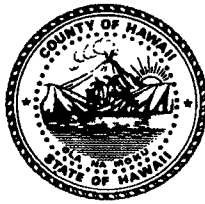


William P. Kenoi
Mayor



BJ Leithead Todd
Planning Director

County of Hawaii

PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720
Phone (808) 961-8288 • Fax (808) 961-8742

March 18, 2009

Gregory R. Mooers, President
Mooers Enterprises, LLC
P.O. Box 1101
Kamuela, Hawai'i 96743

Dear Mr. Mooers:

**CLARIFICATION OF STATUS OF SUBDIVISION AND VARIANCE APPLICATIONS
TENTATIVE SUBDIVISION APPROVAL**

SUBDIVIDERS: BUDWAY, Robert R./Keith Teel

Proposed Subdivision of Lot 2,
Being a Portion of Royal Patent 7679, Mahele Awards 5 and 38,
Into Lots 2-A & 2-B,
Kaiholena 1 & 2, North Kohala, Island of Hawai'i, Hawai'i
TMK: 5-8-001:027 (SUB-07-000569; VAR 08-035)

This will serve to clarify the status of the subject matter and to issue tentative approval to the preliminary plat map dated March 15, 2007. Please bear with us through this seemingly convoluted presentation of the facts and our stand on this issue. We also apologize for the drawn-out delay of this correspondence.

The subject 15.902 acre property was created as part of a 10-lot subdivision approved on June 20, 2003, as Subdivision No. 7701 (SUB 7701). In support of this subdivision, we approved Water Variance No. 1070 (VAR 1070) to allow a 12-lot subdivision without a water system meeting the minimum water requirements of the Department of Water Supply and the Subdivision Code. This variance allowed for roof catchment systems of rainwater for domestic water supply for 12-lots. Subsequent to approval of VAR 1070, the subdivision was revised and only 10-lots were created by SUB 7701, so there was, technically, a balance of two (2) lots that could be created with the support of VAR 1070.

MAR 24 2009

Gregory R. Mooers, President
Mooers Enterprises, LLC
Page 2
March 18, 2009

At the time of our acknowledgement of Mr. Budway's subdivision application (June 8, 2007), we informed you that "There are two (2) pending 2-lot subdivisions of Parcels 16 and 26 (SUB-05-000061 PHILLIPS and SUB-05-000109 REICH FAMILY TRUST) that would, when approved, constitute the last of the 12 lots allowed by Variance No. 1070. The proposed subdivision of this lot into two (2) parcels will constitute the thirteenth lot, and is, therefore, not covered under Variance No. 1070."

On May 11, 2007, Subdivision No. 05-000061 (Phillips) (SUB-05-000061) was granted tentative subdivision approval (TA) of the preliminary plat map dated March 25, 2005. Condition No. 1 of said TA required compliance with all conditions of approved VAR 1070. A Revised TA was issued on July 30, 2008; however that amendment has no bearing on this subject matter. After compliance with all conditions of TA (as amended on July 30, 2008), the subdivision was granted final subdivision approval on December 17, 2008 creating the **eleventh (11th)** lot allowed by VAR 1070. Thus far, there have not been any other lots created with the support of VAR 1070 since SUB-05-000061 was approved. Therefore, there is still, again technically, one lot "available" to be created with the support of VAR 1070.

Of further bearing on our position as to the number of lots "available" to be created with the support of VAR 1070, we offer the following:

Somewhat parallel to and/or subsequent to the above, the Reich Family Trust (SUB-05-000109) was granted a variance from the minimum water requirements of the Department of Water Supply and the Subdivision Code (VAR-05-095). VAR-05-095 allowed the use of a brackish water well system augmented by a reverse osmosis system for potable water supply. VAR-05-095 did not negate the fact that the original lot of the proposed 2-lot subdivision was one of the 10-lots created by SUB 7701 with the support of VAR 1070. Because the second variance was for a different method of relief from the water system requirements of the code (brackish water well w/ reverse osmosis rather than roof catchment system) the additional lot proposed to be created would not be considered to be supported by VAR 1070 and therefore would not be the **twelfth (12th)** lot created through the support of VAR 1070. For the record, this subdivision was issued TA on May 10, 2007, and since then there has been no apparent action taken on the subdivider's part to comply with the TA conditions.

As outlined above, there have been eleven (11) lots created, thus far, with the support of VAR 1070 and there is still one more lot that can be created with the support of VAR 1070. For that reason, we hereby rescind our letter of October 23, 2007, deferring action on Mr. Budway's subdivision application for lack of water and the need for the filing of an application for a water variance. VAR-08-035 is hereby withdrawn from consideration for lack of necessity. We will refund the variance filing fee of \$100.00 to you under separate cover.

Gregory R. Mooers, President
Mooers Enterprises, LLC
Page 3
March 18, 2009

Please be informed that Tentative Approval of the preliminary plat map dated March 15, 2007, is hereby granted with modifications and conditions.

The subdividers are now authorized to prepare detailed drawings of the subdivision plan in accordance with Chapter 23, Subdivision Control Code, County of Hawai'i, as modified. Before final approval can be granted, the following conditions must be met:

- 1) Comply with all conditions of approved Water Variance No. 1070, especially Condition 2 related to filing a written deed covenant including all conditions of this variance. This deed covenant shall be recorded with the State of Hawai'i, Bureau of Conveyances prior to final subdivision approval.
- 2) Drainage
 - a) A drainage report and stream study done for a prior subdivision of the area determined that a drainage way traverses the northeastern corner of the subject parcel (Drainage Report and Stream Study for SUB 99-106 dated May 23, 2001). Identify all the watercourses and drainage ways on the final plat map.
- 3) All easements affecting proposed lots shall be identified for its purpose and to which proposed lot(s) and/or grantee(s) the easement is in favor of. This shall be shown on the final plat map.
- 4) Wastewater Improvements. All future wastewater systems shall meet with the approval of the State Department of Health.
- 5) Property Tax Certification. Submit written proof that all taxes and assessments on the property are paid to date.
- 6) Surveyor's Certification. Place property markers in accordance with the final plat map. Surveyor shall submit certification upon completion.
- 7) Final Plat Map. Submit **ten (10)** copies of the final plat map prepared in conformity with Chapter 23, Subdivisions, within one year from the date of tentative approval, on or before **March 18, 2010**. If not, tentative approval to the preliminary plat map shall be deemed null and void. Only upon written request from the subdividers and for good cause, the director may grant to the subdividers an extension of time within which the subdividers may file the final plat. As part of final plat map submittal, the director request an additional copy of the final plat map be submitted as a ".dwg" or ".dxf" diskette file prepared by CAD software.
- 8) Time Limit. Subdividers shall complete all requirements specified as conditions for tentative approval of the preliminary plat map within three (3) years of said tentative approval, on or before **March 18, 2012**. An extension of not more than two (2) years may be granted by the director upon timely request of the subdividers.

Gregory R. Mooers, President
Mooers Enterprises, LLC
Page 4
March 18, 2009

Please be aware that if at any time during the fulfillment of the foregoing conditions, should concerns emerge such as environmental problems or other problems which were earlier overlooked or not anticipated/accounted for in data/reports available to date, this could be sufficient cause to immediately cease and desist from further activities on the proposed subdivision, pending resolution of the problems. The Planning Director shall confer with the listed officers to resolve the problems and notify you accordingly.

No final approval for recordation shall be granted until all the above conditions have been met.

Land shall not be offered for sale, lease or rent until final approval for recordation of the subdivision is granted by the Planning Director or the proposed subdivision has been issued a preliminary order of registration by the Department of Commerce and Consumer Affairs (DCCA) in accordance with the requirements of Chapter 484, Hawai'i Revised Statutes (HRS).

There has been considerable legal controversy over subdivisions in the agricultural district, including the recent Kelly, et.al. v. 1250 Oceanside Partners, et.al., Civil No. 00-1-0192K. Because of the state of the law at this time, we recommend that subdividers in the State Land Use Agricultural district consult with, and rely on, independent legal counsel in deciding whether their subdivisions comply with the requirements of Chapter 205, HRS. We also recommend that you advise lot purchasers to consult with, and to rely on, independent legal counsel regarding permissible uses and the effect of Land Use Commission Rule 15-15-25(b), HRS Section 205-4.5, and Hawai'i County Planning Department Rule No. 13, on the requirements to build and occupy dwellings on lots within the subdivision.

Again, we apologize for the confusion that has been created by this situation and any trepidation that has been the result of the delay in responding to and clarifying it.

Should you have any questions, please feel free to contact Jonathan Holmes of this department.

Sincerely,



BJ LEITHEAD TODD
Planning Director

JRH:lnm
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Enc.: PPM (03-15-07)

Gregory R. Mooers, President
Mooers Enterprises, LLC
Page 5
March 18, 2009

xc: Manager, DWS
 Director, DPW
 District Environmental Health Program Chief, DOH
 District Engineer, DOT
 DPW-ENG-KONA
 Robert R. Budway & Keith Teel
 Miles S. Horie, LPLS, ESH-Inc.
 M. Shimizu, Accountant I w/copy of Receipt #9751
 SUB 7701, FSA-SUB-05-000061, SUB-05-000109;
 VAR 1070, VAR 05-095, VAR 08-035 W/D