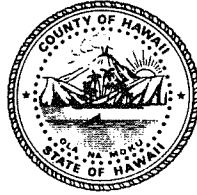


Harry Kim
Mayor



Christopher J. Yuen
Director

Roy R. Takemoto
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252
(808) 961-8288 • Fax (808) 961-8742

November 13, 2001

Raymond K. Hasegawa, Esq.
Attorney at Law
A Law Corporation
688 Kinoole Street, Suite 203
Hilo, HI 96720

Dear Mr. Hasegawa:

**SUBJECT: RESCINDING WATER VARIANCE
TMK: 1-2-007-033**

I have enclosed a memorandum from Patricia K. O'Toole, Esq., on the question whether it was proper to rescind the water variance. The opinion is that the subdivider should have been given notice and an opportunity to object prior to the rescinding of the water variance.

Accordingly, I am withdrawing the rescission of the water variance and reinstating the variance.

Sincerely,

CHRISTOPHER J. YUEN
Planning Director

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Wpwin60\Chris\Letter to Hasegawa

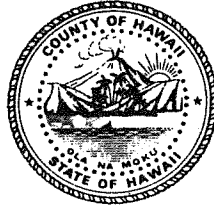
Enclosure

cc: Mr. William Yamanoha, Planner

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Harry Kim
Mayor



Lincoln S.T. Ashida
Corporation Counsel

Gerald Takase
Assistant Corporation Counsel

County of Hawaii

OFFICE OF THE CORPORATION COUNSEL

101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720-4262 • (808) 961-8251 • FAX (808) 961-8622

MEMORANDUM

TO: Christopher J. Yuen, Planning Director

FROM: Patricia K. O'Toole, Deputy Corporation Counsel

DATE: September 11, 2001

SUBJECT: Rescinding Water Variance
TMK: (3)1-2-007:033

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This is in response to your request as to whether action taken by the planning department to rescind and declare null and void a water variance was legal. We do not believe it was legal. The possession of the variance is a possession of a permit conferring a property interest on the holder. No hearing was held to determine if revocation was appropriate and called for.

The project involves an application for a six-lot subdivision. A water variance was applied for and obtained by letter dated January 10, 1990. The letter found that special and unusual circumstances existed for the granting of the variance. The application was granted with several conditions. There was no indication of an expiration date in the variance. Thereafter, in 1997, the landowners applied for a road variance. As you indicate, in the course of acting on the road variance, the department learned that water was now available for the project and stated that the variance was no longer appropriate and rescinded the previously granted water variance.

In the case of *Perry v. Planning Commission*, 62 Haw. 666 (1980), appellant was the holder of a special permit which the Hawaii Supreme Court described as "severely limited in several respects, including duration, permission to use the land for quarrying purposes was, nevertheless, either a property interest, a right, or a privilege. Even if the permit embodied a mere privilege, the 'grant of a public privilege may not be conditioned upon the deprivation of constitutional protections.' (citation omitted.) And 'relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'" (citation omitted.)

The Perry case dealt with alleged breach of conditions of a permit and the necessity for holding a hearing before revoking a permit for those alleged breaches. In this case, there are no

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Memorandum to Christopher J. Yuen

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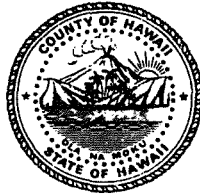
September 11, 2001

conditions on the variance and therefore no alleged violations; however, we believe the principle applies that the variance holder should have a chance to argue that the action taken is inappropriate before being deprived of the variance and the rights it grants.

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Stephen K. Yamashiro
Mayor



Virginia Goldstein
Director

Russell Kokubun
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252
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CERTIFIED MAIL

Z 179 517 488

February 23, 1998

Mr. Daniel E. Wilson
P. O. Box 2
Pahoa, HI 96778

Dear Mr. Wilson:

Variance Permit No. ⁸⁸⁶866 (VAR 97-69)

Applicants: DANIEL E. WILSON, ET AL.

Owner: WALLY PATCH

Request: Variance From Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1), and Section 23-87, Standard for Non-Dedicable Street; Escrow Maintenance Fund, and Section 23-88, Non-Dedicable Street; Dead-End Street; Private Dead-End Street

Tax Map Key: 1-2-007:033

Please accept our sincere apologies for this tardy response to your requested variance. This office has considered the conditions specified by a previous tentative approval dated January 26, 1990, granted to the pending six (6) lot subdivision application and the changes your variance application will have on the existing tentative approval conditions. Furthermore, this subdivision application is subject to Chapter 23, Subdivision Code, Article 4, Section 23-62(d), effective December 4, 1992, which imposed a specific timeframe for actions to be taken. We have been working within the department to improve the efficiency of this process which will hopefully result in more timely responses to future applications.

Your patience and understanding is appreciated.

WATER VARIANCE: The previous variance to allow the creation of a six (6) lot subdivision without a water system meeting with the minimum requirements of Division 2,

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Section 23-84, (1), of the Subdivision Code and conditions of PD VAR NO. 383 and the conditions of subdivision tentative approval dated January 26, 1990 were reconsidered. The Planning Director has concluded that the findings of the original water variance permit (PD VAR. NO. 383) issued on January 10, 1990 be rescinded and declared null and void subject to revised subdivision conditions as pertinent to application SUB 89-38.

Special and Unusual Circumstances -Water Variance

There are no longer any special and unusual circumstances which would sustain the previous water variance from the minimum water requirements for the proposed six (6) lot subdivision:

1. The subject property is Lot 14-A, containing approximately 71 acres and is a Portion of Grant 8306 of the Kikala-Keokea Homesteads, Puna, Island and County of Hawaii. The subject property or lot is also identified by the following tax map key number: TMK: (3) 1-2-007:033.
2. The subject property was zoned Agricultural (A-3a) by the County in 1967 and is designated Agriculture "A" by the State Land Use Commission (LUC).
3. The applicants submitted a subdivision application (SUB 89-38) on March 6, 1989, which included a preliminary plat map dated March 6, 1989, that proposed to subdivide Lot 14-A into six (6) lots. By Certified Letter dated January 10, 1990, water variance (PD VAR NO. 383) was granted to Mr. Daniel Wilson by the Planning Director for subdivision application (SUB 89-38) subject to five (5) variance conditions. For the record, PD VAR NO. 383 conditions 3, 4, and 5 dated January 10, 1990 state:
 - "3. In the event that there are any amendments or changes to the subdivision after the agreement is signed, the subdivider shall be responsible for informing the Department of the amendments or changes so that the agreement can reflect the amendments or changes; further, the written agreement shall be as a considered as a condition and covenant running with the land and shall be binding upon the subdivider or owner, his heirs, executors, administrators or assigns and its 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.
4. In the event that any of the lots are provided by a water service

(individual meter) from the Department of water supply (sic) or an approved private water system, the above covenants for the specific property will no longer be in effect.

5. All other applicable State and County rules and regulations shall be complied with. Should any of the foregoing conditions not be met, the Director may proceed to declare the variance null and void."
- 4a. Subsequent to the approval of PD VAR NO. 383, effective January 10, 1990 by the Planning Director, tentative subdivision approval for the proposed 6-lot subdivision application (SUB 89-38) subject to thirteen (13) conditions was granted to Mr. Daniel Wilson, on January 26, 1990. Eight (8) copies of a final plat map were submitted on December 3, 1990, and, to date, no further conditions of tentative subdivision approval dated January 26, 1990, for the water variance have been addressed or met.
- b. The final plat map dated March 6, 1989, submitted on December 3, 1990, in SUB 89-38 does not list Wally Patch as an owner of the subject property. There is no timely written explanation in the pending subdivision application addressing tentative subdivision conditions dated January 26, 1990 or title changes.
4. The Department of Water Supply (DWS) memorandum and recent comments dated November 24, 1997 in (VAR 97-69), state:

"Water can be made available from an existing 8-inch waterline along the Old Government Road adjacent to the southwest corner of the property.

Pursuant to the Department's "Water Commitment Guidelines Policy," a copy of which is being forwarded to the applicant, a water commitment may be issued. Based on the five (5) additional lots requested in the proposed 6-lot subdivision development, the required water commitment deposit is \$750.00.

Remittance by the applicant of the \$750.00 is requested as soon as possible so that a water commitment may be formally issued. The commitment will be in writing with specific conditions and effective dates stated. Please keep in mind that this letter shall not be construed as a water commitment. In other words unless a water commitment is officially effected, water availability is subject to change depending on the water situation.

For the applicant's information, final approval will be subject to the following requirements:

1. Construct necessary water system improvements, which shall include, but not be limited to:
 - a. water mains capable of delivering water at adequate pressure and volume under peak-flow conditions; minimum diameter of mains shall be 4 inches.
 - b. civic laterals that will accommodate a 5/8-inch meter to each additional lot, and
 - c. cut and plug the existing service lateral at the main and relocate to the appropriate lot.

Submit construction plans and design calculations prepared by a professional engineer, registered in the State (sic) of Hawaii, for review and approval.

2. Remit the prevailing facilities charge, which is subject to change, of \$16,875.00. This is due and payable upon completion of the construction of the water system improvements and prior to final subdivision approval being granted.
3. Convey the water system improvements along with the necessary easements to the Water Commission, County of Hawaii."
5. The State Department of Health (DOH) memorandum dated October 21, 1997, states:

"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 twenty-five (25) individuals daily at least sixty (60) days out of the year.

Past episodes of water quality concerns for lead, copper, algae and microbial

Mr. Daniel E. Wilson
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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 use of these private rain catchment systems for drinking purposes."

6. The Department of Finance-Real Property Tax memorandum dated October 22, 1997, states:

"Real Property taxes are paid through December 31, 1997."

7. No objections to the variance application were received from the surrounding property owners.

In view of the above facts, revised DWS comments, and information submitted by the applicants with the subject variance application, the Planning Director has determined that there are no longer any special or unusual circumstances applying to the subject property which exist either to a degree which deprive the applicants for SUB 89-38 or current owners 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 to sustain the approval of PD VAR. NO. 383.

Therefore, WATER VARIANCE: PD VAR. NO. 383 is null and void as the tentative approval letter (SUB 89-38) dated January 26, 1990 has expired.

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 six (6) lot subdivision without dedicable road or paved road improvements as required by Chapter 23, Division 2, Section 23-87, and Section 23-88, of the Subdivision Code.

Special and Unusual Circumstances - Road Variance

There are special and unusual circumstances that exist which would warrant consideration of the applicant's variance request from the minimum road requirements and roadway standards within the proposed six (6) lot subdivision.

The Department of Public Works (DPW) memorandum dated October 23, 1997, states:

"We have reviewed the subject variance, particularly as it pertains to Sections 23-87 and 23-88, and have the following comments:

Mr. Daniel E. Wilson
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We do not believe there are special and unusual circumstances with regard to the requirements of Sections 23-87 and 23-88. These are the minimum non-dedicable street requirements imposed on all subdivisions of this type.

Therefore, street requirements as contained in the tentative approval for the subject's preliminary plat dated 01/26/90 should remain."

Alternatives-Road Variance

The pro rata cost to improve the private road lot and existing public access roads meeting DOT/DPW standards is economically cost prohibitive. The outlook for the immediate expenditure of available county road monies to improve the existing "network" of public or private road reserves fronting the property from the State highway system is remote at this time. It is felt that current zoning of the property and surrounding land uses have not had an adverse affect on the Kaimu-Pahoa Road, old "Government Road" and the Road Reserves. It is felt the proposed subdivision of the existing lot will not contribute or result in a significant increase in traffic using the public rights-of-way. Therefore, it would be unfair and unreasonable to require DPW approved pavement within the 50-Ft. Roadway which exceeds the existing roadway standards within the old government road and road reserves.

Intent And Purpose-Road Variance

The intent and purpose of requiring subdivision roadway improvements is to designate and assure that legal and physical access to and between the proposed lots and permitted uses on the proposed lots are provided in the event there is a fire or emergency.

The existing property fronts on the old "Government Road and Kaimu-Pahoa Road or the Hawaii Belt Highway (11) System maintained by the State-DOT. Pursuant to the tax map and recent photographs submitted with the current variance application, the existing property is used for pastoral or other agricultural uses. The existing private gravel or dirt roadways within the proposed road lot configure to existing topography and natural terrain conditions. It appears an existing driveway within the road lot already exists and is adequate for the present uses.

The existing public and private road systems to and within the subject property and surrounding areas were established and developed many years before the Zoning and Subdivision Codes were adopted in 1967. Other than the Kaimu-Pahoa Road, F.A.S.P. No. S-0130 (11), little or no significant public access improvement have occurred with the Old "Government Road" and the surrounding "Road Reserves" during the past 30 years.

Mr. Daniel E. Wilson
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The property's existing agricultural or pastoral uses and the immediate surrounding land use have not significantly changed since 1967 when the Zoning and Subdivision Codes were first adopted by the County. Pictures submitted by the applicant indicate the existing natural vegetation or "jungle" topography is due to the hot, humid and rainy conditions. Private access to the property using the private road reserves and within the proposed 50-Ft. wide road lot are better suited for 4-wheel drive vehicles and off-road farming or ranching equipment. However, public access to the existing property and proposed subdivided lots using conventional vehicles is possible. It is felt the existing and surrounding land use patterns and zoning of the existing property are not anticipated to change within the next 10 years.

Therefore, based on the representations made by the applicants and evaluation of existing access and traffic patterns to and near the existing property, the Planning Director has concluded that the DPW comments and recommended road subdivision standards and requirements within the proposed road lot denoted on the preliminary subdivision plat map, conforming to "STANDARD DETAILS R-39", are not warranted or required at this time to develop this subdivision.

DETERMINATION-ROAD VARIANCE CONDITIONS

No objections to the subject variance were received from the surrounding property owners.

The subject variance application was deemed complete by the Planning Department by certified letter dated October 10, 1997.

Based on the foregoing findings, this road variance request would be consistent with the general purpose of the zoning district and the intents and purposes of the Zoning Code, Subdivision Code, and the Hawaii County-General Plan. The approval of the road 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.

The variance requested to allow a proposed subdivision without a dedicable street are approved subject to the following conditions:

1. The owners, their assigns, or successors shall be responsible for complying with all conditions of Variance Permit No. 886 and conditions of revised tentative subdivision approval.
2. ROAD VARIANCE: The owners, 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 89-38. This agreement shall contain the following deed language being covenants, conditions and restrictions which affect the entire property and/or the proposed lots arising from the approval of the subject pending subdivision application, 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 applicant:

- a. No further subdivision of the subject property or those lots arising out of SUB 89-38 shall be permitted unless said roadway meets subdivision code requirements without a variance. Access to the subject property shall be limited to the existing and permitted access using the public owned rights-of-way and from the proposed 50 Foot wide road way lot "G".
 - b. The owners 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 utilizing existing State and County owned rights-of-way or roadway lot "G" arising out of SUB 89-38.
 - c. Upon written demand of the Planning Director of the County of Hawaii, the owners, their assigns, or successors shall pay their fair share contribution for future roadway improvements to the surrounding State or County rights-of-way and improvements to the private road lot "G" arising out of SUB 89-38. The owners, their assigns or successors shall agree to participate and pay their fair share percentage of any improvement district adopted for the purpose of roadway improvements to the existing government rights-of-way or fair share percentage of any improvement to the private 50- Foot Road lot "G" arising out of SUB 89-38.
3. The owners, their assigns or successors shall comply with all other applicable State and County rules and regulations pertaining to subdivisions and land use.

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

Thank you for your understanding and patience during our review.

Sincerely,



J VIRGINIA GOLDSTEIN
Planning Director

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xc: Department of Water Supply
SUB 89-38
Murray, Smith & Associates, Ltd.