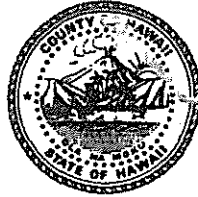


Harry Kim  
Mayor



Christopher J. Yuen  
Director

Brad Kurokawa, ASLA  
LEED® AP  
Deputy Director

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

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224  
(808) 961-8288 • FAX (808) 961-8742

March 20, 2008

Mr. Michael J. Roposh, Project Designer  
ENGINEERING PARTNERS, LLC  
P. O. Box 4159  
Hilo, HI 96720

Dear Mr. Roposh:

**VARIANCE-VAR 06-083 (REVISED)**

**Applicant: ENGINEERING PARTNERS, LLC**

**Owners: JAMES P. TIPTON, ET AL.**

**Request: Variance from Chapter 23, Subdivisions,  
Improvements Required**

**Tax Map Key: 1-4-071:008, (SUB 05-000242), (BOA 07-00045)**

Pursuant to an agreement between the owners of the subject TMK property and Vacationland Hawaii Homeowners Association (VHCA) related to an appeal (BOA 07-000045) of Planning Director's decision and variance conditions dated March 15, 2007, the Planning Director certifies the **approval** of Variance-VAR 06-083 (REVISED) subject to revised variance conditions and agreement. The variance allows the owners to construct alternative non-dedicable roadway improvements for proposed 2-lot subdivision (SUB 05-000242) in lieu of dedicable roadway and other requirements required by the Department of Public Works (DPW) and tentative subdivision letter dated July 26, 2006, Condition "3), b), c)". The variance is from Chapter 23, Subdivisions, Article 6, Improvements, Division 2, Improvements Required, Section 23-86, Requirements for dedicable streets, and Section 23-93, Street lights.

**BACKGROUND**

1. **Location.** The subject TMK property or Lot 35 consisting of approximately 4.996 acres is within Vacationland Hawaii, Unit II, File Plan 920, and situated at Kapoho, Puna, Hawaii.

**MAR 28 2008**

Mr. Michael J. Roposh, Project Designer  
ENGINEERING PARTNERS, LLC

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2. **Zoning.** The subject TMK property is zoned Agricultural (A-1a) and is designated Agriculture "A" by the State-Land Use Commission (LUC). The property is not within the Special Management Area (SMA).
3. **Subdivision Request/PPM.** The above listed owners submitted a 4-lot subdivision (SUB 05-000242). The subdivision application's preliminary plat map (PPM) dated November 8, 2005 was granted Tentative Approval (TA) on July 26, 2006 to allow proposed 4-lot subdivision of subject TMK property subject TA conditions.
4. **Variance Application-VAR 06-083.** The applicant, on behalf of the owners, submitted variance application -VAR 06-083 in December 2006 and other submittals requesting variance from certain TA conditions requiring the owners to construct dedicable roadway improvements within the privately owned rights-of-way fronting the subject TMK property. On March 15, 2007, the Planning Director approved Variance-VAR 06-083 requiring the owners or subdividers to construct non-dedicable roadway improvements within Kapoho-Kai Road subject to variance conditions.
5. **BOA 07-00045/Agreement dated July 31, 2007.** The Vacationland Hawaii Homeowners Association (VHCA) appealed the Planning Director's decision to approve VAR 06-083 dated March 15, 2007. Subsequent to filing the appeal, an agreement between the VHCA and the owners was reached according to VHCA's letter to the Planning Director dated July 31, 2007 which states in part the following:  
  
"VHCA Board of Directors and the variance applicants, James Tipton and Dylan Henderson, met to reach an agreement on issues related to the Appeal of Decision by Planning Director. The goal was to expedite the process by reaching a workable solution for both parties through direct conversation at the community level. The agreed upon issues and acceptance by Planning Department would eliminate in the continuance Board of Appeals Hearing Sept 7, 2007 (sic).

March 20, 2008

Through several discussions, VHCA and Tipton/Henderson have reached an agreement and it is as follows:

1. A two lot equally divided subdivision.
2. One driveway for each lot, with one on of Kapoho Kai and second on Ililani.
3. Developer would improve Ililani to consist of a 20' wide asphalt pavement, 2" thick, centered on the right of way the length of lot 35 fronting Ililani. Grading prior to paving shall consist of removal of any green material in the paving path, and addition of 2" of crushed aggregate suitable for foundation use and heavy roller compaction thereof. Finish grade shall be at or above adjacent ROW elevations. Edge of pavement shall be feathered starting at top of 3' from edge of pavement with 3/4" minus gravel to prevent edge break off. All site work and paving to be in accordance with standard road practices.

With mutual acceptance of this agreement, VHCA agrees to withdraw its appeals petition. It is also agreed that the variance applicants will modify the current variance application as it stands and resubmit modified version reflecting the improvements listed in this letter."

#### **VARIANCE-VAR 06-083 (REVISED/REVISED VARIANCE CONDITIONS)**

Pursuant to BOA 07-00045 and Agreement dated July 31, 2007, the original decision to approve Variance-VAR 06-083 dated March 15, 2007 and variance conditions dated March 15, 2007, is hereby amended and **approved** allowing owners to submit a revised preliminary plat map for proposed 2-lot subdivision of the subject TMK property and the issuance of a revised tentative approval for SUB 05-000242 subject to roadway improvements specified in Agreement dated July 31, 2007 and subject to Variance-VAR 06-083 (REVISED) and following revised variance conditions:

1. The subdivider, owners, their assigns, or successors shall be responsible for complying with all stated conditions of this variance.

Mr. Michael J. Roposh, Project Designer  
ENGINEERING PARTNERS, LLC

Page 4

March 20, 2008

2. The subdivider(s) or applicant shall comply with remaining subdivision TA conditions dated July 26, 2006 and submit alternative subdivision construction plans for agency review and approval. The applicant or owners shall construct the approved water supply system and construct non-dedicable road improvements within Ililani Road (Right-of-Way) pursuant to approved subdivision construction plans prior to issuance of Final Subdivision Approval
3. The subdivider(s), owners, their assigns, or successors understand that the lots arising out of SUB 05-000242 will use and maintain the privately owned access roads fronting the subject TMK property on their own without any expectation of governmental assistance to maintain the privately owned non-dedicable roadways fronting the proposed subdivision or any other access and non-dedicable roadway improvements within the proposed subdivision.
4. ROAD VARIANCE: The applicant, owners, their assigns, or successors shall file a written agreement or approved written document with the Planning Department within one (1) year from the date of this variance permit letter or prior to granting final subdivision approval to SUB 05-000242. This agreement shall contain the following deed language, being covenants, conditions, and restrictions, which affect the entire property and/or proposed lots created by subdivision application SUB 05-000242 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 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 privately owned road right-of-ways fronting the existing TMK property designated on the subdivision application's final plat map.
  - b. The owners understand that the lots created by SUB 05-000242 have been approved with this road variance, and that they will use and maintain the privately owned on-site driveways and privately owned access roadway to and within their property on their own without any expectation of governmental assistance.

Mr. Michael J. Roposh, Project Designer  
ENGINEERING PARTNERS, LLC

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March 20, 2008

- c. The future lot owners agree to participate in any original road maintenance agreement affecting the previous TMK parcel or/and pay their fair share to maintain the existing privately owned access roads fronting the proposed lots arising out of SUB 05-000242.
  - d. The subject TMK property or any lots created by SUB 05-000242 may not be made subject to a condominium property regime. No permit shall be granted to allow an ohana dwelling or building permit issued to allow an "ohana" dwelling shall be granted to the subject TMK or on any lots created by SUB 05-000242, subject to provisions of the Zoning Code or State Law which may change from time to time.
  - e. 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 lots created by SUB 05-000242.
5. The subdivision application's 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 05-000242.
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.

Mr. Michael J. Roposh, Project Designer  
ENGINEERING PARTNERS, LLC

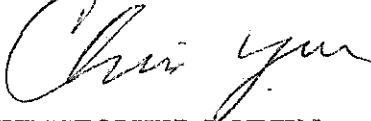
Page 6

March 20, 2008

Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare the subject Variance-VAR 06-083 (REVISED) to be null and void.

Thank you for your understanding and patience during our review.

Sincerely,



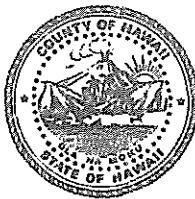
CHRISTOPHER J. YUEN  
Planning Director

WRY/DSA:cs

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xc: DPW-Engineering Branch  
DWS-Engineering Branch  
SUB 05-000242  
Mr. Gerald J. Lindman  
Mr. Richard J. Shea  
Mr. Jack Adam Weber  
Ms. Jan Anderson  
Mr. and Mrs. James Lehner  
Ms. Betty Oberman  
VHCA

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

March 15, 2007

Mr. Michael J. Roposh, Project Designer  
ENGINEERING PARTNERS, LLC  
P. O. Box 4159  
Hilo, HI 96720

Dear Mr. Roposh:

**VARIANCE-VAR 06-083**

**Applicant: ENGINEERING PARTNERS, LLC**

**Owners: JAMES P. TIPTON, ET AL.**

**Request: Variance from Chapter 23, Subdivisions,  
Improvements Required**

**Tax Map Key: 1-4-071:008, (SUB 05-000242)**

After reviewing your variance application, the Planning Director certifies the **approval** of Variance-VAR 06-083 subject to variance conditions. The variance allows the owner or subdivider to construct alternative non-dedicable roadway improvements for proposed 4-lot subdivision (SUB 05-000242) in lieu of dedicable roadway and other requirements required by the Department of Public Works (DPW) and tentative subdivision letter dated July 26, 2006, Condition "3), b), c)". The variance is from Chapter 23, Subdivisions, Article 6, Improvements, Division 2, Improvements Required, Section 23-86, Requirements for dedicable streets, and Section 23-93, Street lights.

**BACKGROUND**

1. **Location.** The subject TMK property or Lot 35 consisting of approximately 4.996 acres is within Vacationland Hawaii, Unit II, File Plan 920, and situated at Kapoho, Puna, Hawaii.

2. **Zoning.** The subject TMK property is zoned Agricultural (A-1a) and is designated Agriculture "A" by the State-Land Use Commission (LUC). The property is not within the Special Management Area (SMA).
3. **Subdivision Request/PPM.** The above listed owners submitted a 4-lot subdivision (SUB 05-000242). The subdivision application's preliminary plat map (PPM) dated November 8, 2005 was granted Tentative Approval (TA) on July 26, 2006 to allow creation of 4-lots subject TA conditions.
4. **Variance Application.** The original variance application and submittals were acknowledged by Planning Department letter dated December 18, 2006. Subsequent to reviewing comments and objection letters received from surrounding or nearby property owners, the applicant, on behalf of the above listed owners, submitted a transmittal letter dated February 15, 2007 and attachment dated February 15, 2007.

The applicant's attachment dated February 15, 2007 states in part the following:

"On behalf of the parcel owners, Mr. James P. Tipton and Mr. Dylan D. Henderson, Engineering Partners, Inc. request an extension until Monday, 19 March 2007 for the Director's decision regarding Variance Application (VAR 06-083), Tax Map Key: 1-4-071:008, (SUB 05-00242). We request the extension given the circumstances that surrounding property owners object to proposed Ililani Road improvements. Due to the objections, we will now focus improvement efforts on Kapoho-Kai Drive.

Specifically, we propose to modify the existing 18-ft wide asphalt pavement on Kapoho Kai Drive with a 7-ft wide shoulder and two (2) driveway stub outs. Designated landscape areas will protect the four (4) water meters when the owner provides water service to each lot. We will locate all improvements to Kapoho Kai Drive only on the side fronting the property. Our proposed improvements have an estimated cost of \$80,000 and provide a feasible alternative to Item 3b of the Planning Department's July 26, 2006 tentative approval letter."

5. **Agency Comments and Requirements (VAR 06-083):**
  - a. The State Department of Health (DOH) memorandum is dated December 22, 2006. (Refer to DOH memorandum in variance file).



- b. The Hawaii County Fire Department (HCFD) memorandum, dated December 28, 2006 states:

“We have no comment to offer at this time regarding the above-mentioned Variance application request.

- b. No comments were received from the Department of Public Works (DPW).

- 6. **Notice to Surrounding Owners/Sign.** The applicant's submitted transmittal letter dated January 3, 2007 and sample packet including a sample notice mailed to list of surrounding property owners within 300 feet of subject TMK property. According to these submittals and copy of mailing receipts received, notice was mailed on January 3, 2007.

**Posted Sign.** Pursuant to the applicant's earlier submittals, affidavit, and photograph, a sign was posted on subject property. (Note: According to March 13, 2007 telephone discussion, the original posted sign was reported stolen and would be replaced with a new sign).

- 7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. The following objection letters to the subject variance application were received:

- 7a. Objection letter dated January 10, 2007 from Gerald J. Lindman received on January 11, 2007.
- 7b. Objection letter dated January 9, 2007 from Richard J. Shea received on January 16, 2007.
- 7c. Objection letter dated January 13, 2007 from Jack Adam Weber received on January 17, 2007.
- 7d. Objection letter dated January 23, 2007 (sic) from Jan Anderson received on January 22, 2007.

Mr. Michael J. Roposh, Project Designer  
ENGINEERING PARTNERS, LLC  
Page 4  
March 15, 2007

- 7e. Objection letter (undated) from James and Sheryl Lehner received on February 15, 2007.
- 7f. Objection letter (fax) dated March 9, 2007 from Betty Oberman received on March 12, 2007.

### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

The Planning Director finds there are special and unusual circumstances apply to the subject project which exist either to a degree which deprive the applicant/owner of substantial property rights that would otherwise be available or to a degree which obviously interferes with the best use or manner of development of the subject property:

1. Existing Zoning and Proposed Subdivision. After reviewing the subdivision's PPM and TA conditions and variance application including the cost estimates for the roadway, the proposed 4-lot subdivision could not support the cost to construct "dedicable" improvements required by the DPW. In lieu of constructing dedicable road improvements required by the TA letter and TA conditions, the applicant is requesting variance to construct non-dedicable improvements and other required subdivision improvements within the Kapoho-Kai Drive right-of-way fronting proposed pursuant to TA subdivision approval letter and TA conditions.
2. Proposed Lot and Subdivision Road Improvements. The access to the area and privately owned roadways fronting the proposed subdivision were created before the Zoning and Subdivision Codes were adopted in 1967. Given the existing paved access road from the Kaimu-Kapoho Road and graveled roadway fronting the existing property, low vehicular usage from the subdivision and adjoining areas, the applicant's reasons for the variance, to a degree, are reasonable.

### **ALTERNATIVES**

**Lot Access/Roadways.** The first alternative requires the owners to construct dedicable road improvements in accordance with TA letter and TA access and road improvement conditions. In addition to the expense to meet the subdivision's water supply requirements, the applicant submitted cost estimates showing the expense to install "dedicable" roadway improvements to meet the TA road conditions. (Refer to the applicant's cost estimates to install dedicable and non-dedicable alternative improvement for proposed subdivision and color copy(s)-photographs of existing access and roadways fronting proposed subdivision in subject variance file).

The second alternative acknowledges the applicant's request for variance to construct reasonable subdivision improvements including additional non-dedicable road improvements within Kapoho-Kai Road fronting the proposed 4-lot subdivision.

Currently, there is adequate room within Kapoho-Kai Road for conventional and emergency vehicles to pass and "dedicable" pavement improvements within the privately owned rights-of-way are not warranted or necessary for the proposed 4-lot subdivision.

Current access to the subject TMK property is via the Kaimu-Kapoho Road (Public) via "Kapoho Kai Drive" and "Ililani Road". The variance request is from the TA letter and TA conditions, "3), b), c)" dated July 26, 2005. Kapoho-Kai Drive is a private road within a 60 feet right-of-way serving both the Vacationland Unit I and Unit II Subdivision(s). Kapoho Kai Drive right-of-way/pavement is maintained by the Vacationland Hawaii Community Association ("VHCA"). According to the applicant's photographs and captions, the pavement or "road", within this 60 feet wide right-of-way, consists of 18 feet wide "A.C. Pavement" and grassed shoulders. The subject TMK property (corner lot) also fronts Ililani Road. Ililani Road is a privately owned 16 feet wide "Red Crushed Rock" gravel road within a 40 feet wide right-of-way. Ililani Road is part of a network of privately owned roadways within the Vacationland Unit II Subdivision. The roadways within Vacationland Unit II are also owned and maintained by the VHCA.

In lieu of constructing a 20 feet wide dedicable pavement from Kaimu-Kapoho Road including street lights for proposed 4-lot subdivision. The applicant is requesting a variance to submit alternative subdivision construction plans to construct non-dedicable road improvement in accordance with their letter dated February 15, 2007 which states in part the following, "modify the existing 18-ft wide asphalt pavement on Kapoho Kai Drive with a 7-ft shoulder and (2) driveway stub outs. Designated landscape areas will protect all improvements to Kapoho Kai Drive only on the side fronting the property. Our proposed improvements have an estimated cost \$80,000 and provide a feasible alternative to Item 3b of the Planning Department's July 26, 2006 tentative letter."

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

The intent and purpose of access requirements to a proposed subdivision is to ensure legal and physical access to the proposed lots are clearly defined and accessible from a public road by domestic and farm vehicles, police, fire, and other service vehicles under various weather conditions without constant maintenance.

Mr. Michael J. Roposh, Project Designer  
ENGINEERING PARTNERS, LLC  
Page 6  
March 15, 2007

The surrounding areas are agricultural in character. The character of property's access fronting the fronting the subject property and immediate and surrounding areas have gradually improved over the last 30 years, largely in part, due to the effort by the owners of the privately owned rights-of-way and community organizations. By granting this road variance with conditions, there should be no adverse impact to adjoining properties or users of paved road within Kapoho-Kai Drive and graveled roadway within Ililani Road fronting the subdivision.

The variance request and application was acknowledged by letter dated December 18, 2006. Additional time was requested by the applicant to review comments or objections letters to the variance application and discuss the variance application with the owners and forward additional information was necessary. An extension of time to render a decision on the variance application was granted to the Planning Director to March 19, 2007.

Therefore, after considering the applicant's variance application, variance background report and findings, and comments and objections to the variance application, the Planning Director finds that the variance application and request to modify the subdivision's TA letter and TA conditions dated July 26, 2007 requiring dedicable roadway improvements can be modified to allow construction of non-dedicable roadway improvements subject to variance and variance conditions.

Based on the foregoing findings, the applicant's variance request would be consistent with the general purpose of the zoning district and the intents and purposes of the Zoning Code, Subdivision Code and the County General Plan. Furthermore, the variance requested will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and to adjoining properties.

#### **VARIANCE DECISION/VARIANCE CONDITIONS**

The variance requested to allow a proposed 4-lot subdivision and delete the following TA conditions: "3) b) c)", dated July 26, 2006, for SUB 05-000242 is **approved** subject to 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(s) or applicant shall comply with remaining subdivision TA conditions dated July 26, 2006 and submit alternative subdivision construction plans for agency review and approval. The subdivider(s) or applicant shall construct the approved water supply system and non-dedicable road and shoulder improvements in accordance with variance and approved subdivision construction plans prior to issuance of Final Subdivision Approval
3. The subdivider(s), owners, their assigns, or successors understand that the lots arising out of SUB 05-000242 will use and maintain the privately owned access roads fronting the subject TMK property on their own without any expectation of governmental assistance to maintain the privately owned non-dedicable roadways fronting the proposed subdivision or any other access and non-dedicable roadway improvements within the proposed subdivision.
4. ROAD VARIANCE: The applicant, owners, their assigns, or successors shall file a written agreement or approved written document with the Planning Department within one (1) year from the date of this variance permit letter or prior to granting final subdivision approval to SUB 05-000242. This agreement shall contain the following deed language, being covenants, conditions, and restrictions, which affect the entire property and/or proposed 4-lots arising from the approval of the subdivision application SUB 05-000242 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 privately owned road right-of-ways fronting the existing TMK property designated on the subdivision application's final plat map.
  - b. The owners understand that the lots created by SUB 05-000242 have been approved with this road variance, and that they will use and maintain the privately owned on-site driveways and privately owned access roadway to and within their property on their own without any expectation of governmental assistance.

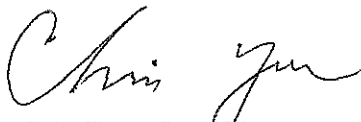
- c. The future lot owners agree to participate in any original road maintenance agreement affecting the previous TMK parcel or/and pay their fair share to maintain the existing privately owned access roads fronting the proposed lots arising out of SUB 05-000242.
  - d. The subject TMK property or any proposed lots created by SUB 05-000242 may not be made subject to a condominium property regime. No permit shall be granted to allow an ohana dwelling or building permit issued to allow an "ohana" dwelling shall be granted to the subject TMK or on any lot(s) arising out of SUB 05-000242, subject to provisions of the Zoning Code or State Law which may change from time to time.
  - e. 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 lots created by SUB 05-000242.
5. The subdivision application's 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 05-000242.
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.

Mr. Michael J. Roposh, Project Designer  
ENGINEERING PARTNERS, LLC  
Page 9  
March 15, 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.

Thank you for your understanding and patience during our review.

Sincerely,



CHRISTOPHER J. YUEN  
Planning Director

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xc: DPW-Engineering Branch  
DWS-Engineering Branch  
SUB 05-000242  
Gerald J. Lindman  
Richard J. Shea  
Jack Adam Weber  
Jan Anderson  
James and Sheryl Lehner  
Betty Oberman