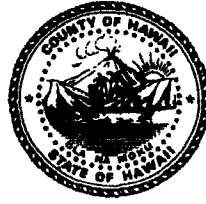


William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

West Hawai'i Office
74-5044 Ane Keohokalole Hwy
Kailua-Kona, Hawai'i 96740
Phone (808) 323-4770
Fax (808) 327-3563

County of Hawai'i
PLANNING DEPARTMENT

East Hawai'i Office
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720
Phone (808) 961-8288
Fax (808) 961-8742

November 13, 2012

Roy A. Vitousek III
Cades Schutte, LLP
75-170 Hualalai Road, Ste. B-303
Kailua-Kona, HI 96740

Dear Mr. Vitousek:

SUBJECT: VARIANCE DECISION VAR-12-000096
Agent: ROY A. VITOUSEK III, CADES SCHUTTE, LLP
Applicants: EDWARD J. AND RHONDALL RAPOZA TRUSTEES
Owner: EDWARD J. RAPOZA TRUST
Request: Variance from Chapter 23, Subdivisions, Article 3, Division 4 Street Design, Section 23-41, Minimum Right-of-Way and Pavement Widths; Section 23-50. Grades and curves; Article 6, Division 2, Improvements Required, Section 23-87, Standard for Nondedicable Street, Escrow Maintenance Fund; Section 23-89. Sidewalks; Section 23-91. Curbs and gutters; Section 23-93, Street lights; and Section 23-95, Right-of-Way-Improvement
Tax Map Key: 7-1-005:027 (SUB-06-000286)

Upon review of your variance application, the Planning Director certifies the **approval** of Variance VAR-12-000096 subject to variance conditions. The variance grants relief for SUB-06-000286 from constructing roadway improvements required by Hawai'i County Code (HCC), Chapter 23 (Subdivisions).

The variance is from the proposed subdivision's minimum requirements pursuant to HCC, Chapter 23 (Subdivisions), Article 3, Division 4, Section 23-41, Minimum right-of-way and pavement widths & Section 23-50, Grades and curves; Article 6, Division 2, Improvements Required, Section 23-87, Standards for nondedicable streets, escrow maintenance fund; Section 23-89, Sidewalks; Section 23-91, Curbs and Gutters; Section 23-93, Street lights; and Section 23-95, Right-of-way improvement.

NOV 15 2012

BACKGROUND

1. **Location.** The referenced TMK property, Lot B, being a portion of Grant 7548, containing approximately 10.748 acres, is situated in the Pu'u anahulu Homesteads, North Kona, Hawai'i.
2. **Land Use Designations.** The subject property is zoned Agricultural – five (5) acres minimum building site area (A-5a) by the County and designated Agricultural (A) by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** Subdivision application SUB-06-000286 was submitted to subdivide the subject TMK property into 2 lots. Further action on the subdivision application has been deferred pursuant to variance application acknowledgement letter dated September 21, 2012 in the variance file.
4. **Variance Application.** The variance request from water supply improvements was acknowledged by Planning Department letter dated September 21, 2012. This variance application includes background history and circumstances and information regarding the pending subdivision application.
5. **Variance Application (VAR-12-000096)-Agency Comments and Requirements.**
 - a. The State of Hawai'i-Department of Health (DOH): see attached memorandum dated September 25, 2012.
 - b. The County of Hawai'i Fire Department (HFD): the HFD did not respond to this application as of this date.
 - c. The Department of Public Works (DPW) did not comment on this variance application as of this date. Reference is made, however, to their November 9, 2006 memorandum in response to the PPM (attached) and the Subdivision Code which requires a minimum of 20-foot wide agricultural pavement in a minimum 50-foot wide right-of-way be provided and that the entire right-of-way be improved. These improvements typically would conform to DPW Standard Detail (Std. Det.) R-39.
6. **Notice to Surrounding Owners/Posted Sign.** The applicant submitted an affidavit regarding notice of variance application mailed to a list of surrounding property owners. According to the affidavit dated September 28, 2012 and other submittals in the variance application file, notice of variance was mailed on or about September 28, 2012. An affidavit dated August 14, 2012 states that a sign was posted upon subject TMK property on or about September 20, 2012. A photograph of the posted sign was also submitted.

7. **Comments from Surrounding Property Owners or Public.** No other agency comments were solicited and none were received. No objections to the application were received from surrounding property owners or the public.

INTENT AND PURPOSE OF THE SUBDIVISION CODE

Lot Access/Roadways. The DPW normally recommends, and the Subdivision Code requires, a minimum of 20-foot wide agricultural pavement within a minimum 50-foot wide right-of-way in the A-5a zoning district and that the entire right-of-way be improved. These improvements would conform to DPW Standard Detail (Std. Det.) R-39.

The intent and purpose of access improvement 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.

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Roadway Variance. In lieu of constructing roadways required by the Subdivision Code and DPW Std. Det., the applicant is requesting this variance to utilize an existing alternative roadway. The applicant proposes to utilize an existing privately-owned and maintained approximately 18-foot wide graveled roadway with grassed or graveled shoulders on both sides, within the 25-foot wide right-of-ways.

Given the recitations of the applicant and evaluation of the request to utilize the existing privately-owned alternative roadway within the 25-foot wide right-of-ways, the Planning Director has concluded that the roadway improvements stipulated by the DPW and in the Subdivision Code can be modified to permit 18-foot wide paved roadway treatment within the privately-owned right-of-ways. However it is found that some mitigative measures are called for in this instance.

The portion of the roadway pavement within the subject property shows approximately 18-foot wide gravel with grassed/graveled shoulders in good repair. However the evidence shows that portions of the paving from the Hawai'i Belt Road and the Homestead Road are in disrepair.

With the below-stipulated modifications, the request for a variance from the roadway requirements of the Subdivision Code, at this time, is 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 this variance, with said modifications, 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 requested is to permit the proposed 2-lot subdivision of the subject TMK property to allow the proposed existing privately-owned alternative roadway improvements within right-of-ways designated on the plat map, 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 conditions of approval.
2. 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.
3. The owners, their assigns, or successors shall file a written agreement document with the Planning Department within one (1) year from the issuance of tentative subdivision approval. This written agreement shall contain deed language, being covenants, conditions, and restrictions affecting the lots created by the proposed subdivision which are serviced by a sub-standard privately-owned alternative roadway. The agreement shall be duly recorded at the Bureau of Conveyances of the State of Hawai'i by the Planning Department at the cost and expense of the owners.

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 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 of the existing property or approved subdivided lots.

4. The subdivider and all grantees, successors, and assigns acknowledge that the parcels were created by a variance from the normal subdivision requirements of Hawai'i County, and that there are no special or unusual circumstances applying to the property which deprive the owners of substantial property rights or to a degree which obviously interferes with the best use or manner of development of the properties, and hence, no grounds exist or will exist for a variance from the Subdivision Code to permit further subdivision of the properties, and that changes in the owners' personal or financial situation after acquiring the properties also will not constitute grounds for a variance from the Subdivision Code to permit further subdivision of the properties.

5. **ROAD VARIANCE.** The subdivider, owners, their assigns, or successors understand that the sub-standard alternative roadway within the 25-foot wide privately-owned right-of-ways will use and maintain the roadway on their own without any expectation of governmental assistance to maintain the improvements.
 - a. The owners, grantees, successors, and assigns shall indemnify and defend the State of Hawai'i or County of Hawai'i from any and all liability arising out of vehicular access to and from the subject properties utilizing the private right-of-ways.
 - b. The existing paving at the access point of the Hawai'i Belt Road and the Homestead Road shall be repaired at the intersections with the private road. These improvements shall meet with the approval of the DPW and/or the Department of Transportation.
 - c. Upon written demand of the County of Hawai'i, 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-06-000286. Should the improvement district require acquisition of any privately owned right-of-ways fronting the lots, such right-of-ways 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).
 - d. The lot owners, grantees, successors, and assigns agree to participate in a homeowners' association or road maintenance agreement and/or pay their fair share to maintain the roadway within the private right-of-ways.
6. The pending subdivision application's (SUB-06-000286) final plat map shall meet all the requirements of the Hawai'i County Zoning Code and the Subdivision Code not covered by this variance.
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 this Variance Permit null and void.

In accordance with Ordinance No. 99-112, you may appeal the director's decision as follows:

- (a) Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the date of the director's written decision, appeal the decision to the board of appeals.
- (b) A person is aggrieved by a decision of the director if:
 - (1) The person has an interest in the subject matter of the decision that is so directly and immediately affected, that the person's interest is clearly distinguishable from that of the general public: and
 - (2) The person is or will be adversely affected by the decision.
- (c) An appeal shall be in writing, in the form prescribed by the board of appeals and shall specify the person's interest in the subject matter of the appeal and the grounds of the appeal. A filing fee of \$250 shall accompany any such appeal. The person appealing a decision of the director shall provide a copy of the appeal to the director and to the owners of the affected property and shall provide the board of appeals with the proof of service.
- (d) The appellant, the owners of the affected property, and the director shall be parties to an appeal. Other persons may be admitted as parties to an appeal. Other persons may be admitted as parties to an appeal, as permitted by the board of appeals.

The board of appeals may affirm the decision of the director, or it may reverse or modify the decision, or it may remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

- (1) The director erred in its decision; or
- (2) The decision violated this chapter or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

In view of the above and for your reference, we have enclosed the GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR form.

Roy A. Vitousek III
Cades Schutte, LLP
Page 7
November 13, 2012

Any questions may be directed to Jonathan Holmes at (808) 961-8146, or jholmes@co.hawaii.hi.us.

Sincerely,



BJ LETIHEAD TODD
Planning Director

JRH:mad

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Enclosures: Agency Comments
BOA Application

xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB-06-000286
Gilbert Bailado, GIS Section (via email)

xc w/enclosures: Edward J. and Rhondall Rapoza Trustees
c/o Roy A. Vitousek III, Cades Schutte, LLP
75-170 Hualālai Road, Suite B 303
Kailua-Kona, HI 96740

DEPARTMENT OF PUBLIC WORKS
COUNTY OF HAWAII
HILO, HAWAII

MEMORANDUM

Date: November 9, 2006

TO: PLANNING DEPARTMENT

FROM: DEPARTMENT OF PUBLIC WORKS

SUBJECT: SUBDIVISION: SUB-06-000286
Subdivider: RAPOZA, Ed & Rhondall
Location: Puuanahulu Homesteads, North Kona, Hawaii
TMK: 7-1-005:027, Por. 063 & Por. 020
Folder No.: 7110-C

We have reviewed the revised preliminary plat map dated June 20, 2006 and have the following comments:

1. §23-64. Identify all watercourses and drainage ways and designate areas within as "approximate areas of flood inundation."
2. Access from North Kona Belt Road to the subdivision is via a substandard homestead road right-of-way that is not maintained by the County. In the interest of public welfare and safety, the DPW recommends that the substandard road should be improved to the following standards.
 - a. §23-86/§23-95. Construct dedicable pavement with paved shoulders and swales meeting with the approval of the DPW.
 - b. §23-92. Drainage improvements shall be provided based on an engineering analysis of actual field conditions.
 - c. §23-93. Streetlights/signs/pavement markings shall be installed as required by the Traffic Division.
3. Roadway design/layout including allowable street grades and curves to provide adequate sight distance shall conform to Section 23-50 of the Hawaii County Code (HCC).

- 583

NEIL ABERCROMBIE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. BOX 916
HILO, HAWAII 96721-0916

LORETTA J. FUDDY, A.C.S.W., M.P.H.
Director of Health

PLANNING DEPARTMENT

2012 SEP 26 AM 9:14

MEMORANDUM

DATE: September 25, 2012

TO: Bobby Jean Leithead Todd
Planning Director, County of Hawaii

FROM: Newton Inouye
District Environmental Health Program Chief

SUBJECT: VARIANCE APPLICATION AND DEFER ACTION (VAR-12-000096)
Agent: ROY A. VITOUSEK III, ESQ., CADES SHUTTE, LLP
Applicants: EDWARD J. AND RHONDALL RAPOZA TRUSTEES
Owner: EDWARD J. RAPOZA TRUST
Request: Variance from Chapter 23, Subdivisions, Article 3, Division 4 Street Design, Section 23-41, Minimum Right-of-Way and Pavement Widths; Section 23-50. Grades and curves; Article 6, Division 2, Improvements Required, Section 23-87, Standard for Nondedicable Street, Escrow Maintenance Fund; Section 23-89, Sidewalks; Section 23-91. Curbs and gutters; Section 23-93, Street lights; and Section 23-95, Right-of-Way-Improvement
Tax Map Key: 7-1-005:027 (SUB-06-000286)

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

WORD:VAR-12-000096.ny

081256

Memo to Planning Department
Page 2
November 9, 2006

4. §23-87/§23-95. For the proposed Road Easements "C-1," "C-2," and "C-3," construct minimum 20-ft wide agricultural pavement within a minimum 50-ft wide easement, conforming to DPW Standard Detail R-39. Where grades are 8% or greater, the roadway section shall be paved per DPW Standard Detail R-34.
5. §23-79. Submit construction plans and drainage report for review and comment.

Questions may be referred to Cres Rambayon at 961-8327.

CR

c: ENG-KON

06.0750 RP.rpd

COUNTY OF HAWAII
BOARD OF APPEALS

GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR

(Type or legibly print the requested information)

APPELLANT: _____

APPELLANT'S SIGNATURE: _____ DATE: _____

ADDRESS: _____

TELEPHONE: (Bus.) _____ (Home) _____

APPELLANT'S INTEREST IN THE PROPERTY: _____

APPELLANT'S NATURE OF APPEAL AND REQUEST: _____

LAND OWNER: _____

TAX MAP KEY: (land in question) _____ AREA OF PROPERTY: _____

STATE LAND USE DESIGNATION: _____ COUNTY ZONING: _____

STREET ADDRESS OF PROPERTY: _____

APPELLANT'S REPRESENTATIVE: _____

REPRESENTATIVE'S SIGNATURE: _____ DATE: _____

REPRESENTATIVE'S ADDRESS: _____

TITLE: _____ TELEPHONE: (Bus.) _____

THIS PETITION MUST BE ACCOMPANIED BY A FILING FEE OF TWO HUNDRED FIFTY DOLLARS (\$250) PAYABLE TO THE COUNTY DIRECTOR OF FINANCE AND:

1. The Original and ten (10) copies of this completed petition with the following:
 - a. A description of the property involved in the appeal in sufficient detail for the public to precisely locate the property.
 - b. A statement explaining the nature of the appeal and the relief requested.
 - c. A statement explaining:
 - (i) How the decision appealed from violates the law; or
 - (ii) How the decision appealed from is clearly erroneous; or
 - (iii) How the decision appealed from was arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.
 - d. A clear and concise statement of any other relevant facts.
2. Proof of Service by the Appellant on the Planning Director for an appeal from the Planning Director's decision relating to the Zoning Code.
3. A list of the names, address and tax map keys of all owners of property within boundaries established by Section 8-11(d) of the Board of Appeals Rules of Practice and Procedure.