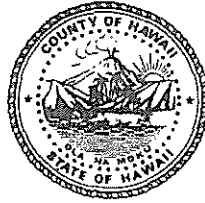


William P. Kenoi
Mayor



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

November 19, 2009

Mr. Sidney Fuke
SIDNEY FUKU, PLANNING CONSULTANT
100 Pauahi Street, Suite 212
Hilo, HI 96720

Dear Mr. Fuke:

SUBJECT: VARIANCE-VAR 09-017
Representative: SIDNEY FUKU, PLANNING CONSULTANT
Applicant: YAMANI, LLC
Owner: YAMANI, LLC
Request: Variance from Chapter 23, Subdivisions
Tax Map Key: 4-7-007:049, (SUB 08-000718)

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 09-017 subject to variance conditions. The variance permits proposed 4-lot subdivision (SUB 08-000718) of above referenced TMK property without constructing minimum water supply system and roadway improvements required by tentative subdivision approval letter dated August 11, 2008 or DWS and DPW requirements to permit proposed 4-lot subdivision. The variance is from the proposed subdivision's minimum requirements pursuant to Hawaii County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2); and, Article 6, Division 2, Improvements Required, Section 23-87, Standard for nondedicable street; escrow maintenance fund.

BACKGROUND

1. **Location.** The referenced TMK property, Lot No. 14 containing approximately 174.428 acres, being a portion of Land Commission Award No. 8559-B Apana 2 to WM. C. Lunalilo, Certificate of Boundaries No. 33 and a portion of a Deed,

NOV 24 2009

Mr. Sidney Fuke
SIDNEY FUKU, PLANNING CONSULTANT
Page 2
November 19, 2009

Kamehameha IV to Lunalilo, dated December 17, 1857, and recorded in Liber 10, Page 55, is situated at Waikoekoe and Lalakea, Hamakua, Hawaii.

2. **Zoning.** The subject property is zoned Agricultural (A-40a) by the County and designated Agricultural "A" by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The owner or subdivider submitted subdivision application (SUB 08-000718) proposing to subdivide subject TMK property into 4 lots. Further action on the subdivision application and preliminary plat map (PPM) including status of preliminary subdivision approval to the PPM is being deferred pursuant to letter dated May 28, 2009 in the subdivision file.
4. **Variance Application.** The variance application and request for variance from water supply and roadways to permit proposed subdivision was acknowledged by Planning Department letter dated June 18, 2009. This variance application includes background history and circumstances and information regarding the pending subdivision application. Subsequent to submission of the original variance application, the representative submitted letters dated May 4, 2009, May 28, 2009, and September 2, 2009 which addresses or includes supplemental information and maps denoting roadways and terminus of proposed access roadway for the subdivision and option enabling the proposed 4-lot subdivision to obtain service from a County-DWS supply system.

The letter dated May 4, 2009 states in part the following:

“Please be informed that we would like to modify the request by providing two (2) paved pull outs at selected points within the 50-foot wide road easement. These pull outs would be 30 feet in length and 18 feet wide, inclusive of the proposed 12-foot wide agriculturally paved section. This would thus enable the reasonable passage of two vehicles within this easement.

We would also like to clarify that the length of the improved section of the road would extend a minimum of 50 feet into proposed Lot 14-D. At that point, there would be a “T” or modified “T” turnaround that meets with the approval of the Fire Department.”

Mr. Sidney Fuke
SIDNEY FUKU, PLANNING CONSULTANT
Page 3
November 19, 2009

Subsequent to discussion with staff on May 7, 2007 regarding proposed subdivision improvements, the representative's submitted letter dated May 28, 2009 including attachments. This letter states in part the following:

"Further to that meeting and to clarify my letter of May 4 regarding the access situation, I am enclosing a map showing the general location of the proposed modified "T" turnaround. The hammerhead would either be the basic one or one of its alternatives as noted in the diagram. To achieve this, the easement near the end of proposed Lot 14-C would be widened. Additionally, the easement would terminate at the hammerhead and not extend to the end of Lot 14-D. These will be reflected in the revised map to be submitted for the subdivision."

The representative's letter dated September 2, 2009 states in part the following:

"The Department of Water Supply's ("DWS") rules require a water meter to front each of the newly created lot. An exception to this requirement can be granted for only one lot with the execution of an "out of bounds" agreement. While the applicant is seeking total relief or variance from the water requirement, the applicant respectfully requests that the relief-if granted-also includes exemption from the requirement to have the water meter front each of the proposed lots. If so, it would give the applicant the option to have a water system that would involve the extension of the water line along Mud Lane to the property, with all of the water meters along Mud Lane. In the event the applicant chooses this option, it would not need to amend the subject water variance application."

5. **Variance Application (VAR 09-017)-Agency Comments and Requirements:**

- a. The State of Hawaii-Department of Health (DOH) memorandum is dated June 22, 2009. Refer to DOH memorandum in the variance application file.
- b. The Department of Water Supply (DWS) memorandum is dated July 14, 2009. Refer to the DWS memorandum in the variance application file.

Mr. Sidney Fuke
SIDNEY FUKU, PLANNING CONSULTANT
Page 4
November 19, 2009

- c. The County of Hawaii Fire Department (HFD) memorandum is dated July 24, 2009. Refer to the HFD memorandum in the variance application file.

Note: The developer is required to construct a "Fire Apparatus Access Road" at or near the terminus of the privately owned roadway in accordance with HFD specifications and requirements; and, the proposed private rainwater catchment system shall be equipped with "connection to the tank" and located in a area accessible by fire apparatus. Refer to variance conditions.

6. **Notice to Surrounding Owners/Posted Sign.** The applicant's representative submitted affidavit regarding notice of variance mailed to a list of surrounding property owners and posted sign. According to the affidavit dated July 13, 2009 and other submittals in the variance application file, notice of variance was mailed on or about June 23, 2009 and a sign was posted upon subject TMK property on or about June 9, 2009. Colored photographs of the posted sign were submitted to the Planning Department on June 10, 2009.
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 and provide the necessary dedicable water system improvements in accordance with DWS standards or memorandum dated July 14, 2009.

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 cost to construct additional water supply improvements or "construct necessary water system improvements" in accordance with the DWS memorandum or alternative private water system meeting DWS standards for the pending 4-lot subdivision 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) can be permitted pursuant to Rule 22, Water Variance.

Mr. Sidney Fuke
SIDNEY FUKU, PLANNING CONSULTANT
Page 5
November 19, 2009

Lot Access/Roadways. The first alternative requires the owners to construct or utilize access and roadways including water supply required by tentative subdivision approval letter dated August 11, 2008.

In lieu of utilizing or constructing roadways required by the tentative subdivision approval letter, the representative is requesting variance to construct alternative privately owned roadway. The owner or developer proposes to construct a privately owned and maintained 12-foot wide agricultural roadway approximately 0.5 mile in length, 3-pull outs to accommodate passing traffic, and fire access roadway at the terminus of the roadway situated within a series of privately owned 50 feet wide roadway easements designated upon the proposed lots.

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.

The State Department of Health has no specific rules or regulations relating to the utilization, construction or inspection of private roof catchment water systems for potable or emergency uses.

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" to allow and utilize privately owned individual rain water catchment systems for proposed 2-lot subdivision can meet the intent and purpose of the Subdivision Code; and, 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

Mr. Sidney Fuke
SIDNEY FUKU, PLANNING CONSULTANT
Page 6
November 19, 2009

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 TMK 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 and indicate the proposed subdivision will receive at least 60+ inches of rainfall annually. The proposed 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.

Therefore, given the unusual circumstances cited by the applicant’s representative and evaluation of the request to construct privately owned alternative roadway via a series of privately owned 50 feet wide easements including terminus improvements for a fire access road, the Planning Director has concluded that roadway improvements upon subject TMK property stipulated by tentative approval letter dated August 11, 2008 can be modified to permit an agricultural pavement standard conforming to Standard Detail R-39 within a series of privately owned access and utility easements subject for proposed 4-lot agricultural subdivision subject to variance conditions.

The subject variance application was acknowledged by letter dated June 18, 2009. Additional time was requested by the Planning Department to evaluate agency comments and other requirements stipulated by tentative approval letter constructing minimum water supply system in a tentative subdivision approval letter dated August 11, 2008. The applicant granted an extension of time to render a decision on the variance application to November 20, 2009.

Mr. Sidney Fuke
SIDNEY FUKU, PLANNING CONSULTANT
Page 7
November 19, 2009

Given the circumstances cited by the applicant's representative, the request for variance from water supply and roadways at this time, 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 this variance 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 to permit proposed 4-lot subdivision of the subject TMK property without providing a water system meeting DWS standards is approved pursuant to Rule 22, Water Variance; and proposed privately owned roadway within 50 feet wide easements designated on a revised plat map approved by the Planning Director, 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. Submit subdivision construction plans to construct alternative privately owned roadway within approved easement(s) including fire access apparatus road and any necessary signage required by the DPW or HFD for approval by the affected agencies in accordance with tentative approval conditions for SUB 08-00718.
3. 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 08-000718. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the proposed subdivision 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 08-000718. 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 lots created by SUB 08-000718. No further subdivision of the lots created by SUB 08-000718 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB 08-000718 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 lot(s) created by SUB 08-000718 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 08-000718, the owner(s) of lot(s) created by SUB 08-000718 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.
4. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the roadway within and upon proposed 50 feet wide road and utility easement(s) will use and maintain the privately owned roadway upon the easement(s) on their own without any expectation of governmental assistance to maintain the alternative access or roadway improvements within the privately owned access and utility easement identified upon approved final plat map or any other necessary access and utility easement(s) within proposed 4-lot 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 08-000718. The proposed lots shall form an 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 the subject property utilizing this existing private utility and access easement.

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 08-000718. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 08-000718, 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 the roadway within 50 feet wide easement(s) including the fire apparatus access road.

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.

5. The pending subdivision application's (SUB 08-000718) final plat map shall meet all the requirements of the Hawaii 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 08-000718.

Mr. Sidney Fuke
SIDNEY FUKÉ, PLANNING CONSULTANT
Page 11
November 19, 2009

6. 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.

Thank you for your understanding and patience during our review.

Sincerely,



TODD LETIHEAD
BJ LETIHEAD TODD
Planning Director

WRY/DSA:mad
PWP60WRY\FORMLETT\VAR09-017WATER-ROADWAY.YAMANI-FUKE

xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB 08-000718