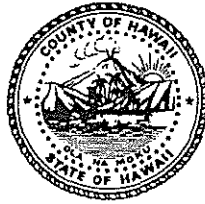


William P. Kenoi  
Mayor



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

January 7, 2010

Mr. Sidney M. Fuke  
SIDNEY FUKE, PLANNING CONSULTANT  
100 Pauahi Street, Suite 212  
Hilo, HI 96720

Dear Mr. Fuke:

**SUBJECT: VARIANCE-VAR 09-028**

**Representative: SIDNEY FUKE, PLANNING CONSULTANT**

**Applicant: JILL JULIE ANDRADE-PHILLIPS TRUST**

**Owner: JILL JULIE ANDRADE-PHILLIPS TRUST**

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

**Tax Map Key: 4-6-007:042, (SUB 08-000765)**

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 09-028 subject to variance conditions. The variance allows proposed 2-lot subdivision (SUB 08-000765) of the referenced TMK property to be created without providing the roadways required by tentative approval letter dated April 16, 2009 or condition "3) Access and Roadway Improvements". The variance request is from Hawaii County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements.

### BACKGROUND

1. **Location.** The referenced TMK property, Lot 3B-1 containing approximately 19.242 acres, being portions of Grant 3699 to Manuel Dos Santos, Grant 3700 to M. F. Mendes, and Grant 4227 to Narcisso De Mello, is situated at Ahualoa Homesteads, Hamakua, Hawaii.

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Mr. Sidney M. Fuke  
SIDNEY FUKU, PLANNING CONSULTANT  
Page 2  
January 7, 2010

2. **Zoning.** The subject property is zoned Agricultural (A-5a) by the County and designated Agriculture "A-" by the State Land Use Commission (LUC).
3. **Subdivision Application/PPM.** The proposed 2-lot subdivision application (SUB 08-000765) preliminary plat map (PPM) dated April 25, 2009 was granted variance (VAR 08-068) from water supply subject to variance conditions and tentative approval (TA) subject to 9-TA conditions dated April 16, 2009 which includes access and roadway condition "3)" which states:
  - "3) Access and Roadway Improvements
    - a) Access to the subdivision from Waipahi Place is via TMK: 4-6-007:093 (private right-of-way). Construct minimum 20-ft. wide agricultural pavement within minimum 50-ft. wide right-of-way from Waipahi Place to each lot of subdivision conforming to Standard Detail R-39. Where grades are 8% or greater, the roadway section shall be paved per Standard Detail R-34.
    - b) Submit construction plans and drainage report for review and comment. Additional storm runoff due to development shall be disposed within the subdivision and shall not be discharged onto adjacent properties or roadways."
4. **Variance Application.** The representative's variance application including "Exhibit-A" or copy of the TA letter dated April 25, 2009 and "Exhibit B" or colored photographs of road improvements was acknowledged by Planning Department letter dated August 24, 2009. The representative's background information states in part the following:

Page 3:

"One of the special and unusual circumstances relates to the inordinate cost to make the improvements relative to the number of lots-two-created by this action. In this case, the length of the road would be over ¼ mile long or approximately 1,500 feet. Making the required improvements of a 20-wide (sic) agricultural standard paved road with a cumulative 30-feet of paved shoulders would cost nearly \$500,000, based on \$300+ a linear foot. This would be excessive and would not make it possible for the applicant to subdivide and use the property

Mr. Sidney M. Fuke  
SIDNEY FUKU, PLANNING CONSULTANT  
Page 3  
January 7, 2010

pursuant to the existing zoning, thus depriving the applicant some measure of property rights.

Relative to the 50-foot wide right-of-way, the applicant does not own the properties through which the existing easement crosses. The affected property owners have already verbally informed the applicant that it would not consent to the additional right-of-way.

In lieu of the required road improvements, the applicant is proposing to allow the retention of an existing 10-foot wide paved road with 3-foot wide grassed shoulders on both sides of the road. Photos of this road are identified as **Exhibit B**. You will note that the beginning section of the road has an asphalt/concrete pavement, whereas the inner portion is concrete-based. The existing grassed shoulders are also visible in the photos.

Notwithstanding the cost to comply with the requirement, the graded rather than paved shoulders within the right-of-way-because of their permeability-could also act as natural storm drains and/or retard the velocity of any potential storm water.

Furthermore, allowing a 10-foot instead of a 20-foot wide pavement would result in less land disturbance and less visual impact from cut and fill slopes.”

5. **Variance Application-VAR 09-028: Agency comments and requirements:**

- a. The State of Hawaii-Department of Health (DOH) memorandum dated August 27, 2009 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 August 31, 2009. Refer to COH-HFD memorandum in variance application file.
- c. The Department of Public Works (DPW) memorandum dated September 9, 2009 states in part:

Mr. Sidney M. Fuke  
SIDNEY FUKU, PLANNING CONSULTANT  
Page 4  
January 7, 2010

“We have reviewed the subject application received on August 26, 2009 and offer the following comment:

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 23-87 and deviation from our standard recommendations may be 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 a notice mailed to property owners to list of surrounding property owners and photograph of a sign posted on subject property. According to an affidavit dated September 8, 2009, it appears that a notice was mailed to surrounding property owners; and, the required sign was posted upon subject property.

**Note:** A photograph of a sign posted upon subject TMK was submitted and filed in the variance applications from water supply and roadways, respectively.

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 first alternative requires the subdividers to expand the easement width and construct minimum 20 feet wide pavement within and upon access and utility easements identified on the preliminary subdivision plat map pursuant to tentative subdivision approval condition required by DPW comments in the subdivision file or roadways required by Chapter 23, Subdivisions.

Mr. Sidney M. Fuke  
SIDNEY FUKE, PLANNING CONSULTANT  
Page 5  
January 7, 2010

The second alternative acknowledges the subject TMK property or proposed subdivision currently can access to the Government Road via the private concrete driveway or improved 10 feet wide improved roadway within and upon existing 20 feet wide access and utility easements denoted upon abutting TMK property (TMK: 4-6-007:093). According to photographs taken by the owner's representative, the driveway or roadway within and upon both access and utility easements is approximately 10 +/- feet wide from the Government Road to proposed subdivision.

#### **INTENT AND PURPOSE OF THE SUBDIVISION CODE**

**Roadway Variance.** The intent and purpose of requiring access and roadways for a proposed subdivision is to ensure legal and physical access to a proposed subdivision or lots created by a subdivision are 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 zoned Agricultural (A-5a). The status of property access and network of publicly owned rights-of-way within this region was created before adoption of the 1967 Zoning and Subdivision Codes by the County of Hawaii. The subject TMK properties (without subdividing) can access the nearest public road or Government Road via a series of privately owned and maintained non-dedicable driveways or roadway constructed upon a series of 20 feet wide utility and access easements denoted on an abutting TMK property and current PPM. Therefore, there should be no adverse impact by allowing the proposed subdivision or additional lot to access and utilize the existing privately owned non-dedicable roadway or driveways within and upon the easements. The maintenance cost to utilize and maintain the privately owned right-of-way lot and non-dedicable paved roadway within the roadway lot fronting the proposed subdivision will be continued to be privately addressed and shared among the current owners and users.

Therefore, based on the representations made by the applicant's agent and evaluation of existing roadway improvements within or upon existing 20 feet wide access and utility easement identified upon abutting TMK property, the Planning Director has concluded, in this instance, that DPW comments to construct roadways or tentative subdivision condition to construct roadways pursuant to the DPW comments are not necessary.

The subject variance application was acknowledged by letter dated August 24, 2009. Additional time was required by the Planning Department to confirm evaluate the current width and condition of improved roadway within and upon easements affecting the proposed subdivision. The owner's agent granted the Planning Director and extension of time to render a decision on

Mr. Sidney M. Fuke  
SIDNEY FUKU, PLANNING CONSULTANT  
Page 6  
January 7, 2010

the variance application or variance from roadways for the proposed subdivision to December 29, 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 and request for variance from roadways to permit proposed 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 variance conditions for VAR 08-068 (Water Variance) dated March 12, 2009 and variance conditions for VAR 09-028 (Road Variance).
2. The applicant or subdivider shall confer with the DWS and designate in writing which lot of the proposed 2-lot subdivision shall be provided with a DWS water service (Account No. 630-90850) prior to submittal of approved written agreement and issuance of final subdivision approval to SUB 08-000765.

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 08-000765. This written agreement shall contain the following deed language, being covenants, conditions,

and restrictions affecting lot not serviced by a County water system or pending 2-lot subdivision application and shall be duly recorded at the Bureau of Conveyances of the State of Hawaii by the Planning Department at the cost and expense of the owners:

- a. The owner(s) agree and accept the fact that a County dedicable public water system is not now able to service the proposed subdivision SUB 08-

000765. 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 owner(s) agree and accept the fact that the County will not, at this time, bear the responsibility of supplying public water to the proposed or affected additional lot created by SUB 08-000765 not serviced by a County water system. No further subdivision of the lots created by SUB 08-000765 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB 08-000765 may not be made subject to a condominium property regime.
- d. Any dwelling constructed on a 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 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 Hawaii 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 affected lot created by 08-000765 that the County Water System has been upgraded or an improvement district initiated to enable service to the affected lot created by SUB 08-000765, the owner(s) of the affected lot created by SUB 08-000765 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 Hawaii 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.

- 3. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the 2-lots arising out of SUB 08-000765 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 access and utility easement and access and utility easement "A" identified on the subdivision application's preliminary plat map (PPM) or any other necessary access and utility easement(s) required for 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 08-000765. The current owners shall form or



participate in a 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 proposed subdivision utilizing the series of privately owned 20 feet wide access and utility easements denoted upon abutting property "LOT 3B-4" or TMK: 4-6-007:093 identified on the PPM.

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 08-000765. Should the improvement district require acquisition of any privately owned rights-of-way, 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 existing access and/or road and utility easements.

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.

Mr. Sidney M. Fuke  
SIDNEY FUKU, PLANNING CONSULTANT  
Page 10  
January 7, 2010

4. The subdivision application-SUB 08-000765 final plat map shall meet all the requirements of the Hawaii County Zoning Code and the Subdivision Code not covered by Variance-VAR 08-068 and Variance-VAR 09-028.
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 Variance-VAR 08-068 and/or VAR 08-069 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  
VAR 08-068  
SUB 08-000765