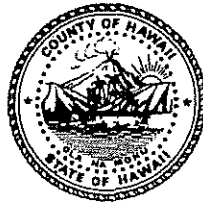


William P. Kenoi
Mayor



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

July 22, 2010

Mr. Clyde Matsunaga
IMATA & ASSOCIATES, INC.
171 Kapiolani Street
Hilo, HI 96720

Dear Mr. Matsunaga:

SUBJECT: VARIANCE-VAR 09-041

Representative: CLYDE MATSUNAGA.
Applicant: VAL RUFFO, ET AL.
Owner: VAL RUFFO, ET AL.
**Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)**

041

Tax Map Key: 1-7-017:135, (SUB 09-000850)

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 09-061 subject to variance conditions. The variance permits proposed 2-lot subdivision (SUB 09-000850) to be created without providing a water system meeting the minimum requirements of the Department of Water Supply (DWS). 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 23-87, Standard for nondedicable street, escrow maintenance fund and section 23-95, right-of-way improvements.

The Planning Director has concluded that a variance application from the minimum water system requirements for proposed subdivision be **approved** based on the following findings:

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BACKGROUND

1. **Location.** The subject property, comprising approximately 41.783 acres, being portion of Royal Patent 7223, Land Commission Award 8559-B, Apana 16 to William C. Lunalilo, being also Lot 69 of Keaau Tract, is situated at Keaau, Puna, Hawai'i.
2. **Zoning.** The subject property is zoned Agricultural – 20 acres (A-20a) by the County and designated Agriculture “A” by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The applicant or subdivider submitted a subdivision application (SUB 09-000850) and preliminary plat map (PPM), dated January 20, 2009, proposing to subdivide subject property into two (2) lots.
4. **Variance Application.** The variance application and request for variance from water supply and roadways, to permit the proposed subdivision, was acknowledged by Planning Department letter dated November 3, 2009. This variance application includes background history and circumstances and information regarding the pending subdivision application.
5. **Variance Application-VAR 09-041-Agency Comments and Requirements:**
 - a. The State of Hawai'i Department of Health (DOH) memorandum is dated November 9, 2009. Refer to DOH memorandum in variance file.
 - b. The Department of Water Supply (DWS) memorandum is dated November 18, 2009. Refer to Department of Water Supply memorandum in variance file.
 - c. The Department of Public Works (DPW) memorandum is dated November 23, 2009. Refer to Department of Public Works memorandum in variance file.
6. **Notice to Surrounding Owners.** The applicant's surveyor filed a transmittal letter dated November 9, 2009 and attached mailing receipts and copy of notice sent to surrounding property owner(s) within 300 feet of the subject property. Notice of this application was published in the Hawai'i Tribune Herald and West

Hawai'i Today on November 9, 2009.

Posted Sign. The applicant submitted an affidavit, dated August 11, 2009, regarding sign posted on the subject property and photograph of the posted sign.

7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received, and no objections 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 March 25, 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 2-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.

Lot Access/Roadways.

In lieu of improving the existing roadway, as required by the Department of Public Works memorandum dated April 8, 2009, the applicant contends that the current gravel roadway (North Road) is sufficient access to the subject property. The applicant is requesting a variance to not improve the existing roadway as stated in the memorandum.

INTENT AND PURPOSE-WATER VARIANCE

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 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 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 limits subdivisions requesting a variance from water supply to two (2) 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 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, indicates 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 indicates the proposed subdivision will receive approximately 160 inches to 200 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 and evaluation of the request to improve the privately-owned roadway, required by the Department of Public Works memorandum, dated April 9, 2009, the Planning Director has concluded that the current gravel roadway (North Road) is sufficient access to the subject property.

The subject variance application was acknowledged on November 3, 2009. Additional time was requested by the Planning Department to complete the variance background report requirements. The applicant granted an extension of time to render a decision on the variance application to July 30, 2010.

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.

VARIANCE DECISION-CONDITIONS

The variance request to allow proposed 2-lot subdivision of the subject property, without providing a water system meeting Department of Water Supply standards required, is **approved** pursuant to Rule 22, Water Variance and 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 owner, 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 09-000850. This written agreement, which shall contain the following deed language, being covenants, conditions, and restrictions affecting the proposed 2-lot subdivision, shall be duly recorded with the Bureau of Conveyances of the State of Hawai'i 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 able to service the proposed subdivision SUB 09-000850. 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. No further subdivision of lots created by SUB 09-000850 will be permitted unless county water system requirements, and other requirements of Chapter 23, Subdivisions, are met.
- c. No condominium property regime (CPR) shall be permitted on any lots created by SUB 09-000850.
- d. Any dwelling constructed on a lot not serviced by a County water system shall be provided with and maintain a private potable rain catchment system that 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 dwelling shall be provided with and maintain a private water supply system that 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 and be located in an area accessible to fire apparatus. 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.
- 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 any lot created by SUB 09-000850 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.
- h. 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 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 two (2) lots arising out of SUB 09-000850 will use and maintain the privately-owned road, and/or any other necessary easement(s), on their own, without any expectation of governmental assistance to maintain the existing privately-owned access or roadway improvements within the North Road identified on the subdivisions preliminary plat map, or any other necessary access and utility easement(s) within or upon proposed lots or 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 09-000850. 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 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 09-000850. Should the improvement district require acquisition of any privately-owned rights-of-way fronting the lots arising out of SUB 09-000850, 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 any road maintenance agreement or/and pay their fair share to maintain the roadway. 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 final plat map for proposed 2-lot subdivision shall meet all the requirements of the Hawai'i County Zoning Code and the Subdivision Code not covered by this variance.
 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

Clyde Matsunaga
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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 subject Variance-VAR 09-041 null and void.

Sincerely,


B. LEITHEAD TODD
Planning Director

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xc: Manager-DWS
DPW—Engineering Division
SUB 09-000850