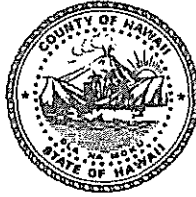


Harry Kim
Mayor



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

January 4, 2007

Mr. Neil Erickson, Architect
82 Ponahawai Street
Hilo, HI 96720

Dear Mr. Erickson:

SUBJECT: VARIANCE-VAR 06-054
Agent: ARCHITECT-NEIL C. ERICKSON or
SHERRILL ERICKSON, ESQ.
Applicant: MICHELLE LEIGH CARRILLO
Owner: MICHELLE LEIGH CARRILLO
Request: Variance from Chapter 23, Subdivisions,
Improvements Required
Tax Map Key: 1-5-005:012, (SUB 05-000055)

After reviewing subject variance application, the Planning Director certifies the approval of Variance-VAR 06-054 to allow proposed 4-lot subdivision (SUB 05-000055) to be created without providing a water supply system and constructing dedicable roadway improvements. The variance request is from Hawaii County Code, Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2), and dedicable roadway requirements 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.

BACKGROUND

1. **Location.** The subject TMK property, "LOT 3-A" consisting of approximately 20.515 acres, being a portion of Grant 4482 to Heirs of D. W. Kaeha, and situated at Nanawale Homesteads, Nanawale, Puna, Hawaii.
2. **Zoning.** The subject property is zoned Agricultural (A-5a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC).

Mr. Neil Erickson, Architect

Page 2

January 4, 2007

3. **Subdivision Request/PPM.** The owner or subdivider (Michelle Brand aka Leigh Carrillo) of subject TMK property submitted proposed 4-lot subdivision application (SUB 05-000055). Further action on this pending 4-lot subdivision application or the subdivision application's preliminary plat map (PPM) dated March 1, 2005 was deferred according to a letter dated August 10, 2005 in the subdivision file.
4. **Variance Application.** The subject variance application was acknowledged by Planning Department letter dated July 27, 2006. The applicant's original background information or report us dated July 11, 2006.

Page 5, "1. WATER REQUIREMENTS", states in part:

"The analysis of existing site conditions, and official rainfall maps maintained by governmental agencies indicate that the Property receives more than adequate rainfall within the vicinity to support a private water roof catchment and storage system for potable and emergency uses."

Page 7, "2. ROAD REQUIREMENTS", states in part:

"(1) With respect to existing public roads, the Applicant is seeking a roadway variance from the suggestions in the DPW memorandum date May 11, 2005 that would require the subdivider to construct dedicable roadway improvements within existing publicly owned rights-of-way leading to and adjacent to the proposed subdivision. The Applicant is seeking a variance from the imposition of any off-site improvements to such Homestead Roads leading to and abutting the subject property.

(2) With respect to existing private roads, the Applicant is seeking a roadway variance from the suggestions in the DPW memorandum dated May 11, 2005 that would require the subdivider to construct 20 ft. agricultural pavements within a minimum 50-ft width right of way to DPW Std Det R-39 for such roads. The Applicant is seeking a variance so that the existing private roads, in particular that private roadway lot bearing TMK (3) 1-5-005:022. Research at the Department of Public works indicates such Homestead/Government Roads were created an in existence long before the enactment of the Hawaii County Code, Chapter 23, Subdivision Control Code in 1975 (sic)."

Mr. Neil Erickson, Architect

Page 3

January 4, 2007

Subsequent to the above, the applicant, on behalf of the owner, submitted letter dated September 25, 2006 which states in part:

In connection with the above-referenced variance application the Applicant hereby commits and agrees to make certain road improvements to those sections of the road marked on the attached Tax Map; namely portions of roadway parcels bearing TMK Nos (3) 1-5-005:016 and 022 respectively. Such road improvements shall consist of a sixteen (16) foot wide agricultural pavement and shall include one (1) foot wide swales conforming to DPW-Standard Detail R-39 and shall be located within the existing roadway on portions of TMK Nos (sic) (3) 1-5-005:016 and 022, owned by the Applicant, as shown on the attached tax map.

I am sending you under separate cover a written estimate from licensed contractors Yamada and Sons (Les Peterson) to perform the above-described road improvements for your information and files."

The applicant's follow-up letter dated October 2, 2006 states in part:

"In light of the above, the Applicant hereby requests that the Planning Department reconsider the scope of the road improvements required for this variance. The applicant submits that instead of 800 linear feet of improvements as shown on both the circled areas of the TMK map attached, the Applicant be instead permitted to improve one or the other of the areas circled on the attached TMK map. This would result in approximately twenty-four thousand dollars worth of improvements, (plus civil engineering to be determined), and given the fair value of the proposed five acre lots, the Applicant submits that this is fair and reasonable compromise."

Subsequent to the above, the applicant's agent met with Planning Department staff and submitted further background information in a letter dated December 17, 2006 and attached colored diagram of access rights-of-way for the proposed subdivision.

This letter dated December 17, 2006 states in part:

Mr. Neil Erickson, Architect

Page 4

January 4, 2007

"This letter is to memorialize the applicant's tentative agreement to make such improvements in the existing right of way as shown on the enclosed TMK map. Said improvements consist of nondedicable 16 foot wide agricultural pavement with 2 foot shoulders per Std Det. R-39 for an area of approximately 1650 linear feet. In order to finance such improvements the applicant will need to obtain a surety bond and/or letter of credit."

5. **Agency Comments and Requirements: VAR 06-054:**

a. The State Department of Health (DOH) memorandum is dated August 4, 2006 (Refer to memorandum in file).

b. The County of Hawaii Fire Department memorandum dated August 3, 2006 states:

"In that the catchment system will also be used for fire protection, it is recommended that the fire department connection to the tank be located in an area accessible by fire apparatus."

c. The Department of Water Supply (DWS) memorandum dated August 9, 2006 states in part:

"We have reviewed the subject variance application; and our comments from our memorandum of May 11, 2006, to you still stand:

"Please be informed that the subject parcel is not within the service limits of the Department's existing water system facilities. . .

The nearest Department of Water Supply water system facility is an existing 8-inch waterline within Kahakai Boulevard, approximately 4,000 feet from the property and from an existing 6-inch waterline within Nanawale Subdivision approximately 4,100 feet from the property."

Further, as the applicant has indicated that they will utilize private rain water catchment systems for each lot, we have no objection to the proposed application."

January 4, 2007

- d. The Department of Public Works (DPW) memorandum dated August 29, 2006 states in part:

"We have reviewed the subject application forwarded by your memo dated July 27, 2006 and offer the following comment:

The DPW still believes that to safeguard public welfare and safety, road improvements to satisfy Section 23-86 of the Hawaii County Code (HCC) should be provided. However, if the Planning Director finds that the applicant's reasons provide valid grounds to justify HCC, Section 23-15, the DPW defers to that determination."

6. **Notice to Surrounding Owners/Posted Sign.** The applicant's agent submitted affidavits regarding a notice mailed to property owners to list of surrounding property owners and photograph of a sign posted on subject property. According to the agent's affidavits and submittals, it appears that a notice was mailed on or about August 3, 2006; and, required sign was posted on subject property on or about August 5, 2006.
7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. No written objections to the variance application were received from surrounding property owners or public.

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Water Supply. The first alternative requires the applicant or owners to extend and/or improve the existing county water system and provide the necessary dedicable water system improvements in accordance with DWS standards.

The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards.

The imposition of extending or improving the existing public DWS water system or providing an approved alternative private water system meeting DWS standards for the pending subdivision would be putting excessive demands upon the applicant or owners when a more reasonable alternative (e.g. private individual rainwater catchment system for potable and emergency requirements) is available.

Mr. Neil Erickson, Architect

Page 6

January 4, 2007

Lot Access/Roadways. The first alternative requires the subdividers to construct 20 feet wide dedicable pavements within minimum 50 feet rights-of-way according to (Standard Detail R-34) according to DPW comments in the subdivision file and Chapter 23, Subdivisions.

In addition to subject TMK property's current access via a series of privately owned roadway lot(s), the second alternative acknowledges that the subject TMK property or proposed 4-lot subdivision abuts a 20 feet wide publicly owned road rights-of-way ("ROAD" or "Road in Limbo" or Government Road Reserve) or Homestead Road system.

INTENT AND PURPOSE OF THE SUBDIVISION CODE

Water Variance. The intent and purpose of requiring a water system for and within the proposed subdivision is to assure that adequate water is available for human consumption and fire protection.

The State Department of Health has no specific rules or regulations relating to the utilization, construction or inspection of private roof catchment water systems for potable or emergency uses.

The analysis of rainfall maps at the Planning Department and rainfall information provided by the applicant's agent appear to indicate that there is adequate rainfall within the subject property and surrounding areas to support individual or separate private rainwater catchment systems for potable and emergency uses for the proposed subdivision. According to map- Plate 6-WATER-RESOURCES INVESTIGATIONS REPORT 95-4212, the proposed 4-lot subdivision appears to be nearest active rain gage station "PAHOA 65". According to NOAA data, "PAHOA 65" received 114.62 inches of rain during 2002. Other historical rainfall data records obtained from HSCO for a rain gage station "PAHOA 65" near the proposed subdivision shows a mean rainfall average of 147.89 inches between the years 1949 and 2000. The analysis of the applicant's submittals compared with recent rainfall data and historical rainfall data for the surrounding areas indicate the proposed subdivision will receive approximately 100 inches +/- of rainfall yearly.

Given the unusual nature of the subdivision and annual rainfall within the immediate area, the proposed subdivision the variance request is reasonable. The provisions for water storage, water distribution, and construction of private rain water catchment system(s) will be addressed by the applicant or future lot owner(s) of the proposed lots.

Mr. Neil Erickson, Architect

Page 7

January 4, 2007

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.

The proposed 4-lot subdivision and adjoining areas are agricultural in character. The status of access to this area and status of ownership of the original railroad right-of-way(s) and the publicly owned network abutting the subject TMK property and surrounding neighborhood was created before statehood and prior to adoption of the 1967 Zoning and Subdivision Codes by the County of Hawaii. The subject TMK property (without subdividing) and surrounding neighborhood can access a "Homestead Road" or the Pahoa Bypass Road via segments of the original 40 feet wide consolidated railroad right-of-way (now a series of privately owned road lots or easements on and over adjoining TMK property) or 20 feet wide "Government Road Reserve" roadways identified on the PPM and TMK map(s). After further discussion with Planning Department staff, the applicant's agent acknowledged the Planning Director's finding and variance regarding alternative roadways and necessary intersection improvements for the proposed subdivision, subject to the right to appeal. In lieu of dedicable access and road improvements required for the subdivision, a variance can be granted to allow alternative paved roadways and necessary intersection improvements to be constructed within road lot(s) and easement denoted on a colored diagram attached to the agent's letter dated December 17, 2006. The variance requires the owner or subdivider to construct 1650 linear feet of "non-dedicable" 16 feet wide "A. C. Pavement" roads together with 2-2 feet wide grassed shoulders and swales utilizing the diagram for non-dedicable private dead-end street of DPW-Standard Detail R-39 within a series of 40 feet wide rights-of-way, e.g. within TMK: 1-5-005:016, portion of TMK: 1-5-005:004, and TMK: 1-5-005:022 fronting proposed subdivision. Road upkeep and maintenance of the compacted shoulders or grassed swales within these 3-segments of the original 40 feet wide consolidated railroad right-of-way will be privately addressed by the subdivider or shared by future lot owner(s) and users. The current owner of the subject TMK property or subdivider will consider and insure that "physical access" to the subdivision or between the subject TMK property and Homestead Road system is maintained and/or recognize that the subdivision may also access other "ROAD" (20 feet wide) fronting the proposed lots.

Therefore, based on the representations made by the applicant's agent and evaluation of existing access to the subject TMK property and other access to the subject TMK property or proposed subdivision utilizing the 20 feet wide network of "Government Road Reserves" or network of roadways called "Homestead Road", the Planning Director has concluded that the DPW comments to expand the existing 20 feet or 40 feet road rights-of-way fronting the proposed subdivision and installing dedicable and/or non-dedicable road improvements within these rights-of-way conforming to Standard Detail R-34 and R-39 are not necessary at this time.

Mr. Neil Erickson, Architect

Page 8

January 4, 2007

Access to the proposed lots or subdivision access to the "Homestead Road" or to the "Pahoa Bypass Road" will be continued to be utilized after the subdivider constructs paved road improvements within 3 road (TMK) segments identified on a colored diagram submitted by the applicant's agent.

The subject variance application and original variance request was acknowledged by letter dated July 27, 2006. Additional time was requested by the applicant's agent to secure cost estimates for alternative roadway improvements and consider alternative subdivision improvements. The applicant's agent agreed to an extension of time to consider the variance application. An extension of time was granted to the Planning Director to render a decision on the subject variance application to January 5, 2007.

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 application to allow a proposed 4-lot subdivision of the subject TMK property without providing a water system meeting DWS standards to proposed lots and alternative access and construction of paved road improvements within existing 40 feet wide road lots or easements to proposed subdivision is hereby **approved** 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 for approval by the agencies to construct approximately 1650 linear feet of non-dedicable 16-foot wide "A. C. Pavement" road and 2-2-feet wide shoulders and grassed swales utilizing the road section diagram for private dead-end street of DPW-Standard Detail R-39 within 40 feet wide segments of the original consolidated railroad right-of-way being TMK: 1-5-005:016, portion of TMK: 1-5-005:004, and TMK: 1-5-005:022 fronting proposed subdivision; and, further identified on your colored diagram submittal in subject variance file.

These alternative roadway improvements including any intersection improvements (e.g. necessary pavement striping and signage for safety) at the intersection(s) of this paved road with Homestead Road and other rights-of-way shall meet with the approval of the DPW-Engineering Division and other agencies and these alternative paved road, shoulders and swales, and intersection improvements permitted by subject variance shall be completed or bonded prior to issuance of Final Subdivision Approval to SUB 05-000055.

3. 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 05-000055. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the lot(s) not serviced by a County water system 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. The owners agree and accept the fact that a County dedicable public water system is not now able to service the proposed subdivision SUB 05-000055. 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 owners agree and accept the fact that the County will not, at this time, bear the responsibility of supplying public water to the proposed or affected additional lots created by SUB 05-000055 not serviced by a County water system. No further subdivision of the lots created by SUB 05-000055 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 05-000055 may not be made subject to a condominium property regime.

- d. Any farm dwelling constructed on a proposed lot not serviced by a County water system shall be provided with and maintain a private potable rain catchment system which includes a minimum 6000-gallon water storage capacity for domestic consumption or potable uses. This private water catchment system shall adhere to the Department of Public Works, Building Division's "Guidelines for Owners of Rain Catchment Water Systems" as well as the State Department of Health requirements related to water testing and water purifying devices.
- e. Each permitted farm dwelling shall be provided with and maintain a private water supply system which includes an additional minimum 3,000 gallon water storage capacity for fire fighting and emergency purposes. The location and capacity of the emergency water supply system, including the necessary compatible connector system, shall meet with the approval of the Hawaii County Fire Department. The Hawaii County Fire Department also advises as a precautionary measure for other uninhabited agricultural structures that consideration be given to the provision of a similar water storage system for fire fighting and emergency purposes.
- 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..
- g. In the event that the County notifies the owner(s) of the lot(s) created by SUB 05-000055 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 05-000055, the owner(s) of the lot(s) created by SUB 05-000055 shall participate in such improvement district or shall pay their pro-rata share of the upgrade and installation of laterals, as determined by the Department of Water Supply.

- h. The subdivider and all grantees, successors, and assigns acknowledge that the parcel was created by a variance from the normal subdivision requirements of Hawaii County, and that there are no special or unusual circumstances applying to the property which deprive the owner of substantial property rights or to a degree which obviously interferes with the best use or manner of development of the property, and hence, no grounds exist or will exist for a variance from the subdivision code to permit further subdivision of the property, and that changes in the owner's personal or financial situation after acquiring the property also will not constitute grounds for a variance from the subdivision code to permit further subdivision of the property.

- 3. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the 4-lots arising out of SUB 05-000055 will use and maintain the privately owned road and grassed shoulders and swales within the 40 feet wide road lots or right-of-way segments of the original consolidated railroad right-of-way on their own without any expectation of governmental assistance to maintain this existing access or any roadway improvements within the privately owned 40 feet wide road right-of-way and/or road easement(s) identified on the subdivision's 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 05-000055. The proposed 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 05-000055 or/and portion(s) of a 40 feet wide road right-of-way fronting SUB 05-000055. Should the improvement district require acquisition of any privately owned rights-of-way fronting any lots arising out of SUB 05-000055, 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 the existing privately owned access and/or utility easement(s).

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.

4. The subdivision application's (SUB 05-000055) final plat map shall meet all the requirements of the Hawaii County Zoning Code and the Subdivision Code not covered by this variance. No other variances from Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 05-000055.
5. 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.

Mr. Neil Erickson, Architect

Page 13

January 4, 2007

Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

In accordance with a recent charter amendment and Ordinance No. 99-111, you may appeal the director's decision regarding the above road variance and request the following:

- (a) Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the date of the director's written decision, appeal the decision to the board of appeals.
- (b) A person is aggrieved by a decision of the director if:
 - (1) The person has an interest in the subject matter of the decision that is so directly and immediately affected, that the person's interest is clearly distinguishable from that of the general public; and
 - (2) The person is or will be adversely affected by the decision.
- (c) An appeal shall be in writing, in the form prescribed by the board of appeals and shall specify the person's interest in the subject matter of the appeal and the grounds of the appeal. A filing fee of \$250 shall accompany any such appeal. The person appealing a decision of the director shall provide a copy of the appeal to the director and to the owner of the affected property and shall provide the board of appeals with the proof of service.
- (d) The appellant, the owners of the affected property, and the director shall be parties to an appeal. Other persons may be admitted as parties to an appeal. Other persons may be admitted as parties to an appeal, as permitted by the board of appeals.

The board of appeals may affirm the decision of the director, or it may reverse or modify the decision, or it may reverse or modify the decision or remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

- (1) The director erred in its decision; or
- (2) The decision violated this chapter or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Mr. Neil Erickson, Architect

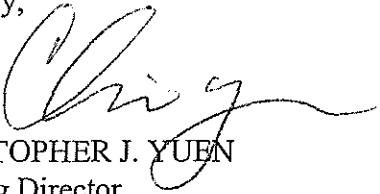
Page 14

January 4, 2007

In view of the above, we have enclosed GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR.

Thank you for your understanding and patience during our review.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

WRY/DSA/CJY:cd

P:\public\wp60\WRY\FORMLETT\VAR06-054SUBWATERROADTMK15005012.ERICKSON-CARRILLO.1.doc

Enclosure

xc: DPW-Engineering Branch (w/o enclosure)
DWS-Engineering Branch (w/o enclosure)
SUB 05-000055 (w/o enclosure)