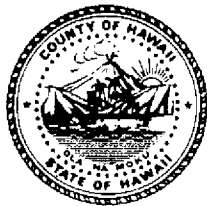


William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

County of Hawai'i

PLANNING DEPARTMENT

Aupuni Center • 101 Paahi Street, Suite 3 • Hilo, Hawai'i 96720
Phone (808) 961-8288 • Fax (808) 961-8742

July 28, 2011

Mr. Steven S. C. Lim
Carlsmith Ball LLP
121 Waiānue Avenue
Hilo, Hawai'i 96720

Dear Mr. Lim:

SUBJECT: VARIANCE-VAR 11-016

Agent: CARLSMITH BALL LLP/STEVEN S. C. LIM
Applicants: HŌKŪKANO RANCH, INC.
Owners: HŌKŪKANO RANCH, INC.
Request: Variance from Chapter 23, Subdivisions
Tax Map Key: 7-9-001:011&012, (SUB 11-001068)

After reviewing your variance application, the Planning Director certifies the approval of **VAR 11-016** subject to variance conditions. The variance permits a 14-lot subdivision (SUB 11-001068) of the referenced subject property to be created without providing a water supply system and non-dedicable roadway improvements pursuant to Chapter 23, Subdivisions. The variance is from Hawai'i County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Water Supply, (1)(2), Section 23-41, Minimum right-of-way and pavement widths; Section 23-87, Standard for non-dedicable street; escrow maintenance fund and Section 23-95, Right-of-way improvement.

BACKGROUND

1. **Location.** The subject property contains approximately 1,823.184 acres and is situated in the Hōkūkano Tract, North Kona, 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 applicants/owners submitted a subdivision

application (SUB 11-001068) and preliminary plat map (PPM) dated October 25, 2010, proposing to subdivide subject property into fourteen (14) lots.

4. **Variance Application.** The subject variance application was acknowledged by Planning Department letter dated May 2, 2011. The variance application includes agent's background information and request for variance from water supply and non-dedicable roadways required to allow proposed 14 lot subdivision.
5. **Agency Comments and Requirements:**
 - a. The State of Hawaii-Department of Health memorandum is dated May 3, 2011 (Refer to memorandum in the variance file).
 - b. The County of Hawai'i Fire Department (COH-HFD) memorandum dated May 17, 2011 (Refer to memorandum in variance file).
 - c. The Department of Water Supply (DWS) memorandum dated June 1, 2011 (Refer to memorandum in variance file).
 - d. The Department of Public Works (DPW) has identified they will defer to the Planning Department concerning road improvements.

Public Notice. A copy of first and second notices was sent by the applicant via USPS to surrounding property owners. According to the affidavit submitted to the Planning Department, the first notice was mailed on March 21, 2011 and the second notice was mailed on May 9, 2011, respectively. In accordance with Ordinance No. 05-135, the applicants submitted a notarized affidavit, dated March 31, 2011, and photographs to confirm posting of required sign. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on May 8, 2011.

Comments from Surrounding Property Owners or Public. Objection letter received on April 18, 2011 sent by Jawmin, LLC.

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Water Supply. The first alternative requires the applicant or owners to extend and/or construct a county water system and provide dedicable water system improvements in accordance with DWS standards.

The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards.

Mr. Steven S. C. Lim
Carlsmith Ball LLP
Page 3
July 28, 2011

The requirement of extending or constructing a DWS water system, or providing an approved alternative private water system meeting DWS standards, for the proposed 14-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 subdividers is requesting a variance to allow the development of the proposed 14-lot subdivision (The Highlands Mauka) without providing roadway improvements meeting the minimum requirements of Chapter 23, Subdivisions, more specifically **Section 23-41 – Minimum right-of-way and pavement widths; Section 23-87 – Standard for nondedicable street; escrow maintenance fund; and Section 23-95 – Right-of-way improvement.** The subject property currently has access to a public roadway (Hawaii Belt Road) via a privately-owned roadway (Main Hōkūkano Ranch Road).

The applicant has stated that Main Hōkūkano Ranch Road is over 7.5 miles long and is partially improved consisting of an asphalt surface treatment for approximately 4.5 miles, after which the roadway is comprised of a compacted gravel surface treatment, usable by two-wheel vehicles, for the next 2.0 miles. The paved portion of Main Hōkūkano Ranch Road is comprised of approximately 14-foot wide asphalt, with 20 foot wide, compacted gravel shoulders, contained within the 100-foot wide roadway corridor. The gravel portion of the Main Hōkūkano Ranch Road is comprised of approximately 40 foot wide compacted gravel surface, contained within the 100-foot wide roadway corridor. The proposed internal subdivision roadway (“Road Lot C”) is currently a 60-foot wide right-of-way, with 40 feet of compacted gravel surface treatment, constructed to a similar standard as the unpaved portion of Main Hōkūkano Ranch Road

In lieu of improving and constructing roadways required by Chapter 23, Subdivisions , the applicant or subdividers contend that the existing roadway (Main Hōkūkano Ranch Road) and proposed roadway (Road Lot C) is sufficient access to subject properties.

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.

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 would be the approval of a water variance to utilize privately-

owned individual rain water catchment systems for proposed 14-lot subdivision, which can meet the intent and purpose of the Subdivision Code according 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 generally 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.

The analysis of variance information and rainfall data submitted by the applicant indicates the subject property and surrounding areas do not receive adequate rainfall to support individual or separate private rainwater catchment systems for potable and emergency uses. The information submitted by the applicant compared with isohyet maps in the Planning Department denotes the subject property and surrounding areas receive an average of 50 inches of annual rainfall. However, Rule 22-6: Exceptions for Large Lot Subdivisions state:

Exceptions to the minimum rainfall requirement and the maximum number of lots (up to an absolute maximum of twenty lots) may be granted if the subdivision results in lots averaging at least twenty acres in size and averaging at least four times the minimum lot size allowed by zoning.

The proposed subdivision will consist of nine lots ranging from 100.681 acres to 237.852 acres in land area. The subject property is zoned Agricultural – 20 acres (A-20a), four times the minimum lot size allowed by zoning is 80 acres. Therefore, the proposed subdivision meets the criteria of Planning Department Rule 22-6; Exceptions for Large Lot Subdivisions.

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, the variance requested 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.

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.

Access to the subject properties is via a private roadway referred to as Main Hōkūkano Ranch Road and a 60 foot wide right-of-way depicted on the Preliminary Plat Map as Road Lot C. The existing and proposed roads are intended to be private, its maintenance and associated liability will be the

responsibility of the homeowners association, who will eventually end up owning and maintaining all of the roads. The maintenance cost to utilize and maintain the privately-owned paved and gravel roadways will be continued to be privately addressed and shared among the current owners and users. Main Hōkūkano Ranch Road is a 14 feet wide asphalt paved roadway with a 20 foot wide compacted gravel shoulders and Road Lot C is 60 feet wide right-of-way with 40 feet of compacted gravel surface which is sufficient to allow for emergency vehicles to access the entire project area.

Given the circumstances cited in the applicant's background report and evaluation of the request to construct significant roadway improvements beyond the easement area granted to the parcel, the Planning Director has concluded that roadway improvements required for proposed 14-lot subdivision, stipulated in Chapter 23, Subdivisions are not necessary and can be remedied by variance approval with conditions.

The subject variance application was acknowledged by letter dated May 2, 2011. Additional time was requested by the Planning Department to review the variance application and other information submitted supporting the variance application. The applicant granted the Planning Department and Planning Director an extension of time to decide on 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 non-dedicable roadway improvements 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.

DETERMINATION/VARIANCE CONDITIONS

The variance request and application submitted by the owner's agent to permit proposed 14-lot subdivision of the subject property without providing a water system meeting DWS standards pursuant to Rule 22, Water Variance and roadway improvements required by Chapter 23, Subdivision Code for the proposed subdivision 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. **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 11-001068. 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 11-001068. 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 11-001068 not serviced by a County water system. No further subdivision of the lots created by SUB 11-001068 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB 11-001068 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 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 11-001068 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 11-001068, the owner(s) of the lot(s) created by SUB 11-001068 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.
3. **ROAD VARIANCE:** The subdivider, owners, their assigns, or successors understand that the 14-lots arising out of SUB 11-001068 will use and maintain the privately owned roadways and/or necessary easement(s) on their own without any expectation of governmental assistance to maintain the current privately owned access or roadway improvements within and upon Main Hōkūkano Ranch Road and Road Lot C identified on the subdivisions preliminary plat map or any other necessary access and any necessary 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 prior to receipt of final subdivision approval of SUB 11-001068. 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 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 11-001068 or/and the privately-owned right-of-way "Main Hōkūkano Ranch Road". Should the improvement district require acquisition of any other privately owned rights-of-way including "Road Lot C" upon abutting properties, 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 Main Hōkūkano Ranch Road and/or maintain the privately-owned roadway (Road Lot C) which access from the Main Hōkūkano Ranch 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.

4. The subdivision application's (SUB 11-001068) 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 11-001068.

Mr. Steven S. C. Lim
Carlsmith Ball LLP
Page 9
July 28, 2011

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 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

LHN:nci

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