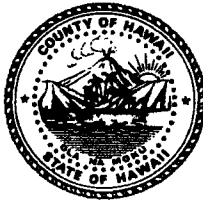


William P. Kenoi  
Mayor



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 30, 2009

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

Dear Mr. Vitousek:

**SUBJECT: VARIANCE-VAR 08-065**

**Applicant: ROY A. VITOUSEK, III-CADES SCHUTTE LLP**  
**Owners: EDWARD K. RAPOZA, ET AL.**  
**Request: Variance from Chapter 23, Subdivisions**  
**Tax Map Key: 7-9-001:010, (SUB 08-000797)**

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After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-065. The variance permits proposed subdivision (SUB 08-000797) to be created without providing road improvements meeting minimum requirements of Chapter 23, Subdivisions. The variance request is from Hawaii County Code, Chapter 23, Subdivisions, Article 3, Design Standards, Division 4, Section 23-41, Minimum right-of-way and pavement widths, Article 6, Improvements, Division 2, Section 23-87, Standard for nondedicable street; escrow fund, Section 23-89, Sidewalks, Section 23-91, Curbs and gutters, Section 23-93, Street lights, and Section 23-95, Right-of-way improvement.

The Planning Director has concluded that the variance from minimum subdivision roadway requirements can be **approved** based on the following findings:

#### **BACKGROUND**

1. **Location.** The referenced TMK property, Lot 13 containing approximately 1022.111 acres of Hokukano Ranch, being a portion of Grant 3155 to Henry N. Greenwell, is situated at Hokukano Tract, North Kona, Hawaii.

**AUG 06 2009**

2. **Zoning.** The subject property is zoned Agricultural (A-20a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The owner's surveyor submitted subdivision application (SUB 08-000797) and preliminary plat map (PPM) proposing to subdivide subject TMK property into 5-lots, "the smallest lot being approximately 85 acres and the largest being approximately 508 acres in size". Further action on subdivision application (SUB 08-000797) is being deferred according to letter dated October 14, 2008 in the subdivision file.
4. **Variance Application.** The applicant submitted the variance application and submittals on October 23, 2008. The application includes background information and following statements on page 3:

"Specifically, the Owners request that the Planning Director approve a variance which will allow the proposed large-lot, agriculture-zoned subdivision to be completed based on access by the existing roadway-the main Hokukano Ranch Road, as is. This means that the Owners request a variance to permit as follows:

1. Use of the existing paved road (approximately width of pavement: 14' with 20' gravel shoulders on a 100'-wide roadway) from Mamalahoa Highway mauka for approximately 3.5 miles to an elevation of 3,341 feet.
2. Use of the existing gravel road from 3,341' elevation mauka for approximately 3.0 miles to the subject property at an elevation of approximately 4,200 feet. The width of the gravel road is approximately 40' in the 100' roadway corridor; the gravel is compacted and the road can be used by a standard two-wheel drive vehicle."

Statements regarding "Street Lights" on page 4:

"The Owners request a variance from § 23-93 of the County Subdivision Code to keep this rural agricultural subdivision consistent with the current character of the area. Farms and ranches in the area do not have street lights. Street lights are not necessary to farming and ranching operations and are not consistent with the

historical agricultural use of this property or other properties in the area. The cost of installing street lights would be excessive for the nature of this subdivision."

Statements regard "Right-of-Way Improvement" including curbs gutter, and sidewalks on page 4:

"The Owners request to use the existing access road "as-is" until such time as the Hokukano Ranch paves and/or otherwise improves the Roadway Lot and/or Easement "1-A."

"Although the County Subdivision Codes do not require sidewalks and curbs and gutter for subdivision approval, the Owners specifically request that the Planning Director exercise the authority to not recommend or require these improvements. The proposed subdivision is for agricultural use, the roadways will receive very low volume use typical of current and historical ranching and farming operations in this area, and such additional improvements would be atypical, unnecessarily costly, and more in keeping with an urban subdivision."

5. **Variance Application (VAR 09-065)-Agency Comments and Requirements:**

- a. The State of Hawaii-Department of Health (DOH) memorandum is dated November 26, 2008 states:

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

- b. The County of Hawaii-Hawaii Fire Department (HFD) memorandum is dated March (Sic) 17, 2008. Refer to the HFD memorandum in the variance application file.

"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 Public Works (DPW) memorandum dated December 18, 2008 states in part:

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

The applicant requests the existing road be allowed in lieu of the Subdivision Code specified cross-section for a non-dedicable agricultural street in Section 23-87 the pavement width required in Section 23-41 and the extent of right-of-way improvement in Section 23-95. Requested variances from Subdivision Code Sections 23-91 and 23-93; in our opinion, are not applicable. No tentative approval for the subject subdivision has been received to date.

Should such variance be granted our main concern is limited to the potential for erosion of the existing un-stabilized road caused by additional traffic with the subdivision and development of improvements on the parcels. The required pavement cross section would address that concern for the roads, however, the potential for increased runoff and the need for additional drainage improvements would also need to be addressed should the variance not be granted. We defer to the Planning Director whether the case meets the criteria for a variance.”

6. **Notice to Surrounding Owners.** The applicant submitted an affidavit dated November 25, 2008 and copy of notice, dated November 25, 2008 mailed to surrounding property owner(s) within 300 feet of subject TMK property. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on November 28, 2008.

**Posted Sign.** The applicant submitted an affidavit dated November 5, 2008 regarding sign posted on subject TMK property and photograph of the 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**

**Lot Access/Roadways.** The subject TMK property (Lot 13) or proposed 5-lot subdivision or “Property” was originally provided access to the Mamalahoa Highway via series of easements utilizing a network of paved and unpaved roadways upon easements within the original

Hokukano Ranch subdivision (SUB 7213). The applicant's background information states in part the following:

"The Property has legal access over a 100-foot-wide (more or less) roadway, Roadway Lot A, designated as TMK 7-9-001:016 (the "Roadway Lot") and Easement "1-A". The County of Hawaii Real Property Tax Records indicates that Roadway Lot is owned by Hokukano Ranch, Inc".

Access and Utility Easement "1-A" burdens Hokukano Ranch property. The existing access to the Property, Roadway Lot and Easement "1-A," are sometimes referred to as the "main Hokukano Ranch Road".

"The existing roadway serving the Property over the Roadway Lot and Easement "1-A" is a combination of asphalt paving at Mamalahoa at the lower elevations and improved gravel at the upper elevations."

The first alternative requires the subdividers to construct access and additional paved roadway and any necessary drainage improvements upon or within "Roadway Lot A" for proposed subdivision (SUB 08-000797) according to DPW memorandum dated November 19, 2008 in the subdivision file (SUB 08-000797) and Chapter 23, Subdivisions.

The second alternative acknowledges the subject TMK property or Lot 13 created by SUB 7213 or proposed subdivision will have access to the Mamalahoa Highway or Hawaii Belt Road via series of easements and network of paved and unpaved roadways upon easements or upon additional paved roadway and drainage improvements being constructed upon and within Easement "1-A" for Phase I of the Hokukano Ranch or pending SUB 07-000036 and acknowledge that the condition of the present roadways upon "main Hokukano Ranch Road" to the large "mauka" lots created by SUB 7213 including the condition of the present roadway and shoulders upon the section of Roadway Lot A fronting the proposed subdivision was designed and developed "as-is" to accommodate very light traffic and limited access to "mauka" area of Hokukano Ranch or Hokukano Tract.

#### **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 subject TMK property or Lot 13 was created by SUB 7213 and is located "mauka" of Phase I of the Hokukano Ranch development. The proposed subdivision or proposed 5 lots will have access utilizing a roadway within an easement approximately 100-feet wide owned by Hokukano Ranch, Inc. The proposed subdivision's primary access via easements to the Mamalahoa Highway Hawaii will be partly improved pursuant to current subdivision improvements being constructed within Phase I of the Hokukano Ranch below Lot 13. Drainage patterns identified by earlier approved or pending subdivision of lots within Hokukano Ranch development and access patterns to the "mauka" region of Hokukano Ranch were created or established many years ago prior Hawaii County adopting the 1967 Zoning and Subdivision Codes including approval of Lot 13 by SUB 7213.

Flooding and drainage have been an issue for this region and is a legitimate concern being addressed by Hokukano Ranch master plan or for all development phases. The lower portion of Hokukano Ranch-Phase I including Lot 13 are located within very large upland area crossed by flood channels, etc. There has been downstream flood damage in recent years. The proposed variance, however, recognizes the following:

- Existing roadway and grassed shoulders upon and within "Easement 1-A" fronting the proposed subdivision including jeep roads within the proposed subdivision should produce less runoff than paved roadways because grassed shoulders and gravel or mowed grass roadways retain some ability of the ground to absorb water.
- Traffic including pedestrian traffic generated by the proposed large lot subdivision within this mauka region of Hokukano Ranch will continue to be light and the subdividers or users will participate and/or pay for maintenance of private access and utility easements including private jeep roadways within the proposed subdivision.
- Any required pedestrian and/or lighting improvements for this large 5-lot agricultural subdivision are not necessary.

The approval of this variance does not constitute approval of the proposed 5-lot subdivision. The applicant is aware that land management measures and controls including the retention of mauka forests and ground cover are necessary to keep this rural agricultural subdivision consistent with the current character of the area; and, mindful that a drainage study or plan for the lower Phase I-Hokukano Ranch is required and flooding issues must be considered and dealt with.

Therefore, based on the representations made by the applicant's agent and evaluation of current state and condition of access improvements and associated drainage improvements being built

within Hokukano Ranch upon and within easement(s) to subject TMK property, the Planning Director has concluded that the roadways required upon and within "Roadway Lot A" for proposed 5-lot subdivision pursuant to DPW memorandum dated November 19, 2008 are not in this instance, necessary or required at this time; and, that physical lot access for Phase I of the Hokukano Subdivision and proposed subdivision will be addressed privately and paid for by the lot owners or users of the roadway upon the main "Hokukano Road" or roadway located upon Easement 1-A and Roadway Lot A or within the proposed subdivision.

The applicant's variance application was acknowledged by letter dated November 18, 2008. Additional time to review agency comments and other subdivisions near proposed subdivision (SUB 08-000797) was necessary. The applicant or owner(s) granted the Planning Director an extension of time to render decision on Variance Application-VAR 08-065 to on or before 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 request to allow proposed 5-lot subdivision (SUB 08-000797) of the subject TMK property(s) without providing a roadways meeting DPW standards or Chapter 23, Subdivisions 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. The proposed subdivision's access using "the main Hokukano Road" to access nearest public road or the Mamalahoa Highway or Hawaii Belt Road proposed to utilize current roadway improvements upon section of "Roadway Lot A" fronting subject TMK or proposed 5-lot subdivision and paved roadway upon and within "Easement 1-A" or additional or improved roadway and associated drainage improvements currently being built upon and within "Easement 1-A" required for Hokukano Ranch or pending SUB 06-000489. Therefore, the proposed 5-lot subdivision or SUB 08-000797 is dependent upon completion of roadway and associated drainage improvements upon and within Easement 1-A or section of

"the main Hokukano Road" within SUB 06-000489. As such, final subdivision approval to SUB 08-000797 will not be granted until the affected section or improved roadway and associated drainage improvements within "Easement 1-A" or "main Hokukano Road" required for SUB 06-000489 are completed.

3. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the 5-lots arising out of SUB 08-000797 will use and maintain the privately owned road and utility easement on their own without any expectation of governmental assistance to maintain the existing access or roadway improvements within the privately owned 100 feet +/- wide easement 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 08-000797. 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 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 upon access or utility easement serving the proposed lot(s) arising out of SUB 08-000797. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 08-000797, 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 "Easement A" or access to proposed lots created by SUB 08-000797.

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 subdivision application's (SUB 08-000797) 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 08-000797.
5. 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 this Variance Permit null and void.

Thank you for your understanding and patience during our review.

Sincerely,



BJ LETIHEAD TODD  
Planning Director

Roy A. Vitousek, III, Esq.  
CADES SCHUTTE LLP  
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July 30, 2009

xc: DPW-Engineering Branch  
DWS-Engineering Branch  
SUB 08-000797