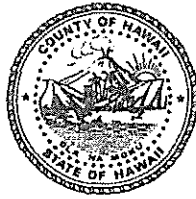


Harry Kim
Mayor



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
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November 30, 2006

Mr. Michael W. Moore, Esq.
TSUKAZAKI YEH & MOORE
Attorneys At Law
85 W. Lanikaula Street
Hilo, HI 96720

Dear Mr. Moore:

SUBJECT: VARIANCE-VAR 06-057

Agent: MICHAEL W. MOORE, ESQ.
Applicant(s): DONALD D. WEEKS, ET AL.
Owner(s): DONALD D. WEEKS, ET AL.
Request: Variance from Chapter 23, Subdivisions
Tax Map Key: 1-4-020:004 and 006, (SUB 05-000167)

After reviewing your variance application, the Planning Director certifies the approval of VAR - 06-057 subject to variance conditions. VAR 06-057 permits proposed 3-lot subdivision (SUB 05-000167) to be created without providing a water supply system and constructing limited non-dedicable roadway improvements within existing access or roadway lot. The variance request is from Hawaii County Code, Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2), and non-dedicable roadway requirements required by the Department of Public Works (DPW) or Chapter 23, Subdivisions, Article 6, Improvements, Division 2, Improvements Required, Section 23-87, Standard for non-dedicable street; escrow maintenance fund, and Section 23-95, Right-of-way improvement.

BACKGROUND

1. **Location.** The subject TMK property(s), containing an aggregate area of approximately 10.592 acres, are portions of R.P. 7483, Apana 3, L.C. Aw. 4452, Apana 1 to Hazaleleponi Kalama and portions of R.P. 4497 and L. P. 8177, L.C. Aw. 8559, Apana 5 to C. Kanaina, and situated at Halekamahina and Kapoho, Puna, Hawaii.

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2. **Zoning.** The subject property is zoned Agricultural (A-3a) by the County and designated Agriculture "A-" by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The owner's submitted proposed (3)-lot subdivision application (SUB 05-000167) on September 9, 2005. Further action on this pending (3)-lot subdivision application and the application's preliminary plat map (PPM) dated August 23, 2005 is being deferred according to a letter dated October 27, 2005 in the subdivision file.
4. **Variance Application.** The subject variance application was acknowledged by Planning Department letter dated July 27, 2006. The variance application's background report states in part:

Page 2. Water.

"There are special and unusual circumstances relating to water which would deprive the Applicants of substantial property rights. The nearest public water system facilities are approximately eight-tenths of a mile from proposed lot 1-A-1 and approximately one mile from proposed Lots 1-A-2 and 1-A-3. Extension of the water system to the Property would be cost prohibitive for a projection of this nature. Further, the drilling of a well and construction of related transmission facilities would be equally cost prohibitive for the Applicants.

The Applicants propose to install and utilize a water catchment system to service the three proposed lots. Rainfall in the area is sufficient to provide water for any potential agricultural activities, as well as for domestic and firefighting purposes. The closest rain gauge to the Property is located in the town of Pahoa. According to the 2005 Hawai'i County Data Book, the annual rainfall in the town of Pahoa was 122 inches in 2000, 113.17 inches in 2001, 114.62 inches in 2002 (Data Book indicates that there was insufficient data for this year and that 1-9 daily values were missing), 93.46 inches in 2003 and 141.12 inches in 2004 (see attached Exhibit 4). In addition to the annual rainfall levels measured at the Pahoa rain gauge, the Property lies in between an 80 inch annual rainfall area and 120 inch annual rainfall area on the United States Geological Survey map included in the Water-Resources Investigations Report 95-4212 (see attached Exhibit 5).

Page 5. Roadway.

There are special and unusual circumstances relating to roadways which would deprive the Applicant's of substantial property rights. The existing private road right-of-way is 16 feet wide. It is presently unpaved. The Applicants believe that the estimated cost of improving the roadway to DPW's recommendation does not correlate to their consolidation/resubdivision request which will result in one additional lot. Pursuant to the recently adopted Planning Department Rule No. 22 relating to water variances, further subdivision of the proposed lots would not be possible should the water variance be approved. In addition, further subdivision would not be possible without a change of zone for the Property. As such, it is unlikely that the roadway will be utilized to provide access to more than four lots.

The Applicants believe that the level of improvement they are proposing would make the existing access better for both ordinary passenger and emergency vehicles, while still allowing the Applicants to use the Property without the major expenditure of fully improving the roadway to DPW's recommendations.

The Applicants' proposal would provide 12-foot wide oil treated pavement for the first 30 feet of the existing roadway and the same level of pavement in the area where the roadway bends. The balance of the roadway would be paved with aggregate base course. The entire length of the improved are would have 2-foot wide compacted shoulders on each side. The Applicants believe that their proposal would improve the existing roadway to a reasonable degree, while still providing safe access to vehicles, including emergency vehicles."

In addition to the above, the applicant's forwarded a letter dated November 9, 2006 and other historical information concerning access to the neighborhood.

5. **Agency Comments and Requirements: VAR 06-057:**

- a. The State Department of Health (DOH) memorandum is dated August 4, 2006 (Refer to memorandum in file).
- a. 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 10, 2006 states in part:

"We have reviewed the subject variance application; and our comments from our memorandum of November 8, 2005, 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 at the end of an existing 8-inch waterline along the Kapoho-Pahoa Road, approximately 1 mile from lots 1-A-2 and 1-A-3 and eight-tenths of a mile to Lot 1-A-1."

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."

- 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;

The DPW still believes that to safeguard public welfare and safety, road improvements to satisfy Section 23-87 and Section 23-95 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 4, 2006; and, the required sign was posted on subject property on or about August 4, 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. Other letters endorsing the subject variance application include the following:
 - 7a. The subdivider forwarded a letter dated August 8, 2006 together with the 3 letters written and signed by abutting or surrounding property(s) supporting the subject variance application:
 - 7a-1. Letter from Edward and Pauline McLaren dated August 4, 2006.
 - 7a-2. Letter from Ivan and Kara Penwell dated August 4, 2006.
 - 7a-3. Letter from Mary Anne Robertson and Justing Navarez dated August 4, 2006.
 - 7b. The subdivider forwarded a second letter dated August 21, 2006 together with a letter written and signed by abutting or surrounding property(s) supporting the subject variance application:
 - 7b-1. Support received letter from Akisuke Kuwahara, Et al. dated August 4, 2006.

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 3-lot 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.

Lot Access/Roadways. Access from to Kapoho-Pahoa Road to proposed "LOT 1-A-2" and "LOT 1-A-3" is via a substandard road within a "16 Foot Road" or privately owned right-of-way (TMK: 1-4-020:010). The DPW is requiring the subdivider to submit construction plans and drainage report to widen this 16-foot wide right-of-way to 50 feet and construct 20 feet wide agricultural pavement conforming to DPW Std. Detail R-39; and, where grades are 8% or greater, the roadway section shall be paved per Std. Detail R-34. Proposed "LOT 1-A-1" has frontage along a remnant of the "Old Government Road".

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. Historical rainfall data records for a rain gage station "KAPOHO UPPER" (Station No. 66.0-Discontinued in 1955) near the proposed subdivision shows a mean rainfall average of 120.69 inches between the years 1934 and 1955. According to map- Plate 6-WATER-RESOURCES INVESTIGATIONS REPORT 95-4212, the proposed 3-lot subdivision is situated near the 120 isohyet line. The analysis of the applicant's submittals compared with historical rainfall data for the surrounding areas indicate the proposed subdivision will receive at least 100 inches +/- of rainfall yearly. The proposed subdivision meets Rule No. 22-Water Variance.

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.

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 subdivision and adjoining areas are agricultural in character. Access to the proposed subdivision or the network of publicly owned and privately owned roadways within this area were created before statehood and prior to adoption of the 1967 Zoning and Subdivision Codes by the County of Hawaii. One of the proposed lots (LOT 1-A-1) has frontage or can access the publicly owned road remnant ("Old Government Road"). The applicant's discussed the original road variance request and other alternative road improvements within the 16 feet wide road parcel (TMK: 1-4-020:010) for 2-proposed lots with the Planning Director.

In consideration of the recent discussion with the owners-subdividers, the Planning Director has concluded that the DPW comments to construct "minimum 20-ft wide agricultural pavement within a minimum 50-ft width right-of-way conforming to DPW Std Det R-39" is not required to permit the proposed 3-lot subdivision. However, the Planning Director finds that a variance to construct a minimum 12-feet wide oil treated pavement with 2-2 feet compacted shoulders (approximately 670 + feet) within the privately owned "16-Foot Road" (i.e. from the intersection of the privately owned road lot with Kapoho-Pahoa Road to approximately 70 feet beyond the proposed pole of "LOT 1-A-3") is reasonable. The cost to install the alternative road and shoulder improvements within the privately owned 16 feet wide road lot will be borne by the owners-subdividers and maintenance of the road and shoulder improvements within this privately owned road lot will be privately addressed and shared among the proposed lot owner(s) and/or users.

The subject variance application was acknowledged by letter dated July 27, 2006. Additional time was required by the applicant to discuss the applicant's original variance request with the Planning Director. The applicant's agent agreed to extend the decision date to render a decision to November 30, 2006.

Based on the foregoing findings, the variance from the water and road improvements for the proposed subdivision 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 water and road variance 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 3-lot subdivision of the subject TMK property without providing a water system meeting DWS standards and road improvements required by the DPW 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. 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 05-000167. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the lots 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 05-000167. 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 SUB 05-000167 not serviced by a County water system. No further subdivision of the lots created by SUB 05-000167 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.

- c. Any lots created by SUB 05-000167 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 05-000167 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 05-000167, the owner(s) of the lot(s) created by SUB 05-000167 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.

2. ROAD VARIANCE. The owners-subdividers shall submit construction plans to construct alternative non-dedicable 12 feet wide agricultural road and shoulder improvements (approximately 670 +/- feet in length) within privately owned 16 feet wide privately owned road lot (TMK: 1-4-020:010) according DPW-Standard Detail-R-39 for review and approval by affected agencies. The subdivider, owners, their assigns, or successors understand that the 2 proposed lots arising out of SUB 05-000167 will use and maintain the privately owned road improvements or road lot on their own without any expectation of governmental assistance to maintain the road improvements within the privately owned road 16 feet wide privately owned road lot (TMK: 1-4-020:010) identified on the subdivision application's preliminary plat map and/or any other necessary access and utility easement(s) required for the proposed 3-lot 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 05-000167. The proposed lots utilizing the road within the privately owned "16-Foot Road" shall form an Homeowner or Road Association or include appropriate deed language, being covenants, conditions, and restrictions, which affect the 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 05-000167. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 05-000167, 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 lot owner(s) or uses of the roadway within TMK: 1-4-020:010 identified on the subdivisions preliminary plat map agree to participate in any road maintenance agreement or/and pay their fair share to maintain the roadways within TMK: 1-4-020:010.

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 05-000167) 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 05-000167.

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.

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

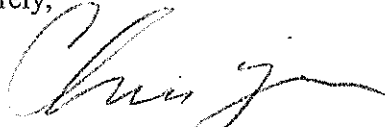
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- (2) The decision violated this chapter or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by and abuse of discretion or clearly unwarranted exercise of discretion.

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

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xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB 05-000167