

William P. Kenoi  
Mayor



BJ Leithead Todd  
Director

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Deputy

## County of Hawai'i

### PLANNING DEPARTMENT

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January 31, 2011

Sidney Fuke  
Planning Consultant  
100 Pauahi Street, Suite 212  
Hilo, HI 96720

Dear Mr. Fuke:

**SUBJECT: Variance Application: VARIANCE (VAR 10-027)**  
**Agent: Sidney Fuke, Planning Consultant**  
**Applicant: 1250 Oceanside Partners**  
**Owner: 1250 Oceanside Partners**  
**Request: Variance from Chapter 23, Subdivisions**  
**TMK: 7-9-012: 004, 006, 011, 029 and 034; 8-1-004: 003, 064, 065, 068 and 070; 8-1-032: 054; 8-1-033: 013 through 017; and 8-1-026: 057 and 8-1-032: 054**

After reviewing your Variance Application, the Planning Director certifies the **approval** of **VAR 10-027** from minimum **road improvements**, subject to variance conditions. The variance is from Hawai'i County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-86, Requirements for dedicable streets and Section 23-95, Right-of-way improvement.

VAR 10-027 permits the retention of existing and construction of new private 20-foot wide roadways with 50 and 60-foot wide rights-of-way within a multi-phased residential subdivision (Hokulia). The requested road section would be to omit the requirement for grading and paving of the road shoulders and replace with grassed shoulders. The decision to approve VAR 10-027 is based on the following background information and findings.

### BACKGROUND

1. **Location.** The subdivision measures approximately 1,552 acres and is located on the border of the North and South Kona districts.

2. **Zoning.** The property is zoned Residential-Agriculture – 1 Acre (RA-1A) by the County and designated Agriculture (A) by the State Land Use Commission (LUC).
3. **Subdivision Application.** The Hokulia subdivision proposes a maximum of 665 residential lots, a golf course and associated amenities. Roads within the development, both existing and planned, are intended to be privately owned and maintained. The development is broken into three general phases: Phase I, Phase II, and Phase III. Phases I and II have been completed and granted final subdivision approval. Phase III is further separated into three sub-phases, North, South and East, with Phase III North and South having received tentative subdivision approval. Phase III East is under review by the Planning Department.
4. **Variance Application.** On April 20, 2010, a variance application was submitted for review, concerning the existing and proposed roads. On July 6, 2010 the variance application was returned, in part due to the department's stance that variance approval was not needed for Phases I, II and III North and South. Construction plans, including roadways with grassed shoulders in lieu of the paved shoulders, had already been approved by the County Departments of Public Works and Planning. Bonding and/or improvements in many of these road sections had already been completed.

Following further discussion with the applicant and the request to reconsider, in order to legitimize the deviations from the subdivision code, the variance application was resubmitted on July 29, 2010 and included such items as the application, fee, narrative, maps and other associated material. Supplemental materials were also subsequently provided on October 18, 2010.

5. **Agency Comments and Requirements.**
  - a. The State of Hawai'i Department of Health (DOH) memorandum is dated December 23, 2010. Refer to SOH-DOH memo in VAR application file.
  - b. The Hawaii Fire Department (HFD) memorandum is dated January 4, 2011. Refer to HFD Memo in Variance application file.
  - c. The Department of Public Works (DPW) memorandum is dated January 5, 2011. Refer to DPW memo in VAR application file.

6. **Public Notice.** The applicant filed a copy of the notice sent to surrounding property owners within 500 feet of the subject property. According to the affidavit provided by the applicant and dated May 18, 2010, notices were provided on May 17<sup>th</sup>. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on December 28, 2010. The applicant filed an affidavit dated May 18, 2010, in regards to posting a sign upon the subject site that included pictures of the installed signage and other information.
7. **Comments from Surrounding Property Owners or Public.**
  - a. A letter from Devlyn Akau, dated May 24, 2010, was submitted and cites concerns with impacts of development on the environment. Refer to memo in VAR application file.
  - b. A letter from R. Dvorak, dated June 20, 2010, was submitted and requests that no variances or future approval should be granted until past commitments are met. Refer to memo in VAR application file.

Aside from the above, no further comments in support of or in opposition to the request have been submitted to the department

## **REVIEW CRITERIA**

Chapter 23, Subdivisions, specifically, Section 23-14, provides the Planning Director general authority to grant variances from Chapter 23. Section 23-14 states in part:

“Variances from the provisions of this chapter may be granted; provided, that a variance shall not allow the introduction of a use not otherwise permitted within the district; and provided further that a variance shall not primarily effectuate relief from applicable density limitations.

Further, Section 23-15, Grounds for variances, states that no variance will be granted unless it is found that:

- a) There are special or unusual circumstances applying to the subject real property which exist either to a degree which deprives the owner or applicant of substantial property rights that would otherwise be available or to a degree which obviously interferes with the best use or manner of development of that property; and
- b) There are no other reasonable alternatives that would resolve the difficulty; and
- c) The variance will be consistent with the general purpose of the district, the intent and purpose of this chapter, and the County general plan and will not be materially

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detrimental to the public welfare or cause substantial, adverse impact to an area's character or to adjoining properties.

## DISCUSSION

The subject subdivision known as **Hokulia** is located in Central Kona which spans over 1,552 acres and will consist of 665 residential/agricultural parcels. The applicant is proposing a 20 foot roadway within 50 and 60-foot wide right-of-ways with the balance of the road-right-of-way being grassed in lieu of the Department of Public Works recommendation for shoulders and swales to be graded and paved. More specifically the applicant is seeking relief from all roadways within the subject subdivision, existing or proposed, including the Halekii Street extension (Road Lot R-1).

The average slope of the subject property ranges from 15-20 percent, with some areas exceeding 20 percent. Therefore, full pavement of the right-of-way would increase water runoff impacting the lower and adjoining properties. The applicant has indicated that grassed swales would not only be more visually compatible and consistent with the area's character but would also act as natural storm drain and impede the velocity of any potential storm water.

In considering Criteria "c" above, the department cites the DPW memo, dated January 5, 2011, which states in part the following:

*"The applicant asks for relief for all Hokulia Subdivision roads, none of which have received a construction final approval. DPW recommends that planning confirm if correct TMK parcels are included on the application. The application does not acknowledge that Ordinance 96-008 Conditions L and M required dedication of the connecting roads. DPW objects to granting variance without specifying cross section details and distinguishing those streets. For example Halekii Street extension, which is a collector street, (see General Plan and Kona Community Development Plan), shall be dedicated to the County as required by ordinance. Because of safety, liability and maintenance concerns, separate details should be provided for roads that do not specifically require dedication to the County by ordinance and those that do require dedication. Additional conditions such as roadside landscape and drainage system maintenance requirements and streetlights along with surety in case of default should be imposed for roads required to be dedicated to the County".*

It should be noted that the extension of Halekii Street has been completed without full right-of-way improvements per construction plans approved by the Department of Public Works.

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Also, similar type relief from road right-of-way improvements have been granted in the past for subdivisions where the road right-of-way and all improvements therein would be owned and maintained by an entity other than the County of Hawaii.

More specifically, the development of the Lualaçi subdivision in Waimea was given relief from improvements by installing grassed swales within the road rights-of-way. This approval was granted with the condition that there would be a written assurance for a maintenance program for the grassed swales. This program may include the requirements for a maintenance bond or other security to assure the work is done in a timely manner.

In order to subdivide the property, an applicant is required to provide road improvements meeting the minimum requirements of the Department of Public Works. In review of the road variance request, the cost for additional right-of-way road improvements would be putting excessive demands upon the applicant when a more reasonable alternative (i.e. allowing the existing road improvement to continue with ongoing maintenance provided by the private owners association) may be permitted under the general authority of the Subdivision.

### **INTENT AND PURPOSE**

Chapter 23, Subdivisions, specifically, Section 23-14, permits and provides the Planning Director general authority to grant variances from Chapter 23.

The intent and purpose of road/access requirements to a proposed subdivision is to ensure legal and physical access to the proposed lots that 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. Further intent of requiring full improvements within the right-of-ways is to minimize the cost of its maintenance by the County of Hawaii.

The applicant's report has stated in part:

“However, as the existing and proposed roads are intended to be private, its maintenance and associated liability will be the responsibility of the homeowners association, who will eventually end up owning and maintaining all of the roads. Thus, the County's concern of maintenance – resulting in the full right-of-way pavement requirement – is absent for private roads.

It should also be noted that this variance would not compromise any safety concern. There will still be a 20-22 foot wide paved road, which will be sufficient to allow for emergency vehicles to access the entire project area. The approval of this variance should therefore not be inherently violative of the spirit and intent of the Subdivision Code”.

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, it is felt that the variances sought to permit the 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 in this subdivision or immediate area.

#### **VARIANCE DECISION – CONDITIONS**

The variance request concerns the Department of Public Works recommendation for 20-foot paved roadways within 50 and 60 foot rights-of-way, with the balance of the right-of-way (shoulders and swales) being graded and paved, for all existing and proposed roadways within the subject subdivision including the Halekii Street extension (Road Lot R-1). The variance request, to permit the shoulder and swale areas to be grassed in lieu of the grading and pavement, is **approved** subject to following variance conditions:

1. **Road Variance.** The sub divider, owners, their assigns, or successors shall be required to provide written assurance meeting with the approval of the Planning director, in consultation with the Department of Public Works, that there will be a maintenance program for the grassed swales. This program may include the requirements for a maintenance bond or other security to assure the work is done in a timely manner. The proposed lots shall form 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 subject property utilizing the paved road or utilities within the Hokulia subdivision.

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 the Hokulia Subdivision. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of the Hokulia Subdivision, such rights-of-way shall be dedicated to the County without cost and the value of the dedication credited to the fair share

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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 access and paved roadways within the Hokulia 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.

2. The subdivision shall meet with all of the conditions of Ordinance No. 96 007 and Ordinance 96 008, Tentative Subdivision Approval conditions and requirements of the Hawaii County Zoning Code, Ordinance and Subdivision Code not covered by this variance.
3. The sub divider, 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 VAR 10-027 null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

GS:LN:nci

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cc: DPW – Engineering  
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TMK File  
SUBDIVISION Files  
OPPONENTS