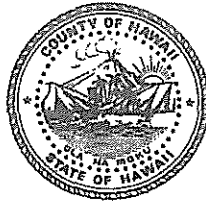


William P. Kenoi
Mayor



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

July 21, 2009

Mr. Keith D. Rabenneck
P. O. Box 65123
Tucson, AZ 85728

Dear Mr. Rabenneck:

SUBJECT: VARIANCE-VAR 08-034

Applicant: KEITH D. RABENNECK

Owner: KEITH D. RABENNECK

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

Tax Map Key: 7-5-002:055, (SUB 05-000221)

After reviewing your variance application, the Planning Director certifies the approval of VARIANCE-VAR 08-034 subject to variance conditions. The variance permits proposed 2-lot subdivision (SUB 05-000221) without constructing minimum road improvements required by tentative approval letter dated August 30, 2008. The variance permits subdivision to utilize existing access and roadway within existing utility and access easement(s) in lieu constructing roadways required by Hawaii County Code, Chapter 23, Subdivisions and/or tentative approval letter (Condition No. 2) dated August 30, 2006.

BACKGROUND

1. **Location.** The referenced TMK property, Lot B-2 consisting of 10 + acres, being portions of R. P. 4000, L.C. Aw. 7464 to Keawelauaole and L.C. Aw. 11216, Ap. 39 to M. Keauonohi, is situated at Keopu 1st, North Kona, Hawaii.
2. **Zoning.** The subject property is zoned Agricultural (A-5a) by the County and designated Agriculture or "A" by the State Land Use Commission (LUC). The property is **not** within Special Management Area (SMA).

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3. **Subdivision Request/PPM.** The owner's surveyor submitted proposed 2-lot subdivision application (SUB 05-000221). Tentative Approval (TA) to the subdivision application's preliminary plat map (PPM) dated November 8, 2005 was granted on August 30, 2006 subject TA conditions dated August 30, 2006. The owner's surveyor submitted letters dated May 22, 2007 and May 1, 2008 requesting time extensions to address TA conditions.
4. **Variance Application.** The applicant-owner submitted variance application from TA condition "2)" regarding roadway dated August 30, 2006. The variance application was acknowledged by Planning Department letter dated June 24, 2008. The application includes background information which states in part the following:

"There is no increase in the number of lots currently existing on the property, and therefore no increase in the current density of the area in question.

The property, TMK 7-5-002:055, is currently divided into 2-5 acre CPR parcels and on record with the county of Hawaii as 7-5-002:055 CPR 0001 and 7-5-002:055 CPR 2. The CPR meets with the underlying Ag-5 zoning regulations and has been in existence since 2003.

The owner has applied for and been granted preliminary approval for the "regular" subdivision of the property which will in effect replace the CRP (described above) with a TMK designation. The lots are configured exactly the same as the current CPR. Once final approval is achieved, the CPR will no longer exist.

The variance that has been requested is to allow that the existing road, which currently serves the lots, be accepted for continued access without widening the road pavement as requested in the preliminary approval letter from the County. The current road configuration is shown on the variance map completed by a licensed engineer."

5. **Variance Application-VAR 08-034-Agency Comments and Requirements:**

- a. The State of Hawaii-Department of Health (DOH) memorandum dated July 1, 2008 states:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."

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

“We reviewed the subject application and have the following comments:

1. Any vehicular security gate and gate swing shall be located a minimum of 20 feet from the County right-of-way.
2. Sight distance at the intersection with Mamalahoa Highway shall comply with AASHTO Guidelines.
3. It is not clear to us how many dwelling units are or could be served by the roadway. The applicant should be required to widen the Mamalahoa Highway approach/driveway throat to 20 feet in compliance with the Section 23-41 of the Subdivision Code, (agricultural roadways) for a distance of 20 feet from the County right-of-way, (sic) Provide an 8:1 transition to the existing pavement width. (sic) Provide 15 foot minimum paved returns at the approach. We have no objection to a reduction to the existing pavement width beyond such transition.”
4. Our records do not indicate that a permit to work in the County right-of-way was obtained for the existing driveway approach.”

- c. The County of Hawaii-Hawaii Fire Department (HFD) memorandum is dated July 15, 2008. Refer to HFD memorandum in variance file.

6. **Notice to Surrounding Owners.** The applicant submitted transmittal letter dated July 17, 2008 regarding notice sent to surrounding property owners and other information. According to these submittals and USPO receipt, it appears that applicant mailed notice to surrounding property owners on July 10, 2008; and, the required sign was posted related to the variance application.

Posted Sign: The applicant submitted a sign affidavit dated July 17, 2008 and pictures or photographs of posted sign on the “mauka” entry gate near Mamalahoa Highway.

7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. Several letters and telephone calls were received from

abutting or surrounding property owners regarding the variance application and/or nature of the variance request to utilize and maintain the current roadway. The following (support/objection) letters were received:

7a. Letter dated July 19, 2008 from Dennis E. Derbonne, stating in part the following: "As neighbor I would be opposed to any widening of the existing driveway". The letter, therefore, supports the applicant's request for variance to utilize the 10 wide feet +/- paved road as access to proposed subdivision.

7b. Objection (fax) letter dated July 21, 2008 from Jeffery A. Zukerman received on or about July 23, 2008, which states in part:

"Continuance of the current road conditions without the said upgrade represents a hazard to health and safety. The steepness and narrowness of the road will not support increased changes to the Rabbenneck subdivision. Increased traffic will further deteriorate a now marginal road and will not allow for two-way traffic. Increased traffic without widening the road would make the probability of accidents higher and jeopardize the safety of local residents."

7c. Objection (fax) letter dated July 22, 2008 from Eric Tallan received on or about July 23, 2008, which states in part the following:

"The road in question is a one lane asphalt surface with a grass shoulder. The terrain is very steep with blind drop-offs as evidenced by the photographs submitted with the variance request. Currently the road serves only one residence and is adequate. My concern is that in the future the road infrastructure will need to service five homes and potentially five additional Ohana houses (potentially 20 vehicles). Moreover the CC &Rs governing the development have recently been amended to allow short term vacation rentals. Clearly there is the potential for significant two way traffic on a single lane road with no turn-offs. I am concerned that in the future such activity will result in shoulder erosion, road deterioration and potential motor vehicle accidents due to the steep terrain and blind drop-offs. I must therefore respectfully request that the planning department uphold the code and deny the request for a code variance."

7d. Support letter dated August 29, 2008 from Arthur Jeff Lee received on or about September 4, 2008. This letter state in part:

"I am writing this letter in support of the variance application VAR 08-034 by Mr. Keith Rabenneck. My properties TMK 7-5-002-042-001 and 7-5-002-042-002 are both directly adjacent to the Rabenneck property on the North side.

The flood concern in the application is a concern I know too well. Twice in the five years runoff has left a ditch six feet wide and two feet deep completely scouring the soil till it reached bare rock. The agricultural designation is well suited to areas like ours that have far too much slope to be covered with any impenetrable surfaces like asphalt or concrete that are (sic) not absolutely necessary.

The land in agriculturally zoned neighborhoods are designated as such for the purpose of cultivation as opposed to pavement. My farm is accessed by a ten foot wide 1500 foot long paved private roadway that is shared by 8 farm lots. To widen an access for the service of four lots is excessive, unnecessary and will contribute to the destructive nature of the steeply sloped farms adjacent."

- 7e. Support letter dated September 2, 2008 signed by Barbara B. Ells and Ben W. Dysart who state they both "share the existing roadway" with the applicant. The letter states in part the following: "The existing road is lightly traveled. The variance will not change the number of homes allowed on the road. We have no problem with avoiding on-coming traffic. Since the shoulders are well maintained, we simply proceed with the uphill vehicle to the side between the trees allowing the down hill vehicle to continue."

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Lot Access/Roadways. The first alternative requires the owner or subdivider to construct following access and roadway improvements in accordance with following TA letter condition dated August 30, 2006:

- "2) Existing multiple side-by-side poles provide access from Mamalahoa Highway to the subdivision. DPW does not support individual lots accesses on multiple side-by-side poles. Provide a common access easement to be shared as a single access by all the flag lots.

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- a) Construct minimum 20-ft. wide agricultural pavement within a minimum 50-ft. wide easement.
- b) Submit construction plans and drainage report for review and comment.
- c) Additional storm runoff due to development shall be disposed within the subdivision and shall not be discharged onto adjacent properties or roadways.
- d) Install streetlights/signs/pavement markings as required by the Traffic Division, Department of Public Works."

The second alternative acknowledges that access and road upon subject TMK property or upon multiple pole lots was created by subdivision (SUB 7263) circa 2000. The approved CPR lots currently access the Mamalahoa Highway via the privately owned non-dedicable paved road approximately 10 feet wide pursuant to current PPM. In addition, the Planning director considered the applicant's background or project information including comments received from abutting property owners regarding access to the area and/or users of the current paved roadway.

INTENT AND PURPOSE OF THE SUBDIVISION CODE

Roadway Variance. The intent and purpose of access requirements to a proposed subdivision is to ensure legal and physical access to the proposed lots 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 or current access and maintenance responsibility to maintain the privately owned 10 feet paved roadway upon the subject TMK property (Lot B) and access roadway servicing the subject TMK property and/or other abutting lots created by subdivision SUB 7263 was created or established circa 2000. The approved CPR lots or unit areas were created after approval of SUB 7263. Both units or CPR lots (without subdividing) currently can access the Mamalahoa Highway utilizing the current 10 feet wide roadway identified upon subject TMK property or PPM or supplemental map drawings and photos submitted with the variance application. According to the applicant, the proposed 2-lot subdivision or proposed lots "are configured exactly the same as the current CPR", and upon issuance of final subdivision approval, "the CPR will no longer exist".

Therefore, after considering information and circumstances including written and oral comments regarding current width and condition of the paved roadway from surrounding property owners

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and users of the current driveway or 10 feet wide road including a recent inspection and verification by Planning Department staff that the current paved road and shoulders permits and can accommodate light or occasional 2-way traffic within the access easement(s) or "poles". In addition, the applicant or subdivider proposes to construct a paved "T" turnaround for emergency vehicles within proposed subdivision. As such, there should be no adverse impact by granting variance to permit and allow proposed 2-lot subdivision to utilize the current access or series of roadways or 10 feet wide +/- paved roadway for access to the proposed subdivision or PPM. Further, based on the representations made by the applicant and confirmation of the paved road upon and light traffic to the subject TMK property and surrounding areas, the Planning Director has concluded that the TA condition dated August 30, 2006 requiring subdivider to widen the current paved 10 feet wide road within or upon a network of access and utility easement(s) including streetlight/signs/pavement markings, etc. required by the DPW as TA condition (2) is not necessary and can be deleted by variance subject to variance conditions.

The subdivider will denote and construct a paved "T" turnaround for emergency vehicles within proposed subdivision prior to issuance of final subdivision approval. Physical access for proposed subdivision or physical access and paved road between proposed lots to the Mamalahoa Highway will be continued to be privately addressed and paid for by the subdivider and/or users of the roadway.

The applicant's variance application was acknowledged by letter dated June 24, 2008. Additional time was required by the Planning Department to consider comments from surrounding property owners supporting and objecting to the request for variance or variance application. The applicant granted the Planning Director an extension of time to render decision on the variance application to July 31, 2009.

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

DETERMINATION-VARIANCE CONDITIONS

The variance application to delete TA condition no. "2)" dated August 30, 2006 to permit proposed 2-lot subdivision is **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 construction plan to construct paved "T" turnaround in accordance with supplemental plan drawing submittal including any necessary signage for approval by County of Hawaii-HFD and/or other affected agencies. Construct approved "T" turnaround for emergency vehicles in accordance with approved construction plans prior to issuance of final subdivision approval.
3. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the both lots created by proposed SUB 05-000221 will use and maintain the current privately owned road and utility easement(s) on their own without any expectation of governmental assistance to maintain the existing access or roadway improvements within the privately owned access and utility easement(s) identified on the subdivision preliminary plat map (PPM) or any other necessary access and utility easement(s) within the proposed subdivision.

The applicant, owners, their assigns, or successors shall file a written agreement or approved written document with the Planning Department within one (1) year from the issuance of tentative subdivision approval and prior to receipt of final subdivision approval of SUB 05-000221. The proposed lots shall form an Homeowner or Road Association or include appropriate deed language, being covenants, conditions, and restrictions, which affect the entire property and/or proposed lots arising from the approval of the pending subdivision application and be duly recorded at the Bureau of Conveyances of the State of Hawaii by the Planning Department at the cost and expense of the applicant:

- a. The applicant and/ or owner(s) shall indemnify and defend the State of Hawaii or County of Hawaii from any and all liability arising out of vehicular access to and from the subject property utilizing existing paved road within privately owned utility and access easement(s).

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 05-000221. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 05-000221, 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 existing access and utility easement(s) from Mamalahoa Highway to proposed subdivision.

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.

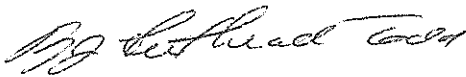
4. The proposed subdivision application (SUB 05-000221) final plat map shall denote turnaround for emergency vehicles and meet all the requirements of the Hawaii County Zoning Code and the Subdivision Code not covered by this variance. No other variances from Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 05-000221.
5. No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to the subject TMK property, subject to provisions of the Zoning Code or State Law which may change from time to time.
6. No additional farm dwellings will be permitted upon proposed lots created by SUB 05-000221 unless the current 10 feet wide paved driveway or road from the Mamalahoa Highway to proposed subdivision is improved or widened from the current 10 feet width to minimum 20 feet wide agricultural pavement along with 4 feet wide compacted shoulders and necessary drainage improvements upon and within access easement(s) in accordance with approved construction plans and Chapter 23, Subdivisions.
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.

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Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare Variance-VAR 08-034 null and void.

Thank you for your understanding and patience during our review.

Sincerely,



BJ LEITHEAD TODD
Planning Director

WRY/DSA:mad
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xc: SUB 06-000221
DPW-Engineering Branch
Dennis E. Derbonne
Jeffery A. Zukerman
Eric Tallan
Arthur Jeff Lee
Barbara B. Ells, Et al.