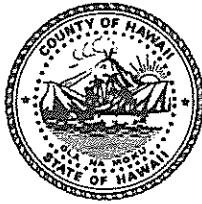


William P. Kenoi  
Mayor



BJ Leithead Todd  
Director

Margaret K. Masunaga  
Deputy

## County of Hawai'i

### PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720  
Phone (808) 961-8288 • Fax (808) 961-8742

May 19, 2010

Mr. Andrew P. Nesting  
101 Dream Spirit Drive  
Santa Teresa, NM 88008

Dear Mr. Nesting:

**SUBJECT: VARIANCE-VAR 08-032**

**Applicants: ANDREW P. NESTING, ET AL.**

**Owners: ANDREW P. NESTING, ET AL.**

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

**Tax Map Key: 4-6-009:017, (SUB 06-000334)**

After reviewing your variance application, the Planning Director **approves** Variance-VAR 08-032 subject to variance conditions. The applicants or owners requested variance from minimum water supply and road improvements for proposed 2-lot subdivision (SUB 07-000334). The variance permits proposed subdivision without meeting subdivision improvements required by Chapter 23, Subdivisions, Article 3, Division 3, Section 23-34, Access to lot from street, Article 6, Division 1, Section 23-79, Construction plans; contents; review, Division 2, Improvements Required, Section 23-84, Water Supply (1)(2), Section 23-87, Standard for nondedicable street; escrow maintenance fund, and, Section 23-95, Right-of-way improvement.

### **BACKGROUND**

1. **Location.** The referenced TMK property, Lot C containing approximately 23.38 acres, being a portion of Grant 7212 to Sam Kahana and also a portion of Grant 6192 to K. Hinau, Ahualoa Homesteads, Honokaa Section, is situated at Ahualoa, Hamakua, Hawaii.
2. **Zoning.** The subject property is zoned Agricultural (A-5a) by the County and

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designated Agriculture ("A") by the State Land Use Commission (LUC).

3. **Subdivision Request/PPM.** The owners submitted proposed 2-lot subdivision application (SUB 06-000334). Further action on the pending subdivision application and the application's preliminary plat map (PPM) is being deferred according to letters in the subdivision application file.
4. **Variance Application.** The subject variance application was acknowledged by Planning Department letter dated May 28, 2008. The applicants submitted the following background information, which states in part:

Page 1:

"The property is currently deeded under one deed. It is owned by brothers, Andrew Palika Nesting and David Keoki Nesting. The property has been in the Nesting family for over 45 years as a working ranch and residence of family members.

This variance application is for the sole purpose of separate and individual deeds of ownership for David and Andrew Nesting to maintain homesteading and the ability to pass on to family members. The AG-5 zoning would be maintained and division would create two lots of approximately 11.56 acres each."

Page 2.

"WATER

The division would create two lots: C-1 and C-2. C-2 has water and an existing meter. C-1 does not. The variance request is for lot C-1 only. For many years the family property has had water supplied by catchment. I am requesting that we be allowed to continue water catchment on C-1 as have other properties in the area.

ACCESS

Access to the property has always been off Punono Road which is a county road. We have used this road for over 45 years. The subdivision of said property does not change our access in any way. Our common driveway comes directly off Punono Road. As mentioned in the above description, our internal driveway accesses both lots (C-1 and C-2) and we feel that there is no reason to change the

existing entrance as it services both lots equally regardless of it being one or two properties.

There is an existing common right or (sic) way entering the property from Saw Mill Road. This right of way has never been cleared and is densely overgrown with old trees and eroded in areas. The right of way also enters our property on our common boundary/driveway and will service both properties equally on the opposite end (North) of the property. The cost for clearing this right of way to county code would be both too costly and detrimental to existing neighbors as well as to natural water run off. We would not be able to afford the improvements. The construction of such a road would jeopardize neighbors' properties by diverting water from or onto their properties. Either depleting their natural water or causing excessive erosion (sic).

Maintaining the access off Punono Road would offer no changes to the area."

5. **Variance Application-VAR 08-032-Agency Comments and Requirements:**

- a. The County of Hawaii Fire Department memorandum dated June 4, 2008 states:

"We have no comments to offer at this time in reference to the above-mentioned Variance application request."

- b. The State of Hawaii-Department of Health (DOH) memorandum is dated June 5, 2008. Refer to SOH-DOH memorandum in variance application file.

- c. The Department of Public Works (DPW) memorandum dated June 18, 2008 states in part:

"We have reviewed the subject application received on May 29, 2008 and offer the following comment:

According to County records, the portion of Punono Road fronting the applicants' property is considered a "Road in Limbo." Therefore, if applicants intend to continue using Punono Road as an access, we recommend Punono Road be improved to a minimum 20-foot wide dedicable pavement within a minimum 50-foot right-of-way including

paved shoulders and swales until it connects to the existing paved portion that is located at the south west corner of parcel 83.

The subdivision improvements as stated in our memo dated July 27, 2006 are the minimum improvements required by the subdivision code. The DPW believes that allowing subdivisions without at least providing the minimum requirements as required by code will compromise public safety and welfare. Therefore all other improvements as stated in the July 27, 2006 memo are still recommended less item 2, which shall be replaced by the recommendation stated in the previous paragraph.

We do not believe there are special and unusual circumstances with regard to the requirements of Sections 23-86 and 23-87. These are the minimum dedicable and nondedicable street requirements imposed on all subdivisions of this type.”

- d. The Department of Water Supply (DWS) memorandum dated June 18, 2008 states in part:

“Our comments from our June 28, 2006, memorandum to you regarding the subject subdivision still stand. Please be informed that there is an existing 5/8-inch meter (Account No. 770-37873) serving the subject parcel, which is limited to a maximum daily usage of 600 gallons and suitable for only one single-family dwelling. The applicant has indicated that the existing meter will be assigned to proposed Lot C-2. We have no objection to the use of a private rainwater catchment system for proposed Lot C-1.”

6. **Notice to Surrounding Owners/Posted Sign.** The applicant submitted copy of notice mailed to surrounding property owners and photograph of a sign posted on subject property. According to the submittals a notice was mailed to surrounding property owners on June 5, 2008; and, the required sign was posted upon subject TMK property on or about June 11, 2008. The public notice for the variance application was published in the Hawaii Tribune Herald and West Hawaii Today on June 5, 2008.
7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. The following letter was received from a surrounding property owner:

- 7-1. Letter from Pablo McLoud concerning proposed or "potential relocation" of a proposed 20 feet wide easement upon parcel 43 along a boundary line of McLoud's property-TMK: 4-6-009:075 shared with parcel 43. (See variance conditions).

### **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 for the proposed additional lot in accordance with DWS standards.

The imposition of extending or improving the nearest DWS water system or providing an approved alternative private water system meeting DWS standards for the proposed 2-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 pursuant to Rule 22, Water Variance.

**Lot Access/Roadways.** The first alternative requires the subdividers to construct improvements within access easement upon abutting properties pursuant to DPW memorandum dated July 27, 2006 in the subdivision file or widen the Punono Road right-of-way to 50 feet and construct dedicable roadway improvements within Punono Road pursuant to DPW memorandum dated June 18, 2008 in the variance application file.

The second alternative acknowledges the subject TMK property (Lot C) without subdividing currently can access to the (makai) Homestead Road utilizing a series of access easement(s) located upon abutting properties and the roadway upon and within the Punono Road (40 feet wide right-of-way) fronting the subject TMK property including a section of Punono Road or paved roadway upon property purportedly owned by the DHHL. Currently, the dwelling or "HOUSE" and other farm buildings or improvements identified upon proposed Lot C-2 utilize the section of Punono Road fronting the subject TMK property purportedly owned by the DHHL which connects to the lower (makai) Homestead Road via Punono Road. The subdivider or family owning the subject TMK property contends that the current road upon and within the publicly owned Punono Road (40 feet wide) including a section of Punono Road purportedly located upon property owned by the DHHL is adequate for the proposed subdivision and no

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additional road improvements should be required for the makai easements and Punono Road fronting the subject TMK property to permit the proposed 2-lot subdivision are necessary.

#### **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 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.

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 "water variance" to allow and utilize privately owned individual rain water catchment systems for proposed subdivision or additional lot without a County water meter 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."

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The analysis of existing rainfall within the subject TMK property provided by the applicant indicate that there is adequate rainfall to support individual or separate private rainwater catchment systems for potable and emergency uses for an additional lot not serviced by a County water meter. The analysis of the applicant's submittals and GIS rainfall data maintained by the Planning Department indicate the proposed subdivision will receive at least 60+ inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

**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 2-lot subdivision and surrounding lots are zoned agricultural. The status of property access and status of ownership of the publicly-owned network of rights-of-way within this district was created prior to adoption of the 1967 Zoning and Subdivision Codes by the County of Hawai'i. The subject TMK property (without subdividing) currently can access the lower Homestead Road via Punono Road fronting the subject TMK property and via two 10 feet wide easement(s) located upon adjoining TMK properties (parcel 43, parcel 16, and parcel 102) between the subject TMK property and "lower" Homestead Road and/or Honokaa-Waimea Government Main Road. Both proposed lots (C-1 and C-2) created by the subdivision will continue to have frontage along Punono Road and direct access to a roadway (Punono Road) located within and upon a 40 feet wide right-of-way belonging to the State of Hawai'i and DHHL.

Therefore, there should be no adverse impact by granting variance to permit the proposed subdivision to utilize the current roadway upon Punono Road fronting the proposed 2-lot subdivision; and, there is no need for a "Relocated 20' feet Easement" upon the abutting TMK property (TMK:4-6-009:043, Lot A-1-A).

Therefore, after reviewing the variance application and other subdivision actions taken by this office to approve subdivisions abutting subject TMK property, including approved public and privately-owned network of access to subject TMK property via the lower Homestead Road or Punono Road, the Planning Director has concluded that the DPW comments or requirements to widen or improve privately-owned access easements or Homestead Road fronting the proposed 2-lot subdivision are not necessary. Physical access to the proposed subdivision or access between both proposed lots and the Homestead Road or section of Punono Road upon DHHL property and/or access to the proposed lots via privately-owned easements upon abutting privately-owned properties will continue to be privately addressed and paid for by the subdivider or users.

The subject variance application was acknowledged by letter dated May 28, 2008. Additional time was required by the Planning Department to review previous approved subdivisions to complete the variance background report. The applicants-owners granted the Planning Director an extension of time to render a decision on variance application.

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 request to permit proposed 2-lot subdivision of the subject TMK property without providing a water system meeting DWS standards to 1 proposed lot and allow proposed 2-lot subdivision to access Punono Road (Right-of-Way) without constructing a dedicable paved road within and upon 40 feet wide Punono Road (Right-of-Way) is **approved** subject to the following variance conditions:

1. The applicants, owners, their assigns, or successors shall be responsible for complying with all stated conditions of approval.
2. Pursuant to Department of Water Supply (DWS) memorandum dated June 18, 2008, the applicant or subdivider shall contact the DWS regarding status of existing 5/8-inch meter or "Account No. 770-37873" and designate in writing "that the existing meter will be assigned to proposed "Lot C-2". Further, the subdivider or lot owner(s) of the designated lot assigned the DWS water service shall not "interconnect" or share the water service with the proposed lot created by the subdivision without a water service and/or abutting TMK property(s).
3. The proposed relocation and creation of a 20 feet wide easement upon abutting property or upon "Lot A-1-A" denoted on the preliminary plat map is not permitted. Any other easements upon proposed lots shall meet with the approval of the Planning Director. The current 10 feet wide easement(s) or series of easement(s) upon abutting TMK parcels (TMK: 4-6-009:016; 043; and 102) to the subject TMK property identified on the PPM shall be maintained. The applicants shall address and satisfy DPW comments or conditions nos. 1 and 4 (submit drainage report), dated July 27, 2006, for agency review and approval prior to



receipt of final subdivision approval of SUB 06-000467.

4. 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 06-000334. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting proposed subdivision and/or designated lot not serviced by a County water system and shall be duly recorded at the Bureau of Conveyances of the State of Hawai'i 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 06-000334. 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 lot or additional lot created by SUB 06-000334 not serviced by a County water system. No further subdivision of the lots created by SUB 06-000334 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
  - c. Any lots created by SUB 06-000334 may not be made subject to a condominium property regime.
  - d. Any farm dwelling constructed on 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 Hawai'i 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 06-000334 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 06-000334, the owner(s) of the lot(s) created by SUB 06-000334 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 Hawai'i 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.

5. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the 2 lots arising out of SUB 06-000334 will use and maintain the current access to the subject TMK property on their own without any expectation of governmental assistance to maintain the access or roadway improvements including roadways within and upon privately-owned easements 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 06-000334. 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 Hawai'i 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 Hawai'i or County of Hawai'i 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 Hawai'i, 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 06-000334 or section of Punono Road fronting SUB 06-000334. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 06-000334, 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 access easement(s) upon

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abutting properties or upkeep of the section of Punono Road fronting the proposed subdivision.

In the event that there are any amendments or changes to the subdivision after the agreement is signed, the applicants 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.

6. The subdivision application's (SUB 06-000334) final plat map shall meet all the requirements of the Hawai'i 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 06-000334.
7. 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,



BJ LEITHEAD TODD  
Planning Director

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xc: DPW-Engineering Branch  
DWS-Engineering Branch  
SUB 06-000334

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xc: Pablo McCloud  
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