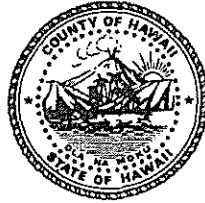


William P. Kenoi  
Mayor



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 11, 2009

Sandra Pechter Song  
Attorney At Law  
10 Kamehameha Avenue  
Hilo, HI 96720

Dear Ms. Song:

**SUBJECT: VARIANCE-VAR 07-076**  
**Representative: SANDRA SONG, Attorney At Law**  
**Owner: HAMAKUA LAND & CATTLE, LLC**  
**Request: Variance from Chapter 23, Subdivisions**  
**Tax Map Key: 2-8-009:047 and 048, (SUB 07-000519)**

After reviewing your request for variance and pending variance application, the Planning Director certifies the approval of Variance-VAR 07-076 from Chapter 23, Subdivisions, subject to variance conditions. The variance permits proposed 3-lot subdivision (SUB 07-000519) to be created without a water supply system and constructing additional roadway improvements required by the Department of Public Works (DPW). The agent, on behalf of applicants/owners, is requesting variance from minimum water supply and road improvements required to permit proposed 3-lot subdivision (SUB 07-000519) pursuant to Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply (1)(2), Section 23-87, Standard for nondedicable street; escrow maintenance fund, and Section 23-95, Right-of-way improvement.

### BACKGROUND

1. **Location.** The referenced TMK property(s), being Lot 49 and Lot 50 consisting of 62.299 acres, Kaupakuea Farms Subdivision, being portion of R.P. 1654, L.C. Aw. 2289 to Kauhola and portion of Grant 872 to Emma Metcalf are situated at Kapehu, South Hilo, Hawaii.

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2. **Zoning.** The subject property is zoned Agricultural (A-20a) by the County and designated Agriculture ("A") by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The owner's surveyor filed proposed 3-lot subdivision application (SUB 07-00519) at the Planning Department on January 27, 2007. Further action on the subdivision application and the application's preliminary plat map (PPM) was deferred according to letters dated March 16, 2007 and August 31, 2007.
4. **Variance Application.** The owner's previous representative filed a variance application from Chapter 23, Subdivisions, from the proposed subdivision's minimum water supply and roadway requirements. The variance application was acknowledged by Planning Department letter on May 28, 2008 subject to receipt of further information and other submittals. The original background information dated November 11, 2007 states in part:

"There are presently 50 Lots in the subdivision. Of those 50 Lots, 24 Lots are less than the 20-acre Agriculture Zone minimum, ranging in size from 5 acres to 16 acres in size."

"Granting of this Variance would not set any new precedent, as there are no other Lots in the subdivision that have the ability to consolidate and re-subdivide to create an additional lot that would conform with the Zoning requirement of a minimum size of 20 acres.

The physical division of Lot 50 and 49, with Lot 49-A being a Flag Lot, makes good planning configuration, giving each Lot it's own road frontage on the existing paved Private access Road (Lauhulu Road) and separate creek frontage on each lot."

Note: The owner's representative filed a copy of a licensed contractor's estimate or cost to resurface Lauhulu Road dated June 12, 2008 for review. Subsequent to the foregoing, the owner's representative filed a letter dated April 2, 2009 and additional background information regarding the owner's variance request for variance from minimum roadway requirements and other circumstances.

5. **Variance Application (VAR 07-076)-Agency Comments and Requirements:**

- a. The Department of Water Supply (DWS) memorandum dated June 18, 2008 states in part:

“We have reviewed the subject application and have the following comments and conditions.

Our comments from our March 29, 2007, memorandum to you regarding the subject subdivision still stand. The nearest point of connection is from an existing 6-inch waterline within Andrade Road, approximately 6,700 feet from the property.

We have no objections to the subject application as the applicant proposed to use private rainwater catchment systems for each lot within the subdivision.”

- b. The Department of Public Works (DPW) memorandum dated June 18, 2008 states in part:

“We have reviewed the subject application received on May 29, 2008 and offer the following comment:

The DPW still believes that to safeguard public welfare and safety, road improvements to satisfy Section 23-87 of the Hawaii County Code (HCC) should be provided. However, if the Planning Director finds that the applicant’s reasons provide valid grounds to justify HCC, Section 23-15, the DPW defers to that determination.

The subdivision improvements as stated in our memo dated April 12, 2007 are the minimum improvements required by the subdivision code. The DPW believes that allowing subdivisions without at least providing the minimum requirements as required by code will compromise public safety and welfare.

We do not believe there are special and unusual circumstances with regard to the requirements of Section 23-87. These are the minimum nondedicable street requirements imposed on all subdivision of this type.

Therefore, street requirements as noted in the memo to you dated April 12, 2007 regarding the review of the subject's preliminary plat should remain."

- c. The County of Hawaii Fire Department memorandum dated June 4, 2008 states:

"We have no comments to offer at this time in reference to the above-mentioned Variance application request."

6. **Notice to Surrounding Owners/Posted Sign.** The applicant's original representative submitted a list of surrounding property owners and photograph of a sign posted on subject property. According to the list and affixed postal receipt, a notice was mailed on June 9, 2008 to surrounding property owners; and, a picture of a sign was submitted for the file. Public notice of this application was published on June 5, 2008. A photograph of the posted sign dated June 6, 2008 was submitted by owner's original representative.
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.

Therefore, after considering the owner's original variance application and additional variance background information submitted by owner's representative, the Planning Director has determined that there are special or unusual circumstances applying to subject TMK properties and proposed subdivision which exist either to a degree which deprives the applicant or owners of property rights that would otherwise be available or to a degree which obviously interferes with the best use or manner of development of the subject property.

#### ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

**Water Supply.** The first alternative requires the applicant or owners to extend and/or construct a county water system or provide the necessary 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.

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The DWS memorandum or comments to the PPM, dated March 29, 2007, in the subdivision application's file states in part:

“We reviewed the subject application.

Please be informed there is no public water system in the area.”

After considering the nature of the proposed subdivision, the requirement to construct a public DWS water system or alternative private water system meeting DWS standards for proposed subdivision (SUB 07-000558) for a large lot agricultural subdivision would be putting excessive demands upon the applicant or owners. Further, the proposed subdivision is subject to Planning Department Rule 22-Water Variance.

**Lot Access/Roadways.** The first alternative requires the subdividers to construct dedicable paved road according to DPW-Standard Detail R-39 including other improvements within the Lauhulu Road pursuant to DPW memorandum comments and requirements dated April 12, 2007 in the subdivision file.

The second alternative acknowledges that the subject TMK properties (Lot 49 and Lot 50) currently access and have frontage along Lauhalu Road; and, access to the proposed 3-lot subdivision from Kaupakuea Homestead Road will be provided by Lauhulu Road (a privately owned roadway right-of-way road lot). According to photographs taken during a site inspection by the Planning Department, Lauhulu Road is paved from the intersection of Kaupakuea Homestead Road and Lauhulu Road (Right-of-Way) up to the proposed subdivision including the current road and utility easement upon Lot 50 created by SUB 7685 or proposed “pole” of proposed flaglot-“LOT 49-A”. The pavement upon and within the Lauhulu Road (Right-of-Way) lot is approximately 11 +/- feet wide from the intersection to the proposed subdivision.

#### **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.

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The alternative to a water system proposed by the applicant or "A Variance from water" to utilize privately owned individual rain water catchment systems for proposed 3-lot subdivision can meet the intent and purpose of the Subdivision Code according 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 information regarding the proposed subdivision or TMK properties indicates the proposed subdivision and surrounding area receive adequate rainfall to support individual or separate private rainwater catchment systems for potable and emergency uses. The information submitted by the applicant compared with the isohyet map study from Planning Department's GIS data base denotes subject TMK or proposed subdivision is near or between the 60 inch isohyet line and 120 inch isohyet line. The analysis of the applicant's submittals compared with rainfall maps and other historical or annual rainfall data maintained by Planning Department indicate the proposed subdivision will receive at least 60+ inches of rainfall annually. The proposed 3-lot subdivision meets Rule No. 22-Water Variance.

**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.

The proposed subdivision and adjoining areas are zoned Agricultural (A-20a). The status of property access and network of publicly and privately owned rights-of-way including "cane roads" 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 Kaupakuea Homestead Road via a privately owned and maintained non-

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dedicable paved road upon Lauhulu Road (privately owned right-of-way lot) identified on previously approved subdivision 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 fronting the proposed subdivision. Access fronting subject TMK properties and/or proposed subdivision was created in 2003. 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 Lauhulu Road fronting proposed including other access improvements within the immediate neighborhood, the Planning Director has concluded, in this instance, that DPW comments or requirements to construct roadways to permit the proposed 3-lot subdivision .

The subject variance application was acknowledged by letter dated May 28, 2008. Additional time was necessary for the Planning Director to review past and current agency comments to permit proposed subdivision and older background information in previous subdivision files. The applicant's representative-Sandra Pechter Song, Esq. granted the Planning Director an extension of time to render decision on the variance application or VAR 07-076.

Based on the foregoing findings, the applicant's request for variance from water supply and roadways 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 variances 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 variances requested by the owners or owner's representative to permit proposed 3-lot subdivision of subject TMK properties without providing a water system meeting DWS standards and minimum access and roadway improvements required by the DPW for proposed subdivision is 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 within one (1) year from the issuance of tentative subdivision approval and prior to receipt of final subdivision approval of SUB 07-000519. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting proposed lots not serviced by a County water system 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 owners agree and accept the fact that a County dedicable public water system is not now able to service the proposed subdivision SUB 07-000519. 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 lots created by SUB 07-000519 not serviced by a County water system. No further subdivision of the lots created by SUB 07-000519 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
  - c. Any lots created by SUB 07-000519 may not be made subject to a condominium property regime.
  - d. Any farm 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 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 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 lots created by SUB 07-000519 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 07-000519, the owner(s) of the lots created by SUB 07-000519 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 lots arising out of SUB 07-000519 will use and maintain the privately owned road and/or any road and utility easement on their own without any expectation of governmental assistance to maintain the existing access or roadway improvements within or upon the privately owned access roadway or Lauhulu Road identified on the subdivisions preliminary plat map or any other necessary access and utility easement(s) within 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 07-000519. 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 utilizing privately owned rights-of-way and/or Lauhulu Road fronting proposed 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 SUB 07-000519 or Lauhulu Road fronting SUB 07-000519. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 07-000519, 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.

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- 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.

4. The subdivision application's (SUB 07-000519) final plat map shall meet all the requirements of the Hawaii County Subdivision Code not covered by this variance. No other variances from Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 07-000519.
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 07-076 null and void.

Thank you for your understanding and patience during our review.

Sincerely,



BJ LETIHEAD TODD  
Planning Director

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xc: DPW-Engineering Branch  
DWS-Engineering Branch  
SUB 07-000519