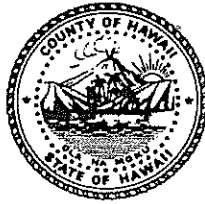


William P. Kenoi
Mayor



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

December 15, 2010

Mr. John D. Weeks
JOHN D. WEEKS INC.
76-6877 Mamalahoa Highway
Holualoa, HI 96725

Dear Mr. Weeks:

SUBJECT: VARIANCE-VAR 05-077

Agent: JOHN D. WEEKS, INC.
Applicants: LORALEI K. RUBIO, ET AL.
Owners: LORALEI K. RUBIO, ET AL.
Request: Variance from Chapter 23, Subdivisions
Tax Map Key: 8-2-010:009, (SUB 03-000017)

After reviewing your variance application, the Planning Director certifies the approval of **VAR 05-077** subject to variance conditions. The variance permits a 2-lot subdivision (SUB 03-000017) of the referenced TMK property to be created without providing a water supply system and dedicable roadway improvements pursuant to Chapter 23, Subdivisions. The variance is from Hawai'i County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2), Section 23-86, Requirements for dedicable street, Section 23-93, Street lights, Section 23-94, Street name and traffic signs, and Section 23-95, Right-of-way improvement.

BACKGROUND

1. **Location.** The referenced TMK property contains approximately 4.00 acres, being a portion of R.P. 4497, L.C. Award 8559 to C. Kanaina, is situated at Kalamakumu, South Kona, Hawai'i.

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2. **Zoning.** The subject property is zoned Agricultural (A-1a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC). The property is not located within an area called and/or designated Special Management Area (SMA).
3. **Subdivision Request/PPM.** The applicant/s/owner's agent submitted subdivision application (SUB 03-000017) proposing to subdivide subject TMK property. Further action on the subdivision application including the preliminary plat map (PPM) is being deferred according to letter dated May 9, 2003 in the subdivision file.
4. **Variance Application.** The subject variance application was acknowledged by Planning Department letter dated May 10, 2006. The variance application includes agent's background information and request for variance from water supply and dedicable roadways required to allow proposed 2-lot subdivision.

The agent's background information states in part the following on page 2:

"The imposition of improving the existing public water system or the private KOA ROAD would be putting excessive demands upon my clients when a more reasonable alternative is available.

The Kalamakumu area in South Kona receives about 60 inches of rain fall per year. A potable rain catchment system having a minimum storage capacity of 6000 gallons should be adequate for human consumption. An additional potable rain catchment system having a minimum storage capacity of 3000 gallons for fire protection should also be adequate.

These conditions (requirements) are tangible for my clients. Improvements on the private road (KOA) are held up, by the fact, the owner (Kealakekua Ranch Ltd), gave my clients only a 16-Ft wide easement. The road consists of existing AC pavement having an average width of 10 feet."

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“Please be advised, this subdivision is among family members. They intend to continue care for the coffee and improve the land and some day build their homes.”

5. **Agency Comments and Requirements:**

- a. The State of Hawaii-Department of Health memorandum is dated May 16, 2006 (Refer to memorandum in the variance file).
- b. The County of Hawai'i Fire Department (COH-HFD) memorandum dated May 23, 2006 (Refer to memorandum in variance file).
- c. The Department of Water Supply (DWS) memorandum dated May 31, 2006 states, in part:

“We have reviewed the subject application and our comments from our memorandum of May 5, 2003, to you still stand. The subject parcel is not within the Department's existing service limits. The Department's existing water system facilities would require extensive additions and improvements including booster pumps, transmission lines, and storage facilities. Currently, funding is not available from the Department for such improvements and no time schedule is set.”

- d. The Department of Public Works (DPW) memorandum is dated June 1, 2006 (Refer to memorandum in variance file).

6. **Notice to Surrounding Owners/Posted Sign.** The applicant submitted a copy of a notice sent to a list of surrounding property owner(s), and other submittals. Pursuant to these submittals, it appears that the applicant's notice was mailed to the surrounding property owners by USPS on May 22, 2006. In accordance with Ordinance No. 05-135, the applicants submitted a notarized affidavit, dated November 29, 2010, and photographs to confirm posting of required sign. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on May 18, 2006.

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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. Letter dated on June 6, 2006 supporting the variance application was received from Henry and Mildred Shimakura on June 7, 2007.

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Water Supply. The first alternative requires the applicant or owners to extend and/or construct a county water system and provide dedicable water system improvements in accordance with DWS standards.

The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards.

The requirement of extending or constructing a DWS water system, or providing an approved alternative private water system meeting DWS standards, for the proposed 2-lot subdivision would be putting excessive demands upon the applicant or owners when a more reasonable alternative is available (e.g. private individual rainwater catchment system for potable and emergency requirements for agricultural zoned parcels can be permitted pursuant to Rule 22. Water Variance).

Lot Access/Roadways. The subdividers have been requested to construct access and roadways pursuant to an earlier DPW memorandum dated April 29, 2003, or roadway requirements pursuant to Chapter 23, Subdivisions. The subject property currently has access to a public roadway (Hawaii Belt Road) via a privately-owned roadway (Koa Road) and an existing 16 feet wide access and utility easement (Easement A & B).

In lieu of improving or constructing roadways required by the DPW memorandum dated April 29, 2003, the developer or owners contend that the existing paved private roadway (Koa Road) and existing gravel access easements (access and utility easement A and B) are sufficient access to subject property. The additional lot to be created by the proposed subdivision will create minimal additional impact. The owners are requesting a variance to not construct roadways, including 20 feet wide dedicable pavement with paved shoulders and swales within a minimum 50 feet wide right-of-way and street lights, required by the DPW memorandum.

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INTENT AND PURPOSE OF THE SUBDIVISION CODE

Water Variance. The intent and purpose of requiring a water system for and within the proposed subdivision is to assure that adequate water is available for human consumption and fire protection.

Section 23-84 of the Subdivision Code requires that all new subdivisions have a water system meeting with the minimum requirements of the Department of Water Supply. The State Department of Health has no specific rules or regulations relating to the utilization, construction or inspection of private roof or rain catchment water systems for potable or emergency uses.

The alternative to a water system would be an approval of a variance from “standards for water,” to allow and utilize privately-owned individual rain water catchment systems for proposed 2-lot subdivision, which can meet the intent and purpose of the Subdivision Code and can be allowed pursuant to Planning Department Rule 22-Water Variance, effective February 25, 2006. Generally, Rule 22 is both a rule and statement of criteria to be used so that consistent decisions can be made on water variance requests. Section 23-84 of the Subdivision Code requires a water system and Rule 22 limits subdivisions requesting a variance from water supply to six (6) lots and requires that a proposed subdivision requesting a variance to allow individual rainwater catchment systems for potable and emergency needs must receive a minimum 60 inches of annual rainfall for each lot served by catchment. Rule 22, states in part:

“22-4 Minimum rainfall. Except as provided in Rule 22-6, all lots to be served by catchment shall be served by catchment shall have an average annual rainfall of not less than 60”. The annual rainfall can be proven by rainfall records at comparable rain gauges, or by the USGS rainfall map.”

The analysis of existing rainfall within the subject property provided by the applicant indicate that there is adequate rainfall to support individual or separate private rainwater catchment systems for potable and emergency uses for the proposed subdivision. The analysis of the applicant’s submittals and GIS rainfall data maintained by Planning Department indicated the proposed subdivision will receive at least 60+ inches of rainfall annually. The proposed 2-lot subdivision meets Rule No. 22-Water Variance.

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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.

Access to the subject property is via a substandard private roadway known as Koa Road and a 16 foot wide access and utility easement depicted on the Preliminary Plat Map as Easements A & B. Documents submitted by the applicant have shown that the owners have historically used Koa Road and the access and utility easements as their ingress and egress to Hawaii Belt Road. Therefore, there should be no adverse impact by allowing the additional lot created by the subdivision to access and utilize the existing privately-owned non-dedicable roadway and access easement. The maintenance cost to utilize and maintain the privately-owned paved roadway and access easement will be continued to be privately addressed and shared among the current owners and users.

Given the circumstances cited in the applicant's background report and evaluation of the request to construct significant roadway improvements beyond the easement area granted to the parcel, the Planning Director has concluded that roadway improvements required for proposed 2-lot subdivision, stipulated by the DPW memorandum, are not necessary and can be remedied by variance approval with conditions.

The subject variance application was acknowledged by letter dated May 10, 2006. Additional time was requested by the Planning Department to review the variance application and other information submitted supporting the variance application. The applicant granted the Planning Department and Planning Director an extension of time to decide on the variance application.

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 applicant's request for variance from water supply and dedicable roadway improvements or request to construct privately owned roadways or driveways within and upon current access easements upon abutting properties will not be materially detrimental to the public's welfare and does not cause substantial adverse impact to the area's character and to adjoining properties.

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DETERMINATION/VARIANCE CONDITIONS

The variance request and application submitted by the owner's agent to permit proposed 2-lot subdivision of the subject property without providing a water system meeting DWS standards pursuant to Rule 22, Water Variance and roadway improvements required by the Department of Public Works for the proposed subdivision are hereby **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. **WATER VARIANCE:** The owners, their assigns, or successors shall file a written agreement or approved written document with the Planning Department prior to final subdivision approval of SUB 03-000017. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the lot not serviced by a County water system and 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:
 - a. The owners agree and accept the fact that a County dedicable public water system is not now able to service the proposed subdivision SUB 03-000017. 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 owners 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 lots created by SUB 03-000017 not serviced by a County water system. No further subdivision of the lots created by SUB 03-000017 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 03-000017 may not be made subject to a condominium property regime.

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- d. Any farm dwelling constructed on any lots 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 farm 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 Hawai'i County Fire Department. The Hawai'i 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 lot(s) created by SUB 03-000017 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 03-000017, the owner(s) of the lot(s) created by SUB 03-000017 shall participate in such improvement district or shall pay their pro-rata share of any installation of laterals, as determined by the County Department of Water Supply (DWS).

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- h. The subdivider and all grantees, successors, and assigns acknowledge that the parcel was 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 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 03-000017 will use and maintain the privately owned roadways and/or necessary easement(s) on their own without any expectation of governmental assistance to maintain the current privately owned access or roadway improvements within and upon Koa Road and roadways or driveway improvement within and upon "Easement A" and "Easement B" identified on the subdivisions preliminary plat map or any other necessary access and any necessary utility easement(s) within or upon proposed lots or proposed subdivision. The applicant, owners, their assigns, or successors shall submit or 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 03-000017. The proposed lots are required to join or participate with 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 Hawai'i 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 Hawai'i or County of Hawai'i from any and all liability arising out of vehicular access to and from the subject property utilizing the current privately-owned roadway fronting the subject property.

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 03-000017 or/and the privately-owned right-of-way "Koa Road". Should the improvement district require acquisition of any other privately owned rights-of-way including "Easement A" and "Easement B" upon abutting properties, 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 Koa Road and/or maintain the privately-owned roadway(s) between Koa Road and the 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 subdivision application's (SUB 03-000017) final plat map shall meet all the requirements of the Hawai'i 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 03-000017.
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.

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Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare subject Variance null and void.

Thank you for your understanding and patience during our review.

Sincerely,


BJ LEITHEAD TODD
Planning Director

LHN:mad

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xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB 03-000017