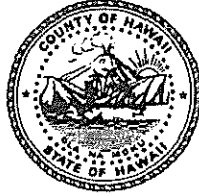


Harry Kim  
Mayor



Christopher J. Yuen  
Director

Brad Kurokawa, ASLA  
LEED® AP  
Deputy Director

**County of Hawaii**  
**PLANNING DEPARTMENT**

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

July 12, 2006

Mr. Tim Lui-Kwan, Esq.  
CARLSMITH BALL LLP  
ASB Tower, Suite 2200  
1001 Bishop Street  
Honolulu, HI 96813

Dear Mr. Lui-Kwan:

**SUBJECT: VARIANCE PERMIT-VAR 06-022**  
**Applicant: CAPTAIN COOK RANCH LLC**  
**Owner: CAPTAIN COOK RANCH LLC**  
**Request: Variance from Chapter 23, Subdivisions,**  
**Improvements Required**  
**Tax Map Key: 8-2-002:002, (SUB 05-000249)**

After reviewing your variance application, the Planning Director certifies the approval of Variance Permit-VAR 06-022 subject to variance conditions. The variance permits non-dedicable paved roadways and grass swale improvements to be constructed within proposed road lot(s) created by proposed subdivision (SUB 05-000249). The variance is from the roadway requirements of the Department of Public Works (DPW) or Chapter 23, Subdivisions, Article 6, Improvements, Division 2, Improvements Required, Section 23-86, Requirements for dedicable streets, Section 23-87, Standard for non-dedicable street; escrow maintenance fund, Section 23-88, Non-dedicable street; private dead-end street, and Section 23-95, Right-of-way improvement.

**BACKGROUND**

1. **Location.** The subject property, containing approximately 72.321 acres, being portion of R.P. 3607 and 7533, L.C. Award 8452, Apana 9, to A. Keohokaole, is situated at Kealakekua, South Kona, Hawaii.

2. **Zoning.** The subject property is zoned Residential and Agricultural (RA-2a) by the County and designated Urban ("U") by the State Land Use Commission (LUC); and, created by SUB 7754 on November 24, 2003. The property or proposed subdivision is within the Special Management Area (SMA) and subject to SMA 269 conditions and Rezoning REZ 580 conditions. The property does not abut the shoreline.
3. **Subdivision Application/Revised PPM.** The owner's filed a subdivision application (SUB 05-000249) on or about December 21, 2005. Subsequent to the foregoing the applicant/subdivider filed a revised preliminary plat map (PPM) on March 9, 2006. The revised PPM was acknowledged on April 27, 2006 and transmitted to the agencies for review and comment. The proposed subdivision is subject to SMA 269 conditions and REZ 580 conditions.
4. **Variance Application.** The subject variance application was filed with the Planning Department on March 9, 2006. The applicant's background report or "Attachment to Application for Variance from Subdivision Code states in part:

First Page:

"3) Summary of Request

The applicant intends to construct a private 20-foot paved roadway within a 50-foot wide right-of-way. The Subdivision Code requires the construction of a standard roadway which would consist of the exact same 20-foot wide pavement in a 50-foot right-of-way. However, according to the Department of Public Works' the entire balance of the right-of-way (shoulders and swales) would also have to be graded and paved. The applicant is seeking a variance so as: i) not to be obligated to pave the balance of the right-of-way (shoulders and swales), and ii) to be obligated to grade only 40' within the 50' right of way instead of grading the entire 50'.

The applicant also intends to construct certain smaller roads with 16-foot pavement within a 20-foot right-of-way as a nondedicable private street as permitted by section 23-88 of the subdivision code. The respective road profiles are shown as 'sections' on the Engineer's Drawing, attached.

4) Project Objective

Mr. Tim Lui-Kwan, Esq.  
CARLSMITH BALL LLP

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The applicant proposes to create a thirty-three (33) lot two (2) acre subdivision. In keeping with the Residential-Agricultural 2ac. Zoning, it is envisaged that the lots will be used for just residential and agricultural purposes. It is the applicant's intention to preserve the rural character of the area and to install necessary infrastructure in a manner appropriate to the environment."

The applicant is requesting the following variances and following reasons/summaries state in part:

Second Page:

"Pursuant to Sections 23-14 through 23-17 of the Subdivision Code, the applicant seeks a variance from Section 23-41 and 23-87 of the Subdivision Code which require (sic) the construction of a minimum 20-foot wide pavement with paved shoulders and swales within a minimum 50-foot wide fully graded right-of-way meeting with the approval of the Department of Public Works.

The applicant intends to conform with requirements of the Subdivision Code as to providing a 50" (sic) right of way and to constrict the 20-foot wide pavement to such standards. The applicant seeks only to depart from such standards, by grading 40-feet instead of the entire 50-feet of such right of way, and by providing a 10-foot wide solid grass shoulder (not paved) on either side of the 20-foot pavement of the roadway.

All of the roads in the proposed subdivision, including the one for which this variance is being sought shall remain private, and shall be maintained by the homeowners association."

5. **Agency Comments and Requirements-VAR 06-022:**

- a. The County of Hawaii Fire Department memorandum is dated April 3, 2006. (Refer to HFD memorandum in variance file).
- b. The Department of Public Works (DPW) memorandum dated April 3, 2006 states in part:

"Although not specified, the applicant also intends a variance from Section 23-95.

We have no objections to the subject variance request, provided the Planning Director finds that there is no use for the roads as County collector or connection streets to adjacent properties and with the following conditions:

1. The subdivision streets shall not be considered for conveyance to the County unless improved to meet dedicable standards.
2. The subdivision road traveled-way pavement section shall be constructed in accordance with Hawaii County Code Section 23-86 or approved equal and shall comply with Hawaii County Code Section 23-41. The roads shall be improved with stabilized shoulders and swales to the required right-of-way or easement width exclusive of cut and fill slopes unless demonstrated by the applicant that proper roadside clear zones and horizontal sight distance is provided for with the proposed road prism.
3. All storm drainage generated by the development shall be disposed of on site in a manner meeting with the approval of DPW and the Storm Drainage Standard. This includes not only the roadways but storm runoff attributable to future development of the lots themselves. The applicant's typical sections show no roadside drainage swales except with a separate drainage easement. A drainage report shall be submitted with construction plans to substantiate how developed lot and roadway runoff is being disposed of within drainage structures and easements. Final construction approval will require complete stabilization of the roadsides and drainage system.
4. A drainage easement appears to channelize a 100-year flood plain shown on the site plan. The proposed development shall not alter drainage patterns upstream or downstream of the development, including but not limited to discharge, velocity and stormwater quality.
5. Any vehicular security gate shall be located at least 60 feet from the County road right-of-way with turnaround on the County road side of the gate."

- c. The State Department of Health (DOH) memorandum is dated April 13, 2006. (Refer to DOH memorandum in variance file).
6. **Notice to Surrounding Owners/Posted Sign.** The applicant's agent submitted transmittal letter dated March 31, 2006 and affidavit dated March 31, 2006 regarding a notice mailed to surrounding property owners and sign posted on subject property (Note: Photograph of the sign was received on or about June 7, 2006). According to the agent's transmittal letter, affidavit, and other submittals, it appears that a notice was mailed on or about March 30, 2006; and, the required sign was posted on subject property on or about February 23, 2006. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on or about April 3, 2006.
7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. The following comments or objections letters were received from surrounding property owners or public:
  - 7a. Objection letter dated April 17, 2006 received from Mary Laird.
  - 7b. Objection letter (fax) dated April 17, 2006 received from Lawrence and Brenda Ford. (Note: A copy of SMA 269 permit letter and SMA conditions dated December 30, 1987 and Ordinance No. 88 93 were faxed to Brenda Ford on or about June 9, 2006 for understanding and reference.
  - 7c. Objection letter (fax) dated April 17, 2006 received from Dore Loewenthal.

**Note:** The above comments/objection letter/concerns generally relate to traffic, flooding, drainage, historical sites, permitted uses, etc. The following is a summary of the concerns expressed by objection letters (especially the objection letter dated April 17, 2006 received from Ford, Et al.) and summary of actions or measures that were previously addressed or addressed by the subdivider before final subdivision approval is granted pursuant to the applicant's representative:

- 7-1. Traffic. A traffic impact analysis study was completed prior to rezoning of the subject TMK property resulting in a one-time payment of developer's pro-rata contribution to intersection improvement cost pursuant to Condition G of REZ 580.

The intersection improvements between the privately owned rights-of-way within the subdivision and Napoopoo Road will be further addressed during review of alternative subdivision construction plans. In addition, a future road widening setback line and minimum building setback(s) to be taken from the front boundary line along Napoopoo Road are being imposed. Refer to previous annual reports submitted by applicant in SMA/REZ files and variance conditions.

- 7-2. Ohana Dwelling Units. Refer to variance conditions
- 7-3. Intersection Improvements. Refer to variance conditions.
- 7-4. Flood Concerns. Flood concerns and/or drainage within the property will be addressed in accordance with approved drainage studies and flooding concerns/drainage improvements will be addressed/installed in accordance with approved alternative subdivision construction plans. Refer to variance conditions.
- 7-5. Drainage Concerns. Drainage improvements within the subdivision and/or within the privately owned rights-of-way will be installed in accordance with approved alternative subdivision construction plans. Refer to variance conditions.
- 7-6. Road Standards (Dedicable vs. Non-Dedicable). The surrounding neighborhood's character is agricultural or rural. The applicant's request to install roadways in keeping with the other roadways in this area or region is reasonable. The width of the paved roadways will be designed and installed in accordance with approved alternative subdivision construction plans. Refer to variance conditions.
- 7-7. The width of the roadways and traffic patterns within the subdivision will be installed in accordance with approved alternative subdivision construction plans. Refer to variance conditions.

- 7-8. According to applicant's representative-Underground Utilities improvements will be installed throughout the subdivision in accordance with approved alternative subdivision construction plans. Refer to variance conditions.
- 7-9. Any proposed cellular towers and/or telecommunication facilities, etc. on any building lots created by SUB 05-000249 are subject to State law and Zoning Code requirements.
- 7-10. Interface between any privately owned rights-of-way abutting the subject TMK property and the proposed privately owned rights-of-way created by the proposed subdivision will be privately addressed between owners. Road barriers or gates can be installed at the terminus or within any privately owned rights-of-way within the proposed subdivision pursuant to DPW requirements and approved alternative subdivision construction plans. Refer to variance conditions.
- 7-11. The width of the proposed paved roadways will be installed in accordance with approved alternative subdivision construction plans. Refer to variance conditions.
- 7-12. The proposed privately owned roadways within the road and cul-de-sac rights-of-way within the proposed subdivision will be installed in accordance with approved alternative subdivision construction plans; and, maintenance of the roadways and other appurtenances within the privately owned rights-of-way will be maintained by the users and/or private/public utility companies. Refer to variance conditions.
- 7-13. The proposed subdivision development is subject to SMA conditions and rezoning conditions. Subdivision improvement will be installed in accordance with approved alternative subdivision construction plans prior to issuance of final subdivision approval or may be bonded. Refer to variance conditions.

- 7-14. The water supply system within the proposed subdivision will be constructed in accordance with DWS standards and eventually dedicated to the DWS. The water supply system will be installed in accordance with approved alternative subdivision construction plans. Refer to variance conditions.
- 7-15. The water supply system (meter installation, water system appurtenances, etc.) will be installed in accordance with DWS standards and approved alternative subdivision construction plans.
- 7-16. Independent Wastewater Systems (IWS) within proposed "building site" lots created by the proposed subdivision are subject to DOH standards and shall be installed or constructed in accordance DOH requirements.
- 7-17. The pending subdivision is required to meet SMA conditions and rezoning conditions prior to issuance of final subdivision approval. Refer to variance conditions.
- 7-18. Drainage within the subject TMK property or within proposed subdivision is required to be addressed pursuant SMA conditions and rezoning conditions. Drainage improvements within the proposed subdivision shall be reviewed by the DPW and drainage improvements shall be installed in accordance with approved alternative subdivision construction plans. Refer to variance conditions.
- 7-19. According to the applicant any historical sites and/or required archeological inventory survey reports/preservation plans, etc. shall be completed in accordance with SMA conditions or rezoning conditions prior to approval of alternative subdivision construction plans. The preservation of any historical sites, etc. within the subject TMK property or proposed lots shall be addressed by the subdivider prior to final subdivision approval. Refer to variance conditions.

**ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES**



**Lot Access/Roadways.** The first alternative requires the subdividers to construct "Access and Roadway Improvements" required by the Department of Public Works (DPW) or Chapter 23, Subdivisions, Article 6, Improvements, Division 2, Improvements Required, Section 23-86, Requirements for dedicable streets, Section 23-87, Standard for non-dedicable street; escrow maintenance fund, Section 23-88, Non-dedicable street; private dead-end street, .

The access to the proposed subdivision is via Napoopoo Road (County owned and maintained Right-of-Way). The applicant/subdivider is requesting a variance to allow "non-dedicable" paved roadways, etc. to be installed within the privately owned network of road lots being created by proposed subdivision. The applicant/subdivider is proposing to design and construct "non-dedicable" privately-owned paved roadway improvements, drainage improvements, etc. within the proposed subdivision meeting "the minimum standards for right-of-way and pavement widths", grass swales, necessary dry wells, light fixtures, and traffic signs, etc. in accordance with alternative subdivision construction plans.

The applicant's background report (Pages 2-3) further states:

- "a) There are special and unusual circumstances relating to the property that deprive the applicant of substantial property rights that would otherwise be available.
  - i) The average slope of the subject property ranges from 10-15 percent, with some areas exceeding 20 percent. The topography of the property will thus result in an (sic) road that will have a grade that-while meeting County requirements-will not be level, and storm water runoff will have to be appropriately mitigated.
  - ii) Full pavement of the right-of-way will result in a 50-foot wide impermeable surface, as opposed to only 20 feet for the road, resulting in a 60% increase in impermeable area! Such 50-foot pavement would substantially increase storm water runoff, potentially impacting makai properties.
  - iii) While drywells will be installed to address potential storm water runoff resulting from the surface of the proposed road, paving the entire right-of-way will substantially increase the amount of impermeable surface and necessitate the construction of more drywells. While this will be additional cost to the applicant, it is also an unnecessary, unsightly and unecological to pave the entire right of way. Paradise should not be paved! Runoff should be constrained not created.

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- iv) Grass shoulders slow sheeting water, further mitigating storm water runoff. 50-feet of pavement would serve to preclude the use of the shoulders and swales to act as natural storm drains and/or retardation of the velocity of any potential storm water.
- v) Reducing the graded width from 50 feet to 40 feet will result in less land disturbance and less visual impact from cut and fill slopes. While construction cost will be reduced, it will not compromise safety, as there will still be adequate area (10' graded and grassed shoulder) to pull off the travel way, if necessary.
- vi) The ground over which the Roadway will be constructed in extremely stony peat over a pahoeoe (sic) underlayment. Once compacted and seeded this will form a firm shoulder onto which to pull off the roadway if necessary. The present use of the area is pasture and grass has been shown to grow consistently without irrigation. The grass shoulders will need to be kept mowed, and this obligation will become an obligation of the homeowners association.
- vii) The circumstances are also unusual, in that the road will kept under private ownership and not dedicated to the County. As such, The (sic) County's concern over the maintenance of the shoulder and swales will not be applicable."

**Note:** According to the applicant's road sections, the subdivider is installing underground utilities including a "dedicable" water supply system, including fire protection, etc. meeting Department of Water Supply (DWS) requirements within the proposed subdivision. The water supply system within the proposed subdivision will be built pursuant to DWS standards and dedicated to the County DWS.

The upkeep and maintenance of the proposed "non-dedicable" roadway improvements and privately owned rights-of-way within the proposed subdivision will be borne by the users or Association subject to variance conditions and the water supply system and fire protection improvements, etc. installed within the proposed subdivision will be dedicated to the County DWS and maintained by the County DWS.

#### **INTENT AND PURPOSE OF THE SUBDIVISION CODE**

**Roadway Variance.** 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.

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The proposed subdivision and adjoining areas are rural and agricultural in character. Access to the proposed subdivision is via a paved road within the Napoopoo Road Right-of-Way (County owned ROW and road maintained by the County) created prior to the adoption of the 1967 Zoning and Subdivision Codes. In addition there are privately owned access and utility easements abutting the proposed subdivision that were privately created or established prior to or after the adoption of the 1967 Zoning and Subdivision Codes by the County of Hawaii. The Planning Director finds that the applicant's objectives and proposed alternative "non-dedicable" road and associated infrastructure improvements within the proposed subdivision can meet the intent and purpose of Chapter 23, Subdivisions. To this end, the applicant or subdivider will submit for approval necessary drainage studies and install "non-dedicable" access and roadways, lighting, street signage, and other roadway improvements as required by County or State regulations or policy; and, including a "dedicable" DWS water supply system and fire protection, etc., within the proposed subdivision pursuant to alternative subdivision construction plans subject to variance and variance conditions. These "non-dedicable" road improvements and other associated roadway improvements and "dedicable" water system improvements within the proposed subdivision, including drainage improvements, lighting, signage, etc. will be installed by the subdivider prior to issuance of final subdivision approval; and, ownership of these rights-of-way within the proposed subdivision will eventually be transferred to an association of users or "homeowners association". Maintenance costs of the privately owned network of roadways or "non-dedicable" subdivision improvements within the proposed subdivision will be privately borne by the association of users or "homeowners association" pursuant to recorded private deed covenants, conditions, and restrictions required by variance conditions.

The subject variance application was acknowledged by letter dated March 17, 2006. The applicant agreed to extend the decision date to on or before July 14, 2006.

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.

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

The variance requested to allow a proposed subdivision of the subject TMK property without providing a dedicable roadway improvements meeting DPW standards or Chapter 23, Subdivisions, is hereby **approved**.

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Specifically, this variance allows the construction of the main access road of the subdivision, "Kalaniopuu Rd." and "Keohokahole Rd.", to be constructed with a 20' wide paved surface for the main travel lanes, 10' grassed shoulders, and adjacent drainage improvements meeting with the approval of the DPW, within 50' right-of-way, in lieu of DPW Standard Detail R-34. The subdivider may construct "Kiwaloa Ln." and "Kapaakea Ln." to private street standards under DPW Standard Detail R-39. The variance is subject to the following variance conditions:

1. The applicant, owners, their assigns, or successors shall be responsible for complying with all stated conditions of approval.
2. Submit alternative subdivision construction plans to construct non-dedicable roadway improvements and other subdivision improvements for SUB 05-000249 to the DPW/DWS and other affected agencies for review and approval. The construction plans shall show construction details of measures to be taken to stabilize the grassed shoulders and the project engineer shall certify the stability of the grassed shoulders against erosion under expected rainfall conditions. The grassed surface cover shall be established prior to final inspection by the DPW. The applicant or subdivider shall provide drainage adjacent to grassy shoulder meeting with approval of the DPW; and, construct required intersection improvements, alternative non-dedicable roadway improvements, water supply system, and other subdivision improvements within proposed SUB 05-00249 in accordance with approved alternative subdivision construction plans.
3. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the building lots arising out of SUB 05-000249 will use and maintain the privately owned road lots and any utility easement on their own without any expectation of governmental assistance to maintain the existing . access or roadway improvements within the privately owned roadways and utility easement identified on the subdivision's revised preliminary plat map or any other necessary access and utility easement(s) within the proposed subdivision.

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 issuance of tentative subdivision approval and prior to receipt of final subdivision approval of SUB 05-00249.

The owner(s) of the proposed road lots shall form an Homeowner or Road Association or include appropriate deed language, being covenants, conditions, and restrictions, which affect the entire property and/or proposed lots arising from the approval of the 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 owner(s) 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 this existing private utility and access easement.

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 05-000249. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 05-000249, 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 respective 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.

- b. The future lot owner(s) agree to participate in any road maintenance agreement or/and pay their fair share to maintain "non-dedicable" roadways and/or roadway system created by SUB 05-000249.

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.

Mr. Tim Lui-Kwan, Esq.  
CARLSMITH BALL LLP

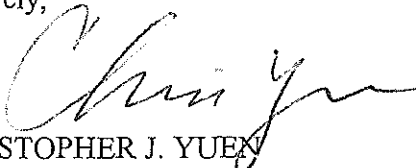
Page 14  
July 12, 2006

4. The subdivision application's (SUB 05-000249) final plat map shall meet with the requirements of the Hawaii County Zoning Code and the Subdivision Code not covered by this variance. The owner/subdivider shall continue to comply and meet remaining SMA 269 conditions and REZ 580 conditions.
5. No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to lots created by the proposed subdivision application SUB 05-000249 subject to provisions of the Zoning Code or State Law which may change from time to time.
6. The subdivider, owner(s), their assigns or successors shall pay any outstanding real property taxes and comply with all other applicable State statutes and County ordinances pertaining to building improvements 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/DSA/CJY:cd  
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xc: DPW-Engineering Branch  
DWS-Engineering Branch  
SUB 05-000249  
Mary Laird  
Lawrence and Brenda Ford  
Dore Loewenthal

TRANSMISSION VERIFICATION REPORT

TIME : 07/14/2006 10:38  
NAME : PLANNING  
FAX : 9618742  
TEL : 9618288  
SER.# : BROE4J601474

DATE, TIME  
FAX NO./NAME  
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