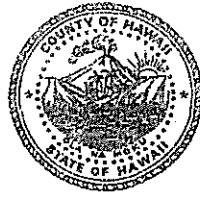


VAR 1391

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 14, 2003

Mr. Jeffery M. Citron  
P. O. Box 982  
Captain Cook, HI 96704

Dear Mr. Citron:

**VARIANCE PERMIT NO. 1391 WH (VAR 03-036)**

**Agent:** JEFFERY M. CITRON

**Applicants:** JOHN GOMES, ET AL.

**Owners:** JOHN GOMES, ET AL.

**Request:** Variance from Chapter 23, Subdivisions,  
Minimum Water and Roadway Requirements

**Tax Map Key:** 8-1-021:004, (SUB 02-0129)

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 2-lot subdivision of existing TMK property(s), without meeting all water and roadway improvements stipulated and required by the Department of Water Supply (DWS) and Department of Public Works (DPW) requirements pursuant to their memorandums to the proposed 2-lot subdivision application (SUB 02-0129). The applicant requested a variance from requirements under the Hawaii County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water supply, (1) (2), and Section 23-87, Requirement for non-dedicable streest; escrow maintenance fund.

**BACKGROUND**

1. **Location.** The subject property, Lot F-30 containing 2.575 acres, is a portion of R. P. 4386, L. C. Award 8452, Apana 10 to A. Keohokaole, and situated at Kaawaloa, South Kona, 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 02-0129). The subdivision application's preliminary plat map (PPM) is dated September 14, 2002. Tentative subdivision approval to the PPM was granted on April 9, 2003 with conditions. These conditions (summarized) require the subdivider to:

Install a minimum 14 feet wide non-dedicable pavement within a minimum 18 feet road easement from Hind Drive to the eastern boundary of proposed Lot F-30B.

The subject property is assigned two (2) DWS water meters. A series of recent DWS memorandum(s) requested the subdivider to upgrade the existing public water system, relocate both water meters, and provide additional fire protection (fire hydrant).

Further, in conjunction with the required road and water system improvements stipulated by tentative approval conditions, the subdivider is required to prepare and submit approved subdivision construction plans to the DPW and DWS to construct the minimum road and water system improvements.

4. **Variance Application.** The subject variance application was acknowledged by Planning Department letter dated June 12, 2003. Access to the proposed subdivision is from via a series of private roadway easements from "Hind Drive" and network of easements "mauka" of the property. The variance request is from DWS and the roadway requirements stipulated DPW memorandums dated July 29, 2003 and February 26, 2003, respectively, in the subdivision file (SUB 02-0129).

The applicant, on behalf of the owner(s) forwarded cost estimates and digital color photographs of existing public and private infrastructure abutting the proposed 2-lot subdivision.

- In lieu of a 14'-wide non-dedicable pavement from Hind Drive to proposed "LOT F-30B". The applicant is requesting a variance to utilize the existing partially paved roadway from Hind Drive and provide a ten (10) feet wide

paved driveway for proposed "Lot F-30B" and "Lot F-30A" in lieu of a 14 feet pavement within the existing easement(s) for the subdivision. Proposed "Lot F-30A" will continue to utilize an existing driveway connection to another "mauka" roadway identified on the PPM.

The applicant, on behalf of the owner(s) has stated that driveway and easement(s) will be resurfaced to a minimum width of ten (10) feet by the future owner(s) of Lot F-30B in accordance with the latest DPW memorandum dated July 14, 2003. The applicant feels that the proposed 10 feet wide paved roadway improvements within the series of easements are sufficient to allow farm vehicle and emergency vehicular access to the proposed 2-lot subdivision. There is adequate room for conventional and emergency vehicles to pass.

- The subject TMK parcel currently is serviced by 2-county DWS meters within Hind Drive. The subdivider will assign a DWS meter to each proposed lot.
- In consideration of the present county water system servicing the property and current access and private roadway improvements to and fronting the subdivision, the applicant feels that further improvements to the existing public water system required by Chapter 23 and DWS and 14' wide pavement requirement originally stipulated by the DPW are not necessary given the nature of the subdivision and existing property's infrastructure.

5. **Agency Comments and Requirements WH (VAR 03-036):**

- a. The Hawaii County Fire Department (HCFD) memorandum, dated June 24, 2003, was received. (Refer to HCFD memorandum in variance file).
- b. The Department of Public Works (DPW) memorandum dated July 14, 2003 states in part:

"A pavement width of 10 feet is adequate to serve 3 dwellings. However, the existing pavement is very poor and should be resurfaced. We discussed the matter with the applicants (sic) representative and received their proposal, dated May 20, 2003 to resurface the existing road. No drainage requirements will be imposed and the drainage report may be omitted. We assume the variance limits the newly created lots to one single family dwelling unit per lot.

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

- c. The Department of Water Supply (DWS) memorandum dated July 29, 2003 states in part:

“We have reviewed the subject application and have the following comments.

Please refer to our memorandums of November 18, 2002, and April 29, 2003, for our comments and requirements.”

The DWS April 29, 2003 memorandum states in part:

“This letter is in response to your Variance Application action taken on March 31, 2003, and April 9, 2003, tentative approval for the subject parcel.

Because of the existing A-1a zoning for the subject property that requires fire protection, we feel that our comments in the enclosed November 18, 2002, letter must be addressed. If the requirements in the subject letter are not addressed with the subdivision, then the applicant should obtain a variance from the Planning Department for the water system improvements.”

A copy of the DWS November 18, 2002 memorandum was included in the subject variance file. (Refer to the DWS memorandum dated November 18, 2003 in the subdivision file-SUB 02-0129).

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 June 20, 2003. It appears that the notice was mailed on or about June 18, 2003.
7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. The following objection to the subject variance application was received:

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- a. Objection letter from Ramon Tanaka citing inadequate roadway and water infrastructure within the Captain Cook Subdivision was received on or about July 1, 2003.

### **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 install the paved wide paved roadway improvements and additional public water system improvements stipulated for the subdivision by the DPW and DWS for the additional lot. Even if not meeting all the subdivision requirements, the availability of the county water system to service the proposed lots will be met and any further roadway improvements within the easement(s) identified by the DPW will be paved and/or maintained by the users. No further subdivision of the 2 resultant lots created by the proposed subdivision would be permitted without rezoning.
2. Proposed Lot and Subdivision Road Improvements. The access to the area and roadway easement(s) fronting the TMK property and 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 variance request is reasonable. The subdivision will be accessible by conventional vehicles (with adequate roadway clearance) and emergency vehicles.

### **ALTERNATIVES**

The decision alternatives include the following:

1. *Improve the roadways within the existing roadway easements with an agricultural roadway standard as required by DPW and install the necessary DWS improvements.* This alternative would require the applicant (owner/subdivider) to improve nearly 900 feet of existing paved/gravel roadway within the easement(s) located on adjoining property(s) in accordance with the DPW memorandum to the subdivision. The costs associated to design and install the 14 feet wide pavement and upgrade the public water system currently servicing the property, pursuant to the DWS, 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 existing paved/gravel roadways and 2-water meters assigned to the TMK property are adequate for the proposed 2-lot subdivision. The applicant, on behalf of the owner(s), has stated that the future owner(s) of proposed LOT F-30B will resurface the driveway between Hind Drive and eastern boundary of proposed LOT F-30B. 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. The subdivider will assign a DWS meter to each proposed lot.

#### **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 and fire protection or water mains and fire hydrants are installed in accordance with the DWS. The applicant is requesting a variance to utilize the existing roadway or "driveway" located within a series of privately owned easement(s) fronting the subdivision. The variance request is from the subdivision requirements to construct "paved" roadway and fire protection improvements stipulated by the respective DPW and DWS agency comments/memorandums to allow the proposed 2-lot subdivision application.

The surrounding areas are agricultural in character. The character of property's access to Hind Road right-of-way via privately owned easements and "AC roadway" fronting the subject property and immediate and surrounding areas have not significantly changed over the past 70 + years. Vehicular access to the subject TMK property and adjoining area has not changed significantly since 1967. By granting this variance, there should be no adverse impact to adjoining properties or other users of Hind Road or the privately owned easement network fronting the proposed subdivision. Road maintenance or upkeep to the privately owned paved and/or graveled roadway within the easement(s) fronting the subdivision will be privately addressed and maintained by the users.

The intent and purpose of requiring a water system and fire protection (fire hydrants) for the proposed subdivision is to assure that adequate water is available for human consumption and fire protection. The analysis of DWS maps show there is fire protection near the proposed

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subdivision or within the immediate neighborhood. It appears that a fire hydrant(s) is located between 400 feet +/- and 600 feet +/- from the subject TMK property.

Therefore, based on the representations made by the applicant, evaluation of existing water system improvements, and the current private roadway access and traffic patterns to and near the existing property(s), it is felt that the variance request is reasonable and some of the agency requirements to develop the proposed subdivision can be deleted or modified.

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

The variance request and application was acknowledged by letter dated June 12, 2003. Additional time to study previous variance approvals and confer with the DWS-Engineering Division was necessary. An extension of time to November 21, 2003 to consider the agency requirements, complete the variance background, and render a decision was granted by the applicant, on behalf of the owner(s).

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 the minimum road and water system improvements stipulated by the DPW and DWS memorandums to allow the 2-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 2-lots arising out of SUB 02-0129 will use and maintain the existing access easements, 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 private access improvements to and within the subdivision. The 10 foot wide driveway improvements shall be installed in accordance with the DPW prior to Final Subdivision Approval or bonded.
3. Prior to final subdivision approval, the subdivider, applicant, or owner(s), their assigns or successors shall confer with the DWS and designate or identify which account number or DWS water meter (Account No. 900-50998 and 900-51020)

will be assigned to the proposed lot arising out of SUB 02-0129. Each unit of water is limited to a daily maximum use of six hundred (600) gallons per unit.

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 02-0129. 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 02-0129) 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 road right-of-ways outside the existing TMK property designated on the subdivision application's (SUB 02-0129) 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 Hind Road serving the proposed lot(s) arising out of SUB 02-0129 or rights-of-way fronting and along the proposed subdivision. Should the improvement district require acquisition of rights-of-way within the lots arising out of SUB 02-0129, 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 02-0129 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



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any road improvements within the privately owned rights-of-way fronting the proposed subdivision.

- e. 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 02-0129.
  - f. Restrictive covenants in the deeds of the agricultural lots arising out of SUB 02-0129 shall give notice that the terms of this variance shall prohibit the construction of a second dwelling unit and condominium property regimes on each lot. A copy of the proposed covenant(s) to be recorded with the State of Hawai'i Bureau of Conveyances shall be submitted to the Planning Director for review and approval prior to the issuance of Final Subdivision Approval. A copy of the recorded document shall be filed with the Planning Department upon its receipt from the Bureau of Conveyances.
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. WATER VARIANCE: The 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 02-0129. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the a lot arising from the approval of subdivision application and shall be duly recorded at the Bureau of Conveyances of the State of Hawaii by the Planning Department at the cost and expense of the owners:

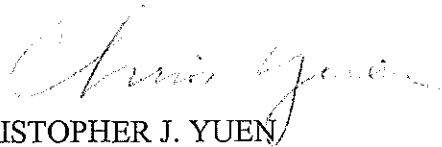
- a. In the event that there are any amendments or changes to the subdivision after the agreement is signed, the applicant shall be responsible for informing the County Planning Department of such amendments or changes so that the agreement can be amended concomitantly. Further, the written or recorded 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.
  - b. In the event that the County notifies the owner(s) of the lot(s) created by SUB 02-0129 that the County Water System will be upgraded, the owner(s) of the lot(s) created by SUB 02-0129 shall pay their pro-rata share of the upgrade as determined by the Department of Water Supply.
  - b. Restrictive covenants in the deeds of all agricultural lots arising out of SUB 02-0129 shall give notice that the terms of this variance shall prohibit the construction of a second dwelling unit and condominium property regimes on each lot. A copy of the proposed covenant(s) to be recorded with the State of Hawai'i Bureau of Conveyances shall be submitted to the Planning Director for review and approval prior to the issuance of Final Subdivision Approval. A copy of the recorded document shall be filed with the Planning Department upon its receipt from the Bureau of Conveyances.
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.
  8. 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.

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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 02-0129  
Mr. Ramon Tanaka