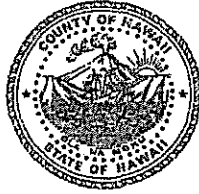


Harry Kim  
Mayor



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

August 4, 2003

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
P. O. Box 1720  
Kailua-Kona, HI 96745-1720

Dear Mr. Triantos:

**VARIANCE PERMIT NO. 1376 WH (VAR 03-010)**  
**Agent:** ROBERT D. TRIANTOS, ESQ.  
CARLSMITH BALL, LLP  
**Applicants:** EDWARD J. RAPOZA, ET AL.  
**Owners:** EDWARD J. RAPOZA, ET AL.  
**Request:** Variance from Chapter 23, Subdivisions,  
Tentative Subdivision Condition(s)  
Roadway Requirements  
**Tax Map Key:** 7-6-011:003, (SUB 00-0210)

After reviewing your variance application, the Planning Director certifies the approval of your variance request with conditions. The subject variance request is to allow a subdivision of subject TMK property, without meeting all roadway improvements stipulated and required by the Department of Public Works (DPW) requirements pursuant to their memorandums to the proposed 6-lot subdivision application (SUB 00-0210). The applicant is requesting a variance from certain conditions of revised tentative subdivision approval dated August 7, 2002 and other requirements pursuant to the Hawaii County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-86, Requirements for dedicable streets.

### BACKGROUND

1. **Location.** The subject TMK property(s), Lot 1, Allotment 45 of the Holualoa 1<sup>st</sup> and 2<sup>nd</sup>. Hui Partition (Makai Section) contains 5.00 acres, is a portion of R.P. 4475, L.C. Aw. 7713, Ap. 43 to V. Kamamalu, and situated at Holualoa 1<sup>st</sup> and 2<sup>nd</sup>, North Kona, Hawaii.

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2. **Zoning.** The subject property is zoned Residential and Agricultural Districts (RA-.5a) by the County and designated Rural ("R") by the State Land Use Commission (LUC). Property zoned RA-.5a means a minimum building site area one-half acre.
3. **Subdivision Request/PPM.** The applicant submitted a 6-lot subdivision (SUB 00-0210). The subdivision application's revised preliminary plat map (PPM) is dated April 18, 2002. Revised tentative subdivision approval to the revised 6-lot PPM was granted pursuant to letter and conditions dated August 7, 2002.
3. **Variance Application.** The variance request and application is from the proposed subdivision's roadway requirements stipulated by the DPW memorandum dated July 22, 2002 and tentative subdivision letter and conditions dated August 7, 2002, respectively, in the subdivision file (SUB 00-0210).
  - Documented access to the subject TMK property and proposed subdivision (SUB 00-0210) via a 30 feet wide easement created in 1963 and a 10 feet wide paved roadway located within a series of 30 feet wide easements and a "TRAIL" pursuant to the final subdivision plat map approved on June 16, 1980 (SUB 4482) and "TRAIL" (Ala Kauwila) pursuant to the preliminary plat map.

According to the DPW and Planning Department's preliminary subdivision approval letter dated August 7, 2002, the subdivider is required to provide a 20 feet wide paved dedicable roadway with paved shoulders and swales within a minimum 50 feet wide easement.

- In lieu of providing paved roadway improvements required by the DPW and tentative subdivision condition(s) issued to the PPM dated March 28, 2002, the applicant is requesting a variance to construct a continuous 16'-wide non-dedicable paved roadway, grassed shoulders, and drainage improvements within a 30-foot wide road access and utility easement (EASEMENT 1) within the proposed subdivision identified on 4-proposed lots (PPM) and utilize alternative subdivision access via Hualalai Road via the 1963 easement or the 10 feet wide A.C. Pavement-driveway roadway within the 30 feet wide easements (Note: 40 feet wide R-O-W, when including the located on those lots created in 1980 and within the "TRAIL" according to the final subdivision

map (Revised March 10, 1980) in SUB 4482. The 10 feet wide driveway between Hualalai and the proposed subdivision will be expanded to 16 feet pavement.

- In addition to the access and roadway improvements, public water to the proposed subdivision will be provided and installed within the respective easement(s) and "Trail" and drainage improvements to "capture and absorb" any water runoff by utilizing this alternative access and route and other safety measures will be addressed and installed (or bonded) by the applicant or subdividers prior to final subdivision approval. (Refer to the DPW comments cited below).

The applicant submitted the subject variance application, variance submittals, and filing fee on or about January 28, 2003.

5. **Agency Comments and Requirements WH(VAR 03-010):**

- a. The County of Hawaii Fire Department (CHFD) memorandum dated March 5, 2003, was received. (Refer to DOH memorandum in variance file).
- b. The State Department of Health (DOH) memorandum dated March 7, 2003 states in part:

"Underground Injection Systems (Ph. 586-4258) which receive wastewater or storm runoffs from the proposed development need to address the requirements of Chapter 23, Hawaii State Department of Health Administrative Rules, Title 11, "Underground Injection Control."

- c. The Department of Public Works (DPW) memorandum dated March 9, 2003, states in part the following:

"The Planning Director has forwarded the variance request with a memo implying the request is for 9 (sic) lots in lieu of the maximum 6 lots on a non-dedicable street meeting the requirements of Section 23-88. With that understanding we have no objections to the subject variance request with the following conditions:

1. All storm drainage generated by the development shall be disposed of on-site in a manner meeting with the approval of the DPW in accordance with the Storm Drainage Standards. A drainage report will be required.
  2. According to our Highway Maintenance Division, the Alanui Kawila Trail is maintained by the County and is therefore a County public roadway. The private road shall be stop controlled and pavement radii and the appropriate vertical and intersection sight distance shall be provided at the intersection with Alanui Kauwila trail from Hualalai Road.
  3. Provide a 25-foot pavement radii at the private road intersection with Hualalai Road and a minimum pavement width of 20 feet to the Alanui Kauwila trail from Hualalai Road.
  4. No entry gate shall be installed on the subdivision road within 40 feet of the Hualalai Road right-of-way or Alanui Kawila Trail.
  5. The subdivision road shall not be considered for dedication to the County unless improved to meet County standards for dedicable roadways.
  6. The applicant shall hold harmless and defend the County from any claims or legal action taken as a result of allowing the variance from the Subdivision Code.”
6. **Notice to Surrounding Owners.** The applicant submitted a copy of a notice mailed to property owners within 300 feet of the subject property(s), list of surrounding property owners, and proof of mailing said notice to surrounding property owners on March 3, 2003. It appears that the notice was mailed on or about February 28, 2003.
7. **Comments from Surrounding Property Owners or Public.** No written objections to the subject variance application were received from surrounding property owners or public. No other agency comments were received.

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### SPECIAL AND UNUSUAL CIRCUMSTANCES

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 development of the subject property:

1. Existing and Proposed Residential/Agricultural Uses. The applicants are proposing a 6-lot subdivision of property fronting the Alanui Kawila Trail and access rights over and across 3-other TMK property(s) within the vicinity of the proposed subdivision. Access to the proposed 6-lots will be via Hualalai Road via paved roadway located within a series of existing and proposed easement (EASEMENT 1) and existing paved roadway improvements located over and across a public "Trail" (Alanui Kawila Trail). No further subdivision of the 6 resultant lots created by proposed subdivision (SUB 00-0210) will be possible without rezoning.
2. Proposed Lot and Subdivision Road Improvements. The applicant, on behalf of the owners, is requesting a variance to allow a 16-foot wide non-dedicable road to be installed within a series of 30-foot wide road and utility easement(s) and upon a public "TRAIL". The access improvements include grassed shoulders and swales, and installation of drainage improvements within the easements. In sum, 9 lots will be dependent on this privately owned roadway and maintained by the users.

The existing paved roadway servicing the 3-lot subdivision approved in 1980 (Approximately 12 feet wide pursuant to the applicant's background) within the 30 feet wide easement established in 1963 will expanded to 16 feet wide and a non-dedicable paved 16-foot wide roadway within the proposed subdivision will installed in accordance with the non-dedicable pavement width standards (R-39) for A-1a or residential subdivisions. Given the limitations of the trail and existing easement width(s) and permission to utilize an alternative access via Hualalai Road via the existing paved 10 to 12 feet wide pavement within an easement (Created in 1963) or series of easements (SUB 4482) located on the 3 lots created in 1980, and current surrounding (residential) vehicular usage from surrounding subdivisions and/or adjoining areas, the variance request is reasonable. The proposed alternative access route via Hualalai Road and privately owned non-dedicable roadway and drainage improvements within the proposed residential/agriculture 6-lot subdivision will be accessible by conventional vehicles (with adequate roadway clearance) and emergency vehicles and installed pursuant to approved subdivision construction plans and other requirements of tentative subdivision approval.

## **ALTERNATIVES**

The decision alternatives include the following:

1. *Improve or widen the existing or proposed easement(s) and adjoining public trail (right-of-way) and construct dedicable roadway standards meeting the DPW.* The costs associated to widen easements on property outside the applicant's control or expand the Alanui Kawila Trail and construct dedicable roadway improvements within the easements/Trail would be substantial and unfair when weighed against the proposed residential or agricultural uses.
2. *Reasonable subdivision roadway improvements to allow lot access and meet minimal emergency vehicular and safety requirements.* This is the selected alternative. It appears that an alternative access to the property was created in 1963. Subsequent roadway improvements were installed within a 3-lot subdivision (1980-SUB 4482). The existing 10 feet driveway within the 3-lots and within or upon the "TRAIL" (Alanui Kawaila Trail) is currently being utilized as access to the existing property. A 16 feet wide paved road will be installed between Hualalai road up to the terminus within EASEMENT 1. The 10 feet wide paved roadway will be expanded or widened to 16 feet pavement. Other subdivision utilities, drainage improvements, and safety measures within the existing 40 feet wide R-O-W, public Trail, and EASEMENT 1 to insure safe ingress and egress to the subdivision and users of the non-dedicable privately owned roadway will be identified and installed in accordance with approved construction plans according to DPW and prior to final subdivision approval.

## **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 utilize and expand the existing paved 10-foot wide roadway and roadway improvements installed over and across the Alanui Kawila Trail and permit installation of non-dedicable roadway improvements. The variance request is from some of the subdivision improvements stipulated by the DPW memorandum and tentative subdivision approval letter to allow the proposed 6-lot subdivision. The variance will enable 3 existing lots and 6-proposed lots to have access via Hualalai Road via a non-dedicable 16-foot wide paved roadway and other subdivision improvements installed

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within a series of 30 feet wide road easements located within a 40 feet wide R-O-W created in 1980, public "Trail", and EASEMENT 1 within the proposed subdivision.

The surrounding areas are residential or agricultural in character. The alignment of the nearest public roadway (Hualalai Road) and location and width of the Alanui Kawila Trail fronting the proposed subdivision have not significantly changed since 1963-1967. Existing vehicular access to the existing property(s) and neighborhood is appropriate for the property's zoning (RA-.5a) and intentions by the subdivider to maintain low intensity residential/agricultural zoning. By granting this variance, there should be no adverse impact to adjoining properties or public rights-of-way. Road maintenance or upkeep within the existing and proposed privately owned roadway easement (EASEMENT 1), and other maintenance of the entryway, pavement/stripping, grassed shoulders, and required drainage and safety improvements will be privately installed and maintained by the users.

Therefore, after considering the circumstances and background presented by the applicant (agent), evaluation of traffic patterns to and around the surrounding area, and evaluation of the proposed alternative access and paved roadway improvements to existing lots and proposed subdivision, the Planning Director finds that the variance request is reasonable and some of the agency requirements or tentative approval subdivision conditions can be deleted or modified.

#### **DETERMINATION-VARIANCE CONDITIONS**

The variance request and application was acknowledged by letter dated February 14, 2003. Additional time to study previous variance approvals and confer with the applicant regarding pavement condition and status of waterline improvements within the existing (30 feet easement and 10 feet wide future R-O-W), proposed 30 feet easement within the proposed subdivision, and the Trail fronting the proposed subdivision was necessary. The applicant granted an extension of time to August 8, 2003 to complete the variance background and render a variance decision (Agent: Robert D. Triantos, Esq. and Royden Yamasato).

Based on the foregoing findings, this applicant's 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 6-lot subdivision without providing the minimum roadway improvements stipulated by the DPW memorandum or tentative subdivision conditions dated August 7, 2002 to allow the 6-lot subdivision 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 6-lots arising out of SUB 00-0210 will use and maintain the existing access easement, proposed easements, and other rights-of-way without any expectation of governmental assistance to maintain the private access improvements within the existing easement and proposed subdivision.
3. ROAD VARIANCE: The access roadway within an adjoining subdivision and access to the existing property(s) is over and across the Alanui Kawila Trail was previously improved by others. 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 00-0210. This agreement shall contain the following deed language, being covenants, conditions, and restrictions, which affect the entire property and/or proposed 6-lots arising from the approval of the subdivision application (SUB 00-0210) 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 Alanui Kawila Trail and/or private road easements located outside or proposed road and utility easements designated on the subdivision application's (SUB 00-0210) 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 Hualalai Road, Alanui Kawila Trail or rights-of-way serving the proposed lot(s) arising out of SUB 00-0210. Should the improvement district require acquisition of any rights-of-way outside the subdivision or within the lots arising out of SUB 00-0210, 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. The owners understand that the lots created by SUB 00-0210 have been approved with this road variance, and that they will use and maintain the privately owned on-site driveways and privately owned access roadway to and within their property, water system, and drainage improvements on their own without any expectation of governmental assistance, including any paved road improvements within or on and across the Alanui Kawila Trail or any other privately owned easements/rights-of-way related to the proposed subdivision.
- d. The lot owners agree to participate in any original road maintenance agreement affecting the previous parcels or proposed lots arising out of the subdivision. Said maintenance shall include, without limitation, grass cutting (mowing), timely repair and/or filling of any and all rutted areas and "potholes" within the 16-foot wide non-dedicable pavement, and mowing of existing roadway shoulders within the road easements created by SUB 00-0210 and/or other privately owned easements providing access to the proposed lots arising out of SUB 00-0210.
- e. Any lots created by SUB 00-0210 may not be made subject to a condominium property regime. Each lot created by SUB 00-0210 shall have no more than one dwelling. No ohana dwelling or "additional farm dwelling" or second dwelling unit shall be permitted on any lot created by SUB 00-0210.
- 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.

Robert D. Triantos, Esq.  
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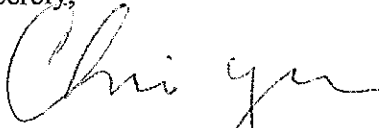
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4. The owners, their assigns or successors shall pay any outstanding real property taxes due and comply with all other applicable State and County rules and regulations pertaining to subdivisions, tentative subdivision approval conditions, approved subdivision construction plans, variance conditions, and land use.
5. Any outstanding and active building permits issued by the DPW shall be addressed and closed prior to final subdivision approval. The location of all permitted and existing building improvements are subject to the minimum building yards pursuant to the Hawaii County Zoning Code.

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 00-0210