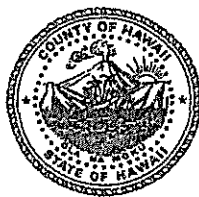


Harry Kim  
Mayor



Christopher J. Yuen  
Director

Roy R. Takemoto  
Deputy Director

## County of Hawaii

### PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-3043  
(808) 961-8288 • Fax (808) 961-8742

May 16, 2003

Ms. Benjamas Seungsiri  
P.O. Box 2285  
Pahoa, HI 96778

**Variance Permit No.: 1358 (VAR 02-028)**

**Applicant: Benjamas Seungsiri**

**Owner: Benjamas Seungsiri**

**Request: Variance from Chap. 23, Subdivisions, Art. 6, Improvements,  
Sec. 23-86, Requirements for Dedicable Streets**

**Tax Map Key: 1-4-002:050 – SUB 2000-0153**

After reviewing your variance application and the information included, and after a review of the record and files of the related subdivision application (Sub. 2000-0153), the Planning Director approves the variance request, with conditions. The variance request is to allow a seven-lot subdivision without installing a 20' wide pavement and swales in conformance with Department of Public Works requirements. The variance is granted with several conditions, including that the lots created by the subdivision be generally three acres in size or more, and that the applicant make certain improvements to Kikiao St. The lot size condition is made because the access road leading to the proposed subdivision, Kapoho Kai St., is close to the standard for a subdivision serving an area zoned for lots of three acres or more in size, but severely deficient for a subdivision of smaller lots. The applicant has received tentative approval for subdivision containing six lots from 1.0 to 1.6 acres in size, and a seventh lot of 22.469 acres. These conditions will require that the applicant revise the preliminary plat map that had previously received tentative subdivision approval.

The Planning Director has made this decision based upon the following background and findings.

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## **Background and Findings**

**Location.** The subject property, T.M.K. No. 1-4-002:050, consisting of 29.7 acres, is located between Kapoho Vacationland Unit I, makai of the subject property, and Kapoho Vacationland Unit II, mauka of the subject property. Kapoho Vacationland Unit I, consisting of 216 lots, mostly in the 8000-10,000 square foot size range, was approved in 1962. Kapoho Vacationland Unit II, consisting of 82 lots, predominantly 5 acres in size, was approved in 1963. Both were approved under older subdivision ordinances that allowed the streets to be built to a lower standard than the present subdivision code.

The subject 29.7 acres were not included within either subdivision, although it was under the same original ownership. One of the preliminary subdivision maps for Unit II shows it as "Future Development."

**Zoning.** The subject property, as well as Vacationland Hawaii Unit II, is within the State Land Use Agricultural District, and is zoned A-1a. It is within the Special Management Area. Vacationland Hawaii Unit I is within the State Land Use Urban District, is zoned RS-7.5, and is also in the Special Management Area.

**Present Access Conditions.** Legal access to the property from the nearest public road, Highway 137, is via Kapoho Kai Street, a private road that serves both Vacationland Unit I and Unit II. Kapoho Kai is maintained by the Vacationland Hawaii Community Association ("VHCA"). The subject property's legal right of access through Kapoho Kai and other Vacationland roads was confirmed by a court case, Vacationland Hawaii Community Association v. West, et. al., Civ. No. 91-109, Third Circuit Court. The case established that certain lots, including the subject property, that were not part of the Vacationland subdivisions had the right to use subdivision roads, and that the VHCA had the right to levy a road assessment against those lots. The owner of the property is a successor in interest to a party to that lawsuit.

Kapoho Kai has a chip-sealed surface, in good condition, installed by the VHCA a few years ago, about 18' wide, within a 60' right-of-way. The remainder of the right-of-way is not improved. The parcel itself is fronted by Kikiao St., also maintained by the VHCA. Kikiao has a cinder surface of varying width, in generally good condition, in a 40' r.o.w. Both Kapoho Kai and Kikiao have nearly flat grades and are well drained. The underlying soil type is E302, "nearly bare pahoehoe."

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On its northern end, Kikiao St. connects with Kapoho Beach Lots Road, which also provides physical access to the property from Highway 137. The applicant has not shown that the property has legal access on Kapoho Beach Lots Road, which was built as part of Kapoho Beach Lots subdivision, and therefore this variance must be analyzed under the assumption that this property does not have legal access through Kapoho Beach Lots Road. (The property may have legal access to the water line along Kapoho Beach Road.)

**Variance Application.** The applicant's predecessor in interest originally submitted a preliminary plat map for 27 lots. This map was submitted September 27, 2000, and officially received on Nov. 27, 2000. The Planning Department suspended processing of the application because of the lack of a Special Management Area Assessment.

On January 14, 2002, the present applicant submitted a revised preliminary plat map, dated December 11, 2001, for seven lots. (The public water system in the area is currently limited to seven units of water per existing lot of record, so the property is effectively limited to a seven-lot subdivision, absent a water variance.) The applicant will be connecting the subdivision to the county water system.

On March 18, 2002, the Planning Director issued an SMA minor permit for the subdivision based upon the applicant's representations that the cost of subdivision improvements would be approximately \$56,500. These did not, however, include road improvements. The applicant was notified that the minor permit would be voided if the subdivision infrastructure exceeded \$125,000 in cost, which would make the subdivision require a major SMA permit.

The Department of Public Works submitted a comment, which included a reference to Haw. Cty. Code sec. 23-86: "Based on the subdivision's A-1a zoning, construct 20-ft. wide dedicable pavement with paved shoulders and swales conforming to Standard Detail R-34."

The applicant then applied for the present variance on May 16, 2002. The applicant submitted an engineer's estimate that to construct a "county standard road" to Highway 137 would cost \$500/lineal foot, or about \$2 million. Presumably, this is for a road meeting the R-34 Standard Detail, from Highway 137 to the subject property.

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**Agency Comments.** The Department of Public Works commented on the variance that "road improvements are the minimum required by the subdivision code, H.C.C. sec. 23-41 and 23-95. DPW believes that, allowing subdivision without at least providing the minimum improvements required by the code, will compromise public welfare and safety."

Fire Department: see memo of June 19, 2002.

**Comments from Surrounding Property Owners and the Public.** Kirk Flanders, president of the Board of Directors of the VHCA, wrote on Sept. 17, 2002, that the board had "unanimously voted not to oppose the request." He also wrote a letter in support dated February 15, 2003; stating that the applicant had a legal right to the use of VHCA roads and that would pay a per-lot assessment if the subdivision were approved. There was also a letter in support from neighbors Lucille Park and Harry Park, received Nov. 11, 2002.

The Planning Director also received a number of letters in opposition, or raising concerns, from Jan Anderson, Greg Braun, Barbara Smith, Phillip Burns, Eileen Ohara-Weir, Lawrence Oberman, Michael Nuss, and others. The Planning Director received a letter on July 3, 2002, from Muhammad Yunis, President, Kapoho Beach Lots Community Association Board, and signed by other members of the Board, stating that the Board "contests the request", unless "there is a legal appropriation of funds for the use/maintenance/repair of Kapoho Beach Lots Road."

**Analysis.** The purpose of roadway standards in the subdivision code is to ensure that there is adequate legal and physical access to the new lots created for use by domestic and farm vehicles, police, fire, and other service vehicles, under all weather conditions, that does not require constant maintenance. The applicant is requesting a variance to allow subdivision without the roadway improvements stipulated by DPW memoranda pursuant to the requirements of Chap. 23.

Haw. Cty. Code sec. 23-34 provides that each lot must abut upon a public street or approved private street. The Subdivision Code, and the DPW Standard Details adopted under the authority of the Subdivision Code, contain a basic distinction between streets serving lots zoned for areas zoned for lots of one acre or less, versus areas zoned for lots of three acres or more. Essentially, the former must have a 20' a.c. pavement, whereas the latter need only have a 20' oil-treatment, unless it has a grade of more than 8%. Sec. 23-86(c)(1) provides the following minimum standards:

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(c) A street shall have sufficient thickness of pavement, and compacted base course and sub-base material to support axle and wheel loads permitted under section 291-35, Hawaii Revised Statutes. In no case shall the streets be less substantial than the following minimum dedicable standards of the County:

(1) A street serving areas zoned for lots seventy-five hundred square feet to and including one acre, shall have a six-inch minimum select borrow sub-base course, a base course of four inches of compacted crusher run base with filler, and a pavement of two inches of asphaltic concrete or two and one-half inches of asphaltic macadam, applied in three separate applications. Pavement width shall conform to the urban standard as set forth under section 23-41.

Sec. 23-86(c)(2) provides almost the same standard for areas zoned for lots of one to three acres.

On the other hand, sec. 23-87(a), for non-dedicable streets, provides that:

(a) A street serving areas zoned for lots of three acres and over shall have a six-inch minimum fine select borrow base course with surface treatment acceptable to the chief engineer and director. Preparation of the surface, application of surface and utilization of equipment shall conform to standards adopted by and on file in the department of public works, subject to the condition that a portion of a roadway where the grade is eight percent or greater shall be built to paved requirements of this chapter. Pavement widths shall conform to the agricultural standards as set forth under section 23-34.

To further define the requirements for various types of streets, the Department of Public Works has adopted Standard Details. Standard Detail R-34 (top) is the normal requirement for this subdivision, because it is an area zoned for lots of one acre or less in size. It calls for 20' a.c. pavement and an oil-treated or asphalt swale and shoulder 15' wide on each side. If this were an area zoned for lots of three acres or more in size, sec. 23-87(a) and Standard Detail R-39 (top) would apply. This would require a 20' oil-treated roadway surface, rather than an a.c. pavement. The differing road standards in the

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Subdivision Code embody an implicit policy decision that it is reasonable to require less of an area with lower density and hence, a lower volume of traffic, than of an area with higher density.

The applicant has requested a variance from the sec. 23-86 standards to create lots of approximately one acre in size. The main access road, Kapoho Kai, would actually be very close to the minimum pavement standard for a road serving an area zoned for lots of three acres or more in size. Its chip-sealed surface is the equivalent of the R-39 oil treatment, and is 18' wide rather than the 20' required under R-39. Although sec. 23-87 refers to the zoning, the conditions of a variance and subdivision can effectively achieve the same end result as a three-acre minimum lot size zoning, if they limit the lots to three acres in size.

If limited to lots of approximately three acres in size, therefore, the proposed subdivision involves only a relatively minor variance from the R-39 road requirements of Kapoho Kai. Kikiaio is presently more deficient with respect to the R-39 standard detail, but some relief from R-39 for Kikiaio is justified by the fact that the street serves a relatively small number of lots, is relatively short, and the number of lots served will not greatly increase as a result of this subdivision. There should be some improvement to Kikiaio, however, as a condition of the variance.

The overall development pattern in the area and the adequacy of the present infrastructure must also be considered under Haw. Cty. Code sec. 23-15(c), the standards for a variance. The side streets in Unit II, such as Kikiaio, typically serve 14-16 individual 5-acre lots. (Kikiaio only serves 8 lots currently because it has 5-acre lots on only one side of the street.) The 5-acre lots are potentially subdividable to 4-5 lots each because of the one-acre zoning. Although each variance has to be considered on its own merits, it would be difficult for a decision on the present variance not to be a precedent for a decision on future variance requests within Unit II. Like the present applicant, the owners of lots within Unit II have potentially subdividable property that cannot be subdivided without expensive road improvements under the R-34 Standard Detail. If a precedent is set that all lots can be subdivided to one acre by variance, without substantial improvements, there is a potential for 300-400 lots in Unit II, greatly increasing the possible demands upon the side roads and upon Kapoho Kai. In addition to the problems that this would cause for the infrastructure within Units I and II, it is very questionable from the standpoint of overall land use. The subdivision is within Lava Hazard Zone 1 (highest risk).

At the same time, it may be reasonable, depending upon the circumstances, for lot owners within Unit II to be able to create an additional lot with modest improvements to the roads fronting their property, and the present variance should not foreclose the decision on subsequent variances.

**Findings and Decision.** Based on the foregoing, the Planning Director finds that there are special or unusual circumstances applying to the subject real property which exist either to a degree which deprives the owner or 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; that there are no other reasonable alternatives that would resolve the difficulty; and that the variance will be 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, if it is approved with the following conditions and requirements:

1. The subdivider, owners, their assigns, or successors shall be responsible for complying with all stated conditions of this variance.
2. The subject property has an irregular shape, which makes it difficult to create lots of an even size. Therefore, although the intent of the variance is to hold the overall density of the subdivision to lots of three acres in size, the applicant may include not more than one lot of 2.0 acres in size. The applicant shall submit a revised preliminary plat map with lots conforming to the conditions in this variance.
3. The applicant shall improve Kikiao St. by making an oil-treated surface, as shown in Std. Detail R-39, but 10' in width, from Kapoho Kai to the southern boundary of the last lot created by the subdivision.
4. The applicant shall submit a revised cost estimate for the purpose of determining the validity of the SMA minor permit.
5. The subdivider, owners, their assigns, or successors understand that the lots arising out of SUB 2000-0153 will use and maintain the roads to and within the subject TMK property on their own without any expectation of governmental assistance to maintain the access easements or any other access and non-dedicable roadway improvements within the subdivision.

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6. 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 revised tentative subdivision approval and prior to receipt of final subdivision approval of SUB 2000-0153. 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 within the existing TMK property designated on the subdivision application's (SUB 2000-0153) final plat map.
  - b. The subject property or any of the proposed lots created by the proposed subdivision may not be made subject to a condominium property regime.
  - c. The owners understand that the lots created by SUB 2000-0153 have been approved with this road variance, and that they will use and maintain the privately owned access roads to and within their property, on their own without any expectation of governmental assistance.
  - d. The owners, their assigns or successors, including any subsequent owners, agree that the lot is suitable for its intended purposes, and that there are no special or unusual circumstances applying to the subject real property which exist either to a degree which deprives the owner 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, and there are, therefore, no grounds upon which to seek a further variance from the Subdivision Code to allow further subdivision of the property.



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7. 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, 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.

Because the granting of the variance contains a number of significant conditions, the applicant has the right to appeal the variance decision/conditions. Therefore, in accordance with a recent charter amendment and Ordinance No. 99-112, the applicant or successor may appeal the director's decision and variance conditions. You may request the following:

- (a) Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the date of the director's written decision, appeal the decision to the board of appeals.
- (b) A person is aggrieved by a decision of the director if:
  - (1) The person has an interest in the subject matter of the decision that is so directly and immediately affected, that the person's interest is clearly distinguishable from that of the general public: and
  - (2) The person is or will be adversely affected by the decision.
- (c) An appeal shall be in writing, in the form prescribed by the board of appeals and shall specify the person's interest in the subject matter of the appeal and the grounds of the appeal. A filing fee of \$250 shall accompany any such appeal.

The person appealing a decision of the director shall provide a copy of the appeal to the director and to the owners of the affected property and shall provide the board of appeals with the proof of service.

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- (d) The appellant, the owners of the affected property, and the director shall be parties to an appeal. Other persons may be admitted as parties to an appeal. Other persons may be admitted as parties to an appeal, as permitted by the board of appeals.

The board of appeals may affirm the decision of the director, or it may reverse or modify the decision, or it may reverse or modify the decision or remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

- (1) The director erred in its decision; or
- (2) The decision violated this chapter or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by and abuse of discretion or clearly unwarranted exercise of discretion.

As such, enclosed GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR.

Should you have any questions on the variance decision/conditions or wish to appeal the variance decision/conditions, please contact staff in our Hilo office by telephone (808) 961-8288.

Sincerely,



CHRISTOPHER J. YUEN  
Planning Director

CJY:pak

Wpwin60/Chris/Kapoho variance.doc Benjamas Seungsiri

Enclosure

xc: DPW-Engineering Branch  
DWS-Engineering Branch  
SUB 2000-0153