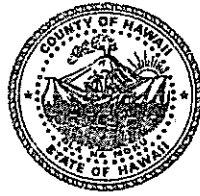


Harry Kim
Mayor



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

November 27, 2003

Muhammad Yunis, DVM
YUNIS FAMILY TRUST
RR 2 Box 3918
Pahoa, HI 96778

Dear Mr. Yunis:

VARIANCE PERMIT NO. 1396 (VAR 03-029)

Applicant: MUHAMMAD YUNIS AS TRUSTEE/
YUNIS FAMILY TRUST
Owner: YUNIS FAMILY TRUST
Request: Variance from Chapter 23, Subdivisions,
Minimum Roadway Requirements
Tax Map Key: 1-4-072:025, Lot 18, (SUB 02-0090)

After reviewing your variance application, the Planning Director certifies the approval of your variance request with conditions. The subject variance request permits a 2-lot subdivision (SUB 02-0090) of the subject tax map key property subject to amended roadway conditions and tentative approval conditions. The variance is from certain conditions of tentative subdivision approval dated April 15, 2003 and other requirements pursuant to the Hawaii County Code, Chapter 23, Subdivisions, Article 3, Division 3, Lots, Section 23-34, Access to lot from street, and Article 6, Division 2 Improvements Required, Section 23-88, Standard for non-dedicable street; escrow maintenance fund, (a) (b) (c).

BACKGROUND

1. **Location.** The subject property, Lot 18 consisting of 4.996 acres, Vacationland Hawaii, Unit II, File Plan 920, is situated at Kapoho, Puna, Hawaii.

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2. **Zoning.** The subject property is zoned Agricultural (A-1a) by the County and designated Agriculture ("A") by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The applicants submitted a 2-lot subdivision (SUB 02-0090). The subdivision application's revised preliminary plat map (PPM) is dated September 12, 2002. Tentative subdivision approval to the revised PPM was granted on April 15, 2003 with conditions.
4. **Variance Application.** The subject variance application was acknowledged by Planning Department letter dated May 13, 2003. Access to the proposed subdivision is via the Kaimu-Kapoho Road (Public) via "Kapoho Kai Drive" and "Kumuloulu Road". The variance request is from roadway requirements stipulated by a DPW memorandum dated April 11, 2003, in subdivision file (SUB 02-0090).

For the record, Kapoho Kai Street or "Drive" is a private road within a 60 feet right-of-way serving both the Vacationland Unit I and Unit II Subdivision(s). Kapoho Kai right-of-way/pavement is maintained by the Vacationland Hawaii Community Association ("VHCA"). The pavement or "road", within the 60' wide right-of-way, consists of 18 feet wide chip-sealed surface. The subject TMK property (corner lot) also fronts Kumuloulu Road. Kumuloulu Road is a "gravel" road situated within a 40 feet wide right-of-way. Kumuloulu Road is part of a network of privately owned roadways within the Vacationland Unit II Subdivision. The roadways within Vacationland Unit II are also owned and maintained by the VHCA.

- In lieu of constructing a 20 feet wide dedicable pavement from Kaimu-Kapoho Road to the northerly boundary of the proposed subdivision. The applicant is requesting a variance to utilize existing non-dedicable paved and gravel roadway located within the 60 feet and 40 feet wide private road rights-of-way fronting the subject TMK property.
- In addition to the cost to provide and install the minimum water system requirements, the applicant cites the expense and high costs to install additional or "dedicable" roadway infrastructure improvements. The applicant feels that the current private roadways are sufficient to accommodate conventional and emergency vehicular access to the proposed 2-lot subdivision. There is adequate room for conventional and emergency vehicles to pass and "dedicable" pavement improvements within the privately owned

rights-of-way are not warranted or necessary for the 2-lot subdivision (Refer to the cost estimates and color copy(s)-photographs of existing infrastructure).

5. **Agency Comments and Requirements (VAR 03-029):**

- a. The State Department of Health (DOH) memorandum, dated May 20, 2003, was received. (Refer to DOH memorandum in variance file).
- b. The Department of Public Works (DPW) memorandum dated June 5, 2003 states:

“We have reviewed the subject application and offer the following comment:

The improvements imposed on the access road are the minimum required for a subdivision street serving areas zoned for agricultural one acre (A-1a), according to Section 23-86 of the Hawaii County Code (HCC). To satisfy HCC, Section 23-34, the DPW still believes that the required improvements should be provided. However, should the Planning Director determine that the roadway’s existing condition is sufficient to support the subject subdivision, the DPW defers to that determination.

Should there be any questions concerning this matter, please feel free to contact Cres Rambayon in our Engineering Division at Ext. 8327.”

- c. The Hawaii County Fire Department (HCFD) memorandum, dated September 8, 2003 states:

“We have no comment to offer at this time regarding the above-referenced variance application.

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 May 22, 2003. It appears that the notice was mailed on or about May 21, 2003.

6. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. The following objection letters to the subject variance application were received:
 - a. Objection letter dated May 28, 2003 from Edith J. Schmidt, Trustee.
 - b. Objection letter dated May 29, 2003 from Don L. James.

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 Agricultural Uses. The proposed 2-lot subdivision could not support the costs to provide or construct "dedicable" pavement improvements required by the DPW.
2. Proposed Lot and Subdivision Road Improvements. The access to the area and privately owned roadways fronting the proposed subdivision were created before the Zoning and Subdivision Codes were adopted in 1967. Given the existing pavement/graveled roadway situation fronting the existing property, low vehicular usage from the subdivision and adjoining areas, the applicant's reasons for the variance, to a degree, are reasonable.

ALTERNATIVES

The decision alternatives include the following:

1. *Improve or install "dedicable" pavement within the existing privately owned rights-of-ways pursuant to the DPW specifications and requirements.* This alternative would require the applicant (owner/subdivider) to improve nearly 1500 feet of existing paved/gravel roadway within the privately owned rights-of-way to comply with the DPW memorandum to the subdivision. The costs associated to design and install the DPW and upgrade the public water system would be substantial and unfair when weighed against the owner's intent and other special and unusual circumstances cited by the applicant.

2. *Reasonable subdivision improvements to meet minimal emergency vehicular and safety requirements and alternative water system improvements.* This is the selected alternative. The width of the existing paved/gravel privately owned roadways are adequate for the proposed 2-lot subdivision. Recently, VAR 1358 was approved by the Planning Director on May 16, 2003 with conditions; requiring a subdivider to install a 10 feet wide oil-treated surface, utilizing specifications stipulated by DPW-Std. Detail R-39. In view of the size and nature of the proposed 2-lot subdivision application and similarity between the subject variance request and VAR 1358, similar or minimal road improvements within the Kumuloulu Road right-of-way for the proposed 2-lot subdivision are required. (See variance conditions).

The applicant will install the water meters and provide additional fire protection commensurate with the DWS memorandum. On site drainage concerns or other drainage improvements within the proposed subdivision development will be identified or addressed by the subdivider 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 are 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 the existing roadway located within the privately owned rights-of-ways fronting the subject TMK property. The variance request is from the subdivision requirements to construct "dedicable" paved roadway improvements stipulated by the DPW memorandum.

The surrounding areas are agricultural in character. The character of property's access fronting the fronting the subject property and immediate and surrounding areas have gradually improved over the last 30 years, largely in part, due to the effort by the owners of the privately owned rights-of-way and community organizations. By granting this road variance with conditions, there should be no adverse impact to adjoining properties or other users of privately owned easement network fronting the proposed subdivision. Road maintenance or upkeep to the privately owned paved and/or graveled roadway within the rights-of-way fronting the subdivision will be privately addressed and maintained by the users or lot owner(s).

Therefore, based on the representations made by the applicant, evaluation of the private roadway access and traffic patterns to and near the existing property(s), and other variance permits within

the immediate area, the Planning Director that the variance request is reasonable and some of the requirements stipulated by tentative approval can be deleted or modified.

DETERMINATION-VARIANCE CONDITIONS

The variance request and application was acknowledged by letter dated May 13, 2003. Additional time to study previous variance approvals and consider agency requirements was necessary. An extension of time to November 21, 2003 to complete the variance background and render a decision was granted by the applicant.

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 2-lot subdivision without providing "dedicable" road improvements stipulated by the DPW memorandum 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 or applicant shall improve the Kumuloulu Road right-of-way and construct a ten (10) feet wide oil treated surface in accordance with DPW-Std. Detail R-39, between the edge of the existing pavement within Kapoho Kai Road (pavement) to the "northern" boundary (approximately 400 feet) of proposed "Lot 18" denoted on the PPM. These required roadway improvements shall be constructed or completed prior to issuance of Final Subdivision Approval.
3. The subdivider, owners, their assigns, or successors understand that the lots arising out of SUB 02-0090 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 privately owned rights-of-way fronting the subdivision or any other access and non-dedicable roadway improvement within the subdivision.
4. ROAD VARIANCE: 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 date of this variance permit letter or prior to receipt

of final subdivision approval of SUB 02-0090. This agreement shall contain the following deed language, being covenants, conditions, and restrictions, which affect the entire property and/or proposed 2-lots arising from the approval of the subdivision application (SUB 02-0090) 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 privately owned road right-of-ways fronting the existing TMK property designated on the subdivision application's (SUB 02-0090) final plat map.
- b. The owners understand that the lots created by SUB 02-0090 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 on their own without any expectation of governmental assistance.
- c. The lot owners agree to participate in any original road maintenance agreement affecting the previous parcel(s) 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", and mowing of existing roadway shoulders within the privately owned right-of-way fronting the proposed lots arising out of SUB 02-0090.
- d. The subject TMK property or any proposed lots created by SUB 02-0090 may not be made subject to a condominium property regime. . No permit shall be granted to allow an ohana dwelling or building permit issued to allow an "ohana" dwelling shall be granted to the subject TMK or the 2-lots arising out of SUB 02-0090, subject to provisions of the Zoning Code or State Law which may change from time to time.
- e. *a.* 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 the property, and there are, therefore, no grounds upon which to seek a further variance from the Hawaii County Subdivision Code to allow further subdivision of the lots created by SUB 02-0090.


5. 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.
7. Any outstanding DPW construction or building permits issued to the subject TMK parcel or proposed lots shall be addressed and closed prior to any further change or transfer of title of the resultant lots. The location of all permitted and future building improvements are subject to 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.

Muhammad Yunis, DVM
YUNIS FAMILY TRUST
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November 28, 2003

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 02-0090
Ms. Edith J. Schmidt
Mr. Don L. James