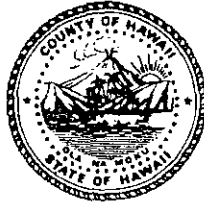


William P. Kenoi
Mayor



BJ Leithead Todd
Director

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PLANNING DEPARTMENT

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January 23, 2012

Mr. Steven S. C. Lim, Esq.
Carlsmith Ball LLP
P. O. Box 686
Hilo, HI 96721-0686

Dear Mr. Lim:

SUBJECT: VARIANCE-VAR 11-000050

Applicant: STEVEN S. C. LIM/CARLSMITH BALL LLP
Owner: MARK D. BERNSTEIN AND KAPAHEE ET. AL.
**Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)**
Tax Map Key: 1-4-003:03, (SUB 11-001119)

After reviewing your variance application, the Planning Director certifies the **approval** of Variance-VAR 11-000050 subject to variance conditions. The variance permits proposed 2-lot subdivision (SUB 11-001119) 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).

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:

BACKGROUND

1. **Location.** The subject property, containing approximately 113.595 acres, is situated at Halepu'a, Puna, Hawai'i.
2. **Zoning.** The subject property is zoned Agricultural – 1 Acres (A-1a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC). Although the subject property does not abut the shoreline, it is located within the Special Management Area (SMA). Special Management Area Use Permit Assessment Application (SAA-11-000654) determined that the proposed 2-lot

subdivision is exempt from the definition of “development”.

3. **Subdivision Request/PPM.** The applicant or subdivider submitted a subdivision application (SUB 11-001119) and preliminary plat map (PPM), dated September 7, 2011, proposing to subdivide subject property into two (2) lots.
4. **Variance Application.** The variance application and request for variance from water supply requirements to permit the proposed subdivision was acknowledged by Planning Department letter dated December 21, 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 December 27, 2011. Refer to DOH memorandum in variance file.
 - b. No comments have been received from the Hawai‘i County Fire Department or the Department of Water Supply, as of this date.
6. **Public Notice.** The applicant submitted a copy of the notice sent to surrounding property owners, affidavit stating notices were sent to surrounding property owners by U.S.P.S. and list of said owners. According to the affidavit, notice(s) were mailed by the applicant to a list of surrounding property owners on December 30, 2011. Notice of this application was published in the Hawai‘i Tribune Herald and West Hawai‘i Today on December 28, 2011. The applicant submitted an affidavit, dated December 30, 2011, regarding sign posted on the subject property, and photograph of the posted sign.
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

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. 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 above referenced water system improvements 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.

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.

An alternative to a water system meeting DWS standards would be to allow and utilize privately-owned individual rainwater catchment systems, which 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 six (6) lots and requires 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 80 inches to 120 inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

Given the circumstances cited by the applicant, the request for variance from water supply, 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 the 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 prior to receipt of final subdivision approval of SUB 11-001119. 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 decidable public water system is not now able to service the proposed subdivision SUB 11-001119. 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 11-001119 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 11-001119.
 - 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.
- f. 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.
- g. 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.
- h. In the event that the County notifies the owner(s) of any lot created by SUB 11-001119 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.
- i. 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

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grounds for a variance from the subdivision code to permit further subdivision of the property.

3. 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.
4. 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-VAR 11-000050 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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xc: Manager-DWS
DPW—Engineering Division
Hawaii County Fire Department
State Department of Environmental Health Services - Hilo
SUB 11-001119