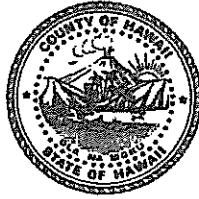


Harry Kim
Mayor



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

May 30, 2008

Mr. Bryan Mims
P. O. Box 1151
Keaau, HI 96749

Dear Mr. Mims:

SUBJECT: VARIANCE-VAR 07-088
Applicant: BRYAN MIMS
Owners: BRYAN MIMS, ET AL.
Request: Variance from Chapter 23, Subdivisions
Tax Map Key: 3-1-004:035, (SUB 06-000443)

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 07-088 subject to variance conditions. The variance is from the water supply and roadway requirements to permits proposed 2-lot subdivision (SUB 06-000443) and creation of proposed Lot 7-A and proposed Lot 7-A. The variance is from Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply (1)(2), Section 23-86, Requirements for dedicable streets, Section 23-93, Street lights, Section 23-94, Street name and traffic signs, and, Section 23-95, Right-of-way improvement.

BACKGROUND

1. **Location.** The referenced TMK property containing 40.00 acres is a portion of Lot 7 Grant 5025 to Joseph H. Moragne, McKenzie Settlement Association Lots, and situated at Kamaee Homesteads, North Hilo, Hawaii.
2. **Zoning.** The subject property is zoned Agriculture (A-20a) and designated Agriculture "A" by the State Land Use Commission (LUC).

3. **Subdivision Request/PPM.** . The applicant or owner's surveyor (The Independent Hawaii Surveyors, LLC, filed subdivision application (SUB 06-000443) and preliminary plat map (PPM), dated February 20, 2006 proposing to equally subdivide the subject TMK property into two (2) lots (Lot 7-A and Lot 7-B) containing 20.00 acres. The letter addressed to the surveyor, dated November 3, 2006, in the subdivision application file, states in part:

Page 1. "The proposed "rear lot (Lot 7-A) fails to meet the minimum building site average width of 500 feet as required by the Zoning Code. As stated in our letter dated May 24, 2006, the proposed lot does not meet this standard. During a November 2, 2006 telephone conversation between Bryan Mims and Daryn Arai of this office, Mr. Mims indicated that he intends to submit an application for a variance from the minimum building site average width requirements of the Zoning Code."

Page 2. "We also note that the proposed subdivision will utilize a water catchment system to service the proposed lots. Therefore, the applicants should submit an application to seek a variance from the minimum water requirements of the Subdivision Code."

4. **Variance Application.** The applicant filed variance applications, attachments, and filing fee for variances from Chapter 23, Subdivision and Chapter 25, Zoning on December 26, 2007. The variance application (VAR 07-088) from Chapter 23, the Subdivision Code includes, a copy of the PPM dated February 20, 2006, drawn to scale.

The applicant's background information states in part:

"Catchment variance: After discussion with Mr. Christensen, we respectfully submitted an application for variance from Article 6, Division 2, Section 23-84 of Chapter 23 of the Hawaii Code.

- Rule-22: This subdivision request meets all criteria under Rule-22. We are asking for only two lots, and our parcel receives more than 60 inches of rain annually."

Road Variance: To help clarify, we have supplied as Attachment-2, a map created by Mr. Christensen, of Independent Survey Inc., clearly showing the paper road in question, and the existing cane road with easements. An existing road cross section is included as Attachment-2A along with photos of the existing easement road.

- The cane roads in question were built by sugar companies from an excellent blue rock quarry on the property. The cross section and specifications of the existing can (sic) road was developed through extensive research and excavation.
- Quarry pit run appears to have been graded and compacted between 18" and 24" thick for the base. Top course is AC regrid tar based aggregate rolled on 2" lifts.
- All water flow concerns are addressed.
- The existing road currently meets most of the county criteria.
 1. Water resistant
 2. The road can accommodate any type of vehicle including emergency vehicles
- The exiting asphalt Kamee Homestead Road that runs from the belt road to the property is ten foot wide. Therefore, it would be consistent to require a ten foot road for the remainder of the easement.
- The section of cane road we plan to improve will service only 3 lots including ours.
- Costs associated with improving our legal easement on the existing cane road, with various road improvement scenarios are submitted as Attachment 2-C.
- After receiving the cost estimates for road improvements, the 20foot (sic) wide approximately 4200ft (sic) in length, at the cost of \$344,000, is totally cost prohibitive.
- The ten foot wide same length, at cost of \$166,000.00 (sic), is also probative because only 3 lots will be serviced the other two lot owners will not participate, and total cost must be covered by us.
- The 'Steep Section' paving of approximately 900 linier (sic) feet at a cost of \$51,000.00 is a possible option.
- Another option we are researching, (sic) is to 'Chip-Seal' the bad sections. This option may be preferable because the cane road is a solid base and chip-seal, comparable to AC, is an all-weather surface, and also meets the requirements of Chapter 25 (sic) of the Subdivision Code.

- All options take into consideration that the section to improve is already an existing full service cane road with a substantial base, due to the proximity of the rock quarry.”

Note: The attachment “2-A” included with the variance application refers to cost estimate(s) by Yamada & Sons, Inc. dated February 2, 2007 to construct “Mims Roadway”. In addition, the applicant submitted pictures showing the roadway and condition of the roadway within 20 feet wide and 30 feet wide access easement(s) identified on the PPM.

In consideration of the above and concurrently with request for variance application from minimum building site average width (VAR 07-089), **the applicant is requesting variance from the following:**

Water Supply: Pursuant to Rule 22, allow privately owned rainwater catchment systems for potable and emergency needs for proposed subdivision.

Access and Road Requirements: In lieu of construction dedicable road improvements, the applicant is proposing to construct following non-dedicable road improvements identified on a supplemental map in the variance file: “AC regrinds rolled” road (10 feet upon privately owned 20 feet and 30 feet wide easements, 1-AC or concrete surface 18’ x 50’ swale upon easement “41-B”, 2-AC or concrete 12’ x 12’ swales upon privately owned 20 feet wide easement “2-A” and “3”, and AC or concrete intersection improvements including signage upon easements (“2-A”, 41-A”, “41-B”). The applicant or owners will construct foregoing nondedicable road improvements within privately owned easements in accordance with variance and alternative subdivision construction plans approved by DPW and agencies.

5. **Agency Comments and Requirements: VAR 07-088:**

- a. The State Department of Health (DOH) memorandum is dated December 26, 2007. Refer to State-DOH memorandum in variance file.

- b. The County of Hawaii Fire Department memorandum dated December 30, 2007 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 January 3, 2008 states in part:

“We have reviewed the subject application and our comments to you in our letter dated November 15, 2006, still stand.”

- d. The Department of Public Works (DPW) memorandum dated January 9, 2008 states in part:

“We have reviewed the subject application received on December 21, 2007 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 defer to that determination.”

6. **Notice to Surrounding Property Owners.** The applicant submitted copy of notice, other submittals, and proof of mailing notice surrounding property owners. According to the applicant’s submittals, notice(s) regarding variance(s) were mailed on December 27, 2007 and December 31, 2007 according to mailing receipts affixed to a list. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on December 26, 2007.

Posted Sign/Photographs of Posted Sign: The applicant submitted affidavit regarding posting of sign related to VAR 07-088 and VAR 07-089 dated January 10, 2008 and photograph of posted sign.

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 following DWS memorandum or comments/requirements dated November 15, 2006 in subdivision file (SUB 06-000443) states in part:

“We have reviewed the subject application.

Please be informed that the subject property is not within the service limits of the Department’s existing water system facilities. There is not water system in this area.”

In view of the above, the first alternative is to improve the nearest DWS water system and install water line improvements to proposed subdivision.

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

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant, at this time. The imposition of extending or constructing a public water system or constructing an alternative private water system meeting DWS standards for proposed 2-lot subdivision (SUB 06-000443) would be putting excessive demands upon the applicant or owners when a more reasonable alternative is available.

Lot Access/Roadways. The first alternative requires the subdividers to construct dedicable roadway improvements according to DPW comments and requirements in memorandum dated November 21, 2006 in the subdivision file (SUB 06-000443) which states in part:

- “2. There is no physical access from State Highway to the proposed subdivision. Legal access is provided by paper homestead road rights-of-way. In the interest of public welfare and safety, the DPW recommends that improved physical access in conformance with the following standards should be provided.

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- a. Roadway design/layout including allowable street grades and curves to provide adequate sight distance shall conform to Section 23-50 of the Hawaii County Code (HCC).
- b. §23-86. Construct minimum 20-ft wide dedicable pavement with paved shoulders and swales within a minimum 50-ft wide right-of-way, conforming to DPW Standard Detail R-34.
- c. §23-92. Drainage improvements shall be provided on an engineering analysis of actual field conditions. Access to the proposed subdivision crosses Mahiola Gulch. The subdivider may be required to obtain a permit from the Department of Land and Natural Resources (DLNR) for any construction affecting the gulch.
- d. §23-93. Streetlights/signs/pavement markings shall be installed as required by the Traffic Division.
- e. §23-79. Submit construction plans and drainage report for review and comment.
- f. The recommended improvements are within government-owned property. An Environmental Assessment/Environmental Impact Statement may be required in conformance with Chapter 343 of the Hawaii Revised Statutes.”

Pursuant to the PPM, the second alternative acknowledges the subject TMK property currently has multiple access to “Kamee Rd.” via privately owned substandard roadways upon 20 feet wide and 30 feet wide easements upon adjoining lots and acknowledge the subdivision currently has frontage along “50 FEET WIDE ROAD RESERVE” or paper road(s) or “Roads in Limbo” network which connects to the paved roadway within Kamaee Road belonging to the County.

INTENT AND PURPOSE OF THE SUBDIVISION CODE

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

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Section 23-84 of the Subdivision Code requires that all new subdivisions have a water system meeting with the minimum requirements of the Department of Water Supply. The State Department of Health has no specific rules or regulations relating to the utilization, construction or inspection of private roof or rain catchment water systems for potable or emergency uses.

The alternative to a water system proposed by the applicant or "Catchment variance" to allow and utilize privately owned individual rain water catchment systems for proposed 2-lot subdivision can meet the intent and purpose of the Subdivision Code; and, allowed pursuant to Planning Department Rule 22-Water Variance, effective February 25, 2006. Generally, Rule 22 is both a rule and statement of criteria to be used so that consistent decisions can be made on water variance requests. Section 23-84 of the Subdivision Code requires a water system, and Rule 22 limits subdivisions requesting a variance from water supply to six (6) lots, and, requires that a proposed subdivision requesting a variance to allow individual rainwater catchment systems for potable and emergency needs must receive a minimum 60 inches of annual rainfall for each lot served by catchment. Rule 22, states in part:

"22-4 Minimum rainfall.

Except as provided in Rule 22-6, all lots to be served by catchment shall be served by catchment shall have an average annual rainfall of not less than 60". The annual rainfall can be proven by rainfall records at comparable rain gauges, or by the USGS rainfall map."

In consideration of above and rainfall and GIS information at the Planning Department and other published rainfall data, the subject TMK property or proposed subdivision is traversed by a 200 inch isohyet line and receives over 200 inches of annual rainfall to support proposed individual or privately owned individual rain water catchment systems for potable and emergency uses for the proposed subdivision. According to rainfall gauge information available at the Hawaii State Climate Office (HSCO) the proposed subdivision is closest to rain gauge station "135" which in 1963 was located approximately 1700 feet away from the subject TMK property or proposed subdivision. The analysis of the applicant's submittals and historic rain gauge information and mean rainfall data available at HSCO for "135" for years 1949-1963 is 201.35 inches. Therefore, the subject TMK property or proposed subdivision and surrounding areas receive in excess of 200 + inches of rainfall annually.

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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. The status of property access and status of ownership of the privately owned and/or publicly owned network of rights-of-way within this district 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) can access Kamaee Road (owned by the County) via a series of privately owned easements upon abutting properties and has frontage or access to "50' WIDE ROAD RESERVE" (albeit "paper roads" or rights-of-way owned by the County) identified on the PPM. Therefore, given that proposed subdivision has frontage to and along a Homestead Road identified on the PPM, there should be no adverse impact by allowing the proposed subdivision or owners to continue using and improving portions of the privately owned roadway located upon 20 feet wide and 30 feet wide easements upon abutting TMK properties. Road maintenance for the "AC regrind" and proposed AC regrind roadway located upon the privately owned access easement(s) or adjoining parcels will be continued to be privately addressed and shared among the current owners and users. The current owners of the subject TMK property or subdividers will install "AC regrinds" (minimum 10 feet wide) upon the gravel roadway upon the easements and maintain minimum 5 feet wide grassed shoulder(s) for passing including paved improvements and signage (stop sign) at an intersection of easements (41-A and 41-B) in accordance with alternative subdivision construction plans and required drainage report approved by the DPW and agencies.

Therefore, based on the evaluation of the present condition roadways and additional proposed improvements upon privately owned easements and the proposed subdivision and proposed lots each abutting a "50 FEET WIDE ROAD RESERVE" or Homestead Road, the Planning Director has concluded that the DPW comments to construct dedicable roadway improvements for proposed subdivision are not required, and, that physical access for the subdivision or physical access between both proposed lots to the Kamaee Road and/or Homestead Road will be addressed privately by the subdividers.

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The subject variance application was acknowledged by letter dated December 18, 2007. Additional time was requested by the applicant and owners to secure cost estimates and submit additional information regarding installation of alternative non-dedicable road improvements upon privately owned easements situated upon abutting properties. The applicant agreed to extend the decision date to both variances related to SUB 06-000443 to on or before May 31, 2008.

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 2-lot subdivision of the subject TMK property without providing a water system and dedicable road improvements and streetlights, 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 construction plans and drainage report to DPW and agencies for review and approval.
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 06-000443. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the subject TMK property or lots created by SUB 06-000443 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 06-000443. 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 06-000443 not serviced by a County water system. No further subdivision of the lots created by SUB 06-000443 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB06-000443 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 06-000443 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 06-000443, the owner(s) of the lot(s) created by SUB 06-000443 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.

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4. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the 2-lots arising out of SUB 06-000443 will use and maintain the privately owned roadways upon easement(s) on their own without any expectation of governmental assistance to maintain the existing access or roadway improvements upon privately owned easement(s) identified on the subdivisions 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 06-000443. The proposed lots shall form a 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 06-000443 or/and both "50' WIDE ROAD RESERVE" fronting SUB 06-000443. Should the improvement district require acquisition of any private or publicly owned rights-of-way fronting the lots arising out of SUB 06-000443, 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.

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- b. The future lot owner(s) agree to participate in any road maintenance agreement or/and pay their fair share to maintain the roadway upon easements identified on the PPM.

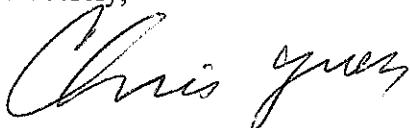
In the event that there are any amendments or changes to the subdivision after the agreement is signed, the applicant shall be responsible for informing the County Planning Department of such amendments or changes so that the agreement can be amended concomitantly. Further, the written or recorded agreement 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.

5. The subdivision application's (SUB 06-000443) 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 06-000443.
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 subject Variance null and void.

Thank you for your understanding and patience during our review.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

Mr. Bryan Mims

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xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB 06-000443