 90-39, the applicant represented the intent that one of the lots was to be consolidated with another lot which would have access through other property to Napoopoo Road. However, the remaining lot (Lot No. 2) was still to take access from Kaawaloa Road. To this date, the lot has not been consolidated with the lot having access to Napoopoo Road.

22. Despite the fact that Lot 2 was still to take access

from Kaawaloa Road, the County neither deferred action on the application until DLNR's permission to use Kaawaloa Road was obtained, nor made such permission a condition of the grant of final approval.

Consolidation/Resubdivision Application of Maryl Development  
Subdivision No. 90-48

23. On March 20, 1990, Maryl Development applied for consolidation/resubdivision for parcels designated as TMK No. 7-5-10:52 and 62, under Subdivision No. 90-48.

24. On April 16, 1990, the DPW submitted its comments and stated that it had reviewed the subject subdivision application, and that pursuant to Section 23-7 of the Subdivision Control Code, had no comments to offer on this land division.

25. On May 1, 1990, the Planning Department issued tentative approval for the preliminary plat map, subject to the following non-standard conditions:

a. Show control of access along State highway frontage;

b. All access shall be from the existing driveway, interior roads or County roads with no access given to the State highway;

c. No additional storm run-off due to proposed subdivision rights-of-way.

26. The Fire Department was not asked to comment on the application in Subdivision 90-48.

27. A turning radius at the access easement, a vehicular

access planting screen easement, street lights, minimum turning radius and similar requirements were not made conditions of final approval for Subdivision No. 90-48.

D. Findings Related to Case On Appeal

28. The proposed consolidation/resubdivision of the property has been evaluated under section 23-7 of the Subdivision Control Code (Chapter 23, Hawaii County Code) which states in full:

"Section 23-7. Applicability to consolidation or resubdivision action. The requirements and standards of this chapter shall not apply to consolidation and resubdivision action resulting in the creation of the same or fewer number of lots than that which existed prior to the consolidation/resubdivision action; provided that the director, upon conferring with the chief engineer and manager of the department of water supply, may require necessary improvements to further the public welfare and safety. (1974, Ord. No.66, sec.5.)"

29. Section 23-7 of the Subdivision Control Code has remained unchanged since the language of the section was enacted in 1974 by Ordinance No. 66.

30. As to the term "necessary improvements" found in Section 23-7, there is no other provision in the Subdivision Control Code which defines or explains the circumstances under which necessary improvements may be required, nor has the Planning Department adopted criteria or rules relating to the application of Section 23-7.

31. The final decision as to what necessary improvements are required in a consolidation and resubdivision action is made by the Planning Director after the receipt of comments from other

agencies. In most cases, and in this case, the Planning Director deferred to the County of Hawaii Department of Public Works regarding the level of improvements which are required.

32. The interpretation of various provisions of the Subdivision Control Code has changed from time to time, as different Planning Directors have been appointed.

33. From 1974 through the present, there have been no written standards, policies or criteria adopted formally as rules by either the Planning Department or the DPW with respect to the processing under section 23-7 of applications for consolidation/resubdivision which result in the same or fewer number of lots than which previously existed.

34. Between 1974 and 1988, the policy of the County was to review requests for lot reconfigurations to determine if the number of lots remained equal to or less than previously existed. If so, then the provisions of section 23-7 were interpreted in a manner that the application was basically approved without the type of conditions found in the letter of tentative approval issued for Appellants' application. Generally, the DPW would make no comment on the application.

35. Beginning in July of 1988, the DPW has used a "decision tree" for purposes of applying a standard for the review of consolidation/resubdivision applications. The DPW's position is that the "decision tree" is the basis upon which the conditions proposed in the consolidation/resubdivision applications identified as Subdivision Nos. 90-20, 90-39, and 90-42 were reviewed.

36. While the DPW has contended that the "decision tree" was first used in a consolidation/resubdivision application of Irene Croft, the DPW's comments on that application, issued in Subdivision No. 88-30, only recommended the use of a 12-foot wide pavement in the proposed internal access easement.

37. The "decision tree" was used as a guide for DPW's comments. No public hearings were held on the "decision tree" by the Planning Department or the DPW, and the public has not been given the opportunity to comment upon the "decision tree" through the rulemaking process.

38. The "decision tree" was not adopted or used by the Planning Department in determining conditions to be imposed on consolidation/resubdivision actions. The Planning Director was not even aware of the existence of the "decision tree" until sometime in March of 1992, a date well after the issuance of tentative approval.

39. The "decision tree" related only to issues of the nature and type of access proposed. Even within these parameters, the "decision tree" does not contain information on when an access should be up to standard, what standard should be applied or what may be considered the minimum necessary for the public welfare. The "decision tree" similarly does not indicate under what circumstances the use of deed covenants in lieu of road improvements may be accepted.

40. While the DPW's position is that the minimum necessary for public welfare is an access traversable by a two-

wheel drive passenger vehicle, the Appellants were required to construct an access with a 16-foot pavement width and the capability to withstand a load of 20 tons on the basis of comments solicited by the DPW from the Fire Chief.

41. The Statewide Uniform Design Manual For Standard Highways, adopted as a guide for the design of highways by the State of Hawaii and all of the counties in 1980 is used by the County in Hawaii in reviewing road construction standards which may be applicable. Section 7-02.1 provides that in some areas of the State, local rural roads may be paved for only one lane traffic with a pavement width of about 10 feet, although the right-of-way can easily accommodate two lanes and some shoulder area.

42. Neither the Subdivision Control Code or the "decision tree" specifically provided for the involvement or comments of the Fire Chief. Prior to the Appellants' application, the comments of the Fire Chief had never been solicited on any application for subdivision or consolidation and resubdivision of property.

43. With respect to the deferral of applications for consolidation/resubdivision, there is no guideline for the Planning Department's deferral, and an application can be deferred indefinitely.

44. In regard to the requirement of permission from the DLNR for the use of Kaawaloa Road, the Planning Department was unaware of any legal basis for deferral on that ground and deferred to the DPW on the issue.

45. With respect to the deferral of the Appellants' application for the reason that the DLNR has jurisdiction over Kawaaloo Road, the County of Hawaii did not require the applicants in Subdivision Nos. 86-42 and 90-39 to submit any proof that the DLNR was granting a right-of-entry permit to the applicants for the use of Kaawaloo Road for access, nor were the applicants in those consolidation/resubdivision applications required to submit such permits or have their applications deferred for that reason. In fact, at the time of the October 30, 1991 letter granting tentative approval to the Appellants, the Appellants had not obtained approval from the DLNR to use Kawaaloo Road as an access. Instead, the Planning Director determined that DLNR's approval would be made a condition of tentative approval rather than a reason for the deferral of the application.

46. The record contains no documents in which the County of Hawaii can point to any conclusion that the DLNR has either jurisdiction, ownership or control over Kawaaloo Road.

47. On June 12, 1990, the DLNR wrote a letter to Dexter Smith indicating that the DLNR did not have jurisdiction over Kawaaloo Road.

48. On April 1, 1991, the DLNR wrote another letter to the Appellants that Kawaaloo Road was owned by either the Department of Transportation or the State or the County of Hawaii, and not by the DLNR.

49. On May 16, 1990, the Department of Transportation sent a letter to Dexter Smith disclaiming the Department of



Transportation's jurisdiction over Kawaaloo Road. The Department of Public Works has no information or knowledge that DLNR ever acknowledged that DLNR of the State of Hawaii owned or controlled Kaawaloo Road.

50. Since at least the 1930s, the County of Hawaii, through its Board of Supervisors, would repair and maintain Kaawaloo Road.

51. On June 21, 1990, the Appellants' attorney wrote a letter to the DPW and enclosed the letters from the DLNR indicating the DLNR did not have jurisdiction over Kawaaloo Road.

52. On June 21, 1990, Appellants' counsel also wrote the the Planning Department, requesting that the Planning Director no longer defer action on Appellants' application.

53. On July 20, 1990, Appellants Dexter Smith and Alexander Smith, along with their counsel, Thomas L.H. Yeh, met with the DPW representatives Robert Yanabu and Lawrence Capellas. At the meeting, the Appellants were informed that the County was of the position that, in lieu of road improvements to Kaawaloo Road, the use of covenants holding the County of Hawaii harmless from claims relating to the maintenance of Kaawaloo Road were not appropriate or believed enforceable. However, the representatives of the DPW did not inform Appellants that just one month before, the County had issued final approval to the consolidation/resubdivision application in Subdivision No. 90-39 on the basis of the execution of such covenants in lieu of road improvements to Kaawaloo Road.

54. As a road which was open to public use before 1892, Kaawaloa Road is a public highway, as defined by Section 264-1(a), Hawaii Revised Statutes, which states:

**"§264-1 Public highways and trails.**  
(a) All roads, alleys, streets, ways, lanes, bikeways, and bridges in the State, opened, laid out, or built by the government are declared to be public highways. Public highways are of two types:

(1) State highways, which are all those under the jurisdiction of the department of transportation; and

(2) County highways, which are all other public highways."

55. The County is authorized to maintain Kaawaloa Road under Section 265A-1, Hawaii Revised Statutes, which states:

**"§265A-1 County authority.** The several councils or other governing bodies of the several political subdivisions of the State shall have the general supervision, charge, and control of, and the duty to maintain and repair, all county highways, bikeways, and sidewalks and shall have the power to determine the terms under which irrigation or drainage ditches, flumes, railroads, including plantation railroads and similar structures, telephone, electric light and power lines and pipes and other conduits may be maintained upon, under, over, and across the same, and the councils or other governing bodies may make all regulations needful for the public convenience and safety in all cases where permission has been or may be granted to maintain the ditches, railroads, pipes, or other structures across, under, over, and upon all county highways. Any other law to the contrary notwithstanding, the several counties by ordinance may take over, or receive by dedication or otherwise, any private street or way or may improve, grade, repair, or do any construction

work upon private streets, ways, pavement, water lines, street lighting systems, or sewer repairs. [L 1981, c 4, §2; am L 1988, c 263, §9]"

56. Kawaaloo Road is a public road and a government road. While the issue of who has jurisdiction over that road may have a bearing on the responsibility of the State or the County to maintain or improve that road, the fact remains that the pre-existing lots for which the consolidation/resubdivision application was filed, presently take access off Kaawaloo Road.

57. The County's position is that if a road has been maintained by the County of Hawaii, then it can continue to maintain the road and there would be legal access to an abutting subdivision. However, section 23-34 of the Subdivision Control Code does not distinguish between County and State maintained roads in determining whether legal access to a subdivision from a public road exists. A legal access to the property from Kaawaloo Road exists.

58. On July 31, 1990, Chrystal Yamasaki, the Appellants' surveyor, submitted eight (8) copies of the required contour map with a coverletter dated July 31, 1990.

59. On August 9, 1990, the Planning Department wrote to Chrystal Yamasaki acknowledging receipt of the contour map. Thus, by August 9, 1990, the applicants had complied with the request for a contour map. After August 9, 1990, no indication was given by the Planning Director of the County of Hawaii that the Appellants' application for consolidation/resubdivision should be deferred for

any reason.

## II. CONCLUSIONS OF LAW

1. As the applicants for approval of the consolidation and resubdivision of the subject property, Appellants have standing to appeal the Planning Director's decision in issuing the letter of tentative approval on October 31, 1991. Rule 8-2 of the Board of Appeals Rules and Practice and Procedure (hereinafter "Rule" or Rules").

2. This appeal is governed by the provisions of Rule 8 of the Rules of the Board. The Appellants filed their notice of appeal on November 27, 1991, and the appeal was therefore timely filed. Rules 8-1 and 8-3.

3. Pursuant to Rule 8-15, a decision appealed from may be reversed or modified or remanded only if the Board feels that the decision is:

- 1) In violation of the Code or other applicable law; or
- 2) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- 3) Arbitrary, or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

4. The Planning Director's decision was in violation of Chapter 23 of the Hawaii County Code or other applicable law in that:

- a) The deferral of the Appellants' application

until October 31, 1991 was without basis in law or fact. The deferral of the application until the Appellants obtained DLNR's permission to use Kaawaloa Road was not supported by any law or rule.

b) The application should have been deemed approved as of a date 45 days after the County's acknowledgement of the receipt of the contour map on August 9, 1990.

c) As the number of lots resulting from consolidation/resubdivision was not greater than the number of legal lots which previously existed, Appellants' application invoked the provisions of section 23-7 of the Subdivision Control Code.

d) Based upon customary interpretations and implementation of section 23-7 of the Subdivision Control Code, Appellants' application should have been approved without the conditions which imposed requirements of roadway and related improvements and other requirements contained in the Planning Director's tentative approval letter dated October 30, 1991.

e) By the change in the DPW's review of applications under section 23-7 stemming from the informal adoption of the "decision tree" to screen consolidation/resubdivision applications in 1988, the County violated the rule making requirements of Chapter 91, HRS. The DPW's application of the "decision tree" is invalid as an amendment to or implementation of the provisions of section 23-7.

f) The conditions contained in the Planning

Director's tentative approval letter are not clearly mandated by Appellants' proposed consolidation/resubdivision, which amounts to a reconfiguration of lot lines on the property. The reconfiguration did not result in impacts to public health and safety which did not previously exist, except as to the proposed internal access location at Napoopoo Road. Thus, the spirit and intent of section 23-7 was violated by the conditions imposed in the letter of tentative approval.

5. The Planning Director's decision was clearly erroneous in light of the reliable, probative, and substantial evidence on the whole record in that:

a) The requirements of roadway and related improvement standards on consolidation/resubdivision applications after 1988 were imposed without legislative amendments or duly promulgated rules which would establish uniform criteria to be applied to the review of such applications.

b) The failure to develop uniform rules to determine what kinds and level of improvements are deemed necessary, led to the imposition of different requirements in cases with similar circumstances.

c) No factual or legal basis exists by which Appellants should have been required to obtain DLNR's permission to use Kaawaloa Road as an access. Therefore, the deferral of the application and the imposition of a condition requiring such permission was clearly erroneous.

d) As of August 9, 1990 (when receipt of

Appellants' contour map was acknowledged), the County had no basis to continue to defer the review of the application.

6. The Planning Director's decision was arbitrary, capricious and characterized by an abuse of discretion in that:

a) The Planning Director generally deferred to the recommendations of Public Works without reviewing the legal basis for such recommendations or specifically analyzing the comments in relation to section 23-7.

b) The Planning Director's decision was issued not on the basis of the provisions of section 23-7, but on the basis of differing interpretations thereof which were not articulated as law or in the form of duly promulgated rules, which interpretations were inconsistently applied.

c) The Planning Department was unaware of the existence of the "decision tree" which was the guideline purportedly followed by the Department of Public Works.

7. Appellants' rights to substantive and procedural due process and to equal protection in the application of the law were violated in that:

a) The agency's actions in administering the provisions of section 23-7, when applied to the Appellants' application have not been shown to have been rationally related to a legitimate government purpose. While the County's goal of furthering public welfare and safety may be mandatory, the effect of the County's procedures was not rationally related to accomplishing such goals and the application of those procedures

resulted in arbitrary and unreasonable decision-making having no rational relationship to the purpose and goals of section 23-7.

b) The Appellants' rights to procedural due process were similarly violated because of the failure of the County to apply uniform standards enacted in accordance with the law. Instead, the County applied standards which were neither specific or uniform. The failure to establish rule-making uniform standards through rule-making procedures or Code amendments led to inconsistent treatment of consolidation/resubdivision applications.

c) The Appellants' constitutional rights to equal protection of the law were also violated. Appellants' application was treated differently from other similar applications reviewed either previously or during the same period of time. The Code provisions upon which the different treatment was based had not changed. While the difference in treatment has been claimed to be justified by public health and welfare, the differing treatment here were based upon invalid policies and interpretations, rendering the subject actions arbitrary and capricious and not based upon legal authority.

### III. DECISION AND ORDER

Based upon the above Findings of Facts and Conclusions of Law, the Board renders the following decision:

A. The October 30, 1991 letter of tentative approval of the Appellants application for consolidation/resubdivision is hereby modified to provide that before final approval can be



granted, the following conditions must be met:

1) Final plat map shall contain all applicable of the requirements of Chapter 23, Subdivision Control Code, Sections 23-63 thru 23-69.

2) Provide an additional future common access point for all lots at Napoopoo Government Road frontage.

3) Remove any existing structures which encroach into the Napoopoo Road right-of-way, except that the removal of the existing residential structure shall be removed within two years of the date of final subdivision approval, provided that a bond or other acceptable security is provided by the applicants to secure the performance of this condition.

4) Place property markers in accordance with the final plat map. Surveyor shall submit certification upon completion.

5) Provide a minimum 50-foot wide right-of-way for internal access to all lots within the subdivision.

6) Construct a 50 to 75 foot section of paved road, as deemed appropriate by a Hawaii licensed and registered engineer, at the entrance of the internal access easement proposed at Lot 1 at the time the existing structures encroaching upon the Napoopoo Road right-of-way are removed. The construction of this paved entrance shall be based upon the design and approval of a Hawaii licensed and registered engineer.

7) Provide a minimum 10-foot radius at the access easement/Napoopoo Road intersection. Roadway shall intersect

Napoopoo Road at right angles.

8) Provide a future road widening setback along the frontage of Kaawaloa Road, with the setback to be a distance of 25 feet from the existing centerline of Kaawaloa Road.

9) Provide a 15-foot wide road widening setback along the frontage of Napoopoo Road, to be measured from the applicants present boundary along Napoopoo Road.

10) Provide minimum 10-foot curve radii at the entrance to all flag lots.

11) As may be required, provide a street light at the access easement/Napoopoo Road intersection and a sewage disposal system.

12) Provide a minimum 45-foot turnaround radius at the end of the 50-foot wide roadway easement.

13) Indicate the location and direction of any watercourses or any areas that may be subject to inundation by a 100-year storm. Encumber all water courses subject to a 100-year storm with a drainage easement conforming substantially to the width of flow, plus free board.

14) No additional storm runoff to adjacent properties or roadways due to subdivision development will be allowed. All generated storm flow shall be disposed of within the subdivision. Indicate how this will be accomplished.

15) Submit construction plans for review and comments provided that final approval of the construction plans for the access easement entrance shall be based upon the final stamped

construction plans of a Hawaii licensed and registered engineer. Indicate on the construction plans the required and available sight distance at the entrance along Napoopoo Road based on the posted speed limit plus 5 Miles Per Hour (MPH).

16) The approved corridor for the Hawaii Belt Road (State), Holualoa to Papa, Project No. F-011-1(8) traverses through the property and may affect proposed Lots 1 and 2.

17) Provide a deed covenant in a recordable form acceptable to the Corporation Counsel, which holds the County harmless against claims arising out of the County's failure to provide police, fire or emergency services to resubdivided Lot Nos. 2-8 until such time as an improved road access to the affected lot(s) is constructed.

18) Place property markers in accordance with the final plat map. Surveyor shall submit certification upon completion.

19) Submit nine (9) copies of the final plat map within one year from the date of tentative approval. If not, tentative approval to the preliminary map shall be deemed null and void. Only upon written request from the applicant and for a good cause can a time extension be granted, provided it is submitted forty-five (45) days before the expiration of said period of one year.

B. The effective date of tentative approval of the Appellants' application for consolidation/resubdivision shall be the date of the filing of this decision and order.

C. The Appellants' application for consolidation/resubdivision approval is hereby remanded to the Planning Department for action not inconsistent with this decision and order.

Dated: Hilo, Hawaii June 12, 1992.

BOARD OF APPEALS  
OF THE COUNTY OF HAWAII

By *Donald Ikeda*  
Donald Ikeda  
Its Chairman

By (ABSTAINED)  
William Paris  
Its Vice-Chairman

By *Joan M. Steffy Channon*  
Joan M. Steffy Channon

By *Diane Gentry*  
Diane Gentry

By *Donald C. McIntosh*  
Donald McIntosh

By (ABSENT AND EXCUSED)  
Stephanie Tabada

By (ABSTAINED)  
Robert S. Tamaye

APPROVED AS TO FORM AND LEGALITY:

*Fredrick M. Hannon*  
DEPUTY CORPORATION COUNSEL

DATED: 6/15/92