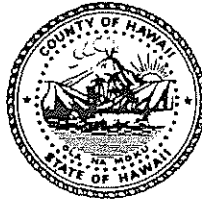


William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
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County of Hawai'i

PLANNING DEPARTMENT

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April 29, 2010

CARLSMITH BALL LLP
121 Waianuenue Avenue
Hilo, HI 96720

Gentlemen:

SUBJECT: VARIANCE-VAR 08-044

Agent: CARLSMITH BALL LLP

Applicant: EWM INVESTMENTS, LLC

Owner: EWM INVESTMENTS, LLC

Request: Variance from Chapter 23, Subdivisions

Tax Map Key: (3) 9-4-001:008, 009, and 017, (SUB 07-000558)

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-044 subject to variance conditions. The variance permits this large lot agricultural subdivision (SUB 07-000558) to be created without providing a water supply system meeting the minimum requirements of the Department of Water Supply (DWS) and constructing minimum dedicable and nondedicable roadway improvements meeting with the requirements of the Department of Public Works (DPW). 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 streets, and Section 23-93, Street Lights, and Section 23-95, Right-of-way improvements.

The Planning Director has concluded that variance from minimum subdivision water system and minimum roadway improvements required for the proposed subdivision can be approved based on the following findings:

BACKGROUND

1. **Location.** The referenced TMK properties, containing an aggregate area of approximately 1,468.9+ acres, (the "Property") being portion of Grant 3210 to W. T. Martin and Grant 3635 to Kealoha'ai, are situated at Ki'olaka'a, Kā'u, Hawai'i.

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2. **Zoning.** The Property is zoned Agricultural (A-20a) by the County and designated Agricultural "A" and Conservation "C" by the State Land Use Commission (LUC). Portions of the proposed subdivision "makai" lot(s) are located within the Special Management Area and the Conservation District. The applicant's agent is also aware of concerns regarding archeological and historic sites upon the subject TMK properties according to Department of Land and Natural Resources (DLNR) letter dated September 10, 2008.
3. **Subdivision Request/PPM.** Pursuant to previous correspondence with the Planning Director, the applicant's agent filed a subdivision application (SUB 07-000558) including a preliminary plat map (PPM) denoting access to the County's Ka'alu'alu Road, which runs along the northwest side of the Property. Further action on the subdivision application and preliminary plat map (PPM) proposing 19 building lots and 2 road lots is being deferred according to letters in the subdivision application file.
4. **Variance Application.** The applicant's agent filed variance application requesting variance from the water supply and roadways requirements of the Subdivision Code. The variance application was acknowledged by Planning Department letter dated September 23, 2008. The applicant's original background report includes a letter dated June 17, 2009 and additional information regarding the roadway and proposed nondedicable requirements. The original background report states, in part:

"The Applicant requests a variance to allow the creation of a 19-lot agricultural subdivision: 1) to service more than six (6) agricultural zoned lots larger than three (3) acres from nondedicable/private dead-end streets within the proposed subdivision, in lieu of the maximum six road access lots up to three acres in size within the agricultural zone, and 2) without a water system meeting with the minimum requirements of the County of Hawai'i Water Supply as required by Chapter 23 (Subdivision), Article 6 (Improvements), Division 2 (Improvements Required), Section 23-84 (Water Supply), Hawai'i County Code.

Access to the Property is approximately three (3) miles makai off of Mamalahoa Highway, as it connects with the adjacent Ki'olaka'a Homesteads and Green Sand Subdivision along Ka'alu'alu-Wai'ohinu Government Road. The County of Hawai'i is the owner of Ka'alu'alu-Wai'ohinu Government Road and maintains the 1.6 mile paved roadway portion beginning at Mamalahoa Highway to the end of Poko Street within the Green Sand Subdivision. The remaining roadway portion of Ka'alu'alu-Wai'ohinu Government Road leading to the Property is unimproved."

5. **Variance Application (VAR 08-044)-Agency Comments and Requirements:**

a. The State of Hawai'i Department of Health (DOH) memorandum is dated September 25, 2008. Refer to DOH memorandum in variance file.

b. The Department of Water Supply (DWS) memorandum dated October 1, 2008 states, in part:

"We have reviewed the subject application and our comments to you in our letter dated June 19, 2007, still stand."

c. The County of Hawai'i-Hawai'i Fire Department (HFD) memorandum dated October 8, 2008 states:

"In that the catchment system will also be used for fire protection, it is recommended that the fire department connection to the tank be located in an area accessible by fire apparatus."

d. The Department of Public Works (DPW) memorandum dated October 24, 2008 states, in part:

"We have reviewed the subject application received on September 24, 2008 and offer the following comment:

We believe the minimum road improvement requirements codified within Chapter 23 of the Hawai'i County Code provide public welfare and safety and are a recommendation made by the Department of Public Works on all similar types of subdivision applications.

We do not believe there are special and unusual circumstances with regard to the minimum requirements of Section 23-86 for the portion of Ka'alu'alu Road not maintained by the County and Section 23-87 for Roads 1 and 2 that are within the proposed subdivision, and deviation from our standard recommendation may be considered arbitrary and capricious.

However, should the Planning Director determine that Section 23-15 is applicable, we defer to the director's authority."

6. **Notice to Surrounding Owners/Posted Sign.** The applicant's agent submitted affidavits regarding notice mailed to a list of surrounding property owners and sign(s) posted near the project's entry. According to the agent's affidavits and submittals, it appears that "notification letter" was mailed on or about September 29, 2008, and that signs were posted upon subject property on July 17, 2008. The agent attached

photographs of posted signs near the project's entry to the sign affidavit dated July 25, 2008.

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.

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Water Supply. The first alternative requires the applicant or owners to extend and/or improve the nearest DWS water system facility or "water line along Hawai'i Belt Road, approximately 6 miles from the property." The second alternative would be to design, drill and develop private wells, and install the necessary water system improvements in accordance with DWS standards.

Given the nature and location of the proposed large lot subdivision, the requirement to extend or improve the nearest DWS water system or providing an approved alternative private water system meeting DWS standards would be putting excessive demands upon the applicant or owners when a more reasonable alternative (e.g. private individual rainwater catchment system for potable and emergency requirements) is available.

Lot Access/Roadways. The first alternative requires the subdividers to construct roadway improvements outside and within the proposed subdivision pursuant to the DPW memorandum dated December 10, 2008, regarding Chapter 23, Subdivisions. This DPW memorandum states, in part, the following:

"We have reviewed the revised preliminary plat map and have the following comments:

1. §27-20. Identify the Flood Zones AE and VE boundaries and areas on the final plat map. The flood zone shown is incompletely labeled, according to Panel 1900 of the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM) revised September 16, 1988.
2. §23-64. Identify any other watercourses and drainage ways besides the designated Flood Zones AE and VE on the current Flood Insurance Rate Map (FIRM), and designate areas within as approximate areas of flood inundation.
3. Access to the subdivision is via Ka'alu'alu Road, a public access with only a short segment of the road maintained by the County. The County-maintained portion of the road ends at the southerly boundary of Green Sand and Ki'olaka'a Homesite Subdivision. In the interest of public welfare and safety, the DPW recommends that the unmaintained portion of Ka'alu'alu Road extending to the north corner of Lot 18 be improved to the following standards.

- a. §23-86. Construct minimum 20-ft wide dedicable pavement with paved shoulders and swales within a minimum 50-ft wide right-of-way, conforming to DPW Standard Detail R-34.
 - b. (sic)
 - c. Access design/layout, including allowable grades and curves, shall conform to Section 23-50 of the Hawai'i County Code (HCC).
4. §23-87/~S23-95. For Road Lots 1 and 2, construct minimum 20-ft wide agricultural pavement within a 50-ft wide right-of-way, 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. Design/layout, including allowable grades and curves, shall conform to Section 23-50 of the Hawai'i County Code.
 - a. Cul-de-sacs shall terminate with turnarounds meeting the requirements of the Planning Department.
 - b. §23-45. Roads shall be laid out to intersect at right angles except where topography requires a lesser angle. Intersections which are not at right angles shall have a minimum corner radius of twenty-five feet along the right-of-way lines of the acute angle. All other right-of-way lines at these intersections shall have a corner radius of not less than twenty feet.
5. Provide common access easement encumbering the side-by-side poles of Lots 3/5 and 6/8. Identify the easements by azimuths and distances on final plat. Ref. Sec. 23-65.
6. Any construction within the designated FEMA flood zone shall comply with the requirements of Chapter 27, Floodplain Management, of the Hawai'i County Code.
7. §23-79. Submit construction plans and drainage report for review and comment.
 - a. §23-92. Additional storm runoff due to development shall be disposed within the subdivision and shall not be discharged onto adjacent properties or roadways.
 - b. §23-93. Install streetlights/signs/pavement markings as required by Traffic Division."

The second alternative acknowledges the proposed subdivision will have access from a public road and frontage along Ka'alu'alu Road, and that the owner or developer proposes to create a network of internal privately owned nondedicable road lots with privately maintained roadways upon the road lots that will be maintained by the users or future lot owner(s).

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, proposed by the applicant, or "water variance" pursuant to Planning Department Rule 22-6, Exceptions for Large Lot Subdivisions to permit privately owned individual rain water catchment systems for proposed large building lots, can meet the intent and purpose of the Subdivision Code and is 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 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. However, Rule 22, states, in part:

"22-6 Exceptions for Large Lot Subdivisions.

Exceptions to the minimum rainfall requirement and the maximum number of lots (up to absolute maximum of twenty lots) may be granted if the subdivision results in lots averaging at least twenty acres in size **and** averaging at least four times the minimum lot size allowed by zoning."

In view of the variance submittals and revised PPM, the proposed large agricultural lots can be permitted pursuant to Rule 22 Water Variance or Rule 22-6 Exceptions for Large Lot Subdivisions."

Roadway Variance. The intent and purpose of requiring access requirements to a proposed subdivision is to ensure legal and physical access are provided to proposed lots and that access to proposed lots 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.

The DPW-Engineering memorandum dated December 10, 2008 in subdivision file (SUB 08-000558) regarding roadway improvements for the preliminary plat map (PPM) requires the owner or subdivider to submit information or an "engineering analysis" or drainage report and subdivision construction plans to construct dedicable and nondedicable streets or roadways, including necessary streetlights, signage, pavement markings, etc., within or upon the publicly owned right-of-way and proposed privately-owned road rights-of-way identified on the PPM.

The applicant's agent submitted additional information in letter dated June 17, 2009 including "Exhibit A," describing the proposed alternative roadway for the road section of the privately-owned 50-foot wide road lots. The agent's letter states, "There are no grades greater than 8% on the Subject Property" and includes the following statements and description of proposed road improvements:

Ka'alu'alu Road. "The existing portion of Ka'alu'alu Road fronting the Subject Property provides adequate access to the proposed 19-lot agricultural subdivision. The portion of Ka'alu'alu Road fronting the Subject Property would be utilized by farm trucks and farm vehicles to access the 19-lot subdivision for agricultural purposes and the existing Ka'alu'alu Road provides adequate access to the Subject Property for emergency vehicles. Therefore, due to the rural location of the proposed 19-lot subdivision and common practice of the Planning Department not requiring subdivision improvements to a County right-of-way at the subdivision level, the Applicant requests full relief from the above-referenced requirement.

Proposed Road Lots 1 and 2. "The Applicant is requesting relief from the above-referenced requirement for Road Lot 1 and Road Lot 2 to allow for the construction of a variable compacted crushed gravel road between 12 to 15 feet in width, and in areas deemed appropriate for vehicles to pass each other, gravel road pullouts will be constructed, expanding the width of the roadway approximately 3 feet in these areas. The variable compacted crushed gravel roads will be contained to a 30-foot wide corridor, within a 50-foot right-of-way, with variable gravel-compacted shoulders on each side to comprise the balance of the improvements within the 30-foot wide corridor (see **Exhibit A**). The width of the corridor was negotiated with the State Historic Preservation Division in an attempt to minimize the amount of ground disturbance required. The Applicant will conduct an archaeological inventory survey of the 30-foot wide right-of-way prior to conducting any ground disturbances within the right-of-way. In the event that the roadway alignment has to be adjusted to accommodate any discovered preservation sites, this issue will be addressed at that time. The current alignment is based on our best case scenario assuming there are no major preservation sites within the right-of-way."

In sum, the applicant requests variance from construction of any dedicable roadway improvements and a variance to permit the following nondedicable roadway improvements as follows:

Section 23-87 - Permit construction of internal subdivision roadways consisting of minimum 12 feet wide gravel road including occasional 15 feet wide sections or pull outs and compacted gravel shoulders upon a 30 feet wide corridor situated within and upon the 50 feet wide privately owned road lots. To this end the subdivider will submit a drainage report and alternative subdivision plans prepared by a licensed civil engineer for agency review.

Maintenance of the access to and/or nondedicable roadway improvements within the proposed subdivision will be privately addressed and paid for by the users.

Section 23-93 - Elimination of street lights along this agricultural roadway to maintain the rural agricultural character within this particular section of Ka'u. However, necessary street name signs and traffic signs at intersections may be required and are subject to agency review and approval.

Section 23-89 and 23-91 - The Subdivision Code does not require the installation of side walks, curbs, and gutters or pedestrian safety improvements along agricultural-standard roadways or "improve the entire street right-of-way" pursuant to Section 23-95, Right-of-way improvement. While a variance, therefore, is not technically required, it is being included to confirm that such improvements will not be necessary.

Access to proposed subdivision is via the Ka'alu'alu Road. The applicant is requesting variance to utilize the current road within and upon the publicly owned right-of-way or portion of Ka'alu'alu Road fronting the proposed subdivision without constructing any dedicable road improvements and variance to permit construction of nondedicable privately-owned compacted gravel roads, pull outs, and compacted gravel shoulders within and upon a 30 feet wide corridor located within the 50 feet wide privately-owned interior road lot(s). The owner or subdivider proposes to conduct an archaeological survey limited to the 30-feet wide corridor within both proposed road lots "prior to conducting any ground disturbances," subject to variance conditions. Access to the proposed subdivision from Ka'alu'alu Road and upkeep and/or maintenance of the privately-owned gravel roads and compacted shoulders will be borne by the users, pursuant to the variance conditions.

The variance application was acknowledged by letter dated September 23, 2008. Additional time was required by the agencies to review proposed alternative road improvements upon the privately owned interior roadway lots. The applicant agreed to extend the decision date to on or before November 27, 2009.

Based on the foregoing findings, this request for variances would be consistent with the general purpose of the zoning district and the intent 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 to allow a proposed subdivision of the subject TMK Property without providing a water system meeting DWS standards to serve the 19 proposed building lots, and to utilize the proposed access and roadway standards for the privately-owned road lots created by the subdivision, are 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. The applicant or subdivider will submit a drainage report and subdivision construction plans prepared by a licensed civil engineer to construct the nondedicable 12 feet gravel roadways and 15 feet wide pull outs within a 30 feet wide corridor within and upon the proposed 50 feet wide road lots for review and approval by the Planning Department, in consultation with the Department of Public Works and State Historic Preservation Division. Maintenance of the nondedicable roadway improvements within the proposed subdivision will be privately addressed and paid for by the users.
3. WATER VARIANCE: The owners, their successors and/or assigns 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 07-000558. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the proposed lots created by SUB 07-000558 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 07-00558.
 - b. 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.
 - c. The owners agree and accept the fact that the County will not, at this time, bear the responsibility of supplying public water to any lots created by SUB 07-000558 not serviced by a County water system. No further subdivision of the lots created by SUB 07-000558 will be permitted unless County water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - d. Any lots created by SUB 07-000558 may not be made subject to a condominium property regime.
 - e. Any farm dwelling constructed upon a proposed lot not serviced by a County water system, shall provide and maintain a private potable rain catchment system which includes a minimum 6,000-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 any applicable State Department of Health requirements related to water testing and water purifying devices.

- f. 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.
 - g. 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 accordingly. Further, the written or recorded agreement shall be binding upon the owner(s), their successors and/or assigns and shall be incorporated as an encumbrance or 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.
 - h. In the event that the County notifies the owner(s) of the lot(s) created by SUB 07-000558 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 07-000558, the owner(s) of the lot(s) created by SUB 07-000558 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.
 - i. 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 unless the Property is serviced by the County Water System or private water well system approved by the Planning Department, 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.
4. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the Subdivided lots arising out of SUB 07-000558 will use and maintain the privately-owned road and utility easement on their own without any expectation of governmental assistance to maintain the existing access or roadway improvements within the privately-

owned road lots identified on the subdivision's preliminary plat map or any other necessary access and utility easement(s) within the proposed subdivision.

The applicant, owners, their successors and/or assigns, 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 07-000558. The proposed lots shall form a Homeowner or Road Maintenance Association or include appropriate deed language, requiring compliance with the following conditions of approval, 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 this existing private utility and access easement.
- b. 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 07-000558 or portion of the roadway fronting SUB 07-000558. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 07-000558, 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.
- c. The future lot owner(s) agree to participate in a Homeowner or Road Maintenance Association road maintenance agreement or/and pay their fair share to maintain the interior privately owned subdivision roadway lots.

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 accordingly. Further, the written or recorded agreement shall be binding upon the owner(s), their successor and/or assigns and shall be incorporated as an encumbrance or 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.

April 29, 2010

5. The subdivision application's (SUB 07-000558) final plat map shall meet all the requirements of the Hawai'i County Zoning Code and the Subdivision Code not covered by this variance.
6. The subdivider, owner(s), their successors and/or assigns 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.

Thank you for your understanding and patience during our review.

Sincerely,



BJ LEITHEAD TODD

Planning Director

WRY/DSA:kwr

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xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB 07-000558

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