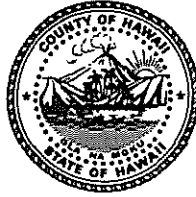


Stephen K. Yamashiro
Mayor



Virginia Goldstein
Director

Norman Olesen
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

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

CERTIFIED MAIL
P 008 113 529

June 5, 1995

Ms. Martha Harden
P.O. Box 10265
Hilo, HI 96761

Dear Ms. Harden:

Variance Application No. 665 (95-27)
Applicant: Martha Harden
Request: Variance From Minimum Road and Water Requirements
of Subdivision Control Code
Tax Map Key: 1-8-07:081

After reviewing your application including comments received from other public agencies, the Planning Director approves your variance request for the creation of a two (2)-lot subdivision without a water system meeting the minimum water requirements of the County Department of Water Supply as required by Subdivision Control Code Sec. 23-84 (1). Secondly, a separate approval is granted for a variance from certain roadway improvement standards.

Location Description. Parcel 81 is located to the west of Glenwood Subdivision and the Volcano Road Highway 11, it fronts a private unimproved roadway, East Kanahale Road, portion of Olaa Reservation Lots, Puna near Mountain View, HI.

Land Use Designation; Minimum Building Site Area. Parcel 81 consists of 13.200 acres and is located within the County's Agricultural 5 acre zone district and the state land use "Agriculture" district. The county zoning designation permits a minimum building site area of five (5) acres. Each parcel of the proposed two (2) lot subdivision is designed to comply with the required minimum five (5) acre building site area.

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Variance from Minimum Water Requirements. The Planning Director has concluded that the variance request from the Subdivision Control Code minimum water requirements should be approved based on the following.

SPECIAL AND UNUSUAL CIRCUMSTANCES

There are special and unusual circumstances that exist which would warrant or necessitate a waiver from the minimum requirements to service the proposed two (2)-lot subdivision. The Department of Water Supply stated "...that the proposed subdivision is not within the service limits of the Department's existing water system facilities." As a result, all dwellings on the two (2)-lots will be provided with water catchment systems for domestic consumption as well as fire-fighting purposes.

There are special and unusual circumstances applying to the subject property which exist either to a degree which deprive the applicant of substantial property rights that would otherwise be available or to a degree which obviously interfere with the best use or manner of development of the subject property.

INTENT AND PURPOSE

The intent and purpose of requiring a water system in this case is to assure that a adequate water system is available for domestic consumption and fire protection. In this situation, the substitute private water catchment system is considered adequate for this agricultural land.

ALTERNATIVES

There are no reasonable alternatives in resolving the required water system. Upgrading the existing County water system by the individual applicant would not be economically feasible. Another alternative requires the drilling of wells to create a private water system. This option, however, would not be cost effective for the proposed two-lot subdivision; and, there is no assurance that adequate water would be found.

To impose upgrading the existing public water system or to construct a private water system for the proposed two (2)-lot subdivision would place an excessive demand upon the applicant when a more reasonable alternative is available.

According to the applicant, Mountain View has a history of adequate annual rainfall of 150 to 200 inches a year which she alleges will more than adequately support a private water catchment system for human consumption and fire protection. The applicant can also purchase water, if necessary, for the private water catchment system.

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Based on the foregoing findings, this variance request would be consistent with the general purpose of the zoning district, the intent and purpose of the Zoning and Subdivision Control Codes and the County General Plan, will not be materially detrimental to the public's welfare, and will not cause substantial adverse impact to the area's character and to adjoining properties.

The variance request is, therefore, approved subject to the following conditions:

1. The applicant, his assigns, or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant, his assigns, or successors shall file a written agreement with the Planning Department prior to receipt of final subdivision approval containing the following stipulations and covenants which shall be duly recorded at the Bureau of Conveyances of the State of Hawaii by the Department at the cost and expense of the subdivider:
 - a. The applicant/subdivider agrees and accepts the fact that a County dedicable public water system is not now or in the foreseeable future able to service the subdivision.
 - b. The applicant/subdivider agrees and accepts the fact that the County will not, at any time, bear the responsibility of supplying public water to the subdivision.
 - c. Any existing and/or future dwellings not serviced by County water system constructed on the property shall have a minimum 6,000-gallon water storage facility for domestic consumption for water catchment. This catchment system shall adhere to the Department of Public Works, Building Division's "Guidelines for Owners of Rain Catchment Water Systems" as well as the State Department of Health requirements related to water testing and water purifying devices.
 - d. Provide a water supply system sufficient for fire-fighting consisting of a minimum 3,000 gallons of water per existing and/or proposed future dwelling on the property meeting with the approval of the Hawaii County Fire Department. If dwellings are spaced closer than 50 feet apart, 4,000 gallons of water per dwelling will be required.

- e. For any amendments or changes to the subdivision after the agreement is signed, the applicant/subdivider shall be responsible for informing the department of the amendments or changes so the agreement can state the amendments or changes. The written agreement shall be considered as a condition and covenant that runs with the land and shall be binding upon the applicants/subdivider or owner, his successors, and assigns and shall be incorporated as an exhibit and made part of each agreement of sale, deed, lease, or other similar documents affecting the title or ownership of each subdivided lot.
- f. When any of the lots are provided water service (individual meter) from the Department of Water Supply or from an approved private water system, the above covenants will no longer be in effect.
- g. The applicant/subdivider agrees to record a covenant to prohibit any second dwelling or ohana dwelling on the two individual lots of the proposed subdivision.
- h. Comply with all other applicable State and County rules and regulations.

Variance from Roadway Improvement Standards. The approval of the roadway variance is based on the following.

SPECIAL AND UNUSUAL CIRCUMSTANCES

There are special and unusual circumstances that exist which warrant or necessitate a waiver from the minimum roadway requirements of the proposed two (2) lot subdivision. The existing substandard private road does not meet current improvement and width requirements of a fifty (50) foot right-of-way with twenty (20) foot pavement, according to the Department of Public Works - Engineering Division. It is an existing road parcel, an unpaved 14 foot gravel road within a 40-foot right-of-way, leading to the proposed subdivision. The roadway is not considered to be a major thoroughfare or a secondary arterial. According to the applicant, the roads bordering parcel 81 will not serve as thoroughfares.

Approximately thirty-three years ago in 1962, the roadway was approved as part of the Orchid Acres Subdivision road system. At that time, the county Planning and Traffic Commission approved the road system to be constructed with exceptions, as a private unpaved, oil treated roadway; as a result, the substandard conditions of the road parcel was lawfully constructed and brought into existence but does not comply with current regulations for the "Agricultural" district it is located in. The development of the road parcel, consequently, qualifies as a nonconforming use or parcel under

the Zoning Code. See also discussion below at Intent and Purpose.

According to the applicant, the road parcel is in private ownership and, under the circumstances, it will continue to remain as a privately maintained road. Consequently, the applicant is not the sole owner of the affected roadway that runs along the boundary of parcel 81. The road parcel is under the ownership of other private landowners, also. The applicant stated that to improve the road parcel to current standards would require the purchase and subdivision of land under the ownership of other individuals; and, the other owners may refuse to sell or approve the use of their land for improvements, such as widening the road width. The proposed subdivision is for two lots, only, and should not generate traffic problems as a result of the variance, according to the applicant. The proposed subdivision complies with the existing zoning and density designation; and therefore, the subdivision should not affect traffic circulation or patterns in the existing subdivision because it is consistent with the permitted zoning density. However, in order to anticipate and mitigate problems that may result from the variance, the applicant is willing to limit by deed restrictions the number of dwellings to one per lot, to inform potential owners of the substandard access, and to indemnify and hold the county harmless.

INTENT AND PURPOSE

The intent and purpose of requiring minimum roadway improvements is to assure that adequate access is available to serve the subdivision.

Background: Road Parcel. The existing substandard private road that services parcel 81 is a road parcel, TMK: 1-8-73: 65. It is a part of the roadway system of the Orchid Acres Subdivision, a subdivision first approved on March 13, 1961; the subdivision was approved with road construction exceptions - use of surface oil treated private roadways in place of asphaltic pavement, and sidewalks were not recommended. Final Approval Letter from Director - Planning & Traffic Commission (1/9/62). The subdivision is described as the Orchid Acres Subdivision (Glenwood Subdivision), Unit 1, Increment 1, Parcel A, Grant 4322, 4334, Lots 188, 189, Olaa Reservation Lots, Olaa, Puna, HI. Subdivision No. 1800 (Final Approval 4/12/62). TMK: 1-8-07: 03 (44 & 45)(former TMK number).

Status: Nonconforming Road Parcel In Lawful Existence. The subdivision and its road system received final approval on 4/12/62; however, the existing roadway does not conform to current county dedicable road improvement standards, specified in Letters from Chief Engineer to S. V. Quitiquit (5/7/76) and Mooney Real Estate (4/11/83). By Zoning Code definition, a nonconforming use means one lawfully in existence on September 21, 1966 but which does not conform to the regulations for the district in which it is located. Sec. 25-4(b)(41).

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The Orchid Acres Subdivision received county final approval on 4/12/62; and, the county's legal approval granted exceptions in the subdivision's road construction. Road parcel no. 65, as a result, is a use lawfully in existence on September 21, 1966. Secondly, although the road parcel does not comply with county dedicable standards it is a nonconforming parcel lawfully in existence BUT does not conform to the road standards of the "Agricultural" district it is located in because of the county approved road construction exceptions granted in 1962. Zoning Code Sec. 25-4(b)(40).

Nonconforming Use Requirements. Generally, a nonconforming parcel and use of land may continue to the extent it existed at the time of adoption of Zoning Code Chapter 25 or any of its amendments; providing however, the nonconforming use complies with the requirements of Sec. 25-79(c)(1) through (5). Subsections (c)(1) and (3) through (5) address nonconforming buildings or nonconforming uses in buildings; as a result, these requirements are not germane to a road parcel. Subsection (c)(2) addresses the cessation of a nonconforming use for a specified continuous period. The continuous use of the road parcel is not disputed.

Consequently, road parcel no. 65 as a nonconforming parcel and use of land may continue to the extent that it existed at the time Chapter 25 was adopted.

ALTERNATIVES

There are no reasonable alternatives in resolving the minimum requirements. To upgrade the substandard private roadway would be economically infeasible to the applicant. The imposition of off-site improvements to the petitioner alone is unfair and unreasonable as others who stand to benefit are not contributing to the cost of the improvements.

The minimum roadway improvements required by the Department of Public Works appears to not be a workable alternative for the given circumstances of parcel 81. For example, the proposed subdivision complies with the required agricultural zoning density; the character of the area is in agricultural five acre lots and remains rural in nature; the two-lot subdivision is anticipated to only create localized traffic; road parcel no. 65 is part of the original subdivision road system approved by the county with construction exceptions thirty years ago; as a result, the county approved exceptions created the existing nonconforming status of road parcel no. 65 - these foregoing factors allows road parcel no. 65 to continue as a nonconforming use or parcel.

The required improvements would place an unnecessary financial burden and hardship on the petitioner for off-site requirements of a two (2) lot subdivision. A reasonable alternative is to require the

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applicant to provide one-half (1/2) roadway improvements that complies with non-dedicable agricultural standards of the Department of Public Works fronting the proposed subdivision

Based on the above findings, the nondedicable road construction standards for an "Agricultural" district is less than what is required for dedicable standard roads. And requiring the applicant to provide one-half (1/2) road improvements will serve to satisfy the purposes of the Subdivision Code.

Since a zoning change is not being sought the variance is consistent with the general purpose of the zoning district, the intent and purpose of the zoning and subdivision control codes and the County's general plan. The variance will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and to adjoining properties because the road parcel is an existing thirty-three year access that will continue in private ownership and nonconforming use.

The roadway variance is approved, subject to the following conditions.

1. The applicant, its assigns or successors, shall be responsible for complying with all stated conditions of approval.
2. Further Subdivision of Parcel 81 Prohibited by Zoning Designation. Any further subdividing of the property served by this access will not be permitted unless the roadway standards of the subdivision control code are met; therefore, subsequent variances will not be considered of the roadway under the existing county Agricultural - 5 acre zoning designation.

No further subdivision of the subject property utilizing the subject roadway shall be permitted unless the roadway meets subdivision control code requirements without a variance.

3. Indemnification Covenant Requirement. According to the variance application, the subdivider recommended recording a deed restriction to inform potential owners of the substandard road access and to indemnify and hold harmless the County of Hawaii.

The subdivider shall submit to the Planning Director a deed restriction or covenant indemnifying the State and County of any liability related to vehicular access; the indemnification covenant is required to be recorded with the deeds of the new lots created by pending Subdivision Application no. 94-25.

4. Covenant Prohibiting Ohana or Second Dwelling Requirement. According to the variance application, the subdivider recommended a deed restriction limiting the number of dwellings to one dwelling per lot, only.

The subdivider is to submit to the Planning Director a deed restriction or covenant that prohibits an ohana or second dwelling for the new lots created by pending Subdivision Application no. 94-25.
5. Covenant Preparation, Recordation, & Payment of Filing Fee Requirement. The subdivider is to prepare the documents of the restrictive covenants required at conditions 3 and 4, above. The draft documents are to be submitted to the Planning Director for review and approval in consultation with the Corporation Counsel's office. The final approved covenant documents are to be submitted for recordation by the Planning Department to the Registrar - Bureau of Conveyances - State of Hawaii. The subdivider is to pay for all recordation fees and costs.
6. Covenants to Run with Land Requirement. For the deed restriction requirements of conditions 3 and 4 the subdivider is to create covenants running with the land. The written covenants shall be a condition running with the land; it shall be binding upon the subdivider or owner, his heirs, executors, administrators or assigns, and successors and assigns and shall be incorporated as an exhibit and made a part of each agreement of sale, deed, lease or other similar documents affecting the title or ownership of each subdivided lot created by Subdivision Application 94-25.
7. Off-site Roadway Improvement Requirement. Provide one-half (1/2) street roadway improvements fronting the subject subdivision in compliance with the Department of Public Works non-dedicable agricultural standards. Submit for approval construction plans that meet the requirements of the Department of Public Works or other appropriate agencies.
5. Comply with all other applicable State and County rules and regulations.


Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

Review of Director's Action; Interested Party. Zoning Code Sec. 25-27(a)(3), provides that an "interested party" may request Planning Commission review of the director's action.

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The request must be made within ten (10) working days after notice of the director's decision, in writing. Consequently, the variance becomes effective after the ten day appeal period has passed; and, an interested party does not request a review of the director's action. Should a request be made we will inform you of the procedures that must be complied with.

Sincerely,


VIRGINIA GOLDSTEIN
Planning Director

EML:mjs
6588D

xc: Department of Water Supply
Department of Public Works
Subdivision No. 94-25