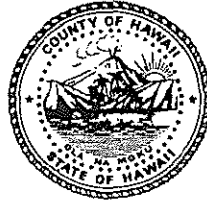


Harry Kim
Mayor



Christopher J. Yuen
Director

Roy R. Takemoto
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720
Phone (808) 961-8288 • Fax (808) 961-8742

September 27, 2004

Stanley H. Roehrig, Esq.
101 Aupuni Street, Suite 124
Hilo, HI 96720

Dear Mr. Roehrig:

Variance Application WH (VAR 01-009)

Variance No. 1476

Applicant: Stanley H. Roehrig, Attorney for Landowner Richard J. Yuen

Subdivision Application No. 1988-0090

Variance from Minimum Right-of-Way and Pavement Widths and Standard for
Non-dedicable Street Requirements & Minimum Water Standards of Subdivision Code

Tax Map Key: 8-7-008: 029, Waikakuu, South Kona, Hawaii

After reviewing your application and the submittals received on its behalf, the Planning Director certifies the approval of your variance request to allow a 5-lot subdivision without meeting the minimum water, right-of-way and pavement widths and standards for non-dedicable street requirements as required by Chapter 23 (Subdivision Code), Article 3 (Design Standards), Division 4 (Street Design), Section 23-41 (Minimum right-of-way and pavement widths), and Chapter 23 (Subdivision Code), Article 6 (Improvements), Division 2 (Improvements Required), Section 23-84 (Water supply) and Section 23-95 (Right-of-Way Improvement).

Please accept our sincere apologies for this tardy confirmation of the approval granted to allow the requested variances. Your patience is appreciated.

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Stanley H. Roehrig, Esq.

Page 2

September 27, 2004

APPROVED VARIANCES

As requested by the applicant and approved by this office, the following variances from the minimum requirements of the Subdivision Code are granted to allow the subdivision of approximately 30 acres of land into five (5) parcels ranging from a minimum of 5 acres to approximately 9.996-acres in size:

1. To allow the creation of the proposed 5-lot subdivision without the provision of a water supply meeting with the approval of the Department of Water Supply as required by Section 23-84 (Water Supply) of the Subdivision Code;
2. To allow the use of an existing 10-foot wide gravel road, to be situated within a 30-foot wide access easement, to provide access to each of the proposed lots in lieu of the minimum 20-foot wide pavement within a minimum 50-foot wide right-of-way as required by Section 23-41 (Minimum right-of-way and pavement widths), Article 6, Division 2 (Improvements Required), and Section 23-95 (Right-of-Way Improvement).

The Planning Director has concluded that the variance request from the Subdivision Code water supply, minimum right-of-way and pavement widths and standard non-dedicable street requirements should be approved based on the following:

BACKGROUND

1. Location. The subject property is situated on the east (mauka) side of the Mamalahoa Highway, being portions of Royal Patent Grant 3141, Waikakoo, South Kona, Hawaii, TMK: 8-7-008: 029.
2. Land Use Designations. The subject property is zoned Agricultural (A-5a) by the County and designated Agriculture (A) by the State Land Use Commission (LUC).
3. Brief Parcel History. Subject 30-acre parcel was part of an action to quiet title that was eventually settled in 1983 by court order. In accordance with the court order, Subdivision No. 5220 was approved on March 4, 1985 to allow for a 4-lot subdivision, of which the subject property was included, and which was accompanied by Variance No. 193, issued November 16, 1984, to allow for its creation without a County-approved water system.
4. Subdivision Request/PPM. On July 15, 1988, the landowner, Richard J.D. Yuen, submitted a subdivision application (SUB 1988-0090) with a preliminary plat map proposing to subdivide the 30-acre parcel of land identified as Tax Map Key: 8-7-008:

029 into 3 lots, with two of those lots approximately 5 acres in size and a remaining lot of approximately 19.5 acres in size. Action on the proposed three (3) lot subdivision application was deferred pending consideration of a water variance application. In September 2000, the applicant submitted a revised preliminary plat map dated September 14, 2000 reflecting the creation of five (5) parcels ranging in size from 5.0 to 9.996 acres.

5. Variance Application. The applicants submitted the variance request and subject variance application on or about January 22, 2001 and other supplemental information.

The applicant's background includes, in part, the following statements:

Water Variance Request

"There are special and unusual circumstances that exist which would warrant or necessitate a waiver from the minimum water requirements to service a five (5) lot subdivision at Waikakuu, South Kona, Hawaii. The Department of Water stated: 'The proposed subdivision is not within the service limits of the Department's existing water system facilities.'

Extensive improvements, including source, storage, transmission lines, booster pumps and distribution facilities must be constructed.

Currently, sufficient funding is not available and no time schedule has been set.

These special and unusual circumstances applying to the subject property deprive the applicant 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 that property."

There are no other reasonable alternatives that would resolve the difficulty. To upgrade the existing County water system by the application would not be economically feasible.

The other alternative would be to drill wells to create a private water system. However, due to the limited nature of the 5-lot subdivision, that would also be cost prohibitive. Also there is no assurance that adequate ground water would be found.

The imposition of providing public or private water system for an agricultural subdivision would create excessive demands on the application, where a more reasonable alternative is available.

The subject property comprises 30 acres located on the eastern side of Mamalahoa Highway; it is at the 93-mile marker at South Kona. It lies at an elevation range between 1240 feet and 1640 feet above mean sea level. This area of South Kona has a history of adequate rainfall, providing a source of water for human consumption and fire protection through the use of individual storage and catchment facilities. According to data prepared by the U.S. Geological Survey, the subject property is situated within an area that receives approximately 60 inches of rainfall per year. As a policy, we look for a mean annual rainfall of at least 60-inches per year when considering variances from the minimum water requirements of the Subdivision Code. This level of rainfall will support a typical residential dwelling relying on a water catchment system. So this project site is situated within an area that allows us to support a variance from the minimum water system requirements of the Subdivision Code.

Also, the applicant will agree to file a written Water Agreement with the Planning Department prior to the receipt of final subdivision approval; said written agreement shall be considered a covenant running with the land.

This Agreement would encompass all of the concerns relating to adequate storage facilities for human consumption and fire protection; provisions for additional dwelling units; and whatever reasonable conditions that are considered necessary.

Roadway Variance Request

“There are special and unusual circumstances that exist which would warrant or necessitate a waiver from the minimum roadway requirements for this proposed five (5) lot subdivision. The roadway easement is not considered to be a major throughfare or secondary arterial and will not even serve as a through road for further development of this area.

Thus, considering the foregoing, there are special and unusual circumstances applying to the subject property which exist to a degree which deprives the applicant 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 that property.

There are no other reasonable alternatives in resolving the minimum road requirements. To upgrade the existing roadway by the applicant would not be economically feasible. The imposition of minimum roadway standards for a five-lot agricultural subdivision

would create excessive demands on the applicant, where a more reasonable alternative is available.

The requested variance would allow the property to be accorded the same treatment as other nearby properties.

Applicant would provide access to each lot off of a 10-foot dirt road that has existed on the premises for many years. This dirt road goes from the highway in an easterly direction along the northern boundary of the proposed subdivision.”

The applicant has agreed to incorporate as a deed covenant a restriction from the construction of any residential dwelling on any of the proposed lots, with the exception of the existing dwelling on Lot 1-A. This prohibition from the construction of additional residential dwellings within the proposed subdivision will limit the use of the proposed lots to agricultural uses only, which is no different from the existing agricultural uses currently occurring on the subject property. Traffic normally associated with residential uses will be much reduced in the absence of any additional residential dwellings on any of the proposed lots.

6. Additional Information: As part of on-going discussions over many months regarding the nature of the requested variances and concerns expressed by this department over adequate access and water system improvements to service the proposed lots, this letter will also confirm a July 26, 2004 conversation between the applicant’s representative, Stanley Roehrig, and Daryn Arai of this office confirming the applicant’s agreement to prohibit the use of the proposed lots as residential home sites, with the exception of the existing residential dwelling on proposed Lot 1-A

7. Agencies’ Comments:

a. Department of Water Supply memorandum dated June 1, 2001:

“We have reviewed the subject application and the comments in our memorandum of July 22, 199, still stand. It states that the proposed subdivision is not within the service limits of the Department’s existing water system facilities.”

b. Department of Health memorandum dated June 4, 2001:

“The Department of Health’s authority on drinking water is based on the definition of a ‘public water system.’ A ‘public water system’ means a system which provides water for human consumption through pipe or other constructed conveyance if such system has 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. All public water systems are regulated by the Department of Health and shall be in compliance with the Hawaii Administrative Rules, Title 11, Chapter 20.

Past episodes of water quality concerns for lead, copper, algae and microbiological and chemical contaminations in private rain water catchment systems have identified the need for self monitoring. The Department of Health does not support the use of these private rain catchment systems for drinking water purposes since the quality may not meet potable water standards.”

c. Department of Public Works memorandum dated June 13, 2001:

“We have reviewed the subject application and object to the proposal for access to the lots. The property is on a severe slope. A paved road meeting with the intent of the Subdivision Code should be required. Given the road is to remain in private ownership and the small number of lots served, we would be open to design variations that have been approved by variance. The most recent variance allowed a 20 foot pavement with 6 foot shoulders in a 32-foot right-of-way.”

8. Public Comments:

a. Philip A. Gallinger letter dated June 15, 2001

“I am Philip Gallinger, owner of record 8-7-10-005
8-7-10-006
8-7-10-007
and reside with my wife Clara & children upon 8-7-10-004

Several Comments

- 1) owners of Record Clara/Philip Gallinger, Abraham Naki, Thomas Naki Juanna Naki only notified on 13 June 2001 of request.
- 2) Proposed 10ft roadway will not permit passage of fire or ambulance.

Stanley H. Roehrig, Esq.
Page 7
September 27, 2004

- 3) Entry to property on east (mauka) side of State Hwy, just north of Mile 96 post. Not mile 93 as indicated by applicant (pg. 2).

This is located on a turn with high banks – limited visibility and dangerous.

Enclose find photos of hwy entrance.

We would recommend a site inspection to verify.

Thank you for your consideration of these concerns.”

9. Notice to Surrounding Owners. The applicant submitted copy of a notice and other information sent to a list surrounding owners within 300 feet of the subject TMK property. According to the applicant, the notices were mailed to surrounding property owners on or about June 13, 2001.

SPECIAL AND UNUSUAL CIRCUMSTANCES

After considering the applicant's project information and variance request, existing and surrounding development, agency comments and/or requirements to proposed subdivision and variance applications, the Planning Director has determined that there are special and unusual circumstances applying to the subject TMK property and the proposed development that deprive the applicant or 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.

ALTERNATIVES

There are no reasonable alternatives in resolving the minimum water system improvements and minimum roadway improvements as required by the Subdivision Code. It would be unreasonable to require the applicant to meet the existing County requirements that would result in the need to construct over 2,800 feet of roadway leading from the Mamalahoa Highway to service each of the five proposed lots. According to the applicant, this roadway has been used to access the subject property for many years. The burden of constructing such a substantial and lengthy roadway to service a total of four additional lots will be unreasonable. It would deprive the owner of substantial property rights that would otherwise be available and obviously interferes with the best use or manner of development of that property for the stated agricultural and related purposes. There are no other reasonable alternatives that would resolve the difficulty. Similarly, the affected area is not serviced by a County water system. To develop an

Stanley H. Roehrig, Esq.

Page 8

September 27, 2004

on-site well and transmission system would be cost-prohibitive given the few number of lots being proposed. The use of water catchment as an alternative source of potable water would be a reasonable alternative, but is rendered moot by the applicant's agreement to prohibit the construction of residential dwellings on the proposed lots, exclusive of the existing dwelling on the first lot nearest the highway.

The Land Use Pattern Allocation Guide (LUPAG) Map designates the area of the subject property as Orchards. Orchards is an agricultural designation for those lands which though rocky in character and content support productive macadamia nuts, papaya, citrus and other similar agricultural products. The LUPAG Map component of the General Plan is a representation of the document's goals, policies, standards and courses of action to guide the coordinated growth and development of the County. It reflects a graphic depiction of the physical relationships among the various land uses. The LUPAG Map establishes the basic urban and non-urban land use pattern for areas within the County. The requested variances are consistent with the general purpose of the district, the intent and purpose of this chapter, and the County general plan and will not be materially detrimental to the public welfare or cause substantial, adverse impact to an area's character or to adjoining properties. In this particular instance, based on the circumstances, conformance to existing subdivision code roadway and water system requirements are impractical. However, each lot can still be utilized for agricultural purposes as it occurs now on the larger 30-acre parcel. Agricultural vehicles can still access all portions of the 30-acre parcel via the existing 10-foot wide gravel road. Rainfall is utilized to sustain existing crops. Approval of this variance will provide for greater opportunities to cultivate the land without the expectation of these lots being utilized as homesites.

The request therefore warrants and necessitates a waiver from the minimum requirements for the proposed five (5) lot subdivision with 5 lots accessing off of an existing 30-foot wide asphalt paving with 6 foot wide inverted grass swales within a 32 foot wide right-of way. This request is considered in relation to existing and planned streets, to topographical conditions, to public convenience and safety, and the proposed use of land to be served by the existing roadway. The eventual owners of the lots would be able to continue any agricultural use of the property given the size of the parcels.

INTENT AND PURPOSE

The subject property consisting of 30 acres is located within the County's Agricultural -5 acre (A-5a) zoned district. Under this zoning designation, the minimum building site area is 5 acres. The applicant is proposing a five (5) lot subdivision with parcels ranging in size from 5.0 to 9.996-acres.

The intent and purpose of requiring minimum rights-of-way with minimum pavement widths is to effectively and safely accommodate traffic generated by domestic vehicles, police, fire, and other service vehicles under various weather conditions without constant maintenance. These requirements are related to existing and planned streets, to topographical conditions, to public convenience and safety issues, and to the proposed use of land to be served by the street. As stated by the applicant, the existing dirt roadway has serviced the entire 30-acre parcel for many years. What is unusual is that the applicant has agreed to restrict use of the proposed properties from any additional residential uses, thereby eliminating all traffic that is not associated with agricultural use of the proposed properties. Each proposed lot will not be permitted to construct a new residential dwelling, effectively limiting the use of the proposed lots for agricultural purposes only, no different from what is currently occurring on the subject property.

Based on the foregoing findings, approval of these variances will be consistent with the general purpose of the zoning district and the intents and purposes of the Zoning Code, Subdivision Code and the County General Plan. Furthermore these variances 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.

DETERMINATION-VARIANCE CONDITIONS

Based on the foregoing findings, this 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 County General Plan. Furthermore, the variance requested 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 five (5) lot subdivision without providing the minimum water system and roadway improvements as required by the Subdivision Code is hereby granted and subject to the following variance conditions:

1. The subdivider, owners, their assigns, or successors shall be responsible for complying with all stated conditions of this variance.
2. The subdivider, owners, their assigns, or successors understand that the proposed lots arising out of SUB 1988-0090 will use and maintain the existing dirt subdivision access within the subject TMK property without any expectation of governmental assistance to maintain the access within the subdivision.
3. The applicants, 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 and prior to receipt of final subdivision approval of SUB 1988-0090. This agreement shall contain the following deed language, being covenants, conditions, and restrictions, which shall affect the proposed lots arising from the approval of the subject pending subdivision application and 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. The applicant and/ or owners shall indemnify and defend the State of Hawaii or County of Hawaii from any and all liability arising out of vehicular access to and from the subject property utilizing the private roadway easement within the existing TMK property designated on the subdivision application's (SUB 1988-0090) final plat map.
 - b. With the exception of Lot 1-A, no residential dwelling shall be permitted on any lot created by SUB 1988-0090. The subject property or any of the proposed lots arising out of the proposed subdivision or subsequent subdivision phases may not be made subject to a condominium property regime. Furthermore, no ohana dwelling or second dwelling shall be permitted on any lot created by SUB 1998-0090.
 - c. The owners understand that the lots created by SUB 1988-0090 have been approved with this road variance, and that they will use and maintain the privately owned access easement to and within their property and drainage improvements on their own without any expectation of governmental assistance.
 - d. The lot owner(s) agrees to participate in any road and/or maintenance agreement to maintain the existing 10-foot wide gravel roadway.

Stanley H. Roehrig, Esq.
Page 11
September 27, 2004

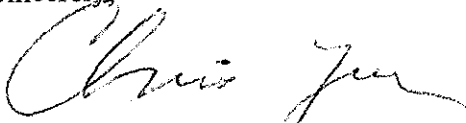
Said maintenance shall include, without limitation, timely repair of the private roadway easement and/or filling of any and all rutted areas to ensure reasonable accessibility to all parcels and that existing drainage patterns are maintained.

- e. In the event that there are any amendments or changes to the subdivision after the agreement is signed, the applicant shall be responsible for informing the County Planning Department of such amendments or changes so that the agreement can be amended concomitantly. Further, the written or recorded agreement shall be binding upon the owner(s), their successors or assigns and shall be incorporated as an exhibit and made part of each agreement of sale, deed, lease, or similar documents affecting the title or ownership of the existing property or approved subdivided lots.
4. The owners, their assigns or successors shall pay any outstanding real property taxes due and comply with the requirement of the State Historic Preservation Office and other applicable State and County rules and regulations pertaining to subdivisions, tentative subdivision approval conditions, approved subdivision construction plans, variance conditions, 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.

Thank you for your understanding and patience during our review.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

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xc: DPW-Engineering Branch
DWS-Engineering Branch
Planning Dept.-Kona
SUB 88-0090