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May 29, 2012

Edmund W.K. Haitzuka, Esq.
Carlsmith Ball, LLP
P.O. Box 1720
Kailua-Kona, HI 96745-1720

Dear Mr. Haitzuka:

SUBJECT: VARIANCE DECISION - VAR-11-000033
Representative: Carlsmith Ball, LLP
Applicant: GAULT'S GULCH, LLC
Owner: GAULT'S GULCH, LLC
Request: Variance from Chapter 23, Subdivisions
Tax Map Key: 4-7-007:018 (SUB11-001100)

After reviewing your variance application, the Planning Director certifies the approval of Variance VAR-11-000033 subject to variance conditions. The variance permits proposed 4-lot subdivision (SUB-11-001100) of above referenced TMK property without constructing minimum county dedicable water supply system and roadway improvements required by Department of Water Supply (DWS) and Department of Public Works (DPW) respectively. The variance is from the proposed subdivision's minimum requirements pursuant to Hawai'i County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2); and, Section 23-41. Minimum right-of-way and pavement widths, 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, Lot No. 13 containing approximately 174.427 acres, being a portion of Land Commission Award No. 8559-B Apana 2 to WM. C. Lunalilo, Certificate of Boundaries No. 33 and a portion of a Deed, Kamehameha IV to Lunalilo, dated December 17, 1857, and recorded in Liber 10, Page 55, is situated at Waikoekoe and Lalakea, Hāmākua, Hawai'i.
2. **Zoning/State Land Use.** The subject property is zoned Agricultural (A-40a) by the County and designated Agricultural "A" by the State Land Use Commission (LUC).

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3. **Subdivision Request/PPM.** The owner or subdivider submitted subdivision application (SUB-11-001100) proposing to subdivide subject TMK property into 4 lots. Further action on the subdivision application and preliminary plat map (PPM) including status of preliminary subdivision approval to the PPM is being deferred pursuant to letter dated August 15, 2011 in the subdivision file.
4. **Variance Application.** The variance application and request for variance from water supply and roadways to permit proposed subdivision was acknowledged by Planning Department letter dated February 28, 2012. This variance application includes background history and circumstances and information regarding the pending subdivision application. Subsequent to submission of the original variance application, the representative submitted letter dated April 25, 2012 which addresses or includes supplemental information regarding water system and roadway improvements of proposed access roadway for the subdivision and enabling the proposed 4-lot subdivision to obtain service from a County-DWS supply system.

The letter dated April 25, 2012 states in part the following:

"...This is to clarify, amend and/or otherwise revise the variance sought by the Applicant ...

With respect to the variance from the DWS requirements, the Applicant seeks to obtain water through an 8-inch waterline within Mud Lane ... The Applicant proposes to install water meters for the subdivided lots on Mud Lane instead of having to install a water main up to the subdivided lots.

As to the roadway, the Applicant proposes to install the roadway in accordance with R-39 standards which includes a sixteen-foot wide agricultural standard paved surface with four-foot wide grassed or graveled shoulders on both sides of the roadway for a total roadway width of twenty feet. ..."

While the applicant was originally seeking total relief or variance from the water system requirement, the applicant respectfully requests that the relief granted include exemption from the requirement to have the water meter front each of the proposed lots. This would allow the applicant to have a water system that would involve the placement of all of the water meters within Mud Lane with private service lines extended to the individual lots within the private road right-of-way.

5. **Variance Application (VAR 09-017)-Agency Comments and Requirements.**
 - a. The State of Hawai'i-Department of Health (DOH) memorandum is dated March 5, 2012. Refer to DOH memorandum in the variance application file.
 - b. The Department of Water Supply (DWS) memorandum is dated May 23, 2012. Refer to the

DWS memorandum in the variance application file.

- c. The County of Hawai'i Fire Department (HFD) memorandum is dated March 8, 2012. Refer to the HFD memorandum in the variance application file.

Note: The developer is required to construct a "Fire Apparatus Access Road" at or near the terminus of the privately owned roadway in accordance with HFD specifications and requirements. Refer to variance conditions.

6. **Notice to Surrounding Owners/Posted Sign.** The applicant's representative submitted affidavit regarding notice of variance mailed to a list of surrounding property owners and posted sign. According to the affidavit dated March 16, 2012 and other submittals in the variance application file, notice of variance was mailed on or about March 7, 2012 and a sign was posted upon subject TMK property on or about March 15, 2012. Colored photographs of the posted sign were submitted to the Planning Department on March 16, 2012.
7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. Written objections to the variance application were received from surrounding property owners and/or the general public.

E-mail dated March 26, 2012 from Rob Shallenberger expressing concerns regarding dust control if the roadway is not paved.

Letter dated March 28, 2012 from Sheryl L. Nicholson of Alston Hunt Floyd & Ing, Lawyers on behalf of Yamani, LLC expressing concerns of the subdivider's request for rain water catchment in lieu of water supply to DWS standards. The objection cited the fact that a new waterline has recently been installed fronting the proposed subdivision and that the subdividers should be required to connect to it.

E-mail dated March 29, 2012 from Derrick Loomis expressing concerns of the roadway being in close proximity to his property. Mr. Loomis was later informed by telephone call from staff that the subdivision preliminary plat map had been revised to locate the roadway to the opposite side of the subdivision, away from his property. Mr. Loomis expressed gratitude and some satisfaction

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 of having the meters front the served lots.

The variance requests an alternative to constructing a water main extension along the private roadway to have water meters to front each lot meeting DWS standards for the pending 4-lot subdivision.

Lot Access/Roadways. The first alternative requires the owners to construct minimum 20-foot wide agricultural pavement with stabilized shoulders and swales according to Standard Detail (Std. Det.) R-39 within a minimum 50-foot wide right-of-way.

In lieu of constructing roadways required by the subdivision code and DPW Std. Det., the representative is requesting variance to construct alternative privately owned roadway. The owner or developer proposes to construct a privately owned and maintained 16-foot wide agricultural roadway with four-foot wide grassed or graveled shoulders on both sides within the 60-foot wide privately owned roadway lot.

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 DWS.

DWS standards require that the water meter is to front the lot which it services. This would require the installation of approximately 2,500 feet of new water main to service the 4-lot subdivision.

The alternative to extending the water system to the end of the private roadway proposed by the applicant is to locate the water meters within Mud Lane and utilize private water system extension and utilizing private water storage systems to the individual lots.

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.

The proposed 4-lot subdivision and surrounding properties are zoned agricultural (A-40-a).

Therefore, given the unusual circumstances cited by the applicant's representative and evaluation of the request to construct privately owned alternative roadway within a privately owned 60-foot wide right-of-way including terminus improvements for a fire access road, the Planning Director has concluded that roadway improvements upon subject property stipulated in the subdivision code can be modified to permit an agricultural pavement standard conforming to Std. Det. R-39 within the privately owned access and utility lot for

proposed 4-lot agricultural subdivision subject to variance conditions.

The subject variance application was acknowledged on February 28, 2012. 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 May 30, 2012.

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.

DETERMINATION-VARIANCE CONDITIONS

The variance requested to permit proposed 4-lot subdivision of the subject TMK property without providing a water system meeting DWS standards of having the meters front the served lots is approved; and proposed privately owned roadway within 60-foot wide right-of-way designated on a revised final plat map, is hereby **approved** subject to the following variance conditions:

1. The applicant, owners, their assigns, or successors shall be responsible for complying with all stated conditions of approval.
2. Submit subdivision construction plans to construct alternative privately owned roadway within approved right-of-way including fire access apparatus road and any necessary signage required by the DPW or HFD for approval by the affected agencies.
3. **WATER VARIANCE.** The 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-11-001100. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the proposed subdivision not serviced by a County dedicable public water system to DWS standards 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 will not be extended to all lots within the proposed subdivision SUB-11-001100. 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 system to front the proposed lots created by SUB-11-001100. No further subdivision of the lots created by SUB-11-001100 will be permitted unless county dedicable public water system requirements and other requirements of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB-11-001100 may not be made subject to a condominium property regime.
- d. Any farm dwelling constructed on a proposed lot not serviced directly by a County water system shall be provided with and maintain a private water storage system which includes a minimum 6000-gallon water storage capacity for domestic consumption or potable uses. This private water storage system shall adhere to the University of Hawai'i's College of Tropical Agriculture and Human Resources' "Guidelines on Rainwater Catchment Systems for Hawai'i" as well as the DOH 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-11-001100 that the County Water System has been upgraded or an improvement district initiated to enable direct service to the lots created by SUB-11-001100, the owner(s) of lot(s) created by SUB-11-001100 shall participate in such improvement district or shall pay their pro-rata share of the upgrade and installation of laterals, as determined by the 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.

4. **ROAD VARIANCE.** The subdivider, owners, their assigns, or successors understand that the roadway within and upon proposed 60 feet wide road and utility lot will use and maintain the privately owned roadway upon the right-of-way on their own without any expectation of governmental assistance to maintain the alternative roadway improvements within the privately owned access and utility roadway within proposed 4-lot 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-11-001100. 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 right-of-way.

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-11-001100. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB-11-001100, 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 the roadway within 60 feet wide right-of-way including the fire apparatus access road.

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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 pending subdivision application's (SUB-11-001100) 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-11-001100.
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 this Variance Permit null and void.

Thank you for your understanding and patience during our review.

Sincerely,



BJ LETIHEAD TODD
Planning Director

JRH:nci

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xc: DPW-Engineering Branch
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SUB-11-001100