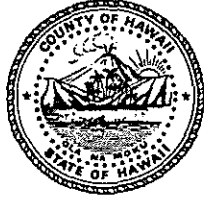


Stephen K. Yamashiro
Mayor



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
Z 095 323 658

February 7, 1997

Mr. Gregory R. Mooers
MOOERS ENTERPRISES
P.O. BOX 1101
Kamuela, Hawaii 96743

Dear Mr. Mooers:

Variance Permit No. 805 (VAR 96-78)
Applicant: Fred N. and Shirley A. Kozy
Request: Variance From the Minimum Water and Road
Requirements of Chapter 23, Subdivision Control Code
Tax Map Key: 4-2-008:018

WATER VARIANCE: After reviewing your application and the information submitted on behalf of it, the Planning Director certifies the approval of your variance request to allow the creation of a four (4) lot subdivision without a water system meeting with the minimum requirements of the Department of Water Supply (DWS) as required by Division 2, Section 23-84 (1) of the Subdivision Code.

The Planning Director has concluded that the variance from the minimum subdivision water requirements be approved based on the following findings.

SPECIAL AND UNUSUAL CIRCUMSTANCES

There are special and unusual circumstances that exist which would warrant consideration of and necessitate a variance from the minimum water requirements to the proposed four (4)-lot subdivision:

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1. The subject property is Lot 2-A-1, Portion of R.P. Grant 4527, Mahele Aw. 26-B, Koholalele, Hamakua, Island and County of Hawaii; and, is a "lot of record" pursuant to the approved final plat map dated November 17, 1986, in files of the Planning Department (SUB 5472). The property's Tax Map Key (TMK) parcel number (TMK: (3) 4-2-008:018), purportedly containing 169.03 acres +/-, is commonly used to identify "Lot 2-A-1".
2. The subject property was zoned Agricultural (A-40a) by the County in 1967 and is designated Agriculture "A" by the State Land Use Commission (LUC) prior to the date of the approved subdivision (SUB 5472).
3. The owners/subdividers Fred N. and Shirley A. Kozy of Lot 2-A-1 have submitted a subdivision application which includes a preliminary plat map dated July 29, 1996, to the Planning Department to further subdivide Lot 2-A-1 into four (4) lots. Further action on the proposed or pending 4-lot subdivision application (SUB 96-091) has been deferred pending consideration of the subject variance application.
4. The Department of Water Supply (DWS) memorandum dated August 27, 1996, in (SUB 96-091) states in part:

"Please be informed that the property is not within the service limits of the Department's existing water system facilities cannot support the proposed subdivision at this time. Extensive improvements and additions, including source, storage, transmission, booster pump, and distribution facilities, must be considered. Currently, sufficient funding is not available and no time schedule is set..."

The Department of Water Supply (DWS) memorandum dated December 20, 1996, in the variance file (VAR 96-78) states:

"We have reviewed the subject application.

Please refer to our memorandum of August 27, 1996, for our comments and requirements."
5. The State Department of Health's (DOH) memorandum dated December 18, 1996, in (VAR 96-78) states in part:

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"The Department of Health's authority on drinking water quality is based on the definition of a "public water system". A "public water system" means a system for the provision to the public of piped water for human consumption, if such system has at least fifteen (15) service connections or regularly serves an average of at least sixty (60) days out of the year.

Past episodes of water quality concerns for lead, copper, algae and microbial contaminations in private rain catchment systems have identified the need for design standards. Without these control standards the Department of Health would not be able to support the standards the Department of Health would not be able to support the use of these private rain catchment systems for drinking purposes."

6. The following statements are taken from the "APPLICANT'S STATEMENT" submitted with the variance application (VAR 96-1):

"...There are special and unusual circumstances that exist which would warrant or necessitate a waiver from the minimum water requirements to service the proposed four (4) lot subdivision...

Since the Department of Water Supply cannot provide the water service, we propose to provide water to all dwellings on these lots with water catchment systems for domestic consumption as well as for fire-fighting purposes.

As such, the applicants propose to allow catchment water to service any development on the property until such a time that the ranch is served by an approved water system.

The area receives adequate rainfall, 70 - 80" annually, to support a private water catchment system. Rainfall data was collected from An Inventory of Water Resources Data: Island of Hawaii (State of Hawaii, Department of Land and Natural Resources). The nearest rain gauge with long term reports is the Umikoa rain gauge State Key No. 118. The median annual rainfall is 72.6 inches.

ALTERNATIVES

One alternative would be to utilize an existing private water system. There presently is a private water system servicing the subject property operated by the Mauna Kea Ranch. The private system receives its water from the Department of Water Supply (DWS) at Mamalahoa Highway via a 5/8" Department of Water Supply's meter.

A second alternative would be for the applicants to make substantial improvements to the Department of Water Supply's system. These improvements, according to Department of Water Supply's letter to you of August 27, 1996, would include expanded source, storage, transmission, booster pump, and distribution facilities. It is not economically feasible for this applicant to make such extensive improvements to the Department of Water Supply system for a four lot subdivision...

INTENT AND PURPOSE

The intent and purpose of requiring a water system is to assure that an adequate water system is available for domestic consumption and fire protection. Regulations of the Department of Water Supply, effective June 1, 1984, fire protection (fire hydrants) are not a mandatory water standard requirement. The analysis of rainfall information for this area indicates in this situation there is adequate rainfall for the proposed private catchment system for these two purposes..."

7. The following comments dated December 16, 1996, were extracted and received from the Department of Finance-Real Property Tax Office:

"...Property receiving agricultural use value
....Property is dedicated, 20 yrs, effective 1974,
....Possible rollback taxes if subdivided to 5 acres or less..."

Real Property taxes are "Current".

Therefore, considering the above facts and information submitted by the applicants with the subject variance application, the

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Planning Director has determined that there are special or unusual circumstances applying to the subject property which exist either to a degree which deprive the applicant or owner/subdivider of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the best use or manner of development of the subject property.

ALTERNATIVES

There are no other reasonable alternatives in resolving the difficulty of the applicant or petitioner. The first alternative, requires the petitioners/subdividers/owners of the proposed subdivision application to pay appropriate water facility charges and any fees to the Department of Water Supply to improve the existing water system and provide the necessary dedicable water system improvement in accordance with the Rules and Regulations and the Standards prescribed by Department of Water Supply. The second alternative would be to plan, explore, design, and drill private wells and install the necessary water system improvements in accordance with the Rules and Regulations and the Standards prescribed by the Department of Water Supply.

The prorata cost per proposed to design and construct a dedicable or private water system for the proposed subdivision for the existing tree far is economically cost prohibitive. As such, the imposition of requiring a public or private water system for the proposed subdivision would be putting excessive demands upon the petitioners/subdividers/owners when a more reasonable alternative is available.

INTENT AND PURPOSE

The intent and purpose of requiring a water system for and within the proposed subdivision is to assure that adequate water is available for human consumption and fire protection.

The analysis of existing site conditions, rainfall data, and information submitted by the petitioners/owners/subdivider's agent and official maps and rainfall summaries in the DWS and the Planning Department appear to support variance request and use of a private water catchment systems. The analysis or comparison of private and available public information monitoring rainfall within the area appears to support the historically there is

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adequate rainfall within the subject property and the surrounding areas to support a private roof water catchment system for portable uses.

The State Department of Health has no building regulations, specific rules or regulations relating to the utilization and construction of private water catchment systems, and inspection of private roof catchment water systems.

The analysis of other approved subdivision and variance applications within the Hamakua District appear to support the contentions put forth in the variance application. The subject property and surrounding areas receive adequate natural rainfall to support a private catchment water system for potable uses and emergency fire uses. Provisions for fire protection and emergency uses will be privately addressed by the petitioners/owners/subdividers and provided by the petitioners/owners/subdividers on the existing or proposed lots.

No objections to the subject variance were received from the surrounding property owners and from other government agencies.

The subject variance application was deemed complete by the Planning Department by letter dated December 5, 1996, and by subsequent discussion with the applicant's agent, the decision date by the Planning Director on the subject variance would be extended to February 7, 1997.

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 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 areas character and to adjoining properties.

WATER VARIANCE: This variance request is approved subject to the following conditions:

1. The applicants/owners/subdividers, his assigns or successors shall be responsible for complying with all stated conditions of tentative subdivision approval.
2. The approval of this variance shall be included in the conveyance document for the subject property, and a copy of the recorded conveyance document shall be

submitted to the Planning Department within one (1) year from the effective date of approval of this variance.

The applicants/owners/subdividers, their assigns, or successors shall file a written agreement or approved written document with the Planning Department prior to receipt of final subdivision approval containing the following deed language, being covenants, condition, and restrictions which shall be duly recorded at the Bureau of Conveyances of the State of Hawaii by the Planning Department at the cost and expense of the applicants/owners/subdividers.

- a. The applicants/owners/subdividers agree 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 applicants/owners/subdividers agree and accept the fact that the County will not, at any time, bear the responsibility of supplying public water to the subdivision.
- c. The permitted dwellings, accessory structures and permitted uses not serviced by a County water system constructed on the property shall have a minimum 6,000-gallon water storage tank or equivalent 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 future farm dwellings on the property meeting with the approval of Hawaii County Fire Department. If dwellings are spaced closer than 50 feet apart, 4,000 gallons of water per farm dwelling will be required.
- e. In the event that there are any amendments or changes to the subdivision after the agreement

is signed, the petitioners/owners/subdividers shall be responsible for informing the County Planning Department of the amendments or changes so that the agreement can reflect the amendments or changes. Further, the written agreement shall be considered as a condition and covenant running with the land and shall be binding upon the applicants/owners/ subdividers, 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. In the event that any of the lots are provided by a water service (individual meter) from the Department of Water Supply or and an approved water system, the recorded conditions and covenants will no longer be in effect.
 - g. Comply with all other applicable State and County rules and regulations.
3. All other applicable State and County rules and regulations shall be complied with.

ROAD VARIANCE: After reviewing the variance application and information submitted, the Planning Director certifies the approval of your variance to allow the creation of a four (4) lot subdivision without non-dedicable road or paved road improvements pursuant to Chapter 23, Subdivisions, Section 23-87, Standard For Non-Dedicable Street.

There are special and unusual circumstances that exist which would warrant consideration to the applicant's variance from the minimum lot access or road requirements to the proposed subdivision of the subject property. This office notes the following:

- 1. The subject property is Lot 2-A-1, Portion of R.P. Grant 4527, Mahele Aw. 26-B, Koholalele, Hamakua, Island and County of Hawaii; and, is a "lot of record" pursuant to the approved final plat map dated November 17, 1986, in files of the Planning Department (SUB 5472). The property's Tax Map Key (TMK) parcel number (TMK: (3) 4-2-008:018), purportedly containing

169.03 acres +/-, is commonly used to identify "Lot 2-A-1".

2. The subject property was zoned Agricultural (A-40a) by the County in 1967 and is designated Agriculture "A" by the State Land Use Commission (LUC) prior to the approval of SUB 5472.
3. The owners/subdividers Fred N. and Shirley A. Kozy of Lot 2-A-1 have submitted a subdivision application which includes a preliminary plat map dated July 29, 1996, to the Planning Department to further subdivide Lot 2-A-1 into four (4) lots. Further action on the proposed or pending 4-lot subdivision application (SUB 96-091) has been deferred pending consideration of the subject variance application.
4. The Department of Public Works (DPW) memorandum dated September 24, 1996, states in part:
 - "2. Access:
 - a. Provide a vicinity map showing the width, name, alignment and ownership of the access road from Hawaii Belt Road to the subject parcel. This road shall be improved to minimum 20-ft wide agricultural pavement within a minimum 50-ft width right-of-way conforming to Std Det R-39.
 - c. ...23-87. For the proposed easement road, construct 20-ft wide agricultural pavement within a minimum 50-ft width right-of-way conforming to Std Det R-39."
5. No objections to the road variance were received from the Department of Health, Department of Finance-Real Property Tax Office, and other agencies. Please refer to the comments stated above.

ROAD VARIANCE: After reviewing your application and the information submitted on behalf of it, the Planning Director certifies the approval of your variance request to allow the creation of a four (4) lot subdivision without improvements pursuant to Chapter 23, Subdivisions, Section 23-87, Standard For Non-Dedicable Street.

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ROAD VARIANCE-SPECIAL AND UNUSUAL CIRCUMSTANCES

There are special and unusual circumstances that exist which would warrant consideration of and necessitate a variance from the minimum lot road requirements to the proposed subdivision of the subject property.

The following, which is an extract from the "APPLICANT'S STATEMENT" in variance file (VAR 96-78), states in part:

"...Page Four...SPECIAL AND UNUSUAL CIRCUMSTANCES..."

The easement road that is shown on the preliminary plat of the subdivision application and attached hereto already exists and has been providing access to the property for years.

The property is a rural wooded parcel which is contiguous with private and public property. The owners/applicants are currently removing dead and diseased trees to create a better growing environment existing mature koa trees and the koa tree seedlings being planted on the property.

The location and alignment of the present roadway and proposed easements follows existing terrain and is designed in such a manner to minimize the impacts on the existing forest and timber operation; while providing better access within the property to manage the existing forest, timber operation, new seedlings, and access the lower or makai portions of the property to clear and plant new koa seedlings. In addition, the roadway has been used extensively by Winkler Woods, a local lumber and distributor of local and exotic lumber for the furniture industry, to operate a portable saw mill throughout the site to harvest dead and diseased trees. The larger dead and diseased trees require access roads to remove the cut lumber from the portable mill and isolated staging areas throughout the site.

The applicants intend to continue to use the proposed lots 2-A-1-C and 2-A-1-D for the planting and growing of koa. The applicant has planted 125,000 trees to date and intends to plant an additional 175,000 trees over the next two years. The use of the existing property will be committed to future timber production in 35 years or after the year 2030.

The cost of improving the easement road to the DPW's R-39 standards for vehicle access to the existing koa forest and

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future forested areas on the property would be not cost effective and justified for this long term agricultural commitment and agricultural endeavor. It appears the present paved substandard access roadway easement from the Hawaii Belt Highway to the existing property and current farm uses are adequate and the current property owners prefer a using a traditional pasture access utilizing natural terrain conditions; within a defined 50 foot right-of-way.

Therefore, considering the existing property conditions and the foregoing issues, it is felt there are special and unusual circumstances applying to the subject property which exist to a degree that interferes with the best and proposed use or manner of development within the subject property.

ALTERNATIVES

The first alternative would require the petitioners/owners of the proposed subdivision to pay for the design and roadway improvements to DPW's R-39 standard as required by the subdivision control code. The grades of within the property exceed 8% and such subdivision roadway improvement costs are not utilized or cannot be justified in the overall agricultural operations on these lots.

The second alternative would be to create a series of flag lots that would allow the access to these lots in any manner the owners deemed fit. This lot configuration would be contrary to the geographical configurations that naturally divide the lots and locate the present roadway to minimize its impact on the timber operations..."

ROAD VARIANCE-INTENT AND PURPOSE

The intent and purpose of requiring subdivision roadway improvements is to designate and assure there is a legal and physical access to and between the proposed lots and permitted uses on the proposed lots and that access to the property and proposed lots are provided in the event there is a fire or emergency. The proposed subdivision will result in 4-lots exceeding forty (40) acres.

The existing access and paved roadway from the Hawaii Belt Highway to LOT 2-A-1 appears to be via and within an existing "Easement (50 feet wide)" approved in 1986 by SUB 5472. A field

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inspection of the existing property, present access conditions, and the proposed road easements within the property was conducted by the Planning Department on December 18, 1996.

The property is currently being used for agricultural and timber uses. The proposed subdivision road easements were recently cleared of exotic and deceased or dead koa trees, vines, and competing plant materials. The areas adjacent to the planned road easements are being replanted with koa seedlings following modern forestry practice, standards, and management practice. Approximately one third of the existing property was previously committed to pasture use and will be eventually planted with young koa seedling during the next two (2) years. The present owners of the subject property are committed to the "koa tree farm" and forestry as a renewable resource.

It appears the location of the proposed road easement and current dirt access road within the proposed subdivision follows existing topography and respects natural terrain conditions. In addition, the planned route and "proposed easements" within the proposed subdivision avoid existing tracts of mature koa trees, native trees, and large and exceptional exotic trees. The proposed road easements meander over natural terrain conditions and include some steep grades which require 4-wheel drive vehicles equipped with winches operated by experienced drivers. The proposed subdivision road easements will define legal lot access to the proposed lots and establish and identify an access road to be used by "farm or timber management personnel" during the next 35 years.

The existing and proposed subdivision's road easements and improvements within the existing lot and adjacent property uses reveal little or no significant access conditions have occurred affecting the existing road access to the existing property and surrounding areas have occurred during the past 35 years. The existing public and private road system and transportation patterns to the subject property and surrounding areas within the Hamakua District were established many years before the Zoning and Subdivision Codes were adopted in 1967; and, to date, few changes have occurred to the public roadway systems or private transportation patterns which exist above the Hawaii Belt Highway.

The existing property conditions, i.e. soil quality, previous and existing pasture and agricultural uses, and existing "roadway

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improvements" appear to have not changed or significantly improved since 1967. The commitment by the present owners to establish a "tree farm" on the existing and proposed lots will preclude other or more intense agricultural uses during the next 35 years. The present transportation and land patterns, gulch locations; and existing groves of mature koa trees limit lot design and conventional access improvements. As such, it is felt the requested variance would not affect or result in a significant increase in traffic using state owned rights-of-way or the Hawaii Belt Highway. The existing road easements and proposed road easements within the proposed subdivision are under or become subject to County jurisdiction. Therefore, it would be unfair to require the owners\applicants to pave or improve the proposed road easements within the proposed 4-lot subdivision and would not significantly affect existing public and privately owned rights-of-way, existing agricultural uses, and future "tree farm" being established on the existing property.

Therefore, based on the representations made by the applicants, staff observations during the recent field inspection, findings, the consolidation and resubdivision action to create the existing property in 1986 by SUB 5472, and existing access and traffic patterns, the Planning Director has concluded that the DPW comments and recommended road subdivision requirements within the proposed easements shown and denoted on the preliminary subdivision plat map, conforming to "STANDARD DETAILS R-39", are not warranted or required to develop this subdivision and future agricultural uses.

DETERMINATION-VARIANCE CONDITIONS

No objections to the subject variance were received from the surrounding property owners and the participating government agencies.

The subject variance application was deemed complete by the Planning Department by letter date December 5, 1996, and by subsequent discussion with the applicant's agent, the decision date by the Planning Director on the subject variance would be extended to February 7, 1997.

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 Codes and the County General Plan; will not be materially detrimental to the

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public's welfare; and will not cause substantial adverse impact to the area's character and to adjoining properties.

This variance request is approved subject to the following conditions:

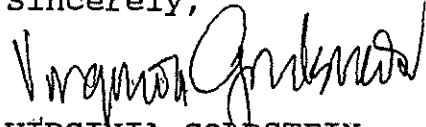
1. ROAD VARIANCE: The applicants/owners/subdividers, their assigns, or successors shall file a written agreement or approved written document with the Planning Department within one (1) year from the issuance of tentative subdivision approval of SUB 96-091 containing the following deed language, being covenants, conditions, and restrictions which affect the entire property and/or the proposed lots arising from the approval of SUB 96-091 and shall be duly recorded at the Bureau of Conveyances of the State of Hawaii by the Planning Department at the cost and expense of the applicants/owners/subdividers.
 - a. No further subdivision of the subject property or those lots arising out of SUB 96-091 shall be permitted unless said roadway meets subdivision control code requirements without a variance.
 - b. The applicants/owners/subdividers shall indemnify and defend the State of Hawaii and the County of Hawaii from any and all liability arising out of vehicular access to and from the subject property over the existing roadway within existing and proposed "easements".
 - c. The applicants/owners/subdividers, their assigns or successors shall comply with all other applicable State and County rules and regulations pertaining to subdivisions and land use.

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

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Thank you for your understanding and patience during our review.

Sincerely,



VIRGINIA GOLDSTEIN
Planning Director

VKG:dc:pak
F:WP60\WRY\FORLETT\VARAPP37

xc: Department of Water Supply
SUB 96-091