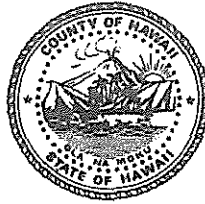


William P. Kenoi
Mayor



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 22, 2009

Roy A. Vitousek, III, Esq.
CADES SCHUTTE LLP
75-170 Hualalai Road
Kailua-Kona, HI 96740

Dear Mr. Vitousek:

SUBJECT: VARIANCE-VAR 08-055

Applicant: ROY A. VITOUSEK III-CADES SCHUTTE LLP

Owners: EDWARD J. RAPOZA, ET AL.

**Request: Variance from Chapter 23, Subdivisions,
Improvements (Roadways) Required**

Tax Map Key: 7-8-012:035, (SUB 07-000560)

After reviewing your variance application, the Planning Director certifies the approval of VARIANCE-VAR 08-055 subject to variance conditions. The variance permits 2-lot subdivision (SUB 07-000560) to be created without providing road improvements meeting minimum requirements of Chapter 23, Subdivisions. The applicant requests variance from Hawaii County Code, Chapter 23, Subdivisions, Article 3, Design Standards, Division 4, Section 23-41, Minimum right-of-way and pavement widths, Section 23-48, Cul-de-sacs, Section 23-50, Grades and curves, Article 6, Improvements, Division 1, Section 23-79, Construction plans; contents; review, Division 2, Section 23-88, Nondedicable street; private dead-end street, Section 23-89, Sidewalks, Section 23-91, Curbs and gutters, Section 23-93, Street lights, and Section 23-95, Right-of-way improvement or variance to delete access and roadway condition "3)" stipulated by Tentative Approval (TA) letter dated September 13, 2007 to permit final subdivision approval of SUB 07-000560.

The Planning Director has concluded that variance from certain access and roadways to permit proposed 2-lot subdivision can be **approved** based on the following findings:

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BACKGROUND

1. **Location.** The referenced TMK property, Lot 1-A containing 26,205 square feet, being portion of Royal Patent 3888, Land Commission Award 5781, Apana 1 to Kanehoa, is situated at Keauhou 1st, North Kona, Hawaii.
2. **Zoning.** The subject property is zoned Single-Family Residential (RS-10) by the County and designated Urban "U" by the State Land Use Commission (LUC). The property is within the Special Management Area (SMA) and abuts the shoreline.
3. **Subdivision Request/PPM.** The owner(s) or subdivider filed a subdivision application (SUB 08-000560) and preliminary plat maps (PPM) proposing to subdivide subject TMK property(s) into 2-lots. Tentative Approval (TA) to the PPM was issued granted by the Planning Department on September 13, 2008 subject to conditions. TA-Condition "3)" specifies construction of specific access and roadway improvements.
4. **Variance Application(s).** The applicant, on behalf of the owner, filed variance application (VAR 08-055) requesting variance "to use the existing roadway "as-is" in lieu of constructing access and roadways in accordance with TA condition. The applicant's background information and following statements (page 2) states in part:

"Applicants hereby submit this request for a variance from 23-88 and 23-41 of the subdivision Code to allow use of the roadway "as is." Applicants would repave the existing paved sections and would pave the "existing gravel road" shown on the attached plot plan."
5. **Variance Application (VAR 08-055)-Agency Comments and Requirements:**
 - a. The State of Hawaii-Department of Health (DOH) memorandum dated September 10, 2008 states in part:

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

- b. The Department of Public Works-Engineering (DPW-Eng.) memorandum, dated September 16, 2008 states in part:

"We reviewed the subject application and our comments are as follows:

The applicant requests the existing road be accepted (with new pavement) in lieu of 16-foot pavement in a 20-foot right of way required by the Tentative Approval dated September 13, 2007.

As indicated on Exhibit 5, presently there is a modern masonry rock wall across the road preventing vehicular access to proposed Lot 1-A-1 that would need to be removed. We defer to the Planning Department the applicant's claim that the existing dry-stack wall bordering the private road is "historical". Should the Planning Department find there would be no historical effect, and the owner of the road lot is allows (sic), we believe the road could be widened to a minimum 16 feet (12 feet of pavement with 2 foot shoulders) with minor alterations to the subject property bordering it. There is already a 5-foot wide road easement indicated on the plat. A 20-foot radius should be provided in the easement at the NW corner of proposed Lot 1-A-2."

- c. The County of Hawaii-Hawaii Fire Department (HFD) memorandum is dated September 25, 2008. Refer to HFD memorandum in variance file.
6. **Notice to Surrounding Owners.** The applicant's submitted an affidavit dated September 24, 2008 and copy of notice sent or mailed to list of surrounding property owner(s) within 300 feet of subject TMK property(s). Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on September 13, 2008.
- Posted Sign.** The applicant submitted an affidavit dated September 3, 2008 regarding sign posted on subject TMK property and photograph or picture of the posted sign.
7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received and no comments from surrounding property owners or public were received by the Planning Department.

Therefore, after considering the applicant's variance application, background information including history of the property and surrounding neighborhood, status of subdivision, and agency comments regarding the variance application, the Planning Director has determined that there are special or unusual circumstances applying to subject TMK property(s) or "Property" or proposed subdivision action which exist either to a degree which deprives the owner of the property rights that would otherwise be available or to a degree which obviously interferes with the best use or manner of development of the subject property(s) or proposed subdivision.

ALTERNATIVES

The DPW-Engineering memorandum dated June 29, 2007 in subdivision file (SUB 07-000560) for the preliminary plat map (PPM) requires the owners or subdivider to file a detailed flood study report and construct private access and roadway improvements within privately owned road right-of-way in accordance with approved subdivision construction plans. (Refer to copy of the DPW memorandum dated June 29, 2007 in the variance file).

The applicant's variance background information (Pages 5-6) states in part:

"The nonexclusive roadway easement that serves the Property is a separate lot of record (TMK (3) 7-8-12: 101) and serves other properties as well. Applicants do not own the roadway but have been granted legal access to the Property over it. Any roadway and associated improvements within the easement within the easement would be by or at the discretion or consent of the owner. The roadway existed before the Subdivision Codes were effected. In this instance, installing a roadway of minimum right of way and pavement width with sufficient curve visibility, street lights, sidewalks, and curbs and gutter to current County standard is limited by the narrow width of the existing roadway easement which is, for the most part, defined by rock walls of historical nature. The narrowness and confines of the easement are insufficient to allow Code improvements without moving the walls. Widening the roadway easement for an improved roadway would entail prohibitively costly purchase of property along the entire length of the easement from the various owners providing the owners of the lot would be willing to sell or assign a portion of their properties and destroy the historical walls defining the easement. This, therefore, is not a reasonable alternative to the Applicants."

After considering the applicant's background information including the history of the property and significant history within this region within North Kona, historical access and roadway and old wall improvements to subject TMK property or within the network of roadways within the region, in this instance, the imposition of expanding the width of access rights-of-way to the property or within immediate neighborhood and constructing non-dedicable roadway

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improvements required by the DPW or TA-Condition "3)" dated September 13, 2007 would be putting excessive demands upon the applicant or subdivider when other compelling circumstances or alternatives regarding access or character of access and access roadways to proposed subdivision and within this historical region within North Kona should be evaluated and considered.

INTENT AND PURPOSE-ROADWAY VARIANCE

The proposed subdivision and surrounding areas are historical and developed prior to the Zoning and Subdivision Code including the County General Plan. The Planning Director finds that the applicant or subdividers request to continue to utilize access and "roadway as it now exists now" and concurs with the applicant that access to this property or within the immediate neighborhood was developed and established many years prior to adoption of the General Plan, etc. and that access and roadway to permit proposed subdivision should not be modified, expanded or changed by requiring construction of "urban-type" road improvements. To this end, tentative approval condition "3)" dated September 13, 2007 is deemed not necessary or required to permit final subdivision approval to subdivision application (SUB 07-000560) and is hereby deleted by variance subject to variance conditions.

The applicant's variance application was acknowledged by letter dated August 28, 2008. Additional time to consider the applicant's variance request and tentative approval conditions dated September 13, 2008 was necessary. The applicant or owner granted the Planning Director an extension of time to render decision on Variance Application-VAR 08-055 to on or before July 24, 2009.

Based on the foregoing findings, the approval of this variance 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, in this instance, it is felt that the variance requested from access and roadway improvements required to permit proposed subdivision will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and to adjoining properties.

VARIANCE DECISION-CONDITIONS

The variance request to allow proposed subdivision application (SUB 07-000560) of the subject TMK property(s) without providing certain access and non-dedicable roadways improvements or deleting Condition "3)" stipulated by TA letter dated September 13, 2007-Condition "3)" is

approved subject to following variance conditions:

1. The applicant, owners, their assigns, or successors shall be responsible for complying with all stated conditions of approval.
2. Minimum Access and Roadway Improvements or Condition "3) Access and Roadway Improvements" required by Tentative Approval (TA) letter dated September 13, 2007 to permit proposed 2-lot subdivision or SUB 07-00560 is deleted by this variance.

The applicant or subdivider shall widen and pave "EXISTING GRAVEL ROAD" portion (approximately 10-12 feet +/- width and 110 feet +/- length) portion or section of unpaved roadway with "Road Lot" between "CRM Wall" and "Dry Stack" walls located near and along north boundary line of subject TMK property prior to issuance of final subdivision approval. Wall modifications required to relocate or re-align any CRM wall and Dry Stack walls near or upon the subject TMK property located within and upon "Road Lot" or "TMK: 7-8-012:101" or along section of "Existing Gravel Road" may be rebuilt and relocated upon subject TMK property. Any relocation and/or repairs to the existing walls shall be done by a competent craftsman and mimic and exhibit good workmanship to harmonize with other older similar historic walls within the immediate neighborhood or surrounding area. Access and driveway location and position and operation of entry gates for proposed lots are subject to DPW review and approval.

The applicant or subdivider shall comply with remaining TA conditions dated September 12, 2007 prior to issuance of final subdivision approval of SUB 07-000560.

3. Maintenance of the access and non-dedicable roadway improvements to subject TMK property or proposed subdivision (SUB 07-000560) will be privately addressed and paid for by the owners and users.
4. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the lots arising out of SUB 08-000742 will use and maintain the privately owned road and any utility easement on their own without any expectation of governmental assistance to maintain the existing access or roadway improvements within the privately owned roadway lots and/or utility easement

identified on the subdivision's revised 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 08-000742. 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 affected lots covered by VAR 08-048 and created by the approval of subdivision application (SUB 08-000742) 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 and privately owned roadway upon private easement(s) and privately owned road lot(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 08-000742.

Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 08-000742, 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 the privately owned roadway lots and/or utility easements.

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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 08-000742) final plat map shall meet all the requirements of the Hawaii County Zoning Code and the Subdivision Code including SMA requirements not covered by this variance. No other variances from TA-Conditions dated September 13, 2007 or Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 08-000742.
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-VAR 08-055 null and void.

Sincerely,



BJ LEITHEAD TODD

Planning Director

WRY/DSA:mad

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xc: DPW-Engineering Division
SUB 07-000560