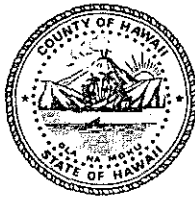


Harry Kim  
Mayor



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 8, 2001

Dr. Harald Ebeling  
3029 Lowrey Avenue, Apt. #K-3201  
Honolulu, HI 96822

Dear Dr. Ebeling:

**Variance Permit No. 1238 (VAR 01-052)**

**Applicant: HARALD EBELING**

**Owner: HARALD EBELING**

**Request: Variance from Chapter 23, Subdivisions,  
Article 6, Division 2, Improvements Required,  
Section 23-87, Standard for nondedicable  
Street; escrow maintenance fund, and,  
Section 23-88, Nondedicable street;  
private dead-end street**

**Tax Map Key: 3-2-003:008, Lot 7**

After reviewing your variance application and the information included with the variance application, the Planning Director certifies the approval of your variance request with conditions. Your variance request is from Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-87, Standard for nondedicable street; escrow maintenance fund; and, Section 23-88, Nondedicable street; private dead-end street to allow the creation of a three (3) lot subdivision of the subject property without providing minimum roadway requirements required by the Department of Public Works (DPW) memorandum dated January 22, 2001 and Condition No. 2 of tentative subdivision approval dated June 27, 2001.

### **BACKGROUND**

1. **Location.** The subject property is Lot 7, containing 86.423 acres, being Grant 4732 to Maria Vierra Souza, Waikaumalo-Maulua Homesteads, Haiku, North Hilo, Hawaii (TMK 3-2-003:008).

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2. **Zoning.** The subject property is zoned Agricultural (A-20a) by the County and Agriculture ("A") by the State Land Use Commission (LUC). A-20a means an agricultural district with a minimum building site area of twenty (20) acres.
3. **Subdivision Request/PPM.** A pending subdivision application (SUB 01-184) by the applicant includes a preliminary plat map (PPM-revised), dated July 28, 2000, prepared by Murray, Smith, and Associates, Ltd. The applicant proposes to subdivide the subject TMK property into three (3) lots exceeding the minimum twenty (20) acre lot area. Tentative subdivision approval with eight (8) conditions to allow a 3-lot subdivision was granted to the PPM-Revised by the Planning Director, Planning Department, County of Hawaii on June 27, 2001.

Condition No. 2 of tentative subdivision approval letter dated June 27, 2001 states:

- "2. Access to the subdivision lots from the Old Mamalahoa Highway is via existing substandard access easements:
  - a) Construct minimum 20-ft. wide agricultural pavement conforming to Standard Detail R-39.
  - b) Submit construction plans and drainage report for review and comment."
4. **Variance Application(s).** For the record, subject applicant was previously granted Variance Permit No. 1206 to allow the proposed 3-lot subdivision (SUB 01-084) on June 21, 2001 without providing a county water system, pursuant to Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1).

The subject variance request from tentative approval condition no. 2 was submitted by the applicant on July 18, 2001 and includes supplemental information describing the existing access conditions and digital colored photographs of the current roadway improvements to the subject property. The existing access consists of paved former cane haul roads with easement widths of 30' and 40'. Legal documents refer to these access easements as easements "P-30" and "S-60". The variance request is to allow the 3-lot subdivision without improving or expanding existing easement access or improving existing paved roads and grass shoulders within Easements "P" and "S".

In addition to the written explanation attached to the variance application, the

applicant included a narrative "TMK 3-3-2-3-8: Status of access roads".

5. **Agency Comments and Requirements:**

- a. The State Department of Health (DOH) memorandum, dated August 6, 2001, states:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."

- b. The Department of Public Works (DPW) memorandum dated August 8, 2001, states in part:

"We have reviewed the subject application and offer the following comments:

The road improvements as stated in our subdivision review dated January 22, 2001 and condition no. 2 of the tentative approval dated June 27, 2001 are the minimum improvements required to roads serving subdivisions of this type. DPW believes, that subdivision allowed without providing the minimum road improvements, as required by the code will accelerate road and traffic degradation. The road improvements imposed by the DPW to subdivision application are the minimum requirements that will not compromise public safety and welfare, therefore, we oppose and will continue to oppose variance requests of this type."

6. **Notice to Surrounding Owners.** Proof of mailing and copy(s) of a notice sent to the surrounding property owners were received on August 7, 2001. Postal receipts affixed to copy(s) of a notice by Harald Ebeling indicate that the notice(s) were mailed on August 1, 2001.
7. **Comments from Surrounding Property Owners or Public.** No oral or written objections were received by the Planning Department.

**SPECIAL AND UNUSUAL CIRCUCUMSTANCES**

The following special and unusual circumstances apply to the subject project which exist either to a degree which deprive the applicant/owner of substantial property rights that would otherwise be available or to a degree which obviously interferes with the best use or manner of

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development of the subject property:

1. According to the county tax maps, the parcel fronts on the "Homestead Road," a 30-foot wide right-of-way. The homestead road should serve the subject lot and other surrounding property, but is a "paper road." Field roads constructed by a sugar plantation company provide de facto access to the lots in the area.

According to the applicant, the existing easements "P-30" and "S-60", hereafter referred to as "P" and "S", have been adequate and "both access roads to the proposed subdivided lots are in good condition, not only compared to other easement roads in the area but in fact also compared to some sections of the Old Mamalahua (sic) Highway".

The applicant understands and agrees that the pavement and road shoulders within easements "P" and "S" will require periodic maintenance and that "maintenance" will be privately addressed by the easement's owners and lots dependent on Easements "P" and "S" for access. As such, the applicant understands that the owner(s) of the proposed lots dependent on "P" and "S" will be responsible for access and share in the costs to maintain access and the roadways within Easements "P" and "S".

2. Several landowners abutting the subject TMK property and surrounding properties, including the County Department of Water Supply (DWS), use the paved and gravel field roads. To require a single user to improve the existing private easements and paved roadways would place an unfair and disproportionate burden to the benefit of the other users.
3. The applicant (subdivider) proposes to add only two additional lots, a minimal increase in the usage of the roadways. No further subdivision of the resultant 3-lots will be possible without rezoning.
4. The existing easement width and "as-built" paved road improvements are adequate and can be used by police and emergency vehicles.
5. Maintenance responsibility of the existing roadways to the subject property or the proposed lots must be coordinated and fairly shared by and among the benefited users. The additional 2-lots resulting from the subdivision will change the current road maintenance responsibilities and may in fact reduce the proportionate contributions among current users.

Said maintenance shall include, without limitation, grass cutting, repairs and/or filling of any and all rutted areas ("potholes"), as well as periodic grading and regrassing of the easements to

ensure that existing drainage patterns are not changed or magnified.

### ALTERNATIVES

The decision alternatives include the following:

1. *Improve the roadways to agricultural roadway standards as required by the tentative subdivision approval.* This alternative would require the applicant to improve to agricultural roadway standards within "Easement P-30" approximately 0.6 mile (or 4300+ feet) of roadway from Mamalahoa Highway to the subject property boundaries, plus the existing roadway within "Easement S-60." The costs associated to design and construct the paved road and shoulder improvements within these easements would be substantial and unfair when weighed against the special and unusual circumstances discussed above.
2. *No roadway improvements.* This alternative implies either that the existing roadway conditions within the existing easements are completely acceptable to a minimum standard to allow access by emergency vehicles, or that the County would improve the homestead road. The likelihood of County funding to improve the homestead road within the next 10 to 20 years is very remote at this time. The existing road conditions do not completely meet minimal standards for emergency vehicular access. There is a short segment of Easement S-60 that would be used by the two additional lots that is not completely paved (compacted gravel) and may be subject to damage during heavy rains. There are two cattle gates within segments of Easement S-60 that could restrict emergency vehicle access to and through proposed "LOT 2" and "LOT 3" identified on the subdivision's preliminary plat map. Conditions of approval can be imposed to address these shortcomings, as discussed in the next alternative.
3. *Reasonable roadway improvements to meet minimal emergency access requirements.* This is the selected alternative. The conditions of approval set forth at the end of this letter include requirements for the applicant to pave the unpaved segment(s), fill major potholes along the length of the easements serving the subject lots, and gate "key" management to ensure timely access by police or emergency vehicles.

### INTENT AND PURPOSE OF THE SUBDIVISION CODE

The intent and purpose of access requirements to a proposed subdivision is to ensure legal and physical access to the proposed lots that is clearly defined and accessible from a public road by domestic and farm vehicles, police, fire, and other service vehicles under various weather conditions without constant maintenance. The conditions of variance approval address these concerns.

The surrounding areas are rural-agricultural in character. The existing network of roadways and "field roads," which have not changed since the late 1940s, are typical of this neighborhood and are appropriate for the intended low intensity agricultural use(s). By granting this variance, there should be no adverse impact to adjoining properties or other users of the easements.

Therefore, based on the representations made by the applicant and evaluation of existing access and traffic patterns to and near the existing property, the Planning Director has concluded that Condition No. 2 of the tentative approval letter dated June 27, 2001 is hereby modified to allow the 3-lot subdivision.

#### **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 subdivision without providing road improvements meeting DPW standards and modifying Condition No. 2 of the Planning Director's tentative approval letter dated June 27, 2001 is subject to the following conditions:

- 1) The subdivider, owners, their assigns, or successors shall be responsible for complying with all stated conditions of this variance. The subdivider, owners, their assigns, or successors understand that the 3-lots arising out of SUB 00-184 will use and maintain the existing access easements and paved roadways and roadway shoulders, gates, etc. to and within the subject TMK property on their own without any expectation of governmental assistance to maintain existing access Easements "P" and "S" or any other access to the subject TMK property or proposed 3-lots.
- 2) Any unpaved portion(s) of the roadways within Easement S-60 providing access to the subdivided lots shall be paved to the width of the abutting existing pavement prior to final subdivision approval (or bonded).
- 3) Major potholes within Easements P-30 and S-60 from Mamalahoa Highway to the subdivision tract boundary shall be filled to the satisfaction of the Department of Public Works or Planning Department prior to final subdivision approval (or bonded).
- 4) The location and any limitations created by the cattle gates within the existing easements

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shall be reviewed for accessibility by the County of Hawaii police and fire prior to final subdivision approval.

- 5) The existing and any new roadway easements within the proposed lots shall be defined by metes and bounds and identified on the pending subdivision's final plat map.
- 6) The applicant shall provide evidence of access easement rights to easements P-30 and S-60 prior to final subdivision approval.
- 7) The applicant, 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 00-184. This agreement shall contain the following deed language, being covenants, conditions, and restrictions, which affect the entire property and/or 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 easements outside and within the existing TMK property designated on the subdivision application's (SUB 00-184) final plat map.
  - b) Upon written demand of the County of Hawaii, the applicant and /or 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 Homestead Road or other roads serving the proposed lot(s) arising out of SUB 00-184. Should the improvement district require acquisition of rights-of-way within the lots arising out of SUB 00-184, such rights-of-way shall be dedicated to the County without cost and the value of the dedication credited to the fair share contribution of the lot owner. Should the Council adopt a Unified Impact Fees Ordinance setting forth criteria for the imposition of exactions or the assessment of impact fees, conditions included herein shall be credited towards the requirements of the Unified Impact Fees Ordinance. .
  - c) No ohana dwelling or " additional farm dwelling" or second farm dwellings shall be permitted on any lot created by SUB 00-184 for the reason that this variance is granted based on minimal increase in the number of users.
  - d) The owners understand that the lots created by SUB 00-84 have been approved with this road improvements variance, and that they will use and maintain the access to their

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property on their own without any expectation of governmental assistance, including any road improvements within easements P-30 and S-60 and the Homestead rights-of-way.

- e) The owners agree to participate in any road maintenance agreement agreed to among the majority of easement holders for the applicable access easement(s) serving their lot.

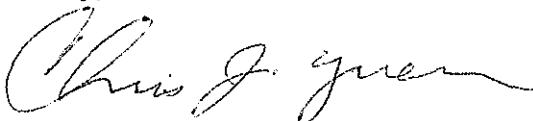
Said maintenance shall include, without limitation, grass cutting (mowing), timely repair and/or filling of any and all rutted areas and "potholes", and periodic grading and regrassing of existing roadway shoulders within Easements "P" and "S" to ensure that existing drainage patterns are maintained and that soil runoff within and along Easement "P" and "S" are not changed.

- 8) 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.
- 9) The owners, their assigns or successors shall pay any outstanding real property taxes due and comply with all other applicable State and County rules and regulations pertaining to subdivisions, tentative subdivision approval conditions dated June 27, 2001, 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  
SUB 00-184