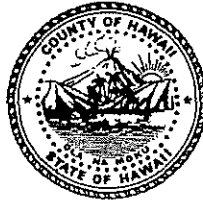


William P. Kenoi
Mayor



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

August 19, 2010

Sherrill Erickson, Esq.
82 Ponahawai Street
Hilo, HI 96720

Dear Ms. Erickson:

SUBJECT: VARIANCE-VAR 08-051

Agent: SHERRILL A. ERICKSON, ESQ.

Applicant: PETER VANA

Owners: CURTIS JARO VANA, ET AL.

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

Tax Map Key: 2-5-014:028, Lot 61 (SUB 94-034)

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-051, subject to variance conditions. The agent, on behalf of the applicant/owners, is requesting variance to permit proposed 4-lot subdivision (SUB 94-000034) to be created without constructing access and road improvements required by tentative subdivision approval (TA) conditions dated May 24, 1994. The variance permits proposed 4-lot subdivision to be permitted without constructing dedicable roadways required by the DPW or dedicable roadway improvements pursuant to Chapter 23, Subdivisions.

The request for variance to delete TA conditions to construct dedicable roadways and other subdivision requirements to permit proposed 4-lot subdivision is **approved** based on following background information and findings:

BACKGROUND

1. **Location.** The referenced TMK property, or Lot 61, consisting of approximately 47,693 square feet, being portion of Grant 4496 to Antone Carvalho, is situated at

AUG 25 2010

Sherrill Erickson, Esq.

Page 2

August 19, 2010

Ponahawai Homesteads, South Hilo, Hawai'i. The TMK property's address is 61A Chong Street.

2. **Zoning.** The subject property is zoned Single-Family Residential (RS-10) by the County and designated Urban, or "U," by the State Land Use Commission (LUC).

The subject property, or Lot 61, and privately-owned network, or 40 feet wide rights-of-way, fronting Lot 61, was created by Charles Chong Man Subdivision circa December 1940 and is commonly called Chong Subdivision.

3. **Subdivision Request/PPM.** The applicant or applicant's engineer submitted subdivision application (SUB 94-0000334) proposing to subdivide the subject TMK property or Lot 61 into four (4) lots. The preliminary plat map (PPM) was issued tentative subdivision approval (TA) on May 24, 1994, subject to TA conditions. Further action on the subdivision application or PPM is being deferred pending resolution of the requirement to construct roadway improvements, or TA conditions to construct further access and dedicable roadway improvements, before final subdivision approval is granted.

4. **Variance Application.** The variance application-VAR 08-051 was acknowledged by Planning Department letter dated August 28, 2008. The agent's background report dated August 11, 2008 states, in part, the following:

Page 2: "This request is from the roadway condition(s) set forth in the Tentative Approval Letter."

Page 3: "The Applicant is requesting a variance to allow the creation of a 4-lot subdivision without meeting with the minimum requirements of the County Department of Public Works as required by Chapter 23 (Subdivision), Article 6 (Improvements), Division 2 (Improvements Required), Section 23-87 (Nondedicable Streets), Hawaii County Code."

5. **Variance Application (VAR 08-051)-Agency Comments and Requirements:**

- a. The State Department of Health (DOH) memorandum is dated September 10, 2008. Refer to SOH-DOH memorandum in the variance file.
- b. The County of Hawai'i Fire Department (HFD) memorandum dated September 10, 2008 states:

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

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

“We believe the minimum road improvement requirements codified within Chapter 23 of the Hawaii County Code provide public welfare and safety and are a recommendation made by the Department of Public Works on all similar types of subdivision applications.

We do not believe there are special and unusual circumstances with regard to the minimum requirements of Sections 23-86 and deviation from our standard recommendation may be considered arbitrary and capricious.

However, should the Planning Director determine that Section 23-15 is applicable, we defer to the director’s authority.”

6. **Notice to Surrounding Owners/Posted Sign.** The applicant’s agent submitted affidavits regarding notice mailed to a list of surrounding property owners and photograph of a sign posted on subject property. According to the agent’s affidavits and submittals, the required notice was mailed on September 12, 2008 to surrounding property owners according to USPO receipts. A sign was posted upon subject TMK property on August 18, 2008. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on September 13, 2008.

Note: A photograph of a sign (“Exhibit A”) posted upon subject TMK property was submitted with the sign affidavit.

7. **Comments from Surrounding Property Owners or Public.** No other comments from agencies or surrounding property owners were received. No written objections to the variance application were received from surrounding property owners or public.

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Lot Access/Roadways. The first alternative requires the subdividers to construct access and roadway improvements pursuant to tentative approval (TA) conditions dated May 24, 1994, prior

Sherrill Erickson, Esq.

Page 4

August 19, 2010

to granting final approval to create proposed lots or subdivision.

The second alternative acknowledges the subject TMK property, created circa 1940, and recent four (4) dwellings permitted and constructed upon the subject TMK property, or Lot 61 (without subdividing), including other original abutting lots created by the Charles Chong Man Subdivision, currently utilize the network of privately-owned 40 feet wide rights-of-way fronting the proposed subdivision. A short section of Chong Street, near the intersection of Chong Street and Kaumana Drive, is owned and maintained by the County. The privately-owned network of roadways created by Charles Chong Man Subdivision was purportedly deemed sufficient as access for Chong Subdivision many years before the adoption of the original Zoning and Subdivision Codes in 1967.

The applicant's agent submitted a recent letter dated May 27, 2010, including photographs to show and verify improvements performed by the applicant to the section of privately-owned paved roadway and grassed shoulders, including driveways, for proposed subdivision:

- “1. The Subject Property is accessed from Chong Street, an existing private paved roadway that has been in long standing use, by both public and private vehicles. A Street light exists where Chong Street intersects with the public Highway. A stop sign is visible to the left of the large orange and black public school bus utilizing Chong Street in the enclosed photograph taken by Mr. Erickson during the Site Visit. The shoulder along Chong Street fronting the Subject Property was observed to have been compacted and mowed.
2. Access from and off of Chong Street to the Subject Property appears to be adequate for the four occupied houses that already exist on the Subject Property. The Applicant adequately maintains the grass shoulder and frontage of that part of Chong Street fronting the Subject Property at his own expense. Additionally, said Chong Street has long been utilized and appears to be adequate for current users. Said long existing usage of Chong Street is consistent with the residential character of the 60 year old+ neighborhood. A public school bus was observed during the Site Visit traveling along Chong Street. (See enclosed photographs).
3. It is felt that to allow the Applicant's proposed 4-lot subdivision will have little or no impact on existing traffic or density conditions, as the Subject Property already has four occupied houses on it that are currently accessed off of Chong Street from improved driveways. The Site Visit photographs further indicate that: 1) the existing four dwellings appear to have County water as demonstrated by Department of Water Supply meters located in the privately owned portion of Chong Street; 2) An overhead street light is

shown at the utility pole; and 3) each of four houses appear to have a mailbox.

4. Road maintenance of Chong Street will be privately addressed by the owner(s) and user(s). The Applicant and their successors in interest will participate in any Association or Road Maintenance Agreement to maintain Chong Street loop. The Applicant intends to convey the Subject Property to his children and/or family members and proposes to introduce appropriate language in deeds to family members at the time of conveyance.
5. Under the circumstances, and given the long standing use of the paved and privately owned Chong Street as access to the Subject Property and surrounding neighborhood by both public and private vehicles, and the overall observed cohesive adequacy and safety of the improvements "as built", including compaction, moving, maintenance and related improvements by the Applicant on the shoulder frontage of Subject Property, no further road improvements or paving will be required of the Applicant."

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 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 original "Charles Chong Man Subdivision" or "Chong" subdivision created subject TMK property or Lot 61 including a network of 40 feet wide privately-owned rights-of-way fronting Lot 61 was permitted nearly 70 years ago. Access between the proposed subdivision utilizing "CHONG STREET" within and upon the 40 feet wide right-of-way to Kaumana Drive and status of the responsibility to privately maintain the paved roadway and shoulder was created prior to Statehood in 1959 and adoption of the original County Zoning and Subdivision Codes circa 1967. The network of the privately-owned rights-of-way including the status or means to maintain the roadways and shoulders fronting Lot 61 or subject TMK property (without subdividing), or Lot 61, was created before the current owner(s) purchased Lot 61. County Real Property Tax Office records show four (4) dwellings were permitted by zoning code and constructed upon subject TMK property or Lot 61 circa 1989 including assignment of County water meters to each dwelling. Recent photographs submitted by the applicant's agent indicate the four dwellings have driveway access to a paved roadway within and upon Chong Street. The pavement width of the privately-owned roads are between 8 feet and 10 feet, with compacted 5 to 10 feet wide mowed grassed shoulders within and upon the privately owned 40 feet wide right-of-way fronting Lot 61. The photographs indicate street lights have been installed near the

Sherrill Erickson, Esq.

Page 6

August 19, 2010

intersection of Chong Street and Kaumana Drive and elsewhere at intersections within Chong Subdivision near proposed subdivision. Public school bus and USPO mail service are currently available to dwellings built upon Lot 61 and other residents abutting Chong Street Loop or the surrounding neighborhood. The 21-year-old access driveways connecting the four dwellings to Chong Street and grassed shoulders fronting Lot 61 are maintained and routinely mowed by the applicant at his expense. According to the applicant's agent, it appears that road maintenance for the section of the privately owned roadways fronting the subject TMK property or overall maintenance of the privately owned 70-year-old network of road lots fronting Lot 61 are addressed by the owner or owners or users abutting Chong Street or the Chong Street "loop" road.

Therefore, after reviewing the application and recent letter dated May 27, 2010, submitted by the applicant's agent, including recent photographs of the status of the privately-owned roadways and other improvements within Chong Subdivision, and other information regarding past performance by the applicant to improve the section of the privately-owned roadway during the last 21+ years, including mowing of the grassed shoulders fronting Lot 61, etc., the Planning Director has concluded that DPW requirements, or TA conditions, to construct dedicable roadways, install streetlights, and other subdivision improvements within the privately-owned rights-of-way fronting proposed 4-lot subdivision, or Lot 61, including requirement to impose and denote a "15-FT. WIDE "NO VEHICULAR ACCESS" PLANTING SCREEN EASEMENT" upon proposed lots, are not necessary or required at this time to permit proposed subdivision. Physical access between the proposed subdivision and Kaumana Drive, utilizing Chong Street and maintenance of the privately-owned network or roadways or section of the privately-owned rights-of-way fronting proposed subdivision, will be privately maintained by the owner(s) of Chong Street "Loop," including future owners of the proposed 4-lot subdivision and abutting lots utilizing the privately-owned network of rights-of-way created by the Charles Chong Man Subdivision circa 1940.

The applicant's variance application was acknowledged by letter dated August 28, 2008. Additional time was required by the Planning Department to review subdivision history and confirm and inspect the installation of privately-owned nondedicable roadway improvements, street lights, and other infrastructure within the Chong Subdivision.

Based on the foregoing findings, the applicant's request for variance is reasonable at this time and 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, it is felt that the variance requested will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to adjoining properties or the surrounding area.

DETERMINATION-VARIANCE CONDITIONS

The variance application and request to delete May 24, 1994, TA conditions "07." and "08." to provide and/or construct dedicable paved roadways including street lights and other appurtenances, and delete a "15-FT. WIDE "NO VEHICULAR ACCESS" PLANTING SCREEN EASEMENT" identified on the proposed lots or subdivision, 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. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the four (4) lots arising out of SUB 08-051 will use and maintain the privately-owned road and utility easement on their own without any expectation of governmental assistance to maintain the existing private access or privately paved roadway improvements, including grassed shoulders, within and upon privately-owned 40 feet wide rights-of-way identified on the subdivision's preliminary plat map, or any other necessary access and utility easement(s) within the proposed subdivision.
3. The current owner(s) or future owner(s) of the lots created by proposed SUB 08-051 agree to participate in any current Homeowner or maintenance agreement or pay their fair share to maintain the current access driveways and section of privately-owned Chong Street roadway, including grassed shoulders, fronting the proposed subdivision.
4. The subdivision application's (SUB 08-051) final plat map shall meet with all the conditions of this variance and/or the Hawai'i County Zoning Code and Subdivision Code not covered by this variance. No other variances from Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 08-051.
5. No permit to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to the subject TMK property or upon lots created by proposed subdivision, subject to provisions of the Zoning Code or State Law, which may change from time to time.
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.

Sherrill Erickson, Esq.

Page 8

August 19, 2010

Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare this Variance-VAR 08-051 null and void.

Thank you for your understanding and patience during our review.

Sincerely,

A handwritten signature in black ink, appearing to read "BJ Letihead Todd". The signature is written in a cursive, flowing style.

BJ LETIHEAD TODD

Planning Director

WRY:kwf

P:\WP60\WRY\FORMLETT\VAR08-051\SUBROADWAY.ERICKSON-VANA

xc: DPW-Engineering Branch
SUB 08-051