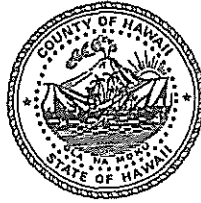


Harry Kim
Mayor



Christopher J. Yuen
Director

Roy R. Takemoto
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

June 27, 2005

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

Mr. Steven S.C. Lim, Esq.
CARLSMITH BALL
P. O. Box 1720
Kailua-Kona, HI 96745-1720

Dear Mr. Lim:

VARIANCE PERMIT NO.1514 VAR 03-022

Agent: STEVEN S.C. LIM, ESQ.
Applicants: CARLSMITH BALL, LLP
Owners: SYLVESTER V. & DIANE S. QUITIQUIT
Request: Variance from Chapter 23, Subdivisions,
Road Improvements Required
Tax Map Key: 6-4-001:161, Lot C, (SUB 01-0105)

After reviewing your variance application, the Planning Director certifies the approval of your variance request with conditions. The variance permits a 2-lot subdivision (SUB 01-0105) of the subject tax map key property utilizing existing the existing paved roadway (13 feet to 14 feet wide) within an 18-foot wide privately owned roadway lot fronting the property in lieu of expanding and installing paved roadway improvements stipulated by tentative subdivision approval dated November 7, 2001 or roadway requirements pursuant to the Hawaii County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-88, Non-dedicable street; private dead-end street, (a) (b) (c), maintenance fund.

BACKGROUND

1. **Location.** The subject property, Lot C consisting of 1.013 acres, being portions of Lots 52 and 53 of the Puukapu Homesteads, First Series and Grant 4210 to Elizabeth W. Lyons, is situated at Puukapu, Waimea, South Kohala, Hawaii.

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2. **State and County Zoning.** The subject property is part of a larger property that was rezoned from Agriculture "A" to Rural "R" by Ordinance No. 98-22 and Agricultural (A-5a) to Residential and Agricultural (RA-.5a) by Ordinance No. 98 23 subject to conditions, respectively, on or about March 16, 1998 (Effective Date).

Access to the property, adjoining property(s) or surrounding areas in 1998 is via the privately owned or "ROAD AREA" containing 0.455 acre. This roadway area was created in 1957 and between 15.00 feet + wide at the intersection with the "Government Main Road" to 30.00 feet wide at the proposed subdivision. (Later, this "ROAD AREA" or unnamed road "lot" was renamed (?) "Lot K-2-B-2"; see discussion below).

The subject TMK property (Lot C) was created in 2000 by SUB 7278. (Refer to discussion below).

3. **Subdivision Request/PPM.** The applicant-owners submitted subdivision application (SUB 01-0105) and Preliminary Plat Map (PPM) dated August 21, 2001. Public access from the Mamalahoa Highway to the proposed subdivision is via a privately owned roadway "Lot K-2-B-2" and approximately 116 feet + of frontage along the "Homestead Road".

Further action on the proposed 2-lot subdivision application is being deferred pending resolve of the subdivision's roadway requirements and resolve of the applicant's request for a subdivision variance.

4. **Variance Application.** The applicant-owner submitted a variance application on or about March 19, 2003. The variance request is from the minimum roadway requirements to the PPM stipulated by tentative subdivision approval (roadway condition "5." dated November 7, 2001).

The DPW comments and memorandum regarding the PPM states in part:

"Access to subdivision from Mamalahoa Hwy shall be via TMK: 6-4-001:093, a private right-of-way (Condition F, Change of Zone Ordinance No. 98 23).

- a. §23-88. Construct minimum 16-ft wide nondedicable pavement within a minimum 20-ft width right-of-way conforming to Std Det R-39. §23-79. Submit construction plans and drainage report for review and comment.

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- b. §23-63. Verify proposed subdivision's legal access over the private road.", and;

Condition F or Ord. No. 98 23 reads as follows:

- "F. Access to the subject property from Mamalahoa Highway Road shall meet with the requirements of the Department of Public Works. The entrance roadway sight distance shall meet with the requirements of the Statewide Design Manual.
1. Access to the commercial zoned area from Mamalahoa Highway on the eastern (Hamakua) side of the subject property.
 2. Access to the RA zoned area from Mamalahoa Highway shall be from the private road located on the eastern side of the subject property."

The variance submittals include color or digital photographs of the access to the proposed subdivision from Mamalahoa Highway and privately owned roadway lot "Lot K-2-2-B-2".

- In lieu of expanding the privately owned roadway lot or paved roadway improvements within roadway lot "Lot K-2-B-2" fronting the TMK property, the subdivider's agent contends that the existing paved roadway (13 to 14 feet wide) within the privately owned roadway lot and related easements (18 feet wide) are adequate for the proposed 2-lot subdivision.
- The variance is from the DPW's comments dated October 10, 2001 or tentative approval (roadway) conditions requiring the subdivider to widen the privately owned roadway lot to at least 20 feet and install minimum 16-foot wide non-dedicable paved road within the privately owned roadway lot. According to the subdivision application's PPM, Lot C has frontage along the Homestead Road; and, pursuant to the Department of Water Supply (DWS) memorandum dated October 1, 2001 (SUB 01-0105), water for the proposed subdivision is available "from an existing 6-inch line waterline along the 30-foot-wide Homestead Road fronting the property".

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5. Agency Comments and Requirements WH (VAR 03-022):

- a. The State Department of Health (DOH) memorandum, dated May 20, 2003, states:

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

- b. The Department of Public Works (DPW) memorandum dated June 18, 2003, states in part:

"We reviewed the subject variance. According to our inspector, it appears there is (sic) at least 5 dwellings and a farming operation are using the road to access Mamalahoa Highway. The existing width is inadequate, especially at the Mamalahoa Highway approach. If the variance is to be granted, we recommend the paved entry approach be widened to 20 feet for a minimum length of 50 foot from the highway right-of-way, free of obstructions. Provide return radii of 15 feet. Paved turnouts should be provided at 300 foot intervals of sufficient width to allow 2-way traffic."

Note: The DPW memorandum dated October 10, 2001 in SUB 01-0105 states in part the following:

- "2. Access to subdivision from Mamalahoa Hwy shall be via TMK: 6-4-001:093, a private right-of-way (Condition F, Change of Zone Ordinance No. 9823).
- a. §23-88. Construct minimum 16-ft wide nondedicable pavement within a minimum 20-ft width right-of-way conforming to Std Det R-39. 23-79. Submit construction plans and drainage report for review and comment.
- b. §23-63. Verify proposed subdivision's legal access over the private road."

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6. **Notice to Surrounding Owners.** The applicant submitted a copy of a notice dated March 1, 2004 sent to surrounding property owners within 300 feet of the subject property(s). Pursuant to the submittals and postal receipt received on March 8, 2004, it appears that the notice was mailed to surrounding property owners on March 2, 2004.
7. **Comments from Surrounding Property Owners or Public.** The following comments or objections to the subject variance application were received from surrounding property owners:
 - a. Objection letter from Pamela C. Davis, Et al. dated May 21, 2003.
 - b. Letter or comments dated May 23, 2003 from Harry Morita, Et al. (Note: Vehicular access to the subdivision is available to the proposed subdivision via the Homestead Road Right-of-Way).
 - c. Letter from Pamela C. Davis, dated August 8, 2003, withdrawing objection to application for a variance.

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 access and proposed alternative roadway improvements. (Please refer to applicant's reasons and background report).
2. Proposed Lot and Subdivision Road Improvements. The proposed subdivision has frontage along a public right-of-way (Homestead Road) and can access the Mamalahoa Highway via the privately owned and paved roadway lot fronting the subject TMK property. The variance conditions set forth at the end of this letter will require limited or safety roadway improvements.

ALTERNATIVES

The decision alternatives include the following:

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1. *Widen and install additional pavement improvements within the privately owned right-of-way lot- "Lot K-2-B-2" according to DPW or the roadway requirements stipulated by tentative subdivision approval conditions dated November 7, 2001. The applicant-subdivider is being required to widen and improve (pave) a privately owned roadway lot created on or about 1957 sandwiched between the Mamalahoa Road and Homestead Road rights-of-way. The cost(s) associated to acquire additional right-of-way from adjoining property owners to widen the road lot created in 1957 or expand a portion of "Lot K-2-B-2" and install the minimum 16-foot wide paved roadway improvements, relocation of utilities, etc. pursuant to DPW's memorandum would be substantial and unnecessary after considering other special and unusual circumstances revealed by previous land use and subdivision approvals.*

The following chronology and some related land use and/or subdivision approvals related to the subject TMK property include and reveal the following:

- a. *SUB 1176 (Approved- September 9, 1957). Note Final Plat Map (FPM) identifies a "ROAD AREA" or Roadway consisting of "0.455 Acre". This "ROADWAY" or roadway lot was renamed (?) or later referred to as "Lot K-2-B-2". The 1957 subdivision map shows the "ROAD AREA" is between the Government Main Road- "Mamalahoa Highway" and a small parcel called Government Land, containing "0.281 Ac.". Another public map, dated May 9, 1958, purports that the property (TMK: 6-4-01:114) consists of "0.243 Ac.".*
- b. *SLU 995 (Ord. No. 98 22-Effective March 16, 1998) and REZ 880 (Ord. No. 98 23-Effective March 16, 1998). The subject TMK property is part of "PARCEL 2", containing 1.632 acres was rezoned from Agriculture "A" to Rural "R" (no conditions) and rezoned to RA-.5a subject to rezoning conditions, respectively. (Note: Parcel 2 appears be bounded on the "mauka" side (Northerly) by a small sliver of property zoned "A-1a").*
Condition F states:
"Access to the subject property from Mamalahoa Highway Road shall meet with the requirements of the Department of Public Works. The entrance roadway sight distance shall meet the requirements of the Statewide Design Manual.
 1. *Access to the commercial zoned area from Mamalahoa Highway shall be on the eastern (Hamakua) side of the subject property.*
 2. *Access to the RA zoned area from Mamalahoa Highway shall be from the private road located on the eastern side of the subject property."*

- c. *SUB 7018 (FPM approved-September 1, 1998). Lot G-3-A created consisting of 3.118 acres. (Note: ROADWAY-"Various Owners" and graphic representation of the position of the privately owned roadways between the Mamalahoa Highway and "Lot K-2-B". "Lot K-2-B" is sandwiched between the privately owned "ROADWAY" and the 30-Foot Wide Homestead Road Right-of-Way. No roadway improvements were required. The subject TMK property (Lot C) was created by a subdivision of Lot G-3-A in 2000 (SUB 7278) .*
- d. *REZ 924 (Ord. No. 99-114-Effective October 8, 1999). The property "PARCEL 1", containing 1.488 Acres, immediately adjoining "PARCEL 2" (REZ 880) is rezoned to RA-5a and subject to rezoning conditions. (Note: Parcel 2 (REZ 880) and Parcel 1 (REZ 924) are bounded on the "mauka" side (Northerly) by a small sliver of property zoned "A-1a"). Condition E states:
"Access to the property from the Mamalahoa Highway shall meet with the requirements of the Department of Public Works."*
- e. *SUB 7278 (FPM approved June 8, 2000). The subject TMK property "LOT C", containing 1.013 acres. (Note: The ROADWAY Lot (SUB 7018) is denoted or called "Lot K-2-B-2" and is clearly "sandwiched" between the Mamalahoa Highway and Homestead Road (30 feet wide) Rights-of-Way. Pursuant to the DPW memorandum dated December 1, 1999, the subdivider was required to expand and improve the privately owned roadway "Lot K-2-B-2". However, according to a follow-up letter to the Planning Director, regarding the DPW requirements (SUB 7278 file), dated January 19, 2000, the subdivider's agent states in part:*

"In our discussion I reviewed the comments that DPW had made regarding this application, specifically the requirement to provide access from Mamalahoa Highway when the subject lots have direct access to the Homestead Road at the rear of the property. You indicated that there should be no such requirements for the subdivision when lots have legal access already.

This being the case I ask that you disregard comment #2 of DPW's memorandum to you dated December 1, 1999."

Subsequent to the receipt of this letter, the tentative subdivision was issued on January 4, 2000 without any roadway requirements or conditions to improve "Lot K-2-B-2". SUB 7278 creating Lot A, Lot B, and subject TMK property- Lot C was approved on June 8, 2000.

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- f. *SUB 7330. (FPM approved October 25, 2000). Subdivision of Lot B (SUB 7278) with direct access via Homestead Road is approved. No roadway improvements to "Easement 2" or the Homestead Road required.*
 - g. *Proposed subdivision of Lot C (SUB 01-0105). PPM, dated August 23, 2001, shows property has frontage along "Lot K-2-B-2" and frontage along Homestead Road. DPW, memorandum, dated October 10, 2001 requires that access to subdivision via Mamalahoa Highway and TMK: 6-4-001:093 ("Lot K-2-B-2") be expanded and further pavement improvements.*
2. *Reasonable subdivision improvements to insure that access and road or driveway access to proposed lots are provided; and, that access to proposed lots are accessible by standard and emergency vehicles. In view of previous or similar subdivision cited above, e.g., SUB 7278 and SUB 7330, the proposed 2-lot subdivision of Lot C has other access options. The property has the option of access to the Mamalahoa Highway via the privately owned roadway lot "Lot K-2-B-2" and access to the Mamalahoa Highway via "Homestead Road". Since proposed Lot C-1 of the 2-lot pending subdivision application (SUB 01-0105) has frontage along the 30-foot wide Homestead Road and can access the Homestead Road directly, access to the subdivision is not limited to the "private road located on the eastern side of the subject property". After considering the previous action or earlier determination by the Planning Director to approve SUB 7278 and circumstances to approve SUB 7330, the DPW roadway requirements and/or tentative approval "roadway" condition-Condition No. 5, dated November 7, 2001 (SUB 01-0105) to improve the existing private roadway "Lot K-2-B-2" are not appropriate or necessary, and, can be deleted.*

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. In lieu of improving the privately owned roadway lot or installing minimum roadway and providing additional non-dedicable pavement improvements to the roadway lot stipulated by the DPW memorandum dated October 1, 2001 and tentative subdivision approval conditions, respectively, the applicant is requesting a variance to delete the roadway requirements stipulated by tentative approval letter dated November 7, 2001, and, only require the necessary driveway improvements between the privately owned roadway lot and/or Homestead Road Right-of-Way in conjunction with construction of dwelling improvements-Building Permit process or permitted uses on the lots created by the proposed 2-lot subdivision.

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The proposed subdivision and adjoining areas are rural or agricultural in character (Photos of the neighborhood show vegetables are grown and evidence of small truck farm operations). However, accessibility to and within adjoining subdivisions has changed during the last 48 + years and residential development in the immediate neighborhood or community has dramatically changed during the last 20 years. It appears that the agencies ignored the presence or existence of Homestead Road fronting the subject tax map key property during review or deliberations to rezone the subject property (SLU 995/REZ 880) circa 1998 and adjoining property (REZ 924) circa 1999, respectively. Recognition of subject TMK property with frontage along or direct access to the Homestead Road (TMK: 6-4-001:060) was ignored by the DPW and other agencies during the rezoning and subdivision process. A 2-lot subdivision (SUB 7330) of property affected by (REZ 924) was allowed or permitted to access Homestead Road without providing any roadway within an access easement connecting the subdivision to the Homestead Road. As such, given that the property is essentially a "corner" lot and also fronts the Homestead Road and is similar to approved SUB. 7330 with direct access to Homestead Road, the roadway improvements stipulated by the tentative approval letter are not necessary. There should be no adverse impact by the proposed subdivision to use the existing privately owned and maintained roadway within the privately owned roadway lot fronting Lot C-"Lot K-2-B-2" (Note: The agent or subdivider submitted proof of ownership or interest in the privately owned roadway-"LOT K-2-B-2") and/or have direct access via the Homestead Road. Road maintenance for the paved roadway within the privately owned road lot, "Lot K-2-B-2", will continue to be privately addressed and shared among the owners and users. In addition, the subdivider or future lot owner(s) of proposed lot- "LOT C-1" has the additional driveway access option to access the Homestead Road.

Therefore, based on the representations made by the applicant, past land use approvals, and evaluation of the alternative access and traffic patterns to and around the subject TMK property, the Planning Director has concluded that the roadway requirements stipulated by the DPW memorandum to the subdivision and tentative subdivision condition-Condition No. 5, dated November 7, 2001 are not required and be deleted.

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.

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The subject variance application was acknowledged by letter dated May 13, 2003. Additional time to consider the DPW comments and past approved subdivisions within surrounding area was necessary. The applicant agreed to extend the decision dated to May 31, 2005 to allow the Planning Director time to complete the variance background report and render a decision on the variance request.

The variance request to delete the Condition-No 5 stipulated by tentative approval letter dated November 7, 2001 and allow proposed 2-lot subdivision to utilize existing access afforded by the privately owned roadway "Lot K-2-B-2" fronting the subdivision and/or direct access to Homestead Road (30-foot wide), is hereby approved 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 2-lots arising out of SUB 01-0105 will use and maintain the privately owned road lot, paved roadways, and grassed roadway shoulders and easements on or along "Lot K-2-B-2" on their own without any expectation of governmental assistance to maintain this existing access subdivision access or other paved roadway improvements within the privately owned roadway lot-"Lot K-2-B-2". Any signage at private intersections or near the Homestead Road required by the DPW shall be installed and minimum drainage requirements for the subdivision shall be addressed and met.
3. The future lot owner(s) agree to participate in any road maintenance agreement an/or pay their fair share to maintain the "ROAD AREA" lot created in 1957 or privately owned roadway lot-"LOT K-2-B-2".
4. The owners, their assigns or successors shall pay any outstanding real property taxes due, comply with remaining tentative subdivision conditions, and comply with State and County rules and regulations pertaining to building construction, 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

WRY/DSA:cd/je

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xc: DPW-Engineering Branch
SUB 01-0105
Planning Department-Kona
Pamela C. Davis, Et al.
Harry Morita, Et al.