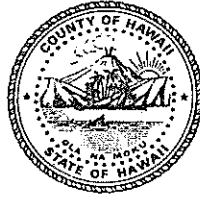


Harry Kim
Mayor



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 18, 2002

Mr. Gregory R. Mooers
MOOERS ENTERPRISES, LLC
P. O. Box 1101
Kamuela, HI 96743

Dear Mr. Mooers:

VARIANCE PERMIT NO. 1341 WH (VAR 02-040)

Applicants: PETER MESSMER/
MOOERS ENTERPRISES, LLC

Owner: PETER MESSMER

Request: Variance from Chapter 23, Subdivisions,
Private Roadway Improvements-
Tentative Subdivision Conditions-
August 3, 2001

Tax Map Key: 5-4-002:006 (SUB 01-0063)

After reviewing your variance application, the Planning Director certifies the approval of your variance request subject to conditions. The subject variance request is to allow a subdivision of the existing TMK property into seven (7) lots and allow the proposed 7-lots to have access via proposed nondedicable roadway improvements in lieu of the access and roadway requirements pursuant to conditions of tentative subdivision approval dated August 3, 2001. The variance request is from the subdivision roadway requirements pursuant to the Hawaii County Code, Chapter 23, Subdivisions, Article 6, Improvements, Division 2, Improvements Required, Section 23-86, Requirements for dedicable streets, and Section 23-88, Non-dedicable street; private dead-end street, respectively.

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BACKGROUND

1. **Location.** The subject property, Lot A consisting of 22.421 acres, being a portion of Royal Patent Grant 1544 to Maknoanoa, Marla and Kanelhalau, and situated at Puehuehu, North Kohala, Hawaii. The subject development has frontage along the Hawi-Niulii Road.
2. **Zoning.** The subject property is zoned Residential (RS-15) by the County and designated Urban ("U") by the State Land Use Commission (LUC). Property zoned RS-15 means a minimum building site area of fifteen thousand (15,000) square feet.
3. **Subdivision Request/PPM.** The applicant or owner submitted a subdivision application (SUB 01-0063) in 2001. The subdivision application's preliminary plat map (PPM-"Undated") was issued tentative subdivision approval on or about August 3, 2001 subject to tentative subdivision conditions.
4. **Variance Application.** Access to the proposed 7-lot subdivision will be via Hawi-Niulii Road and proposed "Easement A-2" identified on the final subdivision plat map dated- Revised October 1, 2001. The applicant, on behalf of the subdivider or owner submitted the subject variance request and variance application on or about June 24, 2002.
5. **Agency Comments and Requirements (VAR 02-040):**
 - a. The Department of Public Works (DPW) memorandum dated July 16, 2002 states:

"We reviewed the subject variance. We recommend the minimum entry pavement width be 20 feet for minimum distance of 50 feet within the subject property to minimize conflicts at the State Highway entry. Otherwise, we have no objections to the request.

If you have any questions, please call Kiran Emler at our Kona office, 327-3530."

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- b. The County of Hawaii Fire Department (HCFD) memorandum dated July 17, 2002. (Refer to memorandum in variance file).
- c. The State Department of Health (DOH) memorandum, dated July 26, 2002, states:

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

- 6. **Notice to Surrounding Owners.** The applicant submitted a list of property owners within 300 feet of the subject property with the variance application. Pursuant to the applicant's letter dated "January 29, 2002" received on July 16, 2002, it appears that a copy of a notice dated July 12, 2002 was mailed to the surrounding property owners within 300 feet of the subject TMK property on or about July 15, 2002 according to the affixed USPO receipt(s).
- 7. **Comments from Surrounding Property Owners or Public.** No further comments to the subject variance application were received from the agencies. The following objection letters was received:
 - a. Objection letter received from Mervyn M. and Adrian Ah Tou dated July 19, 2002. Concerns cited are: grading limits, roadway design and location, and drainage runoff or general development improvements.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In considering the applicant's background information, existing site conditions, and agency comments and requirements, the Planning Director has determined that there are special and unusual circumstances applying to the subject property or development which deprive the applicants/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

The decision alternatives include the following:

1. *Improve the roadways within the proposed access and roadway easements with dedicable roadway or roadway standards required by DPW and tentative subdivision approval.*
(Refer to the applicant's variance background and detailed written explanation).
2. *Install nondedicable or alternative private subdivision and roadway improvements.*
This is the selected alternative. In essence, this is a variance to allow seven lots on a private road built to the standards for a 6-lot subdivision. Grading and drainage concerns or private roadway improvements within the proposed subdivision development will be addressed by the applicant-subdivider-owner and installed in accordance with approved construction plans. Any necessary signage at the intersection between the easement and Hawi-Niulii Road will be installed by the subdivider or installed pursuant to any agency requirements. Road maintenance to the proposed easements and roadways within the subdivision will be privately addressed and shared among the proposed lot owners.

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 applicant is requesting a variance to allow the private access and roadway improvements in lieu of dedicable roadway improvements stipulated by the DPW memorandums and conditions of tentative subdivision dated August 3, 2001 pursuant to the requirements of Chapter 23, Subdivisions.

The surrounding land patterns and lot sizes are residential and agricultural. There is existing public access to the property and the proposed nondedicable roadways are appropriate for current zoning of the area and subdivider intent to limit the subdivision size. Therefore, after considering the circumstances, DOT requirements and DPW comments, and intent to install private nondedicable roadway improvements for the subdivision at this time, the Planning Director has concluded that the DPW roadway requirements and tentative subdivision approval conditions dated August 3, 2001 can be modified to allow the proposed 7-lot subdivision development.

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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 subject variance application was acknowledged by letter dated July 8, 2002. Additional time to consider agency comments, consider DPW comments received, and consider other variance applications was necessary. The applicants agreed to extend the decision dated to November 15, 2002, whereupon, on or before said decision date, the Planning Director shall render a decision on the subject variance.

The variance requested to allow a proposed 7-lot subdivision access and non-dedicable roadway improvements stipulated by the DPW memorandum and tentative subdivision approval dated August 3, 2001 shall be modified 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 7-lots arising out of SUB 01-0063 will use and maintain the proposed roadway access via "Easement A-2", nondedicable paved roadways, and grassed roadway shoulders 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 nondedicable roadway improvements within the subdivision.
3. A minimum 20 wide pavement shall be installed for the first 50 feet within Easement A-2 conforming to DPW-Standard Detail R-34 pursuant to the recent DPW memorandum dated July 16, 2002. The remaining nondedicable pavement-16 feet wide may be installed within Easement A-2 conforming to DPW-Standard Detail R-39. The subdivision construction plans and drainage plans shall be submitted to the affected agencies for review and approval.

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4. The applicants or owners shall submit water system construction plans and subdivision construction plans for the nondedicable roadway improvements and specifications for the alternative roadways pursuant to the variance application for approval by the affected agencies. The applicants or owners shall construct the subdivision improvements (or bond) such improvements pursuant to tentative subdivision approval or final subdivision approval.
5. 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 01-0063. 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 01-0063) 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 Road and Utility Easements serving the proposed lot(s) arising out of SUB 01-0063 or/and Palani Road or other adjoining public roads. Should the improvement district require acquisition of rights-of-way within the lots arising out of SUB 01-0063, 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.

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- c. Each lot created by SUB 01-0063 shall have no more than one dwelling or subject to density permitted by the Zoning Code. No ohana dwelling permit or ohana dwelling shall be permitted on any lot created by SUB 01-0063. The subject property or any of the proposed 7-lots created by the proposed subdivision may not be made subject to a condominium property regime.
- d. The owners understand that the lots created by SUB 01-0063 have been approved with this road variance, and that they will use and maintain the privately owned access roads to and within their property, water system, and drainage improvements on their own without any expectation of governmental assistance, including any road improvements within Road Easement A-2.
- 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 of the private roadway and/or filling of any and all rutted areas and "potholes", mowing of the grassed roadway shoulders within Road Easement "A-2" to ensure that existing drainage patterns are maintained and any soil runoff within and along "Easement A-2" does not affect the proposed lots, surrounding property or immediate areas.

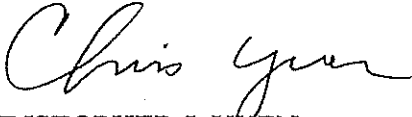
- f. In the event that there are any amendments or changes to the subdivision after the agreement is signed, the applicant shall be responsible for informing the County Planning Department of such amendments or changes so that the agreement can be amended concomitantly. Further, the written or recorded 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.
6. 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.

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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,



CHRISTOPHER J. YUEN
Planning Director

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xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB 01-0063
Planning Dept.-Kona
Mervyn M. Ah Tou, et al.