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Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

County of Hawai'i

PLANNING DEPARTMENT

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June 29, 2011

Kahuna Falls, LLC
Attn.: Peter and Anne Emmons
7455-T NW Ridge Road
Handover, Maryland 21076

SUBJECT: Application: VARIANCE-VAR 11-004
Applicant: KAHUNA FALLS LLC/ANNE and PETER EMMONS
Owners: KAHUNA FALLS LLC/ANNE and PETER EMMONS
Request: Variance from Chapter 23, Subdivisions, Article 6,
Division 2, Improvements Required
Tax Map Key: 2-9-004:014, (SUB 10-001001)

Dear Mr. and Mrs. Emmons,

After reviewing your variance application, the Planning Director certifies the **approval** of Variance-VAR 11-004 subject to variance conditions. The variance permits proposed 3-lot subdivision (SUB 10-001001) to be created without providing a water system meeting the minimum requirements of the Department of Water Supply (DWS) and nondedicable street; escrow maintenance fund required by 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, Requirements for nondedicable streets; escrow maintenance fund.

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

BACKGROUND

1. **Location.** The subject property contains approximately 38.7 acres and is identified as Lot 45, situated at Kaiwiki, South Hilo, Hawai'i.

2. **Zoning.** The subject property is zoned Agriculture – 10 acres (A-10a) by the County and designated Agriculture “A” and Conservation “C” by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The applicant submitted a subdivision application (SUB 10-0001001) proposing to subdivide the subject property into three (3) lots and a preliminary plat map (PPM), dated June 16, 2010.
4. **Variance Application.** The variance application requests relief from water supply and roadways standards, to permit the proposed subdivision. Specifically, the applicant requests approval to use the two existing catchment systems to provide service to the three lots, each improved with an existing residence. The road variance is a request to use the existing 14-foot wide concrete driveway within 30-foot wide easements versus 20-foot wide agricultural pavement within 50-foot wide rights-of-way.

The application was acknowledged by Planning Department letter dated March 24, 2011. This variance application includes background history, circumstances and information regarding the pending subdivision application.

5. **Agency Comments and Requirements:**

- a. The State of Hawai‘i Department of Health (DOH) memorandum dated March 28, 2011 (refer to memo in variance file).
 - b. Hawai‘i County Fire Department (HFD) memorandum dated March 30, 2011 (refer to memo in variance file).
 - c. The Department of Water Supply (DWS) memorandum dated June 1, 2011 (refer to memo in variance file).
 - d. The Department of Public Works (DPW) memorandums dated November 3, 2010 and April 26, 2011 (refer to memos in variance file).
6. **Public Notice.** The applicant submitted copy of notices sent to surrounding property owners along with a list of said owners. In accordance with Ordinance No. 05-135, the applicants submitted a notarized affidavit, dated February 22, 2011, and photographs to confirm posting of required sign. Notice of this application was published in the Hawai‘i Tribune Herald and West Hawai‘i Today on March 30, 2011.

7. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or the general public were received.

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Water Supply.

The first alternative requires the applicant or owners to construct extensive improvements and additions, including source, storage, transmission, booster pumps, and distribution facilities in accordance with DWS standards (refer DWS memo in subdivision file SUB-10-001001).

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 3-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.

The subdivider has been requested to construct access and roadways pursuant to an earlier DPW memorandum dated November 3, 2010, or roadway requirements pursuant to Chapter 23, Subdivisions. The subject property currently has access to a public roadway (Mamalaha Highway) via Kaiwiki Homestead Road. Access to the proposed 3 lots is proposed via a 14-foot wide concrete driveways, and extension thereof, within a 30-foot wide easement.

In lieu of improving or constructing roadways required by the DPW, the owners contend that the existing paved private roadway within the subject area is sufficient access for the proposed subdivision. The additional 2 lots to be created by the proposed subdivision will create minimal additional impact. The owner is requesting a variance not to construct roadway improvements, specifically by allowing the retention/extension of the existing private 14 feet wide concrete roadway within easements RU-1 and RU-2 in lieu of constructing minimum 20-ft wide agricultural pavement within a 50-ft right-of-way conforming to Std. Detail R-39 as required by the Department of Public Works memorandum.

At the northwest corner of the subject property, a portion of Kaiwiki Homestead Road meanders onto the subject site. The proposed subdivision will rectify this encroachment by creating a roadway lot that will eventually be dedicated to the County of Hawai'i. Kaiwiki Homestead

Road, which provides access to the subject property from Mamalahoa Road, is improved to an approximate 14-foot pavement width within a 40-foot right-of-way.

Considering the foregoing issues, there are special and unusual circumstances applying to the subject property which exist either to a degree which deprives the applicant of substantial property rights that would be available or to a degree which obviously interferes with the highest and best use or manner of development of the property.

INTENT AND PURPOSE

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 the above would be the approval of a "water variance," to allow and utilize privately-owned individual rain water catchment systems for the proposed 3-lot subdivision. This alternative meets 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 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 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 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 200 inches to 240 inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

It should be noted that dwellings on each lot, within a subdivision created by a variance under Rule 22, are required to have a 6,000 gallon (minimum) water tank for domestic purposes and a second 3,000 gallon (minimum) water tank for firefighting purposes. Therefore, the request for Lot 45-A to share the existing catchment system with proposed Lot 45-B cannot be permitted. Each lot/dwelling needs to be provided with its own catchment system.

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 circumstances cited by the applicant and evaluation of the request to improve the existing roadway, required by the Department of Public Works memorandum, dated November 3, 2010, the Planning Director has concluded that the current roadway (and extension thereof) is sufficient access to the subject property.

Given the circumstances cited by the applicant, 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.

The subject variance application was acknowledged on March 24, 2011. 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 1, 2011.

VARIANCE DECISION-CONDITIONS

The variance request to allow the proposed 3-lot subdivision of the property, without providing a water system and road improvements meeting Departments of Water Supply and Public Works standards, is **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. WATER VARIANCE: The owner, assigns, or successors shall file a written agreement or approved written document with the Planning Department prior to

receipt of final subdivision approval of SUB 10-001001. This written agreement, which shall contain the following deed language, being covenants, conditions, and restrictions affecting the proposed 3-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 10-001001. 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 10-001001 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 10-001001.
- 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 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 10-001001 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 three (3) lots arising out of SUB 10-001001 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 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 prior to receipt of final subdivision approval of SUB 10-001001. The proposed lots shall form 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 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 10-001001. Should the improvement district require acquisition of any privately-owned rights-of-way fronting the lots arising out of SUB 10-001001, 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. As part of the associated subdivision, SUB 10-001001, any necessary road lot shall be dedicated to the County of Hawai'i according to the memorandum-of-agreement dated October 23, 2003.
 5. The subdivision application's final plat map for proposed 3-lot subdivision 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 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.

Kahuna Falls LLC/Anne and Peter Emmons

Page 9

June 29, 2011

Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare subject Variance-VAR 11-004 null and void.

Sincerely,

A handwritten signature in cursive script that reads "BJ Leithhead Todd".

BJ LEITHEAD TODD
Planning Director

GES:LHN:nci

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xc: Manager-DWS
 DPW—Engineering Division
 SUB 10-001001