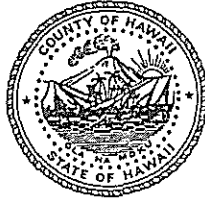


Harry Kim
Mayor



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

September 17, 2004

Steven S.C. Lim, Esq.
CARLSMITH BALL LLP
121 Waiianuenue Avenue
Hilo, HI 96721

Dear Mr. Lim:

VARIANCE PERMIT NO. 1474 (VAR 04-060)

Applicant: KONA PLANTATION ESTATE LLC

Owner: KONA PLANTATION ESTATE LLC

**Request: Variance from Chapter 23, Subdivisions,
Dedicable Roadway Improvements**

Tax Map Key: 7-4-007:098, (SUB 03-0088)

This is Legacy
SUB 7905

After reviewing your variance application, the Planning Director certifies approval of a variance to allow private non-dedicable paved roadway and grassed shoulder and swale improvements to be constructed within proposed cul-de-sac ("HAO-KUNI PLACE EXTENSION") road lot within proposed subdivision (SUB 03-0088). The variance request is from Hawaii County Code, Chapter 23, Subdivisions, Article 6, Improvements, Division 2, Improvements Required, Section 23-86, Requirements for dedicable streets and certain roadway conditions stipulated by tentative subdivision approval letter dated December 23, 2003.

BACKGROUND

1. **Location.** The subject property, containing approximately 9.918 acres, being a portion of R.P. 6855, L.C. Aw. 9971, Ap. 9 to Wm. Pitt Leleiohoku, is situated at Honokohau 2nd, North 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 subdivider or applicant submitted a subdivision application (SUB 03-0088) on or about July 3, 2003. The subdivision application's preliminary plat map (PPM), is dated June 27, 2003. Tentative subdivision approval to the PPM (9-buildable lots and 1-roadway lot) was granted on December 23, 2003 subject to conditions.
4. **Variance Application.** The applicant submitted the subject variance application on or about June 15, 2004.

5. **Agency Comments and Requirements WH (VAR 04-060):**

- a. The County of Hawaii Fire Department (HCFD) memorandum is dated July 2, 2004. (Refer to HCFD memorandum in variance file).
- b. The Department of Public Works (DPW) memorandum, dated July 16, 2004, states in part:

"The applicant is seeking relief from the requirement to provide paved shoulders and swales and a dedicable turnaround. We request approval conditions which address the following:"

(Refer to Item No(s). 1 thru 6 in DPW memorandum in variance file).

A subsequent DPW memorandum dated August 27, 2004 states in part:

"We have reconsidered our comments to the proposed variance and have revised comment number 1 to omit the requirement for a dedicable turnaround outside of the gate. Comment number 1 is revised as follows:

1. Any vehicular entry gate (including gate swing) shall be located on private property and allow space to turn around on Hao Kuni Place, outside of the gated subdivision, meeting with the approval of DPW."
- c. The State Department of Health (DOH) memorandum, dated July 21, 2004, states:

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

1. **Notice to Surrounding Owners.** The applicant submitted notarized Affidavit of Mailing dated July 6, 2004 and list surrounding owners within 300 feet of the subject TMK property. According to the applicant a notification letter was mailed to surrounding property owners on or about July 6, 2004.
2. **Comments from Surrounding Property Owners or Public.** No further comments to the subject variance application were received from the agencies. The following objection letter was received:
 - a. Objection Letter from Joel W. Nye.

SPECIAL AND UNUSUAL CIRCUMSTANCES

After considering the applicant's project information and variance request, existing and surrounding development, agency comments and/or requirements to proposed subdivision and variance applications, the Planning Director has determined that there are special and unusual circumstances applying to the subject TMK property or proposed development which deprive the applicant or 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. *Provide dedicable access to the proposed development or install dedicable roadway and other infrastructure within the proposed roadway lot pursuant to the DPW roadway comments and Tentative Subdivision letter/conditions dated December 23, 2003.*
2. *Allow alternative public turn around within existing public right-of-way and private non-dedicable roadway improvements to be constructed within proposed 50 feet wide roadway lot.*

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The proposed access to the TMK property is appropriate for current zoning of the area and intentions by the subdivider. Therefore, based on the representations made by the applicant or subdivider and evaluation of the current traffic patterns, the applicant's proposed alternative access and private non-dedicable roadway improvements to and within the subdivision, the Planning Director has concluded that the respective DPW memorandum and tentative subdivision approval letter dated December 23, 2003 can be modified to allow non-dedicable access and roadway improvements within the proposed roadway lot.

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 June 25, 2004. Additional time to incorporate DPW comments regarding a "dedicable turnaround" and complete the variance background was necessary. The applicants agreed to extend the decision dated to September 15, 2004, 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 subdivision without providing the dedicable roadway improvements stipulated by the DPW memorandums is hereby granted 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 proposed lots arising out of SUB 03-0088 will use and maintain the privately owned subdivision access, non-dedicable paved roadways, grassed roadway shoulders, lighting fixtures, signage, etc. within the subject TMK property or proposed privately owned right-of-way roadway on their own without any expectation of governmental assistance to maintain the access and non dedicable roadway improvements within the subdivision.

The location and alternative turn around design on Hao Kuni Place and privately owned entry gate (including gate swing) shall be approved by the DPW.

3. The applicants or owners shall submit water system plans and subdivision construction plans for the alternative roadway or non-dedicable roadway improvements and specifications for approval by the affected agencies. The location of a private entry, turnaround area or security gate within the "ROADWAY LOT" shall meet with the requirements of the DPW or in accordance with approved subdivision plans. The applicant or subdivider shall construct the approved subdivision improvements (or bond) such alternative subdivision construction improvements pursuant to variance/tentative subdivision approval or final subdivision approval.
4. 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 03-0088. 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 rights-of-way or common areas within the existing TMK property designated on the subdivision application's (SUB 03-0088) 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 serving the proposed lot(s) arising out of SUB 03-0088 or/and adjoining public roads or rights-of-way.

Should the improvement district require acquisition of the "ROADWAY LOT" or any privately owned rights-of-way arising out of SUB 03-0088, 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(s).

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. Each lot created by SUB 03-0088 shall have no more than one dwelling. No ohana dwelling or second dwelling shall be permitted on any lot created by SUB 03-0088. The subject property or any of the proposed lots arising out of the proposed subdivision or subsequent subdivision phases may not be made subject to a condominium property regime.
- d. The owners understand that the lots created by SUB 03-0088 have been approved with this road variance, and that they will use and maintain the privately owned access road to and within their property, water system, and drainage improvements on their own without any expectation of governmental assistance, including any road improvements within all privately owned rights-of-way and/or common areas.
- e. The lot owner(s) or users of proposed "ROADWAY LOT" agrees to participate in any road and/or maintenance agreement.

Said maintenance shall include, without limitation, timely repair of the private roadway and/or filling of any and all rutted areas and "potholes", mowing of the grassed roadway shoulders/islands within the privately owned roadway lot or common areas to ensure that existing drainage patterns are maintained and any soil runoff within and along parts of privately road lots and common areas do 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.

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5. The owners, their assigns or successors shall pay any outstanding real property taxes due and comply with the requirement of the State Historic Preservation Office and other applicable State and County rules, and regulations pertaining to subdivisions, tentative subdivision approval conditions, approved subdivision construction plans, variance conditions, and land use.

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:cd

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xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB 03-0088
Planning Dept.-Kona
Joel W. Nye