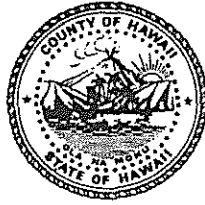


William P. Kenoi  
Mayor



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

March 31, 2010

Mr. Gregory R. Mooers  
MOOERS ENTERPRISES, LLC  
P. O. Box 1101  
Kamuela, HI 96743

Dear Mr. Mooers:

**SUBJECT: VARIANCE-VAR 09-046**

**Representative: MOOERS ENTERPRISES, LLC**

**Applicant: EMILY M. BANKS**

**Owner: CHRISTOPHER G. HILL, ET AL.**

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

**Tax Map Key: 7-7-007:013, (SUB 03-000145)**

After reviewing your variance application, the Planning Director certifies the approval of VARIANCE-VAR 09-046 subject to variance conditions. The variance permits alternative access and roadway improvements for proposed 2-lot subdivision (SUB 03-000145) of above referenced TMK property within an access easement. The variance is from minimum roadway improvements required by tentative subdivision approval letter dated November 8, 2004. The variance is from Hawaii County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-88, Nondedicable street, dead-end street, and Section 23-95, Right-of-way improvement.

### **BACKGROUND**

1. **Location.** The referenced TMK property containing approximately 2.023 acres, being a portion of L. C. Award 7716, Apana 4 to R. Keelikolani, is situated at Laaloa 1<sup>st</sup>, North Kona, Hawaii.
2. **Zoning.** The subject property is zoned Agricultural (A-1a) by the County and designated Agriculture or "A" by the State Land Use Commission (LUC). The

property is not within Special Management Area (SMA).

3. **Subdivision Request/PPM.** The previous owner submitted proposed 2-lot subdivision application (SUB 03-000145). Tentative Approval (TA) to the subdivision application's preliminary plat map (PPM) dated October 20, 2003 was granted on October 20, 2003 subject TA conditions dated October 20, 2003. The current owner's surveyor requested a time extension to address or prepare construction drawing to address subdivision improvements.
4. **Variance Application.** The owner's representative submitted variance application from TA condition "3" dated November 8, 2004 or minimum access and roadway improvements. The variance application was acknowledged by Planning Department letter dated November 3, 2009. The application includes background information which states in part the following:

Page 1. "The owners request approval of a variance from Section 23-88 of Chapter 23, the Subdivision Code. We are requesting a two lot subdivision utilizing the existing County owned access road with a right-of-way width less than the code requirement in the Agricultural one-acre (A-1a) zone."

Page 1-2. "The existing roadway which has provided access to the subject property is considered to be a County owned roadway, although it is not improved or maintained by the County and is not on its inventory of roadways to be improved or maintained. The jurisdiction of this substandard road fell to the County as the result of State legislation that assigned the responsibility of these government roadways to the respective Counties. This was an unfunded mandate."

Page 2. "The existing roadway has a varying width, which at its narrowest is only 12.5 feet."

Page 2. "The owners are requesting that the director allow a variance from the right-of-way-width for a nondedicable street; private dead end street from 16-feet to 12.5 feet."

5. **Variance Application-VAR 09-046-Agency Comments and Requirements:**
  - a. The State of Hawaii-Department of Health (DOH) memorandum dated

November 9, 2009 states:

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

- b. The Department of Water Supply (DWS) memorandum dated November 18, 2009 states in part the following:

“Our comments from our March 11, 2004, memorandum to you regarding the subject subdivision still stand.

We request that the final plat map shows the location of the meters and which proposed lot each meter will be assigned.”

- c. The Department of Public Works (DPW) memorandum dated November 23, 2009 states in part:

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

The applicant requests the existing road width be accepted (with new pavement) in lieu of the required right-of-way and pavement meeting the minimum width under HCC Section 23-88 required by the Tentative Approval dated November 8, 2004.

The tentative approval does not specifically mention how wide the right-of-way and pavement width must be. By examining the TMK map, the road appears to service at least two other properties in addition to the two proposed lots. According to Section 23-88, the proposed subdivision road should be improved to include a minimum 16 feet of pavement within a 20-foot right-of-way. In addition, the other two lots are also Zoned A1a. Similar requests to subdivide could be made by the other lot owners. The Planning Director should consider under what conditions any one or all of the lots would be allowed to subdivide and require consistent conditions for all. The existing substandard width near the Mamalahoa Highway approach should be widened as a condition of any subdivision approval.”

6. **Notice to Surrounding Owners.** The applicant’s representative submitted transmittal letter dated November 10, 2009, copy of notice, and proof of mailing

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notice and other information. According to the submittals with affixed USPO receipts, the notice was mailed notice on November 10, 2009. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on November 9, 2009.

7. **Posted Sign.** The applicant's representative submitted letter or sign affidavit dated November 10, 2009 and 2-pictures or photographs of the posted sign upon subject property.
8. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. No objections from surrounding property owners or public were received.

#### 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 to following TA letter condition dated November 8, 2004:

- “3) Access and Roadway Improvements
  - a) Access from Mamalahoa Highway to the subdivision is through an existing substandard road. To satisfy Section 23-34 of the Hawaii County Code (HCC), the subdivision access shall be improved to conform with the following standards:
    1. Right-of-way and pavement width shall conform to HCC, Section 23-88.
    2. The entire right-of-way width shall be improved as required by HCC, Section 23-95.
    3. Submit construction plans and drainage report for review and comment.”

The second alternative acknowledges that the subject TMK property currently abuts or has frontage along a “substandard road” albeit via an old roadway upon a narrow publicly owned right-of-way which connects to the Mamalahoa Highway.

#### 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.

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The proposed subdivision and adjoining areas are agricultural in character. It appears that the status or current access to the current TMK property is via a substandard "ROADWAY" identified on the PPM within a narrow publicly owned right-of-way fronting the subject TMK property. The entire property (without subdividing) currently can access the Mamalahoa Highway utilizing the current roadway within and upon the "ROADWAY". According to the application's preliminary plat map, it appears that the "House" and "Garage" upon proposed "LOT C-1" has historically utilized the "substandard roadway" upon the "ROADWAY" which connects to the "MAMALAHOA HIGHWAY". The access and roadway within and upon the access easements identified on the preliminary driveway plan proposed by the subdivider would obviate use of the current roadway fronting the subject TMK property or reduce the distance between the dwellings upon both proposed lots and the intersection of the "ROADWAY" or current 10 +/- feet roadway at the Mamalahoa Highway.

Therefore, after considering information and circumstances including width and condition of the paved roadway or users of the current "ROADWAY" fronting the proposed subdivision, there should be no adverse impact by granting variance to allow proposed 2-lot subdivision to utilize or construct a 12.25 + feet to 20 feet wide roadway or driveways upon the access easements for lot access or proposed subdivision. Further, based on the representations made by the applicant's representative and regarding the status of ownership of the old "ROADWAY" fronting the TMK property and alternative proposed lot access and roadways for the subdivision, the Planning Director has concluded that the TA condition dated November 8, 2004 requiring the current subdivider or owners to widen the current public roadway including substantial pavement improvements required by the DPW as TA condition "3" (1 and 2) are not necessary and can be deleted by variance subject to variance conditions. Condition "3" still requires the subdividers or current owners to submit drainage report to the DPW for review and comment prior to issuance of final subdivision approval.

Physical access for proposed subdivision or physical access and paved road between proposed lots to the intersection between the "ROADWAY" and Mamalahoa Highway will be constructed in accordance with proposed alternative construction plans prepared by the subdivider's engineer approved by the DPW and affected agencies. The driveways or roadways upon the proposed access easements or within and upon the subdivision will be privately addressed and paid for by the subdivider and/or users of the roadway prior to issuance of final subdivision approval.

The applicant or representative's request for variance and variance application was acknowledged by letter dated June November 3, 2009. Additional time was required by the Planning Department to consider comments from the DPW regarding the status of the roadway

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fronting the proposed subdivision. The representative granted the Planning Director an extension of time to render decision on the variance application to March 31, 2010.

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. "3)" dated November 8, 2004 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 alternative subdivision plans to construct access and roadway (driveway) improvements upon proposed lots in accordance with approved subdivision construction plans including required DPW drainage report for the proposed subdivision for review and approval by the affected agencies. The alternative access and roadway (driveway) including any necessary drainage improvements required by the DPW shall be constructed for the subdivision in accordance with approved subdivision plans prior to issuance of final subdivision approval.
3. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that both lots created by proposed SUB 03-000145 will use and maintain the current privately owned road or access easement(s) upon proposed lots or subdivision on their own without any expectation of governmental assistance to maintain the existing access or roadway improvements within the privately owned access easements identified on the preliminary subdivision construction plans or the necessary access easement(s) within and upon 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 03-000145. 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 03-000145. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 03-000145, 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 03-000145) final plat map shall meet

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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 03-000145.

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 03-000145.
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 Variance-VAR 09-046 null and void.

Thank you for your understanding and patience during our review.

Sincerely,

  
BJ LEITHEAD TODD  
Planning Director

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xc: SUB 03-000145  
DPW-Engineering Branch