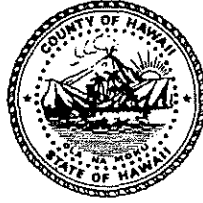


William P. Kenoi
Mayor



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 15, 2010

Mr. William McClatchy
LALAKEA FARM, LLC
2415 Larking Street
San Francisco, CA 94109

Dear Mr. McClatchy:

SUBJECT: VARIANCE-VAR 09-000055
Applicant: LALAKEA FARM, LLC
Owner: LALAKEA FARM, LLC
Request: Variance from Chapter 23, Subdivisions
Tax Map Key: 4-7-007:088, (SUB 09-000926)

After reviewing your variance application, the Planning Director certifies the approval of Variance-09-055 (**VAR 09-055**) subject to variance conditions. The variance permits 2-lot subdivision (SUB 09-000926) of the referenced TMK property without providing a water supply system and minimum roadway improvements pursuant to Chapter 23, Subdivisions. 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, Section 23-93, Street lights, Section 23-94, Street name and traffic signs, and Section 23-95, Right-of-way improvement.

BACKGROUND

1. **Location.** The referenced TMK property containing approximately 404 + acres, being a portion of Deed of Kamehameha IV to William C. Lunalilo (Boundary Certificate No. 34), is situated at Lalakea 'Ili Kupono of Waipio, Hamakua, Hawai'i.
2. **Zoning.** The subject property is zoned Agricultural (A-40a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC). The

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property is not located within an area called and/or designated Special Management Area (SMA).

3. **Subdivision Request/PPM.** The above referenced owner submitted proposed 2-lot subdivision application (SUB 09-000926) of the subject TMK property. Further action on the pending 2-lot subdivision application including the application's preliminary plat map (PPM) is being deferred.
4. **Variance Application.** The subject variance application was acknowledged by Planning Department letter dated November 12, 2009. The variance application includes background information or report regarding reasons for variance from water supply and roadways, etc.

In view of the above, the Planning Director acknowledges that the proposed subdivision application is required pursuant to October 14, 2009, PD letter in the subdivision file, which states, in part, the following:

“We note that this is a Court-Ordered, In-Kind Subdivision with a completion date of August 4, 2010 (18 months from February 4, 2009 Order of Dissolution, Civ. No. 07-1-316K, McClatchy v. Sullivan).”

5. **Variance Application (VAR 09-055)-Agency Comments and Requirements:**

- a. The Department of Public Works (DPW) memorandum dated December 11, 2009 states, in part:

“We have reviewed the subject application received on November 17, 2009 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 Sections 23-87 and deviation from our standard recommendation may be considered arbitrary and capricious.

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

- b. The Department of Water Supply (DWS) memorandum dated December 11, 2009, states, in part:

"We have reviewed the subject application and have no objections as there is no public water system in the area."

- c. The County of Hawai'i Fire Department memorandum is dated January 4, 2010. Refer to the COH-HFD memorandum in the variance file.

6. **Notice to Surrounding Owners/Posted Sign.** The applicant's agent submitted affidavits regarding a notice mailed to property owners to list of surrounding property owners and posting of sign including photograph of sign posted regarding pending subdivision and variance applications. According to the affidavits and submittals, it appears that a notice was mailed to surrounding property owners on or about November 17, 2009; additional information was "affixed" to "existing sign" or posted sign on or about November 10, 2009.

Note: The above affidavits and photograph(s) of the posted sign and other photographs of the project development were filed in the variance application file.

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. Letters supporting the variance application were received from Rebecca Keliihoomalu dated December 12, 2009, and Karl Fink dated December 14, 2009, respectively. In addition, an email from Will McCatchy sent to John Field, dated March 2, 2010, states, in part, the following:

"I can confirm on behalf of myself and Patrick Sullivan that as future lot owners we intend to pay for our individual shares of dues and special charges for road expenses, including any new fees the Association may deem appropriate."

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Water Supply. The first alternative requires the applicant or owners to extend and/or improve

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the nearest county water system and/or provide dedicable water system improvements in accordance with DWS standards or DWS memorandum dated October 19, 2009 in the subdivision application file.

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 requirement or imposition of extending or constructing a DWS water system, or providing an approved alternative private water system meeting DWS standards, for the proposed 2-lot subdivision would be putting excessive demands upon the applicant or owners when a more reasonable alternative is available (e.g. private individual rainwater catchment system for potable and emergency requirements for agricultural zoned parcels can be permitted pursuant to Rule 22. Water Variance).

Lot Access/Roadways. The first alternative requires the subdividers to construct access and roadways pursuant to an earlier DPW memorandum dated October 26, 2009, or roadway requirements pursuant to Chapter 23, Subdivisions.

The second alternative acknowledges the subject TMK property currently has access to a public roadway via a privately owned roadway (West Waikoekoe Lane) upon or within a road lot (TMK: 4-7-007:075).

In lieu of utilizing or constructing roadways required by the DPW memorandum dated October 26, 2009, the developer or owners contend that the current gravel roadway or West Waikoekoe Road is sufficient as access to subject property and additional lot created by the proposed subdivision. The owners are requesting variance to not construct roadways, including street lights, etc. required by the DPW memorandum dated October 26, 2009. The applicant proposes to construct privately-owned roadway within a proposed cul-de-sac ("Easement 1 For Access and Utility Purposes") identified on the PPM after the subdivision is approved subject to variance conditions. Essentially the cul-de-sac will become the terminus and/or extend the privately-owned roadway, or West Waikoekoe Road, after the subdivision is approved. The proposed gravel roadway within and upon the proposed cul-de-sac, or upon proposed Easement 1, will be equivalent or similar to the current gravel roadway (West Waikoekoe Road) fronting the proposed subdivision.

INTENT AND PURPOSE OF THE SUBDIVISION CODE

Water Variance. The intent and purpose of requiring a water system for and within the

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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 variance from "standards for water," 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 can be 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 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 2-lot subdivision meets Rule No. 22-Water Variance.

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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 in the applicant's background report and evaluation of the request to construct privately-owned alternative roadway within the road terminus, the Planning Director has concluded that roadway improvements required for proposed 2-lot subdivision, stipulated by the DPW memorandum dated October 26, 2009, in the subdivision file, can be modified to permit an agricultural pavement standard within proposed "Easement 1 For Access and Utility Purposes," conforming to Standard Detail R-39 for the proposed 2-lot agricultural subdivision subject to variance conditions.

DETERMINATION/VARIANCE CONDITIONS

The subject variance application was acknowledged by letter dated November 12, 2009. Additional time was requested by the Planning Department to review the variance application and other information submitted supporting the variance application.

Based on the foregoing findings, this variance request 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 the applicant's request for variance from water supply and roadway will not be materially detrimental to the public's welfare and does not cause substantial adverse impact to the area's character and to adjoining properties.

The variance requested to allow a proposed 2-lot subdivision of the subject TMK property without providing a water system meeting DWS standards and utilize the current access to the property and construct alternative subdivision improvements permitted by variance, is hereby **approved** 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. Identify and/or denote upon the final plat map any areas subject to flooding. The gravel roadway within and upon the cul-de-sac or proposed "Easement 1" shall be constructed and completed within one year from the approval date of this letter. Photographs of the proposed gravel roadway within and upon the terminus or within and upon "Easement 1" or proposed cul-de-sac identified on the

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subdivision's final plat map shall be submitted for our files (VAR 09-055) on or before July 31, 2011.

3. WATER VARIANCE: The owners, their assigns, or successors shall file a written agreement or approved written document with the Planning Department prior to final subdivision approval of SUB 09-000926. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the lot 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 09-000926. 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 affected additional lots created by SUB 09-000926 not serviced by a County water system. No further subdivision of the lots created by SUB 09-000926 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 09-000926 may not be made subject to a condominium property regime.
 - d. Any farm dwelling constructed on any lots 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

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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.

- 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 09-000926 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 09-000926, the owner(s) of the lot(s) created by SUB 09-000926 shall participate in such improvement district or shall pay their pro-rata share of any installation of laterals, as determined by the County Department of Water Supply (DWS).
- 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.

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4. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the 2-lots arising out of SUB 09-000926 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 Waikoekoe 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 submit or 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 09-000926. The proposed lots are required to join or participate with a 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 the current privately-owned roadway fronting the subject TMK property.

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 09-000926 or/and the privately-owned right-of-way "Waikoekoe Roadway." Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 09-000926, 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.

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- b. The future lot owner(s) agree to participate in any road maintenance agreement or/and pay their fair share to the West Waaikoekoe Association to maintain the existing access or privately-owned roadway between the public right-of-way to proposed subdivision.

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 subdivision application's (SUB 09-000926) final plat map shall meet all the requirements of the Hawai'i 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 09-000926.
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 subject Variance null and void.

Thank you for your understanding and patience during our review.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB 09-000926