



## 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

May 11, 2011

Steven S.C. Lim, Esq.  
CARLSMITH BALL LLP  
P.O. Box 686  
Hilo, HI 96721-0686

**SUBJECT**    **Application:**    **VAR 09-027**  
                  **Re:**                    **Moa'ula Agricultural Subdivision**  
                  **Rep.:**                    **Carlsmith Ball, LLP**  
                  **Applicant:**        **Ka'u Farm & Ranch, LLC**  
                  **Owner:**             **WWK Hawaii – Moa'ula LLC**  
                                  **WWK Hawaii – Church, LLC**  
                  **Request:**        **Variance from Chapter 23, Subdivisions, Improvements**  
                                  **Required – Water Variance**  
                  **TMK(s):**        **(3) 9-6-003:002 and 022; 9-6-005: 015 and 056; 9-6-006: 005,**  
                                  **006, 007, and 008 (PUD 09-000016)**

Dear Mr. Lim,

After reviewing your Variance Application, the Planning Director certifies the **approval of VAR 09-027** to permit an alternative water supply system to be constructed subject to variance conditions. The variance is from Hawai'i County Code and provides exception(s) or relief from the following requirements:

1. Section 23-84 of the Subdivision Code to allow for individual rain water catchment in combination with a private water system.

The decision to approve VAR 09-027 is based on the following:

#### Variance Application

*Request:* The Moa'ula Coffee Farm, or Moa'ula Agricultural Subdivision, is a 101-lot farm community being proposed as a Planned Unit Development (PUD 09-000016), the

application for which is being considered concurrently with this requested water variance.

*Location/Address:* The property, measuring approximately 2,022 acres in size, is located northwest of Pahala Town at Moa'ula, Ka'u District, Island of Hawaii.

*Zoning/State LU Designation:* County A20a/Agriculture.

#### Public Notice

Notice of the application was accomplished as follows:

July 29, 2009 - Mailed notice to surrounding property owners within 500 feet of the site.  
July 26, 2009 - Published notice in the Hawai'i Tribune Herald and West Hawai'i Today.  
September 2, 2009 - Posted sign notice at the property.

#### Agency Comments

- a. State Dept. of Health memo dated July 22, 2009 (retained in VAR file).
- b. County of Hawaii Dept. of Water Supply (DWS) memo dated August 7, 2009 (retained in VAR file).
- c. County of Hawaii Fire Dept. memo dated July 27, 2009 (retained in VAR file).

#### Public Comments

- a. No letters in support of, or in opposition to, the proposed water variance have been received.

### **REVIEW CRITERIA**

Sections 23-14 and 25-2-50 of the County Code provide the Director with the general authority to grant variances. Said sections state the following:

"Variances from the provisions of this chapter may be granted; provided, that a variance shall not allow the introduction of a use not otherwise permitted within the district; and provided further that a variance shall not primarily effectuate relief from applicable density limitations.

Sections 23-15 and 25-2-51 state that no variance will be granted unless it is found that:

- a) There are special or unusual circumstances applying to the subject real property which exist either to a degree which deprives the owner or applicant of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the best use or manner of development of that property; and
- b) There are no other reasonable alternatives that would resolve the difficulty; and
- c) The variance is consistent with the general purpose of the district, the intent and purpose of this chapter, and the general plan, and will not be materially detrimental to the public welfare or cause substantial, adverse impact to an area's character or to adjoining properties.

## **INTENT AND PURPOSE**

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

Certain properties seeking a variance from general water-related infrastructure improvements may qualify for relief under Planning Department Rule 22 – Water Variance. Rule 22 was drafted, in part, due to the State Department of Health having 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. Rule 22 provides criteria to be used so that consistent decisions are made on water variance requests.

## **DISCUSSION**

The August 7, 2009 DWS memo identifies, in part, that the proposed development is not within the department's existing service limits, extensive improvements would be needed to provide water service, and that funding is not currently available nor a time schedule set for such improvements. The memo further identifies no objection to the applicant's proposed use of a private well in combination with rainwater catchment systems.

If applying for a Water Variance under Rule 22, the associated subdivision application would be limited to no more than 6 total lots and require a minimum of 60 inches of annual rainfall. Rule 22 also provides for exceptions to the minimum rainfall requirement and maximum number of lots (up to 20 lots) if the subdivision results in lots averaging at least 20 acres in size and averaging at least four times the minimum lot size allowed by zoning. Given that the development is zoned A20a, proposes 101 lots, and that a significant number of lots are less than the size prescribed by zoning (but could be allowable if permitted as part of a Planned Unit Development), relief under Rule 22 is not applicable.

It should be noted, however, that the application material identifies annual rainfall on the site between 60 and 118 inches per year, which meets the minimum rainfall criteria of Rule 22.

Upon review of the department's GIS data, rainfall measurements range from near the 60-inch per year elevation to near the 120-inch per year elevation.

In lieu of providing a public water system, or system meeting the general requirements of the Department of Water Supply, the applicant proposes alternatives to meet potable household and fire needs. A private well water system is proposed to be developed as part of the project and will be used for potable water, with delivery via tanker trucks as needed. Non-potable household water will be supplied via catchment. Fire protection is proposed by individual catchment systems supplemented by well water. Furthermore, the applicant is investigating the development of irrigation water through the rehabilitation of tunnel water irrigation systems formerly used by the plantations.

## **DECISION**

Based upon the application material and comments received, the department has determined that the requested Water Variance meets the applicable review criteria. The Director hereby approves VAR 09-027 subject to following conditions:

### General Conditions

1. The applicant, subdivider, owners, their assigns, or successors shall be responsible for complying with all stated conditions of approval. The term "applicant" in the following conditions is further understood to collectively mean the applicant, subdivider, owners, their assigns, or successors.
2. The applicant acknowledges 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. No further subdivision of any lots is permitted unless county water system requirements pursuant to Chapter 23, Subdivisions, are met.
4. No condominium property regime (CPR) shall be permitted on any lots created.
5. No Planning Department or Building Division permits shall be issued to allow construction of an "ohana" dwelling on the subject property or upon lots created by

proposed subdivision, subject to provisions of the Zoning Code or State Law, which may change from time to time.

6. The subdivision application and final plat map shall meet with all the conditions of this variance and/or the Hawai'i County Zoning Code and Subdivision Code not covered by this variance. No other variances from Chapter 23, Subdivisions, shall be granted to permit subdivision of the subject property.
7. The applicant 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.

#### Water Variance Conditions

1. Any 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.
2. Each permitted dwelling shall be provided with and maintain a private water supply system which includes an additional minimum 3,000 gallon water storage capacity for firefighting 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 firefighting and emergency purposes.
3. Road access and water requirements, including providing water supply to non-residential structures such as the commercial/agricultural buildings identified within the Planned Unit Development proposal, shall meet the requirements of the County of Hawaii Fire Department.
4. The applicant shall file a written agreement or approved written document with the Planning Department prior to final subdivision approval for the property. This written agreement, which shall contain the following deed language, being covenants, conditions, and restrictions affecting the 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 applicant or subdivider agrees and accepts the fact that a County dedicable public water system is not now readily available to provide service the proposed subdivision. 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 applicant or subdivider agrees and accepts the fact that the County will not, at this time, bear the responsibility to supply public water to the proposed or affected lots created by the subdivision not serviced by a County water system.
- c. 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.
- d. In the event that the County notifies the owner(s) of any lot created by the subdivision that the County Water System has been upgraded, or an improvement district initiated to enable service to those lots, they 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.

Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare VAR 09-027 null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

Steven S. C. Lim, Esq.  
CARLSMITH BALL LLP  
Page 7  
May 11, 2011

cc: County Department of Water Supply  
County Fire Department  
State Department of Health  
PUD 09-000016  
TMK Files